

# NEOLIBERAL POLITICAL LAW

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## I

### INTRODUCTION

In the last twenty-five years, the Supreme Court has struck down all limits on campaign expenditures, some limits on campaign contributions, state experiments in open primaries, and the central feature of the Voting Rights Act. The decisions have not been popular, and, in many cases, the reasoning has been quite inventive and has veered away from precedent. The question behind this article is whether there is an underlying ideology connecting these decisions.

One possibility is that these cases are simply a function of rigorous application of doctrinal commitments. The Justices who led the charge on these cases might believe, as an outgrowth of their theories of constitutional adjudication, in a fairly absolute First Amendment and a rigorous Tenth Amendment. Accordingly, it might be that the centerpiece of the Voting Rights Act and the centerpiece of the campaign-finance laws had to be sacrificed because of intellectual integrity. Alternatively, one might read this history through a cynical lens adopted by some Court critics: The Court is simply exercising raw power. If you take this view, there is no “Roberts Court”; there is something more like a “Kennedy–Roberts alliance” made up of five partisan Justices (Roberts, Kennedy, Alito, Scalia, and Thomas) who use their power to benefit those whom they perceive to be on their team. In this version of recent history, the Kennedy–Roberts alliance think the Voting Rights Act hurt Republicans, so they used invented doctrine to strike it down; they think that fewer restrictions on corporate speech cause Democrats to lose at the polls, so they have struck down corporate expenditure rules. Another, related possibility is that the members of the Kennedy–Roberts alliance are driven by racial, ethnic, or class concerns. The “us” and “them” within the Court are not political teams, but factional ones.

A third possibility is that the Justices are neither doctrinal nor partisan nor group-defending, but driven by an ideology—by something like neoliberalism. In this possibility, the Justices have used their power to build a political society around general principles of politics, persons, and government with which they align. The members of the Court have a background set of political philosophies about government itself that drive these decisions.

If this possibility is the best explanation—or even part of the explanation—

then the task here is to explain that ideology. What do recent election-law cases suggest about the way government and politics should work? Do Justices Roberts, Kennedy, and Alito believe that democracy is a good way to improve the moral character of citizens, to increase the flow of information to decisionmakers, and to lead to greater peace and stability? Do they believe that power should be primarily allocated to the public, or is the public a check on the exercise of the power of elites? Do they have a theory of power?

This investigation cannot help but be a form of ideological palace intrigue focused on the head of the Court: “What does Justice Roberts really think about democracy and his own role in it?” The texts are few, and the writers are even fewer—just a dozen men and women over the last twenty-five years have struck down laws supported by a broad majority of Americans.<sup>1</sup> I regret that imbalance. I find nothing particularly interesting about the minds or theories of these men and women, except inasmuch as those with power are always interesting. But if these dozen men and women are aggressively changing the rules of the American polity, it is worth exploring what they think government should look like. Furthermore, they are not men or women outside of their time, but part of it, and symptoms—as well as causes—of contemporary ideology.

This article, besides being royalist in its focus, is also speculative. One of the more prominent features of the Kennedy–Roberts alliance election-law opinions is how short, ahistorical, and formal they are. The effort to find a background theory of politics connecting *Shelby County v. Holder*,<sup>2</sup> *Citizens United v. FEC*,<sup>3</sup> and other landmark cases is necessarily speculative. Any positive vision of politics—understood broadly as how power should be organized—comes through in glimpses. The ideas largely grow from the negative space left in opinions and in descriptions of the market. Government is often described negatively—in terms of things that politics does badly and things that politics should not do. For example, Justice Roberts wrote in a recent opinion that “[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.”<sup>4</sup> But he does not elsewhere explain what the objectives or hallmarks of democratic government are. All the reader gets are glimpses, shadows, adjectives, ellipses, and guesses instead of a robust theory of government, politics, and power.

In this article, I look at four features that might underpin the ideology of the Kennedy–Roberts alliance. The first is complacency about the threat of internal democratic dissolution. This feature is revealed by the way in which the Kennedy–Roberts alliance has weighed First Amendment speech interests

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1. See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Buckley v. Valeo*, 424 U.S. 1 (1976).

2. 133 S. Ct. 2612 (2013).

3. 558 U.S. 310 (2010).

4. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010) (quoting *Bowsher v. Synar*, 478 U.S. 714, 736 (1986)).

against the threat of corruption, as compared to other threats. A lack of concern about internal democratic dissolution is an unusual jurisprudential characteristic that is at odds with both classical liberalism and the Chicago school of economics.

Second, the opinions show a surprising lack of commitment to federalism, suggesting that the Kennedy–Roberts alliance’s federalism cases are more about taking certain decisions away from democratic choice rather than relocating those decisions in the states. Third, despite rhetoric about a wide-open marketplace, the opinions endorse a vision of a regulated political marketplace, unregulated only in regards to the spending of money. Fourth, and finally, the cases suggest that the role of a person in a democratic society is primarily that of a government-trusting self-interested consumer, instead of a skeptical citizen, and that the job of the Court is to protect the material condition of the person, as opposed to her political position.

Perhaps what is most striking is that the vision of politics that emerges from these cases is not actually federalist in the sense of decentralized power, nor is it laissez faire. If the political law of the modern Court is driven by ideology, it is an ideology that gives states more power to pass their own laws but less power to define their own political experiments and their own polities. A good polity is imagined, it might appear, as a public of relatively passive consumers, who are to be engaged with their government sufficiently so as to not lose faith in it, but no more. It is a market run by a few powerful players, who are responsible for the distribution of goods, and an elite class—the Court—responsible for policing public morality.<sup>5</sup> I call this ideology “postpolitical” democratic theory—a vision of democracy without a major political role for the citizens within it. Whether or not it is also neoliberal I leave to the reader.

Before I begin in earnest, a note on this article’s protagonists. Who are they, really? I have struggled with what to call the “they” whose ideology is being examined: they are neither a precise set of people, nor do they nicely fall into the timeline of various ascendancies; the Court’s ideological shift precedes John Roberts becoming Chief Justice. Ultimately I have settled, with some dissatisfaction, on calling “them” “the Kennedy-Roberts alliance.” Many of the cases I discuss were decided after Justice Kennedy joined the Court in 1988, and he joined the majority in all of them. He has also endorsed the logic in all of the relevant cases that preceded his tenure. At the same time, Chief Justice John

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5. As former Duke Law School Dean Paul Carrington wrote about the First Amendment, the Constitution has become a tool for replacing self-government with elite government:

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

Paul Carrington, *Our Imperial First Amendment*, 34 RICH. L. REV. 1167, 1170 (2001).

Roberts has clearly played a role in accelerating these tendencies and shows some of the greatest impatience and formalism.

## II

### THE ROLE OF FEDERALISM

The Court's election-law federalism jurisprudence suggests that it perceives the federalism principle as more about limiting federal power than granting power to the states. On the one hand, some election-law cases rely heavily on federalism. For example, in order to strike down the Voting Rights Act in *Shelby County v. Holder*, Justice Roberts created an "equal sovereignty principle," which has weak or no grounding in text or history.<sup>6</sup> The idea of the "equal sovereignty principle" is that Congress may not have laws that treat states differently. The Court held that the formula that determined which states need preclearance for voting changes failed to treat states as equal sovereigns.<sup>7</sup> Such a failure constituted a violation of the Tenth Amendment.<sup>8</sup> "The [Voting Rights Act] differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.'"<sup>9</sup> As Professor Rick Hasen has argued, the radicalism of the reasoning in *Shelby County* cannot be overstated.<sup>10</sup> In the words of Michael McConnell, the idea of equal sovereignty is "made up. . . . It might be an attractive principle, but it doesn't seem to be in the Constitution."<sup>11</sup>

A similar inventiveness was on display in *Alden v. Maine*, where the Court considered a state's authority to allow American Indian tribes to sue the state. In *Alden*, Justice Kennedy openly ignored both doctrine and text, instead creating a principle he found "implicit in the constitutional design."<sup>12</sup>

Accordingly, after reading *Shelby County* and *Alden*, one might conclude that equal sovereignty and Tenth Amendment jurisprudence, although textually weak, reflect a genuine ideological commitment to decentralized power. However, in election law more generally, the Court has shown little deference to the rights of states to organize their political societies in the way they want. There is essentially no federalism analysis in any cases regarding campaign-finance law, nor in cases involving political parties. In *California Democratic Party v. Jones*, the Court held that California had no right to experiment with its political structures.<sup>13</sup> The question in that case was whether California could use a "blanket" primary. The word "federalism" did not even appear in the

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6. *Shelby County*, 133 S. Ct. at 2623.

7. *Id.* at 2631.

8. *Id.* at 2623–24.

9. *Id.* at 2621 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

10. See Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. (forthcoming 2014), available at <http://ssrn.com/abstract=2291612>.

11. *Whose Term Was It? A Look Back at the Supreme Court*, NAT'L PUB. RADIO (July 5, 2013), <http://www.npr.org/2013/07/05/198708325/whose-term-was-it-a-look-back-at-the-supreme-court>.

12. *Alden v. Maine*, 527 U.S. 706, 729 (1999).

13. *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

majority opinion, which struck down the state-referendum-passed law.<sup>14</sup> Although Justice Scalia, in his majority opinion, mentioned that “states have a major role to play in structuring and monitoring the election process,” he did not fully engage in a theory of democratic devolution.<sup>15</sup> In *Timmons v. Twin Cities Area New Party*, discussed below, the term “federalism” also did not appear.<sup>16</sup> Similarly, neither a federalism nor a state-sovereignty analysis appeared in *Randall v. Sorrell* or *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, both of which were cases about states experimenting with different ways to finance elections.<sup>17</sup>

If the Court were serious about federalism as a source of state empowerment, it would seem that states’ sovereignty would at least encompass the power to create the political structures that it wanted. Justice Scalia, in concurring in *Crawford v. Marion County Election Board*, a case upholding Indiana’s voter ID law, accused the dissent of encouraging “detailed judicial supervision” of state election-law practices—something he openly supports in the campaign-finance arena.<sup>18</sup> Instead, federalism appears to be less about empowering states as laboratories and more about the limitation of democratic choice. Seen through this lens, federalism may primarily be a tool to take certain items outside the scope of popular discussion and popular control.

### III

#### THE REGULATED MARKET

The Kennedy–Roberts alliance has often described its commitment to an open marketplace of ideas. Indeed, one might get the impression from *Citizens United* that the Court does not think that the judiciary or the legislative branch should interfere with or structure the political marketplace. However, many commenters have identified holes in this open-marketplace premise.

The Court’s role in protecting what it perceives to be a marketplace of ideas is rhetorically grounded in the First Amendment. Justice Alito has noted the “close connection between our Nation’s commitment to self-government and the rights protected by the First Amendment” and has described the First Amendment as a market amendment. “The First Amendment creates ‘an open marketplace’ in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference.”<sup>19</sup> The job of the market is to enable a wide-open choice between competing theories of what is true in the world and what should be done about those truths. Similarly, Justice Roberts has noted: “In a democracy,

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14. *See id.*

15. *Id.* at 572.

16. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

17. *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2808 (2011); *Randall v. Sorrell*, 548 U.S. 230, 240 (2006).

18. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 208 (2008) (Scalia, J., concurring).

19. *Knox v. Serv. Emps. Int’l Union*, 132 S. Ct. 2277, 2288 (2012).

campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the ‘unfettered interchange of ideas’—not whatever the State may view as fair.”<sup>20</sup> The em dashes tell the story: Freedom is freedom to interchange ideas. The market is the evidence of liberty. This self-described open-market idea has been recognized by its supporters as well as its critics: “*Citizens United* advances an understanding of a *laissez-faire* marketplace of ideas.”<sup>21</sup>

However, the nature of the market that the Court has actually endorsed is neither open nor unregulated. In *Buckley v. Valeo*, the Court held that “the central purpose of the Speech and Press Clauses was to assure a society in which ‘uninhibited, robust, and wide-open’ public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish.”<sup>22</sup> However, the subsequent interpretation of “uninhibited, robust, and wide open” has been less focused on inhibition, robustness, and openness and more focused on whether or not there is a market for political power with a limited number of clear choices among which the consumer–citizen may select.

The Kennedy–Roberts alliance is openly committed to the importance of a stable two-party system instead of a wide-open party model. The goal of parties is to create a menu of options—but, ideally only two—that are coherent to the public. Accordingly, the rule of thumb for political-party litigation is—with a few exceptions—that if a major political party is part of the litigation and the case relates to the rights of political parties, the major political party wins.<sup>23</sup> That is true whether the major political party is opposed by the state, candidates, or minor political parties.<sup>24</sup> As Justice O’Connor said in *Davis v. Bandemer*, “There can be little doubt that the emergence of a strong and stable two party system in this country has contributed enormously to sound and effective government.”<sup>25</sup> The Court has justified the two-party system as a stable institution that provides a good shorthand for uninformed voters.<sup>26</sup>

In *California Democratic Party v. Jones*, the Court recognized the right of the major parties to exist as ideologically coherent entities as one of the most important associational rights and implied that the country’s democratic system would be jeopardized if a limited number of major political parties did not

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20. *Bennett*, 131 S. Ct. at 2826.

21. Robert L. Kerr, *What Justice Powell and Adam Smith Could Have Told the Citizens United Majority*, 9 FIRST AMEND. L. REV. 211, 226 (2010).

22. *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

23. See *Jones*, 530 U.S. 567; see also SAMUEL ISSACHAROFF ET AL., *The Role of Political Parties*, in *THE LAW OF DEMOCRACY* 186 (4th ed. 2012).

24. See *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986).

25. *Davis v. Bandemer*, 478 U.S. 109, 144–45 (1986).

26. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997).

represent clear ideological positions.<sup>27</sup> The law in question in *Jones* allowed all people, regardless of party affiliation, to vote for any candidate in any party primary. It was struck down as a violation of the First Amendment.<sup>28</sup>

In *Timmons*, the Court upheld a state fusion ban.<sup>29</sup> The ban made it illegal in Minnesota for a party to nominate someone for office who had been nominated by another party. The ban was passed as part of a sweeping effort by the major political parties to reduce the power of minor parties and to limit the scope of options in the political marketplace.<sup>30</sup> Nonetheless, the Court held that the state had a strong interest in limiting fusion because it could lead to voter confusion and factionalism.<sup>31</sup> The majority opinion implicitly endorsed a two-party system: “[T]he States’ interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system . . . .”<sup>32</sup>

On the other hand, Justice Stevens, in dissent, said that “the fact that the law was both intended to disadvantage minor parties and has had that effect is a matter that should weigh against, rather than in favor of, its constitutionality.”<sup>33</sup> Whether or not Stevens was correct, his critique pointed out that the majority of the Court is actually supportive of a highly regulated duopoly in the political sphere. A “strong and stable” two-party system enables just enough consumer choice that the consumer–citizens may express themselves and discipline bad actors.<sup>34</sup> Accordingly, the Court has struck down laws, like that in *Jones*, that have undermined the duopoly, and has upheld those that have reinforced it. The Court has claimed to do so to encourage stability and diminish confusion and factionalism among voters. Although all of these are indeed real democratic values, the Court has invoked them in order to achieve regulated instead of totally “unfettered” markets.<sup>35</sup>

#### IV

##### INDIFFERENCE TOWARDS CORRUPTION

Classical liberalism saw corruption as a fundamental threat to liberal

27. 530 U.S. 567, 582 (2000).

28. *Id.* at 586.

29. *Timmons*, 520 U.S. at 354.

30. DOUGLAS J. AMY, BEHIND THE BALLOT BOX: A CITIZEN’S GUIDE TO VOTING SYSTEMS 185 (2000).

31. *Timmons*, 520 U.S. at 367.

32. *Id.*

33. *Id.* at 378.

34. *Id.*; see also *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 107 (1990) (Scalia, J., dissenting) (“The stabilizing effects of such a [two-party] system are obvious.”).

35. Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 430 (2013) (“The dominant parties in a two-party system should instead be understood as, in effect, publicly chartered corporations with a constitutionally conferred public function: to integrate voters and interest groups into coherent, competitive coalitions with respect to the government at issue, thereby enabling low-information voters to obtain representation and to hold the government accountable.”).

political society.<sup>36</sup> Midcentury Chicago school of economics placed rent-seeking, a variation of corruption, at the center of its reasons for decreasing the size of government.<sup>37</sup> Although neoliberalism is already associated with indifference towards various social issues, such as environmental protection and poverty,<sup>38</sup> perhaps at least neoliberal political law should also be associated with indifference towards corruption.

This indifference has been exemplified by the Kennedy–Roberts alliance, which has treated corruption as a relatively small risk and has never embraced the rent-seeking rhetoric explained below. Indifference towards corruption may indicate skepticism about democracy; if one is not particularly prodemocratic, then threats of corruption to democratic values like representative equality are not serious threats. Alternatively, the indifference may reflect a genuine complacency that comes from an ideological optimism: If democracy is deeply, profoundly stable, then corruption is not a serious threat. Finally, it may simply reflect a fundamental incompatibility between the idea of corruption—which involves obligations to act in the public interest—and the idea of the person as a consumer as opposed to a citizen. This part discusses this question and gives two possible explanations for the peculiar indifference the Court seems to have towards corruption.

In John Locke’s discussion on the dissolution of government, Locke argued that the “fountain of public security” was threatened by anyone using her wealth to “corrupt the representatives and gain them to his purposes,” or using “solicitation, threats, promises, or otherwise” to entice representatives to promise future enactments.<sup>39</sup> The Framers of the Constitution imported this world view. They were “perpetually threatened by corruption.”<sup>40</sup> Corruption constituted a fundamental “conspiracy against liberty.”<sup>41</sup> The fear of corruption was “near unanimous,” and the sense was that corruption needed to be “avoided, that its presence in the political system produced a degenerative effect.”<sup>42</sup> At the Constitutional Convention, George Mason said that “[i]f we do not provide against corruption, our government will soon be at an end.”<sup>43</sup> The framers were anxious about the “torrent of corruption, which like a general flood, has deluged us all” coming to America.<sup>44</sup> Franklin and Washington both

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36. See GEORGE H. SMITH, *THE SYSTEM OF LIBERTY: THEMES IN THE HISTORY OF CLASSICAL LIBERALISM* 22 (2013).

37. See CHARLES K. ROWLEY ET AL., *THE POLITICAL ECONOMY OF RENT-SEEKING* 3 (1989).

38. See Wendy Brown, *Neo-liberalism and the End of Liberal Democracy*, 7 *THEORY & EVENT* 1, 3 (2003) (explaining neoliberalism in contrast to neoconservative administration at the time).

39. JOHN LOCKE, *Of the Dissolution of Government*, in *THE SECOND TREATISE ON CIVIL GOVERNMENT* 114 (Prometheus Books, 1986).

40. J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT* 507 (1st ed. 1975).

41. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* xiii (1992).

42. James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 *J. POL.* 174, 181 (1994).

43. 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 392 (Max Farrand ed., 1911).

44. BAILYN, *supra* note 41, at 131.



predicted a fairly quick end to the republican project because of corruption.<sup>45</sup>

This fear of collapse outlasted the Revolutionary era and was present in the jurisprudence of the late nineteenth century. It was part of classical liberalism, which assumed representative self-government was fundamentally fragile and threatened. In *Ex Parte Yarbrough* in 1884, the Court held that the right to protect against violence and corruption was inherent in any government because, without that power, government would not exist.<sup>46</sup> Fifty years later, in the 1921 case *Newberry v. United States*, Justice Pitney harped on the central fragility of the state.<sup>47</sup> He insisted that Congress not be left without the power to regulate primary elections to minimize threats of corruption.<sup>48</sup> He argued that Congress must be able to protect “the very foundation of the citadel” from “sinister influences.”<sup>49</sup> In a 1961 challenge to a broadly drafted conflict-of-interest statute, the Supreme Court upheld the statute because the self-interested use of public offices “endangers the very fabric of a democratic society.”<sup>50</sup> The fear of internal corruption leading to democratic collapse has run throughout the dissents in the *Buckley* line of cases, as well as in a few opinions—such as *Austin v. Michigan Chamber of Commerce* and *McConnell v. FEC*—that have taken a broader view of corruption.<sup>51</sup>

But the Kennedy–Roberts alliance has not been concerned about corruption or democracy being undermined by self-interested actors. Stability, unlike threat, is expressed in absences. For example, if one is not worried about infidelity or conflict ending a marriage, then neither infidelity nor conflict arises in describing the marriage. Likewise, more confidence in the basic stability of a liberal democracy means fewer discussions of threats to that democracy. Consistent with that confidence, the majority opinions by the Kennedy–Roberts alliance have been free of any hand-wringing about the nature of democracy. The closest that Kennedy has come to addressing a threat to democracy was during a summary conclusion in *Citizens United*, where he stated that “[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.”<sup>52</sup> His logic was that citizens take the fact that money is spent as evidence that they have political strength.<sup>53</sup>

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45. *Id.* at 136.

46. *Ex parte Yarbrough*, 110 U.S. 651, 657–58 (1884).

47. *Newberry v. United States*, 256 U.S. 232 (1921).

48. *Id.* at 258.

49. *Id.* at 288–90.

50. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961).

51. *See McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003) (holding that limits on soft money expenditures on campaigns was valid, and that regulation on campaign advertisements by corporations and unions was narrowly tailored to the government’s interest); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (holding that a Michigan law limiting corporate expenditures to political candidates was narrowly tailored to its goal and did not violate the Equal Protection Clause).

52. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 360 (2010).

53. This argument is a difficult one with which to grapple—the fact that money is spent might, theoretically, make citizens feel good that they are so important, but the question is not the spending of money but the perception of influence. How can the perception of spenders’ influence make a citizen

Some of the Court's opinions have even demonstrated impatience with the idea that citizens should be troubled with claims of corruption. Consider the history of *Federal Election Commission v. Wisconsin Right To Life, Inc.*, a 2007 Supreme Court case. At issue was a 2000 law that was designed to draw lines between electoral activity and nonelectoral activity.<sup>54</sup> The law intended to solve the problem of the public getting inundated with privately funded advertisements just prior to elections.<sup>55</sup> It was legal to run any ad so long as it did not say "vote for," "vote against," or something equally blunt.<sup>56</sup> The law was challenged by Wisconsin Right To Life, Inc., a nonprofit ideological advocacy corporation.<sup>57</sup>

People worried that the ads were corrupting candidates.<sup>58</sup> To see how, imagine a candidate for Senate in Missouri in a close race; if she knew that the Chamber of Commerce could run an ad naming her, and saying bad things about her, right up to the election, she might be wary of supporting bills that the Chamber of Commerce opposed, even if the majority of her constituency favored it. The ads at the center of *Wisconsin Right To Life* were called "sham" because they were really designed to shape elections, even though they were purportedly just about calling those in power to account.<sup>59</sup> So Congress, after years of cross-partisan haggling, proscribed ads that named a candidate within a particular time period before an election.<sup>60</sup> After that, a corporation, or any person or entity, could not name a candidate in an ad right before an election, whether or not it said "vote for" or something similar.<sup>61</sup>

The law was initially upheld by the Court in 2003 but then struck down in 2007.<sup>62</sup> In the opinion striking down the law, Justice Roberts rejected both Congress's policy and the reasoning of the Court from four years prior.<sup>63</sup> The opinion reads like a clean, formal, impatient screed. Justice Roberts, exhibiting formality, relied on a strict construction of corruption—quid pro quo—and then determined that there was no quid pro quo and therefore no value against which to weigh the First Amendment.<sup>64</sup> Further, demonstrating his impatience, Roberts, referring to the claim that the ads were corrupting, wrote: "Enough is enough."<sup>65</sup> Years of congressional work, in response to public outcry, were all dismissed with this three-word gesture. This impatience reflects Justice Roberts'

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feel like she has ultimate influence?

54. Fed. Election Comm'n v. Wisconsin Right To Life, Inc., 551 U.S. 449, 455–56 (2007).

55. See *id.* at 522–24 (Souter, J., dissenting).

56. *Id.* at 456.

57. *Id.* at 458.

58. See *id.* at 478.

59. See *id.* at 498.

60. See *id.* at 456.

61. See *id.*

62. *Id.* at 460–61.

63. *Id.* at 457–61.

64. *Id.* at 476–78.

65. *Id.* at 478.

sense that the problem Congress was grappling with was not (unlike, for instance, terrorism) a real problem.

To that end, terrorism cases help highlight the Court's indifference towards corruption. In those cases, the First Amendment has been more carefully weighed against the threat of terrorism than it is formally treated as an absolute value. The cases show that Justices Kennedy, Roberts, Alito, Scalia, and Thomas use the First Amendment differently when they perceive a genuine countervailing interest, a concept that appears to include terrorism but not political corruption. In *Holder v. Humanitarian Law Project*, those five Justices (joined by Justice Stevens) upheld a statute that banned contributions to organizations designated as terrorist organizations by the federal government.<sup>66</sup> The *Humanitarian Law Project* plaintiffs sought a declaration that they could give money to, among other things, "engage in political advocacy on behalf of Kurds who live in Turkey" and "teach PKK members how to petition various representative bodies such as the United Nations for relief."<sup>67</sup> Some of the activity was outside the country; some involved writing and speaking before the U.S. Congress.<sup>68</sup>

Justice Roberts, writing for the Court, held that a statute criminalizing such activities did not violate the First Amendment.<sup>69</sup> Unlike in the campaign-finance context, Roberts shed abstraction, formalism, and the absolute defense of the First Amendment. He wrote of the "real dangers at stake" and chided the dissent for its abstraction.<sup>70</sup> He deferred to the Congressional judgment that "we live in a different world: one in which the designated foreign terrorist organizations 'are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.'"<sup>71</sup> He argued that "[t]raining and advice on how to work with the United Nations could readily have helped the PKK in its efforts to use the United Nations camp as a base for terrorist activities."<sup>72</sup> And although he cited to the formal First Amendment doctrine, he concluded with a description of the constitutional value of protecting against violence: "The Preamble to the Constitution proclaims that the people of the United States ordained and established that charter of government in part to 'provide for the common defence.'"<sup>73</sup>

The fact that the First Amendment is also wielded inconsistently within

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66. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 7–8 (2010).

67. *Id.* at 22.

68. *Id.* at 25.

69. *See id.* at 7–8.

70. *Id.* at 38.

71. *Id.*

72. *Id.*

73. *Id.* at 40 (quoting U.S. Const. pmb.). *See, e.g.*, David Cole, *The Roberts Court's Free Speech Problem*, N.Y. REV. BOOKS BLOG (June 28, 2010, 10:55 AM), <http://www.nybooks.com/blogs/nyrblog/2010/jun/28/roberts-courts-free-speech-problem>; Monica Youn, *The Roberts Court's Free Speech Double Standard*, AM. CONSTITUTION SOC'Y BLOG (Nov. 29, 2011), <http://www.acslaw.org/acsblog/the-roberts-court%E2%80%99s-free-speech-double-standard>.

election law demonstrates how weak a threat corruption is deemed to be. In *Timmons*, a majority of the Court rejected a First Amendment challenge to a fusion ban.<sup>74</sup> Given the First Amendment absolutism in other cases, the petitioners likely thought that such a ban, like the independent expenditure bans, was a basic violation of parties' rights to speech and free association, candidates' rights to associate with parties, and voters' rights to support whom they choose during primaries.<sup>75</sup> But the petitioners failed.<sup>76</sup> The Court shrugged off the same associational and speech interests that it used to strike down bans on expenditures.<sup>77</sup> The governmental interest in creating a coherent, easy-to-understand marketplace of political parties did not violate the First Amendment interest.<sup>78</sup> The Court brought a modulated approach toward the First Amendment: "No bright line separates permissible election related regulation from unconstitutional infringements on First Amendment freedoms . . . . '[N]o litmus-paper test . . . separat[es] those restrictions that are valid from those that are invidious. . . . The rule is not self-executing and is no substitute for the hard judgments that must be made.'"<sup>79</sup> The creeping government control of speech that Justice Kennedy worried about in *Citizens United* ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content."<sup>80</sup>), was not a threat in *Timmons* or *Humanitarian Law Project*.<sup>81</sup>

These cases—the political-party cases, the terrorism cases, and the campaign-finance cases—all are evidence of a certain lack of concern for corruption. That lack of concern does not flow naturally from neoliberalism. Neoliberal economic theory places a great deal of importance on the threat of one variant of corruption: rent-seeking.<sup>82</sup> Rents represent "the expenditure of resources on the transfer of wealth through law rather than on the production of wealth through markets."<sup>83</sup> In the Chicago school tradition, groups are more likely to direct their energies—through bribes or other forms of influence—to government when government has more power to regulate.<sup>84</sup> This model shows up in the Gordon Tullock (1967) and Gary Becker (1983) papers on the theory of competition among pressure groups for political influence.<sup>85</sup> The argument,

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74. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 354 (1997).

75. For the arguments made by petitioners, see *id.* at 358, 362.

76. See *id.* at 354.

77. *Id.* at 369.

78. See *id.* at 364, 367.

79. *Id.* at 359 (quoting *Storer v. Brown*, 415 U.S. 724, 729 (1974) (internal quotation removed)).

80. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010).

81. Cf. Patrick M. Garry, *Liberty from On High: The Growing Reliance on a Centralized Judiciary to Protect Individual Liberty*, 95 KY. L.J. 385, 404 (2006).

82. See CHARLES K. ROWLEY ET AL., *THE POLITICAL ECONOMY OF RENT-SEEKING* 3 (1989).

83. Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 408 n.5 (1990).

84. FRED MCCHESENEY, *MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION* 106 (1997) (noting that there is likely a time profile of activity within a single industry).

85. See Gary S. Becker, *A Theory of Competition among Pressure Groups for Political Influence*,

stripped down, comes to this: The fewer resources over which the state exercises dominion, the less that companies and individuals will spend energy trying to extract resources from the state.<sup>86</sup> The term “corruption” is often renamed “rent-seeking.” Rent-seeking and corruption are understood as a central threat to the state and are an essential topic of study.<sup>87</sup> But the Kennedy–Roberts alliance has not explicitly embraced this ideology any more than it did the classical liberal anxiety about corruption. “Rent-seeking” is a term that has been used only in Justice Breyer’s dissent in *Citizens United*<sup>88</sup> and never by any member of the Kennedy–Roberts alliance. Instead, no version of the threat of corruption has played a major role in any Kennedy–Roberts decision.

#### A. Skepticism About Democracy

Neoliberalism is often associated with skepticism about democracy. In his essay *Public Choice versus Democracy*, Russell Hardin has explained how public-choice theory has revealed some “grievous foundational flaws—in democratic thought and practice,” including that it neither leads to majoritarian rule (because of the aggregation flaws) nor to good policy decisions.<sup>89</sup> The conclusion of Hardin and other public-choice theorists has been that many problems of resource distribution are better solved by “the market” than by representative systems in a mass democracy.<sup>90</sup> If one part of politics is made up of the question “How should we distribute goods and things?” then the social choice theorist’s or market fundamentalist’s answer is “through assigning property rights.” The answer voids the need for a central role for other mechanisms—such as monarchy, representative democracy, direct democracy, or lottery—to make decisions about distributions. It is a political answer that narrows the realm of collective decisionmaking via deliberation and decision backed by force.

Kennedy and Roberts have not openly embraced Russell Hardin’s antidemocratic political ideology. There has been nothing in the Kennedy–Roberts alliance’s election-law decisions that suggests that markets are better than a representative government for the task of distributing goods. Those cases have never called into question the importance of voting as a method of electing representatives or of representatives making the central distributional choices of a democracy. Therefore, one can fairly argue that they are not neoliberal in

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98 Q. J. ECON. 371 (1983). See also George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 7 (1971) (suggesting a much more complex political environment, as opposed to modeling a single “rent,” and assumed that the would-be rent-seeker would imagine different rents); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224, 228 (1967).

86. See, e.g., DENNIS MUELLER, PUBLIC CHOICE III (2003); GEORGE J. STIGLER, CHICAGO STUDIES IN POLITICAL ECONOMY (1988).

87. See CHARLES K. ROWLEY ET AL., THE POLITICAL ECONOMY OF RENT-SEEKING 13 (1989).

88. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 467 (2010) (Breyer, J., dissenting).

89. Russell Hardin, *Public Choice versus Democracy*, in THE IDEA OF DEMOCRACY 157, 170 (David Copp et al. eds., 1993).

90. *Id.* at 159.

this sense. Overall, they have never questioned the right or importance of the public making the key distributional choices.

However, the Court's decisions in the campaign-finance realm have changed who has power in making distributional decisions. Since *Citizens United* and *Wisconsin Right To Life*, it has been easier for very wealthy individuals and the wealthiest companies to have greater power in shaping who is elected to office and what policies the elected representatives support. That these companies and individuals might have "undue influence" seems not to trouble Justices Kennedy and Roberts. That Justice Kennedy and Justice Roberts seem to be unconcerned by this influence in the face of a long history of liberal anxiety about corruption might indicate that they have some sympathy for Hardin's skepticism.

### B. End of History Complacency

Another clue about the reasons for the Court's indifference toward corruption comes from the Court's view of government as largely, if not entirely, static. One gets the sense that no theory of government has been seen as necessary to Justices Kennedy and Roberts because the democratic state is like air—necessary, a part of life itself, unavoidable in the best sense, and invisible because it is so central. These thin descriptions of government make sense if democracy is viewed as fundamentally solved and stable and problems of political organization are not seen as serious. The Court has seemed to say that, although the public may quibble about the scope of government at the margins, the basic shape of government is stable and not likely to change.<sup>91</sup>

This viewpoint might underlie the Court's indifference towards corruption, reflecting an "end of history" ideology that has been part of world culture for the last quarter century. In 1989, the Berlin Wall came down, and the Soviet Union began to splinter. Ron Brown became chair of the Democratic National Committee, the first African-American to head a major political party. Mindful of these transformative events, Francis Fukuyama wrote *The End of History?*, an essay (later expanded into a book) arguing that liberal democracy is an equilibrium state and that there is no post-liberal democracy system. He argued:

What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.<sup>92</sup>

The article was largely about the nature of thinking, not the nature of events. Fukuyama's argument was essentially that the ideal form of government had been discovered, not that it would stop history. In this sense, it was not so different than the prior two hundred years of argument: that liberal representative democracy was a superior form of government. However, the

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91. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997).

92. Francis Fukuyama, *The End of History?*, 16 NAT'L INT. 3 (1989).

article's powerful impact on popular culture, and what turned Fukuyama into an object of constant discussion, was not the theory of the history of thought, but the theory of the history of world events. The key feature of this view—as interpreted, not as written—was its political optimism. Fukuyama came to stand for the view that liberal democracy was an end of history in a different sense: Liberal democracy was unlikely to turn into a totalitarian regime, and it was just a matter of time before other countries caught up to the United States and Western Europe.<sup>93</sup>

Fukuyama caught fire because he said (or was perceived to have said) what so many at the time believed and continue to believe: Having once achieved representative democracy, America was unlikely to ever become anything else.<sup>94</sup> If one believes or feels that this is the end of history, self-government is not a central problem or puzzle. Little will change. Tyranny and oligarchy have been solved by the modern democratic form.

A feature of the end-of-history attitude is also the end of facts and the end of the role of history and facts in political-law jurisprudence. If history is fundamentally over, only analytical questions remain. History itself—including historical threats—gets little attention in the modern Court, and facts play a trivial role on the ground. For instance, *Citizens United* was a statutory interpretation case that included an as-applied constitutional challenge.<sup>95</sup> The Court asked for reargument on the general question of corporate independent expenditures even though no record was developed at trial and the issue had not been briefed in the courts below.<sup>96</sup> Further, in a recent oral argument, Justice Scalia suggested that facts do not matter when the principle of the First Amendment is at stake.<sup>97</sup> Although Justice Sotomayor repeatedly asked for evidence from both parties, Justice Scalia rejected the need to develop the record, arguing that “we don’t normally require a record to decide what the law is.”<sup>98</sup> Corruption is therefore treated, in the First Amendment context, as a fundamentally abstract problem, outside the bounds of experience and history.

### C. Theory of the Person

A final explanation for the Court's indifference towards corruption is that

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93. Fukuyama must take some blame for the optimistic reading—he did claim that “in the long run” liberal democracy would prevail—that action would follow thought. *Id.* at 4.

94. This tendency to believe in the stability of current affairs may be more than ideological: it may be biological. A recent paper about personal psychology describes the “End of History Illusion.” This is defined as a widespread belief, which has little evidence in past experience. The belief is held by a person about him or herself and is characterized by a belief that up until the present she has undergone several changes and growths, but will not continue to grow and change in the future. Jordi Quoidbach et al., *The End of History Illusion*, 339 SCI. MAG. 96 (2013), available at <http://www.wjh.harvard.edu/~dtg/Quoidbach%20et%20al%202013.pdf>.

95. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 320–21 (2010).

96. *Id.* at 322.

97. See Transcript of Oral Argument at 17, *McCutcheon v. Fed. Election Comm'n*, cert. granted, 133 S. Ct. 1242 (2013) (No. 12-536).

98. *Id.*

corruption is a concept that simply does not make sense in the world view of Kennedy and Roberts. They have not been worried about corruption because at some deep level they do not see it. To them, the word “corruption” is actually incoherent because corruption depends upon the idea that people can have interactions with government that are not inherently self-oriented.

Neoliberal scholars tend to construct models of politics and motives starting with a very particular (and arguably peculiar) assertion about human nature—the idea that people are rational maximizers of their own welfare.<sup>99</sup> On the one hand, they acknowledge that the assertion is a useful fiction; on the other hand they use that useful fiction to paint a full portrait of human life.<sup>100</sup> Arguably, corruption is a word that simply does not make sense in this model.

It is very hard to talk about corruption in the context of self-interest without discussing virtue or becoming circular. In a series of political-law cases, the Court held that self-interested behaviors that would previously have been coded as corrupt—if not illegal—are either normal or laudable. In a 1999 case, *United States v. Sun-Diamond Growers of California*, the Court noted that gift-giving was normal behavior and therefore held that under federal gratuities law, in order to constitute a bribe, a gift to a federal official had to be tied to a specific official act.<sup>101</sup> Further, in the 2010 case *Skilling v. United States*, the Court held that the federal mail fraud statute did not criminalize undisclosed self-dealing by public officials because an alternate reading would be too vague, would violate the due process clause, and would criminalize normal self-dealing.<sup>102</sup> As discussed previously, in *Citizens United*, which the Court also decided in 2010, the Court held that Congress could not prohibit corporations from spending money to influence elections and policy because spending money to influence elections and policy was normal, even laudable, political behavior.<sup>103</sup>

These cases are part of the Court’s revision of what constitutes a political person. Whereas a political person in the nineteenth century was oriented towards the public good, a political person in the vision of the modern-day Court maximizes his own personal welfare. This modern, postpolitical ideology systematically reduces the role of the political by reducing the number of places in which one perceives citizens. This is what has happened in antitrust law, where the citizen has been replaced by the consumer by way of the idea that a consumer with a political complaint is really a consumer who does not understand her own economic complaint.<sup>104</sup> The consumer–citizen, on the other

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99. See Wendy Brown, *Neoliberalism and the End of Liberal Democracy*, 7 THEORY & EVENT (2003).

100. See Pierre Bourdieu, *The Essence of Neoliberalism*, LE MONDE DIPLOMATIQUE, <http://mondediplo.com/1998/12/08bourdieu> (last visited Nov. 6, 2014).

101. *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404–05 (1999).

102. *Skilling v. United States*, 561 U.S. 358, 409 (2010).

103. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 342–43 (2010).

104. See BARRY LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION 135–38 (2010).



hand, has no such obligation: her obligation is to the policies that serve her best. The citizen is mostly a consumer, and the consumer is presumed to be self-interested.

This idea lies in contrast to two different theories of what is a person in democratic society is—one from the founding era, and the other from the late nineteenth century. In classical republican theory, the theory that animated the founding era, the citizen is the essential unit of a political society.<sup>105</sup> Under this theory, when citizens lose their virtue and engagement, government collapses.<sup>106</sup> The classical republican citizen should therefore be public-oriented in all things, public and private.

Similarly, in classic liberal theory, which dominated the late nineteenth and early twentieth century, the citizen is, again, central in political life.<sup>107</sup> The role of law is to protect public action from private interests and to protect private interests from public action. “The object of legal science and learning was to draw clear boundary lines around these zones of private and public action. The judiciary’s power and duty lay in patrolling these boundaries.”<sup>108</sup> Unlike in the republican thesis, a person has no obligation to join public and private interests; she can choose to retreat from society. However, the obligations to the public of those dealing in public affairs remain. There exists a clear line between public and private, and when the public sphere is entered, various obligations are created.<sup>109</sup>

Justice Swayne, who had a broad view of property and laissez-faire tendencies, also had a demanding view of citizenship. He wrote in 1882 that “[t]he foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history.”<sup>110</sup> Unlike in classical republicanism, according to Justice Swayne, the citizen only had an obligation to be public-oriented in her *public* life, not in her private life.

These two eras are linked by the fact that the citizen in both the classic republican and classic liberal models makes choices for the public good when acting in the public sphere. A citizen may not ethically use government to better her own position if she knows it harms others. Said another way, she can support laws that help her, but only if she also believes that they will help the public as a whole.

The modern Court has not had the same view of the citizen. Citizens are not imagined as either publicly oriented or responsible for most decisions. Instead,

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105. See William Forbath, *Politics, State Building, and the Court 1870–1920*, in *THE CAMBRIDGE HISTORY OF LAW IN AMERICA VOL. 2* 1092 (Michael Grossberg & Christopher Tomlins eds., 2007).

106. See ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA* 46 (2014).

107. See Forbath, *supra* note 105.

108. *Id.* at 1099.

109. See, e.g., Paul Star, *The Classical Discipline*, in *FREEDOM’S POWER* 53 (2006).

110. *Trist v. Child*, 88 U.S. 441, 450 (1874).

citizens are imagined as self-interest maximizers. One of the ways this portrait is drawn is by portraying people as consumers instead of citizens. Scholars openly call the public “consumer-citizens.”<sup>111</sup> Just a summary of marketplace-of-ideas adherents can show how the word “consumer” replaces “citizen.”<sup>112</sup> Sometimes the consumer consumes things and sometimes the consumer consumes political ideas, but the posture is similar. Both market behavior and political-choice behavior are seen through the lens of choice and consumption, and the power held by the citizen consumer is the power of exit (not buying) or voice (selling). This concept is not unlike that of citizens, but the moral orientation is different. When people are perceived as consumers, they are perceived to be generally self-serving.<sup>113</sup> When people are perceived as citizens—at least in the American tradition—they are perceived to be public-interest serving.

This change in perception has been exemplified by a series of cases that shifted the First Amendment right from a right to speak to a right to hear. The First Amendment played a trivial role in political law until the 1940s.<sup>114</sup> The right to speak was invoked only with respect to points of view that were punished by law.<sup>115</sup> It was generally seen as protecting the individual capacity to express moral, religious, and political views.<sup>116</sup> Speaking constitutes the person inasmuch as it constitutes thinking, so the right to speak was centered in the right of individuals to hold transgressive beliefs. For the first forty years of its modern incarnation, it was a speaker-focused amendment, protecting individuals with views far outside the mainstream, such as anarchists, Nazis, and communists.<sup>117</sup>

Starting around the 1980s, however, First Amendment doctrine started to shift away from a focus on the speaker and towards a focus on the listener. In *First National Bank of Boston v. Bellotti*, the Supreme Court held that a referendum in which a Massachusetts banned corporations from making contributions or expenditures that influenced the outcome of an election was unconstitutional because the law indiscriminately differentiated between different types of corporations and citizens had the right to hear and choose

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111. “When one examines the marketplace of ideas in terms of the incentives of information producers, citizen consumers, and political actors, it appears competition within that market produces a healthy and substantial dialogue without the need for government interference or direction.” Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1260 n.18 (1994).

112. See, e.g., Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1808 (1995) (discussing dissemination of cheap speech and using consumer as a word for the population at large).

113. Behavioral economics has put a sizeable dent in this perception. However, behavioral economics has discovered a set of mechanistic behaviors or tendencies within the vision of the person as consumer—animal spirits—instead of within the vision of the person as citizen. See, e.g., GEORGE A. AKERLOF & ROBERT J. SHILLER, *ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM* (2009).

114. See Zephyr Teachout, *The Historical Roots of Citizens United v. FEC: How Anarchists and Academics Accidentally Created Corporate Speech Rights*, 5 HARV. L. & POL’Y REV. 163, 174 (2011).

115. See *id.* at 164.

116. See *id.* at 172–73.

117. See *id.* at 172.

between options.<sup>118</sup> According to the majority, “the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”<sup>119</sup> Note the language here—the First Amendment is not a matter of conscience but a matter of a “stock of information.”<sup>120</sup>

The “stock of information” is marketplace rhetoric—information is a resource, the “stock” of which enables consumer choice.<sup>121</sup> Although there is nothing per se more self-oriented about the consumer who chooses from a stock of information than the citizen who examines a range of ideas and reasons, the rhetoric itself and its structure suggest a different imagination of the moral habits of the public.

Another area demonstrating the transformation from citizen to consumer is antitrust, or competition law, which has shifted its focus from politics and economic decentralization to economic efficiency. The initial antitrust laws were driven by a blend of reasons, including not only the protection of small business and anxiety about particular practices, but also the perception that monopolization threatened democratic self-government.<sup>122</sup> The individual threatened by monopolies was both the private individual tradesperson and the public citizen. The Clayton Act was passed to stop “combinations of capital” that “flaunted their power in the face of the citizenship.”<sup>123</sup> Throughout the mid-1940s, antitrust was understood to protect against the accumulation of economic power that threatened to encroach on the power of the citizen. In 1945, Judge Learned Hand, in *United States v. Aluminum Company of America*, referred to Sherman’s concerns about limiting aggregated capital because of the “helplessness of the individual before them.”<sup>124</sup> Antitrust as a force for decentralization was important “for its own sake and in spite of possible cost.”<sup>125</sup> In 1948, in *United States v. Columbia Steel*, Justice Douglas explained that:

The philosophy of the Sherman Act is that . . . all power tends to develop into a government in itself. Power that controls the economy . . . should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men.<sup>126</sup>

However, in the early 1980s, there was a sea change in the understanding of the purpose of antitrust law and a related change in the understanding of the

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118. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978).

119. *Id.* at 783.

120. *Id.*

121. Information is the key feature of Hayek’s view of the market—expansive information from a great many sources was the truth-producing quality of the market. Here we have a Hayekian view then entering the description of politics. The citizen as a hearer or consumer is a total break from classical liberalism. See Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

122. See James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257, 295 (1989).

123. *Id.* at 297.

124. *United States v. Aluminum Co. of America* 148 F.2d 416, 428 (2d Cir. 1945).

125. *Id.* at 429.

126. *United States v. Columbia Steel Co.*, 334 U.S. 495, 536 (1948).

constituent unit that antitrust laws protected. Whereas earlier cases had purported to protect citizens and individuals, the new antitrust doctrine appeared to protect consumer welfare. The merger guidelines were rewritten to place “consumer welfare” as the goal of competition policy.<sup>127</sup> Richard Posner and Robert Bork argued that current doctrine was based on flawed economic ideological premises and that efficiency and consumer welfare—not the goal of aiding small businesses or having a decentralized economy—were the only legitimate goals of the antitrust statutes.<sup>128</sup> Posner argued that there was no justification for “using the antitrust laws to attain goals unrelated or antithetical to efficiency,” and Bork argued that any political or social concerns were necessarily indeterminate, were creating unmanageable standards, and were normatively unjustifiable.<sup>129</sup> In antitrust, as in election law, the citizen qua citizen was replaced by a consumer. The standard by which large concentrations of economic power was measured became that of consumer welfare alone, not taking into account political power.

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

This world view is both the most difficult to document—no case explicitly erases “citizen” and replaces it with “consumer”—and the most fundamental ideological transformation that I have discussed. More than a case striking down a particular law does, the replacement of the perceived world of citizens with a perceived world of consumers removes public authority from people and gives it to “markets,” whose authority is derived from “consumers.” This shift in perception transforms what it means to be a person in our society. When a person is not a citizen but a consumer, she has a different role. Her societal role is to listen, choose, and trust her government.

## V

### TRUST AND DISTRUST

Indeed, trust that the government, as opposed to the citizens, will provide for the public good is an important characteristic of the consumer-citizen. The Court has confirmed that notion in various cases, despite its own description of its political theory, which purported to be premised in the distrust of power. The First Amendment, at the core of which are “certain basic conceptions about the manner in which political discussion in a representative democracy

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127. Donald I. Baker & William Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CAL. L. REV. 311, 319 (1983).

128. ROBERT BORK, *THE ANTITRUST PARADOX* 81 (1978); RICHARD POSNER, *ANTITRUST LAW* 2 (2d ed. 2001).

129. POSNER, *supra* note 128, at 2; BORK, *supra* note 128, at 81.

should proceed”<sup>130</sup> is the same amendment that, according to Justice Kennedy, is “[p]remised on mistrust of governmental power.”<sup>131</sup> In other words, the positive central story of politics is one of mistrust of governmental power.

However, as much as its language has rested on distrust, the Court has also indicated that generating trust—as opposed to maintaining the government’s actual trustworthiness—may be the primary function of democracy. Trust leads to stability, so the consumer—the constituent member of society—should be trusting. In contrast, under classical liberal or republican philosophy, appearance is not equivalent to reality. The classic threat of private pollution of public power is not one of perception, but of reality. Benjamin Franklin worried more that people would want a monarch than that they would lose faith in democracy.<sup>132</sup> Although the shift from that ideology to one focused on appearances is not unique to the Kennedy–Roberts alliance, it seems to be central to the Kennedy–Roberts alliance’s understanding of the world.

Since *Buckley*, the “appearance of corruption” has been deemed equally problematic as corruption itself.<sup>133</sup> In other words, people’s belief that corruption is occurring is as concerning and as destabilizing as corruption itself. This sentiment was displayed in the recent case *Doe v. Reed*, where the Supreme Court upheld a state law requiring disclosures of the names of citizens who signed a referendum petition.<sup>134</sup> Protect Marriage Washington, which had submitted a referendum petition containing over 137,000 signatures, claimed that forced disclosure of those signatures violated the First Amendment.<sup>135</sup> The first and primary justification given by the Court for upholding the law was that it was needed to keep citizens trustful of government.<sup>136</sup> Roberts wrote that states’ interests in the integrity of political process is “particularly strong with respect to efforts to root out fraud.”<sup>137</sup> The Court explained that the potential for fraud not only created a risk of fraudulent outcomes, but of a systemic effect as well: It “drives honest citizens out of the democratic process and breeds distrust of our government.”<sup>138</sup>

Perhaps the most stunning version of this “trust” argument shows up in Justice Stevens’ decision in *Crawford v. Marion County*. There, the Court justified voter-identification laws on the ground that the absence thereof might lead to the perception of fraud at the voting booth, despite the fact that there was no evidence of voting fraud.<sup>139</sup> “The electoral system cannot inspire public

130. *Brown v. Hartlage*, 456 U.S. 45, 52 (1982).

131. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 312 (2010).

132. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 53 (Bicentennial ed. 1987).

133. *See Buckley v. Valeo*, 424 U.S. 1, 26 (1976).

134. *Doe v. Reed*, 561 U.S. 186, 198 (2010).

135. *Id.* at 190.

136. *Id.* at 197.

137. *Id.*

138. *Id.*

139. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202–03 (2008).

confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.”<sup>140</sup> Translate this logic into another arena, and one comes up with something like: “even if there are no terrorists, the public fear of terrorists justifies searches that would otherwise be unreasonable.”

Stevens, in dissent in *Citizens United*, wrote: “At stake in the legislative efforts to address this threat is therefore not only the legitimacy and quality of Government but also the public’s faith therein . . . .”<sup>141</sup> Souter wrote in a case upholding campaign-contribution limits that “[d]emocracy 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.’”<sup>142</sup>

In fact, the “appearance of trust and legitimacy” line of thinking has become so central to the Court’s processing of election-law decisions (many in the First Amendment framework) that it appears that the modern Court’s view of democracy is premised on trust, not mistrust. The function of democracy, under the Court’s apparent ideology, is the production of trust in order to assure stability. The function of the citizen is to maintain faith in the polity. This is both a meager and important role; it is meager in that it involves no genuine critique of government, nor an expectation or requirement of investigation and criticism, but demands instead faith. It is important because out of all the dystopic visions, the worst dystopia is the collapse of faith and of confidence.

This focus on the appearance of trustworthiness, in combination with the theory of the person as a consumer, not only renders the citizen a consumer in the political market, but also diminishes her role in that market as compared to her role in the economic market. A citizen in a democracy acts both *like* a consumer in the political realm, and *as* a consumer in the market for goods. The function of the goods consumer is to have confidence in the market because that confidence creates growth and wealth. The function of the consumer-citizen, on the other hand, is to have confidence in politics because that confidence creates social peace. The citizen is diminished both in her function and in the scope of places where that limited function applies.

## VI

### CONCLUSION

My goal in this article was more to set up provocations than to provide answers. However, my tentative thesis is that the Kennedy–Roberts alliance is committed to the form of representative democracy for its perceived stability but is not committed to decentralized power.

Politics begin when people come together and ask “what should we do?”

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140. *Id.* at 194 (quoting Building Confidence in U.S. Elections § 2.5 (Sept. 2005), App. 136–37 (Carter–Baker Report)).

141. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 450 (2010) (Stevens, J. dissenting).

142. *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 390 (2000) (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961)).

and when they are in the position to answer that question with action. The political, therefore, encompasses only the people who are within that circle of power. However, the Court's political jurisprudence, both by favoring a limited number of political choices (i.e. favoring a two-party system) and by limiting the types of things that can be decided (i.e. restricting states' abilities to define their own campaign-finance and primary models), has shifted the role of the person from the active decider to the consumer of others' decisions. This ideology has a role for the citizen: to maintain stability; the source of democratic stability may be the belief by its citizens in its legitimacy. If the constituent members of a society are consumers, not citizens, then, like an economic market, democracy fails when those consumers stop believing in it.

It is possible that the Court has been driven in its political-law jurisprudence by the protection of individual rights and markets, or by maintaining a world in which distributive choices are made through markets instead of representative government. However, although the members of the Kennedy–Roberts alliance have not explicitly rejected that ideology, they certainly have not endorsed it.