The Anti-Corruption Argument in Freedom of Expression Discourse

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It is normal in the U.S. that we have several freedom of expression controversies being widely nationally, several more of regional and local interest, debated at all times. Someone outrages conventional sensibilities, especially in a way that potentially threatens the innocent consciousness of vulnerable members of the public, or some individual or institutional actor clumsily attempts to restrict the flow of information—often to preserve his or her own reputation or power, or less commonly some events occur which raise troubling questions about information and security, or information and privacy, or the political economics of the access to/flow of information and thought. These arguments often break down into predictably "liberal" and "conservative" positions. The liberal position is the one we know from Milton, Locke, Mill, certain of the U.S. founders, and in some stirring Supreme Court cases, a theory of the some time counter-intuitive good of "freedom." The other side of the argument is more nearly a-theoretical, the idea that certain messages are offensive—corrupting for innocent recipients, insulting to vulnerable recipients, and comforting to diabolical recipients. The one side is good at theorizing "freedom;" the other side is adept at recognizing the power of "speech." Both sides want the law to be trump in the argument. But for those of us who have achieved a mature age, these affairs are so predictable, we would rightly ignore them, except that we fear the outcomes really do make precedents for the world in which we live.

We are tempted to believe the whole matter was set in commonplaces long ago, that these arguments are essentially intractable and interminable, that the only new area of thought concerning freedom of expression is in the arena of emerging communication technologies and changing business and institution models that need to be reconciled with traditional concepts. But over time there *have* been new arguments about freedom of expression, even if they have been slow to catch on with the broad public, and even in American academia. These arguments can be characterized as being neither liberal nor conservative, but "radical" in outlook. The two outstanding examples of radical innovations in freedom of expression thought are Jean-Paul Sartre's *Anti-semite and Jew* (1948), and Herbert Marcuse's "Repressive Tolerance" (1969). Sartre's small book theorizes "discourse" as a rational activity built on change; in his view the anti-semite and the race hater do not speak at all. That is why it is proper to restrict their speech, to use the force of the law and the penal system to control their expression. Sartre is explicit in his critique of the contradictions of liberal free speech thought: the liberal is the Jew's best friend, but the liberal is *also* the anti-semite's best friend, for the liberal will defend the right of both to speak freely. By theorizing "discourse" rather than "freedom" Sartre breaks this liberal democratic impasse.

Marcuse's essay is more famous in freedom of speech thought; Marcuse holds that the *telos* of tolerance, the only rationale for tolerance, is truth, and that truth is inherently progressive. Tolerance is misspent when it is wasted tolerating the *status quo*. Marcuse envisioned policies that would re-sharpen the dialectic of society, primarily by eliminating the reactionaries from the conversation, so that the powerful, conservative, corporate position did not appear to the public to be the rational center, and the default dialectical "synthesis."

Arguably, both Sartre and Marcuse's positions require more bravery in advocacy than most of us are prepared to exhibit, call for more discretion in restraint than we trust our peers to practice, and have lingered on the margins of freedom of speech discourse, dismissed for their prickly European philosophical nomenclature. But the questions Sartre and Marcuse raised are profound ones. We *are* disappointed in the shape of our public

discussions. Our vaunted democracy does *not* seem especially talented at breaking through false equivalencies, moving along from settled questions, presenting honest assessments of the present condition in order to imagine more ideal futures, lending gravity to new voices of opposition, and making the most powerful people and institutions in society vulnerable to change. Many of us have been especially concerned that in the U.S. a dollar is now regarded as a kind of speech, and it is permissible to spend as many dollars as one pleases, create so many "speeches" all other competing speeches are driven out of the dialectic of society—and that any restriction on this practice is considered a violation of the First Amendment to the Constitution! It seems as if Marcuse is not just not followed, but that he has actually been stood on his head, a political structure created that will *never* permit *any* serious discussion of structural change.

Is there a way to address these matters in a wholly different, American idiom? In 2009 Zephyr Teachout, then a Visiting Assistant Professor of Law at Duke University, summarized and synthesized a tremendous amount of thought in the U.S. Constitutional tradition to argue that, if not the heart of our Constitutional thought, somewhere along the centre of our Constitutional body, lies what she calls an "anti-corruption principle" that is equal to and in some cases greater than our First Amendment absolutism. It is this anti-corruption principle that may eventually provide a rationale for re-shaping the American forum to make it more, perhaps much more, competitive than it has been for a long time. Teachout's argument seems especially brilliant rhetorically in that it does *not* require any references to neo-Marxist thought. Teachout feeds the reader enormous helpings of the founders, until the "inevitability" of our current practices do not seem inevitable at all. This essay follows Teachout's argument in explaining the origins of the anti-corruption principle, the nature of corruption, the way the anti-corruption principle opposes the free speech principle, and the rhetorical effectiveness of Teachout's approach.

The Origins of Anti-corruption

Teachout begins by arguing that the U.S. Constitution contains unstated principles. We are familiar from our earliest civics training that our founding document includes key ideas that are implied in the words of the document itself—ideas such as the separation of powers and federalism (Teachout 342). The concept of sovereign immunity is implied in sovereignty, Teachout notes (Teachout 404). We usually learn when we are older that the founders were pre-occupied with the problem of "faction," and building political structures against the triumph of division. If we accept the idea that there are key concepts, "principles" of good government, lurking within the Constitution, Teachout asserts that we will find "anti-corruption" among those. Teachout argues, "It is not an overstatement to say that the framers of the Constitution saw the document as a structure to fight corruption" (342). Teachout notes that concern over corruption *does* occur in contemporary Supreme Court discourse but often "defensively" or as an "embarrassed rhetorical aside" (343). She holds that the concept could be more nearly central in Constitutional interpretation, if we chose to put it in that place. If we saw our government as corrupt and corruptible, we would obviously make ending the corruption the first priority in our civic life.

Teachout sets about to prove that recent Supreme Courts have been drastically ahistorical in diminishing the anti-corruption principle. She shows that the concern for corruption was significant in Machiavelli (Thompson; Rahe), very important in Locke (corrupt self-government is an oxymoron—Locke 412-414), and crucial in Montesquieu (Bailyn; Teachout 377). J.G.A. Pocock saw the founders as believing they were "… perpetually threatened by corruption" (507). The revolution had been embarrassed and threatened by the

corruption of Continental Congress member Samuel Chase, and from the embezzlements of Army quartermaster Thomas Mifflin. The framers of the Constitution were preoccupied with Gibbon's *The History of the Decline and Fall of the Roman Empire*, and with numerous examples of corruption in British political life. In urging the rejection of the Constitution, Patrick Henry said, "Look at Britain; see there the bolts and bars of power; see bribery and corruption defiling the fairest fabric that ever human nature reared" (Henry 501; mis-cited in Teachout 349). What is really important in our understanding of corruption is that most of the founders had a complete analysis of the problem, and did *not* see corruption as routine human temptation and failing; that is why the familiar British examples were so important. Constitutional convention delegate Pierce Butler saw that Parliament controlled many offices, and that meant that members could seek offices for themselves and their friends (in Yates 377, 379); even more offices were controlled by the King, and that meant that the King could control the decisions of Parliament by utilizing preferments to undermine the judgment of legislators (349). These English corruptions extended to the formation of legislative districts; George Mason and James Madison both raised the question of avoiding the famous "rotten burroughs" of Parliamentary infamy (Teachout 357 citing Rufus King recording a George Mason speech and Madison's Constitutional Convention debate notes; 360). John M. Murrin summarized: in late Eighteenth Century America "corruption" was "… the common grammar of politics" (103-104); according to Pocock the founders thought of corruptions as a "universal crisis," speaking of it in frantic, nearly apocalyptic language (Teachout 353 citing Pocock 513).

Teachout writes, "Corruption derives from the Latin *corrumpero*: to break up, to spoil. *Rumpo* means 'to break, to shatter, to burst open, destroy, violate,' and *co* means 'with,'—instead of two things breaking apart (*dirumpo*), or one thing breaking open (*erumpo*), corruption is when something breaks within itself: the apple rots on the shelf; narcissism corrodes the soul; government internally disintegrates" (346-347). Virtue is tied up with corruption, as Pocock observed, because a government founded in the equality of persons, while it need not produce exact equalities of outcomes, depends on the determination of persons struggling to realize virtues of transparency and access to opportunity, or that government will be perceived as corrupt (516). Small actors get small corruptions, but Gouverneur Morris pointed the Constitutional delegates directly at the scale of national corruption about which they needed to be worried: "[w]ealth tends to corrupt the mind & to nourish its love of power, and to stimulate it to oppression" (Teachout 376 citing Madison's convention notes).

Corruption, in the minds of the founders, occurred when private interests found opportunities in public life. Teachout notes that quantitatively, "Corruption was discussed more often in the Constitutional Convention than factions, violence, or instability. It was a topic of concern on almost a quarter of the days that the members convened" (352). It is important to reiterate, the delegates did not simply throw around the term "corruption" loosely, a broad reference for the likelihood that someone would eventually be tempted to help themselves to the quarters in the Senate Coke machine; they believed that corruption was instigated by the wealthy, by those who greedily saw government as a path to great wealth, and by foreign powers (Teachout 353). Gouverneur Morris argued that a strong President was needed to check the "Great & the wealthy" who would end up dominating the Congress. Madison noted the delegates were concerned that the President and senators would create a self-enriching, self-entrenched "club that would run the country for their own benefit" (Teachout 364 citing Madison's Convention notes). Hamilton saw that if a few of these legislators who set themselves up as oligarchs also had great rhetorical powers ("arts and influence"), these powerful Senators would simply lead the nation along to "odious" policies (Teachout 363 quoting Hamilton in "The Federalist No. 66"). The "Federalists" broadly, and

Hamilton particularly, have gained a reputation in many versions of U.S. history of creating a national political structure friendly to big capital; but the Hamilton of the "Federalist Papers" repeatedly targeted the problem of private and foreign gain at public and domestic expense, avarice, he thought, a likely source of the betrayal of the nation (Teachout 379). In other words, corruption in the new government was potentially systemic, possibly irreversible, because the government commences in an environment of unequal players, and conceived ineptly it may have had no powers to self-correct. The delegates tried to build a Constitution designed prophylactically to stop these problems, and to correct them as they arose.

As typical examples, framers worried that wealthy non-residents could effectively purchase Congressional elections (Teachout 357). They were concerned that the President could financially corrupt a dependent Congress (Teachout 359, citing Vermeule). The framers fretted that the state legislatures might corrupt the new Congress, if given too big a role in Federal elections (Teachout 357). Delegates rose to acknowledge fears about the privileged Senate with special duties in foreign affairs being corrupted by foreign agents (Teachout 358, 362). They sought to create a truly independent judiciary, free from corruption (Teachout 369). The division of the legislature into two chambers was a check against the creation of self-enriching aristocracy (Teachout 370). The Constitution writers argued election policy and procedure, legislative composition, and even the creation of a king, all in terms of what governmental structure was most likely to impede corruption and keep the new government responsive to the people and true to just law (Teachout 362-363). Sometimes the rationales contradicted (Teachout 368): does a fixed, short term in office prevent the holders from establishing durable self-enriching relationships, or does it motivate short term "plunder"? In either case, the problem addressed was corruption.

Teachout holds that there are at least twenty-three specific features of the original U.S. Constitution that were specifically designed to prevent or correct corruption (355). Perhaps the centerpiece of all of the Constitutional evidence for the anti-corruption character of the document is the provision for impeachment (Teachout 367).

The Nature of Corruption

Corruption, Teachout insists, following Laura Underkuffler (2005), is not simply a violation of the law (376). One may be corrupt without breaking the law. The founders recognized that corruption included the lawful abuse of power. Corruption crosses a series of our most profound moral tuitions—that one does not judge oneself but submits one's acts and choices to the judgment of others and hence the good of transparency, equal opportunity in accessing the goods and avoiding the risks of life, especially as organized by the whole community, and that one especially does not curtail the life possibilities of others without their consent. In individuals corruption goes to one's character and deep trustworthiness; for governments it goes to the material and moral possibilities of its citizens. Money, Teachout summarizes on behalf of the founders, has an "alchemical effect," altering not just specific acts and outcomes but the make-up of the agent that uses it. She quotes Bailyn that the framers, "... never abandoned the belief that only an informed, alert, intelligent, and uncorrupted electorate would preserve the freedoms of a republican state" (Teachout 377; Bailyn 379). The final check in any Constitutional scheme would be, Madison averred, a virtuous people (Teachout 378).

Likely the founders were familiar with the paraphrase, perhaps inaccurate, of Aristotle's *Politics* that goes: the state is the greatest teacher. Teachout is convinced that the U.S. Constitution is made to create virtuous

people by removing temptation even for those who are privileged with wealth and its advantages and making it easy to not re-elect corrupt government officers (Teachout 380-381). Madison believed he could actually harness self-interest for the public good by getting the government structures right (Teachout 381). Perhaps the founders exaggerated their ability to do this effectively, and that brings us to the present and the possible opposition of freedom of expression and anti-corruption principles, the possibility that the system may require significant rebalancing of these principles in order to eliminate our corruptions and enhance our public discourse.

The Anti-corruption Principle *versus* the Freedom of Expression Principle

Much of Teachout's research concerns the standing of "corruption" and "anti-corruption" in Supreme Court rulings since *Buckley v. Valeo* in 1976. Like *Buckley*, most of the cases that interest Teachout involve restrictions on campaign and advocacy spending as in *FEC v. Wisconsin Right to Life* (2007), *Austin v. Michigan Chamber of Commerce* (1990), and *McConnell v. FEC* (2003), and Teachout's analysis ranges broadly from high theoretical takes on Constitutional interpretation to the ruling proclivities of individual Supreme Court Justices. But for our concerns at the moment, the crux of the matter is whether or not we are able to accurately ascertain that our republic has, in fact, been corrupted, and assuming it has, are we able to redress the problem with the current Constitutional understandings.

Working within a legal framework, how can corruption be understood empirically? To Teachout's disappointment, conservative Supreme Court Justices have tended to only recognize as corruption *quid pro quo* bribery (Teachout 343, 383 ff.). If this is corruption, then corruption is a rare crime—prosecuted case by case. But if corruption is one hundred million dollars spent annually by K Street lobbyists broadly impeding political-economic change, writing essentially private legislation into the tax code, and keeping industries at the table managing their own regulation, then corruption would need to be addressed by structurally altering those lobbyist's access to elected and even certain appointed officials and to the mechanisms by which they systematically distort public opinion (Mueller). Generally, the rate and direction of political change has not counted for much as empirical evidence of corruption in these arguments.

The Supreme Court has been inconsistent in affirming regulations designed to reshape the national forum toward more popular participation and less pecuniary power. The *Buckley* decision went so far as to acknowledge that citizens have been deeply alienated from their government by Teachout's sense of elite financial corruption, as Teachout observes, the citizen being acknowledged as a victim in the opinions attached to that ruling (Teachout 386). Vocabularies of "inequality [of access]" and "democracy" have been tried in some Justice's opinions in these cases (Teachout 393, 403). These concepts may cluster, but for Teachout the anti-corruption principle stands significantly apart and on its own, a special problem independent of other political goods. With the 2010 *Citizens United v. FEC* decision; the "freedom of speech principle" does not just mean that one is entitled to have one's say but, if resources permit, to be heard everywhere, all the time. Dollars (and perhaps yuan-francs-pounds-yen, etc.), the court majority seems to think, are, if the possessor chooses to use them in this way, free speeches, impossible to restrain Constitutionally. (On the rationale for the restriction of the repetition or amplification of a message see Schauer.) Teachout derides this position as the "sanctified meme" of free speech (346). Zephyr Teachout, both a small "d" and capital "D" Democrat, famous for her pioneering work with social media in the Howard Dean Presidential campaign in 2004, certainly has a profound commitment to

the First Amendment freedoms. But has the First Amendment created a robust political forum, or only a din of privileged cant and incoherent reaction?

How and the Rhetoric of Teachout

What precisely Teachout wants is not clear. Freedom of expression advocates rightly fear all restrictions, each restriction itself an opportunity for grave corruption. Perhaps a workable majority of Americans support campaign finance restrictions, better lobbying disclosure laws, and are willing to at least consider election reforms designed to increase public access to possibly speed up the pace and enhance the quality of change. But most of us probably lack the imagination of a drastically different, more participative political system; we cannot picture a world where the bankers do not write the banking legislation, etc., *ad nauseum*. We are caught in logics of free market rational self-interest and specialized professional expertise that make us apt to have low expectations for political participation, to defer in our own political participation, no matter our perceptions of corruption.

One of the charming weaknesses of Teachout's essay is that while most law journal articles seem to be addressed to practicing attorneys or the controversies of legal academics, this piece seems oddly meant for Supreme Court Justices to read, for it is Supreme Court Justices who could act to re-balance the anti-corruption and free speech principles. As influential as the article is, widely syndicated *Washington Post* columnist George Will—who has defined the most recent years of his career by his dedication to opposition to campaign finance limitations—wrote about it in a column in 2009, one doubts that it is even sane to hope to change American history by addressing nine people via a law review article.

Teachout does not pretend to make a systematic critique of cases such as *Citizens United*. She seems to concede the idea that dollars are speeches just waiting to be voiced. This too is a weakness in her rhetoric. George Will's dismissive critique rightly calls her approach an "end run." Teachout simply changes the subject.

But she changes the subject brilliantly, ingeniously. In a political universe with reactionaries crying at every hand to bring the nation back to the Constitution, back to the original intentions, Teachout rings with historical authenticity. She feeds her audience founder after founder, page by page—Madison, Hamilton, Morris, Henry, King, Mason, Washington—leaving the unmistakable evidence that the framers may, indeed, have been privileged, propertied, Euro-descended males, but even *they* got—and not as an aside but as a central proposition—that big money is the big threat to republican government.

For a moment in the 1980s critical theory stopped to examine an old speech by Kenneth Burke entitled "Revolutionary Symbolism in America" (see especially Lentricchia). Burke's point was an elementary one: in the U.S. radical change required American radical vocabulary, not imported (Marxian) theoretical language. Teachout, whether she meant to or not, realizes this rhetorical requirement. She has written a rationale for the reorganization of our politics, for the re-democratization of our fora, making a universal appeal, but in distinctly American terms, and with no reference whatsoever to the usual intellectual resources of radicalism. It is an impressive achievement, and it will surely spark many discussions where a genuinely free speech is of interest to our people.

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