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John Moore, Moderator

How Corrupt Are Our Politics?

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Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United

by Zephyr Teachout - Harvard University Press, 376 pp., $29.95

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According to Teachout, corruption ... is the most pressing threat that our democracy faces. And the problem, as Teachout sees it, is that those in power refuse to admit it. Just as (Governor) Cuomo shut down the Moreland Commission's inquiry into corruption, so the Supreme Court, by adopting an ahistorical and improperly narrow view of corruption, has shut down an exploration of the very real threat that unrestricted campaign spending actually poses to our democracy.

In *Corruption in America*, an eloquent, revealing, and sometimes surprising historical inquiry, Teachout convincingly argues that corruption, broadly understood as placing private interests over the public good in public office, is at the root of what ails American democracy. Regulating corruption has been a persistent theme through American history, and has bedeviled lawyers, politicians, and political philosophers alike. Everyone agrees that it is a problem, but few can agree on how to define it, much less fight it effectively.

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The framers saw the avoidance of corruption as an essential organizing principle of our representative democracy. They also understood that rooting out corruption on a case-by-case basis is extraordinarily difficult, so they sought to counteract it through structural provisions that were designed to encourage public virtue and reduce the temptation to privilege private interests over the public good. Benjamin Franklin was so concerned with this risk that he advocated denying any salary to public officers; he believed that if government officials were paid, they might seek office for private gain rather than to serve the public.

That particular proposal failed, but the framers adopted many other safeguards to work against corruption, including a prohibition on public officials accepting gifts from foreign sovereigns without congressional approval, limits on the power of appointment and on the positions that members of Congress could simultaneously hold, and the "takings" clause, which requires that government take private property only for public use, and that it provide just compensation when doing so.

The concern with corruption, broadly conceived, has remained a dominant theme of American law and politics. Indeed, because of these concerns, lobbying itself was treated as illegal for much of the nation's history. This seems inconceivable in today's political culture, in which "K Street" lobbying dominates Washington's political and financial economies alike. But until the twentieth century, lobbying was considered contrary to public policy. Some states, such as Georgia, made it a crime. And even where lobbying was not a crime, courts refused to enforce contracts for lobbying on the ground that such conduct was contrary to public policy.

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We have evidently come a long way from then. Today, fully half of all members of Congress become lobbyists upon leaving office. Most of them, of course, represent corporations. Far from a dirty word, lobbying today is seen as a First Amendment right; it's how we petition government, after all, and how we let our representatives know what we believe they should do as they represent us. We understand that lobbyists can engage in unethical behavior, but lobbying as such is seen as a necessary and often salutary part of representative democracy.

As Teachout puts it, lobbying is in fact at once a necessary part of democracy and a dangerous threat to the integrity of the process:

Information and reason are among the highest values in the liberal tradition, and lobbying involves the production and communication of information and reason…. On the other hand, the social function of lobbying is to take money and turn it into political power.

The challenge posed by lobbying is a microcosm of the larger problem that the free flow of money presents in a democracy. Representatives are supposed to be responsive to their constituents' desires, and must gain their constituents' support for election and reelection. Yet if an elected official takes money in exchange for a vote, responsiveness becomes corruption. The principle of one person, one vote reflects a deep commitment to equality. But citizens engage in political campaigns not only by voting—they debate with their friends and neighbors, write letters to the editor or Op-Eds, canvass for their favored candidates, donate money, and spend their own money to express their views on the issues of the day.

That's how representative democracy is supposed to work. But when individuals and corporations can spend unlimited amounts of money campaigning, and when society is marked by vast disparities in wealth, there is a real risk that democracy will become an oligarchy, as elected officials increasingly represent not all of us equally, but those of us who are willing and able to spend vast sums of money on their behalf.

Today, one one-thousandth of the American electorate is responsible for 25 percent of campaign funding. Members of Congress spend 30–70 percent of their time raising money for their next campaign. No one doubts that politicians are more responsive to the one one-thousandth than to the 99.99 percent. According to a study by Demos and US PIRG, SuperPACs in the 2012 election raised $505 million, about $200 million more than the presidential candidates combined, from only 159 donors. A single group funded by Charles and David Koch, Americans for Prosperity, spent $122 million during the 2012 campaign.

At one point, it was thought that unions served as, in John Kenneth Galbraith's term, a "countervailing power" to big business. Indeed, the restrictions on corporate spending that were

struck down in *Citizens United* applied equally to corporations and labor unions. Today, however, private concentrations of wealth are virtually unprecedented, while the labor movement's power has markedly eroded. In total, the Koch brothers' political network spent more than $400 million during the 2012 campaign, more than double the total spent by the top ten labor unions *combined*. Countervailing power has been outgunned by private wealth.

These facts erode trust in our democracy. In 1964, 29 percent of voters believed that government was "run by a few big interests looking out for themselves." By 2013, that view had become a landslide, with 79 percent feeling that way. In 2006, 59 percent of Americans were convinced that corruption in government was widespread; by 2013, that number had jumped to 79 percent. In June and July of this year, more than 77 percent of respondents disapproved of Congress, and only 12 percent approved.[2]

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Teachout's principal target is the Supreme Court, and in particular the unduly narrow understanding of corruption that has come to dominate its campaign finance jurisprudence. Avoiding corruption and the appearance of corruption are the only government interests the Court has deemed sufficient to warrant limits on campaign spending, but its conception of corruption is, Teachout maintains, much narrower than the conception that has preoccupied us since the framing.

The Court treats restrictions on campaign spending as presumptively invalid under the First Amendment, and upholds such laws only where they are narrowly tailored to serve a compelling government interest. This has led the Court to uphold limits on direct campaign contributions to candidates, on the ground that they pose a risk of corruption or the appearance of corruption. But it has struck down limits on expenditures, by candidates and others. It justifies its differential treatment of contributions and expenditures by reasoning that contributions are more likely to be corrupting, and serve First Amendment interests less directly, while independent expenditures pose less risk of corruption, and are more central to the exercise of First Amendment rights.

***Citizens United* v. *Federal Election Commission*, the Court's 2010 decision invalidating a century-old restriction on corporate expenditures in federal election campaigns, is, as might be expected, at the epicenter of Teachout's critique. It is, in one sense, an easy target. The Pew Research Center reported in 2010 that 68 percent of respondents disapproved of the decision, and only 17 percent approved. Even among Republicans, who generally oppose campaign finance restrictions, 65 percent disapproved of *Citizens United*.[3]**

But opposing *Citizens United* is easier than articulating precisely what is wrong with it. The two most common criticisms contend that the Court was wrong to treat restrictions on money as restrictions on speech, and that the Court should not have extended First Amendment rights to corporations, but should limit them to people. These are both superficially attractive arguments, because if they are well-founded, the conflict between First Amendment rights and campaign finance regulation disappears. If "money is not speech," then restrictions on campaign spending should be easily upheld. And if corporations are not entitled to speech protections, then limits on their speech need not satisfy First Amendment scrutiny.

But these common critiques are both misguided. The Court did not say that all restrictions on spending must be treated as regulations of speech, but only that where Congress limits the amount

of money one can spend on *political speech*, the regulations must satisfy First Amendment scrutiny. It costs money to speak, so if government could freely regulate the expenditure of money on various topics, it could for all practical purposes censor speech on those topics. No one would question, for example, that a rule limiting how much money one could spend debating climate change implicates First Amendment rights. So, too, does a rule limiting how much one can contribute to, or spend supporting the election of, a candidate who would pursue one's favored environmental policies.

It is similarly tempting to argue that corporations don't deserve First Amendment rights. As Elizabeth Warren once said, "Corporations are not people. People have hearts, they have kids, they get jobs, they get sick, they cry, they dance. They live, they love and they die. And that matters." But corporations are a form of association, and people often speak most effectively through associations. The NAACP Legal Defense and Education Fund, for example, is a corporation, as is the ACLU, and as was Citizens United itself.

Nor is there anything necessarily incompatible about expressing a point of view and seeking profit—consider *The New York Times*, Fox News, Working Assets, and Ben and Jerry's. While the *Times* and Fox benefit from the constitutional guarantee of free press, no one maintains that their political speech should be restricted because they are for-profit corporations. Ben and Jerry's and Working Assets are not members of the press; but why should their for-profit corporate form deprive them of the right to speak? Moreover, if we protect speech at least in part because of its value to the listener, as the Supreme Court has said, then the source of the speech shouldn't render it unprotected.

Teachout devotes a few pages to echoing the "corporations are not people" critique, but her principal complaint, and indeed the impetus for the book as a whole, is different. She does not seriously dispute that restrictions on campaign spending, even on spending by corporations, raise First Amendment concerns. But she believes, rightly, that today's Court has too narrowly circumscribed the interests that justify limiting speech in this domain. The Court has recognized that forestalling corruption and the appearance of corruption are compelling government interests that can justify regulating campaign spending, but it has limited "corruption" to the narrow sense of a quid pro quo exchange of money for a vote.

It was not always so. As recently as 2003, the Court understood corruption more broadly, as encompassing "undue influence on an officeholder's judgment, and the appearance of such influence." In 1990, in the decision that *Citizens United* overturned, "corruption" included:

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

Teachout convincingly shows that these broader understandings of the concept are much more consistent with the concerns articulated throughout America's history. If the original and historical meaning of corruption were revived, it would support much more robust campaign finance regulation.

But today's Court has become far less tolerant of regulation, declaring this past term that fighting quid pro quo corruption is the "only" legitimate basis for regulating how much money is spent in political campaigns. As a result, wealthy individuals and corporations can spend unlimited sums

of money supporting the election of their favored candidates—paying for extensive TV ads supporting them, for example—and need only avoid outright bribes. Sheldon Adelson, who spent $150 million supporting conservative candidates in 2012, doesn't need to bribe legislators in order to exercise influence far beyond his single vote or the persuasive power of his ideas. But according to the Supreme Court, such purchased influence is not corruption.

Teachout suggests that the Court may have adopted such a cramped view of corruption because the justices lack political experience, and hail from largely academic or legal backgrounds. But I don't think that's fair. The conservative justices who make up today's majority on campaign finance law do not deny that money begets influence. Their concern is rather that it is exceedingly difficult to disentangle that "undue influence" from the influence that properly guides legislators, who, after all, are supposed to be responsive to and influenced by the interests of their constituents.

As Teachout concedes, "it is easier to identify corruption as a political incident than make sense of it legally." She herself does not attempt to specify a detailed set of rules for campaign finance under her broader view of corruption. When does "influence" become "undue?" What is the lodestar against which we should determine whether debate has been "distorted" by partisan expenditures?

Outside the issue of campaign spending, it would be unthinkable to limit speech because the speaker has exercised "undue influence" or "distorted" debate on the issue. Because one of the First Amendment's most important functions is to inform self-government, attempts to regulate political speech are properly subject to the most skeptical scrutiny. And when legislators are setting the rules that govern the terms of their reelection contests, the risks of self-dealing are not trivial. A broader view of corruption, in other words, does not solve the problem.

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Public financing of elections, conditioned on candidates accepting limits on expenditures, might help to level the playing field and reduce the influence of private money. But that was tried and didn't work at the presidential level. The public seems unwilling to support campaigns more broadly with tax dollars. And public financing does not address the issue of independent expenditures, a form of core political speech, but also a huge loophole for aggregated wealth to exert undue influence.

In the end, there are no simple solutions. There is a genuine and inescapable tension between First Amendment values and representative democracy—between free speech, which guarantees everyone an equal opportunity to speak but not the right to equal influence in any particular debate, and the franchise, which guarantees each person one, and only one, vote. As Teachout puts it, "democracy's internal threat (responsiveness to donors) is deeply intertwined with democracy's greatest promise (responsiveness to citizens)."

Both sides of the debate are too often guilty of seeking to deny this difficulty. Those who stress risks to democracy tend to prefer arguments that minimize First Amendment concerns, such as that "money isn't speech" or "corporations aren't people."

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