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**“WORSE THAN THE DISEASE”:  
THE ANTI-CORRUPTION PRINCIPLE, FREE  
EXPRESSION, AND THE DEMOCRATIC PROCESS**

Martin H. Redish\* and Elana Nightingale Dawson\*\*

There are again two methods of removing the causes of faction:  
The one by destroying the liberty which is essential to its existence;  
the other, by giving to every citizen the same opinions, the same  
passions, and the same interests.

It could never be more truly said than of the first remedy, that  
it was worse than the disease.

—James Madison, THE FEDERALIST NO. 10<sup>1</sup>

INTRODUCTION

A number of scholars and jurists have long deplored what they see as the corruption of the American political process.<sup>2</sup> In their view, too much money is having too large and unsavory an impact on American politics, while simultaneously distorting political power towards the wealthy and seductively drawing

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<sup>1</sup> THE FEDERALIST NO. 10 (James Madison), *reprinted in* THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS 167, 168 (David Wootton ed., 2003).

<sup>2</sup> *See, e.g.*, *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654 (1990) (finding constitutional a Michigan law that prohibited “corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office”), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010); Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055, 1056, 1071 (1999) (advocating for an “egalitarian conception of democracy” when the “pervasive political inequality caused by massive wealth disparity” is limited); Frank J. Sorauf, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 COLUM. L. REV. 1348, 1359–60 (1994) (claiming that campaign finance reform is necessary when people believe that “[Political Action Committees] have ‘bought’ the Congress” regardless of whether this belief is legitimate); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994) (explaining that corruption in a system of campaign finance is a concern rooted in “inequality and the dangers of interest group politics”). *See generally* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).

politicians away from pursuit of the public interest.<sup>3</sup> One of the leading scholars advocating such a view, Professor Zephyr Teachout, has gone so far as to suggest that there is actually an “anti-corruption principle” embedded in the Constitution,<sup>4</sup> logically implying that political corruption rises to the level of a constitutional violation. This principle posits that, as a matter of American history and constitutional law, “office holders” are constitutionally obligated to act in the “public interest” and in pursuit of the “common good”; anything less is deemed to amount to “corruption.”<sup>5</sup>

The Supreme Court’s recent decision in *Citizens United v. Federal Election Commission*<sup>6</sup> only intensified scholars’ and jurists’ concerns about the dangers of political corruption.<sup>7</sup> In *Citizens United*, the Court held that the section of the Bipartisan Campaign Reform Act (BCRA) limiting direct corporate political expenditures for expression during a presidential campaign violated the First Amendment.<sup>8</sup> In a strongly worded dissent, Justice Stevens relied on arguments grounded in the anti-corruption principle, as fashioned by Professor Teachout, to justify the BCRA’s suppression of corporate political speech.<sup>9</sup> Justice Stevens’s dissent, like Professor Teachout’s version of the anti-corruption principle, relied on a broad definition of corruption—one extending far beyond the simple act of bribery.<sup>10</sup> According to Justice Stevens, “[t]here are threats of corruption that are far more destructive to a democratic society than the odd bribe.”<sup>11</sup>

Justice Stevens’s dissenting opinion in *Citizens United* is not the first time the Justices have sought to uphold restrictions on political speech in the name of anti-corruption. In *Austin v. Michigan Chamber of Commerce*, the Supreme Court upheld a state law that restricted corporate political expenditures in state elections.<sup>12</sup> The *Austin* Court considered Michigan’s law to be “aim[ed] at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.”<sup>13</sup> The Court’s decision in *Austin*, as Justice Scalia observed in his dissent, “endorse[d] the

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<sup>3</sup> See *supra* note 2 (illustrating judicial and scholarly disapproval of the impact that wealth is having on American politics).

<sup>4</sup> Teachout, *supra* note 2, at 342, 347.

<sup>5</sup> *Id.* at 374.

<sup>6</sup> 130 S. Ct. 876 (2010).

<sup>7</sup> See, e.g., Erica W. Morrison, *Occupiers Wag Fingers at Supreme Court over Political Donation Rule*, WASH. POST, Jan. 20, 2012, [http://www.washingtonpost.com/local/occupiers-wag-fingers-at-supreme-court-over-political-donation-rule/2012/01/20/gIQAriu0EQ\\_story.html](http://www.washingtonpost.com/local/occupiers-wag-fingers-at-supreme-court-over-political-donation-rule/2012/01/20/gIQAriu0EQ_story.html).

<sup>8</sup> *Citizens United*, 130 S. Ct. at 917.

<sup>9</sup> *Id.* at 963–64 (Stevens, J., concurring in part and dissenting in part) (quoting Teachout, *supra* note 2, at 348, 352).

<sup>10</sup> *Id.* at 961–62.

<sup>11</sup> *Id.* at 962.

<sup>12</sup> 494 U.S. 652, 654–55 (1990), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>13</sup> *Id.* at 660.

principle that too much speech is an evil that the democratic majority can proscribe.”<sup>14</sup> The *Austin* decision allowed for “anything the Court deem[ed] politically undesirable [to] be turned into political corruption—by simply describing its effects as politically ‘corrosive . . . .’”<sup>15</sup>

The anti-corruption principle developed by Professor Teachout provides important constitutional grounding for the theories relied upon by the *Austin* majority and Justice Stevens’s opinion in *Citizens United*. Under the anti-corruption principle, if proposed legislation undermines the “public good,” it is unconstitutional for a member of Congress to vote for it, even if she believes it would benefit her constituents.<sup>16</sup> The anti-corruption principle requires that members of Congress always be motivated by the goal of advancing the “public good.”<sup>17</sup> Any political action not motivated by this goal is considered inherently “corrupt,” and therefore unconstitutional.<sup>18</sup>

The most radical element of Professor Teachout’s anti-corruption principle is its conclusion that private citizens, as well as public officials, are to be treated as “office holders” when they interact with the government.<sup>19</sup> As such, they are constitutionally restricted in what they can say and do in the political arena. Under the anti-corruption principle, “[c]itizens must generally work for, and desire, the public good, at least in their political interactions.”<sup>20</sup> Despite the First Amendment’s guarantee to the contrary,<sup>21</sup> under the anti-corruption principle a private citizen may not petition the government for redress of grievances if the grievance is designed to advance the citizen’s personal interests at the expense of the public good.<sup>22</sup> Such a limitation on a private citizen’s actions is an extraordinary leap beyond the regulatory framework of the Constitution, which, with the exception of the Thirteenth Amendment,<sup>23</sup> restricts only government action.<sup>24</sup>

Professor Teachout labels as “political corruption” any activity that brings about political “inequality,” has the effect of “drowning out” other political voices, or gives rise to a “dispirited public” or a loss of “political integrity.”<sup>25</sup> Under her definition,

<sup>14</sup> *Id.* at 679 (Scalia, J., dissenting).

<sup>15</sup> *Id.* at 684.

<sup>16</sup> Teachout, *supra* note 2, at 374–75.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 377–79.

<sup>20</sup> *Id.* at 378.

<sup>21</sup> U.S. CONST. amend. I (“Congress shall make no law . . . abridging . . . the right of the people to petition the Government for a redress of grievances.”).

<sup>22</sup> Teachout, *supra* note 2, at 378 (“A virtuous citizen will not consider his own good as separate from the public good and would not strive to use government to pursue his own ends.”).

<sup>23</sup> U.S. CONST. amend. XIII (prohibiting slavery in the United States).

<sup>24</sup> *See, e.g., id.* amend. V (restricting only the federal government); *id.* amend. XIV (restricting only state action).

<sup>25</sup> Teachout, *supra* note 2, at 387; *see also* *Citizens United v. FEC*, 130 S. Ct. 876, 961 (2010) (Stevens, J., concurring in part and dissenting in part) (noting that corruption can take

“corruption” exists when those with financial means are allowed to use their “wealth for political purposes.”<sup>26</sup>

In examining the premise and rationale of Professor Teachout’s anti-corruption principle, it is important to understand its supposedly constitutional foundation. The principle is designed to be far more than merely a policy-based limitation on—or counterweight to—the First Amendment right of free expression. Rather, it is supposed to function as a freestanding constitutional directive. It is easy to understand the strategic goal of this characterization. If accepted, it would tend to equalize the constitutional weight of the competing interests. For reasons to be explained, however, as both a conceptual and historical matter, it borders on the incoherent to characterize the anti-corruption limits on private individuals as constitutionally dictated.<sup>27</sup> In fact, the truth is quite the opposite: not only is the anti-corruption principle not constitutionally dictated, it is itself unconstitutional. The anti-corruption principle categorically limits political speech by deeming political activity “corrupt” when it is not motivated by an altruistic interest in advancing the good of society as a whole.<sup>28</sup> Under this principle, contributing money to or purchasing advertising on behalf of candidates because their policies would benefit the private citizen’s personal interests would presumably be deemed an unconstitutional act.<sup>29</sup>

There is little doubt that adoption of the anti-corruption principle would have a dramatically negative impact on the free and open communication of valuable political expression.<sup>30</sup> In addition to the serious First Amendment implications raised

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many forms and often “operates along a spectrum”); Burt Neuborne, *One Dollar—One Vote: A Preface to Debating Campaign Finance Reform*, 37 WASHBURN L.J. 1, 9 (1997) (defining corruption broadly in a campaign finance context); Strauss, *supra* note 2, at 1382 (defining corruption in political campaigns as giving contributions in exchange for specific acts by representatives and noting that interest group politics is a problem of inequality).

<sup>26</sup> Teachout, *supra* note 2, at 391 (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 239, 259 (1986)); *see also* Neuborne, *supra* note 25, at 9 (discussing the prevention of corruption in terms of “preventing unequal access to government officials predicated on financial support”); Strauss, *supra* note 2, at 1382 (viewing corruption as “a problem because of inequality”).

<sup>27</sup> *See* discussion *infra* Part II.

<sup>28</sup> Teachout, *supra* note 2, at 377–78. An interesting question is how are we to define “the common good”? There are two alternatives: (1) an externally derived standard, determined by judge or jury, or (2) an assessment of the private individual’s subjective perception of the common good. Neither alternative is particularly attractive. Under the first alternative, the government imposes its own normative value structure on the individual in contravention of more traditional notions of free thought. *See infra* Part III. The second alternative, on the other hand, requires a case-by-case legal assessment of the individual’s personal perception of the common good, giving rise to obvious risks of manipulation, vagueness, and uncertainty. An individual’s right of free expression should not be allowed to turn on such an indeterminate, undisciplined, and unpredictable inquiry.

<sup>29</sup> *See* Teachout, *supra* note 2, at 378.

<sup>30</sup> *See infra* Part III.

by the anti-corruption principle, however, the history, theory, and logic used to support the principle’s existence are seriously flawed. The Constitution imposes no freestanding anti-corruption principle. In fact, the word “corruption” is used only once, in the context of treason.<sup>31</sup> What the Constitution does include are narrow, prophylactic provisions aimed at protecting the government from specific harms *caused by corruption*, rather than a *general prohibition* on corruption.<sup>32</sup>

Beyond its lack of any foundation in constitutional text, the anti-corruption principle also lacks any basis in American historical practice.<sup>33</sup> Interest groups, often focused exclusively on the advancement of the narrow interests of their members, have long been part of the American political experience.<sup>34</sup> Because the anti-corruption principle rests on the theory that purely self-interested motivation—untied to pursuit of the common good—in the political process is inherently improper, virtually all interest group activity logically would have to be prohibited. This theory thus ignores the central role that interest groups have always played in American politics.<sup>35</sup> Indeed, the Constitutional Convention itself was overwhelmingly influenced by special interests.<sup>36</sup> Coalitions formed and regrouped throughout the Convention.<sup>37</sup> Delegates were motivated to form coalitions by their state’s local interests, not by some notion of a universal “common good,”<sup>38</sup> and interest group activity certainly did not cease when the Constitution was ratified. If anything, it steadily increased.<sup>39</sup>

Perhaps most troublesome is the fact that the anti-corruption principle stands in stark contrast to the foundational precepts of American political theory that were embodied in the First Amendment right of free expression.<sup>40</sup> American democracy is, for the most part, adversarial in nature.<sup>41</sup> Thus, citizens are not required to pursue advancement of the common good in their political activities; to the contrary, it is generally understood that citizens may seek to influence the political process to advance their own personal interests. As one of the authors has previously written, citizens have the right to “determine for themselves what governmental choices will improve their lives.”<sup>42</sup> To be sure, citizens may choose to pursue altruistic or ideological goals,

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<sup>31</sup> U.S. CONST. art. III, § 3, cl. 2 (“[N]o Attainder of Treason shall work Corruption of Blood . . .”).

<sup>32</sup> See discussion *infra* Part II.A.

<sup>33</sup> See discussion *infra* Part II.B.

<sup>34</sup> See discussion *infra* Part II.B.3.

<sup>35</sup> See discussion *infra* Part II.B.3.

<sup>36</sup> See *infra* notes 148–57 and accompanying text.

<sup>37</sup> See *infra* notes 148–57 and accompanying text.

<sup>38</sup> See *infra* notes 148–57 and accompanying text.

<sup>39</sup> See *infra* notes 176–79 and accompanying text.

<sup>40</sup> See discussion *infra* Part II.

<sup>41</sup> See *infra* notes 200–01 and accompanying text.

<sup>42</sup> Martin H. Redish & Abby Marie Mollen, *Understanding Post’s and Meiklejohn’s Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1306 (2009).

rather than narrow, selfish ones. But central to the notion of self-determination is governmental “epistemological humility.”<sup>43</sup> In regulating political advocacy, government may not superimpose its own normative perspective. American democracy relies on individual self-determination, as well as the interaction of adverse and competing interests. By confining the constitutional protection of free expression to a universal pursuit of the public good, the anti-corruption principle contravenes the core premise of the American democratic system.

Part I of this Article provides a detailed description of the anti-corruption principle as its advocates—particularly Professor Teachout—have shaped it.<sup>44</sup> The Part that follows explores the numerous historical and conceptual flaws in the premises that underlie the principle.<sup>45</sup> The final Part examines the principle’s inconsistency with a proper understanding of American democratic theory and its ominous implications for the First Amendment right of free expression.<sup>46</sup>

## I. UNDERSTANDING THE ANTI-CORRUPTION PRINCIPLE

It is necessary to understand what the anti-corruption principle entails before discussing its problematic premises and implications. Although a number of scholars and jurists have advocated some form of an anti-corruption principle, Professor Teachout has provided the most detailed and enthusiastic explication of the principle.<sup>47</sup> The fact that the leading anti-corruption advocate on the Supreme Court in recent years has expressly relied on Professor Teachout’s scholarship adds further credibility to her version of the principle.<sup>48</sup> This discussion therefore focuses largely on her articulation of the anti-corruption principle.

### A. *The Goals of the Anti-Corruption Principle*

Although the prevention of corruption or the appearance of corruption has been recognized by the Supreme Court as an appropriate limitation on the First Amendment’s reach in the electoral process, that concern has been viewed solely as a sub-constitutional competing government interest, not as a freestanding constitutional directive.<sup>49</sup> Professor Teachout, however, seeks to take anti-corruption

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<sup>43</sup> Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CALIF. L. REV. 267, 271 (1991).

<sup>44</sup> See discussion *infra* Part I.

<sup>45</sup> See discussion *infra* Part II.

<sup>46</sup> See discussion *infra* Part III.

<sup>47</sup> See generally Teachout, *supra* note 2.

<sup>48</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 947–48 n.51, 963–64 (2010) (Stevens, J., concurring in part and dissenting in part) (citing Teachout, *supra* note 2).

<sup>49</sup> *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985) (“[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”).

concerns out of the “competing government interest” category and place them on equal constitutional footing with the right with which it competes. As fashioned by Professor Teachout, the anti-corruption principle provides constitutionally grounded justification for any governmental action aimed at fighting corruption.

Under the anti-corruption principle as Professor Teachout describes it, “political virtue is pursuing the public good in public life.”<sup>50</sup> Public officials, she asserts, must be motivated by an interest in pursuing the “public good” when using “the reigns of power.”<sup>51</sup> Her version of the anti-corruption principle thus does far more than restrict public officials’ actions; it also restricts their thoughts and motivations in taking those actions. For example, if an elected official votes against a bill solely because she is concerned about her reelection prospects, without considering the bill’s impact on the common good, presumably her vote would have to be deemed corrupt. Indeed, her vote would even have to be considered unconstitutional because it violated the anti-corruption principle, which, according to Professor Teachout, is constitutionally dictated. But even commission of such a violation does not necessarily provide an express basis for impeachment.<sup>52</sup> Thus, it is unclear what legal consequences would flow from a public office-holder’s violation of the anti-corruption principle. Whatever those consequences, however, under the anti-corruption principle it would nevertheless be unconstitutional for an elected official to vote against a bill, even though it would benefit the nation as a whole, solely because it would result in fewer jobs in his district. An interest in one’s own constituents does not necessarily translate into the public interest as a whole. Moreover, if an elected official’s constituents advocate enactment of legislation because it would personally benefit them, the constituents’ advocacy would also violate the anti-corruption principle. Because, pursuant to Professor Teachout’s extremely broad definition of “office holder,” private citizens are subject to the same stringent limits imposed by the anti-corruption principle as government officials,<sup>53</sup> their actions and motivations are similarly subject to constitutional scrutiny. Under the anti-corruption principle, according to Professor Teachout, the Constitution requires that individuals possess civic virtue—meaning that they must “put[] public good before narrow personal interests in [their] public actions.”<sup>54</sup> In contrast, participants in the governing process who are “tempted by narcissism, ambition, or luxury, to place private gain before public good in their public actions” are deemed “corrupt.”<sup>55</sup> Pursuant to her approach, when a private person executes his “public duties”—including any engagement in the political process or interaction with the government—he is constitutionally required

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<sup>50</sup> Teachout, *supra* note 2, at 374.

<sup>51</sup> *Id.*

<sup>52</sup> U.S. CONST. art. II, § 4 (listing “Treason, Bribery, or other High Crimes and Misdemeanors” as grounds for impeachment).

<sup>53</sup> Teachout, *supra* note 2, at 377–79.

<sup>54</sup> *Id.* at 375.

<sup>55</sup> *Id.*



to put the “public good” first.<sup>56</sup> As bizarre as all of these results undoubtedly seem, they are logically inescapable implications of Professor Teachout’s constitutionally dictated version of the anti-corruption principle.

*B. Defining the Terms*

One might reasonably wonder why a constitutionally based anti-corruption principle is needed in the first place, when we already have laws criminalizing corruption. As already seen, however, the “corruption” prohibited by the anti-corruption principle reaches far beyond prevailing understandings of the word.<sup>57</sup> As shaped by Professor Teachout, the anti-corruption principle prohibits “office holders” from taking any political action motivated purely by self-interest rather than the public good.<sup>58</sup> Because the concept of the “public good” is presumably to be defined subjectively,<sup>59</sup> the anti-corruption principle would seem to require only that office-holders *believe* that they are acting in the interest of the “public good,” as they understand it. Corruption, therefore, is “defined in terms of an attitude toward public service, not in relation to a set of criminal laws.”<sup>60</sup> The anti-corruption principle is premised on the notion that the concept of “corruption” sweeps within its reach political activities that, although not illegal in and of themselves, are rendered toxic by the actor’s purpose for engaging in them.<sup>61</sup> A person is “corrupt,” according to Professor Teachout, when “[t]he public good does not motivate him.”<sup>62</sup>

The public’s use and understanding of the word “corruption” appears to be out of step with a definition that encompasses otherwise legal activity solely because of the actor’s motives. For example, the Wikipedia entry on the word “corruption” in the political context confines the definition to criminal acts, such as extortion and bribery.<sup>63</sup> Moreover, the news stories on American corruption demonstrate that the term’s modern understanding encompasses solely criminal behavior, not simply activity by public officials motivated by something other than pursuit of the public good. For example, a Google search for the word “corruption” revealed not a single story concerning Professor Teachout’s non-criminal version of the term.<sup>64</sup> This suggests that the definition employed by Professor Teachout—at least when measured against common understanding—is at best exaggerated and at worst downright misleading.

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<sup>56</sup> *Id.* at 378 (“Citizens must generally work for, and desire, the public good, at least in their political interactions.”).

<sup>57</sup> *See infra* notes 75–80 and accompanying text.

<sup>58</sup> Teachout, *supra* note 2, at 374.

<sup>59</sup> *But see supra* note 28.

<sup>60</sup> Teachout, *supra* note 2, at 374.

<sup>61</sup> *Id.* at 375–76.

<sup>62</sup> *Id.* at 374.

<sup>63</sup> WIKIPEDIA, *Corruption*, <http://en.wikipedia.org/wiki/Corruption> (last visited May 1, 2012).

<sup>64</sup> *Corruption*, GOOGLE, <http://www.google.com> (search “corruption”).

The definition of “office holder” under the anti-corruption principle is also stretched well beyond common perceptions of the term. According to Professor Teachout, “citizenship is a public office; like the public office of Senator or President.”<sup>65</sup> Therefore, “[a]ll citizens—especially powerful citizens—are responsible for keeping public resources generally serving public ends.”<sup>66</sup> This extreme definition of “office holder” leads to the conclusion that private citizens, like government officials, are restrained by the Constitution’s anti-corruption principle.<sup>67</sup> Thus, private citizens may not “ignore a general commitment to the public at large.”<sup>68</sup> Pursuant to this definition, a citizen is considered corrupt if her “interactions with government or with politics” are motivated by self-interest.<sup>69</sup> The consequences are unclear, however, for a citizen if he were to violate the Constitution by not “work[ing] for, and desir[ing], the public good.”<sup>70</sup> Presumably, a constitutionally dictated anti-corruption principle must have an enforcement mechanism. Otherwise, individuals have no incentive to follow the principle’s mandate. Yet Professor Teachout never discusses how the principle would be enforced against *any* office-holder, let alone private citizens. Professor Teachout’s version of “corruption” and her enforcement of it in the Constitution thus place us in a constitutional fantasy land in which the topography is, to say the least, uncharted.

Professor Teachout supports her claim that citizenship is a public office—and that private citizens can therefore be deemed to have violated the Constitution—by noting that “[p]eople regularly call a local businessman ‘corrupt’ if he tries to get something out of government using political ties.”<sup>71</sup> Because the public uses the term “corrupt” to refer to private citizens as well as elected officials, she reasons, the concept of citizenship as a public office will make sense to most people.<sup>72</sup> The logical implication of her definition of “office holder” to include private citizens is that citizens are imbued with a “public trust” when they interact with government.<sup>73</sup> Professor Teachout argues that although citizens possess a constitutional right to petition the government, they are simultaneously constitutionally obligated “to giv[e] credit and thought to the impact on others, and to us[e] public channels for public ends.”<sup>74</sup>

One of the key purposes of the anti-corruption principle is the reduction, if not complete elimination, of the influence of wealth in political campaigns. Campaign

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<sup>65</sup> Teachout, *supra* note 2, at 377.

<sup>66</sup> *Id.*

<sup>67</sup> *See supra* notes 19–24 and accompanying text.

<sup>68</sup> Teachout, *supra* note 2, at 378.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 379.

<sup>72</sup> *Id.*

<sup>73</sup> *See id.* at 378 (“This corruption of the citizen is possible in interactions with government or with politics. For a polity to work, citizens must not abuse the public trust in those interactions.”).

<sup>74</sup> *Id.*

contributions result in corruption, Professor Teachout argues, when any of the following modern conceptions of “corruption” arise: (1) criminal bribery; (2) political inequality; (3) “drowned voices”; (4) a “dispirited public”; or (5) “a lack of integrity” in the political process.<sup>75</sup> Quid pro quo bribery is described as “[t]he archetypal corruption.”<sup>76</sup> Even the “criminal bribery” concept, however, includes “possibly legal” activities.<sup>77</sup> This is true despite the fact that the Supreme Court has recognized a compelling government interest *only* in the prevention of “*quid-pro-quo* corruption.”<sup>78</sup>

The “inequality” version of “corruption” equates the concept with unequal financial access to the political arena.<sup>79</sup> Once money becomes involved in politics, Professor Teachout argues, “it creates unequal access and unequal voice.”<sup>80</sup> It follows, then, that the anti-corruption principle mandates the removal of the unequal impact of money. The anti-corruption principle could thus be employed to uphold limitations on political expenditures by candidates in order to even the political playing field.

An extension of the political equality argument is the notion that corruption also occurs when the voices of powerful actors “drown[] out” the voices of other speakers.<sup>81</sup> The anti-corruption principle would prohibit any communication that suppresses other speech by virtue of its volume, whether literal (speech that is audibly louder than other speech) or figurative (speech that is “louder” because more people hear it). Again, the anti-corruption principle’s purpose is to limit the use of money by the wealthy in order to give those without money an equal shot at contributing to the American political colloquy.

The final two modern conceptions of “corruption” described by Professor Teachout—a dispirited public and a lack of political integrity—are both tied to public perception.<sup>82</sup> Anything that gives rise to the perception of corruption has a dispiriting impact on the public and therefore would be prohibited by the anti-corruption principle. Integrity can be lost any time a person “leverag[es] the channels of power to tempt officials into non-public actions.”<sup>83</sup> Under this formulation, a constituent who contacts her elected representative about a matter of personal importance threatens the integrity of the political process.

It is not difficult to see that Professor Teachout has expanded the concept of “corruption” to include anything that conflicts with an ideological model committed to notions of economic redistribution in the political process. Under her version of the concept, those who are opposed to such redistribution in the political arena—on

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<sup>75</sup> *Id.* at 387.

<sup>76</sup> *Id.* at 388.

<sup>77</sup> *Id.* at 389.

<sup>78</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478–79 (2007).

<sup>79</sup> Teachout, *supra* note 2, at 392.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 394.

<sup>82</sup> *Id.* at 394–95.

<sup>83</sup> *Id.* at 396.

either ideological or constitutional grounds—are automatically characterized as supporters of corruption, with apparently nothing to distinguish support for such “corruption” from open support for criminalized bribery. To be sure, reasonable people can differ over the values of economic redistribution, both in the political arena and society in general. But by treating the position of those with whom she differs as the moral equivalent of support for bribery, Professor Teachout alters the nature of the debate in ominous ways. The very use of the word “corruption” triggers notions of evil and illegality that have no place in the modern debate over American political theory and campaign finance.

### C. *The Origins of the Anti-Corruption Principle*

Professor Teachout finds as the primary historical source of the modern anti-corruption principle the debates at the Constitutional Convention. Madison’s notes recorded mention of the word corruption fifty-four times.<sup>84</sup> According to Professor Teachout, the delegates’ discussion of corruption focused on two specific concerns: (1) the potentially “corrupting influence of wealth, greed, and ambition” on the political process, and (2) the susceptibility of the nation to foreign corruption due to its small size.<sup>85</sup> The anti-corruption principle must be found in the Constitution, she reasons, because concerns about the need to prevent corruption entered into “[s]ome of the most extensive debates in the Convention—those about emoluments and perquisites for civil office, who should have the power of appointment, and the size of the relative bodies.”<sup>86</sup> According to Professor Teachout, the Framers’ overarching concern with corruption led them to use “near-apocalyptic language and [to] search for tools to ward off its threats.”<sup>87</sup> She also cites Madison’s famed *Federalist No. 10* as support for the existence of the anti-corruption principle.<sup>88</sup> Madison’s concern about the dangerous influence of factions supposedly evinces his belief that the existence of factions should be eliminated or, at the very least, controlled.<sup>89</sup>

There are, as we shall see, numerous inaccuracies in Professor Teachout’s understanding of the Framers’ comments and writings.<sup>90</sup> It is important to note, however, that even if one suspends historical disbelief for the moment and unquestioningly accepts her understanding of the Framers’ intentions, Professor Teachout still must make a far stronger showing in order to establish the existence of a constitutionally dictated anti-corruption principle. She must further demonstrate that the Framers intended to embody their understanding within the body of the document. It was, after

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<sup>84</sup> *Id.* at 353.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 376 (citing THE FEDERALIST NO. 10, *supra* note 1, at 79 (James Madison)).

<sup>89</sup> *Id.* at 371–72 & n.151.

<sup>90</sup> See discussion *infra* Part II.B.1–2.

all, the Constitution's text, not the disembodied understandings of the Framers, that was subjected to the formal procedures of the ratification process. In an effort to meet that burden, Professor Teachout identifies twenty-three constitutional features that she believes support the existence of an overarching anti-corruption principle.<sup>91</sup> She contends that the sum total of all the specific constitutional clauses aimed at fighting corruption amount to a freestanding constitutional anti-corruption principle.<sup>92</sup> She points to specific clauses in Articles I, II, and III to establish that the Framers intended to embed an anti-corruption principle in the Constitution.<sup>93</sup> Article I, she asserts "was shaped by concerns that the House [of Representatives] would be populated by men of weak will, easily corrupted to use their office for venal ends, and that the Senate would become corrupted by vanity and luxury."<sup>94</sup> Smaller groups, it was believed, "were easier to buy off with promises of money."<sup>95</sup> Smaller groups were also more likely "to find similar motives and band together to empower themselves at the expense of the citizenry."<sup>96</sup> Large groups supposedly "couldn't coordinate well enough to effectively corrupt themselves."<sup>97</sup> Because of this, "the delegates decided to make the House of Representatives . . . larger to protect against corruption."<sup>98</sup>

In addition to the Framers' concerns about size, Professor Teachout finds evidence of the anti-corruption principle in the constitutional methods adopted for electing the legislature.<sup>99</sup> The Constitution was designed so that members of the House of Representatives would be elected "by the people," rather than "by the legislature," because of fear that "congressional dependency on state legislatures could allow local corruption to infect national corruption."<sup>100</sup> Fear of the influence of foreign powers also supposedly infused the delegates' fear of corruption, leading to the adoption of "[t]he clause demanding seven years of residency in the United States" in order to serve in Congress.<sup>101</sup>

The provision for regular elections was one of the most important checks on corruption, Professor Teachout claims.<sup>102</sup> The concern was that "longer terms strengthened the bonds with the Executive and weakened them with the people."<sup>103</sup> "[T]he Framers wanted to avoid financial dependency of one branch upon another."<sup>104</sup> But

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<sup>91</sup> Teachout, *supra* note 2, at 355.

<sup>92</sup> *Id.* at 342–43.

<sup>93</sup> *Id.* at 354–72.

<sup>94</sup> *Id.* at 354.

<sup>95</sup> *Id.* at 356.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 357.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 358.

<sup>102</sup> *Id.* at 362.

<sup>103</sup> *Id.* at 363.

<sup>104</sup> *Id.* at 362–63.

whereas “[a] short term would ensure accountability and make it difficult to run too far on the public purse. . . . a long term would make it more likely that men of good character would undertake the commitment to service . . . .”<sup>105</sup> Elections, therefore, would ensure that those corrupted by power and wealth would not be reelected.<sup>106</sup>

The Framers also included provisions to ward off the threat of conflicts and temptations that might corrupt legislators. Professor Teachout believes the Framers were concerned “that members of Congress would use their position to enrich themselves and their friends, and that they would see public office as a place for gaining civil posts and preferences, instead of as a public duty.”<sup>107</sup> Evidence of this concern is reflected in the Ineligibility and Emoluments Clauses, which were included in the Constitution to allay concerns “that wealthy non-residents would purchase elections.”<sup>108</sup> These clauses “reflect a deep anxiety about the possibility of civil service corrupting governmental processes by enabling members of Congress to create and fund their own positions as civil servants.”<sup>109</sup> The Foreign Gifts Clause, she notes, grew out of fear “that foreign interests would try to use their wealth to tempt public servants and sway the foreign policy decisions of the new government.”<sup>110</sup>

Professor Teachout also points to a number of anti-corruption clauses in Articles II and III. “Article II contains several provisions to limit executive corruption.”<sup>111</sup> The Presidential Emoluments Clause, which “forbids the President from being paid by the United States . . . beyond his general compensation,” is one such provision.<sup>112</sup> The clause was adopted “to prevent the President from becoming overly dependent upon Congress (and thereby corrupted by them).”<sup>113</sup> Article II, Section 2, which requires Senate approval of judicial appointment, limits potential Executive corruption of the judiciary.<sup>114</sup> The constitutional provision for impeachment is described by Professor Teachout as “clearly the strongest anti-corruption element of Section 1.”<sup>115</sup> Lastly, like Article I, Article II also carefully prescribes an elections process designed “[t]o guard against corruption.”<sup>116</sup>

Professor Teachout claims that the purpose of Article III is to keep the judiciary “independent of both ‘the gust of faction’ and corruption.”<sup>117</sup> She interprets the clause allowing judges to hold office only “during good behavior” to mean in the “absence

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<sup>105</sup> *Id.* at 363.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 359.

<sup>108</sup> *Id.* at 357.

<sup>109</sup> *Id.* at 359–60.

<sup>110</sup> *Id.* at 361.

<sup>111</sup> *Id.* at 364.

<sup>112</sup> *Id.* at 365. *See generally* U.S. CONST. art. II, § 1, cl. 7.

<sup>113</sup> Teachout, *supra* note 2, at 365.

<sup>114</sup> *Id.* *See generally* U.S. CONST. art. II, § 2, cl. 2.

<sup>115</sup> Teachout, *supra* note 2, at 367.

<sup>116</sup> *Id.* at 368.

<sup>117</sup> *Id.* at 368–69.

of corruption,”<sup>118</sup> thus supporting the existence of an anti-corruption principle. Article III, Section 2’s jury trial requirement is also said to be the result of “the anti-corruption urge.”<sup>119</sup>

The Constitution’s structural commitments of power are, as Professor Teachout asserts, “[s]ome of the strongest anti-corruption provisions in the Constitution.”<sup>120</sup> Her claim that the separation of powers among the three branches of government was intended as a check on corruption is not new. For example, G. Edward White has written that the foundational “republican” principles of the American Republic included “the ‘anticorruption’ principle, embodied in the separation of . . . powers.”<sup>121</sup> Structural features within the Senate and the House are also identified by Professor Teachout as being adopted in order to “protect[ ] against corruption.”<sup>122</sup> The Framers believed that “the dignity of the elites might make those in the Senate resistant to corruption.”<sup>123</sup> On the other hand, the House was thought to be resistant to corruption because, in light of its size, “it would be logically impossible for various representatives to all have similar interests that could be similarly exploited.”<sup>124</sup>

The preceding discussion has described, in some detail, the scope and rationale of the anti-corruption principle as it has been fashioned by its leading scholarly advocate. In the Part that follows, we explore the countless flaws in Professor Teachout’s analysis in considerably greater scope and detail.

## II. THE ANTI-CORRUPTION PRINCIPLE’S FUNDAMENTAL FAILINGS

Professor Teachout’s version of a constitutionally dictated anti-corruption principle suffers from numerous flaws. These flaws fall under one or more of the following headings: (1) linguistic, (2) textual, (3) historical, (4) theoretical, and (5) constitutional. We have already explained the linguistic defects in Professor Teachout’s wildly broad and counterintuitive use of the term “corruption.”<sup>125</sup> We therefore now turn to explorations of the remaining defects in her analysis.

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<sup>118</sup> *Id.* at 369. This definition then leaves open the question: What is corruption? In Professor Teachout’s view, corruption exists when “[t]he integrity of the object of corruption is threatened by internal decay.” *Id.* at 347. Beyond this broad and somewhat circular definition, Professor Teachout points to what she describes as modern concepts of corruption: “criminal bribery, inequality, drowned voices, a dispirited public, and a lack of integrity.” *Id.* at 387.

<sup>119</sup> *Id.* at 369. Professor Teachout theorizes that the Framers felt that juries were less susceptible to corruption than judges, “who could be regularly and predictably bought.” *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835*, at 7 (1988).

<sup>122</sup> Teachout, *supra* note 2, at 371.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> See discussion *supra* Part I.B.

*A. The Anti-Corruption Principle's Inconsistency with Constitutional Text*

The argument that an anti-corruption principle is embedded in the Constitution relies heavily on a synthesis of individual clauses with the document's overall structure. It is indisputable that the Constitution was designed to prevent, among other things, corruption on the part of government officials. In fact, many of the Constitution's provisions, including several clauses cited to support the anti-corruption principle's existence, were written to establish a federal government resistant to the dangers of corruption. But that fact, standing alone, fails to justify the anti-corruption principle as Professor Teachout has fashioned it for two reasons. First, the type of corruption that the Framers sought to prevent was far narrower in scope than the sweeping version urged by Professor Teachout. Second, the text reveals that the Framers quite consciously chose to fight corruption *incrementally* and *prophylactically*. In contrast, Professor Teachout describes a *direct* and *categorical* prohibition on corruption. But the fact that the Framers were quite clearly aware of the dangers of political corruption and yet chose *not* to employ the methodology described by Professor Teachout demonstrates their unambiguous rejection of the approach she advocates.

Initially, it is important to recognize that the corruption that the Constitution aims to prevent in no way extends to the anti-corruption principle's far-reaching definition of the term. Corruption, as understood by the Framers, involved only the failure of elected officials to serve their respective electorates.<sup>126</sup> It surely did not include an elected official's failure to pursue some vague notion of the common good. Corruption, properly understood, included the situation in which a legislator, on his own, engaged in an activity *solely to benefit himself*, rather than to benefit his constituents. It does not include situations of public officials choosing solely to foster or protect the narrow interests of their constituents, even at the expense of the broader common good. The Constitution's Framers designed the federal government to ensure that elected officials acted in the best interest of their constituents, rather than in their own personal interests. It was failure to comply with this dictate that the Framers characterized as corruption.<sup>127</sup> Every one of the clauses to which Professor Teachout points is explainable by the Framers' desire to ensure that elected officials truly represent their constituencies, and nothing else.

Equally important is that Professor Teachout has confused narrowly prophylactic structural protections designed to retard the growth of corruption with a direct, categorical prohibition of corruption—a principle that the Constitution's text does not include. Virtually all of the provisions to which Professor Teachout points unambiguously establish only the former, not the latter. For example, the Ineligibility and

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<sup>126</sup> See MICHAEL I. MYERSON, *LIBERTY'S BLUEPRINT: HOW MADISON AND HAMILTON WROTE THE FEDERALIST PAPERS, DEFINED THE CONSTITUTION, AND MADE DEMOCRACY SAFE FOR THE WORLD 177* (2008) (observing that one of the Framers' primary concerns was that elected officials “may forget their obligations to their constituents”).

<sup>127</sup> *Id.*



Emoluments Clauses<sup>128</sup> and the Foreign Gifts Clause,<sup>129</sup> which Professor Teachout points to as Article I's strongest protections against corruption,<sup>130</sup> are classic illustrations of the Framers' limited prophylactic approach. The Foreign Gift Clause's strong, "almost petulant"<sup>131</sup> prohibition demonstrates that the Framers chose to place explicit prohibitions on *specific invitations to corruption* in the Constitution, rather than categorically ban corruption. This was due to the Framers' recognition of the futility of attempting to outlaw "the fallibility of mortals."<sup>132</sup> Instead, they added to the Constitution "auxiliary precautions" against office-holders' impropriety—precautions that "lie[] at the heart of the constitutional separation of powers."<sup>133</sup>

Articles II and III also include a number of clauses aimed exclusively at *stemming the threat of corruption*, rather than categorically banning the activity. The Presidential Emoluments Clause serves as a check on potential Executive corruption by preventing the Executive from receiving pay beyond his or her general compensation,<sup>134</sup> thus preventing dependency on either Congress or the states. The Executive's ability to corrupt the judiciary was limited by Article II, Section 2, which requires Senate approval for judicial appointments.<sup>135</sup> Despite providing for lifetime tenure, Article III prevents judicial corruption by providing that judges may hold their "[o]ffices [only] during good [b]ehaviour."<sup>136</sup> Thus, clause after clause of the Constitution demonstrate that the Framers intended to create a government resistant to the dangers of corruption, as they understood the term.<sup>137</sup> This is a far cry, however, from the sweeping direct ban on corruption that Professor Teachout purports to glean from the Constitution's text.

Professor Teachout does not even attempt to provide textual support for her claim that the anti-corruption principle restricts private citizens. She would be hard-pressed to do so, because the Constitution's almost universal limitation to governmental action is well-established and understood. Indeed, the only constitutional provision that restricts private activities is the Thirteenth Amendment, which prohibits involuntary servitude.<sup>138</sup> There is no support in the Constitution for the proposition that citizenship is a public office and thus private citizens are restrained in the same manner as public officials. To the contrary, the philosophical grounding of the Constitution in liberal political theory necessarily dictates recognition of a separation between the state and private citizens.<sup>139</sup>

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<sup>128</sup> U.S. CONST. art. I, § 6, cl. 2.

<sup>129</sup> *Id.* § 9, cl. 8.

<sup>130</sup> Teachout, *supra* note 2, at 359.

<sup>131</sup> *Id.* at 361.

<sup>132</sup> MYERSON, *supra* note 126, at 176.

<sup>133</sup> *Id.* at 177.

<sup>134</sup> U.S. CONST. art II, § 1, cl. 7.

<sup>135</sup> *Id.* § 2, cl. 2.

<sup>136</sup> *Id.* art III, § 1.

<sup>137</sup> See *infra* notes 145–47 and accompanying text.

<sup>138</sup> U.S. CONST. amend. XIII, § 1 (prohibiting slavery).

<sup>139</sup> See Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 SUP. CT. ECON. REV. 77, 78–79 (2010) (describing the long

*B. The Anti-Corruption Principle and American Political History*

In shaping the anti-corruption principle, Professor Teachout draws support from a gross misreading of American history. She relies heavily on the writings and debates of the Framers during and immediately following the Constitutional Convention.<sup>140</sup> But the history of the framing actually establishes that the Framers themselves were committed to the pursuit of narrow special interests.

1. The Framers and the Founding

Contrary to the understanding of anti-corruption principle proponents, American political thought at the time of the founding actually rejected the notion that a government could be centered on the pursuit of the common good and civic virtue. By the 1780s, according to one authority, “dozens of historical actors . . . came to doubt America’s capacity for an overarching commitment to the public good.”<sup>141</sup> Historian Gordon Wood has recounted the fundamental shift in American political thought from the focus on “individual self-sacrifice for the good of the state” to an emphasis on what was referred to as “public opinion.”<sup>142</sup> America, according to Wood, was designed to “remain free not because of any quality in its citizens of spartan self-sacrifice to some nebulous public good, but . . . because of the concern each individual would have in his own self-interest and personal freedom.”<sup>143</sup> America, then, was a government grounded entirely in the pursuit of its citizens’ self-interest and consent.<sup>144</sup>

The Framers’ goal was to create a government that would resist the potential threat of corruption, by which they meant only the failure of elected representatives to pursue or advance the interests of their constituents.<sup>145</sup> The Framers wanted “to insulate the new government from . . . corruption . . . rather than . . . promote virtue.”<sup>146</sup> The Framers had come to realize that the notion of an overriding “public good,” even if subjectively defined, was not viable in a large, heterogeneous society.<sup>147</sup>

It is important to note that the Framers did not seek to eliminate special interest groups or factions, nor did they expect elected officials to forgo efforts to advance

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standing “public-private dichotomy embodied in the so-called ‘state action’ requirement of the Fourteenth Amendment”).

<sup>140</sup> Teachout, *supra* note 2, at 346–54.

<sup>141</sup> Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 578 (1995).

<sup>142</sup> GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 612 (1998).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> See MYERSON, *supra* note 126, at 171, 176–77 (describing Madison’s fear that representatives would fall victim to the majority faction and fail to protect the interests of the people).

<sup>146</sup> James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. POL. 174, 176 (1994).

<sup>147</sup> Flaherty, *supra* note 141, at 578.

the regional interests of their constituents in the name of the “public good.” Indeed, one need look no further than the Constitutional Convention to see regional interests and factions at work. Alignment among delegates, and thus among different states, was largely dictated by narrow state interests regarding the issues before the Convention. Political scientist Calvin Jillson has provided a model of factional politics at the Constitutional Convention.<sup>148</sup> By analyzing roll call data from the Convention, Jillson was able to distinguish the specific points in time when state delegates realigned their interests.<sup>149</sup> His findings show that “both the intellectual composition and the regional distribution of the ideas, values, and attitudes which formed the American political culture during the founding period” contributed to the various factional alignments that developed during the Convention.<sup>150</sup>

The roll call data from the Convention demonstrates the existence of four “very clear periods of coalition realignment.”<sup>151</sup> Each period of realignment serves as an example of the central role of factions and regional interests in the creation of the Constitution. Delegates first demonstrated their allegiance to regional interests during the Convention’s opening days.<sup>152</sup> As with all coalitional splits during the Convention, alignment among delegates fell along state-based divisions. The major alignments of states were the result of predictable disagreement on some of the most substantial issues before the delegates.<sup>153</sup> The question of representation split the delegates into factions based on the size of their respective states.<sup>154</sup> Debate over the projected role of the Executive, on the other hand, resulted in a battle between middle state delegates and those delegates from the peripheral states.<sup>155</sup> The debate over slavery, not surprisingly, resulted in two distinct groups: the delegates from northern states, which did not allow slavery, and the delegates from southern states, which did allow slavery.<sup>156</sup> Even among the southern states, however, there was disagreement among the delegates on the issue of slavery, which was largely rooted in the differing interests within each state.<sup>157</sup>

Professor Teachout contends that corruption should be understood to include “the use of government power and assets to benefit localities or other special interests.”<sup>158</sup>

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<sup>148</sup> CALVIN C. JILLSON, *CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787* (1988).

<sup>149</sup> *Id.* at 28.

<sup>150</sup> *Id.* at 10.

<sup>151</sup> *Id.* at 31.

<sup>152</sup> *Id.* at 32.

<sup>153</sup> *Id.* at 32–34.

<sup>154</sup> *Id.* at 64–65.

<sup>155</sup> *Id.* at 101.

<sup>156</sup> *See id.* at 147–48.

<sup>157</sup> *Id.* at 144–45.

<sup>158</sup> Teachout, *supra* note 2, at 375 (quoting Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 48 (2003)) (internal quotation marks omitted).

By her definition, however, virtually all of the delegates at the Convention were corrupt. According to Jillson, the delegates, rather than being united by some “assertedly universal moral norm”<sup>159</sup> or “public good,” “were divided by their adherence to regionally distinct visions of the republican government that they all professed to desire.”<sup>160</sup> It is impossible to reconcile Professor Teachout’s notion that the Framers were trying to create a government that would condemn the very acts that proved essential to the creation of that government: regional interests and factions.

The only general consensus among the delegates was the desire for some form of republican government.<sup>161</sup> But even “republicanism” was not a universally agreed-upon concept. According to Jillson, “[d]ifferent groups or factions in various sections of the nation defined ‘republicanism’ as they perceived it and could only view their opponents as dangerously antirepublican.”<sup>162</sup> The delegates were well aware of the fact that they brought differing views to the table. No one expected mass agreement on how to form the new nation based on some generalized notion of the common good.<sup>163</sup> As Madison observed, “in general the members seem . . . averse to the temporising expedients.”<sup>164</sup>

## 2. Madison on Factions

Professor Teachout’s reliance on Madison’s *Federalist No. 10* to support the existence of her version of a constitutional anti-corruption principle is entirely misplaced. She points to this famous document as evidence that Madison intended to create a government in which factions would be eliminated.<sup>165</sup> According to Professor Teachout,

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<sup>159</sup> *Id.* at 376 (quoting Laura S. Underkuffler, *Captured by Evil: The Idea of Corruption in Law* (Duke Law Sch. Legal Studies Research Series, Research Paper No. 83, 2005), available at <http://ssrn.com/abstract=820249>) (internal quotation marks omitted).

<sup>160</sup> JILLSON, *supra* note 148, at 18.

<sup>161</sup> *Id.* at 22.

<sup>162</sup> *Id.* (quoting Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 40, 72 (1972)) (internal quotation marks omitted).

<sup>163</sup> Just a week before the Convention, George Mason wrote to his son saying:

[U]pon the great principles of it, I have reason to hope there will be greater unanimity and less opposition, except from the little States, than was at first apprehended. The most prevalent idea in the principal States seems to be a total alteration of the present federal system. . . . It is easy to foresee that there will be much difficulty in organizing a government upon this great scale. . . . Yet with a proper degree of coolness, liberality and candor (very rare commodities by the bye), I doubt not but it may be effected.

*Id.* at 21–22 (quoting 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 23 (Max Farrand ed., 1911) [hereinafter 3 CONVENTION RECORDS]).

<sup>164</sup> *Id.* at 22 (quoting 3 CONVENTION RECORDS, *supra* note 163, at 27) (internal quotation marks omitted).

<sup>165</sup> Teachout, *supra* note 2, at 371–72, 375–76.

Madison was concerned about the dangers of factions and “argued that a large, confederate republic was less likely to lead to faction and instability than a small one.”<sup>166</sup> She therefore concludes that Madison opposed the corruption caused by the pursuit of narrow self-interest.<sup>167</sup> Professor Teachout fails to grasp, however, that Madison believed that a large country would decrease the danger that factions might bring to bear upon the nation *because more factions would exist in a larger country, thereby diluting the relative power of individual factions.*<sup>168</sup>

The most serious flaw in Professor Teachout’s reliance on Madison is her complete failure to acknowledge that Madison expressly rejected any effort to legally abolish factions—motivated by self-interest or otherwise—because any such effort would represent a serious threat to liberty.<sup>169</sup> Madison therefore accepted the presence of factions as necessary for the existence of a free society. Factions, according to Madison, occur when “a number of citizens, whether amounting to a majority or minority of the whole, . . . are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”<sup>170</sup> He recognized two conceivable ways to eliminate factions: “destroying the liberty which is essential to [their] existence; . . . [or] by giving to every citizen the same opinions, the same passions, and the same interests.”<sup>171</sup> Madison considered both alternatives to present a serious threat to republican government. Most importantly, he concluded that “it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.”<sup>172</sup> Because ensuring liberty meant that factions would continue to exist, Madison was willing to tolerate them, for eliminating liberty would be “worse than the disease.”<sup>173</sup> To be sure, Madison saw potential dangers in any single faction gaining excessive political power. But it was by controlling factions through the use of prophylactic structural devices, rather than by rendering them categorically illegal, that he sought to avoid this danger. And, as previously explained,<sup>174</sup> this is the exact objective of the Constitution’s text.

The anti-corruption principle, as Professor Teachout fashions it, clumsily (and dangerously) seeks to deem unconstitutional a private individual’s pursuit of his own narrow special interest through the political process. She thus expects of society that which Madison recognized is impossible to achieve and dangerous to attempt. Far from enforcing the Framers’ practices and intent, then, Professor Teachout advocates

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<sup>166</sup> *Id.* at 372 n.151 (citing THE FEDERALIST NO. 10, *supra* note 1, at 83 (James Madison)).

<sup>167</sup> *Id.* at 371–72.

<sup>168</sup> *See infra* notes 216–18 and accompanying text.

<sup>169</sup> THE FEDERALIST NO. 10, *supra* note 1, at 168–73 (James Madison).

<sup>170</sup> *Id.* at 168.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *See supra* notes 128–39 and accompanying text.

a policy in direct opposition to their goals. Rather than try to fight the inevitable, Madison accepted reality: “The latent causes of faction are thus sown in the nature of man . . . .”<sup>175</sup>

### 3. The Central Role of Interest Groups in the History of American Politics

The preceding discussion demonstrates the crucial role that factions played both at the Constitutional Convention and in the minds of the Framers. American history, both pre- and post-Convention, tells a similar story, with interest groups playing a central role in all facets of American political life. It is impossible to reconcile the central role of interest groups throughout American history with Professor Teachout’s assertion that the Constitution was designed to eliminate the very existence of such groups. One need not be a serious student of American history to know that interest groups and self-promotion are embedded in this nation’s social fabric.<sup>176</sup> Indeed, in the words of political scholars, “a group basis of American politics has been acknowledged since the founding.”<sup>177</sup>

The period following the Constitution’s ratification was marked by the continued prevalence of special interests’ influence over government decisionmaking. Commentators have long recognized the important dynamic of interest groups in American political history. “Groups of self-seeking individuals have ever importuned legislatures for special favors,” observed one early twentieth-century scholar.<sup>178</sup> In the words of a politician of the same era, “[g]roups, some of them actuated by the most patriotic motives, and others purely selfish, have maintained what are commonly called lobbyists in Washington, I presume since the foundation of the Government.”<sup>179</sup>

Interest groups today continue to play a vital role in American democracy, as anyone who follows the news is aware. They have “become an integral part of our representative system of government.”<sup>180</sup> Groups “offer[] more effective representation (than parties) and hence secur[e] overall public policy that better ‘fits’ citizens’ preferences.”<sup>181</sup> In addition, “the political and social experiences *within* groups are viewed as democratically relevant.”<sup>182</sup>

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<sup>175</sup> THE FEDERALIST NO. 10, *supra* note 1, at 169 (James Madison).

<sup>176</sup> Political scientist David Truman has noted that “the antecedents of the modern trade association go back on the local level at least to the guild organizations of master craftsmen and traces of them can be found very early in American history.” DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION 75 (1951).

<sup>177</sup> Daniel J. Tichenor & Richard A. Harris, *Organized Interests and American Political Development*, 117 POL. SCI. Q. 587, 603 (2003).

<sup>178</sup> E. PENDLETON HERRING, GROUP REPRESENTATION BEFORE CONGRESS 31 (1929).

<sup>179</sup> *Id.* (quoting Letter from Senator T. H. Caraway to E. Pendleton Herring (Aug. 31, 1927)) (internal quotation marks omitted).

<sup>180</sup> *Id.* at 240.

<sup>181</sup> GRANT JORDAN & WILLIAM A. MALONEY, DEMOCRACY AND INTEREST GROUPS: ENHANCING PARTICIPATION?, at 2 (2007).

<sup>182</sup> *Id.*

The role of interest groups in American society has grown exponentially during the twentieth and twenty-first centuries, leading some to describe interest groups as “the stuff of which [American] politics is made.”<sup>183</sup> From 1890 to 1899, “256 interest groups appeared before Congress.”<sup>184</sup> By 1917, that number had grown to 1,301.<sup>185</sup> These national interest groups existed in order to “advanc[e] their policy goals within the Washington establishment.”<sup>186</sup> Members of Congress reportedly found national associations to be “valuable in enabling them to arrive at a clearer understanding of the facts concerning the opinion and the interests of a specific group.”<sup>187</sup> These associations, according to one scholar, “must be understood and their place in government allotted, if not by actual legislation, then by general public realization of their significance.”<sup>188</sup> In 1929, representatives from over 500 national organizations traveled to Washington, D.C. “to watch legislation and speak for their membership.”<sup>189</sup> These organizations were “as much a part of the actual government of the country as [were] other, now well-established units that have arisen outside of the formal legal framework of law and constitution.”<sup>190</sup> Their purpose was “to guard the interests of their respective groups.”<sup>191</sup> These organizations typically had two purposes when lobbying the federal government: “If they [were] not working to get something for themselves they [were] busily struggling to prevent an enemy organization from obtaining legislative favors.”<sup>192</sup>

Interest group formation experienced a “veritable explosion” in the 1960s and 1970s.<sup>193</sup> Citizen groups organized around an idea or cause (sometimes called single-issue groups) saw significant growth during this period as well. Half of all citizen groups were formed after 1960.<sup>194</sup> By 1963, a survey of Americans showed that fifty-seven percent “reported that they held membership in a voluntary association.”<sup>195</sup> Although it is impossible to accurately document the exact number of interest groups

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<sup>183</sup> Tichenor & Harris, *supra* note 177, at 589.

<sup>184</sup> *Id.* at 598.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 599.

<sup>187</sup> HERRING, *supra* note 178, at 243.

<sup>188</sup> *Id.* at 268.

<sup>189</sup> *Id.* at 19, 21.

<sup>190</sup> *Id.* at 240.

<sup>191</sup> *Id.* at 23.

<sup>192</sup> *Id.* at 30.

<sup>193</sup> Allan J. Cigler & Burdett A. Loomis, *Introduction: The Changing Nature of Interest Group Politics*, in *INTEREST GROUP POLITICS* 10 (Allan J. Cigler & Burdett A. Loomis eds., 1983) (explaining that, as the scope of federal policy-making has expanded, more interest groups have gone to Washington, D.C. to lobby).

<sup>194</sup> *Id.* at 11.

<sup>195</sup> RONALD J. HREBENAR & RUTH K. SCOTT, *INTEREST GROUP POLITICS IN AMERICA* 6 (1982).

operating in America at any one time, in 1980 the *Encyclopedia of Associations* identified over 14,000 national nonprofit organizations.<sup>196</sup> Although not all of these organizations could be labeled narrowly self-interested, there is no doubt that many did fit this profile. Indeed, every labor union can be said to be seeking to promote the economic interests of its members, regardless of the impact of such actions on the interests of the nation as a whole. Moreover, most of us (including, we predict, Professor Teachout) find nothing immoral or corrupt in workers joining together to promote their personal economic interests through the political process. There is little doubt that the First Amendment right of association, long recognized by the Supreme Court, protects their right to do so.<sup>197</sup> Yet Professor Teachout characterizes such political activity as corrupt and unconstitutional. It is difficult to take seriously a political and constitutional theory that is so inconsistent with the nation’s accepted practices and normative perceptions.

Today, no one could reasonably doubt that interest groups remain a vital part of the American political scene. The American people are aware that they have a right to seek to influence the political process to advance their self-interest, whether it is through membership in the National Rifle Association or the National Organization for Women. Therefore, modern citizens would no doubt be shocked to learn from Professor Teachout that the Constitution condemns their activities as inherently corrupt and prevents them from taking action to protect and further their own interests. The modern citizen’s involvement in the political landscape is highlighted by the number of organizations that continue to thrive. Today, a search for national organizations in the *Encyclopedia of Associations* generates 24,353 results.<sup>198</sup> A similar search for regional, state, and local organizations generates 98,625 results.<sup>199</sup> Yet the anti-corruption principle, if accepted, would immediately call into question the constitutionality of many of the associations operating in the United States today.

#### 4. The Anti-Corruption Principle and American Democratic Theory

The anti-corruption principle, in its rejection of self-interest as a legitimate basis for political action, is irreconcilable with the foundations of liberal democratic theory and the American democratic tradition. Majority rule, electoral representation, and

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<sup>196</sup> *Id.* at 8.

<sup>197</sup> *See, e.g.,* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (“[I]mplicit in the right to engage in activities protected by the First Amendment’ is ‘a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.’” (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984))).

<sup>198</sup> ENCYCLOPEDIA OF ASSOCIATIONS, GALE RESEARCH, available at <http://galenet.galegroup.com.turing.library.northwestern.edu/servlet/AU/form?origSearch=false&n=100&l=1&locID=northwestern&secondary=false&u=r&u=s>.

<sup>199</sup> *Id.*



the concept of one-citizen/one-vote are central to American democracy.<sup>200</sup> Inherent in this formulation of American democracy is the assumption that citizens' interests may constantly be in conflict, leading to recognition of the centrality of the democratic theory called "adversary democracy," a phrase coined by political scientist Jane Mansbridge.<sup>201</sup> The anti-corruption principle threatens the heart of America's adversarially based democratic system, which (short of quid pro quo bribery, of course) ensures a citizen's right to attempt to influence the political process to advance his or her own best interest. There are two ways individuals may seek, through exercise of their expressive rights, to achieve their political goals: (1) convince those in power to take action on their behalf, or (2) attempt to elect candidates who share their political positions. Professor Teachout's anti-corruption principle severely impairs both opportunities whenever individuals seek to advance their personal interests in either manner.

In order to understand why the anti-corruption principle is incompatible with adversary democracy, it is essential first to understand what this version of democratic theory encompasses. Adversary democracy recognizes that in any self-governing society, people's interests will inevitably conflict.<sup>202</sup> In a truly democratic society, "[e]ach individual's interests are [considered to be] of equal value."<sup>203</sup> This is not to say, however, that all citizens must be able to exert equal power or influence. Rather, the equal protection of interests is accomplished through the equal distribution of power to representatives.<sup>204</sup> Citizens pursue their own interests by voting and lobbying their representatives "in proportion to the intensity of their feelings."<sup>205</sup>

Adversary democracy, as one of the authors has previously written, "recognizes democracy as a system of collective self-government that manages conflict—and thus protects and facilitates individual autonomy—by institutionalizing it as a normal part of democratic life."<sup>206</sup> The conflict that exists in a system of collective self-government is the inescapable result of the inevitably "competing interests and ideologies that motivate individuals."<sup>207</sup> It follows, therefore, that a large, heterogeneous society will rarely, if ever, share a singular vision of a substantive "public interest."<sup>208</sup> In fact,

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<sup>200</sup> JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 3 (1980) (asserting that the combination of these three concepts "is democracy").

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 4–5, 18 ("The mechanical aggregation of conflicting selfish desires is the very core of an adversary system.").

<sup>203</sup> *Id.* at 17.

<sup>204</sup> *Id.* at 6 (explaining that people are more successful in protecting their interests when they give power to representatives than when they retain powers).

<sup>205</sup> *Id.* at 17.

<sup>206</sup> Redish & Mollen, *supra* note 42, at 1353.

<sup>207</sup> *Id.*

<sup>208</sup> Madison recognized as much in a letter written in 1787 to Jefferson, stating: "In all civilized Societies, distinctions are various and unavoidable." WOOD, *supra* note 142, at 502

acceptance of the contention that a monolithic “public interest” exists apart from the interests of the individual citizens could enable the more powerful to mislead the less powerful into collaborating in ways that primarily benefit the former.<sup>209</sup>

Long before Professor Mansbridge coined the term “adversary democracy,” our democratic system recognized the individual’s ability to promote his self-interest as he determines it as a central tenet of political life. “[L]iberal theory holds that individuals establish political authority and engage in political activities to pursue their individually-defined purposes.”<sup>210</sup> Hence, an individual’s purpose may not be defined by a collective authority. To be sure, in most situations the individual must ultimately abide by the choices of the majority, or at least its elected representatives. But American democracy is historically based on the expectation that the individual will be able to influence choices in ways that benefit him, as evidenced (in Gordon Woods’s words) by the “total grounding of [American] government in self-interest.”<sup>211</sup> As framed by Professor Teachout, the anti-corruption principle would restrict any government-related activity motivated by the desire to promote individual self-interest at the expense of the common good—whatever that means, and whoever gets to define it. Citizens would only be allowed to interact with the government when motivated by an interest in advancement of the public interest.<sup>212</sup> Her theory thus clashes with the premises of adversary democracy, which are dictated by the premise of liberal democracy and have dominated the nation since its founding.

It would of course be naive to suggest that adversary democracy is free of problems. Some no doubt believe that, at least in certain instances, promotion of one’s own interest at the expense of, or at least without regard to, the interests of others is normatively reprehensible.<sup>213</sup> But it is important to understand that there is nothing inherent in the concept of adversary democracy that precludes the individual from choosing to act on the bases of altruism, ideology, or abstract moral principle, rather than purely on the basis of narrow self-interest. The point of adversary democracy is simply that this moral choice ultimately must rest with the individual citizen, rather than be imposed by some externally derived moral force.

It is important to recognize how much we take for granted the moral legitimacy of the promotion of self-interest. Medicare recipients urging their representatives to increase their benefits despite the resulting increase in the nation’s budget deficit is, after all, an example of self-promotion, and therefore of adversary democracy.

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(quoting Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 12 JEFFERSON PAPERS 277–78 (Julian P. Boyd ed., 1955)).

<sup>209</sup> MANSBRIDGE, *supra* note 200, at 5.

<sup>210</sup> Arthur L. Kalleberg & Larry M. Preston, *Liberal Paradox: Self-Interest & Respect for Political Principles*, 17 POLITY 360, 360 (1984).

<sup>211</sup> WOOD, *supra* note 142, at 612 (explaining that the freedom of America rested in each individual’s concern for his own self-interest and personal freedom).

<sup>212</sup> See *supra* notes 65–68 and accompanying text.

<sup>213</sup> See *supra* notes 49–51 and accompanying text.

Yet many of those who attack self-interest in politics would no doubt consider such promotion not only acceptable, but even desirable. At the very least, no one, we imagine, would seriously suggest that such self-promotional efforts were not fully protected by the First Amendment right of free expression, despite their inescapable grounding in self-interest.

Once one accepts that self-promotional group politics, as a matter of American political theory and practice, is both normatively legitimate and historically well-established, one must logically accept the centrality of adversary democracy to American politics. And once one reaches that conclusion, one must reject any commitment to the mutually inconsistent anti-corruption principle.

This is not to say, of course, that special interest group politics is immune to abuse. In *Federalist No. 10*, Madison warned of the serious threat of factions to democratic rule.<sup>214</sup> But, as previously shown, rather than try to eliminate special interest groups altogether, Madison sought to establish prophylactic structural devices designed to prevent and control the potential for such abuse.<sup>215</sup> The American experience leading up to the Constitution's creation, according to Gordon Wood, "demonstrated that no republic could be made small enough to contain a homogeneous interest that the people could express through the voice of the majority."<sup>216</sup> In light of this, Madison recognized that a large republic was necessary so that no one special interest group would dominate. Madison believed that an extended sphere of government would encourage the creation of additional factions so that, in the end, the various special interests would balance each other out.<sup>217</sup> He sought to structure a government in which "no one common interest or passion will be likely to unite a majority of the whole number in an unjust pursuit."<sup>218</sup>

Under Professor Teachout's anti-corruption principle, civic virtue is assumed to be the sole legitimate motivating force underlying the political choices of all office-holders, a concept that she posits encompasses both elected officials and private citizens.<sup>219</sup> But although the Framers included prohibitions in the Constitution against actions that a legislator might be tempted to undertake in furtherance of his own self-interest at the expense of his constituents, they never banned government decisions designed to benefit specific groups of constituents. And they most certainly did nothing to prevent private citizens from seeking to influence the political process in pursuit of their personal or economic interests.

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<sup>214</sup> THE FEDERALIST NO. 10, *supra* note 1, at 168–73 (James Madison).

<sup>215</sup> See *supra* notes 165–70 and accompanying text.

<sup>216</sup> WOOD, *supra* note 142, at 504.

<sup>217</sup> See Redish & Mollen, *supra* note 42, at 1357 (quoting HANNAH FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 196 (1967)).

<sup>218</sup> WOOD, *supra* note 142, at 504 (quoting Letter from James Madison to Thomas Jefferson, *supra* note 208).

<sup>219</sup> Teachout, *supra* note 2, at 375.

### III. THE ANTI-CORRUPTION PRINCIPLE’S OMINOUS IMPLICATIONS FOR THE FIRST AMENDMENT RIGHT OF FREE EXPRESSION

Above and beyond its numerous theoretical and historical problems, the most serious concern raised by the anti-corruption principle is its extremely harmful impact on the First Amendment right of free expression. This is true as a matter of both First Amendment theory and doctrine. On a theoretical level, the anti-corruption principle conflicts with the foundational premise of a system of free expression: commitment to the precept of epistemological humility. A concept of free expression confined *ex ante* by an externally derived normative dictate is effectively no right at all. As the Supreme Court has long recognized, the right to speak cannot be confined to expression of only one predetermined viewpoint.<sup>220</sup> Yet the anti-corruption principle seeks to shape American governmental structure and the right of free expression in order to implement a commitment to only one normative political theoretical model—namely, a preference for pursuit of the common good, rather than the promotion of individual interest.<sup>221</sup>

On a less abstract level, advocates of the anti-corruption principle appear oblivious to the dramatically harmful impact that acceptance of their principle would have on free speech. For one thing, the necessary logical implications of a commitment to the anti-corruption principle would be that political activities motivated by concern for the common good would receive First Amendment protection, whereas those motivated by pure self-interest would not. It is difficult to imagine a more invidious degradation of First Amendment rights. Yet if that is not deemed the logical implication of the anti-corruption principle, then the anti-corruption principle would seem to serve no purpose at all.

In addition to its inherent viewpoint-based impact, the anti-corruption principle’s advocates completely ignore the simple fact that political communication costs money, and therefore a restriction on the use of money in political campaigns inevitably restricts the availability of information and opinion to the electorate. And there is no way to know, *ex ante*, that all or even most of that information and opinion will be worthless. As the Supreme Court has recognized, the First Amendment assures that it is the individual, not the government, who determines a communication’s worth.<sup>222</sup> Thus, purportedly in an effort to abolish a form of “corruption” that our system has never sought to suppress (or even characterize as “corruption”), anti-corruption

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<sup>220</sup> *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

<sup>221</sup> *See supra* notes 50–55 and accompanying text.

<sup>222</sup> *See, e.g.*, *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 791 (1978) (“[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.”).

principle advocates would substantially undermine something that has long been central to the American political tradition: free and open debate in the course of a political campaign.

Professor Teachout argues that the First Amendment should not “breathe[] at the expense of political integrity.”<sup>223</sup> However, it is by no means clear what her concept of “political integrity” is designed to include. The vagueness inherent in that phrase potentially allows for the suppression of virtually any political speech, as long as the speech is found to have occurred “at the expense of political integrity.”<sup>224</sup> Professor Teachout writes that “[p]olitical integrity is threatened by . . . the perception of people that they do not have the character or capacity to control the federal government.”<sup>225</sup> But would this mean that First Amendment protection would turn on some sort of empirical assessment of voter attitudes, with the level of protection changing as the results of the surveys change? What if different surveys gave rise to conflicting results? And even if those were the public’s perceptions, how could anyone know what specific acts or events had led to them? Would it matter whether those perceptions had any basis in reality? Or is this nothing more than a rhetorical flourish, designed simply to justify sweeping suppression of free and open political communication? Either way, subjective voter preference is a dangerous basis on which to justify the suppression of valuable political expression. Presumably by the same questionable reasoning, suppression of the speech of Communists in the 1950s could have been justified on the bases of surveys showing that voters considered them a threat to American democracy. Surely, widespread restrictions on political speech cannot be grounded in such a subjective and volatile foundation. The same is true, however, of the presumably well-meaning but sorely misguided advocates of the anti-corruption principle.

Implicit in Professor Teachout’s argument is the notion that political speech may be suppressed when it results in anything that falls within her preposterously broad definition of “corruption.” Recall that, according to Professor Teachout, there are four situations, in addition to criminal bribery, in which corruption arises: political inequality, drowned voices, dispirited public, and lack of integrity.<sup>226</sup> The anti-corruption principle would provide the constitutional basis for the elimination of potentially valuable political expression in all of these situations. Professor Teachout appears to be totally oblivious to the serious costs that will be incurred if the anti-corruption principle is used to remedy her wholly subjective versions of corruption. If the Court were to take such an approach, modern free speech protections would be seriously eroded—if not virtually destroyed—in the political process.

The statute invalidated in the Court’s decision in *Citizens United* illustrates the danger of permitting anti-corruption interests to trump First Amendment protections.

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<sup>223</sup> Teachout, *supra* note 2, at 406.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 411–12.

<sup>226</sup> *Id.* at 387; *see also supra* notes 75–78 and accompanying text.

In *Citizens United*, a non-profit organization challenged the Bipartisan Campaign Reform Act of 2002 (BCRA)<sup>227</sup> on First Amendment grounds.<sup>228</sup> During the 2008 presidential primary season, the non-profit corporation, Citizens United, released a film about then-Senator Hillary Clinton, who was vying for the Democratic presidential nomination.<sup>229</sup> Citizens United received most of its funding from individual donors, but it also received a small amount of funding from for-profit corporations.<sup>230</sup> In light of the fear that the film would be covered by BCRA’s ban on corporate-funded independent expenditures, Citizens United sought declaratory and injunctive relief against the Federal Election Commission, arguing that the BCRA prohibition was unconstitutional as applied to the film.<sup>231</sup>

The Court, in holding that BCRA’s restrictions on corporate expenditures were unconstitutional,<sup>232</sup> recognized the inherent problem with any law that restricted speech solely based on who the speaker was—in this case, a nonprofit organization that received some funding from for-profit corporations.<sup>233</sup> “Speech,” the Court observed, “is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”<sup>234</sup> The Court noted that

[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment “has its fullest and most urgent application” to speech uttered during a campaign for political office.<sup>235</sup>

By restricting people’s motivations when they engage in political discourse, the anti-corruption principle threatens the “fullest and most urgent application” of the First Amendment—the protection of political speech.<sup>236</sup> The Court concluded that “political speech must prevail against laws that would suppress it, whether by design or inadvertence.”<sup>237</sup>

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<sup>227</sup> Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 47 U.S.C.).

<sup>228</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 888 (2010).

<sup>229</sup> *Id.* at 887.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 888.

<sup>232</sup> *Id.* at 917 (finding unconstitutional “2 U.S.C. § 441b’s restrictions on corporate independent expenditures”).

<sup>233</sup> *Id.* at 899 (“We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.”).

<sup>234</sup> *Id.* at 898.

<sup>235</sup> *Id.* (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (citations omitted)).

<sup>236</sup> *Id.*; see also *supra* notes 25–27 and accompanying text.

<sup>237</sup> *Citizens United*, 130 S. Ct. at 898.

The anti-corruption principle would provide constitutional legitimacy to laws that sweepingly suppress political speech. Under the anti-corruption principle, a law need only purport to suppress political speech that is motivated by self-interest to survive a First Amendment challenge. As a result, citizens would be denied the information and opinions essential to making their political choices. Many national associations whose purpose is to advocate on behalf of its members could be constitutionally prohibited from doing so in the political arena, because by their very nature they are committed to the advancement of their membership's narrow self-interest. It is impossible to believe that the Constitution was designed to tolerate such devastating suppression.

Professor Teachout seeks to rationalize the need for the anti-corruption principle in terms of the causes of corruption, primarily “[u]nequal access to political life, and political power.”<sup>238</sup> According to Professor Teachout, “basic intuition” tells us “that there must be some kind of equality in political access.”<sup>239</sup> Political access here takes on a much larger connotation than simply the right to vote. For Professor Teachout, political access includes all forms of politically related speech, including campaign contributions and campaign expenditures.<sup>240</sup> The problem, as Professor Teachout sees it, is that money in politics generally results in unequal access and unequal voice.<sup>241</sup> The more that speakers are able to communicate their message to a political actor, the more likely the political actor is to decide in a fashion favorable to the communicator. Campaign contributions, which allow people to communicate messages to candidates, “are likely to warp [political actors’] decisions.”<sup>242</sup> A political actor whose decisions are “warped” because of campaign contributions is considered “corrupt.”<sup>243</sup> The individuals (or organizations) making the contributions are also considered “corrupt” if their contributions are motivated by a personal interest in the candidate’s election, rather than an interest in advancing the “public good.”<sup>244</sup> Therefore, limitations on campaign contributions are deemed necessary to create political equality and stave off corruption.

Other scholars have also rationalized the anti-corruption principle on the basis of equality concerns. David Strauss, for example, has argued that “‘corruption’ in the system of campaign finance is a concern . . . principally because of inequality.”<sup>245</sup> Strauss questions the validity of the Court’s statement in *Buckley v. Valeo* that government restriction of “the speech of some elements of our society in order to

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<sup>238</sup> Teachout, *supra* note 2, at 391.

<sup>239</sup> *Id.* at 393.

<sup>240</sup> *Id.* at 392–93.

<sup>241</sup> *Id.* at 392.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 392–93.

<sup>244</sup> See *supra* notes 50–55 and accompanying text.

<sup>245</sup> Strauss, *supra* note 2, at 1370.

enhance the relative voice of others is wholly foreign to the First Amendment.”<sup>246</sup> He views campaign contributions as tantamount to votes, and thus deserving of the same equality-preserving measures.<sup>247</sup> Burt Neuborne similarly views the unequal distribution of wealth in political campaigns as a threat to society that must be addressed.<sup>248</sup> According to Neuborne, “wealth disparity introduces massive political inequality skewed to a predictable set of self-interested positions. Massive political inequality skewed to self-interest, without instrumental justification, strikes at the moral underpinnings of democracy by permitting wholly unjustifiable differences in political power to emerge.”<sup>249</sup> He concludes that the Court will only view the fight against corruption broadly if “political equality is . . . smuggled back into the campaign finance picture in the guise of a concern with systemic corruption.”<sup>250</sup> The primary flaw in the reasoning of these highly respected scholars is their failure to recognize the dangers to free and open political debate that would inevitably result from a reduction of would-be speakers to the lowest common economic denominator. A second fallacy is their false equation of expression with the exercise of the vote. Unlike expression, the vote has automatic and immediate legal consequences—the election of government officials.<sup>251</sup> In any event, the argument proves too much, because it would reduce every speaker’s legal ability to speak to the lowest common denominator—a truly preposterous restriction. But whichever way one comes out on this important question, it surely does not advance debate to label the pro-speech position “corruption,” with all of the term’s linguistic baggage and associations.

The anti-corruption principle is also designed to restrict well-funded speech when its effect is to “drown out” the speech of less economically powerful speakers.<sup>252</sup> But neither Professor Teachout nor any other scholar or court has provided any evidence to support the proposition that well-funded speech drowns out other points of view; nor could they, because in all but the most extreme cases the “drowning out” concept makes no logical sense. Except in the case of a truly “limited pie” of expressive resources—for example, when one candidate purchases all available television and radio advertising space—the scope and amount of Candidate A’s expression have no

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<sup>246</sup> *Id.* at 1369 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976)) (internal quotation marks omitted).

<sup>247</sup> *Id.* at 1385 (explaining that contributions are similar enough to votes to question why “one person, one vote” is the constitutional requirement for distribution of the latter state-created right, but an anathema for regulation of the former).

<sup>248</sup> Neuborne, *supra* note 2, at 1072 (“I believe that we should be extremely concerned with a set of institutional decisions that creates massive wealth-driven disparities in political power.”).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 1056.

<sup>251</sup> For a more detailed response to the argument that speech in a political campaign should be equated with the vote, see MARTIN H. REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* 136–39 (2001).

<sup>252</sup> See *supra* notes 75–78 and accompanying text.



impact on Candidate B's ability to communicate her message. Even if Candidate A's expression were cut in half, that would have absolutely no impact on Candidate B's ability to communicate to the electorate. It would mean solely that *the relative position* of Candidate B would have improved. Telling those with money that they cannot spend it on political campaigns does not provide money and means for those who have none. The net result of an equality-based approach to corruption is an equality of ignorance. Society is deprived of the information those with economic power would have shared, but the resultant void is left unfilled.

#### CONCLUSION

Professor Teachout's arguments in support of the anti-corruption principle were apparently persuasive enough to convince Justice Stevens, who relied on her scholarship in his dissent in *Citizens United*.<sup>253</sup> This is truly amazing, because her version of the anti-corruption principle has absolutely nothing to recommend it. It is unsupportable in its assertions that the Constitution directly imposes a sweeping prohibition on political corruption and that the constitutional restriction extends to the political activities of private citizens, as well as elected officials. To complicate matters, she defines "corruption"—generally associated by the common person with quid pro quo bribery—to include pretty much anything that is inconsistent with the positions of one particular ideological perspective. Moreover, her theory is completely inconsistent with the reasoning and constitutional strategy adopted by the Framers, as well as with the nation's long history of interest group politics.

In an ideal world, it would be wonderful for constitutional scholars to be able to ignore text, Framers' understandings, well-established history, accepted linguistic usage, and principled analysis in order to implement completely their own ideological perspectives through the device of constitutional analysis. Professor Teachout has sought to do just that, and others seem to share her perspective. Thankfully, the Supreme Court to date has refused to indulge Professor Teachout's ideologically driven approach. One can only hope that a principled constitutional analysis categorically rejecting the dangerous anti-corruption principle continues to prevail.

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<sup>253</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 948 & n.51, 963–64 (2010) (Stevens, J., concurring in part and dissenting in part).