# The Roberts-Kennedy Court and Post-Political Democracy

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*This Essay explores the ideological underpinnings of the modern Supreme Court's election law decisions, arguing that the Court does not have a strong commitment to federalism or to unfettered debate or to the mistrustful citizen. Instead, the opinions reveal a complacency about corruption and a narrow view of the role of citizens. The Essay is part of a volume on neoliberalism for Law and Contemporary Problems.*

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## Introduction

In the last twenty five years, the Supreme Court has struck down all limits on campaign expenditures, some limits on campaign contributions, state experiments in open primaries, and the central feature of the Voting Rights Act. The decisions have not been popular, and, in many cases, the reasoning has been quite inventive, and overturned decades of precedent. This Essay explores some aspects of the underlying ideology connecting the decisions. Some members of the Court have a background set of political philosophies about government and democracy. These beliefs are deeply entangled with neoliberalism, the topic of this volume of essays, organized by Jedediah Purdy and David Grewal. The Justices have used their power to build a political society around general principles of politics, persons, and government with which they align.

I focus on four ideological tendencies of the modern Court, which I will call, for the sake of convenience, the Roberts-Kennedy alliance.[1] First, and most striking, is the complacency about corruption, which has been a central threat in western political theory since the Enlightenment. This reveals itself mostly in contrast to a history of anxiety about corruption, but also in the way that the First Amendment speech interests are valued when weighed against the

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[1] The ideology that I write about encompasses neither a precise set of people, nor does it nicely fall into the timeline of various ascendancies: the ideological shift precedes John Roberts becoming Chief Justice. At the end I have settled, with some dissatisfaction, on calling "them" "the Kennedy-Roberts Court." Many of the cases I discuss are after Anthony Kennedy joined the Court in 1988, and he was a swing vote for many of them. He has either joined the majority opinion of all of them or, if they preceded his tenure, endorsed their logic. At the same time, Chief Justice John Roberts has clearly played a role in accelerating these tendencies, and shows some of the greatest impatience and formalism.

corruption threat, as compared to other threats. Relatedly, the cases suggest that a person in democratic society is primarily a consumer, instead of a citizen, and that the job of the court is to protect the material condition of the person, as opposed to her political position.
Third, despite rhetoric about a wide open marketplace, they endorse a vision of a *regulated* political marketplace, unregulated only as regards the spending of money. Finally, they show a surprising lack of commitment to federalism, suggesting that their federalism cases are more about taking certain decisions out of democratic, collective choice than relocating those decisions in the states.

If the political law of the modern Court is driven by ideology it is an ideology that gives states more power to pass their own laws but less power to define their own political experiments and their own polities. A good polity is imagined, it might appear, as a public of relatively passive consumers, to be engaged sufficiently not to lose faith, but no more, a market run by a few powerful players, responsible for distribution of goods, and an elite, made up of the Court, responsible for policing public morality.[2] I call this ideology "post-political" democratic theory--a vision of democracy without a major political role for the citizens within it. This trend fits with a move in political theory away from democracy, a tendency to treat the real life of politics, with its parties, passions, and fickleness, with some distaste. Nadia Urbaniti calls this the trend towards "Unpolitical Democracy,"--the erosion of democratic features from within those who ostensibly support democracy.[3] I have chosen to call it post-political democracy in the context of modern doctrine because of one central feature: the end of history inflections within the opinions, the sense that the political problems of democracy have been solved.

This ideological investigation--the effort to find a background theory of politics connecting *Shelby County*, *Citizens United*, and other cases--is necessarily speculative. One of the more prominent features of Kennedy-Roberts Court election law opinions is how short, ahistorical, and formal they are. Any positive vision of politics--understood broadly as how power should be organized--comes through in glimpses. The ideas largely grow from the negative space left in opinions and in descriptions of the market. Most of government is described negatively--in terms of things that politics does badly and things that politics should not do. Justice Roberts wrote in a recent opinion that "Convenience and efficiency are not the

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[2] *Paul Carrington, The Imperial First Amendment, Richmond Law Review (2002) writes* As Former Duke Law School Dean Paul Carrington wrote about the First Amendment, the Constitution has become a tool for replacing self government with elite government:

> The text of the [First] Amendment, intended to express a right central to democratic self-government, has been transmogrified into the means by which life-tenured judges supported by an intellectual elite and the barons of the media suppress self-government and force on fellow citizens the moral and political precepts of a ruling class. These precepts strongly favor powerful individuals (such as those who profit from the "infotainment" industry) and their profit-seeking corporations over citizens' rights to make collective decisions about the communities in which they live and work.

[3] Nadia Urbaniti, Unpolitical Democracy

primary objectives—or the hallmarks—of democratic government."[4] But he does not elsewhere explain what the objectives or hallmarks of democratic government are. We get glimpses, shadows, adjectives, ellipses and guesses instead of a robust theory of government, politics, and power.

**Complacency about Corruption**

In this Section I discuss how the language of the Kennedy Courts opinions suggests that the fundamental threat of corruption is not actual a problem for a modern democracy, and how that reflects a unique view of human affairs and government. The Court is post-political, I argue, in an almost literal sense: that it perceives the basic questions of power within a society to be solved, and doesn't see a threat of corruption or disintegration. Even classical liberalism saw corruption as a fundamental threat to liberal political society. Mid-century Chicago School economics placed a variation of corruption at the center of its reasons for decreasing the size of government. But the Roberts-Kennedy Court treats corruption as a relatively small risk, and never embraces the rent-seeking rhetoric. In this section, I discuss this oddity, and give two possible explanations for the peculiar indifference the Court seems to have towards corruption.

In classic Aristotelian thought, government is always threatened by corruption: the monarchic government can descent into tyranny through corruption, the aristocratic government can descend into oligarchy through corruption, and popular government can descend into "democracy"--self-interested behavior of the masses--through corruption. The anti-Aristotelian Thomas Hobbes also did not presume stability: he presumed radical instability, which only strong central government could prevent. Whether you look at Montesqueiu, Rousseau, Mill, or Locke, the presumption is that stability is threatened by corruption. In John Locke's discussion on the Dissolution of Government, Locke argues that it the "fountain of public security" was threatened by anyone using their wealth to "corrupt the representatives and gain them to his purposes," or using "solicitation, threats, promises, or otherwise" to employ representatives to promise what they will enact.[5] The framers who wrote the constitution imported this world view. They were "perpetually threatened by corruption."[6] Corruption constituted a fundamental "conspiracy against liberty" [7] The fear of corruption was "near unanimous" and the sense that corruption needed to be "avoided, that its presence in the political system produced a degenerative effect."[8] George Mason said as the Constitutional Convention got under way that "If we do not provide against corruption, our government will soon be at an end."[9] They were

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[4] Cite

[5] John Locke, on the Dissolution of Government

[6] JGA Pocock, the Machiavellian Moment 507 (Princeton 1975)

7 Bernard Bailyn, The Ideological Origins of the American Revolution, xiii (1992).

[8] James D. Savage, *Corruption and Virtue at the Constitutional Convention*, *56 J. POL. 174 (1994)* .

9 Notes of Yates (June 22, 1787), in 1 The Records of the Federal Convention of 1787 (Max Farrand ed., 1937) (4 vols.) (quoting Mason).

anxious about the "torrent of corruption, which like a general flood, has deluged us all" coming to America.[10] Franklin and Washington both predicted a fairly quick end to the republican project.

This fear of collapse outlasted the revolutionary era and was part of the jurisprudence of the late 19th century. It was part of classical liberalism, which assumed representative self-government was fundamentally fragile and threatened. In *Ex Parte Yarbrough* in 1883, the Court held that the right to protect against violence and corruption was inherent in any government, because without that power government would not exist.[11] Fifty years later, in a 1921 case, Justice Pitney harped on the central fragility of the state—insisting that Congress cannot be left without power to regulate primary elections to minimize threats of corruption. Congress must be able to protect, he argues, "the very foundation of the citadel" from "sinister influences."[12] In a 1961 challenge to a broadly drafted conflict of interest statute, the Court upheld it because self-interested use of public offices "endangers the very fabric of a democratic society."[13] The fear of internal corruption leading to democratic collapse runs throughout the dissents in the *Buckley* line of cases, as well in the few opinions--such as *Austin* and *McConnell*--which take a broader view of corruption.

But the Kennedy-Roberts Court is not concerned about corruption, or by democracy being undermined by self-interested actors.

Stability, unlike threat, is expressed in absences: if one is not worried about infidelity or conflict ending a marriage, then neither infidelity nor conflict arises in describing the marriage. Likewise, confidence in the basic stability of a liberal democracy means less discussion of threats to that democracy. The majority opinions by the Kennedy-Roberts Court are free of any hand-wringing about the nature of democracy. The closest that Kennedy, in C*itizens United*, comes to addressing the democratic threat is the summary conclusion that "The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy." His logic was that the fact that money is spent is in fact evidence that citizens will take to be evidence of their own strength.[14]

Some opinions are even characterized by impatience that we should be troubled with these repeated claims of corruption. Consider the history of *Wisconsin Right to Life v. FEC*, a 2007 Supreme Court case. At issue was a 2000 law was designed to draw lines between electoral

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[10] Bailyn, Ideological Origins of the American Revolution, page 131.

[11] 110 U.S. 651, 657–58 (1884).

[12] *Newberry v. U.S.*, 256 U.S. 232 (1921)

[13] *United States v. Mississippi Valley Generating Co.* 364 U.S. 520, 562, 81 S.Ct. 294, 315 (U.S. 1961)

[14] Try as I might, I can't square the argument--the fact money is spent might, theoretically, make citizens feel good that they are so important, but the question is not the spending of money but the perception of influence. How can the perception of spenders' influence make a citizen feel like she has ultimate influence?

activity and non-electoral activity.[15] The problem the law was trying to solve was that the public was getting swamped with privately funded ads just prior to an election. It was legal to run any ad so long as it didn't say "vote for" or "vote against," or something equally blunt. People worried that the ads were corrupting candidates. To see how, imagine a candidate for Senate in Missouri in a close race: if she knew that the Chamber of Commerce could run an ad naming her, and saying bad things about her, right up to the election, she might be wary of supporting bills the Chamber of Commerce opposed, even if the majority of her constituency favored it. They were called "sham," because they were really designed to shape elections, even though there ostensibly just about calling those in power to account. So Congress, after years of legislative, cross-partisan haggling, criminalized advertisements that named a candidate within a particular time period before an election. After that, corporations couldn't name a candidate in an ad right before an election, whether or not they said "vote for" or something similar.

The law was initially upheld in 2003, but then struck down in 2007. In the opinion striking down the law, Justice Roberts rejected both the Congressional reasoning, and the prior holding of the court merely four years ago, in an opinion that reads like a clean, formal, impatient screed. Here's what I mean by formal: Roberts first relied on a a construction of corruption (corruption is quid pro quo). Then he determined that there was no quid pro quo, therefore no value against which to weigh the First Amendment.

Here's what I mean by impatient: referring to the claim that the ads were corrupting, he wrote: "Enough is enough." Years of Congressional work, in response to public outcry, were all dismissed with this three sentence gesture.

That impatience reflects a sense that the problem Congress was grappling with was not (unlike, say, terrorism), a *real* problem.

The terrorism cases help highlight the indifference towards corruption, because of the way the First Amendment is treated in those cases is as a value among others, instead of an absolute value. They show that Kennedy, Roberts, Alito, Scalia, and Thomas used the First Amendment differently when they perceive a genuine countervailing interest. In *Holder v. Humanitarian Law Project*, those five Justices (joined by Stevens) upheld a statute that criminalized contributions to organizations designated as terrorist organizations by the federal government.[16] The *Holder* plaintiffs sought a declaration that they could give money to, among other things, "engage in political advocacy on behalf of Kurds who live in Turkey" and "teach PKK members how to petition various representative bodies such as the United Nations for relief." Some of the activity was outside the country, some involved writing and speaking before the United States Congress.

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[15] *Wisconsin Right to Life v. FEC,* 551 U.S. 449 (2007)

[16] *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S.Ct. 2705 (2010)

Justice Roberts, writing for the Court, held that a statute criminalizing such activities did not violate the First Amendment. In that case, unlike in the campaign finance context, Roberts shed abstraction, formalism and an absolute defense of the First Amendment. He wrote of the "real dangers at stake" and chided the dissent for its abstraction. He deferred to Congressional judgment that we "we live in a different world: one in which the designated foreign terrorist organizations 'are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.'" He argues that "Training and advice on how to work with the United Nations could readily have helped the PKK in its efforts to use the United Nations camp as a base for terrorist activities." And although he cited to the formal first Amendment doctrine, he concludes with a Constitutional description of the value of protecting against violence: "The Preamble to the Constitution proclaims that the people of the United States ordained and established that charter of government in part to "provide for the common defence."[17]

The fact that the First Amendment is also wielded inconsistently *within* election law also demonstrates how weak a threat corruption is deemed to be. In *Timmons v. Twin Cities Area New Party*, a majority of the Court rejected the First Amendment challenge to a fusion ban. Minnesota banned parties from nominating a candidate also nominated by another party. Given the First Amendment absolutism in other cases, the petitioners reasonably thought that such a ban, like the independent expenditure bans, was a basic violation of a parties' right to speech, to associate with whom it would, a candidates' right to associate with parties, voters right to support who they would during primaries. But the case failed. The Court shrugged off the same associational and speech interests which were used to strike down bans on expenditures.[18] In that case, the governmental interest in creating a coherent, easy to understand marketplace of political parties overwhelmed the First Amendment interest. The Court brought a modulated approach towards the First Amendment: "No bright line separates permissible election related regulation from unconstitutional infringements on First Amendment freedoms....'The rule is not self executing and is no substitute for the hard judgments that must be made'"[19] The creeping government control of speech that Justice Kennedy worries about in *Citizens United* ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content."[20]), is not a threat in *Timmons*, or in *Holder.*[21]

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[17] *See* eg David Cole, The Roberts Court's Free Speech Problem, N.Y. Rev. Books Blog (June 28, 2010, 10:55 AM), http:// www.nybooks.com/blogs/nyrblog/2010/jun/28/roberts-courts-free-speech-problem; Monica Youn, The Roberts Court's Free Speech Double Standard, Am. Const. Soc. Blog (Nov. 29, 2011), http://www.acslaw.org/acsblog/the-roberts-court%E2%C80% 99s-free-speech-double-standard.

[18] 520 U.S. 351 (1997).

[19] Timmons v. New Party, 520 U.S. 351 (1997)

[20] *Citizens United v. FEC, supra.*

[21] *Cf* Patrick Garry, Liberty from on High: the Growing Reliance on A Centralized Judiciary to Protect Individual Liberty, 95 Ky. L.J. 385, 387 -388 (2006-2007).

These cases--the political party cases, the terrorism cases, and the campaign finance cases--all are evidence of a certain lack of concern for corruption. That lack of concern does not flow naturally from neoliberalism. Neoliberal economic theory places a great deal of importance on the threat of one variant of corruption: rent seeking. Rents represent "the expenditure of resources on the transfer of wealth through law rather than on the production of wealth through markets."[22] In the Chicago School tradition, groups are more likely to direct their energies--through bribes or other forms of influence--to government when government has more power to regulate.[23] This model shows up in Tullock (1967) and the Becker (1983) papers on the theory of competition among pressure groups for political influence.[24] The argument, stripped down, comes to this: the fewer resources over which the state exercises dominion, the less that companies and individuals will spend energy trying to extract resources from the state.[25] The language of corruption is often renamed "rent-seeking." Rent-seeking and corruption are understood as a central threat to the state, and is an essential topic of study. But the Kennedy-Roberts Court does not explicitly embrace this ideology any more than it did the classical liberal anxiety about corruption. "Rent-seeking" is a term used only in dissent in *Citizens United*, and by Justice Breyer, never by any member of the Kennedy-Roberts Court. Instead, no version of the threat of corruption plays a major role in Kennedy-Roberts decisions.

Another clue about the reasons for the indifference come from the way in which government is taken as largely, if not entirely, static. One gets the sense that no theory of government is needed because the democratic state is like air--necessary, a part of life itself, unavoidable in the best sense, invisible because so central. These thin descriptions of government makes sense if problems of political organization are not serious ones. Democracy seems to be fundamentally, solved and stable. While we can quibble at the margins about the scope of government, the basic shape of government is stable and not likely to change, the Court seems to say.

**End of History**

This feature suggests the Court's indifference towards corruption might reflect an "end of history" ideology that has been part of our culture for the last quarter century. In 1989, the Berlin Wall came down, and the Soviet Union began to splinter. Ron Brown became chair of the DNC, the First African American to head a major political party. Francis Fukuyama wrote an

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[22]Cass Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 441 (1990)

[23] Fred McChesney notes that there is likely a "time profile of profile of activity" within a single industry. MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 106 (1997).

[24] Becker built his argument from Stigler's 1971 paper, *The Theory of Economic Regulation*, BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE, no. 3,pp. 3–18 (1971). Stigler, to his credit, suggested a much more complex political environment, as opposed to modeling a single "rent," and assumed that the would-be rent-seeker would imagine different rents.

[25] *See, e.g.* George J. Stigler, ed, Chicago Studies in Political Economy (U Chicago, 1988); Dennis Meuller Public Choice III (2003).

essay (later expanded into a book), arguing that liberal democracy is an equilibrium state and there is no post-liberal democracy system. He argued:

> What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.

The article was largely about the nature of thinking, not the nature of events. His argument was essentially that the ideal form of government had been discovered, not that it would stop history. In this, it was not so different than the prior 200 years of argument: that liberal representative democracy was a superior form of government. However, its powerful impact on the popular culture, the thing that turned him into an object of constant discussion, was not the theory of the history of thought, but the theory of the history of world events. The key feature of this view--as interpreted, not as written--was its political optimism. Fukuyama came to be a stand in for the view that liberal democracy was an end of history in a different sense: liberal democracy is unlikely to turn into a totalitarian regime, and it was just a matter of time before other countries caught up to the United States and Western Europe.[26]

Fukuyama caught fire because he said (or was perceived to have said) what so many at the time believed, and continue to believe: that having once achieved representative democracy, America was unlikely to ever become anything else.[27]If one believes or feels that we are at the end of history, self-government is *not* a central problem or puzzle. Little will change. Tyranny and oligarchy have been solved by the modern democratic form.

**Ahistoricism and Abstraction**

A feature of the end of history attitude is also the end of facts, and the end of the role of history and facts. If history is fundamentally over, only analytical questions remain. History itself--and historical threats--gets little attention in the modern court. Facts play a trivial role on the ground. *Citizens United* arose as a statutory interpretation case that included an as-applied Constitutional challenge; the Court asked for re-argument on the general question of corporate independent expenditures although no record was developed at trial and the issue had not been briefed in the courts below. Facts, Justice Scalia suggested in a recent oral argument, don't matter

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[26] Fukuyama must take some blame for the optimistic reading--he did claim that "in the long run" liberal democracy would prevail, that action would follow thought.

[27] This tendency to believe in the stability of current affairs may be more than ideological: it may be biological. A recent paper about personal psychology describes the "End of History illusion." This is a widespread psychological belief, with little evidence in past experience. The belief is held by a person about him or herself--she believes that up until the present she has undergone several changes and growths, but will not continue to grow and change in the future. http://www.wjh.harvard.edu/~dtg/Quoidbach%20et%20al%202013.pdf

when the principle of the First Amendment is at stake.[28] While Justice Sotomayor repeatedly asked for evidence from both parties, Justice Scalia rejected the need to develop the record:

JUSTICE SCALIA: Ms. Murphy, do -- do we need a record to figure out issues of law?

MS. MURPHY: And that's my second point. Really, this is --

JUSTICE SCALIA: No, no, I agree. I agree -- I agree that --that this campaign finance law is so intricate that I can't figure it out. It might have been nice to have the, you know, the lower court tell me what the law is. But we don't normally require a record to decide what the law is.

Corruption is treated is a fundamentally abstract problem, outside the bounds of experience and history.

The lack of anxiety about facts, history, and corruption may in part reflect a skepticism about the political part of democracy itself. Neoliberalism is often associated with skepticism about democracy. Timothy Kuhner has argued that the court openly prefers unfettered markets to politics.[29] In his honest essay on "Public Choice v. Democracy," Russell Hardin explains how public choice theory has shown up some "grievous foundational flaws – in democratic thought and practice," including that it neither leads to majoritarian rule (because of the aggregation flaws) nor to good policy decisions.[30] The conclusion of Hardin and other public choice theorists is that many problems of distribution will be better made by "the market" than by representative systems in a mass democracy. If one part of politics is made up of the question, "how should we distribute goods and things?" then the social choice theorist/market fundamentalist answer is "through assigning property rights." The answer voids the need for a central role for other mechanisms--monarchy, representative democracy, direct democracy, lottery--to make decisions about distributions. It gives a political answer and in so doing narrows the realm of collective decision-making via deliberation and decision backed by force.

However, Kennedy and Roberts do not openly embrace Russell Hardin's anti-democratic political ideology. There is nothing in the Kennedy-Roberts Court election laws decisions that directly states that markets are better than representative government for the task of distributing goods.[31] They never call into question the importance of voting as a method of electing

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[28] *See* oral argument in *McCutcheon v. FEC*.

[29] *See* Timothy Kuhner, *Citizens United as Neoliberal Jurisprudence*, 18 Virginia Journal of Social Policy & Law 395 (2011) and Timothy Kuhner, *Consumer Sovereignty Trumps Popular Sovereignty: The Economic Explanation for Arizona Free Enterprise v. Bennett*, 46 Indiana Law Review (2013). Kuhner uses these cases to develop the argument that the Court has deliberately been turning the political sphere into a market sphere.

[30] Russell Hardin, Public Choice v. Democracy in the Idea of Democracy, (David Copp ed) (1993)

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representatives, or call into question the importance of representatives making the central distributional choices of a democracy. However, they endorse a "distrust" of government, and Roberts noted in passing that democratic government is neither convenient nor efficient.[32]

Moreover, the result of their decisions in the campaign finance realm have the effect of changing who has power in making distributional decisions.[33] After *Citizens United* and *Wisconsin Right to Life v. FEC*, it is easier for very wealthy individuals, and the most wealthy companies, to have greater power in shaping who is elected to office and what policies they support. The fact that these companies and individuals might have "undue influence" is not troubling to Kennedy and Roberts. The fact that they are unconcerned in the face of a long history of liberal anxiety about corruption might indicate that they have some sympathy for Hardin's skepticism.

## From Corruption to Appearance of Corruption

A variation of the unconcern with corruption shows up in the relative weight put on optics, instead of the reality of corruption. Since *Buckley*, the "appearance of corruption" has been deemed *equally* important as corruption itself. In other words, people's belief that corruption is occurring is as important and as destabilizing as corruption itself. In the recent *Doe v Reed*, the Supreme Court examined the constitutionality of a state law requiring disclosures of the names of citizens who signed a referendum petition. Protect Marriage Washington submitted to a referendum petition containing over 137,000 signatures; they claimed that forced disclosure of those signatures violated their first Amendment rights. The first, and primary justification given by the Court for upholding the law was that it was needed to keep citizens trustful of government. Roberts wrote that the states' interest in the integrity of the process is "particularly strong with respect to efforts to root out fraud, which not only may produce fraudulent outcomes, but has a systemic effect as well: It "drives honest citizens out of the democratic process and breeds distrust of our government."[34]

Perhaps the most stunning version of this "confidence" argument shows up in Justice Stevens decision in *Crawford v. Marion County*. There the Court justified voter identification laws on the ground that the absence thereof might lead to the perception of fraud at voting booth even though there was no evidence of voting fraud. "The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."[35] Translate this logic into another arena, and you'd come up with something like: *"even if there are no terrorists, the public fear of terrorists justifies searches that would otherwise be unreasonable."*

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[32] Cite

[33] See Kuhner, supra.

[34] *Doe v. Reed,* 130 S. Ct. 2811 (2010),

[35] Crawford v. Marion County, supra.

Stevens, in dissent in *Citizens United* writes, "At stake in the legislative efforts to address this threat is therefore not only the legitimacy and quality of Government but also the public's faith therein..."[36]Souter wrote in a case upholding contribution limits that "Democracy works 'only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.'"[37]

Appearance has always bee part of both the classical and republican fear of corruption. However, it has not been *equivalent* to reality. The classic threat of private pollution of public power is not one of perception, but of reality. Thomas Jefferson worried more that people would want a monarch than that they would lose faith in democracy.

However, the "appearance" ,trust and legitimacy line of thinking has become so central to the Court's processing of election law decisions (many of which in the First Amendment framework), that it appears that the democracy of the modern Court is premised on trust, not mistrust. The function of democracy is the production of legitimacy in order to assure stability. The job of the citizen is the job of maintaining faith in the polity. This is both a meager and important job: meager in that it involves no genuine critique of government, or an expectation or requirement of investigation and criticism, but demands instead faith. Important because of all the dystopic visions, the worst dystopia is the collapse of faith, of confidence.

In short, across different fields, we see the central individual unit in distributive policy is the customer or consumer, who exercise choice through purchase, and interacts with other consumers to create distributions. The consumer largely lacks a political dimension--the consumer is a better consumer inasmuch as the consumer is driven by preference, not belief about public good.

This world view is both the most difficult to document--no case explicitly erases "citizen" and replaces it with "consumer"--and the most fundamental ideological transformation. More than a case striking down a particular law, the replacement of the perceived world of citizens with a perceived world of consumers removes public authority from people and gives it to "markets", whose authority is derived from "consumers." This shift in perception transforms what it means to be a person in our society. When a person is not a citizen but the consumer, she has a different job. Her job in maintaining society is to listen, choose, and believe in government.

The citizen both *becomes* a consumer in her citizen role, and her citizen role is diminished as compared to her market consumer role. A citizen in a democracy is both *like* a consumer in a market, and *is* a consumer in a market. The job and function of the good consumer is to have confidence in the market, because that confidence is actually market-and-wealth-

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[36] Stevens Dissent, Citizens United, supra.

[37] Nixon v. Shrink (citing *United States* v. *Mississippi Valley Generating Co.,* 364 U.S. 520, 562 (1961).

creating. The job and function of a consumer/citizen is to have confidence in politics, because that confidence creates social peace. The citizen is diminished both in function of the job, and in the scope of places in which the citizen has a job.

If one were to listen to the Court's own description of its political theory, it would be premised in distrust of power. "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed."[38] It is this Amendment which according to Justice Kennedy is "Premised on mistrust of governmental power." In other words, the positive central story of politics is one of mistrust of governmental power.

However, as much as the language rests on distrust, other language indicates that trust--which leads to stability--may be itself the primary function of democracy. The consumer--the constituent member of society--should be trusting. Unlike the discussion of federalism, complacency, and markets, however, this shift in what a person is seems to have impacted justices across the ideological spectrum. I include it here not because it is *unique* to the Kennedy-Roberts Court, but because it is central to their understanding of the world.

**From Citizen to Consumer-Citizen**

Corruption is a concept that simply does not make sense in the world view of Kennedy and Roberts. They are not worried about corruption because at some deep level they do not see it. The word "corruption" is actually incoherent. Corruption depends upon the idea that people can have interactions with government that are not self-oriented. Neoliberal scholars tend to construct models of politics and motives starting with a very particular (and arguably peculiar) story about human nature—the idea that people are rational maximizers of their own welfare. On the one hand they acknowledge that the belief is a useful fiction; on the other hand they use that useful fiction to paint a full portrait of human life. Arguably, corruption is a word that simply doesn't make sense in this model.

It is very hard to talk about corruption without talking about virtue or becoming circular. In a series of political law cases, the Court has held that self-interested behaviors that would previously have been coded as corrupt--if not illegal--are either normal or laudable. Sun *Diamond* in 1999 interpreted federal gratuities law to require a specific official act be tied to gifts to federal officials, because gift-giving was normal behavior. *Skilling* in 2010 held that the Mail Fraud statute did not criminalize undisclosed self-dealing by public officials, because an alternate reading would be too vague and would violate the Due Process Clause, and it would criminalize normal self-dealing. And *Citizens United* in 2010 held that Congress could not prohibit corporations from spending money to influence elections and policy, because spending money to influence elections and policy was normal, even laudable political behavior.

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[38] Brown v. Hartlage, 456 U.S. 45, 52, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982)

These cases are part of a piece of the revision of what a political person is. While a political person in the 19th century was public-good oriented, a political person in the vision of the Court is self-maximizing. It lies in contrast to two different theories of what a person in democratic society is--one from the founding era, and the other from the late 19th century. I argue that the modern, post-political ideology systematically reduces the role of the political by reducing the places in which we perceive citizens. This is the essence of what has happened in antitrust law as the citizen has been replaced by the consumer: a consumer with a political complaint is really a consumer who does not understand her own economic complaint. The consumer-citizen has no such obligation: her obligation is to the policies that will serve her best. The citizen is mostly a consumer, and the consumer is presumed self-interested.

In classical republican theory, the theory that animated the founding era, the citizen is the essential unit of a political society. When citizens lose their virtue and engagement, government collapses. The classical republican citizen should be public-oriented in all things, public and private.

In classic liberal theory, that dominated the late 19th and early 20th century, the citizen was also central in political life. The role of law was to protect public action from private interests, and to protect private interests from public action. "The object of legal science and learning was to draw clear boundary lines around these zones of private and public action. Courts' power and duty lay in patrolling these boundaries."[39] Unlike in the republican thesis, a person had no obligation to join public and private interests; they could choose to retreat from society. However, the obligations of public-dealing in public affairs remained. There was a clear line between public and private, and when the public sphere was entered, various obligations were created. Justice Swayne, who had a broad view of property and laissez faire tendencies, also had a demanding view of view of citizenship. He wrote in 1882, "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history." Unlike in classical republicanism, the citizen only had an obligation to be public-oriented in her public life, not in her private life.

These two eras are joined in that a citizen in the classic republican, and classic liberal, model, makes choices for the public good when acting in the public sphere. A citizen may not, ethically, use government to better her own position if she knows it harms others. She might support laws that help her, but only if she also believes they will help the public as a whole.

The modern Court does not have the same view of the citizen. Citizens are not imagined as either publicly oriented or responsible for most decisions. Instead, they are imagined as self-interest maximizing. One of the ways this portrait is drawn is through perceiving people as

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[39] William Forbath, Politics, State Building and the Court, accessed through http://ssrn.com/abstract=958104, published at 2 The Cambridge History of Law in America 643, 643-97.

consumers instead of citizens. Hundreds of scholars openly call us "citizen consumers."[40] Just a summary of market-place of ideas adherents will see how the word "consumer" replaces "citizen."[41] Sometimes the consumer consumes things, sometimes the consumer consumes political ideas, but the posture is similar. Both market and political choice behavior are seen through the lens of choice and consumption, and the power held by the citizen/consumer is the power of exit--not buying--or voice--selling. This is not unlike citizens. But the moral orientation is different. When people are perceived as consumers, they are perceived to be generally self-serving.[42] When people are perceived as citizens--at least in the American tradition--they are perceived to be public-interest serving.

The citizen became a consumer in a series of cases which shift the First Amendment right from the right to speak to the right to hear. The First Amendment played a trivial role in political law until the 1940s.[43] The right to speak was invoked only when there was a particular point of view which was punished by law. It was generally seen as protecting the individual capacity to express moral, religious, and political views--speaking constitutes the person inasmuch as it constitutes thinking, so the right to speak is centered in the ability of individuals to hold transgressive beliefs. For the first 40 years of its modern incarnation, it was a speaker-focused amendment, protecting individuals with views far outside the mainstream--anarchists, Nazis, communists. Only since the early 80s has  doctrine been characterized by a shift from a speaker focused first amendment, to a listener-focused First Amendment.

In *First National Bank of Boston v. Bellotti* the Supreme Court replaced a speaker-centered first amendment with a listener-centered first amendment. In *Bellotti*, the Supreme Court held that in a referendum, a state could not have different rules for different kinds of corporate entities spending money, because of a citizen's right to hear and choose between options. According to the majority in *Bellotti*: "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[44] Listen to the language here--this First Amendment is not a matter of conscience but a matter of a "stock of information."[45]

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[40] "When one examines the marketplace of ideas in terms of the incentives of information producers, citizen consumers, and political actors, it appears competition within that market produces a healthy and substantial dialogue without the need for government interference or direction." Lillian Bevier, ...

[41] *See, e.g., Eugene Volokh, Cheap Speech and what it will do, 104 Yale Law Journal 1805* (1995)

[42] Behavioral economics has put a sizeable dent in this perception. However, behavior economics has discovered a set of mechanistic behaviors or tendencies within the vision of hte person as consumer--animal spirits--instead of within the vision of the person as citizen.

[43] When Jefferson denounced the Alien and Sedition laws of the Adams administration, he did so on the grounds that they were directly targeted at particular viewpoints.

[44] 435 U.S. 765 (1978)

[45] *Id.*

The "stock of information" is marketplace rhetoric--information is a "stock" and enables consumer choice.[46] There is nothing *per se* more self-oriented about the consumer who chooses from a stock of information than the citizen who examines a range of ideas and reasons, but the rhetoric itself, and the structure of the rhetoric, suggests a different imagination of the moral habits of the constituents.

At the same time, the citizen became a consumer in Antitrust, or competition law, which shifted its focus from politics and economic decentralization to economic efficiency. The initial antitrust laws were driven by a blend of reasons, including protection of small business, anxiety about particular practices, but also the perception that monopolization threatened democratic self-government. The individual threatened by monopolies was both individual tradesperson (private) and citizen (public). The Clayton Act was passed to stop the "combinations of capital" which "flaunted their power in the face of the citizenship." Throughout the mid-70s, antitrust was understood to protect citizenship, and citizens, from the accumulation of power that threatened their capacity to exercise their own power. In 1945, Judge Learned Hand in *United States v. Aluminum Company of America* referred to Sherman's stated concerns about limiting aggregated capital because of the "helplessness of the individual before them." Antitrust as a force for decentralization was important "for its own sake and in spite of possible cost."[47] In 1948 in *U.S. v. Columbia Steel Co*, Justice Douglas explained that: "The philosophy of the Sherman Act is that … *all power tends to develop into a government in itself.* Power that controls the economy … should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men."[48]

However, in the early 1980s, there was a sea change in the understanding of the purposes of antitrust, and a related change in the understanding of the constituent unit which antitrust laws protected. While earlier cases had protected citizens and individuals, the new antitrust doctrine protected consumer welfare. The merger guidelines were rewritten to place "consumer welfare" as the goal of competition policy. Richard Posner and Robert Bork argued that current doctrine was based on flawed economic ideological premises and that efficiency and consumer welfare—not the goal of aiding small businesses or having a decentralized economy—were the only legitimate goals of the antitrust statutes. Posner argued that there was no justification for "using using the antitrust laws to attain goals unrelated or antithetical to efficiency," and Bork argued that any political or social concerns were necessarily indeterminate and created unmanageable standards, and were normatively unjustifiable.[49] In antitrust, as in election law, the citizen qua

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[46] Information is the key feature of Hayek's view of the market--expansive information from a great many sources was the truth-producing quality of the market. Here we have a Hayekian view then entering the description of politics. The citizen as hearer/consumer is a total break from classical liberalism.

[47] *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 429 (2nd Cir. 1945).

[48] *U.S. v. Columbia Steel Co.*, 334 U.S. 495, 535 (1948)

[49] Robert Bork, THE ANTITRUST PARADOX (1978).

citizen was replaced by a consumer. The standard by which large concentrations of economic power were now measured were by the standards of consumer welfare alone, not taking into account political power.

**The Regulated Market**

The Kennedy-Roberts Court likes to describe its commitment to an open marketplace of ideas. Many commenters have noted both the marketplace premise, and the flaws in the marketplace premise. One might get the impression from reading *Citizens United* that the Court does not think that either the judiciary or the legislative branch should interfere with and structure the political marketplace.

The Court's role in protecting what it perceives to be a marketplace of ideas is rhetorically grounded in the First Amendment. Justice Alito notes the "close connection between our Nation's commitment to self-government and the rights protected by the First Amendment," then describes the First Amendment as a market-amendment. "The First Amendment creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference."[50] The job of the market is to enable a wide open choice between competing theories of what is true in the world, and what should be done about those truths. Justice Roberts:"In a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the 'unfettered interchange of ideas'—not whatever the State may view as fair." The m-dashes tell the story: freedom is freedom to interchange markets. The market is the evidence of liberty.

This self-described open market idea is accepted by those who are supportive, as well as those who are critical: "*Citizens United* advances an understanding of a laissez-faire marketplace of ideas."[51]

However, the nature of the market that the court actually endorses is neither open nor unregulated. While in *Buckley* the Court held that "[T]he central purpose of the Speech and Press Clauses was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish",[52] the subsequent interpretation of "uninhibited, robust, and wide open" has been less focused on inhibition, robustness, and openness, and more focused on whether or not there is a market for power with a *limited* number of clear choices for the consumer citizen to select among.

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[50] *Knox v. SEIU*, 567 U.S. ___ (2012)

[51] Robert Kerr, What Justice Powell and Adam Smith Could have told the *Citizens United* majority, 9 First Amend. L. Rev. 211, 226 (Winter2010)

[52] *Buckley v. Valeo*, 484 U.S. 1, 1993 (1976)

The rule of thumb for political party litigation is--with a few exceptions--if a major political party is part of the litigation, and it relates to the rights of political parties, the political party wins.[53] That is true when the litigation is between political parties and the state, political parties and candidates, or political parties as against minor political parties.[54] The Kennedy-Roberts Court is openly committed to the importance of a stable, two-party system instead of a wide-open party model. The goal of parties is to create a menu of options--but ideally only two--that are coherent to the public. As O'Connor said in *Davis v. Bandemer*, "There can be little doubt that the emergence of a strong and stable two party system in this country has contributed enormously to sound and effective government".[55]The two party system is externally justified as being stabilizing and providing good shorthands for uninformed voters.

In *Jones v. California*, the Court placed the right of the major parties to exist as ideologically coherent as one of the most important associational rights, and implied that the country's democratic system would be jeapordized if a limited number of major political parties did not represent clear ideological positions. The law in question in Jones was a blanket primary allowed all people, regardless of whether they were affiliated with a political party, to vote for any candidate of any party primary. It was struck down as a violation of the First Amendment.

In *Timmons*, the Court upheld a state fusion ban. The ban made it illegal for a party to nominate someone who had been nominated by another party. The ban had been passed as part of a sweeping effort by the major political parties to reduce the power of minor parties. The Court held that the state had a strong interest in limiting fusion because it could lead to voter confusion and factionalism. The majority opinion explicitly endorsed a two-party system. Therefore, the States' anti-fusion ban was upheld. "[T]he States' interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system ...." A "strong and stable" two party system enables just enough consumer choice that the consumer-citizen may express themselves and discipline bad actors.[56] The goal of the law was clearly to limit to scope of options in the political marketplace. Justice Stevens said, in dissent, "the fact that the law was both intended to disadvantage minor parties and has had that effect is a matter that should weigh against, rather than in favor of, its constitutionality." Whether or not Stevens is correct, his critique points out that the majority of the Court is actually supportive of a highly regulated duopoly in the political sphere. It strikes down laws, like that in Jones, which undermine the duopoly, and it upholds those that reinforce it, and it does so in the name of

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[53] *See Jones v. California, Nader, Duke, Smith*

[54] *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989); *Tashjian* v. *Republican Party of Conn.*, supra.

[55] *Davis* v. *Bandemer*, 478 U.S. 109, 144-145(1986)

[56] *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 367 (1997);
Scalia's dissent in *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 107 (1990) ("The stabilizing effects of such a [two party] system are obvious").

stability, lack of confusion, and lack of factionalism. All of these are real democratic values, but they are values that are invoked in favor of regulated, instead of totally "unfettered" markets.[57]

**The Role of Federalism**

The Court's election law federalism jurisprudence suggests that the federalism principle is more about limiting federal power than granting power to the states. On the one hand, some election law cases rely heavily on federalism. In order to strike down the Voting Rights Act, Justice Roberts created an "Equal Sovereignty Principle," which has weak or no grounding in text or history. The idea of the "Equal Sovereignty Principle" is that Congress may not have laws that treat states differently. As Professor Rick Hasen has argued, the radicalism of the reasoning in *Holder* cannot be overstated. The court held that the formula which determined which states needed to get preclearance for voting changes failed to treat states as equal sovereigns. Such a failure constituted a violation of the 10th Amendment. "The VRA "differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.'" The idea of equal sovereignty, in the words of Michael McConnell, is "made up. . . . It might be an attractive principle, but it doesn't seem to be in the Constitution."[58]

A similar inventiveness was on display in *Alden v. Maine*, where the Court was considering a state's authority to allow Indian tribes to sue the state. In *Alden,* Justice Kennedy openly ignored both doctrine and text, creating a principle he found "implicit in the constitutional design."[59]

After reading these cases, one might conclude that equal sovereignty and the 11th amendment jurisprudence, while textually weak, reflect a genuine ideological commitment to decentralized power.

However, in election law more generally, the Court has shown little deference to the rights of states to organize their political society in the way in which they want. There is essentially no federalism analysis in any campaign finance law, nor in the cases involving political parties. In *California v. Jones,* California had no right to experiment with its political structures, according to the Court. The question in that case was whether California could use a "blanket" primary. The word "federalism" does not even appear in the majority opinion, striking

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[57] Elmendorft and Schleicher, Informing Consent: Voter Ignorance, Political Parties, and Election Law "The dominant parties in a two-party system should instead be understood as, in effect, publicly chartered corporations with a constitutionally conferred public function: to integrate voters and interest groups into coherent, competitive coalitions with respect to the government at issue, thereby enabling low-information voters to obtain representation and to hold the government accountable."

[58] Nina Totenberg, Whose Term Was It? A Look Back at the Supreme Court, NPR (July 5, 2013, 3:35 AM), http://www.npr.org/2013/07/05/198708325/whose-term-was-it-a-look-back- at-the-supreme-court (quoting McConnell).(I found this quote in Rick Hasen's excellent article on Shelby).

[59] *Alden v. Maine*, 527 U.S. 706 (1999)

down the referendum-passed law.[60] While the opinion, by Scalia, does mention that "states have a major role to play in structuring and monitoring the election process," it doesn't fully engage in a theory of democratic devolution. In *Timmons v. New Party,* discussed above, federalism does not appear. Nor does federalism or a state sovereignty analysis appear in *Randall v. Sorrell*, or in *McComish v. Bennett*, both cases in which states were experimenting with different ways of financing elections. If the Court were serious about federalism as a source of empowering states, it would seem that states' sovereignty would at least encompass the power to create the political structures that it wanted. Scalia's concurrence in the case upholding Indiana's voter id law accused the dissent of encouraging "detailed judicial supervision" of state election law practices--something he openly supports in the campaign finance arena.[61]

Instead, federalism appears to be less about empowering states to be laboratories, and more about the disempowering of government itself. In this lens, federalism may be primarily a tool to take certain items outside the scope of popular discussion and popular control.

**Conclusion**

Politics begins when people come together and ask "what should we do," when they are in the position to answer that question with action. The political, therefore, encompasses only that scope of people who are within that circle of power. The Roberts-Kennedy political jurisprudence both favors a limited number of choices (its preference for two party systems), by attempting to limit the role of things that can be decided (by restricting states' abilities to define their own campaign finance and primary models), and by shifting the role of the person from the active decider to the consumer of others' decisions. This ideology has a role for the citizen: to enable stability. If democracies are stable, the source of that stability may be the belief by its citizens in its legitimacy. If the constituent members of a society are consumers, not citizens, markets fail when consumers stop consuming because they stop believing that the markets work.

But perhaps most importantly, the Court does not take the stakes of politics--and the threat of democratic dissolution--particularly seriously. Appearance is more important than reality. It is hard to overstate the radicalism of their position in the pantheon of political theory. There are a limited number of political theorists in western political history that do not put corruption as the leading contender for dissolution. The most prominent, of course, being Thomas Hobbes. But Hobbes lack of fear of corruption related to his non-endorsement of democracy. The modern court stakes out a far more novel claim: that one can have democracy without protecting against corruption.

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[60] Earlier cases, such as *Tashjian vs. Republican Party of Connecticut*, 479 U.S. 208 (1986) in which the Court has restricted the ability of states to run closed primaries, at least addressed federalist concerns.

[61] Scalia concurrence in *Crawford v. Marion County*, 553 U.S. 181 (2008).