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DEFINING CORRUPTION AND
CONSTITUTIONALIZING DEMOCRACY

Deborah Hellman*

The central front in the battle over campaign finance laws is the definition of corruption. The Supreme Court has allowed restrictions on the giving and spending of money in connection with elections only when they serve to avoid corruption or the appearance of corruption. The constitutionality of such laws, therefore, depends on how the Court defines corruption. Over the years, campaign finance cases have conceived of corruption in both broad and narrow terms, with the most recent cases defining it especially narrowly. While supporters and critics of campaign finance laws have argued for and against these different formulations, both sides have missed the more foundational issue: Should the Court define corruption at all?

This Article argues that it should not. Corruption is a derivative concept, which means that it depends on a theory of the institution involved. In order to define corruption of an official or institution, one needs an account of how the official ought to act or how the institution ought to function. Defining legislative corruption, therefore, requires a theory of the legislator’s role in a well-functioning democracy. The Supreme Court’s campaign finance case law has ignored the implications of this widely shared and deceptively simple idea.

Drawing an analogy to apportionment and gerrymandering cases, this Article argues that there are important reasons for the Court to defer to legislative judgment about how best to conceive of a legislator’s role in our democracy. Those cases counsel that where both individual rights and questions of democratic theory are at issue, the Court should be cautious about whether judicial intervention is appropriate. Just as the Court is hesitant to define good government, so too it should be reluctant to define corruption.

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INTRODUCTION

The main front in the battle over the constitutionality of campaign finance laws has long focused on defining corruption.¹ Even since the Supreme Court decided that restrictions on the right to spend and give money in connection with elections should be treated as restrictions on speech, yet held out the possibility that such restrictions were permissible if designed to avoid corruption or its appearance,² defining corruption has been

¹ See, e.g., Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2816 (2011) (noting that the type of corruption with which our case law is concerned is quid pro quo); Citizens United v. FEC, 130 S. Ct. 876, 909–10 (2010) (noting that government interest in preventing corruption is limited to “quid pro quo corruption,” and that “[i]nterference and access . . . are not corruption”); McConnell v. FEC, 540 U.S. 93, 150 (2003) (“Congress’ legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing ‘undue influence on an officeholder’s judgment, and the appearance of such influence.’” (quoting FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 441 (2001))); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990) (noting that the government’s interest in preventing corruption includes “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas”); FEC v. Nat’l Conservative Political Action Comm., 470 U.S. 480, 498 (1985) (“The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption . . . .”).

² See, e.g., Citizens United, 130 S. Ct. at 900 (holding that the antidistortion rationale is not a compelling governmental interest and reaffirming that quid pro quo corruption or the appearance of quid pro quo corruption are the only sufficiently compelling governmental interests in the context of campaign finance regulation); Davis v. FEC, 554 U.S. 724, 741 (2008) (dismissing the notion that the state has a compelling interest in equalizing electoral opportunities and emphasizing that preventing corruption or the appearance of corruption are the only acceptable governmental interests); Randall v. Sorrell, 548 U.S. 230, 268 (2006) (Thomas, J., concurring in the judgment) (noting “the interests the Court has recognized as compelling, i.e., the prevention of corruption or the appearance thereof”); Nat’l Conservative Political Action Comm., 470 U.S. at 496–97 (“[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”); Buckley v. Valeo, 424 U.S. 1, 25–27 (1976) (per curiam) (holding that
the central issue in campaign finance cases. This has been a mistake. While
the Court has vacillated between expansive and restrictive conceptions of
corruption,\(^3\) it has missed the significance of the fact that defining legislative
corruption entangles the Court in defining the legislator’s role in our democ-

racy. This is a task the Court should be hesitant to take up.

Yet the Court has not been hesitant at all. Instead, the Court has ad-
dressed the issue with gusto. For instance, the Court’s most recent campaign
finance cases precisely define corruption. In *Citizens United v. FEC*, the
Court asserted that corruption is “limited to *quid pro quo* corruption”\(^4\) and
explicitly emphasized that “[i]ngratiation and access, in any event, are not
corruption.”\(^5\) In *Arizona Free Enterprise Club’s Freedom Club PAC v. Ben-
nett*, decided in 2011, the Court struck down an Arizona law because it
found that the burden on speech was not justified by the need to avoid cor-
rup tion, as the Court defined it.\(^6\) For the Court, corruption included only the
exchange of money for votes or favors.\(^7\) As a result, the Court invalidated
the law under which both candidate spending of his own money and unco-
ordinated spending triggered the allocation of matching funds that the state
provided. Neither type of spending can lead to quid pro quo corruption,
since a candidate cannot sell votes to himself, and uncoordinated spending
by outside groups—if truly independent—cannot be the basis of a quid pro
quo deal. Consequently, neither type of spending can lead to corruption as
the Court defined it.\(^8\)

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\(^3\) Compare *Citizens United*, 130 S. Ct. at 909 (“When *Buckley* identified a sufficiently
important governmental interest in preventing corruption or the appearance of corruption, that
interest was limited to *quid pro quo* corruption.”), and *Nat’l Conservative Political Action
Comm.*., 470 U.S. at 497 (“The hallmark of corruption is the financial *quid pro quo*: dollars for
political favors.”), with *McConnell*, 540 U.S. at 153 (“Just as troubling to a functioning de-
mocracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues
not on the merits or the desires of their constituencies, but according to the wishes of those
who have made large financial contributions valued by the officeholder.”), and *Austin*, 494
U.S. at 660 (defining corruption broadly to include “the corrosive and distorting effects of
immense aggregations of wealth that are accumulated with the help of the corporate form and
that have little or no correlation to the public’s support for the corporation’s political ideas”).

\(^4\) 130 S. Ct. at 909.

\(^5\) Id. at 910.

\(^6\) 131 S. Ct. 2806 (2011).

\(^7\) *Ariz. Free Enter. Club’s Freedom Club PAC*, 131 S. Ct. at 2826–27. I call this con-
ception of corruption “corruption as the sale of favors.” See infra Section I.B.3.

\(^8\) 131 S. Ct. at 2826–27. The Arizona law provided public funding to candidates for
state office who agreed to limit expenditures. In order to simultaneously encourage candidates
to opt into the public funding scheme and to conserve public resources, the initial grant of
public funds was fairly modest. However, if opponents of the candidate opting for public fund-
ing spent over a trigger amount, or if others spent over this amount supporting an opponent’s
campaign (or if the two combined exceeded this amount), then the publicly funded candidate
There are, however, other ways to understand corruption. A legislator who decides how to vote based on a calculation of the likely effect that taking a particular position will have on his ability to raise funds could be considered corrupt. A legislator who weighs the preferences of wealthy constituents more heavily than poor constituents could be considered corrupt. If corruption were defined in either of these ways, such a definition would justify a matching-fund law designed to encourage candidates to take public funding and thereby sever the link between private money and public office.

The constitutional permissibility of most campaign finance cases has turned on how the Court understands corruption. But, as I argue, the Court should instead be hesitant to define it at all. In doctrinal areas of constitutional law outside campaign finance, the Court is appropriately cautious and modest in its efforts to define good government. For the most part, the Republican Guarantee Clause is treated as nonjusticiable. Even where the Court has used the Equal Protection Clause to ensure that states provide an acceptable form of democracy, the Court has been careful.

These cases press us to answer this question: Why refrain from constitutionalizing a view of good government in some cases (e.g., partisan gerrymandering) while asserting in others (e.g., campaign finance) that the was entitled to additional state-provided matching funds. It was this provision that the Court found violated the First Amendment rights of privately funded candidates. Id.

9. See infra Section I.B.1 (defining “corruption as the deformation of judgment”).
10. See infra Section I.B.2 (defining “corruption as the distortion of influence”).
11. See Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (holding nonjustici able a claim that the initiative and referendum violated the guarantee of a republican form of government); Luther v. Borden, 48 U.S. (7 How.) 1, 51 (1849) (holding the Guarantee Clause to present a nonjusticiable political question); see also Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion) (citing with approval Pac. States Tel. & Tel. Co., 223 U.S. at 118); Ohio ex rel. Bryant v. Akron Metro. Park Dist., 281 U.S. 74, 79–80 (1930) (same); Marshall v. Dye, 231 U.S. 250, 256–57 (1913) (same).
12. See Reynolds v. Sims, 377 U.S. 533, 586 (1964) (“[L]egislative reapportionment is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.”); Baker v. Carr, 369 U.S. 186, 258 (1962) (Clark, J., concurring) (“The truth is that—although this case . . . has been most carefully considered over and over again by us in Conference and individually—no one, not even the State nor the dissenters, has come up with any rational basis for Tennessee’s apportionment statute.”).
13. See Vieth v. Jubelirer, 541 U.S. 267, 281 (2004). Vieth is a fractured opinion. Justice Scalia, writing for a plurality, held that claims of partisan gerrymandering are simply not justiciable. Id. Justice Kennedy, concurring in the judgment, found that the particular claim presented “must be dismissed” but “would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.” Id. at 306 (Kennedy, J., concurring in the judgment). On the other hand, Justice Kennedy did not say that partisan gerrymandering claims are justiciable and that the case before him simply failed to present a claim of violation. See id.
Court knows corruption of good government when it sees it? The two are but flip sides of the same coin.

The tension between these two bodies of law derives from the fact that corruption is a derivative concept, meaning it depends on a theory of the institution or official involved. This Article explores the implications of this insight for campaign finance cases. Because defining legislative corruption requires a theory of the legislator's role in a democracy, the Court should look to other areas of constitutional law for guidance about when and whether it properly constitutionalizes theories of democracy.

A court "constitutionalizes" a theory of democracy when it treats a particular conception of democracy as constitutionally required. Apportionment and gerrymandering cases are helpful here. They suggest that there are two important concerns that courts must recognize and consider: there are individual rights issues that point toward judicial oversight and questions of democratic theory that point toward deference.\(^\text{14}\) The recognition that theorizing corruption entails theorizing democracy suggests that our campaign finance cases are deficient in failing to air both the reasons for judicial oversight and the reasons for judicial deference.

A court that considered both the reasons for intervention and the reasons for deference in campaign finances cases, as it would in apportionment and gerrymandering cases, would be much less likely to override legislative determinations that a given law is necessary to avoid corruption. The court would look at the degree to which a campaign finance law affects the free speech right. Where the burden on free speech is not substantial, the important reasons to avoid intervening in legislative prerogatives to define the role of a legislator in a well-functioning democracy would—and should—win out.

The Court's failure to fully recognize that it defines good government when it defines corruption creates tension within constitutional law. Two cases decided in 2011—Nevada Commission on Ethics v. Carrigan\(^\text{15}\) and Arizona Free Enterprise Club's Freedom Club PAC v. Bennett\(^\text{16}\)—illustrate this tension, as well as the Court's blindness to it. Tellingly, each appears to open the door to broad changes in the ability of the legislature or the people to control what they perceive as corruption—the first seeming to make such efforts dramatically easier and the second dramatically harder.

In Nevada Commission on Ethics v. Carrigan, a unanimous Supreme Court, in an opinion written by Justice Scalia,\(^\text{17}\) upheld the ability of the Nevada legislature to ensure that its legislative process is not tainted by conflicts of interest. The Court held that voting is not an activity that the First Amendment protects, and thus state ethics rules requiring the recusal of

\(^{14}\) See infra Section II.B.

\(^{15}\) 131 S. Ct. 2343 (2011).

\(^{16}\) 131 S. Ct. 2806 (2011).

\(^{17}\) The judgment was unanimous. Seven justices signed on to Justice Scalia's opinion; Justice Kennedy filed a concurring opinion; and Justice Alito filed an opinion concurring in part and concurring in the judgment. Carrigan, 131 S. Ct. at 2346.
government officials in cases of conflict of interest raise no First Amendment issue. The opinion is written very broadly. The Court holds that "a legislator's vote is the commitment of his apportioned share of the legislature's power" and thus "is not personal to the legislator but belongs to the people." Having no personal right to it, a legislator has no cause for complaint when it is restricted. As a result, any state legislature, and presumably Congress as well, could write ethics rules that require members to recuse themselves from voting on any piece of legislation where the ethics rules identify a conflict of interest. Such an approach could, in principle, disable legislators from voting on bills when they have received contributions from people, groups, or companies that stand to benefit from the legislation.

Despite this seeming protection of legislative prerogatives to determine the ethical standards governing its own body, an opinion issued just two months later, and decided on a five–four vote, seriously impedes a legislature's efforts to define legislative corruption for itself. In Arizona Free Enterprise Club's Freedom Club PAC, the Court struck down the matching-fund provisions of an Arizona state law that were designed to encourage participation by candidates for state office in the public funding system. The majority, in an opinion written by Chief Justice Roberts, conceived of corruption very narrowly, and in so doing raised some doubts even about the constitutional permissibility of public funding systems. In particular, although the Court broke no new ground in refusing to see the goal of "[l]eveling the playing field" with regard to the impact of money in politics as an interest important enough to justify restrictions on speech, it strikingly characterized that interest as "a dangerous enterprise." This language suggests that the Court may see the goal of attempting to neutralize the disproportionate influence that wealthy individuals and businesses have in the political process as an illegitimate governmental interest, rather than merely a noncompelling one. Such an approach could have far-reaching consequences.

The juxtaposition of these two cases illustrates the inherent difficulty, indeed instability, of the Court's view that while the Court may freely define corruption, it should show deference to legislatures with regard to defining good government. If defining the proper legislative role and defining corruption of that role are but two sides of the same coin, these decisions are fundamentally in tension—a tension that has so far eluded the Court.

18. Id. at 2343, 2347.
19. Id. at 2350.
The Article proceeds as follows. Part I begins by describing the widely held view that corruption is a derivative concept. This Part documents the fact that the idea of corruption is widely understood to depend on an antecedent view about the proper functioning of the institution or official in question. It also explores what this view of corruption means in the context of democratic institutions. Part I then looks in more detail at how the Supreme Court defined corruption in its campaign finance decisions. It identifies three distinct conceptions of corruption and the views of the proper legislative role that each implies.

Part II explores the implications of the claim that corruption is a derivative concept for campaign finance law. More specifically, this Part argues that campaign finance cases are similar to apportionment and gerrymandering cases because articulating a concept of corruption for democratic institutions implies a commitment to a particular, contested theory of representation. In both doctrinal areas, the presence of an individual right at stake (speech or voting) provides a reason for judicial oversight; however, the fact that defining the contours of this right implicates the Court in constitutionalizing a question of democratic theory provides a justification for judicial deference to the legislative branches of government.

Part III turns to counterarguments, considering the reasons for more, rather than less, judicial supervision of how legislatures define corruption. Here, I consider the arguments that protecting the legislative process is quintessentially the Court’s function and that defining rights always implicates the Court in defining democracy. One might think, for example, that a court properly defers to legislative conceptions of a legislator’s role in most instances but must treat a legislature’s conception of corruption with more scrutiny. Allowing legislators to define corruption is to leave the fox guarding the henhouse. This Part replies to these concerns and goes on to argue that when courts weigh the reasons for and against judicial intervention, they should take into account the degree to which the law at issue infringes on an individual right. The Article concludes that consideration of the important reasons for deferring to legislative judgment about the legislator’s role in a well-functioning democracy shifts the balance of reasons in campaign finance cases and should make invalidation of these laws much less common.

I. CORRUPTION IS A DERIVATIVE CONCEPT

A. In Theory

Dennis Thompson explains, “In the tradition of political theory, corruption is a disease of the body politic.” But to know what is disease, one must know what is health for the organism in question. As this metaphor
illustrates, corruption is, in this sense, a derivative concept. If corruption is a disease of the body politic, it depends on an antecedent idea of the healthy state of the political system.

Of course, officials or actors in all sorts of institutions—not only political ones—can be corrupt. So perhaps we ought to say that corruption is the disease-state of an institution or individual. Tellingly, what rightly counts as corruption of one type of institution or one official is not the same as what counts as corruption of another type of institution or official. When we recognize this fact, we see that to define corruption requires articulating the standards of proper functioning of the institution or individual involved.

Consider the following familiar example: nepotism. Suppose I am a public official hiring someone for a public job. Giving the job to John, despite the fact that he is less qualified than other applicants, because he is my brother-in-law, constitutes a classic case of corruption. Here, I act corruptly because the benefit I allocate is supposed to be awarded on the basis of criteria that exclude family connectedness. Contrast this example with the following one. Suppose I decide to invite John to a holiday dinner at my house. I invite him, even though he is a less-gifted conversationalist than other possible dinner invitees, because he is my brother-in-law. Here I do not act corruptly. The criteria that apply to this decision (whom to invite to a holiday dinner) are either completely within my discretion or, properly understood, include family connectedness as a valid criterion.

We have so far considered the institutions of government and the family dinner. In the case of still other institutions, the institutions' internal norms and values do not clearly approve or disapprove of family connectedness as a criterion for use in decisionmaking. For example, suppose an admissions official at a selective high school accepts John, even though his grades are lower than those of other candidates who are not accepted, because John's sister Jane is currently at the school. Here, the school official may not act corruptly if the school allows consideration of family connectedness to play a role in admissions. And the school may do so, for there are good reasons to keep children of the same family in the same school—reasons that redound to the benefit of the children, the family, and the school. This sibling preference may explicitly be part of the admissions criteria used by the school or may be implicit, understood as part of the school's ethos or values.

24. To say that corruption is a derivative concept implies that the conception of the health of the organism is primary and the conception of corruption derives from it. But perhaps there is no reason to say that one or the other comes first. If that is the case, we should instead say that corruption and proper functioning are reciprocal concepts. While I think that there are good reasons to say that corruption for X is derivative of a view about proper functioning of X, nothing much turns on which way one conceives of the relationship. Thinking of health and disease of political institutions as reciprocal concepts leads to the same implications I develop from the derivative conception of corruption.

25. See Zephyr Teachout, The Anti-Corruption Principle, 94 CORNELL L. REV. 341, 373 (2009) ("Corruption . . . has two meanings . . . . It has a broad meaning, describing all kinds of moral decay, and a more specific meaning in the context of politics.").
I describe this case as controversial because some critics of this policy may argue that a school, properly conceived, should consider only academic credentials in deciding whom to admit. In other words, whether an act is corrupt depends, at least in part, on whether the official's action or exercise of judgment comports with the standards of appropriate decisionmaking for an actor within the particular institution. In this sense, actors are corrupt or not corrupt depending (at least in part) on whether they violate the norms for the actor and institution involved. Corruption derives from and depends on a theory of the institution involved.

This theory of corruption is only a partial account. For an action to be corrupt, other factors are likely necessary. Most theories agree that corruption requires the violation of a normative standard, some benefit (personal or political), and some connection between the two. I do not intend to offer a complete theory of corruption. Rather, I argue that in any plausible theory of corruption, a corrupt act is one that violates a norm or standard of the proper functioning of the institution. Thus, an account of corruption for any particular institution depends on a theory of that institution.

26. Controversies over whether legacy preferences at colleges and universities are appropriate replay this same debate. See also Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007), in which the Court held a preference in school assignment based on race unconstitutional but did not even consider a sibling preference controversial.

27. See, e.g., John G. Peters & Susan Welch, Political Corruption in America: A Search for Definitions and a Theory, 72 AM. POL. SCI. REV. 974 (1978) (describing different theories of corruption). For example, Zephyr Teachout describes the Framers' conception of corruption as follows: “To the delegates, political corruption referred to self-serving use of public power for private ends...” Teachout, supra note 25, at 373–74.

28. Laura Underkuffler is one of the few scholars who appear to disagree with this claim. See Laura Underkuffler, Captured by Evil: The Idea of Corruption in Law, (Duke Law Sch. Legal Studies Research Paper Series, Research Paper No. 83, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=820249. For Underkuffler, corruption “is the idea of capture by evil, the possession of the individual by evil, in law.” Id. at 2. Underkuffler objects to those theories of corruption that leave open the possibility that “corrupt” acts could be good from an all-things-considered standpoint. Id. at 3–39. She finds this result problematic because, in her view, it fails to comport with how we understand the term “corruption.” Id.

There are two avenues of reply to this objection. First, one could argue that an action can be corrupt, given the obligations derived from the institution, and yet morally good, all things considered. Officials of Nazi Germany who accepted money from Jews in exchange for letting them escape were acting corruptly—violating the norms of the state and their obligations within it, and doing so for their own benefit—and yet these corrupt actions were good, all things considered. Of course, it would have been better still to let the Jews out without accepting bribes or to have fought against the evil state. But still, these corrupt acts are to be commended.

Underkuffler would agree that the actions are to be commended, but would disagree with attaching the label “corruption” to them. I think this is a mistake. The Nazi official accepts money for private use in exchange for violating his official duties under law. I am not sure there is any more that one can say—or at least not in the context of this Article—about which position is correct about corruption as a concept. It may simply be a matter of competing intuitions. While her view is possible, the better view, I think, is to accept the Nazi’s taking of the bribe as an instance of corruption.
The above examples focus on corruption in different institutions—government, family, and school—but the claim holds true when we restrict the discussion to political corruption. What constitutes political corruption in a democracy depends on a theory of democracy. To put the point in a more grounded fashion, what constitutes corruption of legislators depends on a view of the proper basis for decisionmaking by elected officials. A simple and stylized example will illustrate this idea. Consider the classic disagreement in political theory between the trustee and delegate conceptions of the legislative role.\(^{29}\) According to the trustee conception of the legislative role, a legislator ought to be guided by his best judgment about the merits of bills before the legislature. His constituents elected him, and therefore he ought to use his own judgment to assess various courses of action. According to the delegate conception of legislative role, by contrast, the legislator ought to vote as he thinks his constituents would want him to vote on each piece of legislation.

Suppose one believes that the trustee conception of legislative role is the best account of how representatives ought to act, and thus that legislators ought to act as trustees, and only as trustees, when voting on bills that come before the legislative body. On this view, a legislator who votes in a way that conflicts with his independent judgment of the merits of a bill, and does so because he believes that is what his constituents desire, may well act corruptly. Voting as constituents want when it conflicts with a legislator's independent judgment about the best course of action violates the normative standards of the good legislator (by hypothesis). If the legislator does so in order to derive the personal benefit of increasing the likelihood of reelection, this looks like a quintessential case of corruption.

These two conceptions of a legislator's role overlap to a significant degree in how they define corruption. A legislator who accepts money in exchange for voting a particular way violates both the norm that he vote as he thinks best, as the trustee conception requires, and the norm that he vote as his constituents desire, as the delegate conception requires. What is interesting for our purposes, however, is the fact that in some instances, like the example provided in the prior paragraph, the two conceptions of the legislator's role will yield the result that an action required by one conception may

Alternatively, one can say Underkuffler's view is correct in the limited context of corruption within reasonably justified political institutions. Corruption within a democracy, for example, may carry some negative valence precisely because the corrupt act undermines the democratic values instantiated in the institution. If this is right, the moral weight comes from the goodness of democracy rather than the badness of corruption.

\(^{29}\) Dennis Thompson describes both of these accounts as providing "a functionalist basis for legislative ethics." DENNIS F. THOMPSON, POLITICAL ETHICS AND PUBLIC OFFICE 99 (1987). Thompson cites the following sources as "classic examples" of trustee, delegate, and mixed theories, id. at 225 n.7: EDMUND BURKE, BURKE'S POLITICS 114–20 (ROSS J.S. HOFFMAN & PAUL LEVACK eds., 1949); 2 JEAN JACQUES ROUSSEAU, CONSIDERATIONS SUR LE GOUVERNEMENT DE POLOGNE, ET SUR SA RÉFORMATION PROJETÉE, in THE POLITICAL WRITINGS OF JEAN JACQUES ROUSSEAU 424, 446–61 (C.E. VAUGHAN ED., 1962); and 19 JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, IN COLLECTED WORKS 371, 504–12 (J.M. ROBSON ED., 1977).
Defining Corruption

well be corrupt according to another conception. As this example makes clear, classic disagreements about what good representation entails give rise to different views about what constitutes political corruption in the legislative context.

This is not a novel idea; indeed, it is widely shared. For Dennis Thompson, "A complete conception of [legislative] corruption for our time would require a full-blown theory of democracy." Thomas Burke makes the same point: "Any adequate standard of corruption in politics ... must be grounded in a convincing theory of representation." Scholars of political corruption as ideologically diverse as Daniel Hays Lowenstein and Bruce Cain acknowledge that pinning down what constitutes corruption, or political corruption more specifically, depends on an analysis of what good or desirable politics entails. For example, Lowenstein claims that while the concept has "a descriptive core on which users of the concept can agree roughly," it is "so intertwined with controversial normative ideas that general agreement on the features of the concept is impossible." Cain also sees the debate about what constitutes corruption, between himself on the one hand and Thompson and Lowenstein on the other, as reducing to a debate about political theory. In his view, "Lowenstein and Thompson offer a defensible basis for reform to those who equate representation with legal trusteeship or to those who find ethical formulations of democracy persuasive." In rejecting the theory of democratic politics on which the other scholars' accounts are based, Cain adopts a proceduralist theory of corruption.

David Strauss agrees that one's views about how to define legislative corruption depend on one's theory of a legislator's role in a democracy. Like me, he begins his argument with an observation that actions that are corrupt in one institutional setting are not corrupt in another. He explicates this point by drawing on the example of the Federal Communications Commission ("FCC") auctioning off the right to use certain frequencies. While the FCC practice was somewhat controversial, Strauss stresses that a judge who

30. Thompson, supra note 23, at 29. Thompson emphasizes the same claim in a more recent article. See Dennis F. Thompson, Two Concepts of Corruption: Making Campaigns Safe for Democracy, 73 GEO. WASH. L. REV. 1036, 1038 (2005) ("The form the virus [corruption] takes depends on the form of government it attacks. In regimes of a more popular cast, such as republics and democracies .... [t]he essence of corruption ... is the pollution of the public by the private.").


34. See id. (arguing that "democracy is procedurally, not ethically, defined" and that this conclusion leads to a narrow view about what constitutes corruption).

publicly did the same thing—decided in favor of the highest bidder—would clearly be acting corruptly. Strauss argues that what distinguishes the FCC example from that of a judge selling outcomes is that a judge’s decision is supposed to be governed by certain norms while the FCC’s decision is not. Of course, the market context in which the FCC auction was situated is also governed by norms, so perhaps his point is better expressed by saying that the cases are governed by different norms—justice versus market norms. He then asks which example is closer to the case of legislative decisionmaking. Is legislative decisionmaking best conceived as governed by a norm like “serve the public interest” or instead by a market-like idea of responsiveness to voters’ wishes or preferences, as expressed through their contributions. Deciding between these two models of democratic decisionmaking calls on foundational questions of democratic theory.

If political corruption is a disease of the body politic, then it depends on a conception of the healthy functioning of the political institution involved. And therein lies the problem. Unlike health and illness in the body, where there is substantial agreement among doctors and others about what constitutes bodily health and illness, a “healthy” political system is far more difficult to define. For one, must it be a democracy or can other political systems also be healthy? Even if we limit ourselves to democratic political systems such as our own, we are likely to disagree about how a healthy democracy operates. We therefore disagree about what corruption is, at least in part because we disagree about what democratic politics, when healthy, entails. Consequently, an account of what constitutes corruption depends on a theory of democracy; yet there is substantial disagreement about what a commitment to democratic representation demands.

B. In Practice

Unsurprisingly, given disagreements about what good democratic politics requires, our campaign finance case law contains at least three distinct conceptions of legislative corruption. I call these “corruption as the deformation of judgment,” “corruption as the distortion of influence,” and

36. Id. at 147.
37. Ronald Dworkin explains this phenomenon by claiming that “[t]he concept of democracy is an interpretive and much contested concept.” RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 379 (2011).
38. David Strauss even uses the term “derivative” to describe the concept of corruption, though he means this in a debunking rather than illustrative way. David A. Strauss, Corruption, Equality, and Campaign Finance Reform, 94 COLUM. L. REV. 1369, 1370 (1994) (“[I]t is far from clear that campaign finance reform is about the elimination of corruption at all. That is because corruption—understood as the implicit exchange of campaign contributions for official action—is a derivative problem.” (emphasis added)). For Strauss, the real problem is unequal wealth. In his view, if wealth were equalized, then the fact that the potential for raising contributions from citizens motivates legislative behavior would not be problematic. Strauss’s debunking view of corruption thus rests on normative views about both fair participation in democratic politics and what representation entails.
"corruption as the sale of favors." In what follows in this Part, I describe each of these conceptions of corruption and explain how each depends on a distinct view about the proper way for a legislator in a democracy to make decisions.

In *FEC v. National Conservative Political Action Committee*, in which the Court struck down expenditure limits on uncoordinated expenditures by Political Action Committees ("PACs"), the Court acknowledged that corruption is a derivative concept. The Court began, "Corruption is a subversion of the political process." Tellingly, the Court then emphasized that this interconnection between a conception of corruption and a view about the proper functioning of the political process means that any particular conception of corruption entails a particular view about how legislators ought to make decisions. The Court thus continued its explanation of corruption as follows: "Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." What the Court neglects to describe, however, is its view about what are the "obligations of office" of a legislator in a democracy. Below I describe three variants on these obligations that are present in the Court's campaign finance cases.

1. Corruption as the Deformation of Judgment

On one view, a legislator ought to exercise his own independent judgment about each decision he faces. This view represents one classic conception of the legislator's role. The legislator, according to this view, should consider only the merits-based reasons that bear on the decision at hand. The fact that a certain number of people support or object to the decision he thinks best or that deciding as he thinks best will help or hinder the legislator's ability to raise funds or achieve reelection should not play a role. If proper legislative decisionmaking is merits-based in this way, then improper or corrupt decisionmaking occurs when non-merits-based factors...
influence the legislator's judgment. Corruption, according to this view, resides in the deformation of judgment.

The idea that a legislator's role requires him to exercise independent judgment is one important vision of proper legislative conduct. The Court recognized this idea in *McConnell v FEC*,

45 where the Court claimed that "Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.' 46 While the continued vitality of that ruling, and thus the rationale on which it is based, may be uncertain, corruption as the deformation of judgment also animates the long history of recusal rules that prohibit legislators from voting on legislation in instances where a conflict of interest may compromise their judgment. *Nevada Commission on Ethics v. Carrigan* recognized this history, 47 as well as the ubiquity of such standards: "Today, virtually every State has enacted some type of recusal law, many of which, not unlike Nevada's, require public officials to abstain from voting on all matters presenting a conflict of interest." 48

This conception of corruption is similar to the conception of corruption that Zephyr Teachout attributes to the Framers. 49 Political virtue for the Framers was as much about attitude as actions; 50 it was "an orientation toward the public interest." 51 The Framers' conception of political virtue thus shares much with a conception of corruption that dictates that legislators should exercise independent judgment. Like corruption as the deformation of judgment, the Framers' conception of corruption that Teachout describes sees a corrupt official as one who "is tempted by narcissism, ambition, or luxury, to place private gain before public good in their public actions." 52

The Court's reluctance to uphold campaign finance restrictions in the context of ballot initiatives is also consistent with corruption as the deformation of judgment. 53 Since there is no legislator or other public official

47. 131 S. Ct. 2343, 2348-49 (2011) (finding no First Amendment violation in state ethics rules that require legislators to abstain from voting on legislation when conflicts of interest are present).
50. Id. at 374 (explaining that corruption, for the Framers, relates to the "moral attitude" of the person).
51. Id.
52. Id. at 375.
53. For example, in *First National Bank of Boston v. Bellotti*, in which the Court considered the constitutionality of a Massachusetts statute that restricted corporations' ability to make contributions or expenditures to influence the outcome of a vote on any ballot initiative, the Court explained, "The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." 435 U.S. 765, 767–68, 790 (1978) (citations omitted). This language is quoted in *Citizens Against Rent Control v. City of Berkeley*, where the Court found that ballot initiatives and referenda are not subject to corruption while reviewing a statute prohibiting contributions of more than $250 to committees formed to...
whose judgment can be deformed, there is no possibility of corruption.\textsuperscript{54} While some scholars view this conception of legislative role as antiquated,\textsuperscript{55} it continues to exert influence, as \textit{Nevada Commission on Ethics} demonstrates.\textsuperscript{56}

2. Corruption as the Distortion of Influence

Corruption as the distortion of influence sees the legislator as properly attentive to the desires and preferences of those he represents. In a well-functioning democracy, the legislator responds to these desires and preferences. If responsiveness to constituents’ wishes is a political virtue, its corresponding vice is a distortion in the manner in which these preferences are weighed. In particular, corruption occurs when a legislator weighs the preferences of some too heavily, especially when the legislator considers the wishes of wealthy contributors more than others. McConnell again illustrates this conception of corruption in a passage that also recognizes corruption as the deformation of judgment: “Just as troubling to a functioning democracy as classic \textit{quid pro quo} corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.”\textsuperscript{57}

In another variant of corruption as the distortion of influence, corporate contributions are particularly worrisome. In some campaign finance cases, the Court assumes that contributions to candidates serve as a rough proxy for actual support for the candidate or his ideas.\textsuperscript{58} Corporate contributions raise special problems, however, because “[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation’s political ideas.”\textsuperscript{59} \textit{Austin v. Michigan Chamber of Commerce,}\textsuperscript{60} which was overruled by \textit{Citizens United v. FEC,}\textsuperscript{61} espoused this conception of corruption most clearly. In \textit{Austin}, the Court upheld the regulation of cor-

\textsuperscript{54} Interestingly, Teachout points out that the Framers considered citizenship to be a political office and thus that citizens too could be corrupt. Teachout, \textit{supra} note 25, at 374.

\textsuperscript{55} \textit{See, e.g., id.} at 396–97 (arguing that this conception of corruption does not make sense to many modern justices).

\textsuperscript{56} \textit{See supra} notes 47–48 and accompanying text.

\textsuperscript{57} McConnell v. FEC, 540 U.S. 93, 153 (2003).

\textsuperscript{58} \textit{See, e.g., FEC v. Mass. Citizens for Life, Inc.,} 479 U.S. 238, 258 (1986) (“Relative availability of funds is after all a rough barometer of public support.”).

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} 494 U.S. 652 (1990), \textit{overruled by} \textit{Citizens United v. FEC,} 130 S. Ct. 876, 913 (2010).

\textsuperscript{61} 130 S. Ct. 876 (2010).
porate expenditures on the grounds that there would otherwise be too much influence exerted by "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 62

Corruption as the distortion of influence encompasses a range of views about who properly should have influence (all voters?, all citizens?, all residents?), as well what influence indeed constitutes a distortion. Critics of this conception of corruption say that it is grounded in a view that each person should have an equal influence on legislative decisionmaking 63 or that each candidate should have an equal chance to win—a characterization that makes the view seem implausible, given that some people are more persuasive than others or hold positions in the public or private sectors that make their views more influential. Indeed, it is for this reason that the Court's most recent campaign finance case, Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, again rejects this conception of corruption. 64 But it need not. Corruption as the distortion of influence could simply rule out some reasons for weighing the views of some constituents more than others—for example, that they are wealthier and thus more able to contribute to campaigns than their poorer neighbors—without adopting the view that each person must have an equal chance to influence legislative outcomes.

3. Corruption as the Sale of Favors

A third view of proper legislative conduct can be defined only by what it excludes; it requires only that the legislator not actually exchange votes or favors for money. The legislator may vote for a bill because he thinks that it is good, because his constituents favor it, because he will attract monetary contributions if he does so, or for any other reason so long as he does not take money (or something else of value) in direct exchange for an official act (a vote, for example). Corruption, on this view, is narrowly defined as quid pro quo corruption—that is, the sale of some public favor.

This view of legislative role clearly undergirds the Court's decision in Citizens United. 65 There, Justice Kennedy, writing for the Court, stated that corruption is "limited to quid pro quo corruption" 66 and explicitly emphasized that "[i]ngratiation and access, in any event, are not corruption." 67 Corruption as the sale of favors also grounds the Court's repeatedly reaffirmed view that the aim of avoiding corruption cannot justify limits on

62. Austin, 494 U.S. at 660.
63. See, e.g., Strauss, supra note 38, at 1384.
64. 131 S. Ct. 2806, 2826 (2011) (“Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election.” (quoting Davis v. FEC, 554 U.S. 724, 742 (2008)) (internal quotation marks omitted)).
65. 130 S. Ct. at 876.
66. Id. at 909.
67. Id. at 910.
personal expenditures. Spending one's own money cannot be corrupt because one can hardly make a backroom deal with oneself. Consistent with this view of corruption, the Court in *Davis v. FEC*[^68] found that "reliance on personal funds reduces the threat of corruption."[^69]

Corruption as the sale of favors also explains the Court's view that independent, uncoordinated expenditures cannot be corrupting. Expenditures by people or groups who are not connected to and not coordinated with candidates, campaigns, or parties are independent. If the expenditures are truly uncoordinated with the candidate, the "circuit is broken," which thereby "negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which our case law is concerned."[^70] The political virtue envisioned by this conception of corruption is very limited. A legislator need merely avoid bribery or its very close cousins in order to avoid corruption.

4. Permutations

These three conceptions of corruption are offered as exemplars, not as a complete list. They demonstrate that there are several quite distinct ways of thinking about the corruption of legislative actors and that our campaign finance case law includes elements of these various types. Campaign finance case law also offers variations on these alternatives that complicate this stylized picture. For example, courts differ about whether legislators are properly influenced by political parties. For some, the fact that political parties are able to influence candidates' positions on issues is an integral part of a well-functioning political process.[^71] For others, this influence is troubling.[^72] We also see a debate about whether special access to candidates or officeholders can be a form of corruption. Both positions on this question rely on or relate to the first conception of corruption—corruption as the deformation of judgment—and yet still stake out opposing views. To some, access simply enables the contributor to persuade the officeholder to change his position, and therefore cannot constitute corruption because it is the

[^68]: 554 U.S. 724 (2008) (holding that the two sections of the Bipartisan Campaign Reform Act that unevenly capped campaign contributions violated the First Amendment).

[^69]: *Davis*, 554 U.S. at 740–41.


[^71]: See, e.g., Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 648 (1996) (Thomas, J., concurring in the judgment and dissenting in part) ("Parties and candidates have traditionally worked together to achieve their common goals, and when they engage in that work, there is no risk to the Republic.").

[^72]: E.g., id. at 648 (Stevens, J., dissenting) ("A party shares a unique relationship with the candidate it sponsors because their political fates are inextricably linked. That interdependency creates a special danger that the party—or the persons who control the party—will abuse the influence it has over the candidate by virtue of its power to spend.").
strength of the ideas, rather than the size of the contribution, that matters.\textsuperscript{73} Others find that special access is problematic because it creates "undue influence on an officeholder's judgment, and the appearance of such influence."\textsuperscript{74} While access may enable persuasion and thus work via the intellect rather than the pocketbook, corruption is still possible. This second view envisions officeholders as vulnerable to the repeated presentation of one view at the expense of another.

This brief survey of the various conceptions of corruption embedded within our campaign finance case law and the accounts of proper legislative decisionmaking that each implies demonstrates that there are several different conceptions of a well-functioning democracy embedded in our campaign finance case law. Each conception of corruption relies on a different view about how a legislator should make decisions and what factors may properly influence that process. By choosing one conception of corruption, the Supreme Court in each of these cases thus implicitly adopts one particular, contested conception of a legislator's role in a well-functioning democracy. Defining corruption therefore implicates the Court in defining democracy.

II. DEFINING DEMOCRACY

This Part takes the claim that corruption is a derivative concept as a point of departure and explores its implications for campaign finance law. Because a conception of corruption depends on a conception of the role of a legislator in a well-functioning democracy, campaign finance cases not only raise the question of whether a law intrudes on the First Amendment right of free speech, they also implicate the question of whether courts ought to require particular, contested conceptions of democracy, as well as a legislator's role within it. While the presence of an individual right justifies judicial oversight, the presence of a question of democratic theory at the same time counsels deference to the elected branches of government. What has been missing from our campaign finance case law to date is a recognition that when the Court defines corruption, it inescapably puts forward a conception of the proper role of a legislator in a democracy. This is a task that the Court should be cautious to take up. In what follows, I make and defend two claims. First, that campaign finance case law implicates the Court in defining democracy in a similar way as do the apportionment and gerrymandering cases, in which the Court has evinced caution in so doing. Second, and again by analogy to that body of law, that a court addressing whether a conception of corruption is sufficiently important to justify a restriction on campaign giving or spending must consider both the individual right at issue and the reasons to refrain from constitutionalizing a particular, contested conception of representative democracy.

\textsuperscript{73} Justice Kennedy, writing for the Court in \textit{Citizens United}, remarked that "infratation and access, in any event, are not corruption." \textit{Citizens United v. FEC}, 130 S. Ct. 876, 910 (2010).

A. The Republican Guarantee Clause

Once we notice that, in defining corruption, campaign finance cases implicitly define good government, we must ask whether and when the Court should define the proper role of a legislator in a well-functioning democracy. In asking whether the Court appropriately constitutionalizes a particular conception of democracy, the natural place to begin is with the Republican Guarantee Clause. The Republican Guarantee Clause provides that "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." While the Clause designates the United States as the guarantor of a republican form of government, the Court has interpreted this power or responsibility as one that rests with Congress. Moreover, the Court usually treats the determination of whether Congress has fulfilled this obligation as a nonjusticiable political question. In order to ensure that the states have a republican form of government, Congress must, at least implicitly, employ criteria for representative democracy. If Congress's determinations in this regard are not reviewable by courts, then it is for Congress to determine what, at a minimum, representative democracy requires.

The nonjusticiability of the Republican Guarantee Clause is controversial, as is the political question doctrine itself. Nonetheless, one way to explain what animates it is the view that there are many reasonable ways to instantiate democratic form. Our Constitution does not mandate only one, though it may rule out some. Choosing among reasonable options is for the elected branches of government—the states in adopting the forms they choose and Congress in policing them for constitutional permissibility. This principle—that Congress may choose among reasonable conceptions of democracy—is illustrated by Pacific States Telephone & Telegraph Co. v.

75. U.S. Const. art. IV, § 4.

76. Erwin Chemerinsky, Cases Under the Guarantee Clause Should Be Justiciable, 65 U. Colo. L. Rev. 849, 863 (1994) ("[T]he Supreme Court consistently has rejected claims brought under the Guarantee Clause, always holding that 'the enforcement of that guarantee, according to settled doctrine, is for Congress, not the courts.'" (quoting Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937))).

77. See cases cited supra note 11.

78. See, e.g., Rachel E. Barkow, More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 Colum. L. Rev. 237 (2002) (arguing for more deference by the Court to the coordinate branches of government both via political question cases and its interpretation of other substantive doctrines); Chemerinsky, supra note 76 (arguing that courts should enforce the Guarantee Clause because not doing so renders it a dead letter and because there is no reason to think that courts are ill-suited to enforce what it requires); Richard L. Hasen, Leaving the Empty Vessel of "Republicanism" Unfilled: An Argument for the Continued Nonjusticiability of Guarantee Clause Cases, in THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 75 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007) (arguing that the political question doctrine should be retained, especially in Republican Guarantee Clause cases); Martin H. Redish, Judicial Review and the "Political Question", 79 NW. U. L. Rev. 1031 (1984–85) (arguing for the abolition of the political question doctrine).
There, the Court refused to hear a challenge to a law enacted by referendum in Oregon on the grounds that deciding whether referenda violate the Republican Guarantee Clause is a nonjusticiable political question. The law was challenged on the grounds that a referendum is inconsistent with a republican form of government. While different conceptions of democracy may rule the initiative process in or out, the Court held that it was for Congress to decide whether the form of government that Oregon voters adopted was acceptable.

Of course there are other ways of understanding the normative underpinnings of the nonjusticiability of the Republican Guarantee Clause. It could instead be based on a view about which branch of government is best suited to make certain sorts of judgments, or on prudential considerations like the pitfalls of courts intruding too dramatically into the inner workings of the legislative branches, or as an instance of the larger phenomenon of "underenforced constitutional norms," or on a combination of these reasons. Nevertheless, there are good reasons—to be discussed later—to leave the elected branches with discretion to choose among reasonable forms of democracy. And that view finds support from the way that the Court has interpreted the Republican Guarantee Clause.

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79. 223 U.S. 118 (1912).
80.  Pac. States Tel. & Tel. Co., 223 U.S. at 151.
81.  Id. at 136.
82.  Id. at 151.
83.  In Colegrove v. Green, Justice Frankfurter famously referred to the interference by courts in legislative affairs as a "political thicket." 328 U.S. 549, 556 (1946) (plurality opinion); see also Baker v. Carr, 369 U.S. 186, 277 (1962) (Frankfurter, J., dissenting) ("Both opinions joining in the result in Colegrove v. Green .... demonstrate a predominant concern ... with avoiding federal judicial involvement in matters traditionally left to legislative policy making ....").
84.  Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 passim (1978). According to Sager, the Court regularly declines to enforce the full scope of constitutional norms for a variety of reasons. When it does enforce these constitutional norms, the norms still operate as a constraint. As a result, other branches of government have a duty to regulate their actions to comport with these norms. See also Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 Harv. L. Rev. 1274, 1309 (2006) ("[B]y holding a category of cases nonjusticiable, the Court establishes a rule of decision, mandating dismissal, that leaves a constitutional norm completely judicially unenforced ....").
85.  Mark Alexander argues that the interpretation of the Republican Guarantee Clause as nonjusticiable imposes a duty on Congress to ensure that states have a republican form of government. Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 Wash. & Lee L. Rev. 767, 804 (2003). Based on this claim, Alexander also uses the Republican Guarantee Clause to shed light on campaign finance doctrine. See id. at 804–23. He argues that when Congress acts under this power, the permissibility of its actions may be nonjusticiable. Id. at 784. Alternatively, he argues that congressional action aimed at ensuring a republican form of government satisfies strict scrutiny under the First Amendment. Id. at 828 (asserting that there can be no doubt that acting to protect the republican form of government is a compelling governmental interest). Finally, he makes a claim that is similar to the view I advance here: that the Republican Guarantee Clause provides a reason for judicial deference to congressional understandings of corruption. Id. at 831–32 ("[P]rotecting the
The Republican Guarantee Clause is not the only relevant doctrinal
guidepost, however. While that Clause suggests that it is for the elected
branches to determine what democracy requires, the Court will intervene
where the particular instantiation of democracy intrudes on an individual
right.

B. The Equal Protection Clause

In *Baker v. Carr*, the Court found that a challenge to a state apportion-
ment statute was justiciable because equal protection issues were raised.86 In
other words, while the Court in *Baker* recognized that the case raised issues
regarding democratic form, the fact that it also implicated the individual
rights to vote and to participate equally in the political process was a reason
for the Court to find the case justiciable. Later, in *Reynolds v. Sims*, the
Court adopted the equal-population-per-representative (one person, one
vote) standard as a constitutional requirement.87 While one can certainly
object that the switching of constitutional clauses was simply to dodge the
issue of whether the Court ought to decide apportionment questions,88 the
*Baker* Court’s appeal to the Equal Protection Clause and the right to vote
can be understood as an assertion that there were individual rights at issue,
in addition to the question of democratic form.89 Where that is the case, says
*Baker*, the Court has a role to play.

In apportionment cases, the Court recognizes the dual pressures at work.
There is an individual right at stake, calling for judicial oversight. At
the same time, this oversight will require the Court to articulate and defend a

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86. 369 U.S. 186, 209 (1962). Many scholars have noted that the switch to Equal Pro-
tection from the Republican Guarantee Clause is a bit of a dodge. See, e.g., JOHN HART ELY,
DEMOCRACY AND DISTRUST 118 n.* (1980) (“Friend and foe alike have come to recognize the
obvious, that although the various state voting rights cases decided by the Warren and Burger
Courts have been styled as equal protection decisions, they cannot comfortably be understood
without a strong injection of the view that the right to vote in state elections is a rather special
constitutional prerogative, a view that cannot be teased out of the language of equal protection
alone and in textual terms is most naturally assignable to the Republican Form Clause.”).
Moreover, the switch of doctrinal category has significant implications. Indeed, ones that may
be unfortunate. See Michael W. McConnell, *The Redistricting Cases: Original Mistakes and
issue as arising under the Equal Protection Clause, the Court committed itself to the norm of
equipopulous districts, without proper consideration of whether that is the proper standard.”).


88. See McConnell, supra note 86, at 104–07 (arguing that the issue of malapportion-
ment should have been addressed via the Republican Guarantee Clause and that the “the Court
adopted a legal theory for addressing the issue that was wrong in principle and mischievous in
its consequences”). John Hart Ely makes a similar point. See Ely, supra note 86, at 122 (“[T]o
be intelligible, Reynolds v. Sims, its majority and dissenting opinions alike, must be ap-
proached as the joint product of the Equal Protection and Republican Form Clauses.”).

89. In other words, those forms of government that intrude on individual rights are
ruled out. In this sense, the form of government is justiciable when it falls below a threshold
delineated by the infringement on the right.
controversial conception of democratic form—a task that the Republican Guarantee Clause suggests should be left to the elected branches. This side of the coin is never absent in the Court's assessment, whether or not one thinks that it balances these concerns appropriately in *Baker, Reynolds*, or later cases. Justice Frankfurter emphasized this point, among others, in his dissenting opinion in *Baker*: "What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union." In *Reynolds*, Justice Warren, writing for the Court, defended the Court's intervention in the issue in the following way:

We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thicket and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less.

In an important recent foray into this area, the Court very explicitly wrestled with the twin pressures exerted by the Republican Guarantee Clause and the Equal Protection Clause. In the 2004 case *Vieth v. Jubelirer*, the Court dismissed a claim of partisan gerrymandering with four justices, in an opinion written by Justice Scalia, finding that such claims are nonjusticiable. Justice Kennedy, concurring in the judgment, wrote a

90. Daniel Ortiz calls this claim the "Got theory?" argument and is largely critical of it. See Daniel R. Ortiz, *Got Theory?*, 153 U. Pa. L. Rev. 459 (2004). In his view, this approach is flawed because "[i]nstead of deepening consideration of the political concerns underlying the cases, the argument has been used to foreclose such consideration." Id. at 461. While he may be correct that making the claim that the Constitution should allow the elected branches of government to choose among competing theories of democracy does not necessarily promote dialogue about questions of democratic theory, it is also not clear that it is the "conversation stopper" that he claims. Id. Moreover, the argument for such deference need not rest on the claim that deference engenders conversation. Deference permits alternative arrangements over time, whether thoughtfully debated or not. Finally, in the context of campaign finance rather than apportionment and gerrymandering, there appear to be thoughtful debates about what constitutes corruption that animate campaign finance laws. When the Court strikes these laws down without attending to the reasons to defer to legislative judgment about what good government entails, it is the Court itself that acts as the conversation stopper.

91. Richard Hasen describes it as a "dilemma" facing judges deciding these cases. Richard L. Hasen, *The Supreme Court and Election Law* 75 (2003). As he explains, "Most observers agree that Court intervention in the political process is dangerous (because it leaves important decisions about the structuring of democracy in the hands of unaccountable judges) yet sometimes necessary (because the courts are the only bodies able to police fundamental unfairness in the allocation of political power)." Id. at 75.

92. *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting); see also id. at 301 ("To divorce 'equal protection' from 'Republican Form' is to talk about half a question.").


95. See id. at 305. Whether the plurality opinion rightly or wrongly defers to legislative judgment about the democratic theory issues embedded in the issue of partisan gerrymander-
somewhat opaque opinion in which he seemed to assert that, in his view, such claims were nonjusticiable for now but that he would "not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." The very ambiguity and tension in Justice Kennedy's pivotal opinion exhibits the pull both to refrain from constitutionalizing a contested theory of democracy and to vindicate violations of individual rights. Where Justice Kennedy expressed sympathy with the plurality's approach, he cautioned that while "it might seem that courts could determine, by the exercise of their own judgment, whether political classifications are related to [fair and effective representation for all citizens] or instead burden representational rights," the "lack, however, of any agreed upon model of fair and effective representation makes this analysis difficult to pursue." Thus, Justice Kennedy, like the plurality, was cautious about embracing any particular, contested theory of representation on which a standard of excessive partisan gerrymandering must rely. On the other hand, Justice Kennedy was loath to abandon the individual rights claim altogether. Rather, he also stressed that "[i]t is not in our tradition to foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied."

*Vieth* sits comfortably in line with *Baker* and *Reynolds*, since all are cases in which individual rights were asserted in a context in which the Court recognized that there were also strong reasons for deference to the elected branches of government. These cases thus demonstrate that where the same case implicates individual rights and questions of democratic theory, there are reasons for courts to intervene and reasons for judicial restraint. We should consider and air both sets of reasons. If, as the first part of this Article argues, defining corruption similarly implicates the Court in defining democracy, our campaign finance case law is deficient because it largely

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96. *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring in the judgment) ("[B]ecause ... we have no standard by which to measure the burden appellants claim has been imposed on their representational rights, appellants cannot establish that the alleged political classifications burden those same rights.").

97. *Id*. at 306.

98. *Id*. at 307.

99. *Id*. at 309 (emphasizing that the reasons for the Court to find claims of partisan gerrymandering nonjusticiable "are not so compelling that they require us now to bar all future claims of injury from a partisan gerrymander").

100. *Id*. at 309–10.

101. What these rights are, however, is the subject of dispute. For example, the individual right could be the Equal Protection–based right to a nondiluted vote, as Justice Souter claims, *id*. at 343 (Souter, J., dissenting), or it could be a First Amendment–based right to be free from "disfavored treatment by reason of their views," *id*. at 314 (Kennedy, J., concurring in the judgment).
ignores the reasons for deference. Because the Court's articulation of a conception of corruption implicates the Court in defining good government, these decisions are as soaked in democratic theory as are Baker, Reynolds, and Vieth. While in the first two the reasons for judicial oversight outweighed the reasons for deference, and in the latter the balance tipped in the other direction, in all three the Court recognized that reasons for intervention and for deference were present and argued the case in these terms.

C. Implications for Campaign Finance Doctrine

The first consequence of recognizing that a theory of corruption implicitly entails a theory of democracy is that we should note the importance of the Court's campaign finance decisions in this respect. While Citizens United and other campaign finance cases are treated as significant cases, they are generally not seen as articulating the basic framework of our democracy, as were Baker and Reynolds. This is a mistake.

Second, the apportionment and gerrymandering cases make clear that there are two important concerns at issue, both of which need consideration. There are the individual rights issues that point toward judicial oversight and the questions of democratic theory that point toward deference. Our campaign finance cases are so far deficient in not also presenting both the reasons for judicial oversight and the reasons for judicial deference.

Third, the reasons offered for deference in the apportionment cases are instructive on their own terms. In part, dissenter in these cases focused on prudential concerns, such as the dangers of wading into a "political thicket"; however, critics of the apportionment cases also worried that it may be a mistake—constitutionally, practically, and morally—to see the Constitution as adopting a particular, contested theory of democracy. Justice Stewart, dissenting in Lucas v. Forty-Fourth General Assembly, a companion case to Reynolds, made the point most forcefully and is worth quoting at length. He wrote,

What the Court has done is to convert a particular political philosophy into a constitutional rule, binding upon each of the 50 States, from Maine to Hawaii, from Alaska to Texas.... My own understanding of the various theories of representative government is that no one theory has ever commanded unanimous assent among political scientists, historians, or others who have considered the problem. But even if it were thought that the rule announced today by the Court is, as a matter of political theory, the most desirable general rule which can be devised as a basis for the make-up of the representative assembly of a typical State, I could not join in the fabri-

102. Some scholars prefer to think of the reasons for judicial supervision in structural terms rather than as grounded in individual rights. See, e.g., Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 Stan. L. Rev. 643, 645 (1998). Nonetheless, they too recognize that there are both reasons for and against judicial supervision of democracy that should be considered. Id.

103. See Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion).

cation of a constitutional mandate which imports and forever freezes one theory of political thought into our Constitution, and forever denies to every State any opportunity for enlightened and progressive innovation in the design of its democratic institutions, so as to accommodate within a system of representative government the interests and aspirations of diverse groups of people, without subjecting any group or class to absolute domination by a geographically concentrated or highly organized majority.\textsuperscript{105}

The facts of \textit{Lucas} underscore this point. The voters of Colorado had approved via a referendum the redistricting challenged in \textit{Lucas}.\textsuperscript{106} In addition, the redistricting plan had been approved by a majority of voters in each district, even those that would be disadvantaged by the numerical underrepresentation.\textsuperscript{107} Although the majority did question the meaningfulness of this vote,\textsuperscript{108} the voters' approval of the redistricting plan in each district surely makes it more difficult to claim that judicial oversight was needed to protect the voters who were disadvantaged by the redistricting.

Justice Stewart's concerns are reminiscent of Justice Holmes's warnings in his famous dissent in \textit{Lochner v. New York}.\textsuperscript{109} Just as the Constitution was "made for people of fundamentally differing [economic] views,"\textsuperscript{110} so too the Constitution should be able to serve people of different but reasonable views about the ways that elected representatives best serve their constituents.\textsuperscript{111} Moreover, given the wisdom of hindsight regarding the success of the Court's apportionment and gerrymandering cases, the analogy between the Court's constitutionalization of a particular, contested theory of democracy in \textit{Baker, Reynolds}, and their progeny and the Court's constitutionalization of a particular, contested account of legislative role in its campaign finance cases counsels caution. The "one person, one vote" standard is not obviously correct as a matter of political theory.\textsuperscript{112} In

\begin{itemize}
\item[105.] \textit{Lucas}, 377 U.S. at 748–49 (Stewart, J., dissenting) (footnote omitted).
\item[106.] \textit{Id.} at 731 (majority opinion).
\item[107.] \textit{Id.}
\item[108.] \textit{See id.} (noting that the choice presented to the Colorado electorate was not clear-cut and that the alternative choice in the apportionment scheme had many drawbacks).
\item[109.] 198 U.S. 45 (1905).
\item[110.] \textit{Lochner}, 198 U.S. at 76 (Holmes, J., dissenting).
\item[111.] The philosopher Joshua Cohen made essentially the same point in a public lecture delivered recently in which he argued that the error of \textit{Citizens United} lay in "the imposition of a contested philosophical position about democracy, as the Lochner Court imposed a contested philosophical position about economic liberty." See Joshua Cohen, Martha Sutton Weeks Professor of Ethics in Soc'y, Professor of Pol. Sci., Phil., & Law, Stanford Univ., Address at the Edmond J. Safra Ctr. for Ethics at Harvard Univ. 7–8 (Mar. 11, 2011) (transcript on file with author).
\item[112.] \textit{See, e.g., Dworkin, supra} note 37, at 388 (arguing against the normative appeal of what he terms an "equal impact" conception of political equality); Richard Briffault, \textit{Who Rules at Home?: One Person/One Vote and Local Governments}, 60 U. Chic. L. Rev. 339, 345 (1993) ("The difficulties of applying the one person/one vote doctrine to local governments illuminate the multiple functions and sometimes conflicting conceptions of local government at work in our system and raise questions about the place of the one person/one vote doctrine itself as a bedrock norm in our theory of representation."); Sanford Levinson, \textit{One Person},
addition, the test was originally thought to have practical virtues, including that it would rein in partisan gerrymandering and would be easy to administer. The first has clearly not materialized, and the second is of doubtful value if that is all that can be said for the standard. Critics have questioned why it is population that matters rather than voters when this fact can have the effect of giving voters in districts with large populations of people who cannot vote (children, felons, noncitizens) significantly more influence than voters in districts with small populations of ineligible voters. Others have argued that some issues of local government are stymied by the equal population requirement. If eligible voters are disengaged and therefore do not vote when district boundaries do not track traditional political boundaries, it hardly matters that if they were to vote, their votes would have equal force as all others.

At a more foundational level, Ronald Dworkin questions the normative appeal of a conception of political equality that requires equal impact.

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One Vote: A Mantra in Need of Meaning, 80 N.C. L. Rev. 1269, 1272, 1281 (2002) (arguing that descriptively we do not follow this mantra in that children, felons, and noncitizens are persons yet do not vote and that the real principle we use—which he terms the "one voting representative/one constituent model"—is not obviously defensible from the perspective of political theory).

113. See, e.g., McConnell, supra note 86, at 103 ("[F]reed from these traditional constraints [like respecting political boundaries] by the Supreme Court's 'precise mathematical equality rule,' legislative line-drawers were able to draw maps to produce the results they desired, rendering elections less a reflection of popular opinion than of legislative craftsmanship.").

114. Consider the judicial standard "always rule for the plaintiff." While it is extremely manageable and easy to apply, surely this fact alone is insufficient to recommend it. Richard Hasen makes a similar point in arguing for the virtues of unmanageable, and therefore less constraining, standards. See Hasen, supra note 91, at 48 ("Precisely because these cases require the Supreme Court to make at least implicit normative judgments about the meaning of democracy or the structure of representative government, the danger of manageable standards is that they ossify new rules and enshrine the current Court majority's political theory.").

115. See, e.g., Levinson, supra note 112, at 1271–72.

116. E.g., Briffault, supra note 112, at 419 ("Population equality is not the only factor relevant to assessing the fairness of a representative scheme."); id. at 423 ("Governance structures that combine representation of regional population majorities with extra attention to the interests of component local governments—and, concomitantly depart from pure equal population representation—might not be seen as inherently negating fair representation but rather as part of the complex process of reconciling the competing roles of population, pre-existing communities, economic and social interests, and state political and policy preferences.").

117. By “equal impact," Dworkin means "that the opinion each finally forms in the process will be given full and equal weight." Dworkin, supra note 37, at 388. The "one person, one vote" standard of Reynolds relies on an equal impact conception of political equality. Dworkin proposed instead that political equality requires "that no adult citizen's political impact is less than that of any other citizen for reasons that compromise his dignity—reasons that treat his life as of less concern or his opinions as less worthy of respect." Id. I mention Dworkin's view not to argue in its favor; Dworkin has already done that himself, and the reader will have to judge whether he succeeds. See id. at 388–92. Rather, I refer to his rejection of an equal impact conception of political equality in favor of a view in which “[p]olitical equality is a matter not of political power but of political standing” in order to show that there are alternative, reasonable conceptions of political equality other than the equal impact view that
There are many reasonable ways to instantiate representative democracy. Disagreements about how a representative should conceive of his role, what responsiveness requires, and whether money functions as a proxy for voter support are all reasonable disagreements. Thus we should eschew judicial actions that adopt one view of representative democracy from among reasonable alternatives as the constitutionally mandated account.\textsuperscript{118} Because judicial pronouncements about what constitutes corruption entail commitments to contested conceptions of democracy, there are strong reasons for courts to avoid defining corruption.

This last, straightforwardly normative argument for deference to the elected branches on questions of democratic theory is offered in a tentative vein. Perhaps we need judicial supervision to ensure that the theory of democracy adopted by the legislature, and the concomitant theory of corruption that polices it, is not intended to or does not succeed in overly entrenching incumbents. Then, we could not depend on the democratic process to bring about change, and the judiciary would be required to step in to perform the function John Hart Ely described as "[c]learing the [c]hannels of [p]olitical [c]hange."\textsuperscript{119} This may be so.\textsuperscript{120} But if it is—and I offer some reasons for caution here as well—this justification for judicial oversight nevertheless suggests only a limited role for the courts.

This process-protecting concern thus provides a reason for the Court to reject a particular conception of corruption adopted by a legislature. On this basis, courts could reject campaign finance laws, and the conceptions of corruption and legislative role embedded within them, on the grounds that the laws in question unduly entrench incumbent lawmakers. If, as some po-
Political scientists argue, well-funded opponents can reduce the size of the advantage that incumbents enjoy,\textsuperscript{121} then courts could reject campaign finance laws that unduly limit the ability of challengers to garner financial resources. Note, however, that if the Court may only reject conceptions of corruption for this reason, the ability of the Court to reject campaign finance laws will be substantially limited.

Notwithstanding the process-protecting reasons for a court to oversee whether campaign finance laws serve to overly entrench incumbents, there are reasons for caution. It is not easy to articulate a workable and defensible theory of when a conception of corruption unduly entrenches incumbents. Should we think about this issue in subjective terms, focusing on whether the legislators intend to entrench themselves? Of course, legislators legitimately try to get reelected, and their desire to do so, at least on many accounts, is a proper motive influencing their decisions. It is difficult to define when this subjective intent is legitimate and when it is illegitimate. Perhaps, then, we should think about this question in objective terms, focusing on whether a particular law produces an effect that unduly entrenches incumbents? But here too there are problems. How much entrenchment is too much? Surely, in part, this is a question for the electorate themselves to answer. I do not mean to suggest that these questions are unanswerable, only that they are difficult. Moreover, and perhaps more importantly, their difficulty is reminiscent of the debates about partisan gerrymandering. It is precisely concerns of this sort that led the plurality in \textit{Vieth} to conclude that partisan gerrymandering issues are nonjusticiable,\textsuperscript{122} and it is precisely these concerns that dominate the scholarly literature on this issue.

The same sorts of concerns that make it difficult to articulate "discernible and manageable standards"\textsuperscript{123} to police for the undue entrenchment of incumbents in the context of partisan gerrymandering also make it difficult to articulate workable and defensible standards to police for undue entrenchment of incumbents in the context of campaign finance laws. And gerrymandering is likely to be a far more effective way to insulate incumbents from robust reelection challenges than are laws that restrict campaign giving or spending. Therefore, unless or until courts are ready to police gerrymandering on these grounds, they should refrain from using a concern about the entrenchment of incumbents to strike down campaign finance laws.

Lastly, one cannot help but note that the same justices who were hesitant to constitutionalize questions of democratic theory in \textit{Vieth} were nonetheless willing to do precisely this in \textit{Citizens United}. At the same time, those justices who argued for judicial oversight and the constitutionalization of questions of democratic theory in \textit{Vieth} may well have argued on the side of

\textsuperscript{121.} See, e.g., Ronald Keith Gaddie & Lesli E. McCollum, \textit{Money and the Incumbency Advantage in U.S. House Elections}, in \textit{The U.S. House of Representatives} 71, 84 (Joseph F. Zimmerman & Wilma Rule eds., 2000) ("[T]he key to reducing the incumbency advantage appears to be increasing the financial quality of the challengers in congressional elections.").


\textsuperscript{123.} Id.
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judicial deference when the Court implicitly raised the same questions in *Citizens United*. So, for example, then-Chief Justice Rehnquist as well as Justices O'Connor and Thomas joined Justice Scalia's plurality opinion in *Vieth*. Justice Kennedy filed an opinion concurring in the judgment. The plurality argued forcefully for the view that courts should defer to the elected branches of government when questions of democratic theory are raised. Indeed, Justice Scalia castigated the dissenters on precisely this point, arguing that they were in the "difficult position of drawing the line between good politics and bad politics." Of those justices still on the Court when *Citizens United* was decided (Justices Scalia, Thomas, and Kennedy), all three took the contrary view when the issue of constitutionalizing questions of democratic theory arose in less obvious form. Once we recognize that *Citizens United*'s definition of corruption implicates the Court in adopting a particular, contested theory of democracy in the same way as that of *Vieth*, this fact provides these justices with a reason to change their views about one case or the other.

Similarly, Justices Stevens, Souter, Ginsburg, and Breyer all dissented in *Vieth* on the grounds that each thought that the Court could and should rule out some redistricting as insufficiently democratic to meet constitutional requirements. In other words, these justices thought that the Court should intervene to ensure that the redistricting met at least some minimally required conception of democratic form. Yet of those justices still on the Court when *Citizens United* was decided (Justices Stevens, Ginsburg, and Breyer), these justices were on the side of upholding the law at issue. Here it is not so clear that the justices adopted an inconsistent position on the question of whether courts should supervise or defer to the elected branches when questions of democratic theory arise.

There are two possibilities. First, these justices may think that courts should require that the theories of democracy embedded within law meet minimum standards but find that this requirement is satisfied in the context

124. *Id.* at 270.
125. *Id.* at 306 (Kennedy, J., concurring in the judgment).
126. *Id.* at 299 (plurality opinion).
127. *Id.* at 317 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting) (joined by Justice Ginsburg); *id.* at 355 (Breyer, J., dissenting).
128. Justice Stevens, for example, found that impartiality is a minimum requirement of governmental action in a democracy. *Id.* at 333 (Stevens, J., dissenting) ("[T]he Equal Protection Clause implements a duty to govern impartially that requires, at the very least, that every decision by the sovereign serve some nonpartisan public purpose."). Justice Breyer defended a conception of justified versus unjustified entrenchment by delineating legitimate factors that may influence legislators from those that are illegitimate in his view. See *id.* at 360–61 (Breyer, J., dissenting) ("By unjustified entrenchment I mean that the minority's hold on power is purely the result of partisan manipulation and not other factors. These 'other' factors that could lead to 'justified' (albeit temporary) minority entrenchment include sheer happenstance, the existence of more than two major parties, the unique requirements of certain representative bodies such as the Senate, or reliance on traditional (geographic, communities of interest, etc.) districting criteria."). He did not explain why geographic communities produce justified entrenchment while partisan manipulation does not.
of the campaign finance restrictions. The conception of corruption implicit in the restrictions on corporations and unions using money from general treasury funds at issue in *Citizens United* rests on a theory of representative democracy that these justices may find constitutionally permissible. Alternatively, these justices could think that the fact that campaign finance cases require the court to constitutionalize a question of democratic theory provides a powerful reason to defer to the elected branches. If that is the case, their views would conflict with those they adopted in *Vieth*.

III. THE COURT’S ROLE REEXAMINED: OBJECTIONS AND REPLIES

In this Part, I present and reply to two important objections to the view I have presented thus far. Section III.A addresses the argument that courts should act to ensure fair political processes and indeed act most legitimately when they do so. According to this argument, my suggestion that they should refrain from intervening to leave legislatures free to define democracy is misguided. Section III.B considers the argument that defining democracy cannot be avoided because anytime courts delineate the scope of individual rights, they necessarily also incorporate a theory of democracy.

A. Safeguarding Process

The suggestion that courts ought to defer to the elected branches of government regarding questions of democratic form may, at first blush, seem to turn the insights of John Hart Ely on their head.129 Ely famously argues that courts should refrain from striking down laws when constitutional interpretations rest on controversial substantive moral claims.130 Instead, he argues, courts act most legitimately in striking down laws when they act to remedy one of two process defects: unclogging democratic channels or ensuring the representation of minorities.131 The argument offered in this Article may seem, ironically, to suggest that courts should defer to legislatures in one of the two types of instances where even Ely, a staunch defender of legislative prerogatives, suggests that court intervention is called for. When courts substitute their own conception of corruption for that of the elected branches of government, aren’t they acting to improve the workings of our democracy? And if so, isn’t this precisely, and in fact quintessentially, the sort of role for a court in a democracy?

This objection is overstated for three reasons. First, Ely’s theory is often described as a “process-perfecting view,”132 suggesting that actions taken pursuant to it do not rest on controversial substantive judgments but instead merely on improving the process by which a legislature debates and acts on

130. *Id.* at 102–03.
131. *Id.* at 103.
these values. When the Court substitutes its conception of corruption for that of the elected branches, however, the Court not only speaks to process but also to substance. If a conception of political corruption depends on a conception of good government, then when the Court substitutes its conception of corruption for that of a legislature, it substitutes its conception of good government for that adopted by our elected representatives. In doing so, not only does the Court thus substitute its own controversial moral views for those of the electorate but it does so on one of the central moral questions about which we may reasonably disagree—for defining democracy is itself a critically important moral question. Following Ely, one could easily argue that the Court should be especially deferential in this sort of case.

Ely himself sees the question presented by Reynolds v. Sims as both substantive and procedural in this way. In his view, the decision should be seen "as the joint product of the Equal Protection and Republican Form Clauses." On the one hand, he suggests that the Constitution could not accept wildly disparate weighting of votes, but on the other, he thinks that the particular rule the Court adopted in Reynolds was not constitutionally required. Ely ends up defending it, but not in purely process terms. Rather, based on a living Constitution idea more familiar to current constitutional debates, he argues that the trend toward equality in the distribution of important goods and the expansion of the franchise suggest "a general ideal" of "at least rough equality in terms of one's influence on governmental choices." He recognizes, however, that this value could be instantiated in very different rules regarding how electoral districts must be drawn. Ultimately, Ely defends Reynolds in pragmatic terms. It would be unseemly for the Court to make explicit the different ways in which parties influence the process to thereby justify differential weighting of votes. Thus, Ely defends Reynolds on the grounds that it is better than alternative possibilities. His careful treatment of what might be seen as the poster-child case for his process-based view illustrates how he too recognizes that apportionment issues present important reasons for judicial deference as well as oversight.

133. ELY, supra note 86, at 122.

134. In Ely's view, neither the Equal Protection nor Republican Guarantee Clauses requires this rule. Id. Ely notes that disparate weighting of votes was not irrational. Id. at 121 ("Chief Justice Warren's opinion for the Court in Reynolds tried to suggest that any deviation from a one person, one vote standard was irrational, but that is nonsense."). Moreover, he does not see the problem as the fact that the standard "is incapable of meeting the rightfully stronger demand the Court has imposed in the voting area." Id. at 121–22. Neither does he view the problem with disproportionately weighted votes as lying in a conflict with the Republican Guarantee Clause. Id. at 123. Rather, in his view, "'One person, one vote' is certainly a principle the Republican Form Clause is capable of containing, but so is Stewart's weaker 'simply don't systematically frustrate the majority will' approach." Id.

135. Id. at 119, 123.

136. Id. at 123.

137. In Ely's terms, "Sometimes more is less." Id. at 125.
Second, the view I propose allows for the individual rights issues identified to outweigh the reasons to defer on questions of democratic theory, as we saw in Baker and Reynolds.\textsuperscript{138} Third, the view I propose leaves open the possibility of Court intervention to police for the entrenchment of incumbents, an Ely-esque concern. Nonetheless, I recommend caution in bringing this concern to bear. Given the Court's reluctance to review partisan gerrymandering claims with regard to the entrenchment of incumbents, the Court should be similarly disinclined to overturn campaign finance laws on these grounds.

B. Defining Rights

One might object to the account presented above by noting that any time the Supreme Court defines the scope of a constitutionally protected right, it implicitly relies on a particular theory of democracy. Indeed, this connection will be especially close in the case of First Amendment rights.\textsuperscript{139} For example, before the Court reaches the question of whether a restriction on the First Amendment right to free speech is justified by the statute's role in preventing corruption or its appearance, the Court must first decide that a restriction on giving or spending money on political activity is in fact a restriction on speech under the First Amendment. But, one might argue, deciding whether a restriction on giving and spending money on political speech necessarily implicates questions of democratic theory, in that the decision relates to the proper role of money in the political sphere.\textsuperscript{140} Similarly, we could see classic First Amendment cases like Brandenburg v. Ohio\textsuperscript{141} and New York Times Co. v. Sullivan\textsuperscript{142} as implicating theories of democracy. For example, Brandenburg depends on a theory of the stability of democracy in holding that only speech advocating imminent lawless action can be regulated, and Sullivan depends on

\textsuperscript{138} Of course, Ely would not have conceived of these cases in this way. For Ely, the right to vote is protected not because of its individual rights dimension but rather because of its implications for protecting democratic processes. In his view, "A more complete account of the voting cases is that they involve rights (1) that are essential to the democratic process and (2) whose dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo." Id. at 117.

\textsuperscript{139} I am grateful to Richard Fallon for pressing this point with me.

\textsuperscript{140} Indeed, I have made such an argument myself. See Deborah Hellman, Money Talks but It Isn't Speech, 95 MINN L. REV. 953 (2011) (arguing that the decision whether a particular good ought to be provided via the market or instead via a nonmarket mechanism ought to be left to democratic decisionmakers and thus that only rights which require market-traded goods to be effective include a concomitant right to spend money to exercise them). However, as I argue above, the degree to which defining rights implicates questions of democracy varies.

\textsuperscript{141} 395 U.S. 444, 447-48 (1969) (per curiam) (striking down an Ohio law that made it a crime to "advocate or teach the duty, necessity or propriety" of violence on the ground that mere advocacy cannot be made a crime, and holding that the state may proscribe advocacy of violence only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

\textsuperscript{142} 376 U.S. 254, 279-80 (1964) (holding that false statements of fact about public officials related to official conduct are protected by the First Amendment unless made with actual malice).
a theory of the importance of even false speech about public officials to self-government.

This objection is correct, to some extent. The critique rightly points out that many decisions the Court makes require it to decide questions that implicitly rely on contested theories of democracy, perhaps especially First Amendment cases. However, these decisions do so to varying degrees. Indeed many individual rights cases—upholding the right of women to abort a previable fetus\textsuperscript{143} or deciding that the Constitution does not protect a right to physician-assisted suicide,\textsuperscript{144} for example—have only an attenuated connection to democratic theory. Of course, they do depend on the view that individual rights appropriately limit democratic decisionmaking, but that is hardly debatable in our constitutional order. Moreover, they also implicate theories of how courts should determine what these rights are, but this question relates more to a theory of constitutional interpretation than a theory of democracy itself.

First Amendment cases tread more closely to issues of democratic theory, but here too some do so more than others. So for example, the issue presented in Sullivan more clearly implicates a theory of democracy than does Brandenburg because Sullivan implicates the conditions for self-government, at least in my view. While others may disagree about how to arrange these cases in terms of how much or how little they raise issues that implicate questions of democratic theory, all but the most ardent deconstructionist are likely to agree that there are differences in degree.

Defining corruption is different from these other questions in degree rather than in kind. In that sense, the objection is correct. But the difference in degree is significant and meaningful. So while court decisions about rights always implicate democratic theory, corruption is meaningfully different because it directly entails a particular, contested theory of democracy. The reciprocal relationship between corruption and democratic theory is not present between individual rights, even First Amendment rights, and democratic theory. In part, this is because First Amendment rights are commonly understood to be justified by several different theories, only one of which relates to democracy in a straightforward way. For example, a First Amendment right could either be recognized on the basis of the importance of the right to self-government, or the same right could be recognized on the basis of its importance to self-expression or individual dignity. The fact that alternative theories justify First Amendment rights means that a decision that either recognizes or rejects the right in question need not implicate a contested theory of democracy. Moreover, to the extent that alternative accounts of the normative underpinnings of the First Amendment are overlapping rather than competing, a particular decision that includes considerations related to self-government may also rest on other normatively significant factors such that one cannot say that the decision entails a partic-


\textsuperscript{144} Washington v. Glucksburg, 521 U.S. 702, 728 (1997).
ular theory of democracy. Finally, even when the First Amendment decision seems to rest exclusively on a self-government rationale, the decision may be justified by several different theories of democracy and thus not require the Court to define the proper functioning of a democracy to the same degree required by an account of corruption for democratic politics.

C. Rights and Burdens

In the voting rights and apportionment arena, we see the Court airing and attending to both the reasons for oversight and the reasons for deference. But how does it do so?\textsuperscript{145} On the one hand, we have an individual right at issue, which would seem to call for strict scrutiny. But on the other hand, we do not have an ordinary state interest. Rather, the fact that deciding whether a particular districting scheme violates the Constitution implicitly requires the Court to adopt a particular theory of democracy is a reason for the Court to defer to the legislature. Although the Court is not clear exactly how it weighs these two concerns, in deciding that judicial oversight was called for in \textit{Reynolds} but deference was called for in \textit{Vieth}, something other than regular strict scrutiny appears to be at work.

One way to balance these competing concerns would be to focus on the degree to which the individual right is infringed.\textsuperscript{146} Since weighty concerns point both toward judicial oversight and against it, the Court could look at how much the right is affected by the law at issue in determining whether oversight is necessary. The Court employed this sort of approach in the 2008

\textsuperscript{145} In an interesting article, Yasmin Dawood develops a provocative account of how courts should weigh reasons for judicial intervention versus deference. See Yasmin Dawood, \textit{The Antidomination Model and the Judicial Oversight of Democracy}, 96 GEO. L.J. 1411, 1434 (2008). In her view, courts should focus on whether domination occurs, which she defines as comprised of four factors: the entrenchment of power, the procedural abuse of power, the substantive abuse of power, and the appearance of domination. \textit{Id.} at 1433–34. Because domination can occur as a result of both legislative action and judicial intervention, courts should adopt what she terms “a minimizing-democratic-harms approach,” \textit{Id.} at 1447, choosing to strike down laws only when doing so minimizes domination by the legislature and the judiciary, \textit{Id.} at 1450. One important similarity between her approach and the one I present here is that for Dawood, “the decision to intervene is treated as an institutional tradeoff.” \textit{Id.} at 1470. She overtly balances the reasons for judicial oversight against the reasons for judicial deference (although she thinks of these in different terms), just as the view I propose does.

\textsuperscript{146} Richard Hasen’s view about when courts should intervene in cases in which democratic theory is implicated also tries to balance individual rights concerns with the importance of allowing the elected branches fairly wide latitude to develop their own political theory. See, \textit{e.g.}, HASEN, \textit{supra} note 91. In his view, this balancing is accomplished by distinguishing core principles that enjoy wide social consensus from disputed theories of democracy. \textit{Id.} at 74–100. Court intervention is called for, in Hasen’s view, when it acts to uphold one of these principles. \textit{Id.} Otherwise, the Court should defer to the elected branches of government. \textit{Id.} at 102 (“In the case of a legislative body’s voluntary imposition of a contested vision of political equality, the court should be deferential to (but not a rubber stamp of) the value judgments about the balance between equality and other interests made by the legislative body while at the same time be skeptical about the means by which the legislative body purports to enforce the contested political equality right.”).
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case *Crawford v. Marion County Election Board*, 147 which upheld an Indiana law requiring voters to show photo identification. The Court’s decision rested on the fact that producing a photo ID is not a significant burden on the right to vote.148 The Court looked at the burdens on the ordinary person who lacks a photo ID and concluded that

> [F]or most voters who need them, the inconvenience of making a trip to the BMV [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.

> ... [A] somewhat heavier burden may be placed on a limited number of persons. They include elderly persons born out of state, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed.149

As to all these classes of persons, the Court found that the law did not impose an undue burden. 150 Whether or not one thinks that the Court weighed these burdens appropriately, the plurality, concurring, and dissenting opinions appear to agree that the key factor to consider is the degree of the burden on the right to vote. 151

It is significant that *Crawford* employs an approach that looks to the degree of infringement on the individual right because *Crawford*, like the cases I have been discussing here, must weigh the infringement on the right to vote against the sort of state interest that has significant implications for questions of democratic form. The state interest put forward in *Crawford* was preventing fraud. 152 While preventing voter fraud is clearly an important governmental interest, the question of how much fraud one must prevent in order to compensate for the fact that legitimate voters will be discouraged from voting is a question of political values. Although some commentators thought that the Court was wrong to address the case as raising an issue of individual rights and instead argued that it should have been approached

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149. *Id.* at 198–99 (footnotes omitted).
150. The Court’s conclusion rests, in part, on the fact that the small burden that is imposed is due. As the Court explains, “It is unlikely that such a requirement would pose a constitutional problem unless it is wholly unjustified.” *Id.* at 199.
151. *See id.* at 205 (Scalia, J., concurring in the judgment) (“[T]he first step is to decide whether a challenged law severely burdens the right to vote.”); *id.* at 223, 237 (Souter, J., dissenting) (disagreeing with the majority because the law’s burden on the right to vote is “far from trivial” and that it imposes an “unreasonable and irrelevant burden” on voters); *id.* at 237 (Breyer, J., dissenting) (finding that the law was unconstitutional because it imposed a large burden on voters without a driver’s license or other valid form of identification).
152. *Id.* at 187 (plurality opinion) (noting that the complaint alleges that the law “is neither a necessary nor appropriate method of avoiding election fraud”).
through a structural lens, others commended the Court for retaining the focus on individual rights. The case is noteworthy, however, because it deals with a situation in which the Court recognized and balanced the individual right at issue against the fact that the case implicated a question of democratic values. In this context, the Court looked to the degree of burden on the individual right.

In one sense, campaign finance doctrine already recognizes that the degree of infringement on the free speech right is constitutionally relevant. In *Buckley v. Valeo*, the seminal campaign finance case that set the framework that essentially endures today, the Court distinguished expenditure limitations from contribution limitations on the basis that the latter impose less on the First Amendment right at issue. The Court explained as follows:

By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication . . . . [I]t permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

Perhaps we should say that, in the Court's view, contribution limitations are not an undue burden on the right of free speech.

In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Court invalidated Arizona's matching-fund law because, in its view, the allocation of matching funds to opponents "substantially burdens" a privately financed candidate's First Amendment right. What is missing from the assessment of whether this burden is indeed substantial, however, is an ap-

153. See, e.g., Dan Tokaji, *Crawford: It Could Have Been Worse*, ELECTION L. @ MORTITZ (Apr. 29, 2008, 6:53 AM), http://moritzlaw.osu.edu/blogs/tokaji/2008/04/crawford-it-could-have-been-worse.html (arguing that the biggest problem with the decision is its "focus on the individual voter misses the likely systemic impact of the law"); see also Larry Mantle, *AirTalk: Voter ID Law Upheld by Supreme Court*, S. CAL. PUB. RADIO (Apr. 28, 2008), available at http://www.fluctu8.com/podcast-episode/airtalk-formonday-april-28-2008-hour-2-4320-25805.html (interviewing Richard Hasen who argues that the "most troubling" aspect of the decision is that its reasoning ignores whether legislators enacted the law in order to skew the electorate in a partisan fashion). These views draw on the structural approach to voting issues put forward by Issacharoff and Pildes. See Issacharoff & Pildes, *supra* note 102, at 645 (arguing that it is wrong for the Court to "avoid confronting fundamental questions about the essential political structures of governance and instead apply sterile balancing tests weighing individual rights of political participation against countervailing state interests in orderly and stable processes").

154. See, e.g., Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1292 (2011) (arguing that the so-called "structuralist" turn in voting rights cases leaves out the important interest in equal citizenship enacted through voting, and that the *Crawford* Court was correct to frame the issue as a balancing of the individual right to vote against the state's interest of preventing fraud).


preciation of what counts on the other side. If there is no good reason for a burden, almost any burden on a right will be too great. But if, as this Article argues, the Court were to recognize that, like in apportionment and gerrymandering cases, there is more than an individual right at stake, this case and other campaign finance cases might come out differently.

CONCLUSION

Corruption is a policing concept. A corrupt act is one that violates the norms of the institution. As such, a conception of corruption depends on a theory of the institution involved. Legislative corruption thus depends on a theory of a representative’s role in a democracy. Recognition of the reciprocal relationship between a definition of corruption and a theory of democratic politics has important implications for campaign finance law. In recent cases, the Court has flip-flopped between broader and narrower understandings of corruption, with its most recent pronouncement on this question adopting a narrow definition. Because a definition of corruption relies on a definition of the healthy functioning of a democracy, the Court’s campaign finance cases in fact constitutionalize a theory of representation.

In this respect, campaign finance cases are importantly similar to apportionment and gerrymandering cases, for these too implicate the Court in articulating a particular theory of democracy. But unlike those cases, the Court’s campaign finance cases fail to make explicit the fact that they implicate the Court in constitutionalizing questions of democratic form as deeply as do cases dealing with the drawing of district lines. The appropriate role of money in politics, like the drawing of districts, addresses foundational questions about the form of our democracy. If the latter cases provide reasons for judicial deference to legislative judgment, then so do the former.

In both types of cases, there are important reasons for judicial oversight as well as for judicial deference. Oversight is called for because individual rights are at stake (free speech or the right to vote). In both types of cases, these rights have a purely individual-rights cast and a more systemic cast that implicates questions of democratic theory. The first and most important contribution of this Article is to stress that campaign finance cases must recognize both the reasons for judicial oversight and judicial deference, as districiting cases have done. Delineating proper from improper influence on legislative judgment is no easy task. The reasons to largely leave such a judgment to legislators are not only that these questions involve trade-offs among competing policy considerations and that legislators are familiar with these sorts of challenges but most importantly that doing so allows us the freedom of trial and error that constitutionalizing this question rules out.

If this is right, we must then ask how the Court should weigh the competing reasons for oversight and deference. Here too, it is helpful to look at how the Court addresses this question in other contexts in which it must weigh an individual right against something other than a simple state interest. I suggest that in such cases, the Court should look at the degree of intrusion into the individual right. Applying this approach, many campaign
finance laws would be constitutionally permissible. There are reasons for deference to legislative judgment about what good representation in a democracy requires. So long as the law at issue does not impose an undue burden on an individual's right to free speech, these reasons for judicial deference to legislative conceptions of the proper role of a legislator in a democracy outweigh the reasons for judicial oversight.