THE ANTI-CORRUPTION PRINCIPLE

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Introduction 342
I. Anti-Corruption Roots of the Constitution 346
A. Every Practicable Obstacle: Corruption at the Convention 352
B. Anti-Corruption Clauses in Article I 354
1. *Size, Elections, and Qualifications* 354
2. *Conflicts and Temptations* 358
3. *Elections* 362
C. Anti-Corruption Clauses in Article II 364
D. Anti-Corruption Provisions in Article III 368
E. Structural Provisions: Division of Power and Size 369
F. Anti-Corruption Principle Foundations Conclusions . 372
II. Definitions: Features of Corruption 373
A. Corruption Is Defined by Context and Intent, Not Just by Action 374
B. Citizenship Is a Public Office 377
C. Tension in the Definition (Keeping the Casinos out of Downtown) 379
D. From a Working Definition to an Evolving Standard 382
III. A Second Founding?: *Buckley v. Valeo* 383
IV. Five Modern Concepts of Corruption 387
A. Criminal Bribery: Corruption As "Quid Pro Quo" and "The Creation of Political Debts" 388
B. Inequality: Unequal Access, Unfair Deployment of Wealth, and Undue Influence 391
C. Drowned Voices: Corruption as Suppressed Speech . 394
D. Dispirited Public 394
E. Loss of Integrity 395
V. The Restoration of the Anti-Corruption Principle .. 397
A. Methodological Integrity 398
B. Structural Reasoning 400

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C. The Anti-Corruption Principle as Context 405
D. The Republican Objection 406
CONCLUSION 408

INTRODUCTION

The Constitution carries within it an anti-corruption principle, much like the separation-of-powers principle, or federalism. It is a freestanding principle embedded in the Constitution's structure, and should be given independent weight, like these other principles, in deciding difficult questions concerning how we govern ourselves. Corruption has been part of our constitutional dialogue since the beginning, but in the last 50 years—and particularly since *Buckley v. Valeo* gave corruption a relatively weak role in the constitutional scheme—the concept of corruption has been unbound from the text and history of the document itself.

The purpose of this Article is to prove this principle. While this argument is new, and the way of looking at the Constitution is new, the impulse to give weight to something like it appears in both court cases and the academic literature. Political process "structuralists" like Richard Pildes, Samuel Issacharoff, and Pamela Karlan, who argue for a structure- instead of rights-based approach in democratic governance cases, often argue for giving constitutional-like weight to attempts to fix democratic distortions. Likewise, in cases involving campaign finance, redistricting, term limits, and lobbying, there are often judicial attempts to give weight to the importance of integrity, or self-governance. The anti-corruption principle gives these impulses shape and grounding.

The thrust of the argument is three-fold. First, I show how the fight against corruption is a central part of the United States Constitution—its historical origins, the language of the debates around it, its substance, and its structure. It is not an overstatement to say that the framers of the Constitution saw the document as a structure to fight corruption. Once having decided on the importance of a federal constitutional structure, their primary task became building one that would limit corruption. I substantiate this claim by tracing the meanings of corruption for the Framers as they used the term during the Constitutional Convention, and by exploring the ways in which it shaped their understanding of the Constitution and the challenges of self-government.

Second, I argue that the concept of corruption—literally a threat to the integrity of self-government—has itself lost its integrity. (In a forthcoming book,[1] I explore the reasons for this erosion). True, the

[1] ZEPHYR TEACHOUT, THE MEANING OF CORRUPTION (forthcoming 2010).

word "corruption" persists in constitutional language, but it now functions more as an embarrassed rhetorical aside than as a principled direction. In modern Supreme Court cases—like the recently decided *Wisconsin Right to Life, Inc.* decision[2]—corruption appears as a fairly weak constitutional danger. Those Justices who do invoke anti-corruption interests often do so defensively, or explain them in terms of serving other interests, like equality or speech. Justice Antonin Scalia has argued that the concept of corruption has become logically unsustainable;[3] Justice John Paul Stevens (as well as several commentators) has attempted to cram it into equality frameworks instead of corruption standing alone.[4] Justice Clarence Thomas has offered to do us a service and throw it out entirely, arguing it means nothing more than the criminal law of bribery.[5]

Finally, I argue that the "anti-corruption principle" should be treated as a freestanding constitutional principle. It should be given every bit as much weight as the often-invoked "separation-of-powers principle" in constitutional reasoning. In cases ranging from campaign finance to gerrymandering, this deeply embedded idea should inform whether or not congressional, state and local efforts to reform political processes can be upheld even when they threaten other principles, such as free speech.

I should be clear from the outset that the importance of the anti-corruption principle is not dependent upon any one mode of constitutional interpretation. For those who believe great weight ought to be given to original understanding, the arguments I present here should matter a great deal. I suggest a base understanding of doctrine and structure, which only strong countervailing forces of principle, precedent, or policy can outweigh, and argue that we systematically misunderstand the intent of the Framers and the understanding of the ratifiers when we "disaggregate" corruption into separate little islands of doctrine and theory, each cut off from the main concept.[6]

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2 FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2673–76 (2007).

3 *See, e.g.*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 685 (1990) (Scalia, J., dissenting) (stating that the concept of corruption has "founder[ed] under [a] weight too great to be logically sustained").

4 *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 153 (2003) (describing corruption as unequal capacity to influence based on wealth); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994) (stating that corruption is a problem of inequality); Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 22 (same).

5 *See, e.g.*, McConnell, 540 U.S. at 292 (Thomas, J., dissenting) (describing corruption as only quid pro quo bribery).

6 In this way, my work has benefitted from the global approach to democratic problems advocated by Richard Pildes, Samuel Issacharoff, and Pamela Karlan, among others. *See, e.g.*, Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 40–41 (2004) (arguing that courts ought to take a more unified approach toward problems of democracy and power).

Textualists seeking interpretive context for several words that were introduced to combat structural incentives to corruption will find that corruption provides context for ideas scattered throughout the Constitution. Students of Charles Black and his mode of structural argument[7] will be interested in how this blending of textual and structural originalism makes the anti-corruption principle very similar to the separation-of-powers principle and the sovereign immunity doctrine.

Republican theorists might be interested in the way that republican theories of corruption were represented at the Constitutional Convention. (I should be clear that this Article is not primarily an attempt to revive republicanism. While many of the Framers' views of corruption derived from Montesquieu, who is often placed within what is now called "the republican tradition,"[8] founding-era corruption is distinct enough from republican ideology that we can learn from it without also embracing the messy fears that republicanism can drag in its wake—elitism, homogeneity, etc.)[9]

But what of those who claim to ignore any form of originalism, no matter how modest? For those readers, I still believe the discussion may be of interest, if in a different way. At the very least, this is a study of practical political science—the study of an attempt by a group of extremely able people to create a constitutional structure that would not collapse under its own weight. Even those most hostile to originalism might find considerable interest, and possibly even considerable instruction here—if only as a case study. For example, the rational-choice theorist, convinced that all that matters is harnessing the structures of self-interest to provide a self-limiting machine that will "go of itself,"[10] might be interested in the theoretical models, if one can use that word for the more elegant words of the eighteenth century, cre-

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7 *See generally* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); *see also* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 6 (1995).

8 *See, e.g.*, Mark Tushnet, *Federalism and the Traditions of American Political Theory*, 19 GA. L. REV. 981, 992 (1985) (explaining corruption in the context of "the republican tradition").

9 In fact, the Framers' anti-corruption principles are relevant—and may be critical—to liberal democratic theorists as well. Montesquieu's view of corruption was not that different from that of John Locke, who described corrupt representatives seeking money-grabs, and corrupt executives seducing representatives, in his treatise on the dissolution of governments. *See infra* notes 43–44 and accompanying text (discussing Montesquieu and his influence on the Framers). Locke's intellectual descendants, as well as Montesquieu's, ought to be interested in the American trajectory of the deeply held conviction that corrupt self-government is an oxymoron. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 412–14 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

10 MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF 18, 125, 189 (1986) (quoting JAMES RUSSELL LOWELL, *The Place of the Independent in Politics*, *in* POLITICAL ESSAYS 312, 312 (1888) (warning against political complacency)).

ated by another group of "theorists" deeply concerned with many of the same issues.

In the final analysis, I think we ought to attend to the Framers' fears of corruption because they were wisely held. Their concerns, which might sound quaint to the modern jurist, are very close to the concerns of modern American citizens, who consider corruption, inchoate a concept as it may be, to be one of the biggest threats to government. Understanding the threat of corruption, and incorporating that understanding into constitutional law, may be necessary for good self-government. The Constitutional Convention delegates were right to be diligent in including the anti-corruption principle in the Constitution. Internal decay of our political life due to power-and-wealth seeking by representatives and elites is a major and constant threat to our democracy. History provides some powerful tools to allow us to incorporate the anti-corruption principle into the constitutional law of democracy. We should pay attention to it.

In Part I of this Article, I explain the anti-corruption roots of the Constitution and provide a roadmap of the Constitution through the lens of the anti-corruption principle, demonstrating surprising anti-corruption reasons for many clauses. Then, in Part II, I discuss what the Framers meant by corruption. They took a broad view of corruption, not limiting it to certain particular crimes, like bribery, or the violation of norms.

Part III introduces *Buckley v. Valeo*,[11] the most important Supreme Court case on corruption in the modern era, which explicitly introduced corruption as a concern with weight enough to allow limiting First Amendment freedoms. In Part IV, I trace several different themes that emerged in the following thirty years, as Justices struggled to explain what corruption is and why it is important to combat it, but failed to come together on a common definition or a shared understanding.

In Part V, I argue that the Court ought to weigh the Framers' anti-corruption principle in their decisions about democratic institutions. Instead of treating the fight against corruption as a "compelling state interest," I argue that it ought to be treated as a fundamental constitutional principle, a principle that Congress should have leeway to pursue absent very strong countervailing constitutional limitations. Instead of strictly scrutinizing anti-corruption efforts, the Courts ought to balance anti-corruption concerns against First Amendment concerns as co-equal considerations. I support this argument by tying the history and structure of the Constitution to several modes of interpretation.

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11 *Id.*

Understanding the history of corruption is profoundly important at this time in history. Half of Americans are convinced that Congress is corrupt;[12] strong evidence indicates that many members of Congress are enriched by their service; no-bid contracts and earmarks are regularly rewarded to people who use their wealth to affect public policy. According to Transparency International, the United States ranks eighteenth in its Corruption Perceptions Index.[13] The revolving door between staffers and lobbyists, the lure of powerful contacts, the seductions of a wealthy community, and other forces all give regular work to what Hamilton called "the business of corruption."[14]

The apotheosis of speech, unconstrained by concerns of corruption, is a serious problem. The *Buckley v. Valeo*[15] line of cases has forced courts to balance two interests against each other—the right to free political speech and the societal interest in being free from corruption. It has not been a fair fight. On the one side is the weight of a hundred years of case law, the Holmes' dissents, the images of Vietnam protestors, and the sanctified meme of "free speech." On the other side is a simple word: corruption. One goal of this reconstruction is to show that this lonely word has some equally powerful antecedents, and that the fight between the two interests might be more interesting after all. It is certainly a very important fight, one which may well shape the future direction of our democracy.

I
Anti-Corruption Roots of the Constitution[16]

Corruption derives from the Latin *corrumpero*: to break up, to spoil. *Rumpo* means "to break, to shatter, to burst open, destroy, vio-

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12 *See* CNN Poll 25 (2006), http://i.a.cnn.net/cnn/2006/images/10/19/rel25caf.pdf.

13 Transparency International, 2008 Corruption Perceptions Index, http://www.transparency.org/content/download/36589/575262. This U.S. rank is consistent with ranks in prior years. *See, e.g.*, Transparency International, 2007 Corruption Perceptions Index, http://www.transparency.org/content/download/24104/360217 (ranking the United States twentieth); Transparency International, Corruption Perceptions Index 2002, http://www.transparency.org/content/download/3223/19546/file/cpi2002.pressrelease.en.pdf, (ranking the United States sixteenth).

14 The Federalist No. 68, at 413 (Alexander Hamilton) (Clinton Rossiter ed., 1961). These issues are also important because we are in the middle of the largest export of the democratic form in world history. In Eastern Europe, Africa, and Eurasia, American intellectuals, activists, and government representatives have worked with local leaders to develop constitutions based on the American model. If the Framers were right—if one of the biggest threats to government is corruption—we are entertaining a dangerous game. We are exporting a democratic vision without simultaneously exporting a constitutional tradition of protecting against corruption.

15 424 U.S. 1 (1976).

16 James Savage has written about some of the same convention discussions. *See* James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. Pol. 174 (1994) (discussing the relationship between republicanism and corruption in convention

late," and *co* means "with,"—instead of two things breaking apart (*dirumpo*), or one thing breaking open (*erumpo*), corruption is when something breaks within itself: the apple rots on the shelf; narcissism corrodes the soul; government internally disintegrates. The integrity of the object of corruption is threatened by internal decay. In this Article, I argue that the same is true of the concept of corruption in our constitutional system, and that this is a bad thing.

In this Part, I argue that the fight against corruption is a central part of the United States Constitution—its historical origins, the language of the debates around it, its substance and its structure. It is not an overstatement to say that, above all else, the Framers of the Constitution saw the document as a structure to fight corruption. I substantiate that claim by tracing the meanings of corruption for the Framers and ratifiers and by exploring the ways in which it shaped their understanding of the Constitution and the challenges of self-government.

The Framers of our Constitution considered political corruption a key threat—if not the key threat—to the young country. Anti-corruption reforms were central to their political vision. Delegates to the 1787 convention—the federalist proponents of the proposed constitution, the anti-federalists, the monarchists and those preferring classical republics—all shared a general obsession with corruption. Steeped in the writings of Montesquieu, in which corruption plays the lead antagonist to a flourishing polity, they examined all kinds of corruption that might breed in the proposed governmental structures and designed the Constitution to include as many bulwarks against corruption as possible.

I am not the first to stress the importance of corruption. The concept received some attention in the so-called Republican Revival in American constitutional scholarship. I have benefited greatly from those treatments. Nevertheless, I would argue that they suffer from two linked limitations for the purposes of this argument. The focus on corruption was often a grace note to some other principal focus—particularly to the arguments that we should take a republican conception of the Constitution seriously, or that we should rediscover the ideas of political "virtue" in our constitutional history. This focus had the effect of limiting the full exploration of how anti-corruption principles shaped the Constitution as a legal matter. At the same time, it has also had the unfortunate (and unintended) effect of confining discussions of corruption to the fate of the republican strand in constitutional theory, as if those who did not see the Constitution through a

debates). Additionally, this section draws from Zephyr Teachout, *Corruption, Technology and Constitutional Design*, *in* REBOOTING AMERICA: IDEAS FOR REDESIGNING AMERICAN DEMOCRACY FOR THE INTERNET AGE 126 (2008).

republican lens could somehow afford to ignore the way that anti-corruption concerns shaped the constitutional structure and text.

I argue here that the Court, torn by different democratic instincts, has forgotten corruption's historical roots. While some of the ideas underpinning the anti-corruption principle have been smuggled into separation-of-powers language, and certain views of free expression, I argue here that the principle loses its force if it is not directly addressed. The language of corruption, never tractable, has been deformed, and its role as a central threat to government has simply disintegrated over time.

"[I]f we do not provide against corruption, our government will soon be at an end," George Mason said as the Constitutional Convention got under way.[17] His concern was echoed by many voices throughout the summer of 1787,[18] and it was discussed extensively in the public debates over the Constitution's ratification. Indeed, through the study of Whig pamphlets, the historian Bernard Bailyn became convinced that "the fear of a comprehensive conspiracy against liberty . . . nourished in corruption . . . lay at the heart of the Revolutionary movement."[19] At the Convention, "there was near unanimous agreement that corruption was to be avoided, that its presence in the political system produced a degenerative effect."[20] The historian J.G.A. Pocock describes the Framers at this time as seeing themselves "perpetually threatened by corruption."[21]

The Framers were obsessed with corruption.[22] Corruption in the legislative councils was the immediate motivation for the Convention,[23] and corruption in the Continental Congress concerned them.[24] In 1778, Samuel Chase lost his position—and his reputation—after trying to use insider information to make money on the

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17 Notes of Robert Yates (June 23, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 391, 392 (Max Farrand ed., rev. ed. 1966) (1937) [hereinafter CONVENTION RECORDS]; *see also* Notes of James Madison (June 23, 1787), *in* 1 CONVENTION RECORDS, *supra*, at 385, 387.

18 *See* Savage, *supra* note 16, at 177 (stating that Madison's notes "record that 15 delegates used the term 'corruption' no less than 54 times").

19 BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION, at xiii (enlarged ed. 1992).

20 Savage, *supra* note 16, at 181.

21 J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 507 (1975).

22 In Section II, *infra*, I articulate what they meant by the term corruption. However, for the purposes of understanding their motivations, the Framers' meaning was close enough to our current understanding that a modern reader can make sense of this fear.

23 Notes of James Madison (Aug. 14, 1787), *in* 2 CONVENTION RECORDS, *supra* note 17, at 282, 288 ("What led to the appointment of this Convention? The corruption & mutability of the Legislative Councils of the States.") (recording arguments of Mercer).

24 *See infra* Part I.A; *see also* William G. Mayer, *What the Founders Intended: Another Look at the Origins of the American Presidential Selection Process*, *in* THE MAKING OF THE PRESIDENTIAL CANDIDATES 2008, at 203, 216 (William G. Mayer ed., 2008).

flour market (the Continental Congress authorized flour purchase for troops).[25] Thomas Mifflin allegedly used his position as quartermaster during the revolution to obtain supplies and to make a profit for himself, and was accused of embezzlement.[26] In addition to allegations of corruption at home, there were dozens of accusations of American agents abroad using their intermediary position to enrich themselves through skimming off the top of arms and goods purchases.[27] American agents were not the only ones thought to be enriching themselves abroad; there was substantial evidence of corruption in Britain and in prior republics. This foreign corruption also greatly influenced the Founders' discussions. For example, during the convention of Virginia, Patrick Henry stated, "Look at Britain; see there the bolts and bars of power; see bribery and corruption defiling the fairest fabric that ever human nature reared."[28] Thus, Britain provided both the model government and the harbinger of doom because of its internal corruption. Pierce Butler summarized the concern:

> We have no way of judging of mankind but by experience. Look at the history of the government of Great Britain, where there is a very flimsy exclusion—Does it not ruin their government? A man takes a seat in parliament to get an office for himself or friends, or both; and this is the great source from which flows its great venality and corruption.[29]

The British monarch exercised influence over the representatives, using wealth and patronage to curry favor and to undermine Britain's constitutional government. Moreover, the public culture of Britain had become wealth seeking, pandering, and self-serving, with a

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[25] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 467 (1969) ("It was 'the corruption and the mutability of the Legislative Councils of the States' . . . that actually led to the overhauling of the federal government in 1787."); *see also* Notes of James Madison, *supra* note 23, at 285 ("Nothing else can protect the people agst. those speculating Legislatures which are now plundering them throughout the U. States.") (quoting Mercer).

[26] *See* E. James Ferguson & Elizabeth Miles Nuxoll, *Investigation of Government Corruption During the American Revolution*, 8 CONG. STUD. 13, 23 (1981); *see also* HARLOW GILES UNGER, AMERICA'S SECOND REVOLUTION 97 (2007) (discussing accusations of embezzlement).

[27] *See, e.g.*, JEFF BROADWATER, GEORGE MASON: FORGOTTEN FOUNDER 118 (2006).

[28] Patrick Henry, Speech on the Expediency of Adopting the Federal Constitution (June 7, 1788), *in* 1 ELOQUENCE OF THE UNITED STATES 178, 223 (E.B. Williston ed., 1827). Britain was both a model and a bogeyman—fundamental admiration for British form undergirded design efforts for federalists and antifederalists alike. *See id.*; *see also* WOOD, *supra* note 25, at 32.

[29] Notes of Robert Yates (June 22, 1787), *in* 1 CONVENTION RECORDS, *supra* note 17, at 377, 379 (quoting Butler).

populace undeserving of the title of a republican citizenry.[30] Corruption had become "a disease that has been consuming them."[31]

In thinking about the prevention of corruption in their new nation, the Framers considered ancient as well as modern histories of failure. As with eighteenth-century British intellectuals, the Framers' political thought and discussions were infused by the recently published (in 1776) *The History of the Decline and Fall of the Roman Empire.*[32] Thus, references to the Roman and Greek corruption are scattered throughout the convention[33] and ratification debates.[34] "Can we copy from Greece and Rome?" Charles Pinckney asked.[35] The Framers constantly compared the British government to the end of Rome—where a well-designed government was eventually internally corrupted and, therefore, self-destructed.

This concern with corruption was nothing new, but it had a strong foundation in the intellectual tradition—frequently called republicanism—that influenced many Framers.[36] While other political traditions focus on the problems of stability, anarchy, inequality, or violence, a defining feature of the republican tradition is that it understands corruption as the biggest threat to good government. Republicanism is associated with the rule of law, instead of the whims of tyrants or mobs, and a belief in the importance of mixed government to secure a stable government.[37] At the heart of the republican tradition is a belief in the critical importance of some kind of civic virtue and the impossibility of a public-serving government without it. That virtue is lost when the state is corrupt because virtue and corruption

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30 *See* WOOD, *supra* note 25, at 32.

31 CHARLES PINCKNEY, OBSERVATIONS ON THE PLAN OF GOVERNMENT SUBMITTED TO THE FEDERAL CONVENTION, IN PHILADELPHIA, ON THE 28TH OF MAY, 1787, *reprinted in* 3 CONVENTION RECORDS, *supra* note 17, at 106, 109.

32 EDWARD GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE (1776).

33 *See, e.g.*, Notes of Robert Yates (June 19, 1787), *in* 1 CONVENTION RECORDS, *supra* note 17, at 325, 327 ("Did not Persia and Macedon distract the councils of Greece by acts of corruption?" (quoting Madison)).

34 *See, e.g.*, THE FEDERALIST NO. 70 (Alexander Hamilton), NO. 63 (James Madison); Essays by a [Maryland] Farmer No. VII (Apr. 11, 1788), *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 60 (Herbert J. Storing ed., 1981); Essays of Brutus No. X (24 Jan. 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 413; James Monroe, Remarks During the Virginia Debate on the Adoption of the Federal Constitution (June 10, 1787), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 207, 209–10 (reprint 1941) (Jonathan Elliot ed., 2d ed. 1836) [hereinafter STATE RATIFICATION DEBATES].

35 DAVID J. BEDERMAN, THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION: PREVAILING WISDOM 41 (2008).

36 *See generally* Daniel T. Rogers, *Republicanism: The Career of A Concept*, 79 J. AM. HIST. 11 (1992) (describing the creation of the term "republicanism"); Savage, *supra* note 16 (describing the connection between republicanism and corruption.).

37 *See* POCOCK, *supra* note 21, at 519–26.

are intimately tied to each other as inverses. Accordingly, J.G.A. Pocock wrote, "men who were equal must practice virtue or become corrupt."[38]

In this vein, the Framers were influenced by Montesquieu,[39] Machiavelli,[40] and Plutarch,[41] all thinkers for whom corruption is the most serious of threats for polities. (Gordon Wood argues that the ancients were read in translation by the Framers, and that these translations tended to have a bias toward discussions of decay and corruption;[42] while Montesquieu, Machiavelli, and Aristotle are also concerned with corruption, the dramatic narrative of states of the eighteenth century embedded itself in these translations, and, as a result, reinforced and strengthened this narrative.)

Indeed, the Framers'

> chief authority . . . was Montesquieu, whose name recurs far more often than that of any other authority in all of the vast literature on the Constitution. He was the fountainhead, the ultimate arbiter of belief, his ideas the standard by which all others were set. They reverted to his authority at every turn.[43]

Corruption—and virtue—were Montesquieu's subjects; Book VIII of the *Spirit of Laws* is explicitly devoted to corruption, but it is a theme that informs all of his discussions, ranging from the preferable kinds of commercial laws to the preferable systems of criminal laws.[44]

In the republican narrative, whose heroes are Athens, Rome, and the Italian city-states, great cultural and political flourishing were followed by the slow corruption of public life and then by private concerns. This cyclical narrative held a strong grip on the imaginations of the Framers and informed many of their decisions in framing the Constitution.[45]

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38 *Id.* at 516.

39 *See, e.g.*, Notes of James Madison (June 30, 1787), *in* 1 CONVENTION RECORDS, *supra* note 17, at 481, 485 (Madison cites Montesquieu); Notes of James Madison (July 17, 1787), *in* 2 CONVENTION RECORDS, *supra* note 17, at 25, 34 (same). *See generally* PAUL MERRILL SPURLIN, MONTESQUIEU IN AMERICA: 1760–1801 (1940).

40 *See* MACHIAVELLI'S LIBERAL REPUBLICAN LEGACY 167–278 (Paul A. Rahe ed., 2006). John Adams in particular was heavily influenced by Machiavelli. C. Bradley Thompson, *John Adams's Machiavellian Moment, in id.* at 189, 189–207. For a discussion of the republicanism of the Framers, see, for example, WOOD, *supra* note 25, at 32–34.

41 THE FEDERALIST NO. 18 (James Madison with Alexander Hamilton), *supra* note 14, at 123 ("It happened but too often, according to Plutarch, that the deputies of the strongest cities awed and corrupted those of the weaker . . . ."); Notes of Madison, June 28, 1787, *in* 1 CONVENTION RECORDS, *supra* note 17, at 449 (Madison cites Plutarch).

42 *See* WOOD, *supra* note 25.

43 BAILYN, *supra* note 19, at 344–45.

44 *See* BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS *passim* (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

45 Through the reading of the old texts, the founder's obsession with corruption is obvious. It intrigues me how little focus it has gotten, to the point where indexes to *The Federalist Papers* and to Bailyn's book do not even track corruption references. *See, e.g.*,

But the Framers' concern with corruption did not come solely from the republicans. Framers like Alexander Hamilton, who were more skeptical of republicanism, were also greatly concerned with corruption. Hamilton's reluctance to support a representative government stemmed in part from his belief that republics were more likely to be corrupted than a unified monarchy. Hamilton wrote, "One of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption."[46] Also, the anti-federalist Patrick Henry constantly used corruption as the thumping point in his anti-ratification speeches.[47]

This concern with corruption was "the common grammar of politics."[48] If liberty was the warp of the political ideology of the era, corruption was the weft. Reading the Convention-era documents, the idea of corruption inevitably seizes the reader with grotesque admiration for its force. The Framers wove their own stories and their histories around the coming corruption of the young country—certain it would happen, but nonetheless obsessed with stopping it from happening, controlling the inevitable venal forces that would overwhelm it.

The Constitution was intended to provide structural encouragements to keep the logic and language of society as a whole from becoming corrupt, representing a technical and moral response to what they saw as a technical and moral problem.

A. Every Practicable Obstacle: Corruption at the Convention

Corruption was discussed more often in the Constitutional Convention than factions, violence, or instability.[49] It was a topic of concern on almost a quarter of the days that the members convened.

Clinton Rossiter, *Index of Ideas*, *in* THE FEDERALIST PAPERS, *supra* note 14, at 551–60 (containing no references to corruption but referencing "factions" forty-five times). Although the term "corrupt" or "corruption" is used twenty-two times in *The Federalist Papers*, "factions" are discussed only seventeen times. Bailyn tells the story of his excited realization that "slavery," "corruption," and "conspiracy" were not mere rhetoric and propaganda, and he notes that the history of the republic is rife with a fear of a corruption-fed conspiracy against liberty. The index to *The Federalist Papers*, however, ignores these discussions. I am not suggesting there is a conspiracy against corruption, but that modern thinking has demoted the importance of the anti-corruption motivations that influenced the Constitution's form.

46 THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 14, at 149.

47 *See* 3 PATRICK HENRY: LIFE, CORRESPONDENCE, AND SPEECHES 467, 501, 526, 535 (William Wirt Henry ed., 1891).

48 John M. Murrin, *Escaping Perfidious Albion: Federalism, Fear of Aristocracy, and the Democratization of Corruption in Postrevolutionary America*, *in* VIRTUE, CORRUPTION, AND SELF-INTEREST: POLITICAL VALUES IN THE EIGHTEENTH CENTURY 103, 104 (Richard K. Matthews ed., 1994).

49 A review of Madison's and Yates's notes shows that "corruption" and "corrupt" (not including "corruption of blood" and its variants) show up in discussions twice as often as "faction" or "factions, " and twice as often as "violent" or "violence." *See* Notes of James

Madison recorded the specific term corruption fifty-four times, and the vast majority of the corruption discussions were spearheaded by the influential delegates Madison, Morris, Mason, and Wilson.[50] The attendees were concerned about the corrupting influence of wealth, greed, and ambition.[51] They were concerned that the small size of the young country (compared to the great European powers) would open it up to foreign corruption, that the proposed Senate would be easily corrupted because of its small size, and that the proposed populist House of Representatives would be easily corrupted because of the weak virtue of the men who would stand for it. The delegates' discussion of these issues was far more oriented toward thwarting corruption than of promoting virtue.[52] Corruption was a "crucial term" for the American Framers.[53]

In the writing of the Constitution, "[n]othing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption."[54] Some of the most extensive debates in the Convention—those about emoluments and perquisites for civil office, who should have the power of appointment, and the size of the relative bodies—were debates about the relative strength of different constitutional designs to withstand corruption. The "unique and universal crisis" of corruption as perceived by the Framers led to frantic, near-apocalyptic language and a search for tools to ward off its threats.[55]

The Framers worked hard to create such a tool through a document that would protect new citizens of the Confederation from each others' most mercenary and covetous tendencies, and delay—if not forestall—the corruption that they believed would eventually founder America.[56] Against these fears, the delegates attempted to build a bulwark against corruption in the clauses and structure of the Constitu-

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Madison, *in* 1 CONVENTION RECORDS, *supra* note 17, *passim*; Notes of Robert Yates, 1 CONVENTION RECORDS, *supra* note 17, *passim*.

50 Savage, *supra* note 16, at 177.

51 THE FEDERALIST NO. 57 (James Madison), *supra* note 14, at 354 (discussing a concern that a representative's duty will be "diverted from him by the intrigues of the ambitious or the bribes of the rich").

52 *See id.*

53 J. Peter Euben, *Corruption*, *in* POLITICAL INNOVATION AND CONCEPTUAL CHANGE 220, 221 (Terrence Ball et al. eds., 1989).

54 THE FEDERALIST NO. 68 (Alexander Hamilton), *supra* note 14, at 412. The cabal—the faction—has been discussed and litigated, and it has contributed to the formation of many theories.

55 POCOCK, *supra* note 21, at 513.

56 Benjamin Franklin, in a speech, cheerily predicted that "its complexion was doubtful; that it might last for ages, involve one quarter of the globe, and probably terminate in despotism." 2 MERCY OTIS WARREN, HISTORY OF THE RISE, PROGRESS AND TERMINATION OF THE AMERICAN REVOLUTION 660 (Lester H. Cohen ed., Liberty Classics 1988) (1805).

tion.[57] This Part provides a map of the Constitution through the lens of anti-corruption clauses.[58]

First, to guide the discussion, is a chart of anti-corruption clauses.

B. Anti-Corruption Clauses in Article I

The Framers' discussion of the people's house and the elite's house—the House of Representatives and the Senate—was shaped by concerns that the House would be populated by men of weak will, easily corrupted to use their office for venal ends, and that the Senate would become corrupted by vanity and luxury. The size of the houses, the mode of election, the limits on holding multiple offices, the limitations on accepting foreign gifts, and the veto override provision were all considered in light of concerns about corruption, and designed to limit legislators' opportunities to serve themselves.

1. *Size, Elections, and Qualifications*

One of the most extensive and recurring discussions among the delegates about corruption concerned the size of the various bodies. With regard to the size of the House of Representatives, Elbridge Gerry noted that "[t]he larger the number, the less the danger of their being corrupted."[59] Similarly, James Wilson warned that, "it is a lesson we ought not to disregard, that the smallest bodies in G. B. are notoriously the most corrupt."[60]

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57 John Noonan argued in his influential book *Bribes* that the absence of a direct clause ensuring the integrity of the legislature, the absence of an impeachment formula for legislators, and the absence of explicit criminal laws against corrupt legislators evidence a conscious choice and a "distinctly modest barrier to corruption of Congress." JOHN T. NOONAN, JR., BRIBES 433 (1984). At another point in the book, he argues that "[t]he only sanction for legislative bribetakers was to be political." *Id.* at 435. These efforts were not modest, but they were focused on the political structures. These claims, made in the context of his investigation of criminal laws against bribery, are correct; inasmuch as they might be read as a claim that the Framers were unconcerned about bribery, however, such a reading would be wrong. One of the purposes of this Article is to show, and then explore, non–criminal law responses to the problems of corruption.

58 Many of the clauses and structural elements that I discuss have separate purposes—by suggesting that they were animated by a corruption concern, I do not mean to imply that they did not also have other—and sometimes more important—reasons for their existence.

59 Notes of James Madison (July 10, 1787), *in* 1 CONVENTION RECORDS, *supra* note 17, at 566, 569.

60 Notes of James Madison (June 16, 1787), *in* 1 CONVENTION RECORDS, *supra* note 17, at 249, 254.

Constitutional Provision	**Feature**	**Reference**
Article I, Section 2	Fact and Frequency of Elections	*The Federalist No. 39*
Article I, Section 2	Residency Section in Qualifications Clause	Notes of King, August 8, 1787 Notes of Madison, August 8, 1787
Article I, Section 2	Requirement that the Same Qualifications Apply to State and Federal Elections	
Article I, Section 2	Advise and Consent	Notes of Madison, July 18
Article I, Section 2	Inhabitancy Requirement	Notes of King, August 8, 1787 Notes of Madison, August 8, 1787
Article I, Section 2	Number of Representatives	Letter from Madison to George Hay, August 23, 1823
Article I, Section 2, Clause 1	Election "By the People"	Notes of Yates, June 6, 1787
Article I, Section 6, Clause 2	No Conflict Clause	Notes of Yates, June 22, 1787
Article I, Section 7	2/3 Veto Override	Notes of Madison, September 12
Article I, Section 9	Power of the Purse	
Article I, Section 9	No Title of Nobility or Gifts from Foreign States	Randolph, *in Debates and Other Proceedings of the Convention of Virginia* 321–45 (2d ed., 1805)
Article I, Section 10	Forbids the Creation of Titles of Nobility	
Article II, generally	Generally—An Executive	Notes of Madison, July 19, 1787 Notes of Yates, June 19, 1787
Article II, Section 1	Same Day Elections	Notes of Madison, September 4, 1787
Article II, Section 1	Method of Selecting President	Notes of Madison, September 6, 1787
Article II, Section 1, Clause 3	Method of Electors Voting	Rufus King in the Senate of the United States, March 18, 1824
Article II, Section 2	Treaty-Making Power	Notes of Madison, September 8, 1787
Article II, Section 2	Appointments Clause	William Findley in the House of Representatives, January 23, 1798
Article II, Section 4	Causes for Impeachment	Notes of Madison, July 24, 1787
Article II, Section 4	Fact of Impeachment	Notes of Madison, July 24, 1787
Article II, Section 4	Agents of Impeachment	Notes of Madison, September 8, 1787
Article III, Section 1	Inferior Federal Courts	Notes of Madison, June 5, 1787
Article III, Section 2	Jury Requirement	Notes of Madison, September 12, 1787

The delegates similarly worried that the Senate's small size made it more prone to corruption. "The Senate are more liable to be corrupted by an Enemy than the whole Legislature,"[61] Madison contended. Randolph argued that "[t]he Senate will be more likely to

[61] Notes of James Madison (Aug. 17, 1787), *in* 2 CONVENTION RECORDS, *supra* note 17, at 314, 319 (fearing that foreign countries would be primary agents of corruption).

be corrupt than the H. of Reps and should therefore have less to do with money matters."[62]

Several delegates reiterated a relationship between size and corruption, suggesting that it was, or at least was becoming, conventional wisdom. Magistrates, small senates, and small assemblies were easier to buy off with promises of money, and it was easier for small groups to find similar motives and band together to empower themselves at the expense of the citizenry. Larger groups, it was argued, simply couldn't coordinate well enough to effectively corrupt themselves. James Madison argued:

> Besides the restraints of their personal integrity & honor, the difficulty of acting in concert for purposes of corruption was a security to the public. And if one or a few members only should be seduced, the soundness of the remaining members[ ] would maintain the integrity and fidelity of the body.[63]

Notably, George Washington's only contribution to the Constitutional Convention arose in the context of a debate about the size of the House of Representatives. He argued that it should be larger, to ensure accountability to the people.[64] First, it would take too much time for representatives in a large legislative body to create factions. Second, differences between legislators would lead to factional jealousies and personality conflicts if the same corrupting official tried to buy, or create dependency, across a large body. Because secrets are hard to keep in large groups, and dependencies are therefore difficult to create, the sheer size and diversity of the House would present a formidable obstacle to someone attempting to buy its members.

Madison claimed that they had designed the Constitution believing that "the House would present greater obstacles to corruption than the Senate with its paucity of members."[65] As these examples demonstrate, the argument that a larger House would guard against corruption was fundamentally an argument about problems with coordinating collective action and not about character. As a result of this discourse, the delegates decided to make the House of Representatives—defined in Article I, Section 2—larger to protect against corruption.[66]

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62 Notes of James Madison (Aug. 13, 1787), *in* 2 CONVENTION RECORDS, *supra* note 17, at 267, 279.

63 Notes of James Madison, (July 20, 1787), *in* 2 CONVENTION RECORDS, *supra* note 17, at 63, 66.

64 Savage, *supra* note 16, at 181.

65 Letter from James Madison to George Hay (Aug. 23, 1823), *in* 9 THE WRITINGS OF JAMES MADISON 147, 150–51 (Gaillard Hunt ed., 1910).

66 *See* U.S. CONST. art. I, § 2, cl. 3. The size of the state itself was also a matter of concern. Several delegates noted that Holland was a small state, and they believed that its smallness was one of the reasons it was easily corrupted by French influence. *See* Notes of

In addition to size, the delegates also vehemently debated the method of selecting legislatures, and the qualifications to be imposed on legislators. The delegates discussed these issues in the context of the so-called vertical integration problem of corruption: congressional dependency on state legislatures could allow local corruption to infect national corruption.[67] The delegates had little trust in the integrity of the state legislatures and therefore drafted the Constitution to provide that House members would be elected directly by the people.[68] A proposal to replace "by the people" with "by the legislature" was rejected out of fear that state governments would corrupt the national government: "If the national legislature are appointed by the state legislatures, demagogues and corrupt members will creep in."[69]

Partly to protect against corruption, the delegates also required that House members reside in the represented district.[70] Some delegates suggested eliminating the inhabitancy requirement, but the qualification survived because of fear that wealthy non-residents would purchase elections: "[I]f you do not require it—a rich man may send down to the Districts of a state in wh. he does not reside and purchase an Election for his Dependt. We shall have the Eng. Borough corruption . . . ."[71] After extensive deliberation—some wanted even greater protection, including residency for a term of years in the particular area in which the person was seeking election—the word "resident" was switched to "inhabitant" to clear up confusion, and the residency requirement, with no time requirement, was kept.[72]

James Madison (June 16, 1787), *supra* note 60, at 254 ("Every other source of influence must also be stronger in small than large bodies of men. When Lord Chesterfield had told us that one of the Dutch provinces had been seduced into the views of France, he [need] not have added, that it was not Holland, but one of the *smallest* of them." (alteration in original)). The Framers saw America as a small country, akin to Holland and other small states—a country facing constant threat from the power and wealth of larger, imperial countries such as England, France, and Spain.

67 *See* Notes of Rufus King (June 6, 1787), *in* 1 CONVENTION RECORDS, *supra* note 17, at 142, 142 (recording George Mason's argument that "now it is proposed to form a Govt for men & not for Societies of men or States, therefore you shd. draw the Representatives immediately from the people. . . . [S]uppose a majority of the Legislat. in favor of paper money or any other Bad measure, wd. they not consider the opinions of the candidates on these favorite measures?").

68 U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .").

69 Notes of Robert Yates (June 6, 1787), *in* 1 CONVENTION RECORDS, *supra* note 17, at 140, 140. It seems safe to assume that the clauses that were kept in after argument were inserted in the first place for similar reasons as those given to protect them.

70 *See* Notes of Rufus King (Aug. 8, 1787), *in* 2 CONVENTION RECORDS, *supra* note 17, at 225, 225.

71 *Id.* (recording argument of Mason); *see also* Notes of James Madison (Aug. 8, 1787), *in* 2 CONVENTION RECORDS, *supra* note 17, at 215, 218 (recording argument of Mason).

72 *See* Notes of Rufus King, *supra* note 70, at 225.

The clause demanding seven years of residency in the United States also stemmed from a concern that "adventurers" would make laws.[73] This represented a concern about foreign power, which was often intermingled with the fears of corruption. Mason, who introduced the bill, said he supported "opening a wide door for emigrants; but did not chuse to let foreigners and adventurers make laws for us & govern us."[74] As the passage indicates, Mason was wary of people who would unscrupulously take advantage of democratic forms to pursue their own ends. The parallel nine-year residency requirement for Senators was also heavily debated—Mason again took charge and told stories of cabal and adventurers—but the delegates ultimately settled on nine years, instead of the three, fourteen, or thirteen years advocated by some delegates. Indeed, John Rutlidge advocated for a longer residency requirement for the Senate than the House, stating, "Surely a longer time is requisite for the Senate, which will have more power."[75] The delegates were looking at how legislators might use the public American channels for foreign or private ends.[76] Because of the Senate's special power in foreign affairs, it was especially important to protect against Senators who might be agents of another country.

2. *Conflicts and Temptations*

The greatest concern and the most heated argument developed around the problems of perks of office, which the Framers believed could overwhelm the offices by creating incentives for legislators to abuse their position to reap the benefits of incumbency. Some constitutional provisions directed at this concern were fairly simple and direct, involving the problem of direct access to money. Article I, Section 9, for example, requires an accounting of the treasury to ensure that money is not siphoned from the national treasure.[77] Placing the power of the purse in the legislature was also partially a response

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[73] An adventurer is "one who seeks unmerited wealth or position esp. by playing on the credulity or prejudice of others." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 18 (11th ed. 2004).

[74] *See* Notes of James Madison, *supra* note 71, at 216.

[75] Notes of James Madison (Aug. 9, 1787), *in* 2 CONVENTION RECORDS, *supra* note 17, at 230, 239 (recording statement of John Rutlidge).

[76] *See id.* at 238 ("The men who can shake off their attachments to their own Country can never love any other. . . . Admit a Frenchman into your Senate, and he will study to increase the commerce of France: An Englishman, he will feel an equal bias in favor of that of England.") (recording statement of Gov. Morris).

[77] *Cf.* United States v. Richardson, 418 U.S. 166, 166 n.1 (1974) (addressing the question "[w]hether a federal taxpayer has standing to challenge the provisions of the Central Intelligence Act which provide that appropriations to and expenditures by that Agency shall not be made public, on the ground that such secrecy contravenes Article I, section 9, clause 7 of the Constitution").

to fears of corruption.[78] The Framers were concerned that an executive with the power of appropriation would use it to cultivate dependencies, by giving out money to political leaders who were loyal.[79] Ultimately, three of the biggest protections created by the Framers were the Ineligibility Clause, the Emoluments Clause, and the Foreign Gifts Clause.

Some of the Convention's most heated arguments revolved around the scope of the Ineligibility Clause, which Mason called "the corner-stone" of the republic.[80] Article I, Section 6, Clause 2, prevents members of Congress from holding civil office while serving as a legislator, or from being appointed to offices that had been created—or in which the compensation was increased—during their tenure.[81]

The concern was that members of Congress would use their position to enrich themselves and their friends, and that they would see public office as a place for gaining civil posts and preferences, instead of as a public duty. Government work was stable, relatively easy, and therefore very attractive, compared to most possible sources of income at the time. The sensibly held fear was that elected officials would run for office to become civil servants so that whatever they had promised in election campaigns, their goal would be private comfort rather than public good. (In *Buckley v. Valeo*, the majority reads the Clause as proof of separation of powers,[82] but the discussion about the Clause at the Convention indicates that it was intended to limit corruption—inasmuch as the two are related, there is a connection, but the *Buckley* reading puts the emphasis in the wrong place.[83])

The Ineligibility and Emoluments Clauses reflect a deep anxiety about the possibility of civil service corrupting governmental processes

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78 *See, e.g.*, Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 25–44 (1998) (describing English history that formed the background for the Appropriations Clause); Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1352–53 (1988) (explaining that control over the amount of money the government can spend in effect controls the government's power); Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 COLUM. L. REV. 501, 509 (2002) ("The Appropriations Clause . . . background is the similar concern of seventeenth- and eighteenth-century British Parliaments that an executive with access to the treasury as well as to offices could corrupt legislators and free itself from popular oversight.").

79 *See* Vermeule, *supra* note 78, at 509.

80 Notes of Robert Yates, *supra* note 29, at 381.

81 *See* U.S. CONST. art. I, § 6, cl. 2.

82 424 U.S. 1, 124 (1976).

83 *See* Notes of Robert Yates, *supra* note 29, at 381 (recording remarks of Alexander Hamilton); *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 869 n.11 (1995) (Thomas, J., dissenting) ("The Ineligibility Clause was intended to guard against corruption."); Freytag v. IRS, 501 U.S. 868, 904 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("The Framers' experience with postrevolutionary self-government had taught them that combining the power to create offices with the power to appoint officers was a recipe for legislative corruption.").

by enabling members of Congress to create and fund their own positions as civil servants.[84] Mason argued:

> It seems as if it was taken for granted, that all offices will be filled by the executive, while I think many will remain in the gift of the legislature. In either case, it is necessary to shut the door against corruption. If otherwise, they may make or multiply offices, in order to fill them. Are gentlemen in earnest when they suppose that this exclusion will prevent the first characters from coming forward? Are we not struck at seeing the luxury and venality which has already crept in among us? . . . We must in the present system remove the temptation. I admire many parts of the British constitution and government, but I detest their corruption. [ ]Why has the power of the crown so remarkably increased the last century? A stranger, by reading their laws, would suppose it considerably diminished; and yet, by the sole power of appointing the increased officers of government, corruption pervades every town and village in the kingdom. If such a restriction should abridge the right of election, it is still necessary, as it will prevent the people from ruining themselves; and will not the same causes here produce the same effects? I consider this clause as the corner-stone on which our liberties depend—and if we strike it out we are erecting a fabric for our destruction.[85]

Moreover, representatives would be seduced to ignore their duties by the promises of future offices.[86] "A man takes a seat in parliament to get an office for himself or friends, or both; and this is the great source from which flows its great venality and corruption," Butler said, in the middle of a wrangling debate about limiting the capacity for lawmakers for officeholding.[87] Some delegates proposed a one-year revolving door, or an absolute ban on office holding for all Senators and Congressmen.[88]

The final form prevents someone from holding civil office while serving as a legislator, or from being appointed to offices that had been created—or in which the compensation was increased—during their tenure. James McHenry summarized the debate as one of "division in sentiment," but finding compromise around the principle "to

84 *See* Notes of James Madison, *supra* note 23, at 284 (recording Pinckney's proposal to strike this whole thing as degrading, and Mason ironically agreeing, saying it will help create an "exotic corruption" of the American public).

85 Notes of Robert Yates, *supra* note 29, at 380–81 (quoting a statement of Mason).

86 This fear finds its modern counterpart in representatives who ignore their duties with promises of future jobs in the lobbying industry. *See* Zephyr Teachout, *What Would Madison Do?: Lobbying, Revolving Doors, and the Founding Fathers*, DEMOCRACY: J. IDEAS (forthcoming Winter 2009).

87 Notes of Robert Yates, *supra* note 29, at 379 (quoting Butler).

88 *See id.* at 382 ("[W]hen a member takes his seat, he should vacate every other office.") (quoting Hamilton).

avoid as much as possible every motive for corruption."[89] The Ineligibility and Emoluments Clauses read:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the emoluments whereof shall have been encreased during such time: and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.[90]

The Foreign Gifts Clause perpetuated less debate, but what is striking is that it reflects some of the strongest language of the Constitution, almost petulant in its prohibition. It restricts members of the government from receiving titles or gifts from other countries; it was plainly written "to prevent corruption."[91] During the years between the revolution and the Convention, two small events involving foreign gifts had aroused substantial concern in the young country. First, the king of France gave Arthur Lee a tiny snuffbox.[92] Second, Benjamin Franklin received a diamond-encrusted painting from the French king.[93] After some public uproar, the federation decided that Franklin could keep the painting (and Lee could keep the snuffbox), but there needed to be a structural limitation on the seductions available to foreign powers over American officials.[94]

The context, related to fears about internal corruption, was that the delegates were deeply concerned that foreign interests would try to use their wealth to tempt public servants and sway the foreign policy decisions of the new government—as discussed above in the residency limitations, where the concern was about foreign agents running for office on behalf of another government. At the time, this was largely not a jingoistic fear—the United States was too young, in part, but the countries that threatened were countries that many of the Framers had strong and direct ties to, even affection for—France, most prominently. The fear was not that Frenchmen were heathens, but that they were strong, had no real interest in the good future of America, and, therefore, their loyalties, simply put, were elsewhere. Elites—especially those in appointed office or in the Senate—might

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89 James McHenry, Speech Before the Maryland House of Delegates (Nov. 29, 1787), *in* 3 CONVENTION RECORDS, *supra* note 17, at 144, 148.

90 U.S. CONST. art. I, § 6, cl. 2.

91 DAVID ROBERTSON, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 330 (2d ed. 1805) (1788) (recording the statement of Randolph).

92 *See* Letter from William Lee to Arthur Lee (Jan. 29, 1780), *in* 3 LETTERS OF WILLIAM LEE 774, 774 (Worthington Chauncey Ford ed., 1968).

93 STACY SCHIFF, A GREAT IMPROVISATION: FRANKLIN, FRANCE, AND THE BIRTH OF AMERICA 391 (2005).

94 *See* NOONAN, *supra* note 57, at 431. Noonan mistakenly identifies the box as Franklin's instead of as Lee's. While this is a small mistake, it has been widely repeated because it is in Noonan's book.

be seduced by baubles and titles to put favor toward other countries before patriotism.

Governeur Morris "drew the melancholy picture of foreign intrusions as exhibited in the History of Germany, and urged it as a standing lesson to other nations."[95] Citizenship requirements for office-holders were debated in these terms. Gerry argued that only natives should be allowed to run for office, because

> [f]oreign powers will intermeddle in our affairs, and spare no expence to influence them. . . . Every one knows the vast sums laid out in Europe for secret services. He was not singular in these ideas. A great many of the most influencial men in Massts. reasoned in the same manner.[96]

The snuffbox and the painting represented an embodiment of these fears. Randolph explained in the debates of the Virginia convention:

> A box was presented to our ambassador by the king of our allies. It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states. I believe, that if at that moment, when we were in harmony with the king of France, we had supposed that he was corrupting our ambassador, it might have disturbed that confidence, and diminished that mutual friendship, which contributed to carry us through the war.[97]

The final formulation of the Clause includes the striking line "of any kind whatever"—more demanding than almost any other clause in its formulation:

> And no person holding any Office of Project or Trust under them, shall, without the Consent of Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign state.[98]

If foreigners were to attempt to buy influence or access, or use small gifts to shift the sympathies of American agents, they needed the full consent of Congress.

3. *Elections*

Regular legislative elections were intended as one of the most important checks on corruption. Drawing on the experience of England, where "the electors are so corrupted by the representatives, and the representatives so corrupted by the Crown," the Framers

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95 Notes of James Madison (July 5, 1787), *in* 1 Convention Records, *supra* note 17, at 526, 530 (quoting Morris).

96 Notes of James Madison, *supra* note 62, at 268.

97 *See* ROBERTSON, *supra* note 91, at 331–32.

98 U.S. CONST. art. I, § 9, cl. 8.

wanted to avoid financial dependency of one branch upon another.[99] The problem, according to Madison in *The Federalist No. 41*, was that the House of Commons was elected for seven years, and only a small number of people participated in the election.[100] These longer terms strengthened the bonds with the Executive and weakened them with the people. He argued that the proposed Constitution—where the appropriations power would be entrusted to directly elected representatives for two-year periods—would not yield to the same kind of corruption.[101]

How long should a Senator serve in order to resist the gravitational force of dependency and corruption? A short term would ensure accountability and make it difficult to run too far on the public purse. But, as Williamson argued, a long term would make it more likely that men of good character would undertake the commitment to service, whereas a short term would attract only weaker men, whose characters were capable of corruption.[102]

In *The Federalist No. 66*, Hamilton, who expressed the most reluctance to an elective system (preferring the monarchic model), expressed the compromise between direct elections and monarchy that is found in representative government. The Senators would bring with them a virtuous attitude toward government, something deemed less likely in the democratic rabble. However, if power and wealth corrupts them, the elections would ensure that the corrupted Senators would not be reelected.[103] In this way, the representative government checks corruption—through virtue and elections.

Hamilton believed that corruption would still follow—leading Senators would become corrupt and then, in turn, through "arts and influence" convince the majority to follow them in policies that are "odious to the community."[104] However, Hamilton wrote that "if the proofs of that corruption should be satisfactory," the public will grow to resent these Senators and, as a result, the public would fail to re-

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99 THE FEDERALIST NO. 41 (James Madison), *supra* note 14, at 259–60.

100 *Id.*

101 *Id.* at 260. Election seems like a much better limitation of corruption than, say, hereditary government. The republican tradition, however, sets itself up not only in opposition to monarchy, but also to direct voting. The Romans—with whom they were intimately familiar—and the Greeks each had systems of direct voting and made elaborate efforts to stem corruption. In the Greek democracy, electors were decided by lot on the day of their right to vote in order to limit the possibility that they would have enough time in which to be corrupted. *See* ROBIN WATERFIELD, ATHENS: A HISTORY 51 (2004).

102 Notes of James Madison (July 19, 1787), *in* 2 CONVENTION RECORDS, *supra* note 17, at 50, 59 ("Mr. Williamson was for 6 years. The expence will be considerable & ought not to be unnecessarily repeated. If the Elections are too frequent, the best men will not undertake the service and those of an inferior character will be liable to be corrupted.").

103 THE FEDERALIST NO. 66 (Alexander Hamilton), *supra* note 14, at 406–07.

104 *Id.*

elect these Senators at the next election.[105] Elections had some defensive power but were not absolute protections against the corrupting power of money and wealth. Tracking the experience of Rome, even a robust republic—with elections and a split representative body—could be corrupted.

C. Anti-Corruption Clauses in Article II

Anti-corruption concerns were at the center of the debates about the Executive Branch as well. One of the most frequent arguments given for having an executive was that he would be more insulated from corruption: "The advantage of a monarch is this—he is above corruption—he must always intend, in respect to foreign nations, the true interest and glory of the people," Hamilton argued.[106] Morris believed that the Executive was needed to check the legislative tendency to self-corruption—the Presidency would check "the Great & the wealthy who in course of things will necessarily compose [ ]the Legislative body."[107] Thus, the Framers believed that the Executive—by tying his core identity to the nation's success—would not be as corruptible as Senators and Congressmen.

However, this naïve view was neither universally nor uncritically accepted: Article II contains several provisions to limit executive corruption. The biggest concern seemed to be the possible collusion of the President with a small set of elites—Senators—who would create a self-enriching, self-entrenching club that would rule the country for their own benefit.[108] For example, it was initially proposed that the President could veto legislation, and that a veto could be overridden by a three-fourths vote. However, some thought that the three-fourths requirement would lend itself to corruption: "If 3/4 be required, a few Senators having hopes from the nomination of the President to offices, will combine with him and impede proper laws."[109] Thus, some Framers believed that a few elite Senators, seduced by the promises of presidential appointments, could unhinge the process or that the President might be able to corrupt one quarter of the Senators with temptations of government offices, whereas it would be much harder

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105 *Id.* Even though Hamilton is arguing for the election, he has a hint of reservation—he does not predict that the proofs will be satisfactory, rather introducing a small note of doubt. Even while defending representative government, Hamilton has a dark view of it and defends it by arguing that the natural non-responsibility-taking tendencies of Congress will lead it to, at least, continuously sacrifice its corruptors.

106 Notes of Alexander Hamilton (June 18, 1787), *in* 1 CONVENTION RECORDS, *supra* note 17, at 304, 310.

107 Notes of James Madison, *supra* note 102, at 52 .

108 *See* Notes of James Madison (Sept. 12, 1787), *in* 2 CONVENTION RECORDS, *supra* note 17, at 585, 586.

109 *Id.* (quoting Gerry).

to do the same with one-third.[110] Nevertheless, the Framers were also afraid of dependency running the other way. The Presidential Emoluments Clause forbids the President from being paid by the United States (or any individual state) beyond his general compensation,[111] to prevent the President from becoming overly dependent upon Congress (and thereby corrupted by them) or a particular state.

Nonetheless, the Framers believed that the President could limit the self-corrupting tendencies of the legislature. One explicit concern mentioned by Morris was that members of Congress would order the printing of paper money to the detriment of the public. Thus, in an effort to check against legislative corruption, the Framers gave the Executive the capacity to veto the decisions of Congress.[112]

The Framers wanted to limit Executive corruption of the Judiciary as well. Article II, Section 1, requires that the Senate approve judicial appointments. This was added after Madison questioned the initial draft, which had no requirement for approval. He suggested that at least one-third of Senators approve judicial appointments to forestall "any incautious or corrupt nomination by the Executive."[113]

Many of the Framers saw the power of appointments as a source of corruption. The power "was thrown into different shapes" before the Framers adopted it as it is in the Constitution.[114] The Framers settled on a shape designed to prevent abuse of the power:

> The power of appointing to office was brought down by placing a part of it in the Legislature. It was further restrained by prohibiting any member of the Legislature from enjoying, during the period for which he was elected, any office which should have been created, or

110 There are some sections that occasioned less debate on the convention floor than might be expected but led to objections afterward. Article I, Section 6, which allows for Senators and Representatives to fix their own salaries, was heavily debated in the Virginia legislature because people were concerned that they would simply fix higher and higher salaries for themselves. *See* Patrick Henry, Remarks During the Virginia Debate on the Adoption of the Federal Constitution (June 14, 1788), *in* 3 STATE RATIFICATION DEBATES, *supra* note 34, at 368, 368.

111 Despite these hopes, the prohibition in the Congressional Emoluments Clause has not been given serious weight. *See* NOONAN, *supra* note 57, at 433 (referring to the prohibition on emoluments as "[a] distinctly modest barrier to corruption of Congress" that was "eventually flouted with impunity by Senator Hugo Black and President Franklin Roosevelt, who appointed Black to the Supreme Court after the Justices' emoluments had been increased while Black was a legislator"); Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907, 908 (1994) (suggesting that the Congressional Emoluments Clause is now seen as merely a nuisance).

112 Notes of James Madison *supra* note 102, at 52 ("The check provided in the 2d. branch was not meant as a check on Legislative usurpations of power, but on the abuse of lawful powers, on the propensity in the 1st. branch to legislate too much to run into projects of paper money and similar expedients.") (quoting Morris).

113 Notes of James Madison (July 18, 1787), *in* 2 CONVENTION RECORDS, *supra* note 17, at 40, 43.

114 ANNALS OF CONG. 905 (statement of Rep. Findley, Jan. 23, 1798).

> the emoluments of which should have been increased, during that time. Thus, holding up to view the avenues by which corruption was most likely to enter.[115]

Even Hamilton, the strong advocate for the presidency, was concerned that the power of appointments held by the President could corrupt both the Congress and the President. He rejected a model that would have given the Senate a role in selecting the Presidency because it would lead to the President using his power of appointments to curry favor with Senators.[116] The placement of the appointments power also led to lively debate and concern during ratification debates.[117]

Foreign corruption of the Executive was a concern as well, as we saw in the Foreign Gifts Clause.[118] The Framers gave the Executive the treaty-making power after much disturbed debate. The delegates were concerned that the short executive tenure could lead Presidents to be seduced by promises of future opulence by foreign powers, and give over their country for their own advantage. The discussion was recounted by Rufus King in the South Carolina legislature:

> Kings are less liable to foreign bribery and corruption than any other set of men, because no bribe that could be given them could compensate the loss they must necessarily sustain for injuring their dominions. . . . But the situation of a President would be very different from that of a king: he might withdraw himself from the United States, so that the states could receive no advantage from his responsibility; his office not to be permanent, but temporary; and he might receive a bribe which would enable him to live in greater splendor in another country than his own; and when out of office, he was no more interested in the prosperity of his country than any other patriotic citizen . . . . The different propositions made on this subject, the general observed, occasioned much debate.[119]

To cabin these corrupting tendencies, the Senate was brought into the realm of foreign affairs. In one proposal, peace treaties could be approved by half of the Senate.[120] Gerry, however, "enlarged on the danger of putting the essential rights of the Union in the hands of so small a number as a majority of the Senate, representing, perhaps,

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115 *Id.*

116 Notes of Madison (Sept. 6, 1787), *in* 2 CONVENTION RECORDS, *supra* note 17, at 521, 524–25.

117 *See* THE FEDERALIST NO. 76 (Alexander Hamilton) (defending the appointment power of the President against accusations that he could corrupt the Senate).

118 *See supra* Part II.B.2.

119 Charles Pinckney, Remarks During the South Carolina Debate on the Adoption of the Federal Constitution (Jan. 16, 1788), *in* 4 STATE RATIFICATION DEBATES, *supra* note 34, at 264–65.

120 Notes of James Madison (Sept. 8, 1787), *in* 2 CONVENTION RECORDS, *supra* note 17, at 547, 547–48.

not one fifth of the people. The Senate will be corrupted by foreign influence."[121] The delegates, in turn, enlarged the requirements, demanding two-thirds of Senators to agree to a treaty.[122]

The provision for impeachment is clearly the strongest anti-corruption element of Section 1. If a President could not be removed from office until the next election, a President's "loss of capacity or corruption . . . might be fatal to the Republic."[123] In fact, the initial terms under which a President could be impeached were "Treason[,] bribery[,] or Corruption."[124] (There is no explanation for why the term "corruption" was taken out, suggesting that a committee on style or form removed it, but I have not been able to uncover the real reason; I have also found no indication that corruption was considered too trivial a reason for impeachment, or that the excision was intended to limit the scope of impeachment.)

We do know that the proposed conditions—"treason or bribery"—were not sufficient for the delegates. Mason contended—and Gerry seconded—that treason and bribery should be expanded to have more bite, because bribery alone would not cover the kind of abuse of office, maladministration, and siphoning of funds that could occur.[125] The words "high crimes and misdemeanors" were added to cover these concerns.[126]

Having outlined the conditions for impeachment, the delegates did not want the impeachment process itself to be corrupted. The Supreme Court seemed a possible place to put the power of impeachment, but the "Supreme Court were too few in number and might be warped or corrupted."[127] The delegates ultimately split the power between the House and Senate—giving one the power to bring, and the other the power to try impeachments—making it difficult for a small number to be corrupted by the promises of appointment.[128]

Finally, the delegates were concerned that certain methods of selecting the President could lead to collusion and corruption, and went to great lengths to create an election process that would withstand

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121 *Id.* at 548.

122 *Id.* at 549.

123 Notes of James Madison, *supra* note 63, at 66 (noting that it is "within the compass of probable events" that an executive would be corrupted, hence the importance of impeachments); *see also* Notes of James Madison (July 24, 1787), *in* 2 CONVENTION RECORDS, *supra* note 17, at 99, 103 (recording Morris's contention that presidential terms of "any duration" require the availability of impeachment).

124 3 CONVENTION RECORDS, *supra* note 17, at 595, 600 (laying out the Pinckney Plan, which provided for impeachment for "Treason, bribery, or Corruption").

125 Notes of James Madison, *supra* note 120, at 550.

126 *Id.*

127 *Id.* at 551.

128 *See id.* at 551–52 (recounting the debate over the rule of the legislature in the impeachment process.).

small-group corruption. First, Hamilton successfully repulsed the proposal that the President only last a limited number of years. A man's ineligibility for reelection, he argued, would lead to plunder.[129] Second, there was extensive debate about who—and how many—should decide the Presidency. Madison worried that the election of the President by a small number would too easily facilitate corruption.[130] To guard against corruption, the presidential elections had several key features. One such feature was that legislators themselves could not be electors. Also, all the elections would be done at the exact same time, making it difficult, because of the long roads across the large country, to confidently collude and identify the electors that needed corrupting. Governeur Morris and Wilson both discussed the importance of physical distance as a protection against corruption. Morris suggested that "[i]t would be impossible also to corrupt them," because "the Electors would vote at the same time throughout the U. S. and at so great a distance from each other."[131] Third, the electors from each state had to vote for two people, at least one of whom was from a different state than the electors.[132] Fourth, the sealed vote would be opened in the presence of the Senate and House and would be counted in the presence of the full Congress to make ballot stuffing more difficult.[133] Members of the Convention hoped that "by apportioning, limiting, and confining the Electors within their respective States, and by the guarded manner of giving and transmitting the ballots of the Electors to the Seat of Government, that intrigue, combination, and corruption would be effectually shut out" from presidential elections.[134]

D. Anti-Corruption Provisions in Article III

The delegates gave less attention to Article III during the Constitutional Convention, but judicial corruption was certainly a prominent topic. Many of the Article III discussions concerned ways to ensure the independence of the judiciary. The judiciary, it was ar-

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129 *See* Notes of James Madison, *supra* note 116, at 524 (noting that the president would be "continually tempted by this constitutional disqualification" to abuse the presidential powers "to subvert the Government").

130 *See* Notes of James Madison (Sept. 7, 1787), *in* 2 CONVENTION RECORDS, *supra* note 17, at 535, 536. Madison argued that it is "an evil that so small a number at any rate should be authorized, to elect. Corruption would be greatly facilitated by it." *Id.*

131 Notes of James Madison (Sept. 4, 1787), *in* 2 CONVENTION RECORDS, *supra* note 17, at 496, 500 (quoting Morris).

132 *See* Notes of James Madison, *supra* note 116, at 528.

133 *See id.*

134 Rufus King, Speech in the Senate of the United States (Mar. 18, 1824), *in* 3 CONVENTION RECORDS, *supra* note 17, at 461.

gued, needed to be independent of both "the gust of faction" and corruption.[135]

Thus, in determining the method of selecting judges, the Framers were concerned with dependency and corruption.[136] A number of representatives, like Wilson, argued against a legislative selection process, noting that "[i]ntrige, partiality, and concealment were the necessary consequences."[137] The determination that judges were to hold their office during good behavior meant the absence of corruption.[138] Similarly, the jury protection came in part from the anti-corruption urge. For example, Gerry "urged the necessity of Juries to guard agst. corrupt Judges."[139] Unlike judges, who could be regularly and predictably bought, juries were larger (and therefore harder to corrupt, in the current thinking) and did not depend upon their role for their livelihood, creating far fewer temptations. Likewise, inferior courts were established in part due to anti-corruption concerns. Madison, arguing that it was critical to be able to establish inferior courts along with the Supreme Court, used the example of a corrupt local judge to plead his case. A retrial with the same judge would do no good, he argued, and an appeal to the Federal Supreme Court would clog the system.[140]

E. Structural Provisions: Division of Power and Size

Some of the strongest anti-corruption provisions in the Constitution are not textual provisions at all but structural commitments. Power was divided within the government—and within the legislature—to limit the influence of any particular class, to limit mob rule,

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[135] Notes of James Madison (Aug. 27, 1787), *in* 2 CONVENTION RECORDS, *supra* note 17, at 426, 429 (quoting Wilson).

[136] *See, e.g.*, Notes of James Madison (June 5, 1787), *in* 1 CONVENTION RECORDS, *supra* note 17, at 119, 120 ("Mr. Madison disliked the election of the Judges by the Legislature or any numerous body. . . . It was known too that the accidental circumstances of presence and absence, of being a member or not a member, had a very undue influence on the appointment.").

[137] *Id.* at 119 ("Mr. Wilson opposed the appointmt [of Judges by the] national Legisl: Experience shewed the impropriety of such appointmts. by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences." (alteration in original)).

[138] NOONAN, *supra* note 57, at 429. Noonan notes that, at the Convention, little attention was paid to Article III corruption because "corrupt judges had not been on the revolutionists mind; corruption by the executive had." *Id.*

[139] Notes of James Madison, *supra* note 108, at 587.

[140] Notes of James Madison, *supra* note 136, at 124 ("What was to be done after improper Verdicts in State tribunals obtained under the biased [sic] directions of a dependent Judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the supreme bar would oblige the parties to bring up their witnesses, tho' ever so distant from the seat of the Court. An effective Judiciary establishment, commensurate to the legislative authority, was essential. A Government without a proper Executive & Judiciary would be the mere trunk of a body, without arms or legs to act or move.").

to limit the likelihood of the creation of a monarchy, to limit tyranny, but also to limit corruption. As has been extensively documented elsewhere, the separation of the interests of the Executive and Legislative Branches—and the separation of power through the veto—were intended as checks on corruption.

In order to protect the legislature from self-corruption, it had to be divided. Alternatively, if all of the legislative authority resided in one place, virtue, Wilson argued, would be the only check—and an inadequate one—on the Legislature.[141] The Senate and the House of Representatives were supposed to be proxies in a permanent class struggle that would sustain the country by each class limiting the other. Wilson contended that "dividing [the legislative authority] within itself"—between House and Senate—would keep elite Senators from banding together, as an aristocratic class of their own, and using their power to collectively enrich themselves.[142]

Similarly, justifying the overall design of the proposed Constitution, Madison argued in *The Federalist No. 55* that the likelihood of corruption was low because of the degree to which power was spread across and within bodies. Responding to a fear of corruption, he stated that:

> The improbability of such a mercenary and perfidious combination of the several members of government, standing on as different foundations as republican principles will well admit, and at the same time accountable to the society over which they are placed, ought alone to quiet this apprehension.[143]

In *The Federalist No. 62*, Madison continued asserting that the differences between the Senate and the House are the most important checks against corruption:

> It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents and prove unfaithful to their important trust.[144]

However, Madison goes on to say that "by requiring the concurrence of two distinct bodies," the Senate would provide a check on rabble rule, and the House a check on elite corruption.[145] Indeed, although both bodies, according to Madison, were likely to engage in "schemes

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141 Notes of Madison, *supra* note 60, at 254 ("Theory & practice both proclaim it. If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single House there is no check, but the inadequate one, of the virtue & good sense of those who compose it.") (quoting Wilson).

142 *Id.* at 254 (quoting Wilson).

143 THE FEDERALIST NO. 55 (James Madison), *supra* note 14, at 345.

144 THE FEDERALIST NO. 62 (James Madison), *supra* note 14, at 378.

145 *Id.*

of usurpation or perfidy"—without a check, each on the other, a single body could come under the sway of "ambition or corruption" and government would betray the people.[146] Madison contended that "the improbability of sinister combinations will be in proportion to the dissimilarity in the genius of the two bodies,"[147] thus arguing that the difference between the two bodies would make corruption across both highly unlikely.

Moreover, within these two different bodies, there were different forms of protection against corruption. While Morris, among others, expressed a fear that the Senators would find interests shared among themselves that were not interests of the people, it was nonetheless asserted that the dignity of the elites might make those in the Senate resistant to corruption.[148] For the House of Representatives, resistance to corruption was thought to derive from size, and there was a supposition that it would be logically impossible for various representatives to all have similar interests that could be similarly exploited.[149]

Finally, the hope was that the basic architecture of the country—its size—would diminish corruption. Distance and inconvenience were seen as good defenses against the possibility of corruption. Hamilton argued in *The Federalist No. 68* that:

> The business of corruption, when it is to embrace so considerable a number of men, requires time as well as means. Nor would it be found easy suddenly to embark them, dispersed as they would be over thirteen States, in any combinations founded upon motives which, though they could not properly be denominated corrupt, might yet be of a nature to mislead them from their duty.[150]

The chief corrupting forces were foreign governments, money, and power—all of them, it was argued, would have significant coordination problems to overcome if power were distributed between branches, and, within the Legislative Branch, between classes. But the roads were too bad, the distances too great, and the numbers too formidable to allow for the concerted redirection of the minds of men to private gain, and the interests of the state to private or foreign interests. While traditional republican theorists had always argued that only small countries could be republics, Madison and the delegates

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146 *Id.*
147 *Id.*
148 *See, e.g.*, Notes of James Madison (June 26, 1787), *in* 1 CONVENTION RECORDS, *supra* note 17, at 421, 422; Notes of James Madison, *supra* note 113, at 43 (recording statement of Sherman).
149 *See supra* Part I.B.1.
150 THE FEDERALIST NO. 68 (Alexander Hamilton), *supra* note 14, at 413.

argued that larger countries, among other attractions,[151] provided better protections against corruption.

F. Anti-Corruption Principle Foundations Conclusions

Madison's byzantine argument in *The Federalist No. 63* sums up the efforts of the delegates to create a constitution with power so dispersed that it would be resistant to corruption. The Senate, he argued, "must in the first place corrupt itself; must next corrupt the State legislatures, must then corrupt the House of Representatives, and must finally corrupt the people at large."[152] Therefore, Madison writes, "It is evident that the Senate must be first corrupted . . . . Without corrupting the State legislatures it cannot prosecute the attempt because the periodical change of members would otherwise regenerate the whole body."[153] Moreover, the Senate would inevitably defeat corruption in the House of Representatives, "and without corrupting the people themselves, a succession of new representatives would speedily restore all things to their pristine order."[154] There are too many obstructions and sequential steps of intrigue to be taken in order to corrupt the federal body—or so the delegates hoped.

Given the overwhelming attention and interest paid to the problem of corruption at the Constitutional Convention, you might expect that corruption would have a prominent place in the American constitutional tradition and that the issues raised by the Framers would continue to be some of the central issues raised in constitutional argument. One might have predicted that the Supreme Court would constantly busy itself with arguments concerning definitions of corruption and would not expect, for instance, that privacy—an idea hardly mentioned at the time—would occupy a much greater role in the Supreme Court canon than the concept of corruption. One might expect that when Congress passed several laws attempting to limit corruption, the Framers' ideas would have been revived and closely considered in determining the constitutionality of those laws. However, none of these predictions would have proven true. In the last thirty years, not a single majority opinion has mentioned or discussed the delegates attitudes toward corruption or the anti-corruption principle embedded by the Framers in the Constitution.

In my forthcoming book,[155] I delve into the history and give explanation of how I think the Anti-Corruption Principle fell away from

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151 Most famously, Madison argued that a large, confederate republic was less likely to lead to faction and instability than a small one. *See* THE FEDERALIST NO. 10 (James Madison), *supra* note 14, at 83.

152 THE FEDERALIST NO. 63 (James Madison), *supra* note 14, at 388.

153 *Id.*

154 *Id.*

155 TEACHOUT, *supra* note 1.

(or never fully entered) the canon; for the purposes of this Article, however, the important fact is not that the principle was lost, but that it ought to be revived. I make this argument in Part V, after first introducing the way the founders understood the concept, and looking at the strange constitutional role that corruption has been given by the modern Court.

II
Definitions: Features of Corruption

Perhaps you are now persuaded that the Framers were centrally focused on corruption, but you might still wonder about the object of this obsession. What does corruption mean, after all, and does the mere repeated invocation of a vague concept justify embodying it in modern constitutional reasoning? In this Part, I try to flesh out the signified meaning and show that while corruption may be difficult to define, it is, much like "privacy" or "obscenity," not a word without a powerful meaning.[156]

The term corruption—then as now—has two meanings, each related to the other. It has a broad meaning, describing all kinds of moral decay, and a more specific meaning in the context of politics.[157] This Article is about the more specific, political meaning, the corruption that the renowned historian Gordon Wood called a "technical term of political science" for the Framers.[158] Such an understanding of corruption indicates a specific sphere of activities and habits in the political context.[159]

While 1787 delegates disagreed on when corruption might occur, they brought a general shared understanding of what political corruption meant.[160] To the delegates, political corruption referred to self-

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156 My ultimate argument depends on corruption having tractable meaning, but not a criminal-law-like definition. Like privacy, or separation of powers, I argue that corruption has constitutional weight—and like those concepts, the meaning is contextual and changes over time.

157 Clearly, these two were related. As Peter Euben writes, the word corruption implies an ideal of integrity—or in the case of society, the ideal of a good society. Corruption connotes moral decay, infection, and ultimately a loss of integrity and identity. "A people degenerates when it sinks to a lower standard of behavior than the generations which preceded it. This decline signals an enfeeblement of the culture's animating principles and a departure from the highest ideals of its collective life." Euben, *supra* note 53, at 222. The general enervating corruption was the metaphor upon which political corruption was built.

158 Wood, *supra* note 25, at 32.

159 Colonel Mason complained: "It is curious to remark the different language held at different times. At one moment we are told that the Legislature is entitled to thorough confidence, and to indefinite power. At another, that it will be governed by intrigue & corruption, and cannot be trusted at all." Notes of James Madison (July 17, 1787), *supra* note 39, at 31.

160 This is not an Article about all the possible visions or understandings of corruption. For readers interested in exploring that further, Laura Underkuffler has written a wonder-

serving use of public power for private ends, including, without limitation, bribery, public decisions to serve private wealth made because of dependent relationships, public decisions to serve executive power made because of dependent relationships, and use by public officials of their positions of power to become wealthy.

Two features of the definitional framework of corruption at the time deserve special attention, because they are not frequently articulated by all modern academics or judges.[161] The first feature is that corruption was defined in terms of an attitude toward public service, not in relation to a set of criminal laws. The second feature is that citizenship was understood to be a public office. The delegates believed that non-elected citizens wielding or attempting to influence public power can be corrupt and that elite corruption is a serious threat to a polity. I discuss each feature in turn.

A. Corruption Is Defined by Context and Intent, Not Just by Action

The Framers believed that an individual is corrupt if he uses his public office primarily to serve his own ends. This understanding of corruption focuses the discussion on the intent and context of the potentially corrupt actor (or actors).

In their writing and recorded notes of the Convention, it is impossible to separate corruption from a sense of moral obligation and failure. If corruption—writ large—is the rotting of positive ideals of civic virtue and public integrity, political corruption is a particular kind of conscious or reckless abuse of the position of trust. While political virtue is pursuing the public good in public life, political corruption is using public life for private gain. The purpose—the moral attitude—is essential to the definition. A corrupt political actor will either purposely ignore, or forget, the public good as he uses the reigns of power. Like a bad son who does not love his parents, and therefore does not allow good deeds to flow from that love, he does not love his country. A corrupt political actor will not only consider the good in public life for himself, he will make it his goal and daily habit to pursue it. The public good does not motivate him.

In the ideal republic, the Framers believed, civic virtue exists when there is an orientation toward the public interest. This is the

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ful paper categorizing (and gently eviscerating) modern efforts to craft a definition of corruption scrubbed of its moral roots. Laura S. Underkuffler, *Captured by Evil: The Idea of Corruption in Law* (Duke Law Sch. Legal Studies Research Series, Research Paper No. 83, 2005), *available at* http://ssrn.com/abstract=820249.

161 I would argue they are obvious to the modern public, which continues to use corruption in a moral sense, and happily applies it to elites, like lobbyists, who are not themselves elected officials.

"spring" of "virtue" that Montesquieu describes as necessary for a popular state in his *Spirit of Laws*.[162] A person has civic virtue if he, through his actions, puts public good before narrow personal interests in his public actions. Virtue is not a private matter, a matter for the soul to settle with itself, but a public responsibility to a coherent, shared practice of government. Government can provide structural and cultural protections for the virtue of its citizens and its political leaders, but those protections derive from the initial commitment to virtue of the citizens. Officials are corruptible, but also capable of great civic virtue—and every effort, including every structural effort, must be made to enable that virtue to flourish.

A corrupt official is tempted by narcissism, ambition, or luxury, to place private gain before public good in their public actions. This does not mean that people cannot care for themselves or their families in the private context—in fact, that would be expected, and the sphere of action is a key limiting feature, allowing for real humans to aspire to non-corruption—but that in the execution of public duties, the public good ought first be sought.[163] Politics is not a dirty necessity; it is a moral activity that can be corrupted, and the collective corruption of the minds of political actors leads to the failure of the state.

We can see some evidence of this intent-based or moral understanding of corruption in the kinds of activities that were covered in the use of the term. "The term 'corruption' generally was understood at the time to mean not merely theft (that was covered by the word 'peculation'), but the use of government power and assets to benefit localities or other special interests (in essence, 'factions')."[164] The use of government benefits would not be corrupt, however, if the benefit was accidental. Corruption existed when a narrow benefit was sought and received—the mental attitude and approach toward government was intrinsic to the description.

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162 MONTESQUIEU, *supra* note 44, at 21–23.

163 While this may sound like a tricky distinction, we make similar distinctions all the time when we judge how people care for their family members. Consider two men, each caring for mothers with Alzheimer's disease. On the surface, we notice that both visit regularly, both bring stories and attention, and both express love to their mothers. But one man, if we were to honestly interrogate him, would say, "I do it for what I will get in her will. And I don't want people to accuse me. I love her, but the reason I do it is for myself." The other would say, "I love my mother, and I want her to have some joy in her life. Of course I also do it because it makes me feel good, but I genuinely care for her." These are real differences in attitude that we recognize, discuss, and feel like we can differentiate between. We also would expect that, over time, the man who is instrumental in his care will not care as well. The Framers had a similarly concrete idea about corruption and what was necessary to be a public officer.

164 Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 48 (2003).

Moreover, the activities included could be legal or illegal, so corruption is clearly not attached to a set of violations of criminal law.[165] Morris explicitly said that the corruption concern encompassed lawful abuses of power, not merely unlawful abuses or "usurpations."[166] Morris argued, as an example of predictable legal corruption, that legislatures might want to print money in ways that enriched them personally, using legitimately granted public power for private gain.[167]

It is more than just self-serving behavior; it is self-serving behavior that *must be condemned*. Laura Underkuffler persuasively argues that corruption is never "simply the breach of some politically chosen standard; it expresses the transgression of some deeply held and assertedly universal moral norm."[168] For the Framers, this was clearly true. Madison, in *The Federalist No. 55*, wrote about corruption as "subduing the virtue" of Senators.[169] Governeur Morris spoke about how "[w]ealth tends to corrupt the mind & to nourish its love of power, and to stimulate it to oppression."[170] Morris was clearly not talking about bribery, but rather a transformation in "the mind," a fundamental corrosion of the interior life that would then lead to a corrosion of practices (stimulating it to oppression). When Madison, in *The Federalist No. 10*, puzzles on the problem of bias in self-government and notes by analogy that "no man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and not improbably corrupt his integrity,"[171] he is also making a claim about the interior life of the mind—the moral attitude taken by an individual. He is claiming that exterior forces have the power to shape the moral orientation of a person, just as a powerful flow of water might shape the soil around it. Money has an alchemical effect, not just leveraging action but in so doing, changing the nature of the agent

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165 The popular understanding of corruption retains this feature. For example, campaign contributions are regularly called "legal bribery," showing that for most people, illegality and norms are not the way to understand corruption, and Congressmen and Congresswomen who do not violate the laws are routinely called corrupt. However, it bears pointing out because many scholars have attempted to attach corruption solely to laws and norms. *See* Underkuffler, *supra* note 160.

166 Notes of James Madison, *supra* note 102, at 52 ("The check provided in the 2d. branch was not meant as a check on Legislative usurpations of power, but on the abuse of lawful powers, on the propensity in the 1st. branch to legislate too much to run into projects of paper money & similar expedients.") (quoting Morris).

167 *See id.*

168 *Cf.* Underkuffler, *supra* note 160. Professor Underkuffler's description of the essential immorality of corruption would make much more sense to the Framers than most of her contemporaries. She argues that looking for the essence of corruption in the violation of law, breach of duty, betrayal of trust, poor economic outcomes, and the like, will always feel viscerally unsatisfactory if, in the end, the explicitly moral core of corruption is not recognized.

169 The Federalist No. 55 (James Madison), *supra* note 14, at 345.

170 Notes of James Madison, *supra* note 102, at 52.

171 The Federalist No. 10 (James Madison), *supra* note 14, at 79.

that it works upon. The language is both technical and moral. (One of the many interesting things about this meaning of corruption is that while it is not far from the modern, public use of the word, it is nonetheless very distant from its modern academic use.)

B. Citizenship Is a Public Office

In the worldview of the Framers—a view that persisted in constitutional case law for at least a hundred years[172]—citizenship is a public office; like the public office of Senator or President. Citizens can be corrupted and use their public offices for private gain, instead of public good. They are fundamentally responsible for the integrity of their government. All citizens—especially powerful citizens—are responsible for keeping public resources generally serving public ends.

Therefore, while the constitutional convention delegates were concerned about the corruption of elected officials, they were also concerned about corruption of society as a whole. Bernard Bailyn writes that the Framers "never abandoned the belief that only an informed, alert, intelligent, and uncorrupted electorate would preserve the freedoms of a republican state."[173] The electorate—not just the elected—must be dissuaded from corruption.

Consider Montesquieu's description of a corrupt society, a description that most of the Convention delegates were familiar with: "When that virtue ceases, ambition enters those hearts that can admit it, and avarice possesses them *all*."[174] Or, in this heart-rending passage:

> The misfortune of a republic is to be without intrigues, and this happens when the people have been corrupted by silver; they become cool, they grow fond of silver, and they are no longer fond of public affairs; without concern for the government or for what is proposed there, they quietly wait for their payments.[175]

The governed—the people—have become corrupt in this dystopic vision.[176] This flows naturally from the theoretical underpin-

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172 *See* Trist v. Child, 88 U.S. (21 Wall.) 441, 450 (1875) ("[T]here is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong.").

173 BAILYN, *supra* note 19, at 379.

174 MONTESQUIEU, *supra* note 44, at 23 (emphasis added).

175 *Id.* at 14.

176 The classic example of this is Athens, as described by Thucydides. With military strength and great political skill it managed to destroy itself in a matter of decades as the moral/public fiber of its citizens was weakened. They came to seek luxury and success instead of the good of the state, and in their greed they corrupted themselves, overreached, became sophists (corrupted their language) and lost their empire. *See* Euben, *supra* note 53, at 224–26.

nings of the Framers' project. Because the new government was founded on the authority of the people, not the authority of a ruler, people themselves must have integrity and be public-minded in order for the nation to thrive. Citizens must generally work for, and desire, the public good, at least in their political interactions. A virtuous citizen will not consider his own good as separate from the public good and would not strive to use government to pursue his own ends. A good citizen may be self-seeking in other areas, but in his public functions he will eschew the pursuit of wealth for the pursuit of liberty, a public, political liberty, a statewide freedom from oppression.

This corruption of the citizen is possible in interactions with government or with politics. For a polity to work, citizens must not abuse the public trust in those interactions. A corrupt citizen will distort the truth when talking to his public official in order to earn money. He will pretend to need public support when he does not; pretend to have the best service that government can buy when he does not; and pretend to support a bridge for the good of the public when it in fact his support comes from the fact its placement will enrich him more than his market competitor. His only concern will be for himself in these interactions—he will happily ignore a general commitment to the public at large. This does not mean that the citizen cannot petition the government at all, but he still has a basic obligation to honesty, to giving credit and thought to the impact on others, and to using public channels for public ends.[177]

The protection against this corruption of the citizenry, not just of the government, was critical to the Framers' understanding of corruption. George Washington wrote to the Marquis de Lafayette that he could not (and, indeed, that no one could) promise that time and accident would not lead to the destruction of the government because there was always a threat of "corruption of morals, profligacy of manners, and listlessness for the preservation of the natural and unalienable rights," but that they had designed a constitution that would resist falling into an oppressive form, "so long as there shall remain any virtue in the body of the people."[178] Without the virtue of the people, Madison argued, "[n]o theoretical checks, no form of government, can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people is a

[177] There is a fascinating case, which I discuss in my book, about the development of the term in which the Supreme Court holds, in the late eighteenth century, that lobbying is against the public policy of the United States for exactly this reason. *See* TEACHOUT, *supra* note 1; *see also Trist*, 88 U.S. (21 Wall.) at 450 n.17 (citing Montesquieu for authority).

[178] Letter from George Washington to the Marquis de Lafayette (Feb. 7, 1788), *in* THE WRITINGS OF GEORGE WASHINGTON 291(Lawrence Boyd Evans ed., 1908).

chimerical idea."[179] Wilson reinforced this idea in his claim that the opposition to Britain was not against the king, but "a corrupt multitude."[180]

The Framers agreed with Machiavelli, who argued that when the elite—whether or not elected—become immersed in the creation of wealth, society can collapse.[181] As Governeur Morris stated, "[w]ealth tends to corrupt the mind & to nourish its love of power, and to stimulate it to oppression. History proves this to be the spirit of the opulent."[182] In Morris's view, the mere fact of wealth causes internal distortion, and the "spirit" of wealth becomes antagonistic to the spirit of republicanism. In this worldview, luxury seeking is an even greater flaw. It is a perversion of a government with integrity, and the perversion of a culture of civic virtue. "An avaricious man might be tempted to betray the interests of the state to the acquisition of wealth," wrote Hamilton in *The Federalist No. 75*.[183]

This part of the 1787 meaning will seem most strange to modern theorists of corruption, but it would not seem strange to modern citizens. Thus, Jack Abramoff himself is considered corrupt, and not merely those members of Congress he corrupted. The term "corrupt lobbyists" is not used as frequently as "corrupt Congressmen," but it makes intuitive sense to most people. People regularly call a local businessman "corrupt" if he tries to get something out of government using political ties—the modern vernacular of corruption has maintained this meaning.

C. Tension in the Definition (Keeping the Casinos out of Downtown)

Madison and other Framers brought an original attitude toward virtue and corruption. They believed themselves open-eyed and resigned to the fact that "man in his deepest natures was selfish and corrupt; that blind ambition most often overcomes even the most clear-eyed rationality; and that the lust for power was so overwhelming that no one should ever be entrusted with unqualified authority."[184] They sought to design a system that could withstand the moral failings

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179 James Madison, Remarks During the Virginia Debate on the Adoption of the Federal Constitution (June 20, 1788), *in* 3 STATE RATIFICATION DEBATES *supra* note 34, at 531, 537. *See generally* BAILYN, *supra* note 19, at 367–90. Some contemporaries rejected the importance of virtue wholesale. *See id.* at 390–93.

180 *See* Notes of Rufus King (June 1, 1787), *in* 1 CONVENTION RECORDS, *supra* note 17, at 70, 71; Notes of James Madison (June 1, 1787), *in* 1 CONVENTION RECORDS, *supra* note 17, at 64, 69.

181 NICCOLÒ MACHIAVELLI, DISCOURSES OF LIVY 298–300 (Oxford Univ. Press 1997) (1531).

182 Notes of James Madison, *supra* note 102, at 52.

183 THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 14, at 451.

184 BAILYN, *supra* note 19, at 368.

of normal humans, instead of one that could only be managed by angels. But with a few exceptions, they did not discount the importance of virtue—at least "virtue enough for success."[185]

There appears to be a tension between the founders' tendency to think that all people would be self-interested (the Framers as clear-eyed realists) and the belief that government cannot exist with a corrupt polity (the Framers as moralist republicans). But for the most part, the speakers at the Constitutional Convention did not see this as a tension. They reconciled the two ideas in a few ways.

One of the ways the speakers at the Constitutional Convention reconciled these two ideas was to create conditions under which already corrupt men—those who would always pursue the self-interest—would not gain power. The discussions about the kind of men who would be Senators, Presidents, and members of Congress—and could be reelected—reveals that their primary structural goal was to create conditions making it as difficult as possible for a corrupt man to get into Congress. As a camel is to a needle's eye, a corrupt man—they hoped—would be to Congress.

Second—and more importantly—the Framers believed that structures did not just create virtuous (public-serving) acts, they created virtuous men. They wanted to create conditions under which the spirit would not be too strained—conditions in which the distance between self-interest and public interest was sufficiently short that men of reasonable temperament could pursue the latter. A large gap between public- and self-interest creates temptations that few men can withstand, they believed, and so they pursued structural strategies to limit temptations.

Like keeping casinos out of downtown, the Framers wanted to "keep our men virtuous" by not putting the burden of virtue too heavily on those in office. Therefore, the Framers could believe that corruption was a mortal threat but that self-interest could be leveraged—the trick was not to create conditions in which the hydraulic force of self-interest so distracted men from their public duties that their minds warped and they became corrupt. The idea of temptation runs through the Convention discussions, particularly with Madison and Mason who sought to "remove the temptation[s]" facing public officials.[186]

The desire to remove temptation applies to citizens as well as to elected officials. While the Framers naturally believed that many citizens would be self-serving, they were also attempting to design institutions that did not themselves corrupt citizens. By making corruption

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[185] *Id.* at 369.

[186] *See, e.g.*, Notes of Robert Yates, *supra* note 29, at 380 (quoting Mason).

inefficient and time-consuming, citizens would be sheltered from overwhelming temptations. The Framers understood that, given an assembly of easy virtue, a wealthy man might be tempted to create dependent Senators. However, faced with the logistical maze of the Senate, House, Judiciary, and Presidency, the same wealthy man would find it too burdensome to buy off enough of their members. His civic virtue—like the virtue of the representatives—would be encouraged by the structural restraints.

Furthermore, the Framers tended to equate "the people" and the House of Representatives. They seemed to think that if they could limit corruption in the House, they could limit corruption by citizens generally. They considered the House a truly representative body, far more than we think of it today. The discussions about its role in the constitutional structure demonstrate the degree of identity they perceived between the people and the House. Many of the Framers came from states with massive assemblies and a very low ratio between the number of citizens and the number of representatives. Many of them came from states that maintained the right of instruction whereby citizens could bind their representatives by instructing them how to vote in the statehouse, could recall their representatives, or could force their representative to return to the district if they were not acting in accordance with the local wishes. In this worldview, structures that encourage the virtue of House members would also encourage the virtue of the people in their political life. The method of manipulating the levers of power for most people would be pressure on House members—so structures that constrained those levers would also constrain the more venal tendencies of citizens.

It is this part of Madison's vision which is most often misunderstood in celebrating his game-theory brilliance: that while he was clear-eyed and saw the venal possibilities in poorly structured governments, he also saw the centrality of using structures not just to leverage people's self-interest in the public good, but to cultivate systems in which the structure of their brain and their ambition would not turn to self-serving behavior.[187]

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[187] As a side note, I would suggest that Madison's insights about faction—which have traveled so far—are famous in part *because of* their intelligence and originality. The corruption concern was not an original one—it was already thousands of years old—and so historians, while noting it, may tend to linger less on it perhaps because there is less original to say about it. One can look at any modern index to *The Federalist Papers* and find "faction" well-indexed and "corruption" not indexed at all. *See, e.g.*, Rossiter, *supra* note 45. This is not because faction is more discussed, but because we have attached Madison to faction in our minds and so tag him with our current understanding of him, instead of his more ranging (and corruption-focused) approach toward problems of self-government.

D. From a Working Definition to an Evolving Standard

As this section reveals, the technical nature of the term "corruption" did not mean its contours were exact—it was more "technical" (Wood's description[188]) in the way that we now think of the word depression as a "technical" term. Broadly put, corruption is the use of public forum to pursue private ends. It can affect citizens and societies as well as public officers. The centerpiece of a charge of corruption is intent.

For those seeking more precision, consider how we have a general sense of what we mean when we talk about clinical depression, which we think of in semi-scientific terms. Indeed, we could spend many lively evenings debating the exact application of the "clinical depression" to a particular case. The tests created to measure it—such as DSM IV[189]—may be helpful, but they test trace evidence of depression, not the thing itself, which remains fundamentally untestable. But we mean something when we say it, and feel real sadness when we hear of others beset by it. Likewise, a computer virus is both a metaphor (a diseased computer) and a very particular kind of problem with real world consequences. Like depression or a virus, corruption is both metaphor and a single word, an effort to use ongoing analogy to describe a very real and dangerous human experience in the truest way possible. The physical metaphor of the term underlines the scientific aspiration of the Framers, who were trying to build, like architects or chemists, a society in accord with "laws" of natural politics.

But what ought we to make of these Framers' ideas? Perhaps they provide a working baseline with which to understand corruption? Ought they bind us in the 21st century? How important is it that many of these ideas still reflect the modern, public discussion around corruption? Why not allow the anti-corruption principle to be entirely untethered, waiting to be interpreted radically differently by every judge?

As I argue in Part V, the anti-corruption interest is difficult, but understandable, and probably best understood as an evolving standard. Much like the Eighth Amendment, the anti-corruption principle embodies a broad principle that can mean different things and apply to different acts over time. While it would be quaint to look for a list of "corrupt acts of 1787" to determine corruption, it would also give judges too much leeway if they could each turn to their own understandings, regardless of any relationship to the Constitution: an

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188 Wood, *supra* note 25, at 32.

189 American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR (4th ed. 2000).

evolving standard allows the Court to consider the history, the animating reasons for the principle, and how modern citizens understand corruption.

III
A SECOND FOUNDING?: *BUCKLEY V. VALEO*

Given the history I've outlined, a visitor from the past, hearing about the expanding role of the Supreme Court in political process controversies, would expect that corruption, and the anti-corruption principle, would be the centerpiece of these cases; that lower courts would be struggling with the contours of corruption within an anti-corruption doctrine grounded in the deep historical structural commitment. You would think that in campaign finance, gerrymandering, term limits, and fusion ballot cases, courts would begin their discussions with the relationship between these political puzzles and the American anti-corruption principle.

But the time-traveler would be disappointed, or at least perplexed. Two hundred and thirty years later, courts have become bombarded with cases concerning the law of the political process, questions about what regulations are acceptable to curb the influence of money and the seductions of power, and questions about the proper relationship of speech to self-serving public actors. The idea of corruption has forced itself on the Court with increased frequency in recent decades, as legislatures—responding to intense popular pressure—have repeatedly passed laws attempting to limit the capacity of groups, companies, and individuals to use money to influence political and issue campaigns. It is true that discussions of the concept of corruption—its meaning and scope—have inevitably emerged from these cases. But in the last several decades of extremely important decisions, the anti-corruption principle as embedded in the Constitution has been absent. In my forthcoming book, I offer some explanations for the loss of history (the changing makeup of the Court, the criminalization of bribery, among others),[190] but for purposes of this Article what is important is that the history *is* absent. Instead of turning to history or structure, modern Courts turn to *Buckley*.

Buckley v. Valeo[191] was not a second founding, an amendment to the Constitution, or, for that matter, a particularly coherent opinion.[192] But courts treat it as if it carried the weight of all of these. It is perhaps the single most influential case in the modern law governing

190 TEACHOUT, *supra* note 1.
191 424 U.S. 1 (1976).
192 The confusion is so great that "[a]t times even passages in a single opinion seem to contradict each other." Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127, 130 (1997).

political processes. It sets up the modern framework for analyzing corruption, a framework that has shown itself lacking ballast and fidelity to the Constitution.

Buckley was decided in 1976, two years after Nixon's resignation for Watergate, and the Court confronted these questions—and others—in the sprawling, maddening *per curiam* opinion: Can Congress legislate the amount of money candidates receive for their political campaigns? Can Congress limit the amount of money they spend? Can Congress require disclosure of campaign contributors? If these restrictions are legitimate, what is the source of authority for such limitations, and if not, what is the reason not? What role do anti-corruption interests play in these considerations?

A majority of the *Buckley* Court concluded that laws that limit expenditures, those that limit contributions, and those that require disclosure all threaten basic First Amendment rights.[193] However, the limitations on contributions and the disclosure requirements were upheld because a majority concluded that they served the governmental interests of limiting "corruption" and "the appearance of corruption."[194] The limits on expenditure, on the other hand, were struck down because the Court concluded that the anti-corruption interests did not outweigh the damage done to First Amendment freedoms.[195]

Buckley is vitally important for understanding the modern Court's use of corruption, but not because it clearly defines it. Its importance derives solely from the fact that it has become the source to which courts turn first when discussing the modern meaning of corruption. While *Buckley* makes passing references to prior cases, it is often treated as if it were itself its own beginning—sprung from itself, carrying enormous doctrinal weight. Justice Scalia calls it a "seminal case,"[196] and Justice Stephen Breyer defers to its logic in both *Colorado I* and *Randall v. Sorrell.*[197] While the cases that follow take different elements from *Buckley*, all turn to it for a basic framework.

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193 *Buckley*, 424 U.S. at 58, 84.

194 *Id.* at 45.

195 *Id.* at 58.

196 *See* FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2675 (Scalia, J., concurring) (2007).

197 Randall v. Sorrell, 126 S. Ct. 2479, 2490 (2006) (holding that *Buckley* should be upheld because of stare decisis); Colo. Republican Fed. Campaign Comm. v. FEC (*Colorado I*), 518 U.S. 604, 618 (1996). Justice Breyer's two opinions in the area have the least content of almost any Justice's opinions. The reliance of his *Randall v. Sorrell* decision on stare decisis is a little surprising; in campaign finance law, stare decisis is a tough sell—there is little widespread reliance, and the law changes constantly. His opinion in *Colorado I* (joined by Justices Souter and O'Connor) was based on the premise that the Court need not engage a constitutional question because the campaign effort at issue was an independent expenditure; the decision was then completely controlled by precedent. In two opportunities to articulate a theory of corruption in the law, he simply chose not to engage, but to defer to precedent.

Academics also tend to see *Buckley* as a beginning of its own, granting it charter-like status in their discussions. Thomas Burke analyzes the concept of corruption in case law "beginning with *Buckley*" without explanation,[198] and Dennis Thompson calls it the "original campaign finance decision."[199] These are typical expressions (not quite true, as it turns out—there were prior campaign finance decisions, and prior discussions of corruption[200]); as far as most people who study corruption in the courts are concerned, however, it all began with *Buckley*.

I cannot—and do not want to—give *Buckley* a full analysis in this Article, but I want to point out a few ways in which *Buckley* importantly defined the modern conceptual landscape around corruption—or did not define it, as the case may be. *Buckley* not only lacked care in building historical roots for its framework, it lacked care in its conceptual development of corruption. This vagueness at the core ended up being important moving forward, as it left an important word/concept as a big lacuna to be filled by the political philosophy of each of the Justices, who struggled to find textual or historical ballast.

Most importantly, *Buckley* holds that corruption is an interest that might outweigh First Amendment interests, but it does not ground the concept of corruption in constitutional history. Second, it is important because it introduces the idea that corruption and quid pro quo might be interchangeable. In prior opinions about corruption, this was not the model, and while it was hinted at, the quid pro quo model of corruption ended up being critically important for defining the direction of the use of the concept in modern cases. In *Buckley*, the corruption interest that is "constitutionally sufficient" to justify a $1000 per person contribution limit is described as preventing "large contributions . . . given to secure a political quid pro quo from current and potential office holders."[201] Such contributions, the Court wrote would undermine the "integrity of our system of representative democracy."[202] In discussing what it perceived to be a lesser danger of

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198 Burke, *supra* note 192, at 128.

199 Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1036 (2005); *accord* Michael C. Dorf, *The Supreme Court's Extraordinary Campaign Finance Reform Oral Argument*, FINDLAW'S WRIT, Sept. 7, 2003, http://writ.news.findlaw.com/dorf/20030917.html (also calling *Buckley* "the Court's original campaign finance decision"); *see also* Justin M. Sadowsky, *The Transparency Myth: A Conceptual Approach to Corruption and the Impact of Mandatory Disclosure Laws*, 4 CONN. PUB. INT. L.J. 308, 309 (observing that corruption is important to understand because of the line of cases beginning with *Buckley*).

200 *See, e.g.*, *Ex Parte* Yarbrough, 110 U.S. 651 (1884); Trist v. Child, 88 U.S. (21 Wall.) 441 (1874); Bartle v. Nutt, 29 U.S. (4 Pet.) 184 (1830); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

201 Buckley v. Valeo, 424 U.S. 1, 26 (1976).

202 *Id.* at 26–27.

major expenditures made independently of consulting with the candidate, the Court concluded that the lack of ability to coordinate "alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."[203] As the first Supreme Court decision to mention "quid pro quo" as the core harm against which anti-corruption measures are fighting, *Buckley* suggested a new, more mechanical way of thinking about the power of money. Third, Buckley introduced a new role for the citizen in the concept of corruption. As we've seen, the citizen plays a key role in the Framers' concept of corruption, and this idea of a corruptible citizen persisted through the early twentieth century.[204] Citizens play a central role in *Buckley*'s story about corruption as well, but it is a very different one. The citizen in *Buckley* is most important for her faith in the government. While the Framers were concerned about citizens who wanted to use government to serve their own ends, the *Buckley* Justices were most concerned about citizens who had grown cynical about government. When large contributions successfully influence political choices, that leads to the erosion "to a disastrous extent" of confidence in the representative system.[205] In the *Buckley* model, the citizen is more victim than villain in the play of society's corruption. This represents a fundamental shift in the responsibilities of the citizen in a republic and impacts later discussions of corruption. Finally, the *Buckley* descriptions of the importance of corruption are described as "constitutionally sufficient,"[206] "weighty,"[207] and a "significant governmental interest."[208] If one did not know what the Court was talking about, one might imagine it was the problem of theft in high schools—a matter of "weighty" concern, but not a fundamental threat to the republic. More powerful words, like integrity, are found in a few nooks and crannies of the opinion, but largely when discussing a law whose constitutionality is upheld. "The contributions ceilings," the majority concludes, "thus serve the basic governmental interest in safeguarding *the integrity of the electoral process* without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion."[209] The integrity described here is the integrity "of the electoral process"—not the integrity of the whole thing, the citadel, the heart of society. This, along with the absence of

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203 *Id.* at 47.

204 *See, e.g.*, United States v. Classic, 313 U.S. 299, 328 (1941) (Douglas, J., dissenting); Newberry v. United States, 256 U.S. 232, 275 (1921) (Pitney, J., concurring in part).

205 *Buckley*, 424 U.S. at 27 (quoting Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973)).

206 *Id.* at 26.

207 *Id.* at 29.

208 *Id.* at 96.

209 *Id.* at 58 (emphasis added).

reference to the centrality of the anti-corruption principle as a constitutionally important matter, leads to a vague and light sense of corruption. In fact, reading the opinion one can understand the frustration of those who think that all the legislation was illegitimate. The opinion does not portray the sense that corruption is that important an interest, so why was it sufficiently important to enable interfering with the First Amendment?

IV
Five Modern Concepts of Corruption

> When the vessel labeled "corruption" begins to founder under weight too great to be logically sustained, the argumentation jumps to the good ship "special privilege"; and when that in turn begins to go down, it returns to "corruption." Thus hopping back and forth between the two, the argumentation may survive but makes no headway toward port, where its conclusion waits in vain.
> —Justice Scalia, dissenting, in *Austin v. Michigan State Chamber of Commerce*[210]

In order to make sense of what recognition of the anti-corruption principle might mean, it is important to first understand the current state of the concept in the Court. This Part elaborates how the lack of a tie to history has led to chaos in the Court's political process decisions involving corruption. This Part lays out five different clusters of definitions used in the Supreme Court's case law on corruption. Each of these clusters understands the problem with corruption—the essence of the threat that it expresses—as different.[211] The clusters can be loosely described as gravitating around these concepts: criminal bribery, inequality, drowned voices, a dispirited public, and a lack of integrity. The experience of reading modern corruption cases is one of being lurched from world-view to world-view. The cases identify first one, then another culprit in the search for a definition—and leave one—following the metaphor of Justice Scalia's dissent—a little seasick and confused.[212]

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[210] 494 U.S. 652, 685 (1990) (Scalia, J., dissenting).

[211] In Burke's analysis of the concept of corruption in campaign finance law, he concludes that there are three different strands (quid pro quo, monetary influence, distortion). *See* Burke, *supra* note 192, at 149.

[212] Moreover, there is not much consistently within these clusters. The idea of corruption as the creation of political debts and the theory that corruption is quid pro quo are quite similar. But words have consequences, and a case law built around "quid pro quo" will be different than a case law build around "creation of political debts."

A. Criminal Bribery: Corruption As "Quid Pro Quo" and "The Creation of Political Debts"

In a handful of cases, and for a handful of Justices, corruption is basically coextensive with the criminal law statutory definition of bribery and "political corruption"—a view coming directly out of some (probably) careless writing in *Buckley*. For them, the problem posed by corruption is similar to the problem posed by other crimes. The infringement of free speech is barely acceptable—it seems to them like infringing Fourth Amendment rights in order to catch more criminals to stop a rash of burglaries. On this tilt, language inclines toward a simple, crime-like definition that will make it possible to measure corruption. Corruption comes to mean the crime of corruption as written in federal and state criminal code. Justice Scalia is the most obvious in this regard, pushing for the simplest definition: corruption is illegal bribery.[213] Chief Justice John Roberts appears to agree: corruption is quid pro quo and its close kin. As to efforts to go beyond this, he is frustrated, stating, "enough is enough."[214]

The archetypal corruption occurs when a public official takes money in exchange for a political act. The further away an act is from quid pro quo, the less it is corruption. The more politics looks like a store, where actions can be bought, the more corrupt it is.[215] As previously noted, *Buckley* mentioned, but did not rest on a quid pro quo definition. Justice Warren Burger, writing the majority opinion in *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*,[216] elevated the quid pro quo discussion when he held that quid pro quo, and the appearance of quid pro quo, is the only anti-corruption interest that has constitutional weight.

> *Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate*: "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential

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213 *See Austin*, 494 U.S. at 685 (1990) (Scalia, J., dissenting) (arguing against any definition of corruption other than "as English speakers understand the term").

214 FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2672 (2007).

215 The bribery model and the founder's corruption are related, but they are mirror images of each other. In the bribery model, "corruption" is the illegal or immoral exchange—the official taking a kickback for granting a government contract to an inferior contractor. The fact that officials in his position appear to be narcissistic, ambitious, and self-serving is a clue to the possibility that that corruption might occur. In the founders' model, the kickback or bribe is evidence of corruption, but not the corruption itself. The thing itself is the attitude toward the public interest; the mind, not the act, is corrupt. (An action is not corrupt if no action is taken, but the mode of action, not the fact of it, defines corruption.)

216 454 U.S. 290 (1981).

office holders, the integrity of our system of representative democracy is undermined."[217]

His "single, narrow exception" reading was a bit of a stretch—*Buckley*, as is evident even from his quotation, was only describing one instance of undermined integrity and was by no means creating a hard and fast definition. But Justice Burger is not alone in this misapplication; Justice Scalia goes so far as to scold others for trying to separate "'corruption' from its quid pro quo roots."[218]

Justice Kennedy, dissenting in part in *McConnell v. FEC*, argued that:

> Buckley made clear, by its express language and its context, that the corruption interest only justifies regulating candidates' and office-holders' receipt of what we can call the "quids" in the quid pro quo formulation.[219]

In the strongest form of this view, Justice Thomas argued that bribery laws and disclosure laws are completely sufficient alternatives to expenditure limits: "Federal bribery laws are designed to punish and deter the corrupt conduct the Government seeks to prevent under FECA, and disclosure laws work to make donors and donees accountable to the public for any questionable financial dealings in which they may engage."[220] Lowenstein described criminal bribery having a quid pro quo core with concentric circles radiating outward.[221] The "corruption equals crime" Justices have basically adopted Lowenstein's model[222] (which was developed for criminal law, not constitutional law, purposes). They do it by using the phrase "quid pro quo" as the center, around which all other definitions radiate. In *FEC v. National Conservative Political Action Committee* (*NCPAC*), the Court said, "The hallmark of corruption is the financial *quid pro quo*: dollars for political favors."[223]

But even within this basic model there are meaningful differences. A softer version of this view puts quid pro quo at the center, but allows for other, related—and possibly legal—activities to be counted as corruption. The *Austin* majority stuck with quid pro quo

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[217] *Id.* at 296–97 (quoting Buckley v. Valeo, 424 U.S. 1, 26–27 (1976)).

[218] Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 423 (2000) (Scalia, J., dissenting) ("The majority today, by contrast, separates 'corruption' from its quid pro quo roots and gives it a new, far-reaching (and speech-suppressing) definition.").

[219] McConnell v. FEC, 540 U.S. 93, 292 (2003) (Thomas, J., concurring in part and dissenting in part).

[220] Colo. Republican Fed. Campaign Comm. v. FEC (*Colorado I*), 518 U.S. 604, 643 (1996) (Thomas, J., dissenting).

[221] *See* Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784 (1985).

[222] *See generally id.*

[223] 470 U.S. 480, 497.

but then explained that it was one category of many types of corruption.[224] Other cases mentioned quid pro quo but did not put it at the heart of the corruption concern.[225] *Bellotti* suggested that corruption was concerned with the "creation of political debts,"[226]—something much more expansive than quid pro quo.[227]

As powerful as it appeared, the quid pro quo formulation did not stick. After *Austin*, for over a decade, the quid pro quo formulation largely disappeared from majority opinions about corruption. When the phrase did appear, it was in a quote or used as an example rather than as a definition of corruption.[228] Nonetheless, it lived on in dissents. Justice Thomas wrote in *Colorado I* that "the only governmental interest that we have accepted as compelling is the prevention of corruption or the appearance of corruption . . . and we have narrowly defined 'corruption' as a 'financial *quid pro quo*: dollars for political favors.'"[229] The *McConnell* dissenters used a similar formulation.[230] But the majority opinions do not even recognize the idea that quid pro quo is the archetypal bribery.

Then, in mid-2007, in *Wisconsin Right to Life*, quid pro quo reappears as *the* formulation. Chief Justice Roberts' opinion for the Court announces that "[i]ssue ads like WRTL's are by no means equivalent to contributions and the *quid-pro-quo* corruption interest cannot justify regulating them."[231] Justice Scalia's concurrence under-

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224 *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659–60 (1990).

225 *See, e.g.*, Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 203 (1999) ("We note, furthermore, that ballot initiatives do not involve the risk of '*quid pro quo*' corruption present when money is paid to, or for, candidates."); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 356 (1995) ("Disclosure of expenditures lessens the risk that individuals will spend money to support a candidate as a *quid pro quo* for special treatment after the candidate is in office.).

226 First Nat'l Bank of Boston v. Bellotti, 435 U.S. 768, 788 n.26 (1978). For other invocations of this phrase, see FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2692 n.7 (2007) (Souter, J., dissenting); FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 208 (1982) (quoting *Bellotti*).

227 The *Bellotti* court held that debts would not accrue in a referendum. A candidate would not feel indebted to a corporation that spent money directly on a referendum, so you would not see candidates pandering to major monied interests. "The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." 435 U.S. at 790 (citations omitted).

228 *See, e.g.*, FEC v. Beaumont, 539 U.S. 146, 155–56 (2003) (quoting FEC v. Colo. Republican Fed. Campaign Comm. (*Colorado II*), 533 U.S. 431, 441 (2001) (explaining that corruption is larger than quid pro quo); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000) (discussing concerns as being larger than quid pro quo).

229 Colo. Republican Fed. Campaign Comm. v. FEC (*Colorado I*), 518 U.S. 604, 634 (Thomas, J., dissenting).

230 *See* McConnell v. FEC, 540 U.S. 93, 259 (2003) (Scalia, J., dissenting) ("Any *quid pro quo* agreement for votes would of course violate criminal law, and actual payoff *votes* have not even been claimed by those favoring restrictions on corporate speech."); *id.* at 267 (Thomas, J., dissenting) ("[A]n effective bribery law would deter actual *quid pro quo* . . . .").

231 *Wis. Right to Life, Inc.*, 127 S. Ct. at 2672.

lines the quid pro quo element: "No one seriously believes that independent expenditures could possibly give rise to quid-pro-quo corruption without being subject to regulation as coordinated expenditures"[232] The arguments of Chief Justice Roberts and Justice Scalia are striking because they make claim to a consistency that is not a feature of the cases. For twenty-two years, the Court clearly explained (in majority opinions) that quid pro quo was but one type of corruption—in *Wisconsin Right to Life*, quid pro quo reappears as the heart of corruption.

The quid pro quo definition has the strong attraction of being tractable. It allows the Court to piggyback on criminal law interpretations; it allows the Court to limit the kind of evidence it will take to infractions of those criminal laws; and it gives Buckley founding-like status. The implications of this view are, consequently, more straightforward than other views. If the heart of corruption is clearly criminal activity, then the focus of the anti-corruption efforts should be limiting that clearly criminal activity. Very few laws regulating political money will be upheld if they need to be justified as a tight-fitting response to criminal bribery and its closest kin:

> [A] broadly drawn bribery law would cover even subtle and general attempts to influence government officials corruptly, eliminating the Court's first concern. And, an effective bribery law would deter actual quid pro quos and would, in all likelihood, eliminate any appearance of corruption in the system.[233]

How satisfying and simple is Justice Thomas's conclusion!

B. Inequality: Unequal Access, Unfair Deployment of Wealth, and Undue Influence

Unequal access to political life, and political power, drive the concern of several Justices and their formulations of corruption. In *FEC v. Massachusetts Citizens for Life, Inc.*,[234] the Court focused on those who use wealth, instead of those who are manipulated by it.[235] It also looked at motive—much as the phrase in *NCPAC* had—but instead looked at the motive of the wealthy.[236] Corruption, it concluded, encompasses the "unfair deployment of wealth for political purposes."[237] This particular formulation shows up in Justice David Souter's opin-

232 *Id.* at 2678 (Scalia, J., concurring).
233 *McConnell*, 540 U.S. at 267 (Thomas, J., dissenting).
234 479 U.S. 238 (1986).
235 *Id.* at 256–57.
236 *See id.* at 257–59.
237 *Id.* at 259.

ion in *FEC v. Beaumont*[238] and Justice Souter's dissent in *FEC v. Wisconsin Right to Life.*[239]

Justice Souter means "unfair" in the sense that not all people can equally access it. Fairness and equality are the core principles around which this understanding of corruption radiates. This is very similar to the use of many members of the Court of the phrase, "undue influence." (I argued previously this phrase arose to avoid the puzzle of defining corruption.) In doing so, they try to amplify inequality concerns, but they do so at the price of lessening the moral complaint, and the shift does little to clarify the concern.[240] Justice Souter uses "undue influence" to define corruption in the majority opinion in *Beaumont*, the majority opinion in *Colorado II*, and his opinion in *Nixon v. Shrink.*

In the worldview underlying these formulations, the problem with money in politics is that it creates unequal access and unequal voice.[241] David Strauss has the clearest expression of this worldview when he writes that:

> [C]orruption . . . is a derivative problem. Those who say they are concerned about corruption are actually concerned about two other things: inequality, and the nature of democratic politics. If somehow an appropriate level of equality were achieved, much of the reason to be concerned about corruption would no longer exist. And to the extent the concern about corruption would persist under conditions of equality, it is actually a concern about certain tendencies, inherent in any system of representative government, that are at most only heightened by quid pro quo campaign contributions—specifically, the tendency for democratic politics to become a struggle among interest groups.[242]

Political actors play a fairly mechanical role in this worldview. They process information (gained by access) fairly directly—the more of one kind of input, the more of that kind of output. They are influenced directly—the more pressure from campaign contributions, the more they are likely to warp their decisions. The emphasis is very dif-

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238 539 U.S. at 146.

239 127 S. Ct. 2652.

240 The majority in *McConnell* concludes that "undue influence" occurs when "officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder," McConnell , 540 U.S. at 153, whereas the dissent claims that undue influence is quid pro quo.

241 *See, e.g.*, Dworkin, *supra* note 4 (arguing that corruption is a problem of inequality); Strauss, *supra* note 4, at 1370 (same).

242 Strauss, *supra* note 4, at 1370.

ferent in this worldview with the corruption-as-bribery model,[243] and from the Framers' world view.[244]

A variation on the inequality theme is the concern about disproportionate corporate power.[245] In *Austin v. Michigan State Chamber of Commerce*,[246] the Court describes corruption in terms of

> the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.[247]

This highly conditioned definition depends upon the method of accumulation, the relationship to public support, but is grounded in a basic intuition that there must be some kind of equality in political access. *Austin* does not want to suggest that the equality is absolute, or mandate proportionality, but to suggest that where political speech approaches a state of no proportionality, ("little or no correlation") it ceases to be political, protected speech. It is no longer the expression of anything public when it has no grounding in the public—inequality has the power to transform public speech into non-public, corrupt speech.

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243 The difference between the Framers' model and the inequality model might be best explained by reference to Dr. Suess. Imagine two machines. The Politics Machine of Inequality has a chute. People walk up to the chute and throw in dollar bills along with a slip of paper with a request on them. The machine takes the dollar bills and folds them into the shape of the requested item, and the person who walked up to the machine walks away with as many widgets as he put in dollars. The poor people get few widgets, and the rich people get many. The machine just puts out what it gets in. I imagine the Framers drawing something more like a Jekyll and Hyde Machine, a process more alchemical than mechanical. As people put dollars into this machine, they are dissolved into a big vat full of water, which gets dumped first into the glasses at a long table with all the members of Congress at it. From time to time the person turns and takes a drink from the glasses of water. The rest of the vat gets dumped into the lake. As the members drink more of the water, they gradually turn from Jekyll into Hyde, and start using every opportunity to enrich themselves and get away with what they can—the same occurs with the citizens.

244 In the Framers' model, money tempts and warps the mind, actually transforming the structure of thought, which then leads to self-serving behavior. It plays a more alchemical than mechanical role in politics. They would not agree with Strauss that if we could remove inequality, we would remove corruption or our concern with corruption. An equal polity with all self-serving leaders and citizens would not be attractive to them.

245 The particular kind of corporate form available now was not, clearly, extant in 1787, but there are many themes in their conversations that could be brought to bear on the discussion of corporate power in political life. In particular, their obsession with foreign influence derived from a fear that foreign powers and individuals had no basic investment in the well-being of the country. A similar argument about the fundamental "foreign" (as in non-patriotic) structure of the corporation could be made, inasmuch as its legal loyalties necessarily exclude patriotism. Furthermore, their obsession with dependence, and the kind of dependence that is created when large monied interests choose to hire and please elites, is directly pertinent to the corporate discussion.

246 494 U.S. 652 (1990).

247 *Id.* at 660.

In *Beaumont* and *McConnell*, the Court claims that the state interest in preventing corruption is obviously compelling in part because of the special nature of the corporate form and its special capacity to distort public speech.[248]

C. Drowned Voices: Corruption as Suppressed Speech

Related to—but different than—the equality concern is the concern that some voices will be so very loud, that others will be effectively silenced, if not silenced in fact. Those most concerned with inequality are concerned even if the smaller voices are heard—those concerned with a corporate "drowning out" reimagine the corruption concern as a First Amendment problem.

In *Bellotti*, where the particular drowning was first suggested, the Court considered a Massachusetts law that forbade corporations from spending money on referendum issues that did not directly affect their businesses. It struck down the law. The Court held that some of Massachusetts' concerns might justify this law, but that on the record evidence in front of it, the Justices were not persuaded that corporate spending on referenda would lead to the "drown[ing] out" of other, non-corporate, points of view.[249] While this was later interpreted as a precedential conclusion that corporations do not, prima facia, drown out citizen speech, in its initial incarnation the Court was merely saying that evidence of drowning was insufficient.

This worldview ties anti-corruption concerns to the First Amendment: a problem exists when speech "denigrate[s] rather than serv[es] First Amendment interests."[250] The Court sees its project as balancing two different First Amendment values against each other, instead of balancing a First Amendment value against a separate anti-corruption value.

D. Dispirited Public

Ever since *Buckley*'s reimagining of the citizen, many of the corruption cases have increasingly suggested that the problem with cor-

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248 FEC v. Beaumont, 539 U.S. 146, 154–55 (2003); McConnell v. FEC, 540 U.S. 93, 205 (2003) ("We have repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.' Moreover, recent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against 'circumvention of [valid] contribution limits.'"); *see also* Rennee v. Geary, 501 U.S. 312, 348–49 (1991) (Marshall, J., dissenting). Chief Justice Roberts cites the phrase in order to limit it, and Scalia cites it in order to mock it in *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2672, 2678 (2007).

249 First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 789 (1978).

250 *Id.*

ruption is not corruption itself, but the dispiriting impact the perception of corruption has on the public. Since the appearance of corruption tends to have some correlation with corruption, Congress should have some leeway to limit corruption, because if it does not our citizens will become passive and our democracy will crumble. In *Buckley*, the Court wrote: "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'"[251] This becomes a major theme in the case law after *Buckley*, where courts wring their hands about the cynical electorate.

> Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. 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."[252]

In the strong form of this view—which few Justices take—the real problem with corruption is that voters will stop voting, people will stop running for office, and citizens will stop making serious efforts to read the news and understand the public issues of their day, because they will believe that such efforts are futile.[253] In the weak form, public perceptions are a secondary concern. However, the weak form has a hydraulic power of its own, mostly because evidentiary issues seem much easier when "appearance of corruption" instead of corruption itself needs to be measured, and so this concern allows for Justices to insert their own intuitions about actual corruption into the appearance framework.[254]

E. Loss of Integrity

The cluster of corruption ideas that would have the most meaning for the Framers are those that deal with corruption as a loss of political integrity, and systems that predictably create moral failings for members of Congress. In *NCPAC*, the Court concluded the part of

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[251] Buckley v. Valeo, 424 U.S. 1, 27 (1976); *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000) (quoting *Buckley*).

[252] *Shrink Mo. Gov't PAC*, 528 U.S. at 390 (quoting United States v. Miss. Valley Generating Co., 364 U.S. 520, 562, (1961)).

[253] One of the delightful ironies of this line of thinking is that it has been used to uphold disclosure requirements, which may deter certain kinds of fraud, but may also create a more cynical public that is precisely aware of who is paying the piper. To be an effective disinfectant, sunlight must necessarily reveal all kinds of spots.

[254] For a critical review of this entire doctrine, see Nathaniel Persily and Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004).

the Presidential Election Campaign Fund Act that limited contributions violated the First Amendment: "Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns."[255]

In *McConnell*, the Court talks about the exploitation of gratitude for gifts,[256] and in *Colorado II*, the Court refers to structures that create "undue influence on an officeholder's judgment."[257] *McConnell* includes one of the fuller descriptions of this understanding of corruption:

> Just as troubling to a functioning democracy as classic quid pro quo corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation.[258]

For these courts, "corruption is a subversion of the political process"[259] that involves something different in kind than inequality, but has something to do with leveraging the channels of power to tempt officials into non-public actions. This undercurrent in the case law suggests a yearning for something like the Framers' concept of corruption, and in several opinions one can hear an almost desperate searching by the Court for more weight to add to their intuition that corruption is more than a crime, more than a variation on First Amendment concerns, more than inefficiency, and different than inequality.[260]

Peter Euben contrasts Hobbes' and Aristotle's ideas about corruption in a lovely essay about the history of the term.[261] He argues that Hobbes' view

> is less a direct refutation of Aristotle than part of a theory in which Aristotle's categories and arguments make no sense. Once men are seen as irremedially egoistic subjects rather than potentially activist citizens, as sharing a nature which fragments them rather than a

255 FEC v. Nat'l Conservative PAC, 470 U.S. 480, 497 (1985).

256 McConnell v. FEC, 540 U.S. 93, 145 (2003).

257 FEC v. Colo. Republican Fed. Campaign Comm. (*Colorado I*), 518 U.S. 604, 441 (1996).

258 *McConnell*, 540 U.S. at 153.

259 *Nat'l Conservative PAC*, 470 U.S. at 497.

260 *See, e.g.*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 695 (Kennedy, J., dissenting).

261 Euben, *supra* note 53.

> history which unites them, as requiring an absolutely sovereign ruler rather than a sharing of power, we confront a political and conceptual universe in which republican political theory is irrelevant.[262]

The same can be said for many of the modern Justices' views of corruption, as expressed in this opinion. They do not dislike the term, or try to refute it, but it simply does not make sense to them. They cannot give it weight, because it has no meaning that could carry weight.

In the midst of this perplexing potluck of options, the modern tendency in response to the word—and concept—of corruption is to abandon it, or at least abandon any semblance of its natural meaning. Some Justices—those tending to be from the left—try to avoid the term and replace it with terms like fairness, inequality, and undue—terms that fit within an equality paradigm. Other Justices—those tending to be from the right—do not avoid the term, but try to make it their own, repeating in case after case that corruption is quid pro quo, and nothing more. Justices for whom the word means something different and more than inequality or bribery are increasingly sidelined, and the most popular method of dealing with corruption—for those who most care about it—has been to abandon the word, and search for other angles on the same problem.

V
The Restoration of the Anti-Corruption Principle

The previous Part is important for two reasons: it shows that the *Buckley* corruption doctrine has failed on its own terms, and that the Court (and, following them, the courts) is currently ahistorical and adrift when it comes to corruption. The purpose of this Article is to persuade you that this floating concept can be grounded, and ought to be. The anti-corruption principle belongs in the center of any constitutional discussion of the laws governing political processes. Like the separation-of-powers principle[263] the anti-corruption principle is a fundamental, structural commitment embodied in the Constitution, and despite the absence of any single expression along the lines of the First Amendment, it is so deeply tied to the ways in which the clauses were meant to be interpreted that to ignore it is to misread the Constitution.

Because the anti-corruption principle is both central to the Constitution and has been largely ignored by the Court since at least the

[262] *Id.* at 231–32.

[263] I would argue that the separation-of-powers principle itself has become unbound from its initial reason—corruption—and that this unhinging has been problematic. But you needn't be convinced that separation-of-powers doctrine ought be rewritten in order to accept the anti-corruption principle argument.

late nineteenth century, the argument lands in the center of another discussion, namely the appropriate role of the lawyer as a journeyman historian, digging up facts from the Framers related to particular constitutional arguments.[264] I cannot retread all the important discussions here, but will point out that there are, in this case, an embarrassment of riches in the historical trove—this is not an argument tied to a single clause or debate, but to a structural, legal commitment made and remade hundreds of times throughout the Constitutional Convention, and embodied in dozens of clauses.

Regardless of your prior interpretive commitments or the degree of your originalism, for the idea of constitutional fidelity to mean anything at all, it must at least mean engaging the Founders' concern with political corruption, understood as a moral problem of citizenship as well as a technical problem of bribery. And if history means nothing to you, there is also a very modern, practical reason to revive the anti-corruption principle—definitional problems about the scope and meaning of corruption have been splintering the Court since *Buckley*, as a lack of a shared foundational understanding has led to something close to chaos in the law governing political processes. The Court has lacked a rudder, and as goes the Court, so goes the law—and as goes the law, in this case, so goes the logic sustaining our political processes.

The Framers' anti-corruption principle is important from the perspective of many different forms of constitutional interpretation.

A. Methodological Integrity

First, the most minimal claim: the anti-corruption principle needs to be recognized as a simple matter of methodological integrity. If you ask only that the Court be internally consistent, that consistency alone will lead to a greater consideration of the Framers' attitudes and commitments to fighting corruption. Of the majority opinions in the last thirty years, none has mentioned or discussed the Framers' attitudes toward corruption, the anti-corruption clauses, or the anti-corruption principle embedded in the Constitution—yet dozens have examined and given weight to the Framers' commitments to other principle.

The absence of the Framers' views of corruption is most striking in the campaign finance cases that rely strongly on historical argument and founding-era secondary sources. *Buckley* discusses the Framers extensively in the context of the legitimacy of the FEC, but not in the context of understanding corruption.[265] In the majority opinion

[264] *See, e.g.*, Cass R. Sunstein, *The Idea of a Usable Past*, 95 COLUM. L. REV. 601 (1995).
[265] Buckley v. Valeo, 424 U.S 1 (1976).

of *United States Term Limits v. Thornton,* which struck down term limits, Madison appears frequently for his views on the importance of the qualifications of members of Congress. Both *The Federalist Papers* and the debates on the Convention floor are cited,[266] but not in the context of the Framers' views of corruption. Justice Thomas, dissenting in the important campaign finance case *Nixon v. Shrink Missouri Government PAC,* invokes James Madison, but only for his views on free speech and factions; not for his concern with corruption.[267] In *McIntyre v. Ohio Elections Commission,*[268] holding that anonymous pamphletting about a proposed tax levy could not be outlawed, the Court cited *The Federalist Papers* as evidence of the founding-era practice of the value of anonymous pamphleteering, but did not explore founding-era views of the dangers of corruption.[269] In *First National Bank v. Bellotti,*[270] a letter written by Thomas Jefferson is quoted in a footnote rejecting the argument that corporate political speech unlawfully compels shareholders to support political views.[271] Jefferson's other views about corruption are not mentioned.

The few exceptions where the Framers' views of corruption are elaborated by the Court are found in concurring and dissenting opinions. In *Freytag v. Commissioner,*[272] a case upholding the compatibility of the appointment of a tax court judge with the Appointments Clause, the concurrence notes that "[t]he Framers' experience with post-revolutionary self-government had taught them that combining the power to create offices with the power to appoint officers was a recipe for legislative corruption," and it harshly scolds the majority for its ahistorical understanding of the Appointments Clause.[273] Similarly, Justice Thomas's dissent in *U.S. Term Limits, Inc. v. Thornton* hints at the Framers' concern, noting that "[t]he Ineligibility Clause was

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266 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

267 Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 411 (2001) (Thomas, J., dissenting) (citing Madison on liberty); *id.* at 425 n.9 (citing Madison on factions).

268 514 U.S. 334 (1995).

269 *Id.* at 267–69.

270 435 U.S. 765 (1978).

271 *Id.* at 795 n.34.

272 501 U.S. 868, 906 (1991) (Scalia, J., concurring in part).

273 *Id.* at 904. Justice Scalia further argues:

> The Court apparently thinks that the Appointments Clause was designed to check executive despotism. This is not what we said in *Buckley v. Valeo,* and it is quite simply contrary to historical fact. The quotations on which the Court relies describe abuses by the unelected royal governors and the Crown, who possessed the power to create and fill offices. . . . The Framers followed the lead of these later Constitutions [which granted appointment power to the executive]. The Appointments Clause is, intentionally and self-evidently, a limitation on *Congress.*

Id. at 904 n.4.

intended to guard against corruption."[274] The dissent also quotes Thomas McKean, who was present at the Pennsylvania ratifying convention and defended Article I, Section 4 of the Constitution because he believed that congressional elections should be "held on the same day throughout the United States, to prevent corruption or undue influence."[275] But neither of these instances are indicative of a broader method: both of these provocative ideas are found as parentheticals in a footnote.

In sum, trying to understand the Framers' views on political integrity simply by reading modern U.S. Supreme Court case law would likely lead to the belief that the center of the political theory creating the Constitution, the phrase around which all else rotates, is the First Amendment. Given the historical support used in First Amendment discussions, you might even conclude that the Framers had a theory of honest government that was almost completely dependent upon free speech. You would probably conclude that the Framers did not spend much time discussing political corruption. Perfect historical fairness is impossible, and there are accidental, but non-blameworthy, reasons for the Court's historical inconsistencies in this case. That said, this is a correctible imbalance. If the Court is going to use history, it should use it similarly across different clauses. The historical methods used for one principle ought be used for another, especially when those principles might inform each other.

B. Structural Reasoning

Structuralism assumes the "necessary incompleteness of the written document,"[276] and tries to provide some limitations on the range of ways in which that incompleteness can be read. It tends to be a basically conservative approach, tending toward an attempt to provide similar justifications for decisions over time. It makes breaks with the less certain past, acknowledges the necessary limitations of the Framers, and is forgiving with those limitations.

In Charles Black's important 1963 book on structural reasoning[277] in constitutional interpretation, he argued that textualism and precedent could not—and should not—explain all of the Court's better decisions.[278] Instead, much of the best constitutional reasoning derives from the structure of the Constitution and the inferences

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274 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 860 n.11 (1995) (Thomas, J., dissenting).

275 *Id.* at 894–95.

276 Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY. L. REV. 1601, 1661 (2000).

277 CHARLES BLACK, *Inference from Structure: The Neglected Method*, *in* BLACK, *supra* note 7, at 3.

278 *Id.* at 13.

therefrom. The method Black describes—structuralism—has been most prominently used in separation-of-powers and federalism cases, but has become more popular in recent years in the set of cases involving sovereign immunity. A structuralist argument considers constitutional provisions as they relate to each other, beyond the particular enumeration of items. It considers the reasonable inferences that can be drawn from the structure and the principles that the structure embodies.

As Black argued, "the textual method, in some cases, forces us to blur the focus and talk evasively, while the structural method frees us to talk sense."[279] Sense, above all, drove his argument—the capacity of structuralism to force honest interpretations, instead of shoehorning them into textual explanations, and the fact that structuralism, unlike textualism, "has to make sense—current, practical, sense."[280] Structuralism requires integrated thinking and reasoning, and consistent explanation of core principles. It provides avenues of understanding that are only open because of the global perspective. As the Court said in 1934, "Behind the words of the constitutional provisions are postulates which limit and control."[281] "Viewing the Constitution structurally provides insights that simply are not possible if the Constitution is seen as a list of liberties and little more."[282]

The persuasive structural arguments that have been made in other arenas have all been deeply grounded in and intertwined with history, and history has typically played the lead role in the structural interpretations. As Justice Souter has explained it, "The Framers' intentions and expectations count so far as they point to the meaning of the Constitution's text or the fair implications of its structure . . . ."[283]

Courts regularly invoke this kind of structural originalism with the separation-of-powers principle.[284] That principle, created by the interaction of the words, exists separately from any particular clause.

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279 *Id.*

280 *Id.* at 22.

281 Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934).

282 J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1687 (2004).

283 Alden v. Maine, 527 U.S. 706, 807 (1999) (Souter, J., dissenting).

284 *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 439 (1998); Mistretta v. United States, 488 U.S. 361, 412 (1989) (holding that the Constitution's structural protections did not prohibit Congress from delegating the task of formulating sentencing guidelines to the Sentencing Commission); Morrison v. Olson, 487 U.S. 654, 674 (1988) (noting that "the history of the [Appointments] Clause provides no support for appellees' position" that the appointment of an independent counsel, pursuant to the Ethics in Government Act of 1978, violated the Appointments Clause and the principle of separation of powers); Bowsher v. Synar, 478 U.S. 714, 736 (1986) (striking down the Gramm-Rudman-Hollings Act's balanced budget procedure); INS v. Chadha, 462 U.S. 919, 959 (1983) (striking down a legislative veto); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982) (striking down a provision creating non–Article III bankruptcy courts); Youngstown Sheet

The structure need not (and in fact cannot) show up in any particular place, but is in the juxtaposition of phrases and clauses.

Efforts to ground the separation-of-powers principle in particular phrases, instead of in the spirit of the document, end up sounding warped and feeling disingenuous. Separation of powers helps make sense of the Appointments Clause, but it would be absurd to define it as "Appointments Clause plus"—for deep structural principles, we necessarily refer to different texts than for clause interpretations. Donald Elliott argues that "the 'text' in separation-of-powers law is everything that the Framers did and said in making the original Constitution plus the history of our government since the founding."[285] Structure was the tool the framers used to enshrine the separation-of-powers principle, and adjudicators dealing with that principle therefore need structural interpretation.

In his famous concurrence in *Youngstown*, Justice Robert Jackson wrote:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.[286]

& Tube Co. v. Sawyer, 343 U.S. 579, 588–89 (1952) (invalidating an executive order authorizing the Secretary of Commerce to seize steel mills).

[285] E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 508 (1989). Elliott further writes:

> The Constitutional Convention debated and voted on principles of constitutional structure, as reflected in a series of resolutions. . . .
>
> There is no question that we can, and should, draw meaning from the structural choices made by the Framers, as well as the choices made by others throughout our subsequent constitutional history, but we might as well make our constitutional fate turn on the entrails of birds so as to entrust the constitutionality of innovations in governmental structure to whether Gouverneur Morris and other members of the "Committee on Style" thought to put a particular word or phrase into their draft of the Constitution.

Id. at 524.

[286] *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Granted, Jackson writes this set of sentences after having dismissed the practice of originalism as futile and strange. *Id.* at 634 ("Just what our forefathers envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharoh."). But this passage, anthropomorphizing the Constitution, *id.* at 635 ("[w]hile [it] diffuses . . . [it] contemplates . . . [it] enjoins"), is hard to make sense of without at least some reference to the Framers who created "it." The Constitution does not "enjoin" or "contemplate." Jackson sneaks a kind of loose originalism in through the back door—appropriately so, I would argue, because structural glosses require a general understanding of motivation.

Justice Jackson implies—correctly, I think—that structural glosses are particularly important when it comes to "the art of governing." This kind of interpretation may be necessary to give weight to what Justice Breyer calls "democratic harms."[287] A violation of the separation of powers—like corrupt governance—is rarely experienced as a specific harm, almost always hurting society more in its indirect power than its direct force.[288] Unlike individual rights, the group rights accorded members of a democratic society must frequently come from structure and animating principles, rather than from particular clauses.

The anti-corruption principle, much like the separation-of-powers principle, motivated the Constitution; it was explicitly discussed throughout the Constitutional Convention; it was embodied in particular clauses and structures. The principle was both a cause and a method of construction. Finally, the anti-corruption principle was a reason for the ratification. The successful embodiment of the anti-corruption principle was boasted about by Hamilton, Madison, and others, and can fairly be said to be a reason that the states were willing to adopt the Constitution.

This gives the anti-corruption principle an added legitimacy for structural argument. The anti-corruption principle was a cause, a method, and a reason for adoption. The Constitution was not only intended to fight corruption, but it was adopted *because of* a promise that it would limit corruption. Therefore, the legitimacy of the Constitution depends on the anti-corruption principle to the extent the reasons for that legitimacy include the delegates' efforts to enter into a future binding contract, and our acceptance of the general ideas embodied therein.

There is historical precedent for this kind of approach because through the late nineteenth century the Court assumed something like a structuralist attitude toward corruption. The Court found the power in the form and structure of the Constitution and combined it with the Necessary and Proper Clause.

> If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power it is left helpless before the two

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[287] *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 355 (2004) (Breyer, J., dissenting) (discussing potential "democratic harm" resulting from "purely political 'gerrymandering'" of district boundaries).

[288] This approach can provide support for the anti-entrenchment arguments of Richard Pildes and others. *See, e.g.*, Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

great natural and historical enemies of all republics, open violence and insidious corruption.[289]

Although the counsel's brief stated that "[b]ecause there is no express power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted," the Court dismissed the argument that a specific clause was needed in order to find such a power.[290] Notably, the Court did not merely reject such a view; it dismissed it out of hand. The Court concluded that such a notion "destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed."[291] The Court went on to argue that the U.S. Constitution, "more than . . . almost any other writing" must be understood to imply congressional power to combat corruption and violence.[292] The implied anti-corruption principle in *Yarbrough* is that Congress shall have the power to protect the elections—on which its existence depends—from violence and corruption.[293] Other cases, most notably *Trist v. Child*[294]—holding that lobbying contracts should not be enforced as against public policy—reflect a similar attitude.

Those who might be most interested in a structural approach are the authors and advocates of several cases establishing that states have a constitutionally derived sovereign immunity, the right not to be sued without their own consent. This right is absent in the text of the Constitution, but has been discovered in its structure. It is "[i]nherent in the nature of sovereignty" that the sovereign be immune from liability without consent.[295] Advocates of sovereign immunity have openly abandoned textualism in these cases in favor of seeking postulates from "essential principles of federalism" and the role of "state courts in the constitutional design."[296] Sovereign immunity, in these cases, is a second-level unwritten principle derived from the first-level unwritten principle of federalism. Proponents of sovereign immunity have not offered anywhere near the same level of obsession with or discussion of this federalism principle, as compared to the anti-corruption principle, in, before, or after the Constitutional Convention. Their argument, however, has persuaded the Court.

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289 *Ex Parte* Yarbrough, 110 U.S. 651, 657–58 (1884).
290 *See id.* at 658.
291 *Id.*
292 *Id.*
293 *Yarbrough* has never been overturned. *See supra* text accompanying note 289.
294 88 U.S. 441 (1875).
295 THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 14, at 487; *see also* Seminole Tribe of Fl. v. Florida, 517 U.S. 44, 54 (1996); Alden v. Maine, 527 U.S. 706, 729 (1999).
296 *See generally* Young, *supra* note 276, at 1616–24 (discussing the *Alden* Court's forthright abandonment of textualism in state sovereign immunity cases).

For those persuaded by contextual history, the anti-corruption principle makes a far stronger claim than sovereign immunity. It was uniquely important as a motivating force behind the convening of the convention; second, it was constantly discussed, and embodied in the structure of the Constitution as evidenced by the hundreds of conversations; third, it was a motivator behind the ratifications; and finally, the anti-corruption ideas are critical to understanding the other words and phrases that define political institutions and political rights.

One would be right to be wary of too much structuralism, as it might be over-invoked to introduce almost any worldview held by the contemporaries of the Framers. That said, the anti-corruption principle can fairly be called a central motivating principle, unlike, say, the "House and Senate are two classes" idea, the "Freeholders are voters" idea (or even the political theory of faction pushed by Madison). All of these ideas had avid supporters, and showed up from time to time in the framing of the Constitution, but none of them are as embedded as the anti-corruption principle in the daily work of the Convention, and in the final structures of the Constitution. While the precise line between what defines a principle worthy of structural originalism and what does not could be hard to draw, I can imagine few other principles that were both so clearly motivating all of the Framers, and which so clearly made their way into so many parts of the Constitution. In other words, if structuralism has a place in constitutional interpretation at all, applying the anti-corruption principle is an appropriate, modest use of the method.

C. The Anti-Corruption Principle as Context

For those more focused on the text, a related—but different—method leads us to a different way of incorporating the anti-corruption principle. Concepts not in the Constitution can provide critical context for understanding the written words. "[T]o be worthy of the label, any 'interpretation' of a constitutional term or provision must . . . at least take seriously the architecture of the institutions that the text defines."[297] Taking seriously the architecture requires more than passing knowledge of what motivated the choice of architecture. Political corruption is context without which other specific words don't make sense; it is embodied in the text itself through other words that can't be understood without understanding corruption. The Framers' obsession with, and understanding of, political corruption makes sense of constitutional phrases like "of any kind whatever" in the Emoluments Clause, or "civil office" in the Ineligibity Clause.

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[297] Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1233 (1995).

Understanding corruption is helpful in interpreting what the framers meant by "Congress shall make no law abridging. . . ."[298] Corruption was among the Constitutional Convention delegates' greatest concerns. We cannot understand the First Amendment without understanding its context, and might suspect that a First Amendment that breathes at the expense of political integrity is probably not a faithful one. This context suggests that the Framers did not see political favors or the choice of political roles as a form of speech. How could the Framers support a First Amendment and support restrictions on who could run for office, thereby limiting the kinds of political speech available to the three-year citizen or the one-year inhabitant? How did they understand a Free Speech clause passed at the same time as a clause strictly refusing to allow any foreigner to give any gift ("of any kind whatever") to an American official? If the Framers considered the right to hear as part of the right to speak, did they (or would they) think of gifts as a kind of speech? Probably not. The anti-corruption context helps refine the meaning of the privilege of political speech. When the modern Court interprets the First Amendment's role in a thriving democracy without also introducing the anti-corruption elements of the Constitution, it is missing a core tool in understanding the First Amendment. It is part of a suite of tools—though not the only one—but its interplay with anti-corruption concerns is central to its understanding.

In the narrower field of election-related speech, an understanding of constitutional election law requires serious attention to the anti-corruption concern in order to understand the words that make up the constraints on electoral choice. The number of representatives, the times of elections, the nature of the relationship between the offices—all of these constrain political expression, and all have anti-corruption roots. When, in gerrymandering and census cases, the Court interprets these election clauses outside of the founders' political corruption obsession, they are missing meanings that might be available to them. The anti-corruption meaning of these clauses should not, of course, decisively answer any questions, but the absence of these meanings leads to a diminished understanding.

D. The Republican Objection

There are those who might still be wary of engaging the anti-corruption principle because of the world out of which it came. You might argue that we should not give credence to these ideas because corruption obsession comes out of a tradition—republicanism—with some very troubling features. Republicanism is often associated with a

298 U.S. CONST. amend. I.

vision of small, homogenous, political elite culture. The flip side of corruption—civic virtue—was largely understood as an elite attribute, and you might argue that whatever anti-corruption principle the Framers had, it was too closely intertwined with a republican philosophy in which the promises of democratic power were only reluctantly provided to non-elites, if at all. Many blacks were slaves; women, Jews, and Catholics could not vote; only white men with property had the franchise. The Framers suspected that people who worked for others—the non-yeoman poor—were incapable of citizenship because they imagined that their dependency upon others for their livelihood distorted their capacity for freethinking. You might argue that the Framers' ideas about corruption depended upon this very particular world-view, and either make no sense, or make dangerous sense, in a modern liberal democratic state. Furthermore, you might argue, the corruption principle attached to the republican world view of the era was very quickly jettisoned in favor of a more liberal democratic approach to democracy—and thank goodness. The Constitution we inherited, you may say, lived only a few days as a republican document, and we have happily moved past all of its republican roots.

I have a few responses to this important challenge, assuming, for the sake of argument, that the charges are rightly made, and that the worst caricatures of republicanism merit attention. First, the corruption concern has a distinct history, separate from that of republicanism. In my forthcoming book,[299] I trace the history of the concept of corruption and show that the Framers' ideas about corruption survived long past the republican era, into the Jacksonian era and the beginning of populism. As late as the 1870s, the Court was referring to the same fundamental anti-corruption principle that animated the Framers.[300]

Furthermore, what may seem like odd features—for an academic steeped in "hard nosed", interest group, rational-choice culture—are actually very persuasive to the man-on-the-street. Corruption *is* a serious perpetual threat to democracy; citizens *can* be corrupt; and corruption is necessarily a description of the *moral attitude* of an act, not a description of a crime. The discussion of corruption is rarely limited to illegal acts, even in our very modern and very mass democracy.

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[299] TEACHOUT, *supra* note 1.

[300] *See, e.g.*, Trist v. Child, 88 U.S. (21 Wall.) 441, 450 (1875). Citizens' virtue was the "foundation of a republic," the Court explained. Citizens have an important public office to fill. "They are at once sovereigns and subjects." While public servants are obliged to be "animated in the discharge of their duties solely by considerations of right, justice, and the public good," a citizen has a "correlative duty." A citizen, according to the Court, is "bound to exhibit truth, frankness, and integrity" in his interactions "with those in authority." "Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong." *Id.*

People—our actual citizens—are used to the idea that they take on special responsibilities once they enter the public sphere, whether they do so as an elected official or a non-elected citizen. The idea that citizens are constrained by special responsibilities in public expression is held by the majority of traditions, including the modern Rawlsian ideas about public reason and is defended by the modern advocates of deliberative democracy, such as Amy Guttman. There are many ways to fail these responsibilities; one of them is corruption, when people use the privileges of public power to enrich themselves without considering the public good. This idea is regularly invoked when people talk of "corrupt lobbyists" and "corrupt federal contractors." These are non-elected citizens who people condemn for legal but venal self-seeking abuse of their public rights to petition the government.

Finally, those who would dismiss the Framers' structural intentions and structural meaning as quaint will also have to throw out one of the most important doctrines in our jurisprudence. Just as there is no separation-of-powers clause, and we still constantly refer to a separation-of-powers principle, no anti-corruption clause need exist for the principle to reveal itself—and it would be weird to have one. It is difficult to imagine what the Framers might have done to better enshrine an anti-corruption principle in the Constitution without sounding ridiculous or completely out of keeping with the syntax of the document.

Conclusion

Justice Stevens suggested in a 2006 dissent that it was worth at least considering what the Constitution's Framers might think of corruption in our current polity.[301] This Article argues that we should take that question seriously, and that a failure to take it seriously is bad history, leads to unstable jurisprudence, and may lead to unstable public policy.

In cases involving gerrymandering, patronage, earmarking, lobbying, and corporate political speech, Justices are often left searching for a rudder to keep their debates from leaving the text and meaning

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[301] Randall v. Sorrell, 126 S. Ct. 2479, 2511 (2006) (Stevens, J., dissenting). Justice Stevens stated:

> I am firmly persuaded that the Framers would have been appalled by the impact of modern fundraising practices on the ability of elected officials to perform their public responsibilities. I think they would have viewed federal statutes limiting the amount of money that congressional candidates might spend in future elections as well within Congress' authority. And they surely would not have expected judges to interfere with the enforcement of expenditure limits that merely require candidates to budget their activities without imposing any restrictions whatsoever on what they may say in their speeches, debates, and interviews.

Id.

of the Constitution and entering academic debates about the proper role of money and self-interest in politics. There is no easy answer or savior for these tough questions, but the anti-corruption principle can, at a minimum, provide a shared starting point, one grounded in history and structure.

My final goal in this Article is to set up the next question: how does the anti-corruption principle *work*—what will it *do*? In this Conclusion, I'd like to offer a tentative answer, hoping that this is just the beginning of a rich debate.

Imagine that in 2009 the Supreme Court gets a case involving the new "Open the Books and Shut the Revolving Door" statute. The legislation makes it illegal for a lobbyist ever to run for Congress or work for a member of Congress, and vice versa, and requires all lobbyists to file weekly reports on their activities. A former member of Congress who has recently started working for Patton Boggs brings a First Amendment challenge against both provisions.

A court recognizing the anti-corruption principle would start from a specific set of grounding ideas. Instead of beginning with Free Speech, a political process case would begin with an affirmation that "corruption is one of the greatest threats to our democracy, and the founding fathers believed it was essential for each branch to use whatever tools at its disposal to limit corruption in the other branches." History would lead the parade into the modern concern—Madison, Hamilton, and the Convention debates would be heavily cited. If one of the provisions at issue was one in which corruption was debated, those debates would be trotted out. If it was not, those debates would be trotted out in order to better understand the provision at issue.

Second, the Court would consider, in examining the provisions, what impact this might have on the civic incentives of prior members of Congress. While in modern courts the citizen is largely victim, or has only responsibilities in the arena of speech, the citizen in a court that gave corruption its due would have her own responsibility to be honest in interactions with the government. Third, the discussion of corruption would start with a discussion of the duty of all citizens not to take advantage of their public privileges. The citizen in these cases would not be the victim, but the accused—and the Court would consider the particular provision in terms of its impact on the citizen. The moral problem of corruption would be discussed.

Fourth, the Court would have to differentiate its constitutional corruption from criminal law corruption. It would discuss the subtle ways that money can corrupt the public servant or the citizen considering a petition to the government. It would explore the fragile strength of our representatives and give weight to those who would

want to protect them. It would look at the incentives not only of those who are tempted but those who are tempting—like policymakers who realize that the pushers may be as big a problem as the junkies, and the Court would look at ways to diminish the corrupt spirit of elites who would use our government solely as ends to increase their wealth.

A case recognizing the anti-corruption principle would also note the problems with past decisions, even those that are sympathetic. For example, it would argue that unequal access arguments, while important, miss the larger fact of corruption. The access arguments largely assume, if they rest too heavily on equality concerns, that the representative (or clerk or agency employee) being accessed remains the same before and after these encounters. The information in the representative's head is different, but the structure of the brain remains the same. What is missing in the access arguments is that these encounters change the shape of the spirit, not just its content. Armed with these understandings, the Court would then consider whether these concerns—these mortal threats—justified Congress's efforts to shape our polity in different ways.[302]

The anti-corruption principle should work very much the way the separation-of-powers principle "works" inside other, similar cases. It is a freestanding principle, worthy of weighing directly against other freestanding principles: in *Buckley* redux, the formulation would not be that corruption is a compelling state interest that might, in some cases, justify restrictions on speech, but that there are two competing, equally important constitutional interests at stake: free speech and the

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[302] The Court could use the opportunity to reconsider whether some campaign donations are themselves a form of corruption. Given how anxious the Framers were about Benjamin Franklin's miniature painting and Arthur Lee's snuffbox, one might well argue that the Constitution allows Congress to make campaign donations illegal, as another impermissible form of gift-giving. Closed cases might be given some room to be re-opened. Courts would give more deference to Congress's efforts to do whatever it could to protect the public servant inside every member of Congress. Justice William Douglas, in a 1941 dissent, argued for robust Congressional powers in limiting corruption in the electoral process. *See* United States v. Classic, 313 U.S. 299, 330 (1941) (Douglas, J., dissenting). He argued:

> The fact that a particular form of pollution has only an indirect effect on the final election is immaterial. . . . [T]he important consideration is that the Constitution should be interpreted broadly so as to give to the representatives of a free people abundant power to deal with all the exigencies of the electoral process. . . . [T]he Constitution should be read so as to give Congress an expansive implied power to place beyond the pale acts which, in their direct or indirect effect, impair the integrity of Congressional elections. For when corruption enters, the election is no longer free, the choice of the people is affected.

Id. Justice Douglas argued that this view was essential to understanding the Constitution as an "instrument of government" that was "designed not only for contemporary needs but for the vicissitudes of time." *Id.* This Article follows Justice Douglas's dissent, and the author hopes that Justices yearning for more strength to bring to the corruption battle will find that the Framers have provided them a historical, textual ballast.

anti-corruption principle. Inasmuch as the anti-corruption principle can seem intractable, the shape it would take, much like "cruel and unusual punishment," would be tethered to both the past and the present as an evolving standard.

As I intimated at the beginning, I am sympathetic to the claims of soft originalism, but I am primarily motivated by a conviction that the Framers were right to be so concerned with corruption, and it is a concern we ought attend to. I believe a citizenry with some sense of active obligations to honesty and public dealing when encountering our public institutions is essential to self-government. Our Framers knew that, because they themselves saw how government—even a well-designed government with distinct branches—could turn in on itself and become weak and ineffective through corruption.

A worthwhile democracy cannot be sustained under the active efforts of lobbyists and campaign donors to force policy, pressures that are only increasing—these are exactly the kind of corrupting powers that the Framers imagined, even if they imagined them in slightly different shape (wealthy foreigners instead of wealthy corporations, criminal bribes instead of campaign contributions). In other words, the Framers' views should be given weight because structural originalism requires it, but also because the Framers were politically wise in the ways of corruption, and we would do well to learn more from them. It is naïve to think—as some Justices appear to do—that the democratic experiment can work with only self-serving public servants.

There's reason to believe that the anti-corruption principle could "take" easily—that there's a hunger for historical ballast. Justices like Justice Souter have an intuitive relationship to the evocative word that they will not release despite the battering ram of Justice Scalia's sharp-minded dissents. Justice Souter argues that political integrity has a "value second to none in a free society."[303] He gives great value to political integrity—"second to none" means that it is at least as valuable as—if not more valuable than—free political speech, the right to associate, due process of law, and certainly privacy. (Justice Souter presumably uses the word "value" with care here—that it is valuable does not mean it has greater or equal constitutional strength to these ideals, but that, in his mind, it is at least as important.) He defines political integrity broadly: "the capacity of this democracy to represent its constituents and the confidence of the citizens in their capacity to govern themselves."[304] He shifts from the model in which citizens are victims into one in which they are actors, albeit subtly. Political integrity is threatened by the power given wealthy interests, and the perception of people that they do not have the character or capacity to

[303] FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2689 (2007).
[304] *Id.*

control the federal government. After an extensive discussion of the history of campaign finance laws, Justice Souter returns to the discussion about integrity:

> This century-long tradition of legislation and judicial precedent rests on facing undeniable facts and testifies to an equally undeniable value. Campaign finance reform has been a series of reactions to documented threats to electoral integrity obvious to any voter . . . . Neither Congress's decision nor our own have understood the corrupting influence of money in politics as being limited to outright bribery or discrete quid pro quo; campaign finance reform has instead consistently focused on the more pervasive distortion of electoral institutions by concentrated wealth, on the special access and guaranteed favor that sap the representative integrity of American government and defy public confidence in institutions. From early in the 20th century through the decision in McConnell, we have acknowledged that the value of democratic integrity justifies a realistic response when corporations and labor organizations commit the concentrated moneys in their treasuries to electioneering.[305]

This dissent implicitly connects democratic integrity to corruption, and explicitly rejects the limiting definitions of corruption contained in the majority opinion. However, the dissent never goes further than this in an exploration of the meaning of corruption, and starts its conversation "from early in the 20th century."[306] The bulk of the substantive dissent is an unfavorable discussion of the majority opinion's conclusion that context cannot be considered in determining what constitutes an election.

At the end of the dissent, one can hear something approaching despair in Justice Souter's words—"The price of [the majority opinion] seems to me to be a high one. . . . [T]he understanding of the voters and the Congress that this kind of corporate and union spending seriously jeopardizes the integrity of democratic government will remain. . . . I cannot tell what the future will force upon us . . . ."[307]

Justice Souter's dissent intuitively connects to the Framer's vision, but without history he lacks the rhetoric to push through the majority opinion's worldview. He cannot ground the "value" of democratic integrity in opinions or history, and struggles to tear down the high walls built around a limited definition of corruption in the majority opinion. He does not ask what the relationship between non-election related ads and democratic integrity might be or even consider the alternative argument that corruption might happen outside of elections. He does not, in other words, give substance to the anti-corrup-

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305 *Id.* at 2697.

306 *Id.*

307 *Id.* at 2704–05.

tion interests—the army is fighting against a ghost with a little more soul, but it's still a ghost. The history outlined in this Article should give Justice Souter, and all of us concerned about structural failures in democratic processes, something more to hold onto than his own words.