

# Facts in Exile: Corruption and Abstraction in *Citizens United v. Federal Election Commission*

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## I. INTRODUCTION

William Butler Yeats has a magnificent poem about the strange relationship between literary scholars and the poets that they dissect:

Bald heads forgetful of their sins,  
Old, learned, respectable bald heads  
Edit and annotate the lines  
That young men, tossing on their beds,  
Rhymed out in love's despair  
To flatter beauty's ignorant ear.  
They'll cough in ink to the world's end;  
Wear out the carpet with their shoes  
Earning respect; have no strange friend;  
If they have sinned nobody knows.  
Lord, what would they say  
Should their Catullus walk this way.<sup>1</sup>

The young poets write when overcome with love and despair, creating beauty from passion. But the old literary scholars dissecting these poems have strikingly different goals, which lead them to different understandings, and thus, to a different language. The literary scholars desire respect within the community more than they desire to fully engage at the emotional depth of the original poets. It is absurd, Yeats points out, to see them annotating the lines of the poets. While the poems are allegedly being elevated, they are actually being degraded, stripped of their best essence: passions of the human condition.

Reading the *Citizens United v. Federal Election Commission*<sup>2</sup> decision, I was reminded of this poem. The Constitution's founders—

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1. WILLIAM BUTLER YEATS, *The Scholars*, in YEATS'S POETRY, DRAMA, AND PROSE 60 (James Pethica ed., 2000) (1919).

2. 130 S. Ct. 876 (2010).

young men (Madison, Hamilton, Jay) tossing on their beds, young men debating in a hot hall—were obsessed with the real puzzles of politics and corruption.<sup>3</sup> They understood and engaged in corruption as a real, daily puzzle, and they knew, from their own experiences, the complex relationship between money, influence, power, and politics. That understanding drove their debates at the Constitutional Convention.

Corruption was a constant thought to these young men, and they considered the threat of corruption to be the most dangerous threat to the United States.<sup>4</sup> They spoke of corruption as a living thing and talked about politics in plain terms, relating it to human pressures.

Throughout the beginning of the last century, there was a similar concern about corruption in the U.S. Supreme Court's cases involving politics. In *Ex Parte Yarbrough*, for example, the Court spoke of the need to protect against corruption as the highest concern of any government.<sup>5</sup> To be a republican government, it held, one must necessarily be able to defend against the twin threats of violence and corruption.<sup>6</sup> The courts gave much leeway to Congress and state legislatures to experiment with different mechanisms for limiting private interests' purchase of public decisions. Many states, for example, criminalized lobbying, and the Supreme Court itself refused to enforce contracts to lobby.<sup>7</sup> For many reasons—including the rise of the First Amendment, the decline of the representation of politicians on the Court,<sup>8</sup> and the criminalization of bribery—the strong rhetoric

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3. Zephyr Teachout, *The Anticorruption Principle*, 94 CORNELL L. REV. 341, 348 (2009).

4. *Id.* at 347.

5. 110 U.S. 651, 657–58 (1884) (“If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption.”).

6. *Id.*

7. *Trist v. Child*, 88 U.S. 441, 451 (1874).

8. The decisions of the Supreme Court made by people with an active engagement in politics—e.g., Justices Pitney and Sutherland—tend to value the anti-corruption interest much higher than those without such engagement. Justice Pitney was a representative in New Jersey and in Congress and had hoped to become Governor. Justices Douglas, Frankfurter, and McReynolds never won elective office (McReynolds ran and failed, actually). When *Yarbrough* was decided, over half of the Justices had successfully run for office (Field, Wade, Harlan, Woods, and Matthews). It is not so striking that they saw one of the duties of the Supreme Court to be “vigilance” against the threat of corruption. By the time the first “modern” case pitted the corruption interest against the First Amendment, four of the Justices had been involved in electoral politics (Black, Jackson, Vinson, and Burton), but all three opinions were written by people who had not been in electoral politics (Reed, Frankfurter, Rutledge). Those involved in politics were much more likely to warm to arguments about the severity of the threat of money, having a more subtle understanding of its impact. Now, none of the members of the Court have been involved in electoral politics. See Zephyr Teachout, *Free as in Elections or Free as in*

around corruption diminished between the early 1900s and the late 1970s, when *Buckley v. Valeo*<sup>9</sup> was decided. The last thirty-five years have shown intense debate at the abstract level about what constitutes corruption. While the debate about corruption has reached a high pitch, and different definitions of corruption have different sponsors, the debate has also become increasingly abstracted.

This abstraction reached its peak in *Citizens United v. FEC*.<sup>10</sup> One of the more striking—and disturbing—aspects of Justice Kennedy’s majority opinion was how removed it felt from political realities; how distant from the experience of what it means to be a political candidate, or a politician, or someone who wants to influence policy; how alien the description of politics is to a staffer or someone in the public affairs branch of a corporation, or to anyone who has tried to influence public policy.<sup>11</sup> It suffers from a failure to describe real pressures, and the way those pressures directly interfere with representative government in devastating ways. This failure is the culmination of a series of failed efforts by the Supreme Court to find a way to describe corruption in grounded, narrative terms. Several other essays have talked about the incoherent and conflicted abstract *theories* of corruption;<sup>12</sup> this Essay focuses instead on the failure of narrative. It is not so much that the Court told the wrong story about politics; it did not tell any story at all. Narrative matters. Only with an explicitly expressed narrative can we fairly test the integrity of the Court’s theories and the meaning of its concepts, such as “quid pro quo corruption” and “corruption” and “ingratiation” and “access.”<sup>13</sup> The majority opinion revealed a failure of both understanding and imagination, and left facts in exile in pursuit of cleanly divisible abstract concepts.

While ostensibly grappling with corruption and modern American political life, the Court in fact failed to show us that life.<sup>14</sup> The opinion

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*Speech*, 5 HARV. L. & POL’Y REV. (forthcoming Winter 2010).

9. 424 U.S. 1 (1976).

10. 130 S. Ct. 876 (2010).

11. Richard L. Hasen, *Money Grubbers, The Supreme Court Kills Campaign Finance Reform*, SLATE (Jan. 21, 2010, 12:58 PM), <http://www.slate.com/id/2242209/pagnum/2> (“Finally, Justice Kennedy’s single horrible—his specter of blog censorship—sounds more like the rantings of a right-wing talk show host than the rational view of a justice with a sense of political realism.”).

12. Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT 127, 130 (1997) (“At times even passages in a single opinion seem to contradict each other.”).

13. See *Citizens United*, 130 S. Ct. at 909–11 (discussing the Court’s varying approaches to these unique concepts in regard to independent expenditures).

14. *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), is also notable for the absence of a contextual description of the political pressures faced by candidates.

lacked both micro-facts and the mid-level, institutional facts, which provide a coherent narrative about who does what to whom, and why.<sup>15</sup>

There are two key passages in *Citizens United*—one in the majority, one in the dissent—around which the rest of this Essay turns. The first is Justice Kennedy’s assertion that there are no facts in the record to support a finding of quid pro quo corruption that might justify the ban on independent corporate electioneering.<sup>16</sup> The second is Justice Stevens’s dissenting complaint that:

In this case, the record is not simply incomplete or unsatisfactory; it is nonexistent. Congress crafted BCRA in response to a virtual mountain of research on the corruption that previous legislation had failed to avert. The Court now negates Congress’ efforts without a shred of evidence on how [section] 203 or its state-law counterparts have been affecting any entity other than *Citizens United*.<sup>17</sup>

I am highly sympathetic to this lament, and much of this Essay fills in the objection, and hopefully enriches it. One way to think about the Kennedy/Stevens split in *Citizens United* is that it embodies two debates: there is one explicit debate about the meaning of corruption, and there is another sub rosa debate about the role of facts and narrative. On the one hand, Stevens sees facts, narrative, and context as fundamental to understanding what constitutes corruption. On the other hand, Kennedy seems to believe that facts add little to any analysis, because the categories of corruption and not corruption, and quid pro quo corruption and not quid pro quo corruption, are relatively clear. Inasmuch as the debate emerged at the surface of the opinion, it played out in procedural terms—Kennedy used the record from a prior case, and Stevens argued that the case was being decided without a record.

The debate about narrative has doctrinal implications, because it sends confusing and fuzzy signals about the nature of proof that other courts will require of the government in defending other statutes. It has legislative implications, because it sends unclear and weak signals about the kind of proof Congress must offer to show that in passing campaign funding restrictions, it is narrowly tailoring restrictions to respond to fears of quid pro quo corruption.<sup>18</sup> Finally, it undermines the Court’s

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15. See *infra* note 86 (noting that Justice Kennedy implies that the specific facts of contemporary politics are ultimately irrelevant in justifying restrictions on political speech).

16. *Citizens United*, 130 S.Ct. at 893–94.

17. *Id.* at 933 (Stevens, J., dissenting).

18. See, e.g., Nathaniel Persily, *Fig Leaves and Tea Leaves in the Supreme Court’s Recent Campaign Finance Decisions*, 2009 SUP. CT. REV. 89, 96 (2008) (discussing how the Supreme Court shifts the level of analysis in cases with weak proof, such as where there is no evidence of voter fraud, or in campaign finance cases); Nathaniel Persily & Kelli Lammie, *Campaign Finance*

credibility when it purports to confront a major public policy and structural issue facing the country, yet cannot plausibly describe the crisis back to the country.

In Part II, this Essay first introduces the facts of *Citizens United*. This Part discusses how the procedural decision to hear the case without a record developed around a facial challenge, and judicial notice of the absence of facts from the *McConnell* record demonstrates its disdain for facts, evidence, and narrative.<sup>19</sup> Part II then argues that the Court's decision to take judicial notice of the prior record was ill-advised for several policy reasons. Next, Part III argues that the Supreme Court in *Citizens United* used facts in isolation, thus distorting the narrative of who did what to whom.<sup>20</sup> Part IV discusses the general puzzle about the appropriate role of facts and evidence in election law cases, especially campaign finance cases.<sup>21</sup> Lastly, Part V concludes with a suggestion that courts make more explicit their institutional and contextual assumptions, so that we can better judge their decisions against reality, as well as for internal consistency.<sup>22</sup>

The title of this piece has four meanings. First, it is a comment on the “Constitution in exile” school,<sup>23</sup> and suggests that for the Constitution to make sense, facts must be directly engaged.<sup>24</sup> Second, it refers to the general absence of facts and the disdain for facts in the

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*After McCain-Feingold: Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 135–36 (2004) (discussing the complications of proof in campaign finance cases).

19. See *infra* Part II (describing the facts of *Citizens United* and arguing that the Court's use of judicial notice was ill-considered).

20. See *infra* Part III (finding that the Court's theoretical—as opposed to concrete—conception of corruption in *Citizens United* is consistent with campaign finance law's recent trend toward abstraction).

21. See *infra* Part IV (analyzing the tension between the proper role of facts in election law and attendant issues of constitutionality).

22. See *infra* Part V (contending that the Court ought to depict corruption in a more concrete, reality-based manner).

23. See, e.g., Symposium, *The Constitution in Exile*, 51 DUKE L.J. 1, 4–6 (2001) (outlining the belief that certain clauses of the Constitution have been “exiled” for impeding the expansion of government).

24. In *Wisconsin Right to Life*, Justice Roberts writes: “Yet, as is often the case in this Court's First Amendment opinions, we have gotten this far in the analysis without quoting the Amendment itself: ‘Congress shall make no law . . . abridging the freedom of speech.’ The Framers' actual words put these cases in proper perspective.” *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 481–82 (2007). Justice Roberts argues that the cases are insufficiently grounded in the Constitution. But well-reasoned opinions depend not just on the Constitution, but on an understanding of the Constitution's confrontation with life and how they interact. In the *Wisconsin Right to Life* decision—as in *Citizens United*—the Court does not examine or confront the actual, mechanical operation of how money moves in politics. Proper perspective demands both a confrontation with the text and a confrontation with political life.

opinion, as evidenced by the procedural choice. Third, it refers to the disconnect between the facts relied on by Justice Kennedy (facts from a case several years earlier) and the current controversy. And fourth, it refers to the way the Court internally “exiles” facts by pulling them out as independent widgets, unconnected to one another.

## II. FACTS IN EXILE THROUGH PROCEDURE

The facts the Court used in *Citizens United* were facts in exile from context and from narrative. To understand the debate about narrative, it is necessary to understand the procedural posture of the case. *Citizens United* is a nonprofit corporation funded in part by for-profit corporate funds. It created a cable movie about Senator Hillary Clinton called *Hillary: The Movie*. *Citizens United* planned to air the movie on Cable TV’s video on demand and advertise it on broadcast television within thirty days of several primaries and caucuses in the Democratic Presidential selection of a nominee. *Citizens United* asked the United States District Court for the District of Columbia for a preliminary injunction that would prevent the Federal Election Commission (FEC) from applying the Bipartisan Campaign Reform Act (BCRA) to the movie and the advertisements. Hillary Clinton was running for President, and *Hillary: The Movie* expressed opinions about her fitness for the Presidency.

Advertisements that expressly advocate the election or defeat of candidates for federal office within sixty days before a general election or thirty days before a primary are considered electioneering communications.<sup>25</sup> According to the law challenged in *Citizens United*—section 203 of the Bipartisan Campaign Reform Act—corporations could not use their general treasury funds to pay for electioneering communications.<sup>26</sup> *Citizens United* initially argued that: (1) section 203 did not apply to *Hillary: The Movie* and its advertisements; (2) section 203 violated the First Amendment on its face; and (3) section 203 violated the First Amendment when applied to *Hillary: The Movie* and advertisements for it. They also objected to disclosure requirements, which is beyond the scope of this Essay.

In January 2008, the district court denied the request for a preliminary injunction. It held that the movie was the functional

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25. *Id.* at 484 (holding that the Bipartisan Campaign Reform Act’s ban on the use of corporate funds for political advertisements sixty days before an election is unconstitutional as applied to advertisements that do not explicitly endorse or oppose candidates).

26. 2 U.S.C. § 441b(b)(2) (2002) (banning banks and corporations from using funds in connection with any political campaign).

equivalent of express advocacy, and thus section 203 applied. The court found that the film's purpose was to discredit Clinton. It held that section 203 was not unconstitutional as applied to the movie, relying on earlier precedent upholding section 203.<sup>27</sup> It briefly discussed the facial challenge but held that the claim was foreclosed by precedent. After the preliminary ruling, in late March, the Government requested time to "develop a factual record regarding [the] facial challenge."<sup>28</sup> In May 2008, the parties stipulated to the dismissal of the facial challenge.<sup>29</sup> On July 18, the district court granted summary judgment to the FEC.<sup>30</sup>

Citizens United appealed to the U.S. Supreme Court arguing three issues: (1) the movie and its advertisements did not fall within the scope of the existing statute; (2) even if it did, it was an unconstitutional application of the law; and (3) the disclosure law was unconstitutional as applied. No facial challenge was made. During the argument in the Supreme Court on the as-applied challenge, a set of embarrassing interchanges between the lawyers for the FEC and the Justices led to re-argument.<sup>31</sup> However, instead of merely re-arguing the issues considered by the district court, the Court required re-argument on the facial challenge to the law.

In the re-argument, the Supreme Court did not allow for a new development of the factual record below. Instead, it relied on a very sparse record, one developed just for this case, and on facts from outside the record. In particular, Justice Kennedy appeared to rely on the record from *McConnell v. FEC*, the 2000 case that had rejected a facial challenge to section 203.<sup>32</sup> Justice Kennedy noted the absence in the *McConnell* case record of "direct examples of votes being exchanged for . . . expenditures." Justice Kennedy wrote:

When the statute now at issue came before the Court in *McConnell*, both the majority and the dissenting opinions considered the question of its facial validity. . . . Four Members of the *McConnell* Court would

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27. See *Citizens United v. Fed. Election Comm'n*, 530 F. Supp. 2d. 274, 280 (D.D.C. 2008) (relying on *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), to conclude that section 203 of the Bipartisan Campaign Reform Act was constitutional).

28. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 933 n.4 (2010) (Stevens, J., concurring in part and dissenting in part).

29. *Id.* at 931.

30. *Id.* at 888 (majority opinion).

31. See Transcript of Oral Argument at 27, *Citizens United*, 130 S. Ct. 876 (No. 08-205), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-205.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf) (transcribing how Malcolm L. Stewart, Deputy Solicitor General, arguing on behalf of the FEC, struggled to answer a question suggesting that Congress could ban a book providing the same information as *Hillary: The Movie*).

32. *Citizens United*, 130 S. Ct. at 894.

have overruled *Austin* [*v. Michigan Chamber of Commerce*], including Chief Justice Rehnquist, who had joined the Court's opinion in *Austin* but reconsidered that conclusion. That inquiry into the facial validity of the statute was facilitated by the extensive record, which was "over 100,000 pages" long, made in the three-judge District Court.<sup>33</sup>

#### A. *Facts from Exile: Reaching Outside the Record*

Under what authority was Justice Kennedy reaching outside the record to refer to *McConnell*'s record? The general rule is that appellate courts cannot consider facts not in front of it and developed in the lower court.<sup>34</sup> However, the doctrine of judicial notice allows appellate courts to incorporate indisputable facts and policy considerations at any time in the proceeding.<sup>35</sup> Without any other mode of incorporation, the reference to *McConnell* appears to have been done through judicial notice. Historically, judicial notice of court records was typically circumscribed. This has changed recently: current rules (and habits) governing judicial notice are very broad and permissive, especially concerning legislative history and other court records.<sup>36</sup> Under this doctrine, courts may take judicial notice of facts not in the record if they are "not subject to reasonable dispute," either because they are generally known, or because they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."<sup>37</sup> The Court has broad discretion to take this kind of judicial notice and can do so at any time in the proceeding.<sup>38</sup> The rule saves time, and allows for non-controversial facts to be introduced without using judicial and litigant resources and slowing down proceedings.<sup>39</sup> For example, the U.S. Supreme Court judicially noticed

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33. *Id.* at 893–94.

34. *Sw. Elec. Power Co. v. Martin*, 844 S.W.2d 229, 236 (Tex. App. 1992) (citing FED. R. APP. P. 52, which provides that a party must present all matters to the trial court in order to preserve them for appellate review).

35. *See* FED. R. EVID. 201 (governing judicial notice of adjudicative facts).

36. *See, e.g., Aguilar v. U.S. Immigration & Customs Enforcement Div. of Dep't of Homeland Sec.*, 510 F.3d 1, 8 n.1 (1st Cir. 2007) (noting that the court may take judicial notice of copies of orders from immigration judges, and granting a motion to supplement the record with the proffered orders); *Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007) (finding that the district court did not err in relying on public records of a Missouri court, outside of the pleadings, to show that the malicious prosecution claim was barred by the statute of limitations). *See generally* JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* 201–42 (2d ed. 1996) (discussing rules of judicial notice).

37. FED. R. EVID. 201.

38. *Id.*

39. *See* Brett Hubler, *United States v. Newland*, 60 S.C. L. REV. 1207, 1211 (2009) ("First, judicial notice allowed courts to decide issues without requiring adversarial argument, thereby reducing the administrative burdens on courts. Second, limiting judicial notice to issues not

Coast Guard records that showed that the defendant had a fishing license.<sup>40</sup> Courts have judicially noticed such things as more women than men teach elementary school,<sup>41</sup> and that gray ash on charcoal is a sign that charcoal is lighted.<sup>42</sup>

Legislative facts, on the other hand, are not facts about a particular litigant, but are facts that allow a court to decide general questions of law and policy—they do not need to be “indisputable” in the same way that adjudicative facts need to be.<sup>43</sup> They need not relate to the particular questions of the case—for example, the social science facts on which the Court relied in *Brown v. Board of Education*.<sup>44</sup>

Courts historically have not taken judicial notice of their own records, but the Court did in *Citizens United*.

It is not always clear whether something is a legislative, policy, social science fact, or an adjudicative fact. In the *Citizens United* context, it is unclear the precise scope of the content Justice Kennedy took from *McConnell*, because a determination that a law discourages “quid pro quo” corruption implicates a mixture of both legislative facts and facts that can only be deduced through adjudication—a blend of facts discoverable in a court and facts more generally known and researched.

However, it *is* clear that the trend is towards permissiveness, and regardless of how categorized, Kennedy’s notice of the *McConnell* record was surely allowed. That said, the legal permission to act does not suggest the wisdom of doing so.<sup>45</sup> Instead, the historical reasons for

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reasonably disputable protected parties’ right to dispute facts significantly influencing a case’s outcome.”).

40. *Massachusetts v. Westcott*, 431 U.S. 322, 323 (1977).

41. *Caulfield v. Bd. of Educ.*, 486 F. Supp. 862, 885 (E.D.N.Y. 1979), *aff’d*, 632 F.2d 999 (2d Cir. 1980).

42. *Goodman v. Stalfort, Inc.*, 411 F. Supp. 889, 894 (D.N.J. 1976), *aff’d in part, rev’d in part, and remanded to* 564 F.2d 89 (3d Cir. 1977).

43. See 29 AM. JUR. 2D *Evidence* § 30 (2010) (citing FED. R. EVID. 201 advisory committee’s note that distinguishes legislative facts from adjudicative facts).

44. See generally David L. Faigman, “Normative Constitutional Fact-finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991) (discussing social science facts).

45. See, e.g., *Greene v. State*, 977 S.W.2d 192, 200 (Ark. 1998) (“As the Supreme Court of Wyoming observed, ‘[j]udicial notice upon appeal should not . . . be invoked to relieve parties of their duty to present adequate evidence at the trial . . . .’ The court construed language identical to our ARK. R. EVID. 201(d), which mandates the taking of judicial notice upon a party’s request and his supplying of necessary information, to mean that an appellate court is required to take judicial notice on appeal ‘only when timely request has been made to the trial court and the necessary information made a part of the record on appeal.’” (citations omitted)); *Vons Cos., Inc. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1091 n.3 (Cal. 1996) (“Augmentation does not function to supplement the record with materials not before the trial court. Reviewing courts generally do not take judicial notice of evidence not presented to the trial court. Rather, normally ‘when reviewing

limiting judicial notice would suggest that Kennedy ought to have been chary of introducing facts outside the record.

Indeed, five reasons should have restrained Kennedy from using outside facts in the *Citizens United* decision: (1) the Court is technically the same, but not “the same,” leading to an asymmetry of information between Justices; (2) if judicial notice is presumed and not required to be announced, it creates logistical demands on the Court beyond its institutional capacity, and is not “fair” to the litigants in that it requires them to rely on facts developed by different lawyers, and will lead to the temptation of not allowing factual development; (3) facts have often changed in the intervening years—the facts that justify an initial logic may have been proved correct or incorrect, and there is no mechanism for resolving contradictions between the prior facts noticed and the facts introduced into the current record; (4) all of these are even more true in the context of a facial challenge to a statute, where the burden is high; and (5) these concerns are heightened when the judicially-noticed fact is the absence of facts. In sum, in the unique case of a Court reviewing its own prior precedent, with some passage of time between the initial and latter review, the integrity of the Court system suggests the Court ought to be circumspect in noticing potentially contested judicial facts from prior Supreme Court records.

1. Asymmetry of Information: When the Court Is Technically “the Same” but Actually Not “the Same”

The choice to engage in a prior Court’s record created an asymmetry of information between appellate Justices. There is a wonderful philosophy story given to introductory philosophy students. In the story, a ship—the Ship of Theseus—is made up of some number of planks of wood. The planks of wood are replaced one by one by new planks of wood that are not identical but similar to the prior planks. The removed planks are then built into a new ship. The students are asked if, when all the planks are removed, the “Ship of Theseus” is the second ship, or the first ship. The story raises several questions about identity: If all the constituent parts are in fact different, can one still say the first ship is the same? Why is not the second ship, the one now made up of all the original planks, the “Ship of Theseus,” and the first ship a mere imitation?

The Supreme Court is similar to the Ship of Theseus, made up of Nine Planks. On the one hand, it is a continuous entity; on the other

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the correctness of a trial court’s judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.” (citations omitted)).

hand, its constituent parts are not continuous. In the fiction of the Court, these replacements do not change a continuous identity as “the Court.” Justices routinely say “we decided” in referring to prior cases in which the author of the opinion was not a member of the Court. The Court exists and persists as a coherent “thing” with a single identity even as the constituent parts are replaced. (Even the idea of Elena Kagan taking “Stevens’s seat,” or Sonia Sotomayor taking “Souter’s seat,” reinforces the idea of Justices as planks.) This fiction makes sense most of the time. Yet there are times—such as in Kennedy’s use of facts from a prior record—where it falls apart.

The Court’s traditional use of the phrase “we held” suggests this kind of continuity.<sup>46</sup> But there is an uneven relationship to the facts in the prior holding for different Justices. Justice Kennedy was extensively briefed on those facts, as they were argued, debated, and discussed for months before the mammoth *McConnell v. FEC* decision was issued; Justice Alito was never briefed at all, and as a practical matter, he necessarily had to pick and choose elements from the 100,000 page record to judicially notice it, without being given the guidance of opposing counsel. The practical, factual imbalance of the inflowing information meant that the Justices were not considering the same world when they encountered a case that had a prior facial-challenge record attached to it.<sup>47</sup> This can lead to dissonance in the way the Justices approach facts. It puts an unfair burden on all Justices—some have better memories than others. It asks Justices to sit on trial on an ancient case, half of whom have seen it once, the other half of whom have only a pile of documents. Kennedy went out of his way to mention that several of the members of the Court were on the Court at the time, implying that they should not have to create a new record, with the implicit suggestion that any new record would be functionally the same. He wrote, “When the statute now at issue came before the Court in *McConnell*, both the majority and the dissenting opinions considered the question of its facial validity. . . . It is not the case, then, that the Court today is premature in interpreting § 441b ‘on the basis of [a] factually barebones recor[d].’”<sup>48</sup>

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46. See, e.g., *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 956 (2010) (Stevens, J., concurring in part and dissenting in part) (discussing the Court’s history of upholding laws barring corporate contributions to political candidates using “we held”).

47. This imbalance is a long way from the slighter imbalance that often occurs with judicial notice, i.e., one Justice has read the dictionary, whereas the other Justice has not.

48. *Id.* at 893–94 (majority opinion). Justice Kennedy’s language is precise but slippery: he says that it is “not premature” to determine facial validity, but he does not (and cannot) say that the Court has a 100,000 page record in front of it.

But several members of the Court were not on the Court in 2003. Justice Roberts, Justice Sotomayor, and Justice Alito were not on the Court and did not read or review that 100,000 page record. The other Justices, even if they read it in 2002 or 2003, could not plausibly and effectively recall its contents for purposes of a 2010 decision. The lower court did not directly review that record. Justices Alito and Roberts might be presumed by commentators to have an ideological tendency in relation to campaign finance cases—this might be Kennedy’s operating assumption—but that presumption is inappropriate in determining what facts they might want to learn about the nature of the political culture in the context of the judicial system.

A second bite at a facial challenge ought not to be easier than the first simply by the fact of the first (failed) attempt. Either there are no Justices who closely read the first record—in which case it should operate much like a record from another court, where there is at least a high degree of skepticism around introducing anything but the most indisputable facts (e.g., whether someone has a fishing license)—or there are some Justices who closely read the first record, in which case there is a radical asymmetry of information and familiarity of the Justices, which undermines the integrity of the Court.

## 2. Institutional Demands on Courts and Lawyers

Similarly, this reliance on prior records of prior cases places a significant practical demand upon courts and litigants inasmuch as it creates a precedent. Once the litigants know that it is possible for the Court to reference prior case records without providing any notice, the responsible litigator will be obliged not only to read the existing record and past precedent but also the record underlying the prior precedent. This will increase costs and uncertainty, as the prior-record review will be defensive and predicated on a possibility, not a certainty, of spontaneously noticed facts. In this case, the prior record noticed was the record in *McConnell v. FEC*, but there is no reason to think that the logic that allowed *that* record to be noticed would also allow notice of the factual records of *Bellotti*,<sup>49</sup> *Austin*,<sup>50</sup> *Buckley*,<sup>51</sup> and every case between that touched on Congressional findings of fact underlying corruption-related legislation. Unannounced, extensive judicial notice of a prior record is fundamentally unfair to the litigants involved. They are not given a chance to prepare and explain those aspects of a record

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49. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 769 (1978).

50. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 656 (1990).

51. *Buckley v. Valeo*, 424 U.S. 1, 7–8 (1976).

that are likely to be noticed. Moreover, this unfairness decreases the legitimacy and integrity of the Court's opinions because it will base conclusions on factual claims that have not been tested or explained in the context of the Court and the particular legal questions in front of it.

At the same time, the possibility of noticing the record of prior iterations of facial challenges could tempt the Court to under-develop facts in order to streamline litigation. When faced with a factual record that seems "off" to a particular Justice, and does not fit his or her worldview, that Justice will have the capacity to pick and choose facts from prior records. This undermines the logic behind strict standing and ripeness requirements, both of which are intended to require the Court to engage issues when there are particular facts in front of it, instead of decide abstract questions of law.<sup>52</sup>

### 3. Intervening Facts Could Change the Rules, and There Is No Clear Mechanism for Resolving Conflicts Between the Facts

Intervening facts, that either come to light or come to occur after the facially challenged law is passed, could impact the Court's decision. If the Court relies on the factual record developed in a prior case, those facts will not have a chance to be heard by the Court. There is no clear mechanism for addressing conflicting factual records. If there is conflicting evidence in the two *corpi*, does the appellate judge who notices the prior facts make findings of fact that resolve disputes between the two? The doctrine of judicial notice is built on "indisputability."<sup>53</sup> It is justified because it saves the court time to notice incontrovertible facts.<sup>54</sup> But in a case where the facts are political and controversial, indisputability is illusive.

For example, the Supreme Court rejected a facial challenge to Indiana's voter identification requirements on the grounds that Indiana had a legitimate state interest in protecting voter fraud, and that there was insufficient evidence of voters being burdened by the identification requirements.<sup>55</sup> The Court, in a decision by Justice Stevens, left open the possibility of a future as-applied challenge. If a later as-applied challenge to the Indiana law includes a request to reconsider the facial

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52. See 1 FED. PROC., L. ED. § 1:16 (West 2010) ("The doctrine of ripeness is closely related to the doctrine of standing, in that the application of either is intended to prevent courts from becoming enmeshed in abstract questions which have not concretely affected the parties.").

53. See FED. R. EVID. 201 (governing judicial notice of adjudicative facts).

54. See *Record Museum v. Lawrence Twp.*, 481 F. Supp. 768, 771 (D.N.J. 1979) (taking judicial notice of the phenomenon known as the "Counterculture of the Seventies" wherein untraditional attire such as spoons and hand-crafted pipes adorn both home and person).

55. *Crawford v. Marion County*, 553 U.S. 181, 202-04 (2008).

challenge, the litigants bringing the facial challenge should be able to redevelop the facts in light of the decision by Justice Stevens and the way in which he used the *Burdick*<sup>56</sup> standard. If not, litigants will be encouraged to treat each case in which there is a facial challenge—however unlikely to succeed and regardless of the suggested rule—as the one chance to develop facts for all future facial challenges. Justice Stevens said that there was no evidence of individuals being significantly burdened in *Crawford*.<sup>57</sup> If, in a later case, later litigants brought an as-applied challenge that the Court chose to treat as a facial challenge, it would not make sense for the Court to rely on the older set of gathered evidence, but rather to allow litigants to bring forward new evidence, pro and con, that individuals had been burdened. In the *Crawford* hypothetical, does the Supreme Court take two fully developed records and select between the conflicting stories of voter fraud between them?

In the case of *Citizens United*, at least one critical intervening fact is the ubiquity of the Internet.<sup>58</sup> The threat of independent expenditures *directly* corrupting candidates and elected officials is much greater because the Internet allows a kind of invisible, untraceable coordination. Imagine the simplest case: A medical corporation makes a \$20,000 advertising buy. It also posts lots of press releases on its home page about the importance of keeping federal funding for scientific research into cancer treatments, a topic of some disagreement. The message to the candidate, and the candidate's staff, is as clear as if there was an email message from the corporation: future independent expenditures depend on the candidate continuing to support federal funding for scientific research into cancer treatments. But the smoking gun does not exist. A federal investigator would find that both parties—the corporation and the candidate—likely discussed the independent expenditure as a clear proffer for support, but would find no evidence of conversation or coordination, as the lawyers for both corporation and candidate would warn them never to speak, email, or meet—yet something that looks and feels like “quid pro quo corruption” would have happened.

The line between facts and interpretation of facts is difficult to draw, particularly for politically-related concepts. Is the finding of “quid pro

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56. *Burdick v. Takushi*, 504 U.S. 428 (1992).

57. *Crawford*, 553 U.S. at 183 (noting that although it would impose a special burden on some voters, the law's overall burden is minimal and justified).

58. See Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 270–71 (1999) (pointing out that the Internet creates the possibility for facts changing during Court proceedings).

quo corruption” a finding of fact by a prior court, or a finding of law?<sup>59</sup> It is quite obviously a blend. Moreover, when it comes to politics and contested concepts like corruption, fraud, integrity, quid pro quo corruption, confidence, and appearance of corruption, there is an inevitable indeterminacy leading to the likelihood that appellate courts will have to choose between records.

#### 4. Factual Record Should Require More for a Facial Challenge

The general hesitation against using records from other cases ought to be exaggerated in cases involving facial challenges. In *United States v. Salerno*,<sup>60</sup> the Supreme Court affirmed a general test governing facial challenges in the federal courts. The Court stated that to succeed on a facial challenge, the challenger must meet a “heavy burden” and “must establish that no set of circumstances exists under which the Act would be valid.”<sup>61</sup>

#### 5. The Problems Related to Judicial Notice of Prior Records Is Exacerbated when the Judicially-Noticed “Fact” Is the Absence of Facts

The fact noticed by the majority is that there was no evidence of dangers of “quid pro quo corruption” from corporate independent expenditures in the 2000 district court’s record. While an affirmative fact found in a prior record might, in some cases, merit being incorporated despite the foregoing reasons, negative facts are more troubling. First, a negative fact might not be in a prior record because it was not being sought out in the first place; thus, it might reflect not so much an absence but a different focus. In *McConnell*, the district court’s primary focus was on other aspects of the BCRA.<sup>62</sup> Inasmuch as the court made findings, it assumed without discussion that the limits on independent corporate expenditures would be upheld, and so it did not scrutinize the record closely for evidence related to quid pro quo corruption between independent expenditures and candidates.<sup>63</sup>

The *McConnell* district court did not find quid pro quo corruption, at least in part, because it was not seeking it. Even if it had looked, however, “quid pro quo” is a contested legal term that has never been defined by the Supreme Court (not even in the *Citizens United* opinion).

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59. This is a rhetorical question, not a technical one.

60. 481 U.S. 739 (1987).

61. *Id.* at 745.

62. *See* *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 104 (2003) (affirming the district court’s judgment with respect to certain provisions of the BCRA), *overruled by* *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

63. *Id.* at 203–09.

To say “that which is covered by the bribery statute” is not enough; the bribery statute would cover much of what is currently legal if it were not otherwise excepted because it is covered by campaign finance law!<sup>64</sup>

The *McConnell* district court’s opinion was itself deeply divided about definitions of corruption and whether or not there were findings of corruption in other areas, or whether what was found constituted quid pro quo corruption. Therefore, finding this “fact of absence” is at least contested enough to merit full briefing, discussion, and interpretation of the prior courts’ facts, if not (more appropriately) a full development of new facts relevant to this particular case.

Finally—and most importantly—the district court would have been hard-pressed to find evidence of corporate independent expenditures directly corrupting candidates and elected officials because the ban was not new to the BCRA, as a version of section 203 was already federal law.<sup>65</sup> The desired congressional finding and congressional basis, in fact, makes no sense.

*B. When the Supreme Court Is Reconsidering Its Legal Conclusion in a Prior Facial Attack, It Ought to Be Particularly Solicitous of New Facts and the Chance to Develop New Facts*

A court which considers reversing its own prior precedent regarding a facial challenge stands in a peculiar relationship to previously developed facts. The prior lower court developed facts with the precise ultimate legal question in mind being confronted by the Supreme Court—the facial invalidity of the statute. The temptation to indulge in that prior record is understandable.

However, it may not have developed facts with the precise subsidiary questions in mind. Rules develop around particularly circumscribed stories instead of generalized questions. Moreover, judicial notice in this context upsets the orderly mechanism for submitting information that might be relevant to a court’s decision. This is not simply a matter of fairness but allows for problems with the facts to be pointed out and a richer and better understanding of the facts that are present.

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64. See 18 U.S.C. § 201 (1994) (penalizing anyone who gives, promises, or offers something of value to a public official in order to influence that person’s official behavior).

65. *Id.* § 203 (1990).

### C. *What Difference Does It Make?*

As the Court held in *Sabri v. United States*,<sup>66</sup> it is dangerous to assess facial challenges with a bare-bones record. Such a practice risks “losing the lessons taught by the particular, to which common law method normally looks. Facial adjudication carries too much promise of ‘premature interpretatio[n] of statutes’ on the basis of factually bare-bones records.”<sup>67</sup> As Rick Hasen has written, the Court in this case seems to think it has achieved a new kind of coherence.<sup>68</sup> One of the reasons for the illusion of coherence, I believe, is that the Court gave itself permission to consider the statute without forcing itself to consider the factual context.

One might parry, but what difference might the finding of facts have made in this particular case? First, it is worth pointing out how critical the record was to the *McConnell* Court, which held differently on this precise subject—with the aid of a substantial record. The fact that the *McConnell* Court came to a different conclusion after review of a 100,000 page record might indicate that facts actually matter.

In this case, the FEC was not given an opportunity to develop facts in order to defend the constitutionality of the law on its face. The FEC would have developed a much more intensive record at the trial level had it understood that this case was about the constitutionality of section 203 as opposed to the constitutionality of section 203 as applied to this particular movie. Indeed, these facts may have helped define what constitutes quid pro quo corruption.

In sum, the procedural choice made in this case is troubling on its own terms. Kennedy’s willingness to review a fact-free record is *also* an accurate and important reflection of a deeper aspect of his understanding of the relationship between politics, law, and corruption. The Court not only considered a question around which no factual record had been developed, and breezily referred to a prior record in a different case, but took very little adjudicative notice, either—while considering fundamental questions of politics, the Court did not spend time asking about the nature of politics. Kennedy treated political issues as a formal game, able to be understood *a priori*, without reference to political facts. Instead of a lived experience that is different in different times in American history, the majority believes it is

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66. 541 U.S. 600 (2004).

67. *Id.* at 609.

68. Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. (forthcoming 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1620576](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1620576) (suggesting that *Citizens United* will lead to incoherence in the Court’s campaign finance law).

possible to abstract political experience into a somewhat idealized or modeled form. To understand influence, corruption, or ingratiation, the majority believes one can ask a few simple stylized facts.

All factual questions in politics involve a blend of theoretical and empirical questions, and neither aspect can be ignored. What constitutes “exchange” in the context of campaign finance? When is there a true trade of votes for outside action? On what aspect of that trade can Congress legitimately rely? At what point does money become such a force in politics that it undermines confidence in the integrity of government? The answer to all of these questions cannot be answered in the abstract and might, in fact, be different for different times.

If one understands this procedural choice as a principled one, instead of an unprincipled one, it implies that courts can determine the likelihood of a particular set of institutions leading to quid pro quo corruption without reference to any contemporary record. This turns the court into a set of philosophers—not even philosopher kings—who need not engage the world of politics in their private or professional lives, and then need not encounter it in the briefing and evidence before them. It is a troubling vision, that of those making decisions about the political philosophy of our country without having any need to understand it.

### III. FACTS IN EXILE FROM THEMSELVES

The content of a concept as intractable as corruption or speech must be explained through stories and examples; characters’ actions and incentives can be understood through a thick description of political culture, but they are nonsense without context. The writer Kelly Nuxoll skewered Sarah Palin a few years ago for her prose, not because it was inelegant and clumsy, but because it lacked the basic building blocks of a story: Who did what to whom?<sup>69</sup> When Congress passed a law limiting independent corporate spending, it did so for various reasons, but at least in part because it thought that without it, corporations would force members of Congress to take positions that did not represent the public interest through the implicit threat that they would be destroyed by corporate ad campaigns in the next election cycle. Over hundreds of

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69. Kelly Nuxoll, *Palin’s Sentences Lack Transparency and Accountability*, HUFFINGTON POST (Oct. 3, 2008, 1:03 PM), [http://www.huffingtonpost.com/kelly-nuxoll/palins-sentences-lack-tra\\_b\\_131666.html](http://www.huffingtonpost.com/kelly-nuxoll/palins-sentences-lack-tra_b_131666.html) (“Many of Palin’s sentences failed to answer the fundamental question that language serves to answer: who is doing what to whom?”); *see also* STEVEN PINKER, *THE LANGUAGE INSTINCT* 22, 116, 232 (2000) (discussing general syntactic rules of speech and sentence structure).

lifetimes, members of Congress experienced situations in which the NRA destroyed a candidate, or the Chamber of Commerce forced a candidate into a particular position. Their stories and those histories and experiences made up the backbone of the reasons for the bill. Congress had a theory—right or wrong—about “who did what to whom.”

But the majority of the Supreme Court does not have a theory about “who did what to whom.” When Kennedy engaged the 100,000-page record of *McConnell*,<sup>70</sup> he did so by pulling out isolated facts. This is a problem. In order to understand corruption—as to understand liberty or equality—isolated facts will necessarily fail. Corruption is necessarily a story, not an isolated fact; it involves motives, characters, and impacts. This is true even if the question is limited to understanding quid pro quo corruption. (The word “corruption” implies change and action: a change from an uncorrupted to a corrupted state).

#### A. *The Absence of Facts and the Contingent Nature of Buckley*

Kennedy’s narrative is an anti-narrative. He relied on the *absence* of evidence of direct corruption as evidence of no corruption. In *Citizens United*, Kennedy held the absence of a record against the very party that wanted to develop one. He referred to the “scant evidence that independent expenditures even ingratiate” and concluded summarily that “ingratiation and access, in any event, are not corruption.”<sup>71</sup> He did not even go to the length of proffering the “scant evidence” for review. On the face of the opinion, it is not clear whether the evidence is “scant” but plausible or “scant” because of its implausibility. Nor did he define ingratiation or explain what he meant by “ingratiate,” which can mean either “seek favor” (which sounds like quid pro quo corruption) or “get on someone’s good side” (which does not).<sup>72</sup> He did not describe the ingratiating encounter that is not influential or the access that has no influence. This is important not because I think that these *cannot* be described (I am sure they can), but because the failure to describe them forces the public to make a movie of Kennedy’s understanding of what constitutes politics, quid pro quo corruption, and ingratiation with the “scantest” of scripts.

Justice Kennedy’s demand for “direct examples” is almost impossible on its face. Congress could not have produced direct examples of its

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70. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003), *overruled by* *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

71. *Citizens United*, 130 S. Ct. at 910.

72. *Id.* at 910–11.

members exchanging federal votes for unlimited corporate independent expenditures because such expenditures had been illegal for nearly forty years. However, he nonetheless finds the absence of direct examples of quid pro quo corruption to “confirm[] *Buckley v. Valeo*’s reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption.”<sup>73</sup>

*Buckley* itself is not a good model for facts or narrative.<sup>74</sup> *Buckley* had a scant fact-record and was full of conclusory descriptions of the political process, which have taken on the quality of *stare decisis* instead of temporal factual conclusions made on weak evidence.<sup>75</sup> Even if *Buckley* had fully examined a deep Congressional record, that record would need revisiting more than thirty years later, as facts about the role of independent expenditures as either a corruptor or “corruption-perception creator” is highly time-bound and will be different in different cultures in American political history.

The *Buckley* Court casually recognized its own temporal limitations as a case seeking time- and context-bound political facts. *Buckley* held:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas *in today’s mass society* requires the expenditure of money. The distribution of *the humblest handbill or leaflet* entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate’s *increasing dependence on television, radio, and other mass media* for news and information has made these expensive modes of communication indispensable instruments of effective political speech.<sup>76</sup>

This passage is highly fact- and time-bound and contingent. It includes a fairly simple but straightforward portrait of the nature of political campaigning *at the time* as it was understood by the Court.<sup>77</sup> This suggests that the Court did not see its ruling as applying to all times and for all technological and social contexts, but rather for the particular political and technological context of *its* time. Since it has

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73. *Id.* at 910.

74. *Id.* at 966–67.

75. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

76. *Id.* (emphases added).

77. See the italicized phrases, *supra* text accompanying note 76, referencing “today’s mass society” and “increasing dependence.”

taken on a founding-like mystique, few of its offspring have recognized the explicitly conditional nature of *Buckley*'s holding.

The facts in *McConnell*, like the facts in *Buckley*, were highly contextual. For example, the record in *McConnell* included detailed examinations of the cost of newspaper advertisements as compared to broadcast advertisements.<sup>78</sup> Further, it included a detailed examination of the role of direct mail.<sup>79</sup>

It did not—because it could not, being time-bound as it was—include a detailed examination of the way in which for-profit and not-for-profit corporations create massive databases designed to influence voters directly. Nor did it include an examination of the way in which the Internet changes what it means to “coordinate” and have “independent” expenditures. Kennedy did not explore these cultural changes.

By pulling out a few isolated non-instances from the record, and failing to recognize the time-bound nature of any examination of corruption (particularly when both technology and media are changing so quickly), Kennedy told a thin and unpersuasive story.

#### *B. Agency, Narrative, and Institutional Context: The Building Blocks of Description*

Kennedy's fact-free opinion is not an isolated instance. In the last decade, campaign finance law has undergone a shift from the concrete to the abstract. In 2003, *McConnell* included more concrete, narrative based descriptions,<sup>80</sup> but since then, campaign finance decisions have been increasingly abstract and lack any descriptions, images, or narrative to help make sense of the opinions.

In Justice Stevens's opinion in *McConnell*, he began, a few paragraphs into the opinion:

Many contributions of soft money were dramatically larger than the contributions of hard money permitted by FECA. For example, in 1996 the top five corporate soft-money donors gave, in total, more than \$9 million in nonfederal funds to the two national party committees. In the most recent election cycle the political parties raised almost \$300 million—60% of their total soft-money fundraising—from just 800 donors, each of which contributed a minimum of \$120,000. Moreover, the largest corporate donors often

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78. *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 324 (D.D.C.), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003), *overruled by Citizens United*, 130 S. Ct. 876.

79. *Id.* at 230.

80. *See, e.g., McConnell*, 540 U.S. at 107–08 (describing plaintiffs' specific allegations with respect to fundraising and campaigning strategies).

made substantial contributions to both parties. Such practices corroborate evidence indicating that many corporate contributions were motivated by a desire for access to candidates and a fear of being placed at a disadvantage in the legislative process relative to other contributors, rather than by ideological support for the candidates and parties.<sup>81</sup>

This is by no means vivid, Nobel-winning narrative prose, but there are, nonetheless, clear agents acting on clear objects, with real reasons. The candidates and donors come alive in a small story, albeit from a distance and painted in broad strokes. Donors give things for desired access and out of fear of disadvantage.

In contrast, there were few actors with agency in the narrative of *Citizens United*. In the fifty-seven-page essay by Justice Kennedy, the mentions of “campaign” and “candidate” were in the context of “campaign finance legislation” or the legal texts; they were not, and did not, describe what it means to be a candidate and what such pressure entails.<sup>82</sup> There were few actors with desires and fears. The opinion is striking for its lack of subjects actually *doing* anything. Had it been written about a country other than our own, it would be very difficult to paint a picture of the political system under which that country operated; if someone from another country or time read it, he would not be able to turn to a compatriot and explain the narrative context of the laws or why Congress might want to pass them.

In *Citizens United*, there were a few areas in which the majority opinion made a movie, as it were, of political life:

[T]he following acts would all be felonies under § 441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate’s defense of free speech. These prohibitions are classic examples of censorship.<sup>83</sup>

This passage *is* helpful. It provides at least a few scenes of the movie that played in Justice Kennedy’s brain when he contemplated political life. He did not have an entirely a-historical understanding but instead a very particular, stylized one. Kennedy took for granted the institutions of the NRA, the Sierra Club, and the ACLU. He did not examine their

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81. *Id.* at 124.

82. *Citizens United*, 130 S. Ct. at 887.

83. *Id.* at 897.

institutional structures, or whether they could be structured differently, or the relationship between their structures and the fundamental goals of public participation. He was not lacking in *any* concrete vision, but his concrete vision relied on stereotype, an assumption of cultural good will towards three groups organized under a particular provision of the tax law, and engaged in no sincere investigation of whether these groups could express public will in another way.

Perhaps what Kennedy meant to say in this passage, if he were to disentangle his thoughts, was this: “The Sierra Club reflects the will of millions of people; it has chosen the appropriate form in which to express that will; the Sierra Club is the epitome of grassroots participation and community involvement; creating rules around what the Sierra Club can spend on elections would violate basic American norms that encourage participation.” No doubt the Sierra Club Executive Director, staff, and donors would be thrilled to have this vision of their public role declared the law of the United States, but it is not accurate.<sup>84</sup> However, I do not know if it was Kennedy’s actual belief, because he did not express it directly. Only once Kennedy’s narrative assumptions are laid bare can Congress—or the FEC—engage the Court in the terms of corruption and the Constitution.

In sum, even where Kennedy was purportedly engaging in a thick description<sup>85</sup> of politics, his description was thin, idealized, and less concrete than the language might suggest.<sup>86</sup> Not only do the narratives

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84. First, the Sierra Club is not a person or an independent agent. It is a creature of limited liability, and the reason the Executive Director chose this particular form was no doubt to limit its own liability and to be able to ask for tax deductible contributions. Should the Executive Director decide that speaking freely about election campaigns is more important than these two financial benefits, she could decide to un-incorporate, take donations, encourage action, and make directed political appeals around particular candidates in coordination with other individuals, including all the people who gave her donations to continue to speak. There are in fact many opportunities for speech available if one were to make a close examination of the facts. I do not mean to redo Kennedy’s entire opinion. I do mean to draw conclusions from it in order to show how much conjecture must be injected before understanding Kennedy’s political portrait of America.

85. See generally Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in 1 *CULTURE: CRITICAL CONCEPTS IN SOCIOLOGY* 179 (Chris Jenks ed., 1973) (explaining that “thick description” is the consideration of an action’s context when interpreting the meaning of that action).

86. Kennedy suggests two very different conclusions at different points in the opinion. The first is the suggestion that facts might, in fact, matter, noting that influence would indeed be a cause for concern. *Citizens United*, 130 S. Ct. at 911. The second is that he fails to introduce or engage facts, and the opinion was clearly written with the assumption that facts were not necessary. See *supra* note 48 and accompanying text (highlighting that the Court did not consider its decision on the statute’s validity premature despite the lack of facts in the record). The implication of the latter position is that *no* set of facts could justify this kind of restriction, and this seems hard to believe.

lack characters, actors, and acted upon characters, but they also lack a sense of institutional context. In a novel where the institutions surrounding the characters are not described, it is typically because they are assumed. Kennedy appropriately called Stevens's dissent to task for failing to fully acknowledge the ways in which the changing institution of "the press" challenges doctrine.<sup>87</sup> He completely failed, however, to engage or describe the institutions one must understand in order to understand corruption.

Kennedy's opinion included facts, but they were not political facts that set the scene or explained the characters in contemporary political life. The building blocks of narrative—such as actors with agency and institutional context—were missing.<sup>88</sup>

### C. *What Would a Thick Description Look Like?*

Institutions are more than mid-level facts—not surveys or facts about the number of donors that made contributions, but rather scene-setting facts about the nature of contemporary American politics. These are sociological facts that describe American politics in institutional terms, including features that would be critical for anyone with less familiarity to the culture.

Congress starts from such a deep understanding of the institutions of campaigns that it does not need to constantly describe them, and might not be able to as they are so natural to its life; the Supreme Court appears to start from such a deep lack of understanding. The weakness in the institutions, characters, temptations, and stakes during the electoral process between candidates and between parties leads to a situation in which the fundamental idea of representative democracy is

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87. Kennedy discusses how with bloggers and online media it is difficult to make a principled distinction between press and non-press. *Citizens United*, 130 S. Ct. at 913 ("Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues. Yet, 441b would seem to ban a blog post expressly advocating the election or defeat of a candidate if that blog were created with corporate funds."); *id.* at 923 ("If taken seriously, *Austin's* logic would apply most directly to newspapers and other media corporations.").

88. The "perceptionization" of corruption law has accelerated this trend, as it is far easier (that might be an understatement—it is possible as opposed to impossible) to measure perceptions of corruption instead of corruption itself. Therefore, courts have succumbed to the temptation to look at perception studies, continuing a constitutionalization of the con (confidence), all in the name of *Buckley* with the slightest nod to "integrity and legitimacy." The con game ducks the issue of corruption, but it also ducks the issue of narrative, leaving it up to those polled to fill in various and inconsistent stories of what constitutes corruption. See, e.g., *Corruption Perceptions Index 2010*, TRANSPARENCY INT'L, [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/results](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results) (outlining measurements of perceptions of corruption).

corrupted. And yet neither the crafters of the law nor the judges of it typically describe it.

It may be helpful to lay out what a narratively rich description might look like and some of the elements it might contain. What follows is not a complete picture, but six examples of the kind of discussion that would enrich the opinion:

1. Electoral campaigns are weak institutions, and many corporations are strong, well-funded institutions. Campaigns are created for a brief period. They typically begin without an office, without much of a budget, and the staffers are often poorly paid, do not have health insurance, and have relatively little experience.

2. Campaigns tend to be staffed by more men than women, and more white staffers than minority staffers. Unlike in well-developed, strong institutions where there are places to bring complaints for gender discrimination, race discrimination, and sexual harassment, campaigns do not have the infrastructure to deal with these kinds of issues.<sup>89</sup> There are no ombudsmen or women for campaigns. For the most institutionalized of campaigns—i.e., the Presidential campaign—there are staff managers, but for many other campaigns, there is no one who is dedicated to dealing with complaints about poor management or other internal problems.

3. A candidate typically comes to a campaign with a few issues about which he or she has thought seriously and most policy positions about which he or she has given no thought. For the first several months of a campaign, supporters tend to come from friends or people with highly specific issues, or those who want to get on board early because they think the candidate will win. Early supporters are rarely representative in any meaningful sense. In this context, strong institutions, like well-capitalized corporations, can have enormous and intended effects on how a candidate talks about issues that in turn have an effect on how that candidate votes.

4. Imagine a multibillion dollar financial services company with a strong interest in a few very particular types of laws that are being considered at the time—such as whether derivatives are regulated on an open exchange. The global financial services company stands to lose billions of dollars with the proposed change in the law. The candidate, with a staff of two or three researchers at the most highly developed and institutionalized campaign (and often fewer), has a general populist

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89. Kelly Nuxoll & Zephyr Teachout, *Presidential Campaign Staffs Dominated by Men*, HUFFINGTON POST (Oct. 24, 2007, 12:20 PM), [http://www.huffingtonpost.com/zephyr-teachout-and-kelly-nuxoll/presidential-campaign-sta\\_b\\_69698.html](http://www.huffingtonpost.com/zephyr-teachout-and-kelly-nuxoll/presidential-campaign-sta_b_69698.html).

impulse that he thinks will appeal to the voters but knows nothing about derivatives regulation. The global financial institution has over 1,000 employees, all of whom personally stand to lose if the new legislation is passed. The employees are well educated on the particular issue and politically savvy. The firm is stable, with strong institutional protections and logical, systematic methods of working. The firm's public relations arm keeps close track of where candidates and officials stand on the issues that make billions of dollars' worth of difference to the firm. The firm—e.g., JP Morgan—can set up a quid pro quo deal in many ways. It can make a public statement that it will spend half a million dollars in independent expenditures to defeat candidates who support derivatives regulation and spend another half a million dollars to support candidates who help defeat the legislation. Or it can have meetings with senators on the one hand and advertise its public relations budget on the other. In both examples, it has several strategic meetings trying to figure out how to translate its million-dollar public relations budget into a firm commitment from the relevant senators. These conversations are plausible in part because JP Morgan knows the weakness of campaigns, and because the campaigns know the strength of JP Morgan.

5. Inasmuch as a member of Congress, once elected, becomes a kind of institution herself, it is worth figuring out precisely how that institution is built. For any kind of building, one wants to look to foundations. The current campaign system requires that the first act of most would-be candidates is to raise enough money to be taken seriously by the press and public. At the very low end, that amount is \$100,000. Prior to raising \$100,000 (or creating the impression that raising \$100,000 on her own is relatively easy), a candidate will not get substantial attention by the press, bloggers, or other donors. So the most fundamental building block in creating the institution of a member of Congress is, in practical terms, making a list of 400 people who could donate \$2,000 each, and then calling them and asking them to help expand the list and make calls. The average American family of four makes roughly \$50,000 per year.<sup>90</sup> If someone in that family were to give \$2,000 to one political campaign, it would comprise nearly 5% of that family's take-home income. For a donation of \$2,000 to be reasonable, a family needs to make at least \$150,000.

6. A candidate's first task is to think about what policies, ideas, or ideologies will appeal to 400 people in the top 5% of the income

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90. U.S. Census Bureau, *Current Population Reports*, table 674 (Aug. 2008), <http://www.census.gov/compendia/statab/2010/tables/10s0674.pdf>.

bracket. A healthily-obsessive candidate will start finding themes—and those themes may not run directly in the financial favor of those top-bracket people, but they will be far from representative. They will represent the ideologies and priorities of the top 5% of society. The institution, in other words, has rendered the richest people in the country the first-level “gatekeepers” in deciding who can run for public office. This thought process changes if the candidate is also aware that corporations can direct uncoordinated political attack advertisements against her at any time. It increases the likelihood that the candidate will not take on controversial positions, but instead focus on positions that are likely to at least survive until there is substantial attention. A candidate might easily choose to make a quid pro quo exchange with the corporation: a candidate adopts a corporation-friendly position in exchange for that corporation’s independent expenditure support. Both the candidate and the corporation would understand this deal as an exchange—perhaps not an enforceable one, but an exchange nonetheless.

As applied to the *Citizens United* decision, this kind of missing, material description makes a great deal of difference. This pairing of the weak institution and the strong institution creates enormous incentives for the strong institution to use its relative strength early on in a political campaign.<sup>91</sup>

If *Citizens United* was proceeding on a less theoretical and more grounded understanding of corruption, it would explore these claims (and counter-claims) seriously, and while the Court might still conclude as it did that other concerns outweigh the public harms caused by influence, it would at least have to explain, in a more precise way, what constitutes the line between influence and quid pro quo.

Were the Court to start describing the political system in terms of actors with agency, it would be much harder to explain why there is no threat of quid pro quo corruption with unlimited independent expenditures. If one imagines JP Morgan’s perspective (spending money to support particular issues) and the candidates’ perspective (making choices in order to receive money, or not to be attacked by money), it sounds like a very straightforward quid pro quo case.

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91. In short, this is a classic case of an institutionalized “Mancur Olson” problem, where a small, well-funded group that is not representative will have substantial and disproportionate political power. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 53 (1971).

At a minimum, without facts illustrating concepts, the concepts become more powerful, less grounded, and constrained by logic at the same time.

#### IV. THE PROBLEM OF FACTS AND NARRATIVE IN ELECTION LAW

The role of facts is always a struggle for courts judging the constitutionality of election-related law. The evidence justifying a law that changes political structures is broader and less tractable than the evidence justifying, say, whether there should be a ban on guns near schools.<sup>92</sup> In challenges to the Voting Rights Acts,<sup>93</sup> courts must evaluate evidence of racial difference and discrimination in political communities and the degree to which an ethnic group shares political interests.<sup>94</sup> In challenges to laws requiring voters to bring photo identification to the polls, courts must weigh the lack of evidence of voter fraud against the lack of evidence that voters are dissuaded from going to the polls because they lack identification—ghosts of evidence fighting ghosts of evidence.<sup>95</sup> In ballot access cases, courts must assess the credence of potentially unsubstantiated theories, such as theories that parties serve as useful heuristics for voters, that voters are confused by long ballots, and that sore-loser candidacies undermine legitimacy.<sup>96</sup>

But the puzzle of what does, and should, constitute good evidence reaches its apex in the cases where laws are passed because of widespread public demand for structural change in the campaign finance system. This is because in order to follow *Buckley v. Valeo*'s general framework—the framework that we now work within for lack of any ability by those opposed (for a myriad of different reasons) to shift the framework<sup>97</sup>—courts must balance an ill-defined speech

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92. For example, *Crawford v. Marion County Election Board*, 533 U.S. 181, 185 (2008), and *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1345 (11th Cir.), *cert. denied*, 129 S. Ct. 2770 (2009), involved new state laws requiring more voter identification. The courts (at all levels) struggled over the correct burden of evidentiary proof for both voter fraud and the likelihood that voters would be deterred from voting.

93. 42 U.S.C §§ 1973–1973aa-6 (2006).

94. *See, e.g.*, *Solomon v. Liberty County*, 957 F. Supp. 1522, 1547 (N.D. Fla. 1997) (holding that under the “multivariate” approach, a court must compare the voters’ races and whether voters were racially motivated in how they cast their ballots to determine if racial bias in the community prevented a minority group from electing the candidate of their choice).

95. *See Crawford*, 533 U.S. at 200–02 (rejecting petitioner’s argument that the Court should balance the voter’s burden against the state interest in election integrity absent evidence of actual burden to voters).

96. Richard L. Hasen, *The Law of Presidential Elections: Issues in the Wake of Florida 2000: Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 393–94 (2004).

97. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF*

interest against an ill-defined anticorruption interest. Despite efforts by this Court to paper over the problematic relationship between the two, any understanding of what constitutes speech is dependent on an explanation of what constitutes corruption. They are treated as independent variables when in fact they are dependent.<sup>98</sup> Therefore, they are weighed against each other in the same moment as they are defined in terms of each other—making for tricky weighing *and* tricky defining.

In general, Justices have taken one of four basic approaches to the description of the facts of political life in campaign finance cases: (1) relying on social science facts;<sup>99</sup> (2) relying on testimonials from politicians;<sup>100</sup> (3) relying on evidence of perception of corruption, instead of corruption itself;<sup>101</sup> and (4) relying on no facts at all. In *Citizens United*, the Court relied on the fourth prong: there are no real facts for debate. Without facts, it is harder to build meaningful precedent. For example, the Court has been trying to hide the conceptual puzzle of corruption's definition within "quid pro quo corruption" instead of "corruption," which obviously admits many different meanings.

When it comes to describing corruption conceptually, the Court has been chaotic and lacked a coherent narrative approach, separate from the doctrinal approach.<sup>102</sup> Corruption has been described in dozens of different ways, without a clear methodology for any description. In *Citizens United*, the Court failed to describe the problem that is being confronted in the law that it is striking down. In failing to engage in the facts of the case, the Court made serious constitutional consideration extremely difficult.

The absence of stated facts does not mean that Justices have a tabula rasa when they are thinking about politics; they have some implicit narrative, but this narrative is not revealed in the current jurisprudence. It is not that Justices have no "political facts" that are influencing their

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DEMOCRACY 334–38 (3d ed. 2007).

98. Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 799–802 (1985).

99. Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law after Randall v. Sorrell*, 68 OHIO ST. L.J. 849, 853 (2007) (record references politician's testimony).

100. See, e.g., *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 324 (D.D.C.), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003), *overruled by Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

101. Persily & Lammie, *supra* note 18, at 128–29.

102. The confusion is so great that "[a]t times even passages in a single opinion seem to contradict each other." Burke, *supra* note 12, at 130.

reasoning. To the contrary, they have strong, stylized visions of how politics works. Only if these facts are on display, in the text of opinions, in the evidence before the Court, can one fairly judge them, compare them to reality, and determine how they relate to the purported theories.

The *Citizens United* decision indicates two neat categories of potential corruption: bribery and speech. Bribery, according to *Citizens United*, can be regulated—in fact, can be outlawed—and speech cannot. If something is bribery, then it is not speech. One of the dirty secrets of over-theorization—one that Justices do not like to engage—is based on a false premise that it is possible to know what is “speech” and what is “not speech” without referring to the notion of corruption. In a striking passage in *Citizens United*, Justice Kennedy made two inconsistent statements: (1) donations in order to secure influence are legitimate;<sup>103</sup> and (2) criminal law is sufficient to cover quid pro quo corruption.<sup>104</sup> This attempts to shovel the problematic line between bribery and campaign contributions into the criminal law realm—where it remains just as problematic as it did when certain contributions were criminalized in campaign finance law. The title and name of a bill (campaign finance or anti-bribery) does not demarcate a clear line between speech bribery and non-speech bribery. The idea of a neat line between speech and not-speech is always ephemeral, and can only be made through narrative.

## V. CONCLUSION

Corruption is not a static thing, but a narrative—the word itself invokes the meaning of change from something whole to something that disintegrates. Like the crimes of murder or theft, corruption has a story that must be told. Working within Kennedy’s quid pro quo framework of *Citizens United*, corruption exists when someone seeks to influence an official through compensation. This is a story. When we investigate a story, we investigate cause and effect, but we also inquire about as many details of the story as possible in order to test our understanding. We ask, “What time did John go to the store?” “What color was the shooter’s shirt?” “Do people usually carry guns?” We rely on circumstantial evidence if there is no direct evidence, and we recognize that even eyewitness testimony is flawed and constitutes a kind of trace

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103. See *Citizens United*, 130 S. Ct. at 910 (“The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt . . . .”); see also *id.* at 908 (“The practices *Buckley* noted would be covered by bribery laws.”).

104. *Id.* at 908.

evidence, as opposed to unassailable truth. But these rich details of the story are missing in the *Citizens United* opinion.

At a procedural level, the *Citizens United* decision explicitly diminished the role of facts and narrative in determining what constitutes corruption. The rejection has (rightly) been regarded as an example of the Roberts Court's activism: the Court reaching out beyond normal procedural constraints to reach the substantive decision it wants.<sup>105</sup> It is more than that: it reveals a theory of corruption—that narrative, context, and institutional understanding are not important in determining its scope. For corruption, Kennedy seems to have said: the life of the law is logic, not experience.

Kennedy's choice to reference, and depend upon, the 100,000 page record in *McConnell v. FEC* is particularly troubling and sets a disconcerting precedent. It shows a disregard for the importance of carefully developed and considered facts.

Nevertheless, the evidentiary problem in campaign finance cases is a genuine one and exists for good reason: the key definitions of speech and corruption depend on theory *and* on the practice of modern political life.<sup>106</sup> Despite some Justices' efforts to create a fact-free zone if "speech" is implicated, a serious evaluation or application of any of the corruption theories depends on facts: both small facts (who did what to whom) and big facts, like the nature of the institutional structures. If the Court is called upon to assess whether there is a legitimate anti-corruption interest justifying legislative action, it must assess the factual grounds on which the relevant legislature took action.

The facts that ground corruption cannot be narrow; they are the entire scope of contemporary political life. They are mornings and evenings in campaign offices; they are phone calls; they are deeply subjective experiences of how power moves through Congress, and objective evaluations of the nature of appropriate and inappropriate influence. Arguably, they are the facts that ground western political thought, or at least contemporary American political experience. The "evidence" is deeply rooted in the collective experience of all the politicians who

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105. Richard L. Hasen, *The Supreme Court kills campaign finance reform*, SLATE (Jan. 21, 2010, 12:58 PM), <http://www.slate.com/id/2242209/> ("[T]he court went out of its way to overturn its own precedent, in violation of its usual rule of *stare decisis*, which calls for respecting past rulings for the good of reliable law-making. And it did so violating its usual rule, which it cited even yesterday, that it does not generally reach issues not raised in the initial petition to the court.").

106. This is related to the "what is corruption?" question that I have laid out elsewhere, but is not in fact the same thing. *See infra* Part IV. The court must both amass evidence *and* weigh it against an idealized understanding of "corruption"; it cannot fairly skip either step.

passed the law. Unlike a law banning guns in schools, where members of Congress, relying on outside evidence, could pass that evidence on to the Court, it is the life experience of those members that constitutes the evidence.<sup>107</sup>

Corruption is a concept that is similar to other concepts we hold very close—e.g., liberty, democracy, or equality—that are extremely difficult to demarcate. It is tempting to imagine that they can be managed like equations. It was tempting for Justice Kennedy to try to avoid the real puzzle of the boundary line between speech and corruption in two swift moves: first, recognizing only quid pro quo corruption, and second, making his decision in a case without any factual record. However, this double punt does not actually get rid of the puzzle; it forces the question of “what is corruption” inside the question “what is quid pro quo corruption,” and it leaves it to the reader’s imagination to discern as best as she can the narrative in Kennedy’s head. But it does not and cannot eliminate the necessity to describe corruption, and in so describing, give a little bit of a sense of what political life looks like.

The commitment to *a priori* understandings of corruption, instead of real-world understandings of corruption, has parallels in other areas of experience, where the increased commitment to modeling instead of observing has led to very dangerous results. Financial modeling left no room for the financial crash of 2008. And these models—like the models of corruption and speech understood by the Court—are dangerous, because while they purport to be self-contained, they never are.

Justices would be wise to give more detailed drawings of the narrative structures in their head when they talk about corruption, and describe, with genuine curiosity and respect, the nature of the political life as lived today, not an idealized or formal one.

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107. David Donnelly alerted me to this when, in talking about trying to lobby for campaign finance reform, he said that lobbying for public funding is unlike lobbying for anything else, because every member of Congress is an expert in campaign financing.