No. 21-

IN THE
Supreme Court of the United States

DONNA PATRICK, JAMES K. BARNETT, AND JOHN P. LAMBERT

Petitioners,

v.

THE ALASKA PUBLIC OFFICES COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alaska

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners are Alaskan citizens who challenged the Alaska Public Offices Commission's ("APOC's") refusal to enforce Alaskan law regulating contributions to independent political action committees. APOC had defended its refusal on the basis of federal circuit court rulings that held such regulations violate the First Amendment. Petitioners had asked the Alaska courts to consider the original meaning of the First Amendment, to conclude that a majority of this Court would not affirm those circuit court decisions. The Alaska Supreme Court rejected the relevance of any argument from originalism and upheld APOC's refusal.

The question presented in this petition is whether this Court should grant certiorari, vacate the judgment below, and remand ("GVR") with instructions to weigh the arguments from originalism in determining whether the First Amendment permits the regulation of contributions to independent political action committees.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Donna Patrick, James K. Barnett, and John P. Lambert respectfully petition this Court for a writ of certiorari to the Supreme Court of the State of Alaska.

OPINIONS BELOW

The opinion of the Alaska Supreme Court is available at *Alaska Pub. Offices Comm'n v. Patrick*, 494 P.3d 53 (Alaska Sep. 3, 2021) and is reproduced in the Appendix at App. A.

The opinion of the Superior Court, *Patrick v. Interior Voters,* No. 3AN-18-05726CI (Nov. 4, 2019), is available at https://perma.cc/YLW2-KHRJ.

JURISDICTION

Petitioners seek review of the opinion and judgment of the Supreme Court of Alaska entered on September 3, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or

abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Alaska Statute § 15.13.070 provides in relevant part:

> (a) An individual or group may make contributions, subject only to the limitations of this chapter and AS 24.45, including the limitations on the maximum amounts set out in this section.
>
> (b) An individual may contribute not more than
>
> (1) $500 per year to a nongroup entity for the purpose of influencing the nomination or election of a candidate, to a candidate, to an individual who conducts a write-in campaign as a candidate, or to a group that is not a political party;
>
> …
>
> (c) A group that is not a political party may contribute not more than $1,000 per year
>
> (1) to a candidate, or to an individual who conducts a write-in campaign as a candidate;
>
> (2) to another group, to a nongroup entity, or to a political party.
>
> …
>
> (f) A nongroup entity may contribute not more than $1,000 a year to another nongroup entity for the purpose of influencing the nomination or election of a candidate, to a candidate, to an individual who conducts a write-in campaign

> as a candidate, to a group, or to a political party.

Alaska Statute § 15.13.380(b) provides in relevant part that "[a] person who believes a violation of this chapter or a regulation adopted under this chapter has occurred or is occurring may file an administrative complaint with the commission within five years after the date of the alleged violation."

Alaska Statute § 15.13.400 provides in relevant part:

> (10) "independent expenditure" means an expenditure that is made without the direct or indirect consultation or cooperation with, or at the suggestion or the request of, or with the prior consent of, a candidate, a candidate's campaign treasurer or deputy campaign treasurer, or another person acting as a principal or agent of the candidate;

28 U.S.C. § 2601 provides that "[t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

INTRODUCTION

This Court's judgments are sometimes compound. Throughout its history, in a small proportion of its cases, a majority of this Court has reached the same conclusion but on different, or distinctive, grounds, none commanding a majority. *See* James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 Geo. L.J. 515, 519 (2011); Database of Supreme Court Decisions, *available at* https://bit.ly/3p09Yms (plurality decisions constitute less than 3% of judgments). Those differences reflect good faith differences in the approach to constitutional or statutory interpretation. Such differences are both inevitable and healthy, reflecting the diversity of American jurisprudence.

Originalism is one such distinctive ground. Throughout its history, Justices on this Court have drawn upon the original meaning of the Constitution to determine its scope and reach. Sometimes that approach has commanded a majority. Sometimes less than a majority has based its decision on originalist grounds which, together with other opinions, then constitute a compound judgment of this Court.

Most prominently most recently, a majority of this Court relied upon the original meaning of the Second Amendment to conclude that that Amendment protects an individual right to bear arms for self-defense. *D.C. v. Heller,* 554 U.S. 570 (2008). Earlier authority, *United States v. Miller*, 307 U.S. 174 (1939), had rejected that conclusion. That authority was then reversed in *Heller* on originalist grounds. As the Court noted, the government's brief in *Miller* had "provided

scant discussion of the history of the Second Amendment." 554 U.S. at 623-24. That fact left this Court free to examine afresh what the historical evidence showed. Based on that review, the Court reframed the scope of the Second Amendment in light of its original meaning.

By contrast, in *Harmelin v. Michigan*, 501 U.S. 957 (1991), Justice Scalia, joined by Chief Justice Rehnquist, announced the judgment of this Court in an opinion grounded in originalism. That judgment was joined by Justices O'Connor, Kennedy, and Souter, but not on the basis of the originalist argument advanced by Justice Scalia. That compound judgment, nonetheless, had the effect of allowing Michigan's judgment to stand.

In this case, Petitioners have argued that a compound judgment by this Court would affirm Alaska's power to regulate independent political action committees ("SuperPACs"). In *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc) ("*SpeechNow*"), the United States Court of Appeals for the D.C. Circuit concluded to the contrary. This Court did not review *SpeechNow*, *cert. denied sub nom. Keating v. FEC*, 562 U.S. 1003 (2010). Neither has this Court ever considered an originalist argument about the regulation of independent political action committees under the First Amendment.

Petitioners had asked the Alaska courts to consider these originalist arguments so as to conclude that there would not be a majority on this Court to affirm the holding in *SpeechNow*. Petitioners had based their

argument in part upon the extensive and unchallenged testimony in the trial court of one of America's leading historians on the original meaning of the Constitution and constitutional culture, Professor Jack Rakove. Apps. B, D. That testimony was complemented by work recognized by Justice Thomas mapping the original meaning of the First Amendment and revealing its relatively limited scope. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1584 (2020) (Thomas, J., concurring) (citing Jud Campbell, *Natural Rights and the First Amendment,* 127 Yale L.J. 246, 259 (2017)). Together, Petitioners argued, these authorities suggested that a majority of this Court would uphold the power of a state to regulate *institutional*, as distinct from *individual,* or *quid pro quo,* corruption. Put most directly, Petitioners argued that Alaska's law would be upheld in a compound judgment supported on both originalist and non-originalist grounds.

The Superior Court agreed with Petitioners about the constitutionality of the Alaska law under federal law, though on separate grounds, not defended by Petitioners.

The Alaska Supreme Court reversed. Though it conceded that this Court has not yet addressed the question, and it acknowledged that "institutional corruption" is distinct from "*quid pro quo* corruption," App. 15a; *see also* Jacob Eisler, *Conceptualising Corruption and the Rule of Law*, Modern L. Rev. 1 (2021), *available at* https://perma.cc/VY8M-RXW3, the court felt bound by language in the plurality opinion in

McCutcheon v. FEC, 572 U.S. 185, 207 (2014) (plurality), that "Congress may target only a specific type of corruption — 'quid pro quo' corruption." App. 17a.

Petitioners ask this Court to grant this petition for certiorari, vacate the decision of the Alaska Supreme Court, and remand with instructions to evaluate its law according to the historical evidence properly presented in its courts. Until this case, it is Petitioners' belief that no court has ever been presented with the original meaning of the First Amendment, or with a historical understanding of the core idea within the modern test announced in *Buckley v. Valeo*, 424 U.S. 1 (1976), "corruption." Given the clear and good faith jurisprudential commitments of a substantial number of this Court, the Alaska courts should not have discounted the arguments from originalism nor ignored how they could be relevant to the ultimate judgment of this Court about the power of a sovereign to regulate SuperPACs. GVR is the appropriate procedure to direct the Alaska courts to consider such arguments, giving this Court, if Petitioners prevail, a chance to review that conclusion ultimately.

As explained below, *infra* Part V, Petitioners are not asking for full review by this Court at this time. This is both because the courts below ignored, and hence left untested, the historical record, and because there is a legitimate question about Petitioners' standing in this Court. That question, however, does not block this Court's power to GVR.

STATEMENT OF THE CASE

I. Legal Background

This case involves a state statute that aims, in part, to regulate contributions to independent political action committees. Alaska Statute § 15.13.070 sets the limits on such contributions by both individuals and non-political groups. Those limits were upheld by the Alaska Supreme Court. *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 600 (Alaska 1999). The Alaska legislature then amended the law to increase the amount individuals and groups could contribute to independent political action committees. 2003 Alaska Laws Ch. 108 § 8. In 2006, citizens in Alaska objected to that increase, successfully ratifying an initiative to lower the limits once again. State of Alaska, 2006 Primary Election Official Results, *available at* https://perma.cc/ZK36-7GRD (Measure 1).

In 2010, this Court decided *Citizens United v. FEC,* 558 U.S. 310 (2010), which, consistent with *Buckley*, upheld the rights of corporations and labor unions to *spend* money to affect political elections without limit. "Independent" expenditures, this Court reasoned, "by definition" could not be "*quid pro quo*." *Id.* at 360. Limitations on such expenditures could therefore not be justified as a way to avoid individual, or *quid pro quo,* corruption. Two months later, the United States Court of Appeals for the D.C. Circuit extended that rule to cover *contributions* as well as *expenditures*. *SpeechNow*, 599 F.3d at 696. This Court did not review the judgment in *SpeechNow*, *cert. denied sub nom. Keating v. FEC*, 562 U.S. 1003 (2010).

Following this Court's decision in *Citizens United*, then-Alaska Attorney General (now United States Senator) Dan Sullivan concluded that Alaska's regulation of contributions to independent political action committees remained constitutional. Respondents' Excerpts of Record 197-204, APOC v. Patrick, 494 P.3d 53 (AK 2021) (No. S-17649). Two years later, however, citing *SpeechNow*, Alaska's Public Offices Commission (APOC) reversed its position and announced it would no longer enforce its statute limiting contributions to independent political action committees. Petitioner's Excerpts of Record 2, APOC v. Patrick, 494 P.3d 53 (AK 2021) (No. S-17649) ("Exc.").

II. This Case

Alaska law gives "persons" the right to challenge a decision by APOC not to enforce election laws. Alaska Statute § 15.13.380(b). Under that provision, Petitioners Donna Patrick, James K. Barnett, and John P. Lambert filed a complaint with APOC about its refusal to enforce § 15.13.070(b). In a 3-2 vote, APOC rejected Petitioners' complaints on the grounds that contributions above the statutory limits were permitted by its 2012 advisory opinion. Exc. 10-73.

On appeal, the Superior Court heard the testimony of two expert witnesses, Stanford Professors Jack Rakove and Adam Bonica. Both appeared for live testimony. As described below, Professor Rakove provided extensive evidence of the Framers' understanding of the concept of "corruption." App. 20a-58a, 79a-110a. Professor Bonica provided detailed evidence of current trends in political donations and the

dependence they created. App. 59a-78a. APOC did not cross-examine either witness, nor did it offer any testimony to counter the experts' evidence or conclusions.

In November 2019, the Superior Court sustained Petitioners' complaint, based on a legal theory not advanced by Petitioners. In September 2021, the Alaska Supreme Court reversed the Superior Court's judgment. Though APOC had conceded that this Court had not decided this question, Oral Argument before Alaska Supreme Court, January 20, 2021, *available at* https://bit.ly/3CveRIT, the Alaska Supreme Court concluded that to affirm the judgment below would require this Court to "reverse itself." App. 18a. And while the Alaska Supreme Court acknowledged that Petitioners had grounded their argument on the original meaning of the First Amendment, App. 7a, the court refused to uphold its own law against the perception that this Court had already determined against the original meaning of the First Amendment.

REASONS FOR GRANTING THE WRIT

I. Whether the Original Meaning of the First Amendment Forbids Regulations against What The Framers Plainly Considered "Corruption" Is a Critically Important Question.

The Alaska Supreme Court has affirmed a conventional view of this Court's campaign finance jurisprudence. Like the view of academics and commentators on the Second Amendment before *Heller*, that conventional view holds that this Court has determined finally the scope of the state's power to regulate political speech within campaigns. That power is limited, as the Alaska Supreme Court held, to regulations targeting individual, or *quid pro quo*, corruption alone. App. 3a, 10a-11a, 18a. As contributions independent of any political campaign cannot, on this reasoning, implicate "corruption" so defined, regulations targeting SuperPACs are unconstitutional. App. 10a.

Petitioners agree that contributions "independent" of any political campaign cannot constitute individual, or "*quid pro quo*," corruption.

But Petitioners reject the claim that the only compelling interest recognized by this Court for regulating political speech is "*quid pro quo* corruption." *See, e.g.*, *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011) (Kavanaugh, J.), *aff'd*, 565 U.S. 1104 (2012) (upholding restriction on independent campaign expenditures by non-citizens). And Petitioners strongly reject the claim that this Court has ever considered either the

application of the original meaning of the First Amendment to campaign finance regulations, or, in applying *Buckley*, to the Framers' conception of the core concept in *Buckley*, "corruption."

These arguments establish two conclusions that should be fundamental to any originalist.

First, following Justice Thomas' suggestion in *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1223-24 (2021) (Thomas, J., concurring) ("regulations that might affect speech are valid if they would have been permissible at the time of the founding") and *McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari) (rejecting the "policy-driven decisions masquerading as constitutional law," instead embracing "the original meaning of the First and Fourteenth Amendments"), they demonstrate that the regulation of contributions to political action committees would not be subject to judicial constraint under the original meaning of the First Amendment, at least so long as such regulation was (1) promulgated by legislatures (2) in pursuit of the general welfare. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1584 (2020) (Thomas, J., concurring) ("there is 'no evidence [from the founding] indicat[ing] that the First Amendment empowered judges to determine whether particular restrictions of speech promoted the general welfare,'" citing Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 259 (2017) (providing extensive analysis of the original meaning of the First Amendment)).

Second, following the method of Justice Scalia in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality) (original understandings used to set the scope of "Due Process"), even in applying the modern First Amendment test announced in *Buckley*, these arguments would be relevant to determining the scope of the core concept within that test, "corruption." For *Buckley*, with respect to the First Amendment, like *United States v. Miller,* with respect to the Second Amendment, declared its standard without any effort to tie its rule to either the historical understanding of the First Amendment or any historical conception of "corruption." The per curiam in *Buckley* simply declared, *ipse dixit*, that the state could suppress speech to regulate "*quid pro quo*" corruption, 424 U.S. at 26-29, without any argument grounded in either history or logic for why this conception would be the *only* conception of "corruption" that a state may police. Whether or not limiting a sovereign's power to this extremely narrow conception of "corruption" makes good sense from the perspective of political science, *Buckley* made no effort to establish that it made any sense from the perspective of our Framers. By contrast, as Petitioners argued, in determining how to apply *Buckley's* modern test, an originalist, following Justice Scalia's method in *Michael H.*, would fix the conception of "corruption" to the framing conception of "corruption" so as to constrain judicial discretion to craft a test according to a judge's personal political preferences. As described below, the uncontradicted evidence in this case demonstrates that the framing conception of "corruption" included institutional as well as individual, or *quid pro quo*, corruption. That fact should mean that

an originalist has no constitutional sanction for disabling a sovereign from regulating against such corruption.[1]

The Alaska Supreme Court refused to consider either argument in determining the rule of this Court. Instead, it observed that the argument that "corruption should be defined more broadly than quid pro quo corruption is not new." App. 17a. Petitioners agree that many have tried to persuade this Court that "corruption" should be interpreted more broadly. But *none* of those arguments have been grounded in originalism.[2] And while it is true that history was referenced

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[1] Petitioners have set the Framing as the relevant baseline for measuring the scope of "corruption" under *Buckley*. If anything, the period surrounding the adoption of the Fourteenth Amendment would reveal an even broader conception. *See, e.g., Trist v. Child,* 88 U.S. 441, 451 (1874) ("If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous. If the instances were numerous, open and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times.").

[2] In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court considered an originalist argument about the status of corporations. 558 U.S. at 425-32 (Stevens, J., dissenting). Justice Stevens relied upon that history to justify the regulation of corporate independent political spending. Justice Scalia rejected that history, as an incomplete account of the Framers' view of corporations. *Id.* at 386 (Scalia, J., concurring) (criticizing the dissent for failing to take a "straightforward approach to determining the Amendment's meaning," instead embarking "on a detailed exploration of the Framers' views about the 'role of corporations in society.'").

by Justice Breyer in his dissent in *McCutcheon*, 572 U.S. at 235-37, Justice Breyer certainly did not make an originalist argument for interpreting the scope of *Buckley's* conception of "corruption" differently.

Three Justices on this Court have indicated clearly that they would uphold the regulation of SuperPACs. *McCutcheon v. FEC*, 572 U.S. 185, 232 (2014) (Breyer, J., dissenting). If just two of the remaining six were persuaded by these originalist arguments, then a compound judgment of this Court would uphold Alaska's law.

This fact should incline the Court to resolve its position with respect to regulations of institutional as distinct from individual, or *quid pro quo,* corruption. States have sovereign authority within our federalist system. That authority should not be restricted through an overreaching overreading of this Court's precedent. Because of the plurality opinion in *McCutcheon*, the Alaska courts understandably did not feel free to evaluate the originalist arguments completely. This Court should grant the court that freedom by vacating its judgment and remanding with instructions to consider the argument from originalism directly.

But the Framers' view of corporations is distinct both from the original meaning of the First Amendment and from an original understanding of "corruption." Those questions no party has ever presented to this Court.

II. Until This Case, No Court Has Considered Originalist Arguments for Regulating Institutional Corruption.

Since *SpeechNow*, a wide range of courts have considered challenges to the conclusion that the First Amendment forbids the regulation of contributions to independent political action committees. Every one of those cases has upheld the position articulated in *SpeechNow*. *See, e.g.*, *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486-88 (2d Cir. 2013); *Texans for Free Enter. v. Tx. Ethics Comm.*, 732 F.3d 535, 537-38 (5th Cir. 2013); *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 151-55 (7th Cir. 2011); *Farris v. Seabrook*, 677 F.3d 858, 864-68 (9th Cir. 2012); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1117-21 (9th Cir. 2011); *Long Beach Area Chamber of Comm. v. City of Long Beach*, 603 F.3d 684, 696-99 (9th Cir. 2010), *cert. denied*, 562 U.S. 896 (2010); *Republican Party of New Mexico v. King*, 741 F.3d 1089, 1092-1103 (10th Cir. 2013); *Lieu v. FEC*, 370 F. Supp. 3d 175 (D.D.C. 2019), *cert. denied*, 141 S.Ct. 814 (2020). As the Second Circuit has put it, "[f]ew contested legal questions are answered so consistently by so many courts and judges." *N.Y. Progress*, 733 F.3d at 488.

Yet in none of those cases did the parties raise an originalist argument about the scope of the First Amendment. To the contrary, in every single case, the challengers tried to convince the courts that the influence effected by SuperPACs was, in effect, even if not in form, *quid pro quo* corruption.

This Court has rejected these arguments for expanding the scope of individual, or *quid pro quo,* corruption. *McCutcheon* v. *FEC*, 572 U.S. 185, 192 (2014) (plurality) ("hallmark of corruption is the financial *quid pro quo*"). That rejection in turn has been read to mean that this Court has considered — and rejected — an argument that has never been presented to it or any other court: namely, that an originalist understanding of the First Amendment should permit the regulation of institutional corruption. States like Alaska have thus stopped enforcing anti-SuperPAC regulations. So too has the FEC. *Lieu v. FEC*, Brief for the Respondent in Opp. 16 (No. 19-1398) (2020), *available at* https://perma.cc/MK3M-HF74 (arguing that *SpeechNow* was "correctly decided"). That resolve thus leaves little opportunity for the question to be raised in any lower court or to this Court directly. Without any clear signal by this Court, there is little reason for litigators or courts to take the arguments from originalism seriously.

III. Laws Regulating SuperPACs Are Laws Regulating Institutional Corruption.

Petitioners have argued that an originalist would ***either*** read the First Amendment narrowly, limiting judicial power to second guess legislative judgments about corruption, *see Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring); *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1584-85 (2020) (Thomas, J., concurring); *McKee v. Cosby*, 139 S. Ct. 675, 682 (2019) (Thomas, J., concurring in the denial), ***or*** interpret the

scope of "corruption" in *Buckley* according to the Framers' conception of that concept, so as to constrain the discretion of judges. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (looking to the most "specific level at which a relevant tradition . . . can be identified" to avoid giving judges the power to "dictate rather than discern").

To prevail under the first alternative, Petitioners need only establish that the law they defend was enacted by a legislature. To prevail under the second, they must demonstrate that SuperPACs would be considered a "corruption" of representative democracy under the Framers' conception of that idea.

Neither the Alaska Supreme Court nor Superior Court engaged this analysis seriously. The Superior Court bypassed any consideration of the originalist argument because it decided the case on alternative grounds. *Patrick v. Interior Voters*, No. 3AN-18-05726CI, 23 n.68 (Nov. 4, 2019) ("the Court need not address Patrick's argument about the understanding of corruption that the Founders of the United States Constitution had"). The Supreme Court described the originalist argument but did not engage in an analysis to determine whether independent political action committees should qualify as institutional corruption. This incomplete record is reason enough to remand the case for further consideration in light of the framework provided by Professors Rakove and Bonica.

That framework would reveal a view of "corruption" that is distinct from the modern view. For the Framers, the paradigm "corruption" of government

was *institutional,* not individual. *See* Excerpt, Dr. Rakove, App. 88a-91a. The "corruption" at the core of their concern was the development of improper dependencies within public institutions. The clearest and most frequently cited example of such corruption was the British House of Commons. Expert Report of Dr. Rakove, App. 22a, 34a-37a, 40a-41a, 43a; Excerpt, Dr. Rakove, App. 83a-85a, 89a-90a. Constitutionally, the Commons was to be dependent upon the British people. Yet because of rotten boroughs, many members of Parliament were actually dependent upon the Crown. That monarchical dependence thought improper. That improper dependence the Framers called "corruption." Expert Report of Dr. Rakove 34a-35a; 45a-46a; Excerpt, Dr. Rakove, App. 84a.-85a. Their aim in crafting the institutions of the American Republic was to avoid such improper dependence. Thus, Judges were to be dependent upon the law, not upon Congress or the President for reappointment. Senators (originally) were to be dependent upon state legislatures, not upon the People. And the House of Representatives was to be, as James Madison promised, "dependent on the people alone" — whereby "the people," he explained, he meant "not the rich, more than the poor." The Federalist Nos. 52, 57. Professor Rakove clearly articulated these original understandings to the Superior Court in Alaska. Excerpt, App. 92a-94a. That testimony was neither challenged nor contradicted by APOC.

The evidence offered by Professor Bonica complemented Professor Rakove's by showing how SuperPACs have now created just such an improper

dependence within the representative institutions of the American Republic. Increasingly and across a wide range of offices, representatives have recognized that they are dependent not "on the people alone," but dependent as well upon the very few funders of these SuperPACs. Indeed, as Professor Bonica established, in some contexts, SuperPACs have become *the* dominant force driving political speech in an election. Expert Report of Dr. Bonica, App. 59a-78a.

This improper dependence is especially salient in state elections. As the Alaska Supreme Court was told,

> In Alaska, 99% of the independent money comes from contributions of $1,000 or more. In 2018, in the governor's race, the outside spending was four times the spending of the candidates themselves. In 2020, we've seen a 1,000% increase since 2016, in outside spending, mainly in the ballot measures. . . . In Measure One, five groups spent $17 million to oppose that measure. In Measure Two, $5 million was spent to support the measure, most of it . . . coming from large, independent liberal groups outside of Alaska. This is a dependence on a tiny slice of America — the very rich[, for] corporations, or non-Alaskans—and out-of-state spending in Alaska has gone up by 47-fold between 2016 and 2020. The same growth exists with non-measure spending as well. "Defend Alaska" was a group . . . aiming to support Democrats

> and oppose Republicans in Alaska. Two liberal groups from DC each contributed more than $100,000 to that group.

Argument Before the Alaska Supreme Court, January 20, 2021, *available at* https://bit.ly/3FFa3Tv.

This concentration in funding, Petitioners argued, has created corrupting dependencies within our representative democracies. When a handful of coordinating SuperPACs dominate political spending, politicians become dependent upon these entities either supporting them or opposing their opponents. That dependence, as Petitioners proffered, is a corruption of representative democracy — or at least, as Petitioners established below, it would be considered a corruption by the Framers of our Constitution.

In light of this corruption, Alaska cannot promise its people a representative government "dependent upon the [citizens of Alaska] alone," at least so long as its representatives are dependent upon SuperPACs based in Washington, D.C., or elsewhere. For the same reason that the United States should be free to protect its political institutions from foreign influence, a state should have at least some freedom to protect itself from influences foreign to it. *Cf. Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011) (Kavanaugh, J.), *aff'd,* 565 U.S. 1104 (2012). (upholding the power to exclude independent spending to protect domestic democratic institutions from foreign influence).[3]

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[3] Petitioners concede that Alaska's power to protect its republic from outside influence is less than the power of the United States,

Petitioners maintain that SuperPACs effect an improper dependence within representative institutions. Such improper dependence, from an institutional perspective, corrupts representative democracy — *whether or not* such a dependence is also *quid pro quo* corruption. The concepts are distinct; one does not entail the other. Thus, regulations limiting the power of SuperPACs could well target that dependence, or institutional corruption, even if they do not target *quid pro quo* corruption.

These conclusions about SuperPACs may or may not apply to the independent expenditures generally. Petitioners did not argue that *Citizens United* must be overruled. Nor do we believe that the speech protected by *Citizens United* has been shown to be similarly corrupting. In 2020, direct political spending by corporations (the speech enabled by *Citizens United*) was less than $2 million; in the same cycle, SuperPAC and hybrid PAC spending was $2.6 *billion*. Of that $2.6 billion, the top ten committees accounted for more than 54% of spending. *See Post CU spending by group type*, *generated by* OpenSecrets.org, *available at* https://bit.ly/3FIKC3i. The economy of influence enabled by *Citizens United* is thus radically different from the economy of SuperPACs enabled by *SpeechNow*.

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since citizens of the United States have an interest in the affairs of Alaska that is more legitimate than German citizens have in the affairs of the United States. But the reasoning supporting *Bluman* suggests why such power in Alaska should not be denied, even if it is not as strong. At the very least, *Bluman* should establish that the interest of Alaska in protecting its republic extends beyond the interest in avoiding *quid pro quo* corruption alone.

The likelihood that uncoordinated corporate spending has produced an improper dependence is thus significantly less than with SuperPACs. Recognizing that the First Amendment does not forbid sovereigns from regulating institutional corruption would therefore not necessarily entail the reversal of *Citizens United*. Put differently, while the First Amendment may well protect the freedom of individuals, corporations, and labor unions to spend money to speak, *Citizens United*, 558 U.S. 310 (2010), an originalist understanding of "corruption" would not necessarily protect all contributions to independent committees, at least if the institutions coordinating such contributions were shown to have effected a corrupting dependence within a representative democracy. Reversing *SpeechNow* therefore does not entail reversing *Citizens United*.

Consistent with the Framers' own values, sovereigns such as Alaska should be free to protect their republics from improper, corrupting dependencies. The Alaska Supreme Court acknowledged the risk of such dependence, App. 16a (Petitioners' "historical argument may be particularly apt in Alaska"), but it viewed this Court's precedents as forbidding it from determining whether such corrupting dependence had in fact been shown.

Were this Court to GVR in light of these originalist arguments, the lower court would have reason to engage in this analysis more completely. That more complete analysis would in turn give this Court a clearer record for evaluating whether, consistent with its values, sovereigns such as Alaska should be free to regulate independent political action committees.

IV. Exercising Its Power under § 2106, This Court Should Return This Case to Alaska, Directing Those Courts to Consider Arguments Grounded in Originalism before Embracing a Conclusion Grounded in an Ahistorical, Non-originalist Understanding of the First Amendment.

28 U.S.C. § 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

As this Court has recognized, § 2106 affords it broad equitable power ("as may be just under the circumstances") to vacate a judgment and remand with instructions to a lower court. *Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (per curiam). Traditionally, this power is triggered by an intervening decision of this Court or explicit changes in law. *Stutson v. United States*, 516 U.S. 163, 180 (1996) (Scalia, J., dissenting). But this Court has relied upon this power to "grant, vacate and remand" in a wide range of cases beyond that traditional practice.

1. This Court has GVR'd when there has been no intervening change in law. In *Youngblood v. West Virginia*, 547 U.S. 867 (2006) (per curiam), this Court vacated a judgment of the state Supreme Court because the opinion had not addressed *Brady v. Maryland*, 373 U.S. 83 (1963) — a decision then more than 40 years old. Likewise, in *Walker v. True*, 546 U.S. 1086 (2006) (per curiam), this Court vacated a judgment based on an opinion of this Court that predated the lower court decision by more than a year. As Professor Buhl has concluded, based upon the largest empirical analysis of this Court's GVR practice to date, "GVRs in light of precedents that were already on the books at the time of the decision below are not especially uncommon."[4]

2. This Court has GVR'd when a lower court has failed to recognize what this Court has considered to be an important argument. Thus, in *Maryland Casualty Co. v. Jones*, 279 U.S. 792, 796-97 (1929), this Court remanded to consider objections that went unmentioned in the lower court opinion. Likewise, in *Blackburn v. Alabama*, 354 U.S. 393 (1957) (per curiam), this Court vacated the judgment of a state court that had apparently failed to consider a Due Process argument, remanding the case "in order that it may pass upon this claim." *Id.* at 393.

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[4] Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs — And an Alternative*, 107 Mich. L. Rev. 711, 716 (2009). Bruhl refers to this class of cases as "Antecedent-Event GVRs." *Id.* at 727.

3. This Court has GVR'd when it would have preferred that the case be considered on different grounds. Thus, in *Beer v. United States*, 564 U.S. 1050 (2011) (per curiam), this Court vacated and remanded with instructions to consider a different basis to resolve the issue — presumptively reaching the same conclusion. Likewise in *Barr v. Matteo*, 355 U.S. 171 (1957) (per curiam), this Court vacated a judgment grounded on a claim of absolute immunity and directed the lower court to apply a qualified immunity standard instead.

4. This Court has GVR'd to help it determine whether a cause is worthy of certiorari. *See Taylor v. McKeithen*, 407 U.S. 191, 194 & n.4 (1972) (per curiam).

5. This Court has GVR'd to declare the applied standard incorrect, without specifying which standard ought to be applied in its place. *See Elonis v. United States*, 135 S. Ct. 2001, 2004, 2006, 2013 (2015).

As Justice Gorsuch has remarked, "[w]e vacate and remand for reconsideration under different — new tests all the time." *Rodriguez v. FDIC*, 2019 WL 6530435 (U.S.), 37 (U.S. Oral. Arg., 2019). This range of examples affirms the Justice's claim and affirms the broad discretion that § 2106 secures.[5]

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[5] Justice Scalia had criticized this practice, remarking the Court "[has] no power to set aside the duly recorded judgments of lower courts unless we find them to be in error, or unless they are cast in doubt by a factor arising after they were rendered." *Beer*, 564 U.S. at 1050 (Scalia, J., dissenting). But as Professor Buhl has observed, "the skeptics are wrong about the extent of the remand

Petitioners know of no case in which this Court has GVR'd in light of a competing theory of constitutional interpretation such as originalism. Yet this case shows precisely why such an exercise of § 2106 authority is appropriate.

Lower courts are understandably cautious about reckoning the authority of this Court by counting the votes of individual Justices, or even groups of Justices. Though that was effectively the method of Judge Silberman in the case that gave rise to *Heller*, *Parker v. D.C*, 478 F.3d 370, 385 (D.C. Cir. 2007), *aff'd sub nom. D.C. v. Heller*, 554 U.S. 570 (2008), very few lower court opinions deduce the position of this Court through any such accounting. *But see Barnette v. W. Va. State Bd. of Educ.*, 47 F.Supp. 251, 253 (1942) (justifying reversal of this Court's authority because "[o]f the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound."). This reluctance remains even when, as in this case, the resulting conclusion would not overturn any prior Supreme Court precedent. It is especially true when, as in *Barnette*, such reckoning yields a conclusion that is flatly contrary to earlier Supreme Court authority.

Yet when litigants have presented that alternative understanding from the beginning of their case, and when that alternative has been effectively ignored by

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power. There are in fact few relevant limits on appellate remedies found in Article III, federal statutes, or historical practice." Aaron-Andrew P. Bruhl, *The Remand Power and the Supreme Court's Role*, 96 Notre Dame L. Rev. 171, 177 (2020), *available at* https://perma.cc/W23H-REMX.

the lower courts, this Court should GVR if the alternative theory could plausibly result in a different, even if compound, judgment.

GVRing at this stage would give the Alaska courts a clear signal to engage the factual and historical arguments that Petitioners have pressed. If the Alaska Supreme Court then accepted the results of this compound analysis, its decision would come before this Court in a manner that would afford it the chance to review the issue fully. By GVRing here, this Court could thus establish a practice that might guide in other cases where there is a plausible basis for believing that a compound decision grounded in originalism might yield a different judgment.

V. Questions about Standing Are Not a Barrier to GVR.

Under the principles announced in *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013), Petitioners would likely not have standing to ask this Court to rule on the merits of their cause directly. As in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), Petitioners' standing in the state courts is grounded on a statute. AS § 15.13.380(b). Under existing precedent, that statutory standing would likely not suffice to secure Article III standing in this Court. Had Petitioners prevailed in the Alaska Supreme Court, then Alaska would have had standing to defend its law in this Court. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618-19 (1989). But without that ruling, this Court would plausibly not have jurisdiction to rule on the merits of this case.

That uncertainty, however, does not limit this Court's power under § 2106. As noted in *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007), "there is no mandatory 'sequencing of jurisdictional issues.'" *Id.* at 431 (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999)). Instead, as Judge Easterbrook has written, "[j]urisdiction is vital only if the court proposes to issue a judgment on the merits." *Sinochem*, 549 U.S. at 431 (citing *Intec USA v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006) (Easterbrook, J.)).[6]

As a GVR is not a judgment on the merits, there is no jurisdictional bar to this Court vacating the judgment of the Alaska Supreme Court and remanding under § 2106. The only consequence of such an action would be to direct the lower courts to engage in further

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[6] *See also Sinochem*, 549 U.S. at 425 ("a court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case."); *Younger v. Harris*, 401 U.S. 37 (1971) (a federal court need not decide whether the parties present an Article III case or controversy before abstaining); *Tenet v. Doe*, 544 U.S. 1, 7, n.4 (2005) ("a dismissal under *Totten v. United States*, 92 U.S. 105 (1876), prohibiting suits against the Government based on covert espionage agreements, 'may be resolved before addressing jurisdiction.'"); *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 465 (1962) (permitting transfer of case even without personal jurisdiction over the parties); 28 U.S.C. §1631, "Transfer to cure want of jurisdiction." Finally, this Court's long practice of GVRing to clarify whether an independent and adequate state ground bars Supreme Court review confirms that jurisdiction need not be established before a GVR. *See, e.g.*, *Montana v. Jackson*, 460 U.S. 1030 (1983).

review — as in *Maryland Casualty Co. v. Jones*, 279 U.S. 792, 796-97 (1929) (directing lower court to consider objections unmentioned in opinion), *Blackburn v. Alabama*, 354 U.S. 393 (1957) (directing court to consider a Due Process claim related to confession) and *Beer v. United States*, 564 U.S. 1050 (2011) (asking court to consider alternative basis for dismissing claim). If that review produces a reversal of the Alaska Supreme Court's earlier opinion, this Court would then have jurisdiction to review the Alaska Supreme Court's conclusion. *ASARCO*, 490 U.S. at 624. If it does not, this Court could then address whether Petitioners' statute-based standing should be sustained. The function of a GVR in this case would therefore simply be to signal to the lower courts the appropriateness of considering the alternative jurisprudential grounds that the Petitioners have raised and to offer to this Court a more careful analysis of how they might apply.

* * *

So long as Justices on this Court continue to craft opinions that identify alternative jurisprudential approaches to interpreting the federal Constitution — approaches such as originalism — an effective way within the lower courts to reckon those differences is necessary. Or put differently, if the Court is going to choose to speak with more than one voice, there must be a way to count those voices faithfully. Petitioners submit that the method we have advanced here — to GVR in light of the potential for a compound judgment grounded in alternative jurisprudential approaches —

is the most conservative way to permit such perspectives to be recognized without destabilizing the law in the lower courts.

This review is important and timely now. Given the position of the FEC and the uniform judgment of the courts of appeals, it is extremely unlikely that this issue will work its way back to this Court. But if indeed a full accounting of the positions of Justices on this Court would permit states the sovereign power they otherwise would hold to regulate institutional corruption, there could be no justification for this Court allowing that misunderstanding to continue. The authority of this Court to limit state sovereignty is grounded in the belief that the federal Constitution, speaking for "We, the People," disables state regulatory power. But if, as Petitioners insist, no "People" ever ratified a constitution that purported to disable their representative democracies from protecting themselves against corrupting dependencies, then there is no authority to restrict either the states or federal government as they struggle to sustain public faith in representative institutions.

Originalism grounds the power of this Court to restrict legislative action in the view that the Constitution, properly interpreted in the particular case, requires it. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 Cincinnati Law Rev. 849, 862 (1989) (describing the "need for theoretical legitimacy"). Petitioners submit that the First Amendment, properly interpreted both from originalist and non-originalist perspectives, cannot be held to restrict the power of

states to regulate institutional corruption. If Petitioners' submission is correct, then the Alaska Supreme Court was wrong to restrict Alaska's power to regulate institutional corruption. This Court should therefore vacate and remand the case to give Alaska courts the opportunity to consider this practical, judicial reality.

There is no partisan valence anymore to the question of SuperPAC spending. Spending on the Right has been exceeded by spending on the Left. *See* OpenSecrets.org*, Total Liberal vs. Conservative Outside Spending by Election Cycle,* OpenSecrets.org, *available at* https://perma.cc/EU4N-RRCB. Rather, the simple, non-partisan question that begs answering now is whether our Constitution forbids states from resisting this form of "corruption," by limiting the contributions that effect such a corrupting dependence. Petitioners submit that once the full range of arguments relevant to the Justices on this Court is considered, this Court will conclude that it does not.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari, vacate the judgment below, and remand for further consideration in light of its instruction.

Respectfully submitted,

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APPENDIX

Appendix A

494 P.3d 53

Supreme Court of Alaska.

ALASKA PUBLIC OFFICES COMMISSION,
Petitioner,

v.

Donna PATRICK, James K. Barnett, and John P. Lambert, Respondents.

Supreme Court No. S-17649

September 3, 2021

Petition for Review from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, William F. Morse, Judge.

Before: Bolger, Chief Justice, Winfree, Maassen, and Carney, Justices. [Borghesan, Justice, not participating.]

OPINION

CARNEY, Justice.

I. INTRODUCTION

In 2012 the Alaska Public Offices Commission (APOC) issued an advisory opinion stating that the contribution limits in Alaska's campaign finance law are unconstitutional as applied to contributions to independent expenditure groups. In 2018 three individuals filed complaints with APOC alleging that independent expenditure groups had exceeded Alaska's contribution limits. APOC declined to enforce the

contribution limits based on its advisory opinion. The individuals appealed to the superior court, which reversed APOC's dismissal of the complaints and ordered APOC to reconsider its advisory opinion in light of a recent Ninth Circuit Court of Appeals decision. APOC appealed, arguing that it should not be required to enforce laws it views as unconstitutional and that its constitutional determination is correct. Because it was error to reverse APOC's dismissal of the complaints, we reverse the superior court's order.

II. FACTS AND PROCEEDINGS

A. Alaska's Campaign Finance Laws

Alaska's campaign finance laws distinguish between campaign contributions — that is, payments to a candidate, political party, or other group for the purpose of influencing an election — and campaign expenditures, which are transactions that secure goods or services to influence an election.[1] For example, an individual's payment to a political party would be a contribution; if the party then spent that money on a political advertisement, the party's spending would be an expenditure.[2] Expenditures can be either coordinated or independent; an "independent expenditure" is

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[1] *See* AS 15.13.400(4) (defining "contribution"); AS 15.13.400(7) (defining "expenditure").

[2] *See Buckley v. Valeo*, 424 U.S. 1, 21-23, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), *superseded by statute on other grounds as stated in McConnell v. FEC*, 540 U.S. 93, 120-22, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (contrasting campaign expenditures with campaign contributions in the federal context).

one "made without the direct or indirect consultation or cooperation with, or at the suggestion or the request of, or with the prior consent of, a candidate, a candidate's campaign treasurer or deputy campaign treasurer, or another person acting as a principal or agent of the candidate."[3] At issue in this case is AS 15.13.070, the campaign finance law that limits campaign contributions to candidates, groups, and parties.

In January 2010 the United States Supreme Court issued a landmark decision in *Citizens United v. Federal Election Commission*, striking down restrictions on independent expenditures by corporations as an unconstitutional restriction on free speech and holding that "*quid pro quo* corruption" is the only form of corruption that could be targeted by campaign finance limits.[4] *Citizens United* did not directly address restrictions on contributions to independent expenditure groups.[5]

In February 2010 Alaska's then-Attorney General Dan Sullivan prepared a memorandum analyzing the impact of *Citizens United* on Alaska campaign finance election laws. The memorandum concluded that Alaska's prohibitions on independent expenditures by corporations and labor unions were likely unconstitutional but that its laws regulating "contributions to

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[3] AS 15.13.400(11).

[4] 558 U.S. 310, 359, 365, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

[5] We use "independent expenditure groups" to refer to groups that make *only* independent expenditures. A group that makes independent expenditures as well as contributions is not an independent expenditure group.

candidates, coordinated expenditures, disclaimers, and disclosures are not directly affected."

In 2012 APOC issued a unanimous advisory opinion at the request of a group that sought to "take in unlimited contributions from the public to make independent expenditures only." APOC's advisory opinion stated that "contributions to [groups] are currently limited by Alaska's campaign finance laws. However, it appears to APOC staff that the United States Supreme Court's decision in *Citizens United v. FEC* has potentially rendered these restrictions unconstitutional as applied to groups that make only independent expenditures." APOC's advisory opinion cited several federal cases which had overturned limits on contributions to independent expenditure groups and concluded, "APOC Staff recommends that [the group's] proposed contribution activity be allowed because the statutory limitation to that activity may be unconstitutional."

B. Commission Proceedings

In January 2018 Donna Patrick, James K. Barnett, and John P. Lambert (collectively Patrick) filed identical complaints with APOC against two independent expenditure groups. The complaints alleged that the groups had accepted contributions from individuals and groups in excess of the limits imposed by AS 15.13.070(b)-(c). Subsection (b) of the statute limits contributions from individuals to groups, while subsection (c) limits contributions from groups to other groups.

APOC's staff rejected the complaints because they "concern[ed] transactions and activity described and indistinguishable from the activity in an approved advisory opinion" and cited its 2012 advisory opinion. Patrick requested that APOC review its staff's decision.

APOC considered Patrick's request at its February 2018 meeting. Patrick argued that the advisory opinion was incorrect and should be reconsidered, but APOC's staff attorney argued that it was still valid. In March APOC issued an order affirming the denial of Patrick's complaints. It cited AS 15.13.374(e)(1)-(2), which prohibits APOC from considering a complaint about activities approved in an advisory opinion,[6] and concluded that the 2012 advisory opinion prevented it from considering Patrick's complaints.

C. Administrative Appeal

Patrick appealed APOC's decision to the superior court, arguing that the contribution limits were constitutional because the Framers of the United States Constitution had a broader view of corruption than the quid pro quo corruption identified in *Citizens United*. The superior court allowed Patrick to present expert testimony on the Framers' understanding of corruption, which Patrick argued was key to her position that

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[6] AS 15.13.374(e) states, in relevant part: "A complaint under AS 15.13.380 may not be considered about a person involved in a transaction or activity that (1) was described in an advisory opinion approved under (d) of this section; [or] (2) is indistinguishable from the description of an activity that was approved in an advisory opinion ...."

the contribution limits in AS 15.13.070 are constitutional as applied to independent expenditure groups. The court heard testimony from Patrick's expert witnesses in October 2018.

In November 2019 the superior court reversed APOC's dismissal of the complaints and remanded for APOC to consider the complaints in light of a Ninth Circuit decision, *Thompson v. Hebdon*.[7] The *Thompson* court upheld Alaska's limit on individual contributions to all groups, but the Supreme Court later vacated the decision.[8] On remand the Ninth Circuit recently struck down that contribution limit as unconstitutional.[9]

The superior court also "encourage[d] all parties to seek immediate review," recommended that we grant review, and declined to rule on the constitutionality of AS 15.13.070. APOC petitioned for review, which we granted. We ordered the parties to address both the underlying constitutional issue and APOC's authority to decline to enforce a law it deems unconstitutional.

APOC argues that it was prevented by statute from considering complaints concerning activity approved in an advisory opinion, that its advisory opinion holding AS 15.13.070 unconstitutional as applied was correct, and that it has discretion to refuse to enforce laws it considers unconstitutional. Patrick agrees that

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[7] 909 F.3d 1027 (9th Cir. 2018), *judgment vacated*, —— U.S. ——, 140 S. Ct. 348, 205 L.Ed.2d 245 (2019).

[8] *Thompson v. Hebdon*, —— U.S. ——, 140 S. Ct. at 351, 205 L.Ed.2d 245 (2019).

[9] *Thompson v. Hebdon*, 7 F.4th 811, 827–29 (9th Cir. 2021).

APOC had authority to decline to enforce a law it determined was unconstitutional, but argues that the law is constitutional based on a novel originalist interpretation of the Constitution that the Supreme Court has not considered.

III. STANDARD OF REVIEW

"Constitutional issues are questions of law subject to independent review."[10] "We ... substitute our own judgment for" the agency's when deciding questions of law "[w]hen the statutory interpretation does not involve agency expertise, or the agency's specialized knowledge and experience would not be particularly probative."[11]

IV. DISCUSSION

The superior court declined to decide whether Alaska's contribution limit is constitutional as applied to independent expenditure groups. Although neither this court nor the Supreme Court has addressed the issue, APOC argues that limits on contributions to independent expenditure groups are unconstitutional in

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[10] *Eberhart v. Alaska Pub. Offs. Comm'n*, 426 P.3d 890, 894 (Alaska 2018) (quoting *Patterson v. GEICO Gen. Ins. Co.*, 347 P.3d 562, 568 (Alaska 2015)).

[11] *Id.* (quoting *Studley v. Alaska Pub. Offs. Comm'n*, 389 P.3d 18, 22 (Alaska 2017)). If "the interpretation at issue implicat[ed] agency expertise or the determination of fundamental policies within the scope of the agency's statutory functions," we would "give deference to [the] agency's interpretation of a statute so long as it is reasonable." *Id.* (quoting *Studley*, 389 P.3d at 22). In this case the agency's expertise is not implicated.

light of *Citizens United* and subsequent federal appellate cases. Patrick acknowledges that "a line of federal appellate cases" has held that limiting such contributions is unconstitutional but argues that those "cases were wrongly decided because the courts ... were not presented with evidence about the original understanding of the term 'corruption.' "We are not persuaded by Patrick's argument and hold that AS 15.13.070's limits on contributions to independent expenditure groups are unconstitutional.

A. *Thompson v. Hebdon* Is Not Dispositive.

The superior court based its decision on the original Ninth Circuit decision in *Thompson*. But even before *Thompson* was overturned, the superior court's reliance on it was misplaced. *Thompson* concerns the constitutionality of Alaska's contribution limits in general; this case addresses the constitutionality of those contribution limits only as applied to independent expenditure groups.[12] There is only partial overlap between the contribution limits addressed by *Thompson* and the ones at issue in this case.[13] And "[a]n as-applied [constitutional] challenge requires evaluation of

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[12] 7 F.4th at 816–17 (describing parties and challenges).

[13] This case concerns Alaska's individual-to-group and group-to-group contribution limits. Although *Thompson* addresses the individual-to-group contribution limit, it does not address the group-to-group contribution limit. *Id* at 816–17 (listing challenged provisions).

the facts of the particular case in which the challenge arises."[14]

More relevant to this case are two other Ninth Circuit cases in which the court indicated that contribution limits in other states were unconstitutional as applied to independent expenditure groups.[15] Because the issue in this case is the more precise question of the constitutionality of contribution limits as applied to independent expenditure groups, those cases are more pertinent to our analysis. Indeed, APOC has raised a concern that if it is required to prosecute Patrick's complaints, it will be placed in the "impossible position" of having "to take an action that the Ninth Circuit has held unconstitutional."

B. Federal Precedent Overwhelmingly Suggests That Limits On Contributions To Independent Expenditure Groups Are Unconstitutional.

The Supreme Court has yet to address whether limits on contributions to independent expenditure groups are unconstitutional, but it has created a legal framework to analyze the constitutionality of

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[14] *Dapo v. State, Off. of Child.'s Servs.*, 454 P.3d 171, 180 (Alaska 2019) (alteration in original) (quoting *Kyle S. v. State, Dep't of Health & Soc. Servs., Off. of Child.'s Servs.*, 309 P.3d 1262, 1268 (Alaska 2013)).

[15] *See Long Beach Area Chamber of Com. v. City of Long Beach*, 603 F.3d 684, 698 (9th Cir. 2010); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1121 (9th Cir. 2011), *overruled on other grounds by Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019).

campaign finance laws. In *Buckley v. Valeo*, the Court held that a law limiting campaign contributions will be upheld if it furthers a sufficiently important state interest and is closely drawn to serve that interest,[16] but a law limiting expenditures must "satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression."[17] The Court held that preventing corruption and the appearance of corruption is a sufficiently important state interest.[18] In *Citizens United* the Court clarified that the anti-corruption interest identified in *Buckley* is "limited to *quid pro quo* corruption."[19] The Court struck down a law that prohibited corporate independent expenditures, holding "that independent expenditures ... do not give rise to corruption or the appearance of corruption."[20] The Court reiterated this framework in *McCutcheon v. FEC*, where it noted that the only legitimate governmental interest it had identified for restricting campaign finances was "preventing corruption or the appearance of corruption" and emphasized

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[16] 424 U.S. 1, 25, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), *superseded by statute on other grounds as stated in McConnell v. FEC*, 540 U.S. 93, 120-22, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003).

[17] *Id.* at 44-45, 96 S.Ct. 612.

[18] *Id.* at 26-29, 96 S.Ct. 612 (plurality opinion) (upholding $1,000 contribution limit).

[19] *Citizens United v. FEC*, 558 U.S. 310, 359, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

[20] *Id.* at 357, 130 S.Ct. 876.

that "Congress may target only a specific type of corruption — '*quid pro quo*' corruption."[21]

Two rationales underlie the Court's different treatment of campaign contributions and independent expenditures. First, the Court has held that contribution limits are a "lesser restraint" on political speech than expenditure limits and therefore subject to less exacting review.[22] Second, the Court has reasoned that, unlike contributions, independent expenditures are not prearranged or coordinated with a campaign, which "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[23]

APOC argues that *Citizens United* calls into question the constitutionality of limits on contributions to independent expenditure groups because, if independent expenditures themselves do not give rise to corruption or its appearance, it is difficult to argue that contributions to groups that make only independent expenditures give rise to corruption or its appearance.

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[21] 572 U.S. 185, 206-07, 134 S.Ct. 1434, 188 L.Ed.2d 468 (2014).

[22] *Id.* at 197, 134 S.Ct. 1434 (noting that expenditure limits are subject to exacting scrutiny while campaign contributions are subject to "a lesser but still 'rigorous standard of review' " (quoting *Buckley*, 424 U.S. at 29, 96 S.Ct. 612)); *see also Buckley*, 424 U.S. at 20-21, 96 S.Ct. 612 (reasoning that contribution limits are less restrictive than expenditure limits because "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support").

[23] *Citizens United*, 558 U.S. at 357, 130 S.Ct. 876 (quoting *Buckley*, 424 U.S. at 47, 96 S.Ct. 612).

A number of federal courts, including the Ninth Circuit, have come to the same conclusion. Shortly after *Citizens United*, the D.C. Circuit Court of Appeals decided in *SpeechNow.org v. FEC* that "contributions to groups that make only independent expenditures ... cannot corrupt or create the appearance of corruption" and therefore "that the government has no anti-corruption interest in limiting contributions to an independent expenditure group."[24] The Ninth Circuit held that a city ordinance prohibiting groups from making independent expenditures if they received contributions above certain amounts was unconstitutional as applied to political action committees that made only independent expenditures.[25] The Second,[26] Fourth,[27]

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[24] 599 F.3d 686, 694-95 (D.C. Cir. 2010). Because the D.C. Circuit found no legitimate government interest, it declined to decide which standard of review to apply, holding that "[n]o matter which standard of review governs ... the limits on contributions to [an independent expenditure group] cannot stand." *Id.* at 696.

[25] *Long Beach Area Chamber of Com. v. City of Long Beach*, 603 F.3d 684, 698 (9th Cir. 2010). The Ninth Circuit later relied on this precedent to uphold a preliminary injunction against enforcement of a similar law. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1121 (9th Cir. 2011), *overruled on other grounds by Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019).

[26] *See N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (noting in preliminary injunction context that "[f]ew contested legal questions are answered so consistently by so many courts and judges").

[27] *See N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293 (4th Cir. 2008) (observing that independent expenditure groups are "furthest removed" from candidates and political action committees).

Fifth,[28] Seventh,[29] and Tenth Circuit[30] Courts of Appeals have reached similar conclusions. The Second Circuit noted that "few contested legal questions are answered so consistently by so many courts and judges."[31]

Although we are not bound by federal circuit court decisions,[32] we agree with their reasoning. Given the Supreme Court's holding that preventing quid pro quo corruption and its appearance is the only legitimate governmental interest for campaign finance regulations and its holding that independent expenditures do not give rise to quid pro quo corruption or its

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[28] *See Texans for Free Enter. v. Texas Ethics Comm'n*, 732 F.3d 535, 537-40 (5th Cir. 2013) (upholding a preliminary injunction on the basis that a law limiting contributions to independent expenditure groups was "incompatible with the First Amendment").

[29] *See Wisc. Right to Life State PAC v. Barland*, 664 F.3d 139, 155 (7th Cir. 2011) (holding $10,000 annual contribution cap unconstitutional as applied to independent expenditure committees).

[30] *See Republican Party of N.M. v. King*, 741 F.3d 1089, 1103 (10th Cir. 2013) (affirming grant of preliminary injunction and holding that political committees not formally affiliated with a party or candidate "may receive unlimited contributions for independent expenditures").

[31] *N.Y. Progress & Prot. PAC*, 733 F.3d at 488.

[32] *See Native Vill. of Tununak v. State, Dep't of Health & Soc. Servs., Off. of Child.'s Servs.*, 334 P.3d 165, 175 (Alaska 2014) ("We are 'not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law.'" (quoting *Totemoff v. State*, 905 P.2d 954, 963 (Alaska 1995))).

appearance,[33] there is no logical rationale for limiting contributions to independent expenditure groups. If anything, contributions to such groups are *more* attenuated from the possibility of quid pro quo corruption than the expenditures themselves. There is no logical scenario in which making a contribution to a group that will then make an expenditure is more prone to quid pro quo corruption than the expenditure itself. In light of *Citizens United*'s holding that independent expenditures "do not give rise to corruption or the appearance of corruption,"[34] contribution limits to independent expenditure groups would not withstand even the lower level of scrutiny applied to contribution limits.[35]

C. Patrick's Argument Fails Because It Is Based On The Assumption That The U.S. Supreme Court Will Overrule Its Decision.

Patrick does not dispute that federal courts have consistently held that limits on contributions to independent expenditure groups are unconstitutional. Patrick instead argues that those cases were wrongly

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[33] *Citizens United v. FEC*, 558 U.S. 310, 357-59, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

[34] *Id.*

[35] *See Long Beach Area Chamber of Com. v. City of Long Beach*, 603 F.3d 684, 693 (9th Cir. 2010) (holding that appeal does not turn on whether limit on contributions to independent expenditure groups is classified as contribution limit or expenditure limit because statute "does not withstand scrutiny under the constitutional standards applicable to either type of campaign finance regulation").

decided. Patrick agrees that if the government may guard only against quid pro quo corruption, then "Alaska's law would not stand." But Patrick contends that the Supreme Court has never been presented with the argument that the government may permissibly use campaign finance laws to protect against forms of corruption other than individual corruption. As a result, Patrick says, there is still an opportunity for the Court to embrace broader conceptions of corruption held by the Framers of the Constitution, specifically the concept of "institutional corruption."

Patrick asserts that the Framers originally intended to guard against not only individual corruption but also "institutional corruption" or "structural corruption." Indeed, Patrick argues, "institutional corruption was the most important [consideration] ... as they developed their constitutional design." Patrick argues that the Framers focused on "the structure of incentives allowed to evolve within institutions .... [because] institutional corruption occurs when those incentives undermine the intended manner in which those institutions were meant to function." And Patrick points to empirical evidence that unregulated campaign finance leads to institutional corruption by making politicians dependent on, and therefore responsive to, a small number of major donors rather than the population as a whole.

Patrick then posits that those justices who subscribe to an originalist interpretation of the Constitution should adopt a more limited understanding of judges' roles in protecting First Amendment rights because protecting First Amendment rights was

originally viewed as the province of legislators. Although Patrick acknowledges that modern First Amendment jurisprudence does not reflect an originalist understanding, Patrick believes the originalists on the Court should nonetheless "constrain judicial discretion by fixing the meaning of the First Amendment doctrine to an original understanding of the concepts deployed."

Patrick compares this case to *District of Columbia v. Heller*,[36] arguing that in that case "the Court remade the scope of the Second Amendment" contrary to an earlier decision because the government's brief in the earlier decision "provided scant discussion of the history of the Second Amendment"[37] and "presented ... no counterdiscussion."[38] Patrick argues that the Court could similarly revise its understanding of the Constitution in this case in light of historical evidence not previously brought to its attention.

Patrick's historical argument may be particularly apt in Alaska, which "has the second smallest legislature in the country and derives approximately 90 percent of its revenues from one economic sector,"[39] making the state "highly, if not uniquely, vulnerable to

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[36] 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

[37] *Id.* at 623-24, 128 S.Ct. 2783.

[38] *Id.* at 624, 128 S.Ct. 2783.

[39] *Thompson v. Hebdon*, —— U.S. ——, 140 S. Ct. 348, 351-52, 205 L.Ed.2d 245 (2019) (Ginsburg, J., concurring).

corruption in politics and government."[40] Patrick's argument essentially asks us to ignore Supreme Court precedent in the hope that the Court will reverse itself.

But the Court has clearly held that "while preventing corruption or its appearance is a legitimate objective, Congress may target only a specific type of corruption — '*quid pro quo*' corruption."[41] Similarly, "because the Government's interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption, the Government may not seek to limit the appearance of mere influence or access."[42] And "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[43] Patrick's argument that corruption should be defined more broadly than quid pro quo corruption is not new.[44] The dissent in *McCutcheon v. FEC* made historical and structural

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[40] *Id.* at 352 (quoting *Thompson v. Dauphinais*, 217 F. Supp. 3d 1023, 1029 (D. Alaska 2016)).

[41] *McCutcheon v. FEC*, 572 U.S. 185, 207, 134 S.Ct. 1434, 188 L.Ed.2d 468 (plurality opinion) (2014).

[42] *Id.* at 208, 134 S.Ct. 1434.

[43] *Citizens United*, 558 U.S. at 357, 130 S.Ct. 876.

[44] *See, e.g.*, *McCutcheon*, 572 U.S. at 235, 134 S.Ct. 1434 (Breyer, J., dissenting) ("The plurality's first claim — that large aggregate contributions do not 'give rise' to 'corruption' — is plausible only because the plurality defines 'corruption' too narrowly.").

arguments for a broader view of corruption,[45] and the plurality specifically rejected that approach.[46]

While it is conceivable that the Supreme Court could overrule *Citizens United* in light of Patrick's historical analysis, we are bound by the Court's current interpretation of the federal Constitution. We will not rule otherwise based on a prediction that the Court will reverse itself.[47] Because the logic of Supreme Court precedent requires us to conclude that limits on contributions to independent expenditure groups are unconstitutional, AS 15.13.070's contribution limits are unconstitutional as applied to contributions to independent expenditure groups.[48]

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[45] *Id.* at 236-37, 134 S.Ct. 1434 (discussing structural concerns of the Framers and arguing that "the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech *matters*" (emphasis in original)).

[46] *See id.* at 208, 134 S.Ct. 1434 (plurality opinion) ("The dissent advocates a broader conception of corruption ....").

[47] *See Fam. Sec. Life Ins. Co. v. Daniel*, 79 F. Supp. 62, 69 (E.D.S.C. 1948), *rev'd on other grounds*, 336 U.S. 220, 69 S.Ct. 550, 93 L.Ed. 632 (1949) ("We are firmly of the opinion that if the decisions of the Supreme Court are to be reversed, that function should be reserved to the Supreme Court itself.").

[48] Because the 2012 advisory opinion was correct, we need not address APOC's argument that it was bound by the advisory opinion due to the "safe harbor" provisions in AS 15.13.374(e)(2). And Patrick does not challenge APOC's authority to decline to enforce a law it deemed unconstitutional. Because the parties do not dispute that issue, we decline to decide it. *See Clark v. Mun. of Anchorage*, 777 P.2d 1159, 1161 n.3 (Alaska 1989) (declining to decide whether compromise and release was governed by same rules

V. CONCLUSION

The superior court's decision is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

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governing "simple release[s] of tort liability" when parties agreed that it was).

Appendix B

Expert report of Dr. Jack Rakove

Superior Court for the State of Alaska

Background

I am the William Robertson Coe Professor of History and American Studies, and Professor of Political Science and (by courtesy) Law at Stanford University, where I have taught since 1980. I earned an A.B. in History from Haverford College in 1968 and a Ph.D. in History from Harvard University in 1975. I am the author of seven books on the American Revolution and Constitution, including *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (1979); *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996), which received the Pulitzer Prize in History and two other book prizes; *Revolutionaries: A New History of the Invention of America* (2010), which was a finalist for the George Washington Prize; and *A Politician Thinking: The Creative Mind of James Madison* (2017). I have edited another six books, with a seventh, *The Cambridge Companion to The Federalist*, due to be published next year. I have written roughly seventy-five scholarly articles and chapters, and numerous other short essays and op-eds.

I have also been the principal author of four *amicus curiae* historians' briefs submitted to the United States Supreme Court in these cases: *Vieth v. Jubilier* (2003-2004), which dealt with partisan gerrymandering in Pennsylvania; *Hamdan v. Rumsfeld* (2005); *D.C.*

v. Heller (2008); and *Arizona State Legislature v. Arizona Independent Redistricting Commission* (2015). I also participated in drafting an *amicus curiae* brief on the meaning of the two Emoluments Clauses of the Constitution in *C.R.E.W. v. Trump* (2017). In 1983-1988 I was a consultant to Goodwin, Procter & Hoar and expert witness in *Oneida Indian Nation v. State of New York*.

For this litigation, I have been asked to discuss how issues of governmental corruption were viewed during the Founding era of the American republic, with reference to prevailing political ideas and debates and constitutional and legal provisions that were conceived to deter or limit the impact of corruption on public life. This report is, in effect, a discussion of the concept of political corruption, which has different meanings and connotations in different periods and societies.

As compensation, I am receiving a flat fee of $12,500 as well as travel expenses covering my trip to Anchorage.

Introduction

How did the founding generation of the American republic, and more specifically, the framers and ratifiers of the Federal Constitution, think about the problem of political corruption? There is obviously no question that they understood overt forms of bribery to be blatant forms of corruption. The Impeachment Clause of the Constitution identifies bribery as one of three categories of offenses that warrant removal from office. The Foreign Emoluments Clause, which is now much in the news, was written with well-established

historical knowledge of the formerly secret Treaty of Dover of 1670, when Louis XIV had effectively bribed Charles II of England to pursue a pro-French foreign policy and privately commit himself to support the Church of Rome. Some framers of the Constitution believed that the wartime French embassy to the United States had bribed at least one member of the Continental Congress—John Sullivan of New Hampshire—to support French policy. Back in the 1760s, Virginia politics had been wracked by charges of financial corruption directed against John Robinson, the speaker of the lower house of the Virginia legislature.

But was the founding generation's understanding of corruption limited to bribery alone? The short answer is that while bribery was, by definition, the most obvious form of corruption, it was only one example of the ways in which a political system could be corrupted. As one of the numerous political *concepts* that the American colonists had inherited from European and British writers, the concept of corruption covered a whole array of phenomena. One could use it, as Machiavelli did, to describe the civic erosion of an entire political culture. It could also describe a set of relationship between institutions that had befouled the true principles of constitutional government, as eighteenth-century British opposition writers used it to lambaste the Crown's influence over the House of Commons. Like most political concepts, *corruption* had inflationary properties: it could be used opportunistically to criticize some innovation that one detested for other reasons. History provided numerous examples of what corruption had meant in the past, but that did

not eliminate the appearance of other forms of corruption in the present or future.

The concept of political corruption

The practice of corruption is the subject of countless books. Like obscenity, we know corruption when we see it, and cases are easily multiplied. The distinguished American jurist, John T. Noonan, Jr., for example, has written a massive history of *Bribes* that spans several millennia, moving from ancient Egypt to the ABSCAM scandal of the late 1970s and early 1980s.[1] Specific episodes of corruption have their particular histories. The history of the Yazoo land scandal of the late 1790s or the presidencies of Ulysses S. Grant and Warren G. Harding easily generate probing accounts of greedy politics and public malfeasance.

Yet a comprehensive history of the *concept* of political corruption has yet to be written. As a political phenomenon, corruption has an intellectual history of its own. The concept of corruption is not reducible to a simple definition or a mere compendium of acts of bribery, embezzlement, or patronage. One could write a history of the concept of corruption that could go as far back as Thucydides' *History of the Peloponnesian War* and Aristotle's *Politics*.[2] The problem of the *corruzione* of a state was a main topic in the political thinking of Niccolò Machiavelli, whom scholars often treat as the

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[1] John T. Noonan, Jr., *Bribes* (New York, 1984).

[2] J. Peter Euben, "Corruption," in Terence Ball, James Farr, and Russell L. Hanson, eds., *Political Innovation and Conceptual Change* (Cambridge, UK, 1989), 223-230.

first modern student of politics. His chapters on this subject in the *Discourses on Livy* proved fundamental to the development of early modern republican thinking in the sixteenth century. Machiavelli's ideas about republicanism were soon transmitted to English readers in the Tudor and Stuart eras of the sixteenth and seventeenth centuries.[3] A concern with the corruption of an independent and legally supreme Parliament by the Crown then became a major theme in eighteenth-century British opposition thinking. The Scottish philosopher-historian David Hume wrote an influential essay on this subject, and that essay, along with comparable work by other English opposition writers, had a major impact on America's revolutionary founders. Their ideas about separation of powers, checks and balances, and the idea of an extended federal republic were profoundly influenced by their inherited perceptions of the corruption of the eighteenth-century British constitution.

One cannot reconstruct the Founding generation's view of corruption, then, simply by examining how the word was defined in eighteenth-century dictionaries. The word *corruption* does not appear in the Revolutionary-era constitutions that were written first at the state and then at the national levels of government. The closest one gets is the presence of the word *bribery* in the impeachment clause of Article II, Sect. 4 and the references to *emoluments* in Article I, Section 9, and Article II, Section 1. Corruption is much more a

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[3] Felix Raab, *The English Face of Machiavelli: A Changing Interpretatiuon, 1500-1700* (London and Toronto, 1964, 2010).

concept than a mere word, and to grasp its original meaning at the time the Constitution was adopted, one has to ask how the Founding generation thought about the diverse ways in which their polity or government might be corrupted. In a sense, one has to be able to write an intellectual history of how the Founding generation thought about politics in the broadest sense of the term.

Machiavelli's significance

At first glance, Machiavelli seems an odd figure to place at the start of a report asking how the Founding generation thought about political corruption. We know Machiavelli primarily as the author of *The Prince*, that landmark manual of statecraft that asked how a prince could secure his rule in a new city he had not previously governed. Manuals for princes were a standard element of medieval and early modern political theory, universally couched in terms of Christian morality. Machiavelli broke decisively with that moral tradition. He famously asked whether it is better to be feared or loved, and came down decisively on the side of fear. To his many critics, Machiavelli is cast as a "teacher of evil." When we characterize some political actor or action Machiavellian, it is this calculating, cynical, and even brutal perspective that we have in mind.

Yet the Machiavelli who wrote *The Prince* was also working more or less concurrently on his *Discourses on the First Ten Books of Titus Livy*. Determining the relationship between these two texts is the great challenge that has shaped the rich scholarship on

Machiavelli. That question need not interest us here. Two other essential facts, however, do matter. First, the *Discourses* is a foundational text of early modern republican thinking, and concepts and arguments that Machiavelli used there resonated throughout the sixteenth, seventeenth, and eighteenth centuries, with important results in both England and revolutionary America. Second, the problem of corruption was a controlling theme in Machiavelli's thinking. Corruption, as he thought about it, had little to do with prosaic acts of bribery or nepotism or non-bid contracts. It involved forces more essential and corrosive: the emergence of a degraded way of life that would prevent a community from leading a political life (*vivere politico*) or a civil life (*vivere civile*) or from living in *uno stato libero,* a "free state." (This term reappears in the preamble to the Second Amendment of the U.S. Constitution, and one could indeed draw a straight line from Machiavelli's concerns with having a militia of Florentine citizens to the language of that Amendment.) For Machiavelli, the concept of corruption offered an essential way of describing the health—or better, diagnosing the diseases—of a body politic. In his era, and later, the idea that a state had a constitution did not mean, as it later would, that it had a written charter of government; it was rather a metaphor for the organic strength of the body politic, and therefore for the lasting welfare of the whole society.[4]

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[4] There are numerous analyses of Machiavelli's political ideas and, more specifically, his view of corruption. In this report, I rely on J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republic Tradition* (Princeton,

Appendix B

Machiavelli devoted three chapters to the problem of corruption in Book I of the *Discourses*.[5] In Chapter 16, in a preliminary way, he announced that "a people which has become completely corrupted"—which had lost all the attributes of living in liberty—"cannot live free even for a brief time, not even a moment." For that reason, Machiavelli declared that he would limit his "concern [to] those peoples where corruption has not spread too widely and there remains more of the good than the tainted." The prime historical example of this, Machiavelli observed in concluding Chapter 16, was the Roman people after their expulsion of the Tarquin kings and their creation of the republic in 509 b.c.e. In Chapter 17, Machiavelli then argued that "it was Rome's greatest good fortune that its kings quickly became corrupt, so that they were driven out, and long before their corruption had passed into the heart of the city." From this situation Machiavelli concluded "that where the material is not corrupt, disturbances and other disorders can do no harm, and where the material is corrupt, carefully enacted laws do no good," unless they are imposed by an individual—a prince or lawgiver—"in such a way that the material becomes good." When Machiavelli speaks of "material" (as in "*la materia dove la è corrotta*") he is describing the

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1975), 183-218, and a recent book by Fabio Raimondi, *Constituting Freedom: Machiavelli and Freedom*, trans. Matthew Armistead (New York, 2018), 1-31. Also very helpful is Quentin Skinner, *Machiavelli: A Very Short Introduction* (Oxford, UK, 1981), 54-87.

[5] In this and the next paragraph I have used the translation by Julia Conaway Bondanella and Peter Bondanella, *Niccolò Machiavelli: Discourses on Livy* (New York, 1997), 62-71.

formative qualities and characteristics of a city's citizens and subjects.

Machiavelli described the great problem he was raising in the opening sentence of Chapter 18: "to consider whether or not it is possible to maintain a free government [*lo stato libero*] in a corrupt city if one already exists; or whether or not, if one does not already exist, it can be established there." This was, Machiavelli immediately conceded, a truly difficult problem, and he made the challenge even greater by assuming that "the city in question is extremely corrupt." In his accounting, the forms of corrupting *la materia* of the people were many and diverse, and the paths to reform few and difficult. But the end goal for Machiavelli remains the same: to enable a people to lead a political life (*vivere politico*) or a civil life (*vivere civile*) where laws are obeyed; inequalities minimized; all citizens, even the most meritorious, remain subject to the laws when they commit unjust acts; and where ordinary people could participate in public life and be required to defend their republic against its enemies (rather than relying on the mercenary armies that Machiavelli utterly distrusted). In such a republic, the people would have legal devices available to monitor and prosecute the misdeeds of the elite. The great example on which Machiavelli drew was the Roman tribunate, which was elected by the plebeians, and which had the authority to bring legal charges against patricians.

All of these practices and institutions instantiated and exemplified "the new modes and orders [*modi ed*

ordini nuovi]"[6] that Machiavelli proposed instituting in cities that were not yet too corrupt, where a civil and political life reconstituted on republican principles could still be restored. Machiavelli derived these "new modes and orders" either from the Roman history that he had studied or from his own rich experience. The great attraction of Roman history lay in the centuries-long process whereby the Roman republic had been able to expand and to create a vast empire across Italy and then the Mediterranean. The most important consequence of implementing these new modes and orders would be to create or revive a deep sense of civic *virtú*. Among all the other key words that characterized his thought—*corruzione*, *stato*, *fortuna,* and *materia*—*virtú* was arguably the one that remained most essential to Machiavelli's republican commitments.

Just like *corruzione*, the concept of political *virtú* also has a complicated meaning. In *The Prince*, for example, *virtú* embodied the talents that enabled the lone ruler of a community to master all the vicissitudes and contingencies of *fortuna*. In effect, *virtú* and *fortuna* were linked as opposites. *Fortuna*, the chaotic world of human affairs, created the unstable and dangerous political world that the prince had to master;

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[6] Machiavelli used this famous phrase in the opening sentence of his preface to the autograph manuscript of *The Discourses*, asserting that the difficulties of explaining how to establish a republic are no less dangerous than the task of exploring "unknown lands and seas." Some translators prefer to say "new methods and institutions," but in my view, *institutions* in contemporary English has too specific a meaning to capture the range of practices Machiavelli had in mind.

virtú identified the talents that the prince needed to wield in order to command it. But in *The Discourses*, Machiavelli's notion of *virtú* takes a different form. Now it involves all those relations—the "new modes and orders"—that collectively enable the citizens of a polity to maintain their republic. *Virtú* connotes a set of civic obligations and attitudes that a people must possess to create a stable republic, one that will resist both the turmoil of *fortuna* and the various sources of *corruzione*.

Foremost among the latter is the underlying ambition of the upper classes and aristocracy (sometimes known as the *grandi* [the great] or the *ottimati* [optimates]). As the historian John Najemy observes, "the unifying theme of the *Discourses* is the precariousness of republics and their vulnerability to the ambition of the noble and elite classes. The motor driving the history of republics, their forms of government, and their capacity for survival, defense, and expansion is the perpetual antagonism between the nobles and the people." In opposition to other writers, who viewed the antagonism between the patricians and plebeians with contempt, Machiavelli boldly and radically argued that the active struggles between the *grandi* and the *populo* made possible by the creation of the tribunate was the real source of Rome's stability. Where the nobility wanted to dominate the people, and would happily use corrupt means to attain their ends, the people only wanted to be left alone to govern their own lives,

and to rely upon the legal system to secure their liberty.[7]

Machiavelli's fear of corruption, it can thus be said in conclusion, takes the form of a deep and persisting worry that the wealthy who want to dominate the rest of the population will always look for devices that will enable them to exploit their resources and influence for politically sinister purposes, to the weakening of the free state the republic is conceived to be. The proper answer to this corruption is the preservation of popular *virtú*, which will be especially enhanced both by the people's participation in the militia and by the existence of means to impose justice on the elite. Unlike other writers who perpetually worried about the danger of turmoil, in any form, Machiavelli believed that the active prosecution of civic crimes, even when directed against a society's elite or its past heroes (who had gone astray), was one of the "orders" that would maintain the collective *virtú* of the population.

Corruption in Anglo-American Political Culture

The theme of *virtú*, now translated in pale form into English as virtue,[8] had a prominent place in American

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[7] John M. Najemy, "Society, Class, and State in Machiavelli's *Discourses on Liberty*," in Najemy, ed., *The Cambridge Companion to Machiavelli* (Cambridge, UK, 2010), 102-104. For a much more extended treatment of these issues, see John P. McCormick, *Machiavellian Democracy* (New York, 2011).

[8] The colloquial use of virtue in contemporary English does not really capture the robust political character of Machiavelli's *virtú*. In their translation of *The Discourses* (p. 361) the Bondanellas,

republican thinking. "If there is a form of government then, whose principle and foundation is virtue," asked John Adams in his revolutionary pamphlet, *Thoughts on Government* (1776), "will not every sober man acknowledge it better calculated to promote the general happiness than any other form?"[9] Like Machiavelli in the early 1500s, the American revolutionaries believed that the fate of the republican governments they were now forming depended on the people's possession of civic virtue, which they defined primarily as a willingness to subordinate private interest to public good. Republican government required a culture where "each man must somehow be persuaded to submerge his personal wants into the greater good of the whole."[10] Montesquieu had taught that each of the three forms of government (monarchy, aristocracy, republic) had a defining moral characteristic: virtue was the true signifier of republicanism.

On the question of political corruption, however, the American revolutionaries accepted a much more focused definition that was the direct product of British history since the Glorious Revolution of 1688, when the Dutch *stadtholder* William of Orange and his wife, Mary, replaced her father, James II, on the throne. The main constitutional result of this revolution, as confirmed by the Declaration of Rights of 1689, gave

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for example, list "ability, skill, merit, ingenuity, strength, [and] sometimes even virtue" as defining synonyms for *virtú*.

[9] Philip Kurland and Ralph Lerner, eds., *The Founders' Constitution* (Chicago, 1987), I, 108.

[10] Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, N.C., 1969), 65-70 (quotation at 68).

legal supremacy to Parliament. The Stuart monarchs had previously voiced claims to absolutist authority, and they had periodically attempted to rule either without allowing Parliament to meet at all or by prolonging a single Parliament without holding fresh elections to the House of Commons. After 1689, that disdain for parliamentary consent to acts of government was no longer possible. A Triennial Act adopted in 1694 required that Parliament meet every three years, but equally important, the practice of granting "annual supplies" (appropriations for funding government) and the annual adoption of a Militia Act (which evolved into a general statute organizing military activities) made Parliament a standing institution of government.[11]

So far, so good: England (or, after the adoption of the Act of Union with Scotland in 1707, the United Kingdom of Great Britain) had become a constitutional monarchy unlike the absolutist monarchies of France, Spain, and Russia. Its "mixed" constitution combined the estates of royalty, aristocracy, and common subjects in one sovereign Parliament, known as the King-in-Parliament. This "boasted" or "vaunted" British constitution became the envy of enlightened Europe. Its virtues were celebrated in a famous section of the Baron of Montesquieu's *The Spirit of the Laws*, arguably the greatest work of eighteenth-century political science, which noted that there was only one nation

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[11] For a great survey of this subject, see J. H. Plumb, *The Origins of Political Stability; England, 1675-1725* (Boston, 1967).

whose constitution made the preservation of liberty its chief end: Britain.

But in the years after the Hanoverian dynasty took the throne in 1714, the practice of British politics evolved in significant ways. Beginning with Sir Robert Walpole, this period marked the beginning of the growth of ministerial government, in which effective control of the executive (the Crown) passed to whichever leader commanded majority support in the House of Commons (as well as the personal favor of the king). British politics became coalitional politics, as leaders gathered coteries of followers and negotiated to form stable coalitions. Other mechanisms worked to make politics more manageable. A Septennial Act extended the period between parliamentary elections from three years to seven. The existence of "pocket" and "rotten" boroughs—parliamentary constituencies respectively either controlled by some dominant government interest or that contain few, easily influenced voters—made it easier for ministries to manage elections. The national electorate contracted, so that an estimated ten thousand voters in a nation of eight million determined who served in the Commons.

Perhaps most important, the Crown found reliable techniques to build a steady phalanx of supporters in Parliament. Offices, pensions, sinecures, and other sources of patronage and influence guaranteed the loyalty of backbenchers. If individual ministers occasionally lost the support of the majority of the Commons, requiring new coalitions to form, the Crown was never in the minority. The king retained the right to veto

legislation, but its use was abandoned after 1707 because there was never any need to deploy it.

This was the form of corruption, by patronage and other forms of influence, that opposition political writers began denouncing in the 1720s and 1730s, and which the American colonists in turn absorbed through newspapers and pamphlets. It was a distinctively British form of *corruzione*, in Machiavellian terms, because it violated the true principles of the Glorious Revolution. The idea of parliamentary supremacy rested on the belief that the true duty of the legislature was to check the misuse of the executive power held by the king and his ministers. The concrete exercise of power was the natural work of the Crown; the protection of liberty was the chief responsibility of Parliament. It could fulfill that task only if it preserved the legislative privileges that secured its deliberative independence; only if it accurately represented the feelings and interests of its constituents; and only if its members remained free from the different forms of corrupt influence the Crown could bestow.

Drawing upon ideas that went as far back as the 1670s, British politics was often described in terms of a division between "Court" and "Country" parties, the former favoring the policies of the king and his ruling ministers, the latter worrying about all the insidious uses of patronage and influence that were enabling the Crown to sap the independence of a theoretically supreme Parliament. These were not political parties in the modern sense of the term, but rather perspectives that were repeatedly, even tediously, echoed in public debate, yet which also retained a deep hold on

contemporary views of how the British constitution was actually working. It was in this sense that the philosopher-historian David Hume referred to "the principles of the *court* and *country* parties, which are the genuine divisions in the BRITISH government."[12] Adherents of the country perspective repeatedly argued for excluding "placemen" from Parliament, and for requiring members of the House of Commons to serve relatively short terms.[13] A House of Commons whose members were habituated to government offices and pensions was constitutionally corrupted. On the other side of the question, advocates of the Court party believed, as party-men always do, that patronage makes government more efficient and decisive; it is something the constitution needs to make it work.

Hume addressed this issue incisively in his short essay "Of the Independency of Parliament." The "paradox" of the British constitution, Hume argued, was that although "The share of power, allotted by our constitution to the house of commons, is so great, that it absolutely commands all the powers of government," it nevertheless refused to wield that power to its full extent, but was content to remain "confined with the proper limits" of the constitution. The motivation for that restraint lay in the personal "interest of the majority of its members. The crown has so many offices at its disposal, that, when assisted by the honest and

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[12] David Hume, "The Parties of Great Britain," in Eugene F. Miller, ed., *David Hume: Essays Moral, Political, and Literary*, rev. ed. (Indianapolis, 1985, 1987), 71.

[13] Pocock, *Machiavellian Moment*, 406-410.

disinterested part of the house," it always had the support it needed to preserve monarchical power within the balanced constitution. "We may call [this] influence by the invidious appellations of *corruption* and *dependence*," Hume wrote; "but some degree and some kind of it are inseparable from the very nature of the constitution, and necessary to the preservation of our mixed government"—and with it the liberty it was boasted to preserve.[14]

As forms of corruption go, these ideas of using patronage and pensions to produce reliable legislative majorities hardly seem the most odious threat the liberty of the people might face. As Hume argued, there was a net positive good to the Court party's position: it preserved the balanced constitution of King, Lords, and Commons that Montesquieu and other eighteenth-century observers so admired, and which distinguished Britain from all other regimes. But from the vantage point of English opposition writers and their American colonial readers, the danger remained real nonetheless. A Commons staffed by placemen and party-men would be unable to check all the forms of aggrandizement and personal enrichment that the King's ministers would assiduously pursue. Perhaps the constitutional settlement of 1688 and its immediate aftermath could be preserved if there was a "king above party," as Henry St. John, the Viscount Bolingbroke, argued—a monarch who would not be the captive of his ministers, but who would instead embody the entire

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[14] Hume, "Of the Independency of Parliament," in Miller, ed., *Essays Moral, Political, and Literary*, 44-45.

national (or even imperial) interest. But that was not the working reality of British government during the reigns of the first three Georges.

For opposition, country-party style writers—like John Trenchard and Thomas Gordon, the co-authors of the influential *Cato's Letters*—the best cure to the forms of corruption that Parliament was now illustrating lay in governing the composition of the House of Commons. There were two basic methods to minimize legislative corruption, *Cato* argued in two essays published in January 1721:

> these deputies must be either so numerous, that there can be no means of corrupting the majority; or so often changed, that there shall be no time to do it so as to answer any end by doing it. Without one of these regulations, or both, I lay it down as a certain maxim in politicks, that it is impossible to preserve a free government long.[15]

There were long periods in English history when these ends had not been obtained. In a hilarious sentence, *Cato* described the temptations that had

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[15] "How free Governments are to be framed so as to last, and how they differ from such as are arbitrary," January 13, 1721, in Ronald Hamowy, ed., *Cato's Letters: Or, essays on Liberty, Civil and Religious, and Other Important Subjects* (Indianapolis, 1995), I, 421, echoing a similar passage in "All Government proved to be instituted by Men, and only to intend the general Good of Men," January 6, 1721, *ibid.*, 418.

corrupted past parliaments.[16] But the deeper considerations that would prevent the corruption of legislatures lay in narrowing the distance between legislators and subjects through "the frequent fresh elections of the people's deputies," or "what the writers in politicks call rotation of magistracy." Such rules would have two main benefits. First, legislators new to office would "remember what they themselves suffered, with their fellow-subjects, from the abuse of power, and how much they blamed it." In effect, lawmakers who came and went would recall their status as subjects and legislate with the understanding that they would be bound by the same measures they were enacting. Second, because their terms would be short, they would avoid the vices of long-term incumbents, "seeing themselves in magnifying glasses, grow, in conceit, a different species from their fellow-subjects; and so by too

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[16] For the record, here is *Cato*'s text on the multiple sources of corrupt "disservice" in the Commons: "What with the promises and expectations given to others, who by court-influence, and often by court-money, carried their elections: What by artful caresses, and the familiar and deceitful addresses of great men to weak men: What with luxurious dinners, and rivers of Burgundy, Champaign, and Tokay, thrown down the throats of gluttons; and what with pensions, and other personal gratifications, bestowed where wind and smoke would not pass for current coin: What with party watch-words and imaginary terrors, spread amongst the drunken 'squires, and the deluded and enthusiastick bigots, of dreadful designs in embryo, to blow up the Church and the Protestant interest; and sometimes with the dread of mighty invasions just ready to break upon us from the man in the moon: I say, by all these corrupt arts, the representatives of the English people, in former reigns, have been brought to betray the people, and to join with their oppressors." *Ibid*., 422.

sudden degrees become insolent, rapacious and tyrannical."[17]

The concern with corruption in eighteenth-century Anglo-American political discourse was primarily institutional in nature. It was a conception of corruption that was much more narrowly drawn than Machiavelli's notions of *corruzione*. Although Machiavelli sometimes focused on specific officials and agencies of government, when he spoke about cities being either irredeemably corrupt or not corrupt enough to lose the possibility of civic reformation, he was contemplating the health of the whole body politic—the *virtú* of its rulers and subjects alike. The opposition writers who influenced eighteenth-century Americans did have some comparable concerns. They worried, for example, about the complicated ways in which the manly *virtú* idealized in Machiavelli's militiaman was being effeminized—that is the best term for it—by the softening habits of commerce, the taste for luxury, and the flourishing of mechanisms of private and public credit that made Britain the Atlantic world's wealthiest and most commercial empire.[18] But the dominant story remained political and constitutional. The concern with corruption was first and foremost a matter of allowing Parliament to play the role that the political turmoil of the seventeenth century had ultimately assigned to it. A Commons controlled by patronage and influence,

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[17] *Ibid*., 423.

[18] This complex relationship is explored in Pocock, *Machiavellian Moment*, chapter XIV: "The Eighteenth-Century Debate: Virtue, Passion and Commerce," 462-505

representing too many pocket and rotten boroughs, serving seven-year terms insulated from the wishes of their constituents, was inherently corrupt. And its corruption would enable power to devolve upon other institutions, and enable the real holders of power to strip subjects of their liberty.

American perceptions

For a wide array of reasons, American colonists were deeply attracted to this image of a corrupted Parliament, and this perception influenced not only their movement toward independence in the decade after the Stamp Act crisis of 1765-66 but also the substance of the new constitutions they began adopting in 1776.

In the decades following the Glorious Revolution, Americans repeatedly argued that the legislative privileges that Parliament had secured in 1688 also set the dominant precedents that should define the proper rights of their own provincial assemblies. Those privileges included the right to initiate legislation, to meet regularly, and to enjoy freedom of speech within their legislative chambers. It also meant that colonial acts of legislation, responsive to Americans' own perceptions of their needs and interests, should not be subject to the twin evils of being suspended or vetoed. The American colonists happily imagined their provincial legislatures, housed in small but handsome buildings, evolving into miniature parliaments. Although this comparison seemed preposterous to many imperial officials, who treated the colonists as backwater

provincials, Americans found their claims for near-equality wholly convincing.[19]

Their ability to achieve this result, however, faced several persisting obstacles. First, royal governors were firmly instructed not to treat the colonial assemblies as miniature parliaments. Second, and arguably more important, governors retained aspects of the royal prerogative—powers deemed inherent to the Crown—which had effectively lapsed in Britain. They had the authority, for example, to *veto* or *suspend* legislation (the latter meaning, delaying its enforcement pending further review by the Privy Council). They could also *prorogue* or *dissolve* legislative assemblies (meaning, postponing their meeting until the lawmakers seemed more amenable to imperial preferences, or terminating the existence of one troublesome legislature and calling for the election of another, hopefully more compliant body). Where English judges now enjoyed the tenure during good behavior provided by the Act of Settlement of 1701, which had led to the Hanoverian succession, colonial judges still served at the pleasure of the Crown, making them subject to immediate dismissal.[20]

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[19] The classic studies include Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* (New Haven, 1943), and Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689-1776* (Chapel Hill, 1963). Numerous monographs make the same case for the political history of individual colonies.

[20] Bernard Bailyn, *The Origins of American Politics* (New York, 1968), 59-70.

These disparities between English precedent and colonial practice made Americans highly receptive to opposition writings. Because Parliament played no formal role in colonial governance—other than regulating imperial trade through the Navigation Acts—the responsibility for regulating colonial affairs devolved on various ministries in London. In effect the colonists saw themselves as objects or victims of the same cabals of ministerial power-seekers whom English opposition writers (like Trenchard and Gordon) held responsible for the erosion of parliamentary independence and supremacy. As the distinguished historian Bernard Bailyn argued, a full half-century ago,

The opposition vision of English politics, conveyed through these popular opposition writers, was determinative of the political understanding of eighteenth-century Americans . . . . Threats to free government, it was believed, lurked everywhere, but nowhere more dangerously than in the designs of ministers in office to aggrandize power by the corrupt use of influence, and by this means ultimately to destroy the balance of the constitution. Corruption, especially in the form of the manipulation and bribery of the Commons by the gift of places, pensions, and sinecures, was as universal a cry in the colonies as it was in England, and with it the same sense of despair at the state of the rest of the world, the same belief that tyranny, already dominant over most of the earth, was spreading its menace and was threatening even that greatest bastion of liberty, England itself.[21]

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[21] Ibid., 56-57.

Appendix B

Many Americans (certainly Thomas Jefferson) had read and understood John Locke; but it was this less famous group of opposition writers who shaped American political thinking much more directly.

Yet between Britain and its American colonies two other critical difference remained. First, the techniques of influence that worked so well in Georgian Britain were not readily available to imperial governors in America, simply because they lacked the same resources that Crown ministers "at home" freely wielded. David Hume's analysis of the real sources of political influence in eighteenth-century Britain did not apply to America. In Bailyn's vivid language, "The armory of political weapons so essential to the successful operation of the government of [Sir Robert] Walpole and the [Duke of] Newcastle was reduced in the colonies to a mere quiverful of frail and flawed arrows."[22] Royal governors were themselves only creatures, not manipulators, of eighteenth-century patronage. Lacking offices to bestow on colonial notables, they repeatedly had to reach some kind of working bargain with the provincial assemblies that general disappointed their superiors in London.

Second, and equally important, the use of rotten and pocket boroughs to manage politics did not work in the colonies, where freehold tenure enlarged the electorate and new communities regularly received the right of representation in their provincial legislatures.[23] Even before the Stamp Act crisis of 1765-66

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[22] Ibid., 72.

[23] Ibid., 70-105.

dramatized these points, the colonists sensed that that there were profound differences between how political representation operated in Britain and how it worked in America. The idea that there were "rotten" aspects to the British constitution was not an eighteenth-century discovery. In his *Second Treatise of Government*, for example, John Locke (writing in the early 1680s) had alluded to the existence of parliamentary boroughs lacking any serious number of voters as a sign of rot. Americans expected every community in the land to have a seat in the legislative chamber, and they regarded their delegates, not as distant lawmakers whose first duty was to contemplate the general good of the whole society, but as attorneys for their townships and counties, representatives who could be instructed to follow the directions of their constituents. When the Stamp Act crisis made the question of representation a fundamental point of controversy between Britain and America, colonial writers like James Otis boasted of the superiority of the American insistence on the accountability of lawmakers to their constituents. When British writers asked why the Americans should have a voice in the House of Commons when such prosperous cities as Birmingham and Sheffield held no seats either, Otis simply scoffed in reply. "To what purpose is it to ring everlasting changes to the colonists on the cases of Manchester, Birmingham, and Sheffield, which return no members?' Otis wrote. "If those, now so considerable, places are not represented, they ought to be."[24] Indeed, it was

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[24] James Otis, *Considerations on Behalf of the Colonists* (London, 1765), 9.

precisely because ideas like these were so powerful—and so potentially embarrassing in Britain—that spokesmen for Parliament's authority over America largely abandoned the argument about representation and relied instead on a simple assertion of Parliament's legal sovereignty over the entire empire.

This prevailing perception of the corruption of British politics through the ministerial domination of Parliament thus played a critical role in the American movement toward independence by providing a systematic and self-confirming explanation of why the British government was pursuing one measure after another inimical to American rights.[25] That issue does not concern us here. What does matter, however, is the impact this perception had on the new state constitutions that Americans began adopting in 1776. These documents, more than the Federal Constitution of 1787, illustrated the underlying political conceptions and commitments that shaped American constitutionalism in its first, creative phase.

In many respects, the constitution writers of 1776 looked backward in defining their underlying concerns. They were naturally more inclined to apply lessons derived from the past than to anticipate problems likely to arise in the future. As James Madison observed in 1785, while denouncing the lack of "*wisdom*

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[25] Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, 1967, 1992, 2017), esp. 94-159; Pauline Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765-1776* (New York, 1972).

and steadiness to legislation" revealed in the separate states, "The want of *fidelity* in administration of power having been the grievance felt under most Governments, and by the American States themselves under the British Government[;] It was natural for them to give too exclusive an attention to this primary attribute."[26] For Madison and his contemporaries, the "administration of power" meant the workings of the executive—that is, the Crown and its officials. With hindsight and his own experience in Virginia's fifth provincial convention, which drafted the commonwealth's new constitution, Madison grasped that the constitution-writers of 1776 were the conceptual prisoners of history.

This retrospective attitude deeply informed the first state constitutions. The dominant animus of the first state constitutions was to reconcile the principle of legislative (or parliamentary) supremacy inherited from the Glorious Revolution of 1688 with the criticisms of British politics laid down by opposition writers like Trenchard and Gordon. The whole imperial controversy of 1765-1776 had reminded the colonists that their practice of "actual" representation was superior to the arguments for "virtual" representation that the defenders of parliamentary supremacy over the colonies "in all cases whatsoever" had propounded.[27] The coming of independence only confirmed

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[26] James Madison to Caleb Wallace, August 23, 1785, in Jack N. Rakove, ed., *James Madison: Writings* (New York, 1999), 40.

[27] The theory of "virtual" representation argued that Americans who sent no members to the House of Commons were

that position. To secure maximum support for "the cause," the provincial conventions encouraged communities to send representatives to government, and they actively debated whether the franchise should be broadened (but not narrowed). Even more important, every state except South Carolina applied a rule of annual elections to the lower house of their legislature. As John Adams observed in his *Thoughts on Government*, in a widely repeated saying: all elections "should be annual, there not being in the whole circle of the sciences, a maxim more infallible than this, 'Where annual elections end, there slavery begins.'"[28]

This commitment to annual elections was arguably the single most important anti-corruption provision of the first state constitutions. It presumed that legislators would recognize that they would soon return to the body of the people, to be governed by the same laws they were framing, with no status higher than that of ordinary citizens; and that virtuous voters would understand the benefits of rotation in office. These views were fully consistent with *Cato*'s argument of 1721,

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nevertheless legitimately represented in Parliament. The American claims for the superiority of their system of "actual" representation relied on the existence of a broad electorate and the allocation of legislative seats to every community (townships or counties). See Bailyn, *Ideological Origins*, 161-175.

[28] *Founders' Constitution*, I, 109. Adams then added this further observation, drawing on a couplet from Epistle III of Alexander Pope's famous poem, *An Essay on Man*: "These great men, in this respect, should be, once a year

'Like bubbles on the sea of matter borne,

They rise, they break, and to that sea return.'"

which had assumed that routine turnover in office would minimize the dangers of corruption because it would make no sense to bestow pensions and positions on lawmakers who essentially held office as an avocation. This perception was also fully consistent with the principle articulated in several of the declarations of rights issued by the states as they were adopting their first constitutions. As Article 5 of the Virginia Declaration of Rights stated, in order to ensure that members of the legislative and executive branches of government "may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections," leaving the legislature free to determine whether these former officials should be made "eligible, or ineligible" for further service.[29] This was (in modern legal analysis) a *standard* rather than a *rule*, a principle that officeholders and voters should honor rather than a mandate that had to be enforced. Term limits in fact were applied only to a few state governors and delegates to the

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[29] Virginia Declaration of Rights, *Founders' Constitution*, I, 6. Cf. the corresponding Article VIII of the Massachusetts Declaration of Rights of 1780: "In order to prevent those, who are vested with authority, from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and appointments." Ibid., I, 12.

Continental Congress.[30] No legal barriers limited the number of terms that legislators could serve. Yet scholars who have done quantitative studies of legislative service have demonstrated that rates of turnover at both the national and state levels of government remained high well into the nineteenth century. Down to the 1890s, the mean term of service in the House of Representatives was three years, meaning that the vast majority of its members served one or two terms. Rotation in office was thus a working principle of American politics.

Viewed in this way—and recalling the inherently retrospective nature of much constitutional thinking—it is important to recognize that the prevailing view of political corruption in the founding era was primarily concerned with relations between institutions, or more specifically, the relation between a dominant executive and a supplicant legislature. Lacking a monarch, Americans had no need to worry about the sycophantic behavior of courtiers and royal flatterers. But with the British opposition writers' model of an office- and influence-wielding Crown firmly implanted in their political consciousness, American constitutionalists wanted to insulate the legislature from executive manipulation. The idea of annual elections in a society

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[30] As it happens, James Madison was the first delegate who was term limited out of the Continental Congress following the ratification of the Articles of Confederation. Patrick Henry was term limited out of service as Virginia's governor. But in both cases, the prohibition was limited to restricting service to three years out of six, so that Henry returned to the governorship in the mid-1780s and Madison returned to the Continental Congress in 1787.

where the pursuit of public office was more an avocation than a career thus seemed the most obvious way to accomplish this. Equally important, the first constitutions minimized the political capacity and influence of the executive. In most states governors were annually elected by the legislature and (quoting John Adams) "stripped of most of those badges of domination called prerogatives."[31] Executive power became just that: the duty to execute and administer policies enacted by the legislature. Yet even so, of all the branches of government that the people had to fear, the executive still remained the most threatening.[32]

The decade separating the adoption of the first state constitutions from the ratification of the Federal Constitution in 1787-88 modified these views in some important ways. The Revolutionary War placed enormous and unprecedented burdens on governance. While legislative assemblies met and adjourned, governors had to respond on a daily basis to the demands of war. Moreover, the idea that experience in office would be a boon to sound governance led some thinkers to challenge the hoary maxim about annual elections, with its expectations of high turnover. Considering this question in 1785, Madison noted that "For one part of the Legislature Annual Elections will I suppose

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[31] *Founders' Constitution*, I, 109. The second-generation constitutions of New York (1777) and Massachusetts (1780) allowed the people to elect the governor, triennially in New York, still annually in Massachusetts. Not surprisingly, George Clinton and John Hancock became revolutionary America's two most powerful governors.

[32] Wood, *Creation of the American Republic*, 132-150.

be held indispensably though some of the ablest Statesmen & soundest Republicans in the U States are in favour of triennial."[33] He counted himself in the latter group.

Two years later, the framers of the Constitution proved amenable to this claim. In their initial discussion of June 12, 1787, they voted (seven states to four) to give the lower house a term of three years. Nine days later, they reduced the term to two years. Some speakers still favored the "fixed habit" of annual elections, while Madison and Alexander Hamilton, soon to be the co-authors of *The Federalist*, endorsed three years. Madison offered the most balanced account of the reasons for abandoning annual elections. There was, first, a general question of convenience, and the difficulty of enabling members coming from distant corners of the country to go back and forth between their homes and the capital. Secondly, members "from the most distant States" who wished to be reelected and who faced "a Rival candidate" at home would have to "travel backwards & forwards at least as often as the elections should be repeated." Third, and arguably most important to Madison, "Much was to be said also on the time requisite for new members who would always form a large proportion [of the total membership], to acquire that knowledge of the affairs of the States in general without which their trust could not be usefully discharged." As other speakers also noted, the United States was a much larger country than Britain, and it would take each member some time to

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[33] Madison to Wallace, August 23, 1785, *Madison: Writings*, 44.

be educated in the diversity of American affairs.[34] Madison believed that the ideal model of congressional deliberation was one in which each lawmaker—and especially the numerically preponderant newcomers — would learn the business of government only in the course of each Congress, which would meet over several sessions with intervals allowing representatives to visit their constituents at home.[35]

The two-year term for members of the House of Representatives predictably became an object of discussion during the ratification debates of 1787-88. But it was arguably another Convention decision, limiting the initial size of the House to sixty-five members (if all thirteen states ratified) that seemed more controversial, when the British House of Commons had fully 558 members. The Anti-Federalist opponents of the Constitution argued that so small a number would make the House of Representatives vulnerable to "cabal," and it also violated the British opposition writers' belief that the greater size of a legislative body was also an antidote to its corruption. Madison responded to these arguments in *The Federalist* in multiple ways, not least by arguing that the quality of legislative deliberation would decline if a body grew too numerous.

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[34] Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven, 1911, 1937, 1966), I, 214-215, 360-362, 367-368. After this second debate of June 21, the two-year term remained non-controversial for the rest of the Convention.

[35] For a more sustained examination of Madison's ideals of legislative deliberation, see Jack N. Rakove, *A Politician Thinking: The Creative Mind of James Madison* (Norman, Okla., 2017), 54-95.

To his way of thinking, the best alternative to legislative corruption involved developing the legislative habits that would encourage representatives to act responsibly. If a body grew too numerous, he worried, that sense of political responsibility would decline, and the danger of corrupt or factious activity would increase.

There was one other source of corruption that the framers of the Constitution actively considered. This was the idea that key officials of the national government, in either the legislative or executive departments, could become the targets of bribes from foreign powers. The key word used to describe this danger was *emolument*—a word that seems mysteriously exotic today, but which was commonly used in the eighteenth century to describe a wide array of material payments and benefits. History provided a famous example of the misuse of foreign emoluments that every framer knew quite well: the secret Treaty of Dover of 1670, in which Louis XIV of France turned Charles II into his ally in his war against Holland, in part by giving him a young French mistress, but also by providing Charles with the additional funds he badly needed. This Treaty was well known to eighteenth-century readers. At the Federal Convention, Gouverneur Morris of Pennsylvania, who is often regarded as a chief architect of the presidency, explicitly invoked it during the July 20, 1787 debate over impeachment:

Our Executive was not like a Magistrate having a life interest, much less like one having an hereditary interest in his office. He may be bribed by a greater interest to betray his trust; and no one would say that

we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay, without being able to guard agst. it by displacing him. One would think the King of England well secured agst. bribery. He has as it were a fee simple in the whole Kingdom. Yet Charles II was bribed by Louis XIV.[36]

This idea of overt bribery directed by foreign powers at the president or senators remained part of the ratification discussions of 1787-1788. The Anti-Federalist opponents of the Constitution were inventive advocates, and many of their arguments reflected the deep fear of the self-aggrandizing nature of political power that was embedded in American political thinking well before 1776. In a sense, the Anti-Federalists were deeply loyal to the revolutionary cause of 1776.[37] But from the vantage point of modern views of political corruption, two aspects of these debates remain especially salient.

First, the disputants of 1787-88 were preoccupied with the role of institutions, in the strict sense of the term. They were not concerned with the ways in which interests and groups acting outside of government would try to capture its institutions for their own self-interested, and therefore potentially corrupt, purposes. Of course, some aspects of the social dimensions of national politics—like the division between slave and free states—were not wholly ignored. But those were fundamental regional interests that any system of national government would have to confront or

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[36] Farrand, ed., *Records of the Federal Convention*, II, 68-69.

[37] Bailyn, *Ideological Origins*, 331-351.

accommodate directly. They were not sources of corruption but rather the basic, inescapable stuff of national politics. Perhaps this story would have looked different, had the American economy been more developed and differentiated, and had economic interests sought to obtain public support for their particular ends. But the newly independent United States had no equivalent to the East India Company, which had played so influential a role in eighteenth-century British politics, to the point of helping to precipitate the American Revolution by pushing the adoption of the Tea Act of 1773. One could argue, as Charles Beard famously did a century ago in his *Economic Interpretation of the Constitution*, that the holders of the revolutionary public debt did form one such interest, and that the whole movement to adopt the Constitution was contrived in many ways to secure the interests of speculators over the sufferings of its original holders. Yet most students of the policies that Hamilton pursued as first secretary of the treasury believe that his program rested not on corrupt motives but rather on a sophisticated analysis of the economic and political benefits of securing the public credit of the United States.

Second, contrary to our contemporary understanding of the ambitions of politicians—and especially congressmen—the desire to secure re-election was not the driving motive of officeholders. At both the state and national levels of government, rates of legislative turnover remained remarkably high by twentieth- and twenty-first-century standards. Because that was the case, a modern study of the corrupting forces of

political behavior remains extremely difficult to apply to the Founding era. Today we assume as a matter of course that the desire of legislators to serve term after term after term explains the whole nexus of political ambition; it is what leads them to spend enormous amounts of time courting donors and, in the process, feeding a common perception of the underlying corruption of (to borrow a phrase from Madison) "the political system of the United States." There were no real equivalents to this in the world of the Founders. They did not actively campaign for office, though occasionally they might give a public speech or write letters to trusted correspondents or even engage in a debate (as Madison and James Monroe once did during their rival efforts to be elected to the First Congress of 1789). There was little if anything they could obtain by spending money. Perhaps more important, few of them were active seekers of office or individuals who would have thought or said that politics was their career. Madison was one exception here, serving three-and-a-half uninterrupted years in the Continental Congress and four successive terms in the federal Congress after 1789. Other leading revolutionaries wound up following similar careers, but less from outright ambition than because the Revolution seemed to demand their service.

Yet the idea that they would inhabit a political universe in which the continuous solicitation of campaign-related funds had become a norm of daily behavior would have struck them as being wholly improbable and morally offensive. Privately, too, they would have

regarded such an existence as a shameful mark of their own political corruption.

Appendix C

Expert Report of Dr. Adam Bonica

Superior Court for the State of Alaska

Summary of qualifications: I am an Associate Professor in the Department of Political Science at Stanford University. My research has primarily focused on campaign finance and money in politics in the context of American politics. I have published extensively on the topic of campaign finance and the preferences and behavior of donors. I also maintain the widely used Database on Ideology, Money, and Elections (DIME), a public resource that combines data on campaign contributions and candidates from state and federal elections. In addition to my academic work, I am a cofounder of Crowdpac, a crowdfunding platform for politics.

Publications from the past 10 years: I have published a total of 22 articles in peer review journals, two law review articles, and 3 book chapters. I have listed below a set of selected publications most relevant to the report. For a complete list of my publications, see the attached CV.

Bonica, Adam, 2016. "Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives." Business and Politics, vol. 18, no. 4, pp. 367–394.

Bonica, Adam. 2014. "Mapping the Ideological Marketplace." American Journal of Political Science, vol. 58, no. 2, pp. 367–387.

Appendix C

Bonica, Adam, Nolan McCarty, Keith Poole, and Howard Rosenthal. 2013. "Why Hasn't Democracy Slowed Rising Inequality?" Journal of Economic Perspectives, vol. 27, no. 3, pp. 103–24.

Bonica, Adam. 2013. "Ideology and Interests in the Political Marketplace." American Journal of Political Science, vol. 57, no. 2, pp. 294–311.

Bonica, Adam, Nolan McCarty, Keith Poole, and Howard Rosenthal. 2015. "Campaign Finance and Polarization," updated chapter in Polarized America., 2nd Edition. MIT Press.

Bonica, Adam and Jenny Shen. 2013. "Breaching the Biennial Limit: Why The FEC Has Failed to Enforce Aggregate Hard-Money Limits and How Record Linkage Technology Can Help." Willamette University Law Review, vol. 49, no. 4, pp. 536–602.

Compensation: I am being paid $200 per hour and have spent 22 hours on this report. I will also be compensated for my testimony. Reasonable travel expenses will also be covered.

Previous experience as an expert witness: I have not been an expert witness for any cases in the prior four years.

Background

I have been asked to examine whether candidates and parties have become more dependent upon the favor of Super PACs in American elections. Super PACs

are a type of independent political action committee allowed to make "independent expenditures," which refers to spending that is not coordinated with candidates or parties and "expressly advocates the election or defeat of a clearly identified federal candidate."[1] Super PACs differ from traditional PACs in three important ways. First, there are no legal limits on the amount an individual or organization can give to Super PACs or the amounts Super PACs can spend to advocate for or against candidates. Second, Super PACs are allowed to raise funds from corporations and unions. Third, restrictions are placed on Super PACs to prevent directly coordinating expenditures with any candidate or party.

In this report, I provide a brief history of the rise of independent expenditures and outside spending groups, document relevant trends in state and federal elections, and address the existing evidence about the ways independent expenditures have influenced politicians.

The Escalation of Independent Expenditures In Federal Elections

The rise of independent expenditures is among the most significant trends in campaign finance in recent decades. This growth in part reflects a changing legal environment that has loosened restrictions on how outside spending organizations can raise and spend money. For much of the nation's history, political

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[1] Super PACs are officially known as "independent-expenditure only committees."

spending was largely unregulated. This began to change during the early twentieth century, first with the passage of the Tillman Act in 1907 which prohibited corporations from making campaign contributions and then with the Labor Management Relations Act of 1947 (Taft-Hartley) which did the same for labor unions. The original justification prohibiting corporate contributions had focused as much on the need to protect corporations from politicians pressuring them to contribute to their campaigns as it did on the corrupting influence of corporate interests.[2]

The regulatory framework governing campaign finance and political expenditures was set in place by the Federal Election Campaign Act (FECA) of 1971, which among other things, gave legal status for PACs. Amendments to the FECA passed in 1974 put contribution limits on the amounts individuals could give to PACs and candidates and the amounts PACs could give to candidates. Over the next two decades, PACs proliferated as candidates came to rely almost exclusively on "hard-money" contributions raised in limited amounts to fund their campaigns.

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[2] Senator Benjamin Tillman wrote of the bill that banning corporate contributions "will lessen a very mean and sordid practice of blackmail... the great number of corporations that have suffered extortion through weakness and cowardice will have their backbones stiffened, and parties will be put to it to fill their coffers by really voluntary contributions." The New York Times of June 17, 1906.

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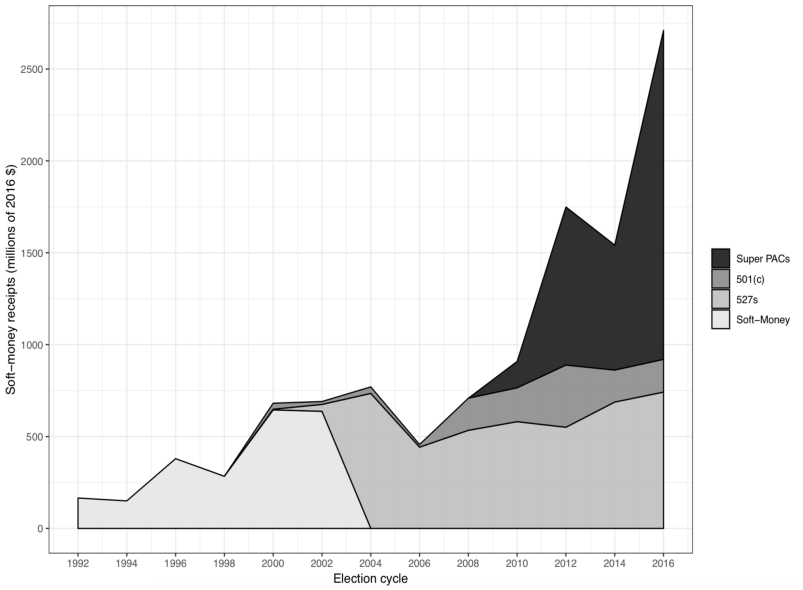

Figure 1: Total soft-money receipts to outside spending groups.

Sources: FEC (Super PACs and soft-money), IRS (527s), Center for Responsive Politics (501(c)).

Although Congress had placed limits on all forms of campaign contributions and expenditures, the constitutionality of these limits was challenged in the courts. The Supreme Court struck down limits on expenditures made independently of candidates on First Amendment grounds in *Buckley v. Valeo*, 424 U.S. 1 (1976). While the Federal Election Campaign Act (FECA) placed limits on the amounts individuals and PACs could give to the national party committees, it did not regulate contributions to state and local party committees. This created the so-called "soft-money" loophole that allowed corporations and unions to make

unlimited contributions to these state party organizations for the purposes of "party building," which could then be transferred back to the national party committees. The Supreme Court would later rule in *Colorado Republican Federal Campaign Committee v. FEC* (1996) that Congress could not restrict how much parties could spend[] on independent expenditures on behalf of federal candidates. The ruling corresponded with a sharp rise in independent expenditures, from $165.5 million in 1992 to nearly $637.0 million in 2002. Concerns about the corrupting influence of these unlimited soft-money contributions was a key factor in driving up support for campaign finance reforms, ultimately resulting in the passage of Bipartisan Campaign Reform Act (BCRA) in 2002, which closed the existing soft-money loophole.

Following the ban on soft-money contributions enacted in BCRA, 527 organizations emerged as the primary vehicle for independent expenditures. Spending by 527s increased sharply from $37.5 million in the 2001-2002 election cycle to $734 million in 2003-2004. Total spending by 527s declined in the following election cycles but remained the primary source of independent expenditures at the federal through until 2012. Spending on 527s, however, continued to grow in the subsequent election cycles, reaching $741.5 million in 2016.

The legal environment for independent expenditures changed again in 2010 following the Supreme Court ruling in *Citizens United v. FEC*, which struck down restrictions on spending by corporations and unions to support independent campaign expenditures

and relaxed restrictions on political spending by 501(c) nonprofit organizations. The main development following the ruling was the creation of Super PACs, which have since become the primary vehicles for independent expenditures. By 2012, Super PACs raised $860.3 million, largely in support of presidential candidates. In 2016, the amounts raised by Super PACs had more than doubled to $1.79 billion. Spending through 501(c)--often referred to as "dark money"--increased sharply from $184.4 million in 2010 to $338.4 million in 2012 but fell back below $200 million in each of the following two election cycles.

	Soft-Money	527s	501(c)	Super PACs	Total Federal Spending	%IEs
1992	$165.5	$0.0	$0.0	$0.0	2325.9	7.1%
1994	$149.9	$0.0	$0.0	$0.0	2000.1	7.5%
1996	$379.6	$0.0	$0.0	$0.0	2781.5	13.6%
1998	$283.7	$0.0	$0.0	$0.0	2113.8	13.4%
2000	$644.8	$3.6	$33.0	$0.0	3352.3	20.3%
2002	$637.0	$37.5	$16.1	$0.0	2534.3	27.2%
2004	$0.0	$734.4	$35.7	$0.0	5260.2	14.6%
2006	$0.0	$441.9	$14.7	$0.0	3547.3	12.9%
2008	$0.0	$533.6	$175.0	$0.0	5875.0	12.1%
2010	$0.0	$580.6	$184.4	$143.7	3953.3	23.0%
2012	$0.0	$550.3	$338.4	$860.3	5985.8	29.2%
2014	$0.0	$687.4	$174.0	$680.3	3940.8	39.1%
2016	$0.0	$741.5	$178.0	$1,790.6	6701.6	40.4%

Table 1: Total independent expenditures by cycle.

Sources: FEC, IRS, and the Center for Responsive Politics.

Appendix C

A. Independent Expenditures Have Grown Sharply As A Percentage of Total Political Spending

The rise of independent expenditures has outpaced other forms of political expenditures in federal elections. In 1992, total independent expenditures account for just 7.1% of total spending in federal elections. This percentage grew sharply over the next decade, reaching 27.2% of total spending by 2002. Independent expenditures as a share of total spending was almost halved in the 2003-2004 election cycle and continued to decline as a share of total spending, reaching a nadir of 12.1% in the 2007-2008 election cycle. This trajectory reversed in the following election cycle as super PACs emerged on the scene and spending by 527s and 501(c)s continued to grow. Spending by IEs as a percentage of total spending soared in the following election cycles, account for 40.4% of total spending in 2016.[3]

The reasons why independent expenditures have grown so sharply as a percentage of total federal spending are two-fold. The introduction of Super PACs clarified much of the regulatory uncertainty surrounding 527s and thus likely made them a more attractive vehicle for both candidates and wealthy donors.

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[3] As of the time of writing, outside spending in the 2017-2018 election cycle is on pace to exceed the amounts spent in the 2013-2014 election cycle. Opensecrets.org reports that outside spending thru September totals $309.2 million, a 58% increase over the $195.8 million spent thru September of 2014. (See, https://www.opensecrets.org/outsidespending/fes_summ.php, accessed 9-11-2018.)

However, the growth in independent expenditures also reflects the growing concentration of income and wealth more generally as economic inequality has increased.[4]

Independent Spending In State Elections

Spending on independent expenditures has similarly grown in recent years. According to data maintained by the National Institution for Money in State Politics, spending on independent expenditures increased from $125.2 million in 2008 to $465.3 million in 2016. This rate of growth is consistent with the claim that politicians at the state level have become more dependent on this type of spending. This is consistent with the trends observed at the federal level.

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[4] See, Bonica, Adam, and Howard Rosenthal. *Increasing Inequality in Wealth and the Political Consumption of Billionaires*.

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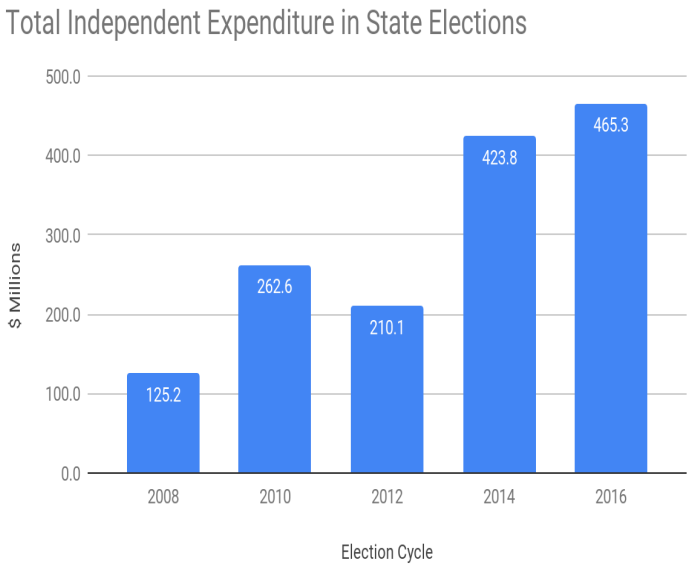

Figure 2: Total independent expenditures in state elections.

Source: The National Institute for Money in State Politics, Author's calculations.

Independent Spending In Alaska

Independent expenditures in Alaska state elections have increased both in total amount and as a proportion of total spending. The amounts spent on independent expenditures tend to be more variable from one cycle to the next, but as with federal and state elections more generally, the trend is increasing.[5]

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[5] Much of the amounts spent on independent expenditures in 2014 were related to a ballot measure relating to the energy industry.

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Election Cycle	Total Spending	Independent expenditures	%IEs
2008	17,297,858.00	582,432.00	3.3%
2010	21,649,181.00	1,922,743.00	8.2%
2012	8,996,460.00	596,701.00	6.2%
2014	52,009,831.00	20,363,046.00	28.1%
2016	15,632,765.00	3,663,620.00	19.0%

Table 3: Independent expenditures in Alaska state elections.

Source: The National Institute for Money in State Politics, Author's calculations

The Growth of Independent Expenditures Has Made Political Spending More Unequal

One concern raised by reformers is that permitting citizens and corporations to make unlimited political contributions exacerbates unequal access to the political process. The rise of independent expenditures corresponded with a commensurate increase in inequality in political giving, further concentrating political contributions among an elite group of wealthy donors. The top 1% of the 1% of the voting age population[6] accounted for between 9 and 15 percent of total contribution dollars during the 1980s and has risen steadily since then. By 2016, the share of total contributions from the top donors exceeded 40%.

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[6] This group includes the top 24,949 donors in 2016, or 1% of %1 of the 249,485,228 million adults of voting age according to the U.S. Census.

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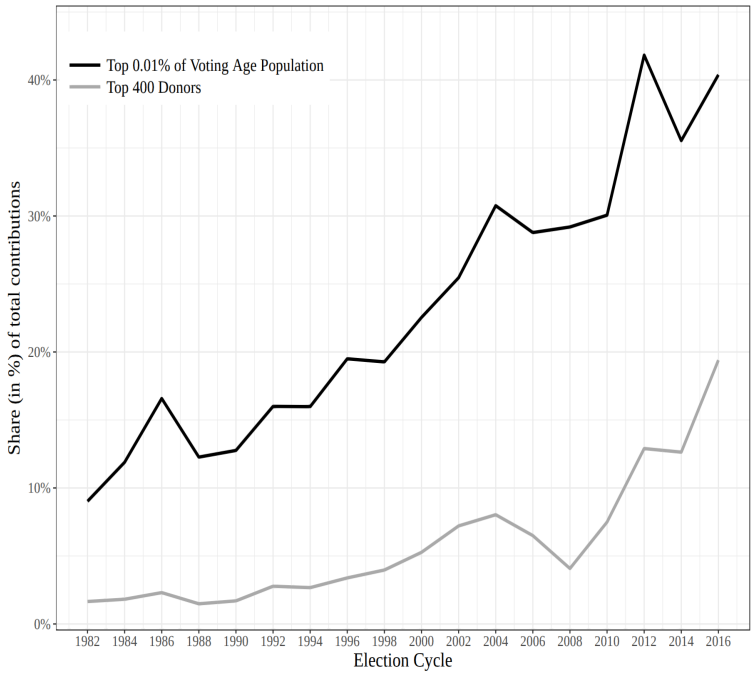

Figure 3: Shares of federal contributions from the top 1% of 1% of donors and the top 400 donors.

Source: Database on Ideology, Money in Elections. Author's calculations.

An important development since the 2012 election cycle has been the further concentration of donations among the top 400 donors (or approximately the 0.00016% of the voting age population). Between 2012 and 2016, the share of contributions made by the top 1% of the 1% of the voting age population ticked down slightly, from 42 percent in 2012 to 40 in 2016. However, the trend for the top 400 donors increased from 12.8% in 2012 to 19.3% in 2016. In fact, the top 400 donors accounted for nearly all of the growth in federal

contributions between 2012 and 2016. Total donations from the top 400 donors increased from $772 million in 2012 to $1.3 billion in 2016, accounting for about 70% of the total growth in total federal contributions during that period. To help put the $1.3 billion in perspective, it is several times larger than the total amounts spent by corporate and labor PACs in 2016. It is also about exactly 10 times the total amount Bernie Sanders raised from the millions of small donors who gave to his presidential campaign.

Because these super donors have come to increasingly control access to the resources that candidates and parties require, this, in turn, is likely to create incentives for politicians to court these donors, thus inflating their influence.

Theory and Evidence of the Corrupting Influence of Big Money

The claim that large money donors directly influence politicians and political outcomes is notoriously difficult to establish empirically. The reasons for this have more to do with the availability of the types of data required to directly test these claims rather than a lack of evidence. Although claims regarding the corrupting influence of big money are hard to demonstrate empirically in a systematic fashion, most experts believe such influence exists. In fact, most theoretical models of campaign contributions and interest group influence developed by political scientists and economists are directly premised on the

assumption that special interest groups engage political funding with the goal of securing favorable outcomes.[7]

The seminal model of Denzau and Munger (1986) views contributions as payments in a market for legislative services, votes, and access.[8] The main line of critique of the "investor" or "service-induced" models of campaign contributions is that legal limits placed on the size of contributions price most legislative services out of the market. In other words, a few thousand dollars is unlikely to be sufficient compensation for the electoral or reputational risk legislators would take on by doing their donors' bidding. In the words of *Milyo, Primo and Groseclose (2000),*

> "Simply put, PAC contributions are not the only route by which interested money might influence policy makers and, given existing limits on the size of PAC contributions, neither are they the most likely route. The very idea of building a majority coalition by buying off individual members of Congress (a group not renowned for their fidelity or trustworthiness) with small campaign contributions and without an explicit contracting mechanism, as all the while competing interests work at counter

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[7] See, e.g., Baron, David P. "Service-induced campaign contributions and the electoral equilibrium." *The Quarterly Journal of Economics* 104.1 (1989): 45-72.

[8] Denzau, Arthur T., and Michael C. Munger. "Legislators and interest groups: How unorganized interests get represented." *American Political Science Review* 80.1 (1986): 89-106.

purposes, sounds something akin to herding cats." pp. 76.

Even so, large contributions are widely viewed within the literature as a mechanism to secure access to legislators.[9] Access of this sort, at a minimum, provides an opportunity for interested parties to communicate their concerns and desires about specific policies. Absent competing voices, such access is likely to sway some politicians towards a donor's viewpoint. The cumulative effect of "buying access" is likely to make politicians more attuned to the interests and concerns of individuals and organizations that can afford to pay the price of admission. The main barrier to engaging in quid pro quo behavior, however, breaks down if donors are legally allowed to spend in unlimited amounts on elections.

Corporate and Labor Union Funding of Independent Expenditures

Although much of the attention following the ruling in Citizens United focused on corporate political giving, corporations have, as of 2018, contributed relatively little to the growth in independent expenditures. In 2010, the first election cycle in which Citizen United had taken effect, a handful of corporations spent just $15 million (to disclosed sources) from treasuries to fund outside spending groups. The amount given by corporations increased to $75 million during the 2012

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[9] Hall, Richard L., and Frank W. Wayman. "Buying time: Moneyed interests and the mobilization of bias in congressional committees." *American Political Science Review* 84.3 (1990): 797-820.

election cycle.[10] This accounted for just 5% of total spending on independent expenditures and represented a tiny fraction of the $5.1 billion corporations spent on lobbying during that cycle.[11] According to data compiled by Center for Responsive Politics that covers from 2013 through 2016, corporate funding of independent expenditures has not significantly increased since 2012.[12] Total spending by corporations declined to $28 million in 2013-2014 and rebounded to $112 million in 2015-2016.

It is important to note that amounts reported above do not capture corporations giving to "dark-money" organizations. However, given the challenges large corporations face in keeping such spending secret, it is unlikely corporations are the main funding source for the roughly $100-300 million spent each cycle by dark-money groups.[13]

Labor unions, by contrast, spent significantly more on independent expenditures in the wake of *Citizens United*. In 2011-2012, labor unions reported spending $105 million from their treasuries to fund independent expenditures, slightly more than the $95 million spent by labor unions during the same cycle on federal

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[10] Bonica, Adam. "Avenues of influence: on the political expenditures of corporations and their directors and executives." Business and Politics 18.4 (2016): 367-394.

[11] ibid.

[12] See, https://bit.ly/30PtJp3

[13] Bonica, Adam. "Avenues of influence: on the political expenditures of corporations and their directors and executives." Business and Politics 18.4 (2016): 367-394.

lobbying.[14] In fact, the amount spent by labor unions to fund independent expenditures accounted for 40% of what organized labor spent at the federal level on political activity.[15] Although labor unions have been more willing than corporations to take advantage of *Citizens United*, their spending still represents a relatively small fraction of total spending on independent expenditures.

This analysis is consistent with the claim that wealthy individuals, rather than corporations, are currently the main source of funding for independent expenditures. This is not to suggest that concerns about the corporate political spending are unfounded or that corporations will never spend large amounts on elections. Even if massive corporate spending in elections has yet to be realized, the potential remains. The 1896 presidential election provides some historical precedent that corporations are willing and able to spend enormous sums on politics if they believe their interests are threatened.[16]

Journalistic Accounts of the Corrupting Influence of Big Money

Where evidence of the potentially corrupting influence of independent expenditures has been more forthcoming is from accounts from journalists, politicians, and donors.

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[14] ibid.

[15] ibid.

[16] See, http://enikrising.blogspot.com/2012/03/more-spending-on-presidential-elections.html.

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The demands placed on candidates and politicians to fundraise is well documented. For example, slides from a presentation delivered to incoming freshmen by the Democratic Congressional Campaign Committee that had been leaked revealed that party leaders recommended allocating 4 hours each day on "call time" devoted to fundraising.[17] To the extent that politicians feel pressure to prioritize fundraising, it is sensible to assume that politicians to have incentives cater to the interests of their donors. There are good reasons to believe that the combinations of fundraising pressures and repeated interactions with donors influence the beliefs and preferences of politicians. As former representative Barney Frank famously remarked about the constant pressure to raise money as a congress member,

> "People say, 'Oh, it doesn't have any effect on me. Well if that were the case, we'd be the only human beings in the history of the world who on a regular basis took significant amounts of money from perfect strangers and made sure that it had no effect on our behavior."[18]

There are many journalistic accounts of examples where politicians appear to have catered to donors' demands out of fear of losing out on their funding. One widely reported example was the response by

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[17] See, https://www.huffingtonpost.com/2013/01/08/call-time-congressional-fundraising_n_2427291.html.

[18] See, https://www.npr.org/sections/money/2012/03/26/149390968/take-the-money-and-run-for-office.

congressional Republicans in late 2017 to a "revolt from their top donors" who had threatened to withhold contributions if their agenda did not move forward.[19]

Lastly, there is also the issue of opportunity costs. The time and effort politicians spend fundraising detracts from their official responsibilities. In almost any other context, if an employee was devoting half of their time to an activity unrelated to their official activities--for instance, playing online poker--it would be reasonable to conclude that this behavior had a corrupting influence on their job performance. This might not amount to a corrupting influence under a narrow conception of corruption that focuses on *quid pro quo* transactions. However, when politicians are deciding how much of their time and effort should be allocated to fundraising versus their official duties, they are, in effect, trading their time for contributions.

Conclusion

Independent expenditures have increased as a total share of political expenditures, both in total amounts and as a share of spending on politics. This has made candidates and parties more dependent on these sources of funding than had been the case in the past. The ability of individuals, corporations, and other groups to spend unlimited amounts to fund independent expenditures has empowered wealthy donors to become much more important to the fundraising ecosystem than had been the case in the 1980s when

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[19] See, https://www.politico.com/story/2017/10/05/republican-donors-trump-mcconnell-anger-243449.

contribution limits applied more generally. The proliferation of independent expenditures has also increased political inequality as contributions have become increasingly concentrated among a relatively small group of individuals. This has likely influenced the behavior of politicians and focused their attention to a greater degree on the donors funding Super PACs. Taken together, the above offers evidence to suggest that donors do influence the behavior of politicians.

Appendix D

Excerpt of Transcript of Evidentiary Hearing

Dr. Jack Rakove

Superior Court for the State of Alaska

October 4, 2018

[…]

BY MR. LESSIG:

Q. []Professor Rakove, looking at the report with your name and Ph.D. at the top, what I'd like to do is start at the very end, actually, at page 33.

At page 33 you say, "The idea that they" — speaking of people in public life — "would inhabit a political universe in which the continuous solicitation of campaign-related funds had become a norm of daily behavior would have struck them as being wholly improbable and morally offensive. Privately, too, they would have regarded such an existence as a shameful mark of their own political corruption."

So, when you say "their own political corruption," can you tell us what you mean by that?

BY DR. RAKOVE:

A. I think the best way to put it would be to say they would have regarded it as a modern equivalent of a pattern of depending upon Aristocratic favor, which in an 18th century republican culture like that in

the United States would have seemed dishonorable and unseemly.

In a sense, a violation of an office holder's fundamental obligation to be an independent thinker and actor. In a sense, it would have been regard as a way of cultivating the equivalent Aristocratic favor in a way that would be distinctively anti or unrepublican. For our case, unrepublican in nature.

Q. Okay. This idea of "dependence" we're going to return to. But you don't mean by saying that it would have been corrupt that they would be engaging in bribery, do you?

A. If they accepted such? I mean, I think you gave me a double negative, which I'm trying to sort out here.

Q. I'm sorry. So when they said — when you say "their own political corruption," they wouldn't be saying — or they're not saying, are they, that they're engaging in a practice of bribery when they're living in this world where they're participating in campaign contributions?

A. I think they would have thought they were living in the equivalent of that kind of world in the sense — if they were continuously needy or directly dependent upon having the patronage in this form of outside interest.

Q. And if I could say to them, "Look, are you engaged in quid pro quo bribery?" And they said, "Well, no, never do I engage in quid pro quo bribery." Would

that mean they would no longer feel themselves engaged in a corrupt enterprise when they were in this —

A. No. Well, I think they would have still felt themselves engaged in a corrupt enterprise.

Q. Okay. Now, this point is critical, I think, to your report and also to the issue in this case. Because clearly, as you indicate, "the concept of corruption," which is the way you describe it, included the idea of bribery. Is that correct?

A. Right.

Q. So, for example, you describe at page 2 of your report the impeachment clause, which expressly refers to bribery; the foreign emoluments clause, which, of course, was written in response to a famous historical instance of bribery with a British monarch; John Sullivan of New Hampshire, bribed by the French embassy; John Robinson, speaker of the Virginia house, engaging in bribery. These were all instances of bribery, which would have been at the forefront of their minds. And it would have been their objective to avoid this type of behavior in the future?

A. Yes. I mean, I think any form of bribery in the political context would be the most obvious and manifest example of what corruption would be.

Q. Okay. So, for clarity sake, can we call these forms of corruption individual corruption where it's an

individual who's engaged in a quid pro quo that we refer to as corruption?

A. Yes.

Q. And then plainly, as you describe, the framers were concerned about this concept of individual corruption?

A. Yes.

Q. But it is your view that, within this conception of corruption, as you describe the framers to have, bribery was the only way, quote, as you say on page 3, "in which a political system could be corrupted"?

A. No. It's the most obvious, but by no means the only method.

Q. Okay. So then do you believe that the concept of corruption could be reduced, as you describe, "to a simple definition" or a compendium of "bribery, embezzlement, or patronage" and still be an accurate characterization of the framers' conception?

A. No.

Q. Okay. So then let's think a little bit about the corruption beyond this category we've created of individual corruption. And in light of the evidence that you've submitted in your report beyond individual corruption, I'd like to distinguish between two other types. One we could call institutional corruption —

and I'll describe that in a second — and the other term I'm creating here is societal corruption.

Okay, so let's start with institutional corruption. On page 3 of your report, you identify this example. You speak of a corrupt "relationships between institutions that had befouled the true principles of constitutional government." And the example you're speaking of is "the Crown's influence over the House of Commons" in Parliament.

Can you first describe, when is the period that is being spoken of when we're thinking of their referring to the House of — to Parliament as corrupt?

A. It would essentially be the period of the first two or three Georgian kings, meaning the phase of English monarchy that begins with the death of Queen Ann in 1714 and then the succession to the throne of the first George, the Electorate of Hanover. And concurrently with that, the growth of what's called ministerial government, really beginning with Sir Robert Walpole and then his various successors who served as what would later be called — not really an 18th century term, but what would later be called the Prime Minister of Britain. So essentially, it's a broad way of characterizing early to mid to late 18th century English — English, you could say British — politics.

Q. Okay. So, when you refer to the Crown's influence over the House of Commons, what was the nature of the influence that is being described here?

A. The nature of the influence involves the role that the king and his ministers play in disbursing honors, offices, pensions, places, other forms of royal or governmental favor upon members of Parliament as a means of securing their loyalty to the dominant ministerial coalition.

Q. And is there also a way in which the king would exercise control over who gets elected to Parliament through special provisions —

A. I'm not sure I would say — I think I would say the Crown more than the king.

Q. The Crown, yes, of course.

A. Yes. There were a number of techniques that were developed, again, starting really in the 17-teens and 1720s, to make parliamentary boroughs, you know, corporate charters that they had the rights to send members to the House of Commons to make them more manageable. The conventional language that was used was to talk about rotten boroughs, essentially constituencies that had hardly any voters. Old Sarum outside Salisbury is the best-known example. Or pocket boroughs, which meant constituencies where either the government or some local aristocrat or member of the gentry had a dominant personal interest so they could easily sway or influence or control the electoral.

Q. Okay. So, then the Crown would exercise control over these boroughs, and those boroughs would send representatives to the House of Commons. And so,

the improper influence was that the Crown was essentially creating a dependency with those representatives who were in the Parliament?

A. Yes.

Q. And so that dependency wouldn't necessarily involve any bribery. It wouldn't necessarily involve any quid pro quos. It would be more, "This is my man in Parliament because he's come from this rotten borough?"

A. The theory might involve some bribes, but I think there were multiple forms the influence might take.

Q. Yeah. But conceptually speaking, just to be clear about the analytical claim that you're making, to say that that nature — that type of influence is corrupt, you are not necessarily saying that there was any bribery at all?

A. Right.

Q. It could have been corrupt even if everyone involved was living completely beyond the means of bribery?

A. Yes. Yes.

Q. Okay. So, would you be comfortable if we could refer to this type of arrangement or this type of corruption as a kind of institutional corruption?

A. Yes.

Q. Okay. Now by contrast, I'd like to focus on the conception of corruption you described, for example, in the writings of Machiavelli. In particular, in his *Discourses*.

As you say at page 6, Machiavelli's writing has "little to do with...acts of bribery or nepotism" but instead the "emergence of a degraded way of life that would prevent a community from leading a political life" — and then I'm not going to try the Italian — "or a civil life or from living in...a free state." That's his [conceptual] approach?

A. Right.

Q. So, can you explain a little bit more what this conception is focused on?

A. Yeah. This conception, broadly defined, is focused on the nature of the — in effect, the communal life of a city like Florence, which was, of course, Machiavelli's home. So it has — you know, there are three dimensions of this. And one is — and, you know, the terms I use here, whether translated to English or used in Italian, are in a sense complementary. They are, in a sense, mutually reinforcing. To lead a political life is, in a sense, a kind of Aristotelian idea. The argument that man is a political animal. That the participation in public life is a fundamental characteristic of who we are as mature citizens, subjects of a community. The idea of a civil life implies notions, other notions, broader notions of community. There may be multiple ways in which we form attachments to our culture, to our society, to our

community that will reinforce its corporate, corrective existence. And the — and the idea of living in a free state, in a sense, would be the collective product of both having a political life of a vetted republican, or perhaps democratic form, and of living within a community that was united around some set of values, attachments, aspirations, and so on.

Q. Okay. So this is looking at corruption beyond the corruption of institutions. It's looking at, really, the corruption of a whole society?

A. Right.

Q. So would you object if I referred to that as societal corruption?

A. I'd be happy with the definition, yeah.

Q. Okay. And, of course, it's not just Machiavelli who you describe as focused on societal corruption. Page 11 of your report, you describe John Adams insisting that virtue — and this is virtue in the society — is a cornerstone of a republic. You quote your friend the historian Gordon Wood to state, "republican government" — this is at page 11, again — "republican government required a culture where 'each man must somehow be persuaded to submerge his personal wants into the greater good of the whole.'" These are consistent with the perspective of Machiavelli in the sense that you're thinking about the society as a whole and whether that society is living up to its ideals or has been corrupted. Is that correct?

A. Yes.

Q. Okay. So it's fair to say that the framing generation would have considered it corruption, corruption in the societal sense, if the virtue in the society were somehow degraded. Is that correct?

A. It is correct. And it echoes very deeply in 18th century political culture.

Q. Okay. Or that they — when they would have spoken of such a decline of virtue or moral decay, they would have referred to that as the corruption of the society?

A. Yes.

Q. All right. And to keep this clear, let's summarize a little bit where we are at this point.

At the time of the framing, what we're saying is the conception of corruption was multiple. It would have included the conception of individual corruption, for sure. But it also would have included what I've called institutional corruption and societal corruption. Are you —

A. I would agree with you.

[…]

Q. Okay. So, I'd like to go back, then, to these conceptions of corruption. Let's think of them as buckets. What's striking in your report is that you say that

the primary concern they had was with institutional corruption. On page 18 you say, "The concern with corruption in 18th century Anglo-American political discourse was primarily institutional in nature."

[…]

Q. So are these characterizations of their primary concern correct?

A. Yes. Or, you know, to put it in my own voice, the dominant concern in 18th century Anglo-American political discourse starting from, you know, the 1720s on was with the use of various techniques of influence, which can also align with corruption, on the part of the Crown. In effect, to subvert, compromise, dilute, minimize, reduce the independence of the House of Commons, which was seen ever since the glorious revolution of 1688 as having been, in effect, a principal check upon the Crown acting arbitrarily. Meaning the Crown making laws of his or her own accord without any mechanisms of consent.

[…]

Q. So you have identified a primary concern. And it's important that we understand the sense in which you mean it's a primary concern.

A. So —

Q. Please.

Appendix D

A. The primary concern in 18th century Anglo-American political thinking, particularly on the part of the colonists down to 1776 — I'll say down to the mid-1770s, the crisis of independence — was the belief that the extensive use of all the techniques of corruption and influence on behalf of the Crown had effectively subverted the independence of the House of Commons. Had effectively turned the House of Commons into a tool, to use an 18th century term, of the dominant ministry.

And so as Americans tried to explain, "[W]hy was the British government pursuing the policies[ ] that the colonists deemed inimical to their rights, it's a core belief that the reigning ministries had all these mechanisms for subverting the independence of Parliament.

And then when you get to the point where Americans are prepared to declare independence and, therefore, to write their own constitutions, they did so under what we call republican suppositions about who the Americans were as a people. They wrote republican constitutions. And you can say that meant two things. It meant, you know, in the first place there would be no crown or aristocracy. I mean, in one sense, to be republican simply means to live in regime, to live in and government where there's no king and no aristocracy to, you know, control the instruments of state. But the second thing the republican — republicanism means is that the people — and this is the Machiavellian motif, is that republicans as a people have to possess something called

virtue. Or to use the Italian phrase, *virtu*. That they have to have certain characteristics. And those characteristics should, you know, in their own way resist corruption.

Q. Okay. So then thinking about how they structured the institutions of government to avoid this corruption, you've described — you've pointed repeatedly, both here and in your writing, to this notion of dependence. And I just wonder if you could help us understand the particular sense of dependence that you are referring to here.

A. Well, you know, the opposite of dependence is independence. Independence means that, in the case of an institution, it should not be subject to excessive or distorting influence or control by someone else.

Or more specifically, since the key institutions in the new American constitutions were actually the representative branches of government, the idea of independence here meant that the legislative assembly should be supreme not only in theory but also in practice. That they — you know, they should not be subjected to the direct control of the executive branch.

So, for example, there was no — well, except for New York and Massachusetts, which wrote their constitutions later — there should be no veto over legislation. Legislators should be elected annually so that they would be accountable not to other institutions of government but to the people themselves or, really, to their constituent communities. But

there should be a lot of turnover in office. So, again, representatives would not have a long-term relationship, kind of a running investment in holding onto their offices. They would show up and do their duty responsibly. And, actually, in most cases they were expected to go back into the community and act simply as citizens.

All of these were thought of as a means of reducing the risk of corruption or the danger of corruption, because they would enhance and promote the independence of the legislature from anybody else other than the desires of their own constituents.

Q. Okay. So independence is what they sought. But in that description you just gave us, of course, it also depended on a certain dependence, right? So Madison, in *Federalist* 52, said the house would be "dependent on the people alone." So in what sense is that consistent, the idea of that dependence, with your claim that what they were seeking was to eliminate dependence or create independence?

A. Well the proper — I think at the time you would say representatives have two essential duties. One is, Americans had very advanced notions sometimes called the theory of actual representation. But Americans had very advanced notions that there should be a close connection between the representative and his constituents. There's a lot of discussion, for example, could constituents actually instruct their representatives as to how they were supposed to behave? And that's — you know, it's

related, for example, to the petition — the assembly and petition clause of the 1st Amendment is actually related to this.

And then secondly, particularly when you move to a national level of government, you do expect representatives to be open to deliberation. They have to learn what other constituencies want. They have to be open-minded and fair in terms of trying to think about what Madison would call the collective public good. So there are — those are the two dominant dimensions, Americans emphasize accountability to constituents and a kind of openness in deliberation so that you act responsibly.

Q. So [there is] a dependence on the people. And you're saying there's an independence, as you testified, from the —

A. Right. Yeah.

Q. — executive, for example, in that dynamic? Okay. And then what is the role of elections in the framers' conception in assuring that dependence on the people?

A. The short answer, which is, you know, a very common saying — I think I quote John Adams saying this — is "Where annual elections end, slavery begins." Or sometimes "tyranny begins." That's the other version.

So that reinforces the idea of accountability that I just mentioned. It also stands in contrast with the

dominant English practice, which was to have a septennial parliament. Meaning the new House of Commons could sit seven years before a new election was called. So Americans believed very much that elections conducted as frequently as possible would be the best way to — you know, to promote the right set of attitudes among the representatives.

Q. So you note that in the states the annual election was the dominant form. The federal government didn't adopt that. So why didn't we have annual elections for the members of the House, for example?

A. Yeah. Madison liked three years. The convention settled on two. I think they felt for one thing it would — you know, it would be a big deal if you have a national legislature to go back and forth from your constituency to the capital. Probably — well, really two reasons. One is political service was still avocational in nature. It wasn't really a career the way it would become. Members of Congress might still have their own occupations, as lawyers or whatever, that they'd want to pursue. And secondly, it would be helpful for them to go back and consult with their constituents. Three years seemed too long. Madison liked it. But, you know, that wasn't good enough. Two years was the minimum.

And I think they also felt there was actually — something I've been writing about, actually, a lot recently — that each session of congress would be its own learning cycle. You'd have a bunch of

newcomers. Madison correctly anticipated there would be high rates of turnover — which, in fact, was true for the next century — that most congressmen would be newcomers. They would need some time in office to learn, actually, what their duty was.

Q. And so the rates of turnover, you testify in your submission, were very high all the way through the 19th —

A. Right.

Q. So what does "very high" mean here?

A. According to work done by the distinguished political scientist from Berkeley, Nelson Polsby — (inaudible), I think, came out 40, 50 years ago now — I think the mean term of service in the House of Representatives down to about the — down to the 1890s was three years. Meaning the vast majority of representatives were serving — members of the House were serving one or two terms. In the case of the senate, there are very few two-term senators. Six years is a long time to spend — to spend away from your home. So the idea of rotation in office, in a sense, is a mechanism for preventing corruption. In a sense, for limiting the desire for reelection that today we take as being, you know, the dominant ambition of every member of Congress is really to be reelected. That wasn't really the norm at the time the Constitution was written, and it didn't really become a practice until really the turn of the 20th century.

Q. Okay. And then one more part of that. When we're thinking about the dependence on the people, who would they have thought of "the people" as? Were the people — well, let me just —

A. Who were the people?

Q. Yeah.

A. When we say "we the people," who do we mean?

Q. Yeah.

A. Well, I think the best way to answer this is go back and make the Anglo-American comparison.

At the time of the American Revolution, if you rely on the famous British political writer James Burgh, B-U-R-G-H, who publishes just on the eve of independence, I think the estimated size of the electorate for the House of Commons in Britain, which is a nation of about 8 million people, was about 10,000. In the American colony — and, you know, of course, then you also have this problem of pocket and rotten, particularly rotten, boroughs. You have to remember the House of Commons was not really reformed — to use the term we use — was not really reformed until you have two famous acts of legislation in, I think, 1832 and 1868.

The American practice from the beginning had two really striking dimensions. One was communities were routinely given the right of representation when they were organized, whether they were

townships in New England or communities, you know, in other provinces. That just happened pretty much as a matter of course. So there's no selective use of the privilege of chartering to create the right representation. Secondly, access to land in the American colonies was relatively easy. And so, meeting the standard — you know, what's known as the standard of the 40-shilling freehold, a land holding that would produce 40 shillings of income in any given year [—] wasn't a big deal in the American colonies. It was easy to qualify to vote.

The one thing that holds the vote down is you need political competition. When you have political competition, people want to vote. If you don't have competition, which oftentimes was not the case, then the incentive to vote declines. But the Americans had practice pretty much from the start, let's say even from 1619 when the first Virginia House of Burgesses met … their norms of representation look in some ways remarkably modern.

Q. And so, these people, what's the breakdown of rich and poor in this? Does it look like America today?

A. Well, short answer is no. I can't give you the data because it's not something I've studied. There are some large estates, obviously, that emerged in the plantation south. Although, there the real capital effect that matters is not how much land you have but how many slaves do you own. That's the real variable that matters. The northern colonies were settled, I think as we all know, you know, with —

pretty much on freehold tenure with most sons of fathers being given, you know, their own farms. Starts to become a bit of a problem by the end of the 18th century in New England, but that's not a detail we need to go into.

Q. And so, beyond the actual numbers, was it a conceptual fact about the framers that they would have objected to a system of representation that benefitted one class over another?

A. Yes. You know, there was some discussion at the convention of — and a position Madison favored — you know, "Should we increase the property holding requirements either for the electorate or for the elected, for officials?" And there was some discussion about that. And there's — some people, you know, were positive to the idea. The problem with that is it would be very difficult to come up with a national norm to fit either the existing set of potentially 13 states or the new states that would be created in the interior. Pretty hard to specify what that norm would be. So, in the end, the default option was you'd have the same electorate for the House of Representatives that you'd have for the lower house of assembly in each state. And there was no property requirement to hold office that was ever attached to any federal office.

Q. Okay. So then when Madison says "by the people" [he] means "not the rich more than the poor," that's consistent with your understanding of that?

A. Right. Yes.

Q. Okay. So you've described a system where we would have a "dependence on the people alone." "The people" would not be "the rich more than the poor." That's an institution for representation. Can you give us an example of how that might be corrupted in the institutional corruption sense?

A. Well, I think the first — you know, I can't say just off the top of my head, but, you know, one way to think about this would actually be to think about the time, place, and manner clause of the Constitution. There was a worry about — you couldn't say […] gerrymandering quite yet in 1787. But one reason that we have the time, place, and manner clause, from Madison's perspective, was the idea that, in fact, state legislatures might corrupt the distribution of seats. So that they were not constituted on what we now call the one person, one vote principle. That would be one way of corrupting the House of Representatives.

On the positive side, there's a very strong conviction in the Americans, it's — John Adams says in 1776 and George Mason repeats in 1787, that a representative assembly should be, the terms they use, a mirror, a miniature, a portrait, a transcript of the entire society. You think of representation, it's almost a kind of mapping function between society on the one hand and particularly the lower house of the assembly on the other.

Q. Okay. So then in the way that they would have spoken of corruption of institutions, if you imagined

developing an institutional structure that screwed up that mapping, that interfered with that mapping, that's what they would refer to as a corruption as well?

A. There would be a corruption, yes.

Q. Okay. So let me give you one hypothetical and you tell me whether that fits, okay? Imagine today the political parties, say members of Congress, are spending too much time raising money. So what we're going to do is we're going to appoint one person on the democratic side and one person on the republican side who is going to give all of his or her money to support political candidates. So on the republican side it's the Koch brothers. On the democratic side it's […] Soros. And that — those two people or those two forces get to decide who the candidates are by effectively deciding who they're going to give money to. In the sense of the 18th century conception of institutional corruption, would this be an example a kind of institutional corruption?

A. You know, historians are not great at hypotheticals, I'll say straight off. But I think the shortest answer I could give is this would represent a form of Aristocratic […] domination that would be fundamentally antirepublican in nature.

Q. Okay. But in the terms that we've just described, would that be an example where the dependence of the members is not on the people?

A. Right. Obviously. Yeah. Obviously.

Q. It's "on the rich more than the poor?"

A. Obviously.

Q. Okay. So, in this sense, we can understand institutional corruption as breaking that dependence that they intended, an intended dependence about that relationship?

A. Yes.

Q. Okay. All right. So near the end of your report, I'd like you to look at page 31. I'd like you to clarify the meaning of something you've said. But given counsel's objections, would you please read beginning at "First." "First, the disputants."

[…]

A. "First, the disputants of 1787-88 were preoccupied with the role of institutions, in the strict sense of the term. They're not concerned with the ways in which interests and groups acting outside of government would try to capture institutions for their own self-interested, and therefore potentially corrupt, purposes."

Q. That's it. Okay. So I take it by this, what you're saying is that they were not so much concerned with special interests like what we would think of as oil companies or unions today, capturing — is that what you're trying to describe?

A. In part. I think the best way to put it is — there's a great passage in *Federalist* 10 that illustrates this — that they certainly expected representatives, particularly members of the lower house, to speak for the dominant prevalent interests of their own communities. And they expected them to learn something about the interests that representatives for other communities would voice. And then to try to think collectively about the national interests, the public good.

Q. Okay. But does that — do you mean by that, then, that if these interests began to become a dominant force inside of a legislature, that their conception of institutional corruption would not read on that, it would not be relevant to that?

A. Yeah. That's a fair implication. I think if you want to take one great example, Americans would have thought about the East India Company, you know, whose financial woes were paramount to the passage of the Tea Act of 1773, which provoked the Boston Tea Party and eventually leads you to the Coercive Acts of 1774. They would have thought of that as a paradigmatic example of the corruption of government on behalf of a specific corporate interest that was — it became so dominant, so pervasive that it was exercising undue influence over policymaking.

Q. And this is in the sense of institutional corruption that you described?

A. Yes.

Q. Okay. Then you talk a lot about the relationship in republics and this antagonism between the nobles and the people. Can you tell us a little bit about what you are reflecting —

A. What I'm getting at?

Q. Yeah.

A. Well, that's kind of — in a sense, that's kind of Machiavellian theme. It's a major theme of Machiavelli to kind of oversimplify what's a more complicated point[:]

That the rich want to dominate. They want to control. They want to manipulate. And the rest of us mostly want to lead secure lives. Secure in our liberty. Our women should be secure, that's a theme that Machiavelli refers to repeatedly. We should be allowed to lead the lives we lead without domination. So, Machiavelli sees this. And, of course, he's speaking about 16th century Florence. And Machiavelli sees this as a kind of pervasive characteristic; the rich want to dominate and most citizens want to lead lives of liberty and security. And he sees this as a recurring antagonism in political life.

Q. And would that antagonism manifest itself in different forms in different — in these different contexts?

A. Right. And so can I pursue the Machiavelli motif? I mean, so, you know, the application of this[?]

[O]ne of the great lessons that Machiavelli draws from reading Livy is that one of the best institutions the Romans had was the role of the tribunes — who, in fact, were elected by the people — in terms of bringing prosecutions against the rich. And Machiavelli felt that — where most other writers would say this is a terrible way to disrupt society because you're going to pit one class against another. Machiavelli said, "No, actually, the use of prosecutions pursued by the tribunes against the rich when they abuse their power would actually reinforce democratic or republican values." And the citizens would — in a sense, it would be a way of building that political and civil life. We won't use the Italian phrases here, but that political and civil life which constituted the essence of a republican society.

Q. All right. Great. So then one final part I want to frame before a pause before our conclusion here.

So you've described here this difference between individual, institutional, and what I've called societal corruption. And you've testified that all three were present.

In light of that distinction, I'd like you to reflect on the way the Court has spoken of the — the Supreme Court has spoken of corruption. Without objection, if I can just refer to a couple lines from the Supreme Court opinions that are relevant here.

So, as you know, as you've written, since *Buckley v. Valeo*, the Court has said that if you regulate political speech, you can only do so to address

"corruption." And the conception of corruption that the Court has addressed so far quite consistently has been what Chief Justice Roberts and McCutcheon referred to, for example, as *quid pro quo* corruption, as he says at page 2 and 3. And I have copies of the opinion here to submit — the "hallmark" of corruption is the financial quid pro quo, dollars for political favors. And throughout these cases, including *Citizens United* before and *Buckley* originally, the reference to corruption here is a reference to corruption as in quid pro quo. Would you agree that by quid pro quo corruption Justice Roberts is speaking of what we've referred to here as individual corruption?

A. Yes.

Q. Okay. And so, it's quite clear the Court has endorsed the power of Congress to target individual corruption in the sense in which they've said this is authorized?

A. Uh-huh.

Q. So, likewise, Justice Scalia has a concurrence in the *Citizens United* case where he was deeply troubled by the fact the opinion was charged as being "unhistorical," page 7 of his opinion. And, of course, for Scalia those are fighting words. Because Scalia is an originalist, and he believes what he does is historical understanding of the Constitution.

But his response to this charge is, I think, telling. And I want to make sure to get your characterization of it as well.

He pointed to the evidence that was offered in the dissent by Justice Stevens. And that included an author — an article by Professor Zephyr Teachout. And Scalia quoted this from the — from Zephyr Teachout's article: "Corruption was originally understood to include moral decay and even actions taken by citizens in pursuit of private rather than public ends." So Scalia rejected the idea that you can restrict 1st Amendment freedom to address that corruption.

But would you understand the kind of corruption that's being referred to there in the way that we've been discussing as societal corruption?

A. Yes. You know, I think the whole point of my report, just to try to summarize, is to say that corruption is a concept with a rich and complicated history of its own. The framers were heirs to that complication. They were trying to sort out within the framework of assumptions about republican government, what it might mean.

It's worth noting — let me just add a point, you know, beyond what you suggested. Because curiously I was just teaching a book yesterday that talks about this. The role of the press, if we think about the press as — or the media as main instruments for the disbursements of funds that may or may not be corrupting of politics, that's something that the

founding generation was actually doing a lot of experimenting with. I mean, there's a terrific expansion of the press in the 18th century. And there's a discussion of the whole nature of the process of, "How do you shape and form and figure out what public opinion is all about?" So that's — you know, in a sense it kind of complicates my answer, Larry, because this was a dynamic problem. It was something they were actively wrestling with. And they had to think about, you know, "How do you create a political press?" I mean, the number of the newspapers in the United States multiplies enormously in the 1790s and with each successive decade. Many newspapers were created to kind of run particular elections. So there's a lot of creativity that's involved here so that it makes it hard to oversimplify any one response.

But I do think — I think it remains fair to say that the conception of how these processes could be corrupted, or what are potential uses that would be inimical to the health of a republican body politic, I think the evidence for that remains fairly strong. And that's what I've tried to summarize here.

Q. Okay. Right. But it sounds like, though — you say this is complicating the answer. It seems to me that's simplifying your answer, right? Because if the question is —

A. Trying to do both, I think.

Q. Good. If the question is: Do the framers have a broader conception of corruption than just quid pro quo —

A. Yes.

Q. — then what you're saying is —

A. Yes.

[…]

Q. Okay. And the second follow-up question, just to be clear, about the relationship between what you've been saying and the adoption of the Constitution and, in particular, in the adoption of the 1st Amendment[. I]s there anything in your experience or understanding of this period that would suggest that in adopting the 1st Amendment, the framers meant to weaken the opportunity to address these different forms of corruption?

A. No.

Q. Okay. And in the Constitution itself — in the adopting of the Constitution and the debates about the Constitution [—] was there present in those debates, in the conventions as well as in the Philadelphia Convention[,] state conventions as well as the Philadelphia Convention, a recognition of the need for the government to be able to police or be vigilant about avoiding at least the first two categories of corruption, individual and institutional?

A. Well, those were dominant political values. So I guess I would say as a deep background condition as kind of representing underlying assumptions about the nature of political life, those concerns were very much part of, you know, the founding era debates, the framing era debates.

Q. Okay. Great.

So I'd like to just summarize some key points that we've got here and make sure we've got an agreement on that summary.

[A]s I've simplified these into three buckets of individual, institutional, societal, whether there are three or 30 of these buckets, is it your view as a historian[,] expert in the political thought of the early American republic and constitutional history of America[,] that it would be, in the words of the late Justice Scalia, "unhistorical" to insist that the only conception of corruption that they were animated to avoid was individual corruption?

A. Yes.

Q. Okay. And that whether or not the "hallmark" of one of these conceptions of corruption is quid pro quo, that there were more — that there was more than one prominent conception and not all of them had the same hallmark?

A. Yes.

Q. That the institutional corruption of Parliament involved no necessity of quid pro quo corruption?

A. It was a product of the conception of quid pro quo.

Q. And that the societal conception that Machiavelli or Adams was focused on had no necessary connection to quid pro quo?

A. Yes.

Q. And that while it would be true to say that the "hallmark" of individual corruption was quid pro quo, it would not be true to say that the hallmark of "corruption," as it was understood at the framing, was quid pro quo corruption?

A. Yes.

MR. LESSIG: I have no more questions.

[…]