Loyola of Los Angeles Law Review

Volume 48
Number 3 *Developments in the Law: Election Law; Developments in the Law: Law of War*

Article 3

Spring 2015

When Rhetoric Obscures Reality: The Definition of Corruption and Its Shortcomings

Jessica Medina

WHEN RHETORIC OBSCURES REALITY: THE DEFINITION OF CORRUPTION AND ITS SHORTCOMINGS

Jessica Medina∗

Due to public scorn after the unraveling of the Watergate scandal, the Supreme Court considered the constitutionality of the Federal Election Campaign Act's restrictions on political contributions and expenditures. Buckley v. Valeo *established that no legitimate government interest existed to justify restrictions on campaign expenditures, and only the prevention of corruption or the appearance of corruption could justify restrictions on campaign contributions. Since then, the Court has struggled to articulate a definition of corruption that balances First Amendment protections with the potential for improper influence. This Article argues that the Court's current definition of corruption is too narrow, and proposes a flexible definition dependent on the speaker. Furthermore, this Article advocates for the acknowledgment of additional governmental interests as legitimate. Adopting a broader definition of corruption and considering additional interests will placate public fears without infringing on important speech rights.*

∗ J.D., May 2014, Loyola Law School Los Angeles; M.A., Professional Communication, January 2010, California State University, Fullerton; B.A. Legal Studies, May 2007, Chapman University. I am grateful to my advisor and mentor, Professor Jessica Levinson, for sharing her indispensable insights during our countless discussions, and to my editor Marleina Paz, for her attentive editing and thoughtful input. Thank you also to Scott Klausner, Cameron Bell, Michael Driscoll, and the staff and editors of the *Loyola of Los Angeles Law Review* for their scrupulous work in preparing this Article for publication. Finally, thanks to Matt, my family, friends, and Monty for their continuing love, support, and encouragement.

TABLE OF CONTENTS

> *Politics has become a growth industry and a way of life for millions of Americans. The corrosive influence of money blights our democratic processes. We have not been sufficiently vigilant; we have failed to remind ourselves, as we moved from town halls to today's quadrennial Romanesque political extravagances, that politics is neither an end in itself nor a means for subverting the will of the people.*[1]

I. INTRODUCTION

The concept of "one person, one vote" is central in a successful democracy.[2] The communal beliefs that no vote goes uncounted and no voice is too small strengthen the public's faith in the system.[3] The possibility that politicians will trade donations for political favors threatens these beliefs.[4]

In 1972, the Washington, D.C., police department arrested five men for breaking into the Democratic campaign headquarters in the Watergate Hotel, leading to the unraveling of one of the largest government scandals in U.S. history.[5] The ensuing investigation unveiled a pervasive practice of illegal campaign fundraising and eventually led to the President Richard Nixon's resignation.[6] In an attempt to recover from the wake of the Watergate scandal and restore the public's faith in the government, Congress enacted amendments to the Federal Election Campaign Act of 1971 (FECA).[7] As amended in 1974, FECA established yearly limits on the amounts

1. Buckley v. Valeo, 519 F.2d 821, 897 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976).

2. *See* J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 609 (1982).

3. *Id.* at 627 (citing Alexis de Tocqueville's description of American "civic spirit" due to the belief in a system of equality).

4. *Id.* at 645 (concluding that the presence of money in the political system poses a threat to the principle of "one person, one vote").

5. KURT HOHENSTEIN, COINING CORRUPTION: THE MAKING OF THE AMERICAN CAMPAIGN FINANCE SYSTEM 217–20 (2007).

6. David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 REV. LITIG. 85, 91–92 (1999).

7. HOHENSTEIN, *supra* note 5, at 202–04.

individuals were permitted to raise and spend through either campaign contributions or campaign expenditures.[8]

In its 1976 landmark decision, *Buckley v. Valeo*,[9] the Supreme Court upheld the FECA's restrictions on campaign contributions but deemed limitations on expenditures unconstitutional.[10] According to the Court, a campaign expenditure is a form of speech, so regulations attempting to restrict this type of speech are subject to strict scrutiny.[11] The Court considered a number of purported governmental interests, including preventing corruption and its appearance, equalizing individuals' opportunities to affect elections, and halting the escalating costs of campaigns.[12] In a 5–4 decision, the Court held that these governmental interests were insufficient to justify suppressing independent or candidate expenditures, what the *Buckley* Court considered political speech.[13] But because the Court viewed contributions as speech by proxy, it applied a lower level of scrutiny, holding that the governmental interests in preventing corruption and the appearance of corruption were enough to justify contribution limits.[14]

The *Buckley* Court used the term "quid pro quo" in providing an example of corruption,[15] but it did not expressly define corruption as such.[16] Later courts, however, interpreted *Buckley* as preventing quid-pro-quo corruption—dollars for promises.[17] For years, anything

8. *See* Federal Election Campaign Act Amendments of 1974, 2 U.S.C. § 431 *et seq.* (West 2012). FECA also established aggregate contribution limits. *Id.* These limits were recently called into question by *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014), which ultimately struck down the aggregate limits. *Id.*

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

10. *Id.* at 58.

11. *Id.* at 19–23.

12. *Id.* at 25–26.

13. *Id.* at 44–45.

14. *Id.* at 58.

15. *Id.* at 26–27 ("To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.").

16. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 388 (2009) ("*Buckley* mentioned, but did not rest on a quid pro quo definition.").

17. *See* Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127, 132 (1997). According to Burke, the *Buckley* Court "mentions the *quid pro quo* standard, but also suggests that corruption goes beyond pre-arranged trading of votes for contributions." *Id. But see* HOHENSTEIN, *supra* note 5, at 240 (stating that the "power of the quid pro quo rationale remains the most significant and controversial legacy of *Buckley*").

short of a quid pro quo was not recognized as corruption.[18] That changed with *Austin v. Michigan Chamber of Commerce*.[19] There, in a controversial decision, the Court expanded its definition of corruption to include "corrosive and distorting effects."[20] This new definition provided greater opportunity for the Court to find corruption or the appearance of corruption, thereby making it easier to uphold restrictions on corporate expenditures.[21]

In 2002, Congress again attempted to reform the campaign finance system by passing the Bipartisan Campaign Reform Act (BCRA).[22] BCRA addressed growing problems by placing regulations on the solicitation and use of "soft money" and sham-issue advertising.[23] Building on *Austin*, the Court upheld BCRA's restrictions in *McConnell v. Federal Election Commission*.[24] With the decisions in *Austin* and *McConnell*, the Court appeared to be adopting a broader definition of corruption.[25] However, in its most recent decision, *Citizens United v. Federal Election Commission*,[26] the Court overturned *Austin* and part of *McConnell*. In so doing, the Court contracted the definition of corruption, turning away from distortion and returning to a narrow definition: quid pro quo.[27]

---

18. *See, e.g.*, FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

19. 494 U.S. 652, 660 (1990), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

20. *Id.*

21. *See* Schultz, *supra* note 6, at 102 ("Austin's significance lies in demonstrating that the Court was willing to employ strict scrutiny to examine an independent expenditure regulation that implicated the First Amendment and actually find that the interest was compelling enough to justify the regulation.").

22. Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 588 (2011).

23. Crafty candidates and parties were able to bypass FECA's reporting requirements and contribution limitations through the solicitation and use of "soft money"—money not subject to FECA restrictions because of technical statutory loopholes. McConnell v. FEC, 540 U.S. 93, 122–26 (2003), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

24. *Id.* at 246. This Article was written and accepted for publication prior to the Court's decision in *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014), and proceeds without reference to the decision or its implications.

25. *See* Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 643, 644 (2011) (referring to the *McConnell* decision as "capacious"); Adam Winkler, *Beyond* Bellotti, 32 LOY. L.A. L. REV. 133, 154 (1998) (calling the *Austin* definition of corruption "novel").

26. 130 S. Ct. 876 (2010).

27. The main opinion repeatedly refers to "quid pro quo corruption," indicating that corruption can only be defined as quid pro quo. *Id.* at 901, 908–11.

The Supreme Court has struggled to articulate a definition of corruption that sufficiently balances concerns that politicians are subject to undue influence with respect for the First Amendment. Thus, this Article addresses the need for a more expansive definition in the realm of campaign finance. Part II tracks the evolution of the term "corruption" throughout the Court's opinions, from *Buckley* to its most recent decision, *Citizens United*. This history will show various expansions and contractions—from quid pro quo and back again. Part III dissects the reasoning in the precedent and argues that the modern definition of corruption is too narrow because it disregards historical and modern concerns, ignores legislative intent, and involves additional problems in its application. Part IV argues for the recognition of additional interests as compelling, proposes a definitional sliding scale dependent upon the identity of the speaker, and addresses the expected criticism.

II. TRACING THE DEVELOPMENT OF "CORRUPTION"

The Court's definition of corruption "has expanded and contracted" throughout the years.[28] This part follows the Supreme Court's development of the definition of corruption by examining some of the most influential campaign finance cases.

A. Buckley *Sets the Stage*

Buckley v. Valeo,[29] the forefather of all campaign finance cases, involved a challenge to the FECA amendments—amendments that were passed because of the Watergate scandal. The Watergate controversy "catalyzed the reform coalition that had been advocating reform of the campaign finance system since the mid-1950s."[30] The scandal revealed many of the illegal tactics that politicians used in campaign fundraising and spending, and left the public disgusted and distrustful of the government.[31] The public "revulsion" toward these political abuses induced Congress to reevaluate the 1971 FECA and adopt the 1974 FECA amendments to lend teeth to the act.[32]

28. Jessica A. Levinson, *We the Corporations?: The Constitutionality of Limitations on Corporate Electoral Speech After Citizens United*, 46 U.S.F. L. REV. 307, 347 (2011).

29. 424 U.S. 1 (1976).

30. HOHENSTEIN, *supra* note 5, at 202.

31. Schultz, *supra* note 6, at 91–92.

32. *Id.*

The 1974 FECA amendments created the Federal Election Commission (FEC) to enforce the legislation and placed limits on political contributions and expenditures.[33] In other words, these amendments empowered the FEC to regulate the giving and spending of money in elections.[34] The newly revised FECA prohibited individuals from contributing more than $1,000 to a single candidate and placed an annual cap on contributions at $25,000.[35] In addition, the restrictions prohibited any individual from spending more than $1,000 per year "relative to a clearly identified candidate."[36] Senator James L. Buckley brought suit challenging the constitutional validity of the restrictions in the Supreme Court's landmark campaign finance case, *Buckley v. Valeo*.[37]

1. Giving and Spending as Speech

In considering the constitutionality of these restrictions, the Court first determined the restrictions' First Amendment implications.[38] According to the Court, "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."[39] The Court focused on the importance of a well-informed citizenry in deciding that campaign contributions and expenditures should be protected as speech rather than conduct.[40] The Court then found that the First Amendment implications differed with respect to contributions and expenditures.[41]

a. Contributions as Speech By Proxy

The FECA restrictions prohibited contributing more than $1,000 to a single candidate and contributing more than $25,000 total in a

33. 2 U.S.C.A. §§ 431–442 (West 2012).

34. *Id*; *Appendix 4*, FED. ELECTION COMM'N, http://www.fec.gov/info/appfour.htm (last visited Mar. 2, 2015) (showing that the FEC was created "to ensure compliance with the campaign finance laws").

35. Act of Oct. 15, 1974, Pub. L. No. 92-225, title II, § 203, 86 Stat. 9, *invalidated by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

36. Formerly 18 U.S.C. § 608(e)(1) (1970).

37. 424 U.S. 1 (1976).

38. *Id.* at 14–23.

39. *Id.* at 14.

40. *Id.* at 14–19.

41. *Id.* at 16, 23.

single year,[42] which the Court determined constituted only a "marginal restriction" on the contributor's free speech rights.[43] The Court explained that while donating money directly to a candidate expresses general support for the candidate, it fails to relay the contributor's reasoning for support.[44] Further, the "quantity of communication" is affected only minimally by the size of the contribution.[45] In essence, the Court equated political contributions to speech by proxy because "the transformation of contributions into political debate involves speech by someone other than the contributor."[46]

The Court posited that contribution restrictions could pose a severe threat to First Amendment freedoms if they prevented candidates from accumulating enough funding to effectively run their campaigns.[47] Yet the Court quickly rejected this concern based on the evidence before it by pointing out that, in practice, the Act did not pose any threat to fundraising efforts; it merely required campaigns to rely on contributions from a greater number of sources.[48] The Act's contribution limits involved "little direct restraint" on individuals' abilities to communicate political ideas because they "in themselves [did] not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues."[49] Nonetheless, the Court interpreted the restrictions on expenditures as a much more direct attack on speech.[50]

b. Expenditures as "Pure Speech"

Like the restrictions placed on contributions, the FECA restrictions on expenditures prohibited spending in excess of $1,000 a year "relative to a clearly identified candidate."[51] Unlike the restrictions on contributions, however, the restrictions on

42. Formerly 18 U.S.C. §§ 608(b)(1), (3) (1970).
43. *Buckley*, 424 U.S. at 20.
44. *Id.* at 21.
45. *Id.* ("At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.").
46. *Id.*
47. *See id.*
48. *Id.* at 21–22.
49. *Id.* at 21, 29.
50. *Id.* at 19.
51. *Id.*

expenditures posed considerable restraints.[52] The Court found this restriction problematic because any "restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[53] According to the Court, spending money in support of a candidate or campaign is a form of expressing ideas.[54]

The Court explained that modern communication, from handbills to television, involves spending money in some way.[55] Further, the most effective ways to spread an ideology are often expensive.[56] Since the essential means of powerful political speech all involve spending money, the expenditure cap precluded most citizens from using these effective means of communication.[57] Accordingly, the Court found that the expenditure limits were far more restrictive of political speech, and subjected the corresponding part of the statute to strict scrutiny.[58]

2. Governmental Interests

The infringements imposed by the contribution and expenditure limits could be upheld if the governmental interest in enacting the limitations outweighed the restrictions on the First Amendment freedoms.[59] The Court considered a number of potential governmental interests, but none was sufficient to justify the expenditure limitations, and, under a less stringent level of scrutiny, only one was deemed sufficient to justify the restrictions on contributions.[60]

According to the government, the primary interest served by the contribution and expenditure limits was the "prevention of corruption and the appearance of corruption."[61] With respect to the expenditure

52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 19–20.
57. *Id.*
58. *See id.* at 44–51.
59. *See id.* at 44–45.
60. *Id.* at 26, 45–51.
61. *Id.* at 25.

restrictions, this interest was inadequate.[62] Since the cap on expenditures "heavily burden[ed] core First Amendment expression," it had to be justified by a "substantial governmental interest."[63] The Court found that the statute was underinclusive because it did not prohibit all forms of large expenditures.[64] According to the Court, people and groups could spend any amount they saw fit as long as they avoided expressly advocating for or against a specific candidate.[65] Additionally, since expenditures were not "coordinated" with the candidate, there was no threat of "quid pro quo for improper commitments."[66]

However, the Court found that the interest in preventing corruption and its appearance was sufficient with respect to the contribution limitations.[67] Most, if not all, candidates rely on contributions to fund their campaigns.[68] Because the practice of contributions is such a staple in American campaigns, "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."[69] And the Court found that the *appearance* of corruption was nearly as concerning.[70] With these potential threats in mind, the Court held that the "weighty interests served by restricting the size of financial contributions to political candidates [were] sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling."[71]

The government also asserted that the contribution limitations served to "mute the voices of affluent persons and groups in the

62. *Id.* at 45.

63. *Id.* at 48, 47.

64. *Id.* at 45.

65. The Court stated that "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." *Id.* This language creates the problem of "soft money" later addressed by the Court in *McConnell v. FEC*, 540 U.S. 93 (2003). *See infra* note 182 and accompanying text.

66. *Buckley*, 424 U.S. at 47.

67. *Id.* at 28–29.

68. *Id.* at 26.

69. *Id.* at 26–27.

70. *Id.* at 27 ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").

71. *Id.* at 29.

election process."[72] The government suggested that the limitations on contributions and expenditures would allow all citizens an equal opportunity to affect political elections.[73] Since the Court found the interest in preventing corruption and its appearance sufficient to justify the contribution limitations, it applied this interest only to the expenditure limitations.[74] Yet the Court rejected this interest as sufficient, stating, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[75] Because the Court found that the government did not have a legitimate interest in equalizing the political playing field, the "muting" interest was deemed insufficient to justify the expenditure limitations on speech.[76]

The government also asserted another ancillary interest: stopping the "skyrocketing costs of political campaigns."[77] The Court similarly disregarded this interest.[78] Despite evidence that federal campaign spending had increased by almost 300 percent in twenty years, the Court rejected these costs as a basis for restricting political speech.[79] "The First Amendment," the Court said, "denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise."[80] In other words, the people, not the government, must determine the quantity and depth of political discussion.

Finding no substantial governmental interest sufficient to justify the restrictions on speech caused by the expenditure cap, the Court struck down the independent-spending ceiling as unconstitutional.[81] Since contribution ceilings posed less of a threat to protected First Amendment speech, however, the Court found that the governmental interest in preventing corruption and its appearance was sufficient.[82] These limitations on contributions, the Court found, "serve the basic

72. *Id.* at 25–26.
73. *Id.*
74. *Id.* at 26 (stating that it was "unnecessary to look beyond the Act's primary purpose").
75. *Id.* at 48–49.
76. *Id.* at 47–49.
77. *Id.* at 26.
78. *Id.* at 57.
79. *Id.*
80. *Id.*
81. *Id.* at 58.
82. *Id.*

governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion."[83] Yet this seemingly simple interest in the prevention of corruption and its appearance would prove to be exceedingly difficult to define.

B. Corporations are People Too: First National Bank of Boston v. Bellotti

Buckley provided that preventing corruption and the appearance of corruption was the only governmental interest sufficient to justify restrictions on campaign contributions for individuals.[84] But notably, it had not addressed whether corporate speech deserved the same level of protection as that of individuals and unincorporated groups. The Supreme Court first considered the constitutionality of limitations on corporate expenditures in 1978 in *First National Bank of Boston v. Bellotti*.[85]

In *Bellotti*, two banking institutions and three for-profit corporations challenged the constitutionality of a Massachusetts statute that prohibited them from making any contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."[86] The statute further specified that no question concerning taxation would be deemed "materially to affect the property, business[,] or assets of the corporation."[87] The statute also imposed a maximum fine of $50,000 on corporations in violation, and any director in violation was faced with the possibility of a $10,000 fine, one-year imprisonment, or both.[88]

The Court avoided the prefatory question of the extent to which corporations were entitled First Amendment rights, stating that the speech's source was irrelevant, and it considered instead the extent to

83. *Id.*

84. *Id.* at 26.

85. 435 U.S. 765 (1978).

86. *Id.* at 768 (quoting MASS. GEN. LAWS ch. 55, § 8 (West Supp. 1977)) (internal quotation marks omitted). The Court in *Bellotti* invalidated the Massachusetts statute. *Id.* at 795.

87. *Id.* at 768 (quoting MASS. GEN. LAWS ch. 55, § 8 (West Supp. 1977)) (internal quotation marks omitted).

88. *Id.*

which the Massachusetts statute abridged freedom of speech.[89] According to the Court, the statute infringed essential democratic speech.[90] The Court held that neither the First nor the Fourteenth Amendments support "the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation."[91]

Because the Court found that the statute restricted speech, it applied strict scrutiny to the legislation, thus requiring that the restriction be justified by a compelling government interest.[92] Massachusetts proffered two interests not considered in *Buckley*: (1) "the State's interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government;" and (2) the interest in protecting the views of minority shareholders who disagreed with the management.[93] However, the Court found that these interests were neither triggered by the facts of the case nor properly served by the restrictions set forth in the statute.[94]

With respect to the interest in preserving citizens' confidence in government, the state failed to show how corporate communications threatened confidence.[95] Additionally, the governmental interest in protecting divergent shareholders was defeated because the legislation was both underinclusive and overinclusive.[96] The statute was underinclusive because it prohibited expenditures with respect to only referenda but not to lobbying or any expression made before an issue reaches the ballot. Furthermore, the statute applied only to banks and corporations but not to trusts, unions, or other associations. It was overinclusive because the statute would have prohibited an organization from making a contribution or expenditure for a referendum even if it had unanimous approval from its shareholders.[97]

89. *Id.* at 775–77.
90. *Id.* at 777.
91. *Id.* at 784.
92. *Id.* at 786.
93. *Id.* at 787.
94. *Id.* at 787–88.
95. *Id.* at 789–90.
96. *Id.* at 793–94.
97. *Id.* at 794–95.

Working within the *Buckley* framework, the Court mentioned the importance of preventing corruption.[98] However, since the statute at issue in *Bellotti* dealt purely with referenda rather than candidates, the Court felt that there was little to no risk of corruption.[99] In making this determination, the *Bellotti* Court implicitly adopted a reading of the *Buckley* decision in which "corruption" referred only to quid pro quo exchanges.[100] Because none of the governmental interests was sufficient to justify the restrictions imposed on corporate speech, the Court declared the Massachusetts statute unconstitutional.[101]

As in *Buckley*, the *Bellotti* Court left many questions unanswered. The Court, in a footnote, left open the possibility that expenditures might also pose a threat of corruption.[102] The now-infamous footnote 26 proclaims: "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."[103] Additionally, for the first time the Supreme Court appeared to shift the inquiry from the identity of the speaker to the content of the speech.[104] In making this shift, the Court established that the real concern is not about the speaker's rights, but the listener's.[105]

C. Refining the Definition of Corruption

The decisions in *Buckley* and *Bellotti* left the possibility of few revisions to the campaign finance system.[106] According to scholar Richard Briffault, the *Bellotti* decision was "not at all consistent with

98. *Id.* at 788–89 (calling the interest in preventing corruption "of the highest importance").

99. *Id.* at 790.

100. *See* Winkler, *supra* note 25, at 149 ("To the *Bellotti* Justices, this financial quid pro quo version of corruption was not applicable to corporate expenditures on ballot campaigns. Since no candidates are involved, expenditures on ballot measures pose no threat of improperly influencing the votes of public officials.").

101. *Bellotti*, 435 U.S. at 795.

102. *Id.* at 788 n.26.

103. *Id.*

104. *Id.* at 783 (setting forth the idea that the "First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit the government from limiting the stock of information from which members of the public may draw").

105. *See* Levinson, *supra* note 28, at 309 ("Currently the Court focuses solely on listeners' rights . . . .").

106. Wright, *supra* note 2, at 609. As a member of the U.S. Court of Appeals for the D.C. Circuit, Judge Wright voted to uphold FECA when *Buckley* was argued at the appellate court level. *Id.*

the logic underlying the traditional speech treatment of corporations."[107] However "unfortunate" these precedents were, the Court had to work within the limits of the two decisions when deciding subsequent issues, keeping in mind that only the prevention of corruption and the appearance of corruption were deemed sufficient to justify restraints on political speech.[108] Accordingly, "corruption [was] the criterion by which the constitutionality of further reforms in campaign finance regulation [were] measured."[109]

1. Corruption When the Speaker Is a Nonprofit Corporation

In the 1980s, the Court heard multiple cases involving challenges brought by nonprofit organizations against the FEC.[110] The first of the cases was *Federal Election Commission v. National Right to Work Committee* (NRWC)[111] in 1982. In this case, the FEC authorized a suit for the violation of § 441b of FECA.[112] Section 441b prohibited the solicitation of funds from anyone other than shareholders or employees but provided an exception whereby corporations without stock could solicit "members."[113] The FEC defined members as "all persons who are currently satisfying the requirements for membership in a membership organization."[114] But someone was not a member within the regulation if "the only requirement for membership [was] a contribution to a separate segregated fund."[115]

NRWC solicited money for its segregated fund from people who had previously donated to NRWC, and it argued that these donors were "members" within the meaning of the statute.[116] NRWC advocated that the term "members" needed to be given an "elastic definition."[117] However, in finding that the individuals solicited were

107. Briffault, *supra* note 25, at 652 (emphasis omitted).
108. Wright, *supra* note 2, at 609.
109. Burke, *supra* note 17, at 127.
110. *See* FEC v. Mass. Citizens for Life, 479 U.S. 238 (1986); FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985); FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982).
111. 459 U.S. 197 (1982).
112. *Id.* at 201.
113. 2 U.S.C. § 441b *et seq.* (2012).
114. FEC Regulations, 11 C.F.R. § 114.1(e) (2004).
115. *Id.*
116. *NRWC*, 459 U.S. at 200–01.
117. *Id.* at 206.

not members,[118] the Court expressed a concern that expanding the definition of members too broadly would effectively eliminate the statutory limitation.[119]

With respect to the constitutional challenge, the Court determined that "the associational rights asserted . . . [were] overborne by the interests Congress . . . sought to protect in enacting § 441b."[120] The Court found that Congress had attempted to consider the discrete features of corporations and labor unions.[121] The Court again acknowledged the interest in preventing corruption and its appearance, yet it drew the interest narrowly as "[t]he governmental interest in preventing both actual corruption and the appearance of corruption *of elected representatives*."[122] Accordingly, the Court appeared to adopt the definition of corruption as strictly quid pro quo, whereby corruption meant explicit agreements trading votes for money.[123]

In 1986, four years after *NRWC*, the Court again heard a challenge to FECA limitations in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* ("*Citizens for Life*").[124] Like *NRWC*, this case involved a challenge to § 441b of FECA, albeit a different aspect of that statute.[125] Also like in *NRWC*, the Court upheld the restrictions imposed by the statute. But unlike in *NRWC*, the Court found that Massachusetts Citizens for Life, Inc. (MCFL) did violate the statute. As applied to MCFL, however, the statute was unconstitutional.[126] In making this determination, the Court focused on three main characteristics of MCFL that made § 441b unconstitutional as applied to them:

> First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. . . .

---

118. *Id.*

119. *Id.* at 204 (The "determination that NRWC's 'members' include anyone who has responded to one of the corporation's essentially random mass mailings would, we think, open the door to all but unlimited corporate solicitation and thereby render meaningless the statutory limitation to 'members.'").

120. *Id.* at 207.

121. *Id.* at 209.

122. *Id.* at 210 (emphasis added).

123. Burke, *supra* note 17, at 130.

124. 479 U.S. 238 (1986).

125. In *NRWC*, the Court dealt with the aspect of § 441b regarding solicitation, while *Citizens for Life* addressed the statute's prohibition against using treasury funds to make an expenditure. *Compare NRWC*, 459 U.S. at 198, *with Citizens for Life*, 479 U.S. at 241.

126. *Citizens for Life*, 479 U.S. at 263.

> Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. . . . Third, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities.[127]

Because of MCFLS's unique features, the Court found there was no threat of corruption.[128] MCFL did not pose the same type of threat to "electoral integrity" that a traditional corporation did because "nonstock, nonprofit corporations did not have the same corruptive effect on political spending that business corporations and unions possessed."[129] According to the Court, "Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form."[130] The Court posited that because MCFL was formed to spread ideas rather than amass capital, it posed no danger of corruption.[131] In its discussion, the Court, as it did in *NRWC*, narrowly defined corruption by refusing to acknowledge that a group engaged in the "political marketplace" rather than the "economic marketplace" could nevertheless pose a threat of corruption.[132]

Although the Court upheld the statutory limitations in both of these cases, neither case can be seen as a victory for campaign finance reform. Nevertheless, these cases laid the foundation for what was to come. For example, the Court acknowledged the "concern over the corrosive influence of concentrated corporate wealth" in *Citizens for Life*;[133] this is how the Court chose to expand the definition of corruption in *Austin v. Michigan State Chamber of Commerce*.[134] Additionally, with respect to the contributions at issue in *NRWC*, the Court held that the interests in preventing political "war chests" and protecting minority shareholder interests were sufficient to justify the solicitation restrictions.[135] Accordingly, these cases set the groundwork for the Court to eventually expand its

127. *Id.* at 264 (emphasis omitted).
128. *Id.* at 263.
129. HOHENSTEIN, *supra* note 5, at 242.
130. *Citizens for Life*, 479 U.S. at 263.
131. *Id.* at 259.
132. *Id.*
133. *Id.* at 257.
134. 494 U.S. 652, 660 (1990).
135. FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 207–08 (1982).

definition of corruption. Unfortunately, this expansion would not come quickly or easily.

2. Corruption When the Speaker Is a Political Party or Committee

While the early campaign finance cases provided some guidance, they left many issues unresolved, including whether contribution and expenditure limits could be constitutionally applied to political parties and political action committees. The Court resolved these issues in a series of cases beginning with *Federal Election Commission v. National Conservative Political Action Committee* (NCPAC).[136]

After *NRWC*, but before *Citizens for Life*, the Supreme Court decided *NCPAC*.[137] In this case, the Democratic National Party and Democratic National Committee, later joined by the FEC, brought suit against NCPAC and sought a declaration that § 9012(f) of the Presidential Election Campaign Fund Act was constitutional.[138] Section 9012(f) prohibited political committees from making expenditures in excess of $1,000 to aid candidates who were receiving public funding.[139] NCPAC, a nonprofit corporation, had announced that they would be spending large amounts of money to support the reelection of President Reagan, which the Democratic National Committee and FEC thought would violate § 9012(f).[140]

The Court determined that political action committees, as groups of citizens joined for political purposes, were entitled to First Amendment protection.[141] In so concluding, the Court reiterated that "preventing corruption or the appearance of corruption [was] the only legitimate and compelling government interest[] thus far identified for restricting campaign finances."[142] According to Thomas Burke, the Court in the early cases failed to describe its

136. 470 U.S. 480 (1985).

137. The Court decided *NRWC* in 1982, *NCPAC* in 1985, and *Citizens for Life* in 1986. *See Citizens for Life*, 479 U.S. 238 (1986); *NRWC*, 459 U.S. 197 (1982); *NCPAC*, 470 U.S. 480 (1985); *Citizens for Life*, 479 U.S. 238 (1986).

138. *NCPAC*, 470 U.S at 483.

139. 26 U.S.C. § 9012(f) (2006), *invalidated by NCPAC*, 470 U.S. 480 (1985).

140. *NCPAC*, 470 U.S. at 483.

141. *Id.* at 494.

142. *Id.* at 496–97.

perception of corruption.[143] In *NCPAC*, however, the Court explicitly defined corruption as "a subversion of the political process."[144]

While this definition appeared to expand the meaning of corruption, in keeping with the precedent, the Court in *NCPAC* discussed corruption and its appearance in terms of quid pro quo exchanges.[145] The Court concluded the types of expenditures that the Presidential Election Campaign Fund Act prohibited did not pose a threat of corruption or the appearance of corruption because the money funded expenditures, indirectly aiding the candidate, rather than contributions directly to the candidate himself.[146] Further, the Court concluded that the absence of coordination with the candidate "alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."[147] Accordingly, the Court again equated corruption and its appearance with quid pro quo exchanges.

NCPAC applied to political action committees but did not resolve the issue of restrictions on political parties. In *Colorado Republican Federal Campaign Committee v. FEC* (*Colorado I*),[148] the Colorado Party defended against a complaint brought by the FEC by challenging the constitutionality of the expenditure limitations set forth in a FECA provision. Section 441a set limits on individuals' and political committees' contributions,[149] but § 441a(d) created a special exemption for political parties, known as the "Party Expenditure Provision."[150] Under this provision, political parties were exempt from the contribution limitations of § 441a(a), but its expenditures were instead limited in senatorial campaigns to $20,000 or two cents per member of the state's voting-age population, whichever was greater.[151]

---

143. Burke, *supra* note 17, at 135.

144. *NCPAC*, 470 U.S. at 497.

145. The Court states that quid pro quo—exchanging money for favors—is the "hallmark" of corruption. *Id.*

146. *Id.*

147. *Id.* at 498.

148. 518 U.S. 604 (1996).

149. For individuals: $1,000 to any candidate, $5,000 to a political committee, $20,000 to a party's national committee, and an overall limit of $25,000 per year; for "multicandidate political committees": $5,000 to any candidate, $5,000 to a political committee, and $15,000 to a party's national committee. Fed. Election Campaign Act, 2 U.S.C.A. § 441a(a)(1), (2) (West 2002).

150. Fed. Election Campaign Act, 2 U.S.C.A. § 441a(d)(3) (West 2002).

151. *Id.*

In a plurality opinion authored by Justice Breyer, the Court reasoned that limitations could not be imposed upon political parties for independent, uncoordinated expenditures any more than they could be imposed upon individuals.[152] Justice Breyer wrote, "We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties."[153] Failing to find that political parties pose any distinct potential for corruption, the plurality followed the "established principle" that independent expenditures pose less of a danger of quid pro quo because they are not coordinated with candidates.[154] For this Court, like those that came before, corruption was akin to quid pro quo dealings.

Coordinated expenditures were treated as contributions under FECA,[155] and the Colorado Party argued that the First Amendment barred limitations even on political parties' coordinated expenditures.[156] The Court in *Colorado I* remanded the case to consider this broader argument.[157] In *Federal Election Commission v. Colorado Republican Federal Campaign Committee* (*Colorado II*),[158] the Court addressed the issue left open in *Colorado I*.

The Court rejected the argument that the Party Expenditure Provision's limitations on coordinated expenditures constituted a violation of the First Amendment.[159] In making this determination, the Court first concluded that since political parties "act as agents for spending on behalf of those who seek to produce obligated officeholders," they were not in a different position from other political speakers and were thus subject to the same standard of scrutiny.[160] Further, the Court reasoned that removing the restrictions

152. *Colorado I*, 518 U.S. at 616 ("The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees.").

153. *Id.* at 618.

154. *Id.* at 615, 616.

155. 2 U.S.C. § 441a(a)(7)(B)(i) (2006).

156. *Colorado I*, 518 U.S. at 623.

157. *Id.* at 626.

158. 533 U.S. 431 (2001).

159. *Id.* at 437.

160. *See id.* at 452 (stating that parties "perform functions more complex than simply electing candidates" and this role "provides good reason to view limits on coordinated spending by parties through the same lens applied to such spending by donors, like PACs, that can use parties as conduits for contributions meant to place candidates under obligation").

on coordinated expenditures would pose a potential for misuse.[161] The Court concluded that "contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open."[162]

Perhaps the most striking detail in the Court's opinion in *Colorado II* was a comment made in a parenthetical. In discussing the different levels of scrutiny for contributions and expenditures, the Court echoed past sentiments, declaring that contribution limits are "more clearly justified by a link to political corruption."[163] The Court, however, explained in a parenthetical comment that corruption is understood not only as quid pro quo agreements, but "also as undue influence on an officeholder's judgment, and the appearance of such influence."[164] While this parenthetical is merely dicta—and seems to have had little effect on the subsequent case law—its presence in the opinion demonstrates the Court's recognition that corruption should not only be defined in terms of quid pro quo.

D. Moving Toward a More Expansive Definition

Before hearing the *Colorado* cases,[165] the Court loosened its grip on the quid pro quo standard and appeared to adopt a more expansive definition of corruption.[166] In *Austin v. Michigan Chamber of Commerce*,[167] the Court departed from the traditional notion of corruption as strictly quid pro quo and acknowledged the corrosive and distorting effects of corporations' wealth.[168]

In *Austin*, the Court upheld a Michigan statute prohibiting corporations from making either contributions or expenditures to state candidate elections using treasury funds.[169] Although the Michigan Chamber of Commerce, a nonprofit organization whose membership was dominated by for-profit corporations, had a segregated fund, it wanted to use its corporate treasury to buy

161. *Id.* at 457.
162. *Id.*
163. *Id.* at 440–41.
164. *Id.* at 441.
165. The Court decided the *Colorado* cases in 1996 and 2001, while *Austin* occurred in 1990.
166. *See* Burke, *supra* note 17, at 136; Levinson, *supra* note 28, at 348.
167. 494 U.S. 652 (1990).
168. *Id.* at 659–60.
169. *Id.* at 655.

advertisements in support of a specific candidate.[170] Since the Michigan Campaign Finance Act prohibited these types of expenditures, the Chamber challenged the constitutionality of the restrictions.[171]

Working within the confines of precedent, the Court recognized that the burden on expression could be outweighed only by a compelling governmental interest—specifically the prevention of corruption or its appearance.[172] In its discussion of the state interest, the Court stated that the Michigan statute was aimed at "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[173] It went on to explain that because of the special benefits granted to corporations, independent expenditures made using corporate wealth are capable of unfairly impacting elections and, therefore, the limitations were justified.[174]

In making its decision, the Court focused heavily on corporations' inherent advantages.[175] It repeated that corporations' state-conferred structure was what made them capable of accumulating wealth.[176] Accordingly, the Court appeared to concentrate on the concept of corruption based on the identity of the speaker. The justification for the statutory restrictions, according to the Court, was specifically tied to addressing the special challenges posed by corporations.[177]

Although the Court framed the compelling government interest in terms of the prevention of corruption and its appearance, the "corrosive and distorting effects" of corporate wealth could arguably be a separate governmental interest independent of preventing corruption and based on equality.[178] Once the majority introduced the concepts of corrosion and distortion, the opinion does not again use

170. *Id.* at 656.
171. *Id.*
172. *Id.* at 658–60.
173. *Id.* at 659–60.
174. *Id.* at 660.
175. *Id.* at 665.
176. *Id.* (referring to the "state-conferred advantages of the corporate structure" and "advantages unique to the corporate form").
177. *Id.*
178. Hasen, *supra* note 22, at 588.

the word corruption, instead referring to "potential for distortion" and "corrosive effect."[179] This emphasis on avoiding distortion suggests that the Court was concerned with equality.[180] Whether the Court meant to establish a new compelling governmental interest or simply adopt a broader view of the existing governmental interest, the *Austin* decision expanded the definition of corruption.

In 2003, the Court decided *McConnell v. Federal Election Commission*, and ruled on the constitutionality of BCRA.[181] BCRA sought to amend FECA and resolve the issues concerning the use of soft money.[182] In doing so, the provisions "t[ook] national parties out of the soft-money business" by prohibiting parties from soliciting or spending soft money.[183]

Since many of the restrictions at issue pertained to contributions, the Court applied a lower level of scrutiny to determine whether the restrictions were justified.[184] With respect to the government's interest of preventing corruption and the appearance of corruption, the Court declared: "We have not limited that interest to the elimination of cash-for-votes exchanges."[185] In determining that large soft-money contributions have the potential for corruption, the Court found that many soft money contributions were given "not on ideological grounds, but for the express purpose of securing influence over federal officials."[186]

The Court flatly rejected the perception of corruption as strictly quid pro quo and declared that "[t]his crabbed view of corruption, and particularly of the appearance of corruption, ignores precedent, common sense, and the realities of political fundraising."[187] Instead, the *McConnell* Court interpreted corruption as including "undue influence."[188] The Court recognized that parties' selling access to

179. *Austin*, 494 U.S. at 661, 666.

180. *See* Hasen, *supra* note 22, at 588.

181. McConnell v. FEC, 540 U.S. 93 (2003).

182. *Id.* at 132. FECA restrictions defined contributions specifically as money intended to influence federal elections. 2 U.S.C. § 431(8)(A)(i) (2006). However, since the restrictions were silent as to money intended to aid state or local campaigns, a loophole allowed donors who had reached their maximum annual contributions to nevertheless donate additional funds to parties for uses other than federal elections. *McConnell*, 540 U.S. at 122–26.

183. *McConnell*, 540 U.S. at 133.

184. *Id.* at 141.

185. *Id.* at 143.

186. *Id.* at 147.

187. *Id.* at 152.

188. *Id.* at 154.

candidates implied that "money buys influence" and held that this type of influence could qualify as corruption sufficient to justify the contribution restrictions.[189]

BCRA also prohibited corporations from spending treasury money on electioneering communications.[190] In the latter part of the decision, the Court also upheld these expenditure restrictions,[191] relying on its decision in *Austin* to justify sustaining the legislation.[192] The *McConnell* Court, therefore, adopted the "corrosive-and-distorting-effects" rationale for justifying the expenditure limitation.[193] With *McConnell* building upon *Austin*, it appeared that the Court was moving toward a more expansive view of corruption.

E. Progress Is Halted: A Return to Quid Pro Quo

In *Austin* and *McConnell*, the Court appeared to be making strides toward adopting a broader definition of corruption such that more statutory limitations could be upheld. The Court's decision in *Citizens United v. Federal Election Commission*[194] ended this progress, however, and returned the Court to the early definition of corruption: quid pro quo.

In *Citizens United*, the Supreme Court again heard a challenge to the BCRA provision prohibiting corporations from spending treasury money on electioneering communications.[195] Citizens United, a nonprofit corporation, released a documentary criticizing then-presidential candidate Hillary Clinton [in theaters and on DVD] and wanted to make it available to a larger audience through video-on-demand service.[196] The nonprofit organization wanted to air the film and its advertisements within thirty days of the 2008

189. *Id.*

190. 2 U.S.C. § 441b(b)(2) (2006), *invalidated by* Citizens United v. FEC, 130 S. Ct. 876 (2010). An electioneering communication is any "broadcast, cable, or satellite communication" that refers to a "clearly identified candidate for Federal office" and was made within 60 days before a general election or 30 days before a primary. 2 U.S.C. § 434(f)(3)(A)(i) (2006).

191. *McConnell*, 540 U.S. at 209, *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

192. *Id.* at 204–05.

193. *Id.* at 205.

194. 130 S. Ct. 876 (2010).

195. *Id.* at 886.

196. *Id.* at 886–88.

primary, but it feared that doing so would violate BCRA.[197] Thus, Citizens United brought suit seeking declaratory relief and challenging the constitutionality of the provision as applied to the documentary.[198]

The Supreme Court called § 441b an "outright ban" on corporate speech whose "purpose and effect are to silence entities whose voices the Government deems to be suspect."[199] As to the government's interest in protecting minority shareholders, the Court found that dissident shareholders could protect their interests by selling their stock.[200] The Court rejected *Austin*'s "antidistortion rationale" and called it an "aberration."[201] In doing so, the Court treated the antidistortion principle as a separate governmental interest rather than a broadened definition of corruption.[202]

The Court did not merely reject *Austin*'s antidistortion principle; it overruled the precedent.[203] In overruling *Austin*, the *Citizens United* Court declared that "government may not suppress political speech on the basis of the speaker's corporate identity."[204] Further, the Court overruled part of *McConnell*, as *McConnell* had relied on *Austin* to uphold the prohibition on corporate independent expenditures contained in BCRA.[205] The *Citizens United* Court similarly rejected the government's interest in preventing corruption and its appearance.[206]

The Supreme Court found that the anticorruption interest was inadequate to justify restricting the speech at issue.[207] In reasoning that the prevention of corruption and its appearance was an insufficient governmental interest, the Court addressed *Bellotti*'s infamous footnote 26 and concluded once and for all that "independent expenditures, including those made by corporations, do

197. *Id.* at 888.
198. *Id.*
199. *Id.* at 882, 898.
200. *Id.* at 911.
201. *Id.* at 907.
202. *Id.* at 903 (characterizing the government's compelling interests as the "antidistortion rationale," the "anticorruption interest," and the "shareholder-protection interest").
203. *Id.* at 913.
204. *Id.*
205. *Id.*
206. *Id.* at 908.
207. *Id.*

not give rise to corruption or the appearance of corruption."[208] This declaration all but ensured that independent expenditures could never be restricted or limited.

Finding no governmental interest sufficient to justify the limitations on corporate political speech, the Court found § 441b's prohibition of corporate independent expenditures unconstitutional.[209] In doing so, the Court returned to the familiar conception of corruption as quid pro quo.[210]

The decision in *Citizens United* took an "exceedingly narrow definition of political corruption."[211] Accordingly, "the *Citizens United* decision crystallized for many people the concern that corporate money dominates American politics."[212]

III. THE MODERN DEFINITION OF CORRUPTION IS TOO NARROW

The Court's decisions in *Austin* and *McConnell* advocated for a broader reading of the definition of corruption.[213] The Court took an "exceedingly narrow" view, however, when it overturned these precedents in *Citizens United*.[214] This return to a strictly quid pro quo understanding is a "crabbed view of corruption."[215] According to Justice Stevens, the majority in *Citizens United* "disregard[ed] our constitutional history and the fundamental demands of society."[216] Such a narrow definition of corruption ignores societal concerns and legislative intent, thus leading to a unique set of problems.

A. Corruption at the Constitutional Convention

Defining corruption narrowly in terms of quid pro quo neglects the historical understanding of the term.[217] Americans' fear of

208. *Id.* at 909.
209. *Id.* at 917.
210. Levinson, *supra* note 28, at 309.
211. Ofer Raban, *Constitutionalizing Corruption: Citizens United, Its Conceptions of Political Corruption, and the Implications for Judicial Elections Campaigns*, 46 U.S.F. L. REV. 359, 359 (2011).
212. Briffault, *supra* note 25, at 644.
213. *See supra* Part II.D.
214. Raban, *supra* note 211, at 359.
215. Citizens United v. FEC, 130 S. Ct. 876, 964 (2010) (Stevens, J., concurring in part and dissenting in the judgment) (quoting McConnell v. FEC, 540 U.S. 93, 152 (2003)).
216. *Id.* at 961.
217. HOHENSTEIN, *supra* note 5, at 237.

corruption dates back to the formation of the country.[218] The Framers of the Constitution were "obsessed with corruption."[219] In fact, corruption was one of the most widely discussed topics during the Constitutional Convention.[220] This concern with corruption can be seen in many of the Constitutional provisions.[221]

The Framers reflected their fear of corruption in the first three articles of the Constitution.[222] Using the examples of the British monarchy and the fallen Roman Empire as cautionary tales, the Framers sought to design a system of government complete with corruption-preventing measures.[223] The size of the House of Representatives, as designated in Article I, reflects the Framers' view that larger bodies were less susceptible to corruption.[224] Additionally, the Framers' distrust of state legislatures prompted the Framers to reject election "by the legislature" in favor of election "by the people."[225]

Articles II and III also contain anticorruption measures.[226] The most prominent example is the impeachment process.[227] Wary of the thought of a corrupt Executive, the Framers implemented a system in which two-thirds of the Senate could approve removal of the President for "Treason, Bribery, or other high Crimes and Misdemeanors."[228] Further, the Framers' concern with judicial corruption led in part to the protection that the jury system and the inferior court system provide.[229]

---

218. Teachout, *supra* note 16, at 347.

219. *Id.* at 348.

220. *Id.* at 352.

221. *See id.* at 354–70 (arguing that the Framers' concerns regarding corruption shaped their considerations when drafting the Articles of the Constitution).

222. *Id.*

223. *Id.* at 349–50.

224. *Id.* at 356.

225. *Id.* at 357.

226. *Id.* at 364–69.

227. *Id.* at 367 (noting that the impeachment provision contains a strong anti-corruption element because without such a provision, a president's corrupt practices could substantially injure the Nation).

228. U.S. CONST. art. II, § 4; *see also* Teachout, supra note 16, at 367 (noting that the words "high crimes and misdemeanors" were included to address the concern that the words "treason or bribery" would not be enough alone to prevent a president from abusing his position).

229. Since the "current thinking" was that larger bodies were more difficult to corrupt, the Framers sought to avoid a judicial system that relied upon individuals "who could be regularly and predictably bought." *See* Teachout, *supra* note 16, at 369.

The topic of corruption weighed heavily on the Framers' minds, and some of the most heated debates at the Constitutional Convention involved efforts to ensure that the new government would be properly insulated from corruptive influence.[230] To attendees of the convention, corruption was perhaps the "key threat" to the fledgling nation.[231] The Framers agreed that political corruption comprised "self-serving use of public power for private ends"[232] and did not relegate the concept to strictly quid pro quo transactions.[233] Accordingly, by focusing narrowly on corruption as quid pro quo, the Supreme Court has overlooked the broader historical definition.[234]

B. Societal Concerns About Corruption

Like the Framers, the American public is exceedingly wary of the presence of corruption in government, and the meanings attached are "multifaceted" and "open to different interpretations" rather than solely focused on quid pro quo.[235] In addition to disregarding the historical understanding of corruption, Justice Stevens also asserted that the majority in *Citizens United* ignored the public belief.[236] A functional definition of corruption should take into account the concerns of society.

In their study of public perceptions of corruption, Nathaniel Persily and Kelli Lammie found that the majority of Americans believe that the campaign process is corrupt and in need of reform.[237] While such widespread support can be indicative of society's view that corruption is present in campaign finance practices, the public's general lack of understanding of this complicated topic makes true public opinion difficult to accurately measure.[238]

In their survey, Persily and Lammie noted correlations between certain citizens and their propensity to believe that campaigns are

230. *Id.* at 353.
231. *Id.* at 347.
232. *Id.* at 373–74.
233. *Id.*
234. HOHENSTEIN, *supra* note 5, at 237.
235. Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 144 (2004).
236. Citizens United v. FEC, 130 S. Ct. 876, 961–63 (2010) (Stevens, J., concurring in part and dissenting in the judgment).
237. Persily & Lammie, *supra* note 235, at 143–44.
238. *Id.* at 132–33, 138.

corrupt.[239] The Persily and Lammie polls found that the wealthier an individual is, the less likely he or she is to believe that the government is corrupt.[240] Similarly, racial minorities are more likely to believe that "few big interests" control government officials.[241] The study also found that "[o]pinion of the sitting President is one of the best predictors of perceptions of corruption."[242] Accordingly, those who favor the current president are less likely to suspect corruption.[243]

Although the study did not dispute that large majorities of Americans suspect the presence of corruption in campaign finance, these suspicions are "largely independent of anything occurring in the campaign finance system."[244] Campaign reform opponents have argued that as a result of this tenuous relationship, campaign reform is unlikely to affect the public's perception of corruption.[245] These statistics, however, should not be given less weight because of this anomaly. Instead, the seemingly inconsistent findings are arguably a result of the public's lack of expertise in the subject.[246] The mere fact that a majority of the American public instinctively believes that campaign donations result in undue influence is troublesome enough.

C. Legislative Intent Regarding the Prevention of Corruption

In addition to considering broad historical context and societal concerns, the definition of corruption should also include legislative intent. The legislative history of some of the country's formative campaign finance statutes indicates that Congress has an interest in preventing corruption, including, but not limited to, quid pro quo dealings.

---

239. *Id.* at 119–21.
240. *Id.* at 155.
241. *Id.* at 153.
242. *Id.* at 156.
243. *Id.* at 157.
244. *Id.* at 144.
245. Although a large majority of the population believes that the campaign finance system could benefit from reformative measures to remove corruption, an equally large majority believes that even contributions within the limits established by BCRA would result in undue influence over the politician receiving the funds. *See id.* The argument would follow that if the public would still suspect the system of corruption even when it is operating within the legal limits, reform is unlikely to reduce public perception of corruption. *See id.*
246. As a primer to gauge the respondents' levels of expertise, the surveyors asked five questions about campaign finance law. Less than 1 percent of those polled answered all five questions correctly, and 88 percent answered two or fewer correctly. *Id.* at 138–39.

Legislatures have long tried to remedy public concerns about corrupt government officials.[247] Beginning as early as the 1890s, states enacted legislation to address the prevailing "concern among the electorates . . . that their elected representatives . . . might still be controlled by those who provided campaign funds."[248] These state laws would later provide the groundwork for federal legislation.[249]

The Tillman Act of 1907 signaled the beginning of campaign finance law.[250] In this early statute, the federal legislature acknowledged the public's view that corporate contributions could lead to political corruption.[251] The intent behind this legislation was to combat corruption in both candidates and the electorate.[252] For the next forty years, Congress set out to adopt federal campaign finance statutes that would prevent not only bribery but also a broader concept of corruption.[253]

In 1939, Congress passed the Hatch Act, prohibiting federal employees from contributing more than five thousand dollars per year.[254] The legislation was intended to prevent wealthy groups and individuals from unduly influencing elections.[255] This "principle of equity" endured with the passage of the Taft-Hartley Act in 1947.[256] Like the Hatch Act before it, the restrictions contained in the Taft-Hartley Act sought to resolve the problem of "undue influence on the electorate" rather than merely bribery.[257]

---

247. Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 603 (2008) ("The story of campaign finance reform properly begins in the 'Gilded Age,' when a variety of political reform movements began to question the growing influence of trusts and other organized economic interests within the American democratic system.").

248. Florida, Missouri, Nebraska, and Tennessee were among the first states to implement statutes prohibiting corporate contributions in the late seventeenth century. *Id.* at 604–05 (quoting ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND THE COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW xvii (1988)).

249. *Id.* at 605.

250. Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871, 871 (2004).

251. Winkler asserts that corruption should be understood not merely as "excessive corporate power," but more appropriately as the "misuse of 'other people's money.'" *Id.* at 873.

252. Pasquale, *supra* note 247, at 605–06 (citing John R. Bolton, *Constitutional Limitations on Restricting Corporate and Union Political Speech*, 22 ARIZ. L. REV. 373, 377 (1980)).

253. *Id.*

254. *Id.* at 608.

255. *Id.*

256. *Id.*

257. *Id.* at 609.

In 1974, Congress passed amendments to strengthen FECA.[258] These amendments responded to the "problem of inequitable influence" by placing limitations on individuals' contributions and expenditures.[259] When the regulations were challenged in *Buckley*, FECA proponents clung to the equality-based understanding of corruption.[260]

D. Problems with a Quid Pro Quo Corruption Standard

Since the prevention of corruption and its appearance have been the only governmental interests deemed sufficient to justify restrictions imposed by campaign finance statutes to date, such a "crabbed view"[261] makes it unlikely that the Court will uphold further regulations.[262] Nothing in the country's history, including the opinions of the founding fathers and the legislative intent behind campaign finance laws, indicates that corruption exists only in quid pro quo situations.[263] Accordingly, by adopting a strict quid pro quo standard for corruption, the majority in *Citizens United* set aside historical and current public opinion.[264] Furthermore, the quid pro quo standard accomplishes little—if anything—more than current bribery statutes, is exceedingly difficult to prove, and excludes problematic behavior.

1. Quid Pro Quo is Too Similar to Bribery

The Court in *Citizens United* offered an "intellectually and practically untenable" difference between practices that were corrupt from those that are not.[265] To the majority, expecting a favorable outcome is a "substantial and legitimate reason" for contributing to a

258. *Id.* at 614.
259. *Id.* at 603, 614.
260. *Id.* at 616.
261. McConnell v. FEC, 540 U.S. 93, 152 (2003).
262. According to Ofer Raban: "the narrower the Court's understanding of the anti-corruption interest, the smaller the government's ability to regulate all campaign finances." Raban, *supra* note 211, at 380; *see also* HOHENSTEIN, *supra* note 5, at 237 ("The construction of a 'quid pro quo' definition of corruption the permitted Congress to regulate campaign finances limited the potential for other legitimate interests to balance public access to deliberative ideas and discussion.").
263. *See supra* Part III.A–C.
264. Citizens United v. FEC, 130 S. Ct. 876, 961 (2010) (Stevens, J., concurring in part and dissenting in the judgment).
265. Raban, *supra* note 211, at 374.

campaign.[266] Without a specific quid pro quo agreement there is no political corruption.[267] It follows, then, that if there is no political corruption, the government has no interest in curbing its occurrence.[268] Since the Court expressly declared that independent expenditures never pose a threat of quid pro quo corruption, it further narrowed the field of potential corrupt activity to include only contributions given at the behest of an explicit arrangement.[269] Yet, offering votes or donations in exchange for favorable political outcomes is very similar to the crime of bribery.[270] In light of this similarity, quid pro quo corruption is superfluous.

If the standard for corruption is merely "that it is corrupt for an officeholder to take money in exchange for some action,"[271] it is difficult to see how this differs from the long-established crime of bribery. Since bribery covers "only the most obvious instances of corrupt conduct,"[272] if corruption requires a showing of quid pro quo arrangements, the two concepts would appear to be synonymous. For example, as courts have interpreted most laws prohibiting bribery, a majority of contributions from special interest groups are bribes since they are given with the intent to influence the recipient.[273]

It seems redundant for the Supreme Court to define corruption as activity that is already prohibited by federal bribery laws. In fact, in his opinion in *McConnell*, Justice Thomas suggested that quid pro quo corruption was merely a restatement of bribery.[274] He challenged the government to explain "why the bribery laws are not sufficient."[275] In his view, regulations would expand each time the Court declared a certain type of behavior as an attempt to circumvent

266. *Citizens United*, 130 S. Ct. at 910 (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part)).

267. *Id.* at 911.

268. Raban, *supra* note 211, at 374.

269. *Citizens United*, 130 S. Ct. at 908–09.

270. The crime of bribery occurs when someone "directly or indirectly . . . gives, offers or promises anything of value to any public official . . . with intent . . . to influence any official act." 18 U.S.C. § 201(b)(1)(A) (2000).

271. Burke, *supra* note 17, at 131.

272. Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 786 (1985).

273. *Id.* at 826–28.

274. *See* McConnell v. FEC, 540 U.S. 93, 267 (2010) (Thomas, J., concurring in the judgment in part and dissenting in part).

275. *Id.* at 269.

the limitation.[276] The anticorruption governmental interest supporting limitations on speech creates a "never-ending and self-justifying process,"[277] yet adds nothing beyond the scope of bribery statutes.

Some scholars have attempted to offer differences between bribery and quid pro quo corruption.[278] Bruce Cain defines "traditional" bribery as "the performance of [a] public duty in exchange for something of personal value."[279] According to Cain, the critical distinction between a bribe and a contribution is their ability to ultimately influence the election.[280] Contributions, he claims, are only effective if the recipient is elected, while bribes are effective regardless of their impact on the election.[281] He goes on to say that with contributions, "voters still have sovereignty."[282] Daniel Lowenstein counters Cain's assertion, however, by pointing out that voters do not lose their sovereignty in the context of bribes.[283]

While it may be true that contributions are effective only when the candidate is elected, bribes and quid pro quo contributions share the same objective: to gain favorable action from elected officials through the use of money.[284] There is no practical distinction, therefore, between a bribe and quid pro quo corruption.[285] An examination of the current bribery laws further evidences this similarity.

---

276. *Id.* at 268–69.

277. *Id.* at 269.

278. *See* Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111 (1995); *see also* David A. Strauss, *What Is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 143 (1995) (arguing that assuming "that everyone has an equal opportunity to 'bribe' the official . . . will isolate the problem of corruption.").

279. Cain, *supra* note 278, at 113.

280. *Id.* at 117.

281. *Id.* ("The campaign contribution is ultimately translated into the currency of votes. The pure legislative bribe is not.").

282. *Id.*

283. Daniel Hays Lowenstein, *Campaign Contributions and Corruption: Comments on Strauss and Cain*, 1995 U. CHI. LEGAL F. 163, 186 (1995) ("Assuming that campaign contributions and personal payments are both fully disclosed, voters are free to attach whatever significance they wish to the transactions.").

284. Bribery involves giving something of value in exchange for influence. 18 U.S.C. § 201(b)(1) (2006). Similarly, quid pro quo corruption involves donating money in exchange for political favors. FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985).

285. If corruption is defined as quid pro quo, then corruption occurs when someone gives a contribution as a result of a quid pro quo agreement. Both bribery and corruption, then, involve giving money in exchange for an agreement. Conversely, *Citizens United* stated that expenditures, as opposed to contributions, can never be corrupt. Citizens United v. FEC, 130 S. Ct. 876, 909 (2010).

Bribery involves blatant and obvious occurrences where someone with disposable income intends to exert influence over a government official.[286] As such, it is understood as "having fixed, clear boundaries."[287] Laws prohibiting bribery should, therefore, require a quid pro quo agreement.[288] While such laws are often presumed to require this type of showing, most statutes do not actually contain such a requirement.[289] Additionally, Daniel Lowenstein asserts that no court demands an "actual, bilateral agreement."[290]

Furthermore, according to Thomas Burke, even bribery laws do not specifically target quid pro quo corruption.[291] Burke states that bribery laws require evidence of an explicit agreement merely to prove that the money had a corruptive effect.[292] Even bribery laws, he claims, are aimed at the corruptive influence that accompanies monetary donations.[293] As Ofer Raban points out, the federal bribery statute does not require that the intent to influence and the actual influence be proved simultaneously.[294] Since bribery statutes focus more on subjective intent, the crime of bribery can occur without an agreement between the donor and recipient.[295]

The Court's decision to limit corruption to quid pro quo contributions is puzzling in light of the fact that federal and state bribery laws already prohibit this type of behavior. Moreover, the Court appears to battle itself within its own reasoning. In *Citizens United*, the Court acknowledged that the legitimate governmental interest lies in preventing explicit quid pro quo agreements, but nothing less.[296] This distinction "makes little theoretical and practical sense," especially considering that the Court has also recognized the

286. Lowenstein, *supra* note 272, at 786.
287. *Id.*
288. *Id.* at 786–87.
289. *Id.* at 787, 820.
290. *Id.* at 820.
291. Burke, *supra* note 17, at 138.
292. *Id.* at 137–38.
293. *Id.* at 138.
294. Raban, *supra* note 211, at 374–75 (citing United States v. Ring, 768 F. Supp. 2d 302, 308–09 (D.D.C. 2011)).
295. *Id.* at 375.
296. Citizens United v. FEC, 130 S. Ct. 876, 908 (2010).

prevention of the appearance of corruption as a legitimate state interest.[297]

2. Quid Pro Quo Is Hard to Prove

Although it would be troublesome if elected officials were to "surrender their best judgment" and "succumb to improper influence," the *Citizens United* majority made clear that these activities would not be deemed corruptive in the absence of quid pro quo arrangements.[298] In practicality, however, proving the existence of such agreements is exceedingly difficult. According to Justice Stevens: "Proving that a specific vote was exchanged for a specific expenditure has always been *next to impossible*."[299]

The requirement of quid pro quo is easily evaded and, further, is challenging to prove even when such an agreement has occurred.[300] The Court itself acknowledged this difficulty in *Buckley*.[301] In rejecting the challengers' argument that FECA's $1,000 limitation on contributions was overbroad because most large contributors did not seek "improper influence," the Court stated that it would be "difficult to isolate suspect contributions."[302]

According to scholar Daniel Lowenstein, American politics involve "nearly endless" amounts of giving and receiving political benefits daily.[303] The United States' political decision-making process arguably involves more bargaining than any other country in the world.[304] Although strategic bargaining is a common practice, it is unlikely that there will be any proof of quid pro quo corruption.[305] Elected officials act for differing reasons, and none are likely to admit to selling votes.[306] Because "only the most crude or stupid" will explicitly agree to bargaining terms, "such external

297. Buckley v. Valeo, 424 U.S. 1, 27 (1976); Raban, *supra* note 211, at 375.

298. *Citizens United*, 130 S. Ct. at 911.

299. *Id.* at 965 (Stevens, J., concurring in part and dissenting in the judgment) (emphasis added).

300. Lowenstein, *supra* note 272, at 786.

301. *Buckley*, 424 U.S. at 29–30.

302. *Id.*

303. Lowenstein, *supra* note 272, at 816.

304. American political decisions "are made by endless bargaining; perhaps in no other national political system in the world is bargaining so basic a component of the political process." *Id.* at 816 n.117 (quoting ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 150 (1956)).

305. *See* Raban, *supra* note 211, at 374.

306. Citizens United v. FEC, 130 S. Ct. 876, 965 (2010) (Stevens, J., concurring in part and dissenting in the judgment).

manifestations are not likely to exist, or to ever be found even if they did."[307]

Justice Stevens protests that the "majority's apparent belief that quid pro quo arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics."[308] Quid pro quo corruption is narrow in scope because it is not difficult for parties to achieve a specific, questionable purpose without making an explicit agreement to that effect.[309]

3. Quid Pro Quo Misses Concerning Behavior

Citizens United's definition of corruption draws a bright line between activity that is corrupt and that which is not.[310] While this approach is conceptually simple to apply—no corruption without a quid pro quo arrangement[311]—it is troublesome because it fails to encompass disconcerting behavior.[312] During the debates over the first campaign finance reform acts, "the terms 'corruption' and 'undue influence' were used nearly interchangeably."[313] In the post–*Citizens United* world, however, that is no longer true.

According to Justice Stevens, corruption "operates along a spectrum" and "can take many forms."[314] Since it is fairly easy to avoid making explicit arrangements, the quid pro quo standard ensures that very little will constitute corruption.[315] Because the public regards many common political activities as unfair, the quid pro quo concept of corruption overlooks many practices that should be considered corrupt.[316] For example, Nathaniel Persily and Kelli Lammie found that the American public conceives of a contribution of practically any size as resulting in undue influence.[317] But under

307. *See* Raban, *supra* note 211, at 374.

308. *Citizens United*, 130 S. Ct. at 961 (Stevens, J., concurring in part and dissenting in the judgment).

309. Lowenstein, *supra* note 272, at 819.

310. *Id.*

311. Raban, *supra* note 211, at 374.

312. Levinson, *supra* note 28, at 349.

313. Pasquale, *supra* note 247, at 601.

314. Citizens United v. FEC, 130 S. Ct. 876, 961 (2010) (Stevens, J., concurring in part and dissenting in the judgment).

315. Lowenstein, *supra* note 272, at 819.

316. *Id.* at 816; *see also supra* Part III.B.

317. Persily & Lammie, *supra* note 235, at 122.

Citizens United, these contributions would not be considered corrupt unless given at the behest of an explicit arrangement.[318]

a. Undue Influence

Undue influence is missing from the modern conception of corruption. In *Austin*, the Court recognized the "corrosive and distorting effects" of money, specifically funds that were amassed due to the benefits of the corporate form.[319] The Court was particularly concerned with the possibility that corporate wealth could "unfairly influence elections."[320] Similarly, before the Court in *Colorado II* foreclosed the possibility, it indicated that corruption encompassed undue influence.[321] Nonetheless, the *Citizens United* majority declared that in the absence of a quid pro quo arrangement, undue influence is not corruption.[322]

According to Richard Hasen, money is capable of affecting the political process "electorally and legislatively."[323] This "electoral influence" involves using wealth to persuade other voters to support or defeat a specific candidate, and also affects who runs and which issues are debated.[324] A donor seeking legislative influence, according to Hasen, would support a candidate in order to later leverage his or her gratitude if the campaign were successful.[325] Dennis Thompson identified similar concepts of corruption but defines them a bit differently.[326] As a parallel to Hasen's "electoral influence," Thompson offers "electoral corruption," which he defines as "refer[ring] to the integrity of the elections and the campaigns that lead up to them."[327] Instead of legislative influence, Thompson refers

318. *Citizens United*, 130 S. Ct. at 911.

319. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659–60 (1990), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

320. *Id.* at 660.

321. FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 441 (2001) (understanding corruption "not only as quid pro quo arrangements, but also as undue influence on an officeholder's judgment, and the appearance of such influence").

322. *Citizens United*, 130 S. Ct. at 910–11.

323. Hasen, *supra* note 22, at 606. *But see* Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 63 (1997) ("Money's alleged corrupting effects are far from proven.").

324. Hasen, *supra* note 22, at 606.

325. Hasen specifies that "[u]nder a legislative strategy, a spender's support for a candidate can help secure access—if not more—from grateful elected officials." *Id.*

326. *See* Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036 (2005).

327. *Id.* at 1037.

to governmental corruption, in which a private citizen gives a payment or favor to an official to gain access.[328] The categories suggested by both Hasen and Thompson, then, indicate that undue influence is not the only worrisome behavior that is outside of modern quid pro quo corruption's scope.

b. Preferential Access

In addition to missing undue influence, the quid pro quo standard fails to address the corruptive potential of preferential access. In fact, the majority in *Citizens United* specifically declared that "[i]ngratiation and access . . . are not corruption."[329] Zephyr Teachout, however, suggests that "[d]onors give things for desired access and out of fear of disadvantage."[330]

Before *McConnell* reached the Supreme Court, Judge Kollar-Kotelly was among the three-judge district court panel that presided over the case.[331] In reviewing the congressional record developed concerning the passing of BCRA, Judge Kollar-Kotelly found that the activities of unions and corporations "substantially demonstrate[d] the potential for the appearance of corruption."[332] The record indicated that donors made sure to inform the elected officials when they purchased issue advertisements.[333] Accordingly, campaigns are "quite aware of who is running advertisements on the candidate's behalf, when they are being run, and where they are being run."[334] The politicians are especially thankful when the *donors* run "negative" advertisements because it allows the candidates themselves to appear "above the fray."[335] Despite this staggering evidence, under *Citizens United* these situations are not corrupting.[336]

---

328. *Id.*

329. Citizens United v. FEC, 130 S. Ct. 876, 910 (2010).

330. Zephyr Teachout, *Facts in Exile: Corruption and Abstraction in Citizens United v. Federal Election Commission*, 42 LOY. U. CHI. L.J. 295, 316 (2011).

331. McConnell v. FEC, 251 F. Supp. 2d 176, 183 (2003), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

332. *Id.* at 623.

333. *Id.*

334. Raban, *supra* note 211, at 366 (citing *Citizens United*, 130 S. Ct. at 961–62).

335. *McConnell*, 251 F. Supp. 2d at 623 (quoting the Court's factual findings).

336. In the immediate example, the purchasing of issue advertisements would not be deemed corrupt for multiple reasons. First, independent expenditures can never pose a threat of corruption, so a donor purchasing an advertisement on behalf of a candidate can never be corrupt. *Citizens United*, 130 S. Ct. at 908–09. Further, the Court explicitly declared that access is not

c. Distortion

Beyond undue influence and preferential access, the quid pro quo definition of corruption also fails to incorporate distortion of the political process. The *Austin* Court claimed to have proffered a broader definition of corruption when it declared that the governmental interest was in preventing 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."[337] Arguably, this was more than a "different type of corruption"[338]—it was an entirely independent governmental interest.

In the specific context of corporate speech, corporations distort the marketplace through disproportionate corporate spending.[339] Since the corporate form allows corporations to accumulate large amounts of money,[340] corporate speech can distort the market by overpowering it.[341] According to Justice Stevens, distortion caused by corporate speech flooding the marketplace "undermine[s] rather than advance[s] the interests of listeners."[342] Because the electorate devotes only finite time and attention to electoral messages, corporations have the potential to dominate the political marketplace.[343] Distortion hinges, then, on whether the political marketplace accurately reflects public opinion.[344]

As discussed, undue influence, preferential access, and distortion are all situations that can be worrisome but do not fit within the narrowly defined corruption as set forth in *Citizens United*.[345] Rather than involving explicit quid pro quo transactions,

---

corruption. *Id.* at 910. Even without these blanket generalizations, however, this situation still would not be corrupt under the *Citizens United* definition because there was no explicit quid pro quo agreement. *Id.* at 911.

337. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010).

338. *Id.*

339. Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 992 (2011).

340. *Citizens United*, 130 S. Ct. at 974 (Stevens, J., concurring in part and dissenting in the judgment).

341. Levinson, *supra* note 28, at 341.

342. *Citizens United*, 130 S. Ct. at 974 (Stevens, J., concurring in part and dissenting in the judgment).

343. Levinson, *supra* note 28, at 341–42.

344. *Id.*; *see also* Burke, *supra* note 17, at 131.

345. *See supra* Parts III.D.3.a–b.

each of these situations endangers the integrity of the electoral system.[346] Instead of a quid pro quo standard, "[a] broader, more common sense view of corruption is necessary to embrace behavior which is problematic, but which cannot literally be defined as quid pro quo."[347]

IV. OTHER INTERESTS AND A NEW PROPOSAL

The quid pro quo corruption standard is simply too narrow to incorporate all behavior that has the potential to corrupt.[348] This part argues that for Congress to effectively regulate harmful activity, it must be allowed to consider interests other than the prevention of quid pro quo corruption. These interests include equalization, public participation, accessibility, time protection, and shareholder protection. Additionally, this part suggests adopting a definitional sliding scale and addresses the criticism that such an approach is likely to elicit.

A. Other Interests to Consider

In *Buckley*, the Supreme Court rejected any interest other than the prevention of corruption and its appearance as sufficient to justify the limitations on freedom of speech.[349] The precedent has echoed that holding with only slight variation.[350] These previously rejected interests, however, are valid concerns and should be taken into account when developing a workable definition of corruption. While they might not be easy to limit from a definitional perspective, it is important that the Court have the flexibility to recognize other competing interests.

346. Levinson, *supra* note 28, at 309; *see also* Lowenstein, *supra* note 272, at 825 ("Corrupt arrangements in the most conventional sense and in the most conventional settings often are carried out without express quid pro quo agreements.").

347. Levinson, *supra* note 28, at 349.

348. *See supra* Part III.D.3; *see also* HOHENSTEIN, *supra* note 5, at 237 ("The construction of a 'quid pro quo' definition of corruption that permitted Congress to regulate campaign finances limited the potential for other legitimate interests to balance public access to deliberative ideas and discussion.").

349. Buckley v. Valeo, 424 U.S. 1, 48–59 (1976).

350. *See supra* Parts II.B–C.

1. Equalization

Equalization refers to "equalizing the relative ability of all voters to affect electoral outcomes."[351] The government first offered equalization as a governmental interest in *Buckley*.[352] The government argued that placing limits on contributions and expenditures would level the playing field so that each citizen had an equal opportunity to affect the outcome of an election.[353] The Court swiftly rejected this interest and stated that the "concept that government may restrict the speech of some . . . in order to enhance the relative voice of others is wholly foreign to the First Amendment."[354] Arguably, however, the intention behind the American system of government is "one person, one vote," and individuals' financial situations should not place them at either an advantage or a disadvantage.[355]

The wealthy should not be afforded greater opportunity to affect political outcomes merely because of their larger bank accounts.[356] Wealth in the economic sphere should not be translated into power in the political sphere because "[p]olitical inequalities stemming from disparities in wealth have historically made Americans uneasy."[357] These inequities must be alleviated—or at least curbed—in order to foster a healthy democratic conversation.

The problem of financial inequality is prevalent in modern society.[358] According to Judge J. Skelly Wright, these inequities "pose a pervasive and growing threat to the principle of 'one person, one vote' and undermine the political proposition to which this nation is dedicated—that all men are created equal."[359] Judge Wright, who heard *Buckley* at the circuit-court level, calls the

351. *Buckley*, 424 U.S. at 17.

352. *Id.* at 25–26.

353. *See id.*

354. *Id.* at 48–49.

355. *But see* Smith, *supra* note 323, at 96, 98 (stating that "citizens are free to use their differing abilities, financial wherewithal, and personal disposition to become more or less active in political life and to attempt to persuade their fellow citizens to vote in a particular manner" and "[few] concepts are more elusive than that of political equality").

356. Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1204 (1994).

357. Wright, *supra* note 2, at 629. Judge Wright stated that: "The broader purposes of our political system are ill-served by allowing the power of money to drown out the voices of the relatively moneyless." *Id.* at 631.

358. *Id.* at 610.

359. *Id.*

Supreme Court decision "tragically misguided."[360] As technology grows more sophisticated, the stark divide between those who have money and those who do not is intensified.[361]

According to Judge Wright, electoral equality is "the cornerstone of American democracy."[362] One need only revisit American history to find support for the proposition that equality is a laudable goal, and one that has guided public policy.[363] Although it has yet to be achieved, this goal of equality has existed in America since the country's inception.[364] In Federalist No. 57, James Madison expressed his view that wealth was not to interfere with a citizen's ability to be heard.[365]

One scholar goes so far as to say that equalization should not merely be a compelling governmental interest sufficient to justify campaign finance restrictions, but should instead be a constitutional guarantee.[366] According to Edward Foley, the government should provide an equal amount of money for each individual, who could then choose which electoral organizations to support.[367] Since no one would be permitted to contribute any other funds, including their own personal money, each citizen would have exactly the same amount of resources with which to affect the outcome of an

---

360. *Id.* at 609.

361. *Id.* at 610, 621. Judge Wright wrote his article in May of 1982, and recognized the divide created by the advancement in technology. *Id.* He could not possibly predict, however, the level of sophisticated technology in the modern world, and its effect on campaign budgets. *See infra* Part IV.A.4.

362. Wright, *supra* note 2, at 625.

363. *See id.* at 627–28 (referring to the "white primary, the poll tax, and voter qualifications based on property").

364. *Id.* at 626. *But see* Smith, *supra* note 323, at 96 ("The Framers certainly never intended that each person should have equal 'political influence.'").

365. Madison wrote:

> Who are to be the electors of the Federal Representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States . . . . No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.

Wright, *supra* note 2, at 626 (quoting THE FEDERALIST NO. 57, at 385 (James Madison) (Jacob Cooke ed., 1961)).

366. Foley, *supra* note 356, at 1206 (saying that he is "seeking not merely to overturn these precedents, but to go much further"). *But see* FEC v. Mass. Citizens for Life, 479 U.S. 238, 257 (1986) ("Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources.").

367. Foley, *supra* note 356, at 1206.

election.[368] While Foley's proposal is too dramatic, it demonstrates the importance of the equality interest and shows just how far it can extend.

2. Public Participation

Similar to, but distinct from, the interest of equalization is the interest of public participation in the political process. The government proposed this interest in *Bellotti*, but ultimately the Court did not believe that it was implicated.[369] The Court described this interest as "the State's interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government."[370]

The existence and persistence of the donor class means that a minority of the population dictates the available field of candidates for whom the majority vote.[371] Since public participation is "a crucial democratic value,"[372] apathy is "the greatest menace to freedom."[373] Widespread political participation ensures that citizens feel that they are able to affect decisions, resulting in greater confidence in the system.[374] Without this sense of "self-affirmation,"[375] the likely result is "cynicism and disenchantment."[376]

According to Spencer Overton, "Massive disparities in the distribution of wealth cause disparities in public participation."[377] He asserts that a "homogenous donor class" is responsible for funding the bulk of American political campaigns.[378] As a result, this

368. *Id.* at 1207.

369. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 787–88 (1978).

370. *Id.* at 787.

371. Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 73 (2004).

372. *Id.* at 101.

373. *Id.* (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

374. *Id.* at 101–02 (offering the critical functions of widespread participation, including that it "furthers the self-fulfillment and self-definition of individual citizens who play a role in shaping the decisions that affect their lives").

375. *Id.* at 91.

376. Citizens United v. FEC, 130 S. Ct. 876, 974 (Stevens, J., concurring in part and dissenting in the judgment). Although Justice Stevens is specifically referring to the repercussions of an overload of corporate speech in the quoted language, his position is that citizens lack confidence in the political process when they do not feel that their needs are represented. *Id.* Arguably, this effect is not any less salient when the overload comes from a donor class rather than corporate speech.

377. Overton, *supra* note 371, at 77.

378. *Id.* at 73.

homogenous class essentially decides which candidates will be able to run for office.[379] Since evidence shows that in many cases the better-funded candidate wins elections, the donor class, by extension, effectively determines who will be in office.[380]

In the modern American political marketplace, donors must both be interested in the process and have access to disposable income in order to join the donor class.[381] This unfortunate circumstance compromises public participation.[382] The result is that the largest donations come from only a few citizens, while the majority of the population cannot afford to make comparable donations.[383]

Judge Wright suggests that this disparity results in a "disillusioned and apathetic" electoral class[384]: If a citizen is not a member of the donor class, he or she might lose faith in the democratic process.[385] "To the extent that vast disparities exist," Overton writes, "citizens feel less able to shape the decisions that affect their lives and question the legitimacy of the laws."[386]

3. Accessibility

The government's interest in promoting accessibility goes hand in hand with the problem of a powerful donor class.[387] The accessibility problem is that high costs associated with political campaigns deter many people from entering the race.[388] In the current political marketplace, there is a real correlation between a candidate's budget and likelihood of success.[389] As a result,

379. *Id.* at 77. Overton declares that a "relatively small and wealthy group of individuals—the 'donor class'—gives large hard money contributions that fund the bulk of American politics." *Id.* at 74–75 (footnotes omitted).

380. *Id.* at 86–89. Overton states that "the extent to which electoral and legislative outcomes remain unaffected by money is a contested empirical question that one cannot answer with mathematical precision." *Id.* at 86. However, he points to the results of the 2002 elections to illustrate that 94 percent of the candidates with more money went on to win the election. *Id.*

381. *Id.* at 76.

382. *Id.* at 73.

383. *Id.* at 76.

384. Wright, *supra* note 2, at 625.

385. Overton, *supra* note 371, at 103.

386. *Id.*; *see also* Wright, *supra* note 2, at 638 ("[D]isillusionment breeds alienation; that alienation breeds apathy; that apathy menaces the democratic idea.").

387. Overton, *supra* note 371, at 101 (noting that participation includes not only funding campaigns, but also involvement and "public advocacy and protest").

388. Wright, *supra* note 2, at 621.

389. *Id.* at 622 ("The correlation between success and money is not a statistical artifact."); *see also* Overton, *supra* note 371, at 86 (noting the connection between fundraising and electoral

candidates are only considered viable if they can amass sufficient funding.[390]

Unless potential candidates are wealthy and willing to use their personal resources to fund their campaigns, they might consider the effort required to solicit the required funds hopeless.[391] In order to give the electorate a more diverse choice, the political process must be more accessible. A healthy political system is one that allows a greater number of viewpoints to be heard, regardless of financial ability.[392] However, the reality is that because high-spending campaigns win far more often than they lose,[393] a candidate's focus often shifts to securing funding, and would-be candidates who cannot raise the proper funding never enter the race.[394]

The *Buckley* Court addressed the accessibility problem but ultimately found that it was insufficient to justify the statutory restrictions at issue.[395] The government offered evidence of the "skyrocketing costs of political campaigns" and argued that the government had an interest in limiting such costs.[396] According to the government's statistics, federal election campaign costs had risen 300 percent in twenty years.[397]

The modern focus on "media-dominated, highly professional campaigns" has made campaigning far more expensive than it was when *Buckley* was decided.[398] According to Judge Wright, the modern practice of campaigning is extremely expensive and discourages many people who might otherwise be qualified from running.[399] These potential candidates "are defeated before they

success). *But see* HOHENSTEIN, *supra* note 5, at 252 (expressing the critics' view that the "connection between money and electoral success is not a direct one, and while most candidates who spend more win, this is merely evidence of preexisting political support").

390. Overton refers to these candidates as "viable," suggesting the view that a candidate does not stand a very good chance of winning without a large bankroll. Overton, *supra* note 371, at 73.

391. Wright, *supra* note 2, at 621.

392. *Id.* at 630–31 ("The unstated but inescapable premise of this discussion is that the political arena is less healthy, and less likely to serve the public interest and democratic ideals, if the agenda and the discussion are dominated by those with ample financial resources.").

393. *Id.* at 624.

394. *Id.* at 621.

395. Buckley v. Valeo, 424 U.S. 1, 56–57 (1976).

396. *Id.* at 57.

397. *Id.*

398. *See* Wright, *supra* note 2, at 621.

399. *Id.* ("Able, dedicated individuals, whose ideas and personal qualifications might attract many voters, are deterred from even entering the race for political office because of the immense sums of money required to run a media-based campaign.").

start."[400] Unwilling to take on personal debt, otherwise-competent candidates choose to forego the campaign process, and "the nation is often the loser."[401]

4. Time Protection

Another interest connected with the costs of engaging in the political process is the interest in "limiting the amount of time state officials must spend raising campaign funds."[402] Since campaigns have become so expensive, candidates seeking office must spend much of their time fundraising, rather than interacting with voters.[403] This interest coincides with the corruptive potential of the sale of access to political officials.[404]

Although ultimately rejected by the Supreme Court, the interest in candidate time protection is "fundamental to our representative democracy."[405] The system is harmed when political officials spend more time worrying about fundraising than worrying about their constituencies.[406]

As this Article describes, the high costs of campaigns require candidates to either dip into their personal accounts or solicit funds from other sources to acquire the funds necessary for an effective campaign.[407] In the modern system, this means that "[n]inety-nine percent of lobbying . . . is now fund-raising."[408]

In short, the more money a campaign needs, the more time candidates spend trying to raise money, which translates into less

400. *Id.*

401. *Id.*

402. Randall v. Sorrell, 548 U.S. 230, 240 (2006).

403. *See id.* at 245 ("Increased campaign costs, together with the fear of a better-funded opponent, mean that without expenditure limits a candidate must spend too much time raising money instead of meeting the voters and engaging in public debate.").

404. *See supra* Part III.D.3.b (discussing the corruptive potential of preferential access).

405. Landell v. Sorrell, 382 F.3d 91, 123 (2d Cir. 2004), *rev'd sub nom.* Randall v. Sorrell, 548 U.S. 230 (2006).

406. *Landell*, 382 F.3d at 123 (citing Vincent Blasi, *Free Speech and the Widening Gyre of Fundraising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1282–83 (1994) (representation is impaired "when legislators continually concerned about re-election are not able to spend the greater part of their workday on matters of constituent service")).

407. *See supra* Part IV.A.3; *see also* Wright, *supra* note 2, at 621 (noting potential candidates' need for personal wealth or special interest assistance to effectively campaign).

408. Lowenstein, *supra* note 272, at 828 (alteration in original) (quoting E. DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION 58 (1983)).

time "reading, studying, and passing legislation."[409] The Court has referred to this practice in passing as "time-consuming cultivation"[410] and the "rigors of fundraising."[411] Accordingly, the high costs of political campaigns dictate how both incumbent and hopeful officials spend their time.[412]

5. Shareholder Protection

The government in *Bellotti* offered an additional potential interest specific to the corporate realm: protecting the rights of minority shareholders.[413] This interest involves "protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation."[414] If corporations are allowed to use funds from the general treasury to finance corporate electoral communications, there is a risk that some shareholders will disagree with the message being conveyed.[415] Since the shareholders are "footing the bill," this can result in a "kind of coerced speech."[416]

According to Justice Stevens, the interest in protecting dissenting stockholders has historical roots.[417] It was one of the main inspirations for enacting the Tillman Act and statutes that followed.[418] Until *Citizens United*, this interest had previously been supported by various Supreme Court cases.[419]

The majority in *Citizens United* rejected this interest because shareholders can resort to "the procedures of corporate democracy" to avoid any misuse of their investments.[420] However, forcing shareholders to sell their stock does not adequately address their concerns or dissension.[421] The main objective for shareholders in

409. HOHENSTEIN, *supra* note 5, at 248.
410. FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 460 (2001).
411. Buckley v. Valeo, 424 U.S. 1, 91 (1976).
412. Landell v. Sorrell, 382 F.3d 91, 122 (2d Cir. 2002), *rev'd sub nom.* Randall v. Sorrell, 548 U.S. 230 (2006) ("[T]he pressure to raise large sums of money greatly affects the way candidates and elected officials spend their time.").
413. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 787 (1978).
414. *Id.*
415. Citizens United v. FEC, 130 S. Ct. 876, 977 (2010) (Stevens, J., concurring in part and dissenting in the judgment).
416. *Id.*
417. *Id.*
418. *Id.*
419. *Id.*
420. *Id.* at 911.
421. *See id.* at 978 (Stevens, J., concurring in part and dissenting in the judgment).

for-profit corporations is to make money, not to spread political ideas.[422] To present individuals with a choice between compromising their political beliefs and walking away from an economic investment creates the unacceptable result of valuing the corporate speech above the individual's freedom of speech.

B. Proposal: Definitional Sliding Scale

Although "nothing in the First Amendment commits us to the dogma that money is speech," this Article does not challenge that aspect of the *Buckley* holding.[423] If corruption and its appearance are the only governmental interests that are (or will ever be) sufficient to justify intrusions on electoral "speaking," however, the definition of corruption should depend on the speaker's identity. According to Justice Stevens, "Corruption operates along a spectrum."[424] Accordingly, the analysis of corruption should be similarly flexible, involving a balance between the various potential governmental interests[425] and the definition of corruption attributable to the speaker. While the analysis will differ depending on who is speaking and the governmental interests at stake, the standard remains the same: corruption or the appearance of corruption. Essentially, the standard should be uniform, but the application should be customized.

1. Individuals

According to the *Buckley* Court, the First Amendment protects political discussions "integral to the operation of the system of government established by our Constitution."[426] Private citizens are the most deserving of First Amendment freedoms, so as applied to them, the definition of corruption should remain as it is: quid pro quo. Should the Court find reason to reconsider the quid pro quo standard, it would make sense to employ a broader definition even as applied to individuals. However, since the Court has been reluctant

422. Levinson, *supra* note 28, at 332.

423. J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005 (1976).

424. *Citizens United*, 130 S. Ct. at 961 (Stevens, J., concurring in part and dissenting in the judgment).

425. *See supra* Part IV.A.

426. Buckley v. Valeo, 424 U.S. 1, 14 (1976).

to abandon the quid pro quo standard, it should only be applied to private individuals.

The other interests discussed above come into play when deciding the degree to which individuals deserve protection. Since allowing private citizens broad protection furthers the interests of equalization and public participation, the scale tips heavily in favor of less restriction. The prevailing theories of free speech indicate that it "allows individuals to seek self-fulfillment, self-realization, or self-actualization," "promotes a marketplace of ideas," and "facilitates a . . . political debate."[427] Accordingly, the First Amendment protects individuals' rights to both speak and hear.[428] Both of these aspects of freedom of speech are necessary in a democracy where the public must make well-informed decisions about their sovereignty.[429]

Private citizens are the backbone of the American republic. In penning the Constitution and granting free speech, the Framers had "individual Americans" in mind;[430] their intent was to allow individual citizens the ability to freely hear and discuss ideas to make informed political decisions. Therefore, to find corruption when a private individual is involved, the Court must find quid pro quo or its appearance. If there ever were a time that quid pro quo would make sense, it would be in the case of individuals. Since this version of corruption is the most stringent, it provides individuals with the most protection.

2. Non-Natural Entities

Non-natural entities are less deserving of protection than private individuals. Additionally, because of their membership, these organizations presumably control larger sums of money than individuals. The goals of these organizations need to be considered when developing the sliding scale. Accordingly, because nonprofit organizations are, by definition, not operated to make money, they should be afforded more protection than for-profit corporations.

---

427. Levinson, *supra* note 28, at 319.

428. *Id.* at 321.

429. *Buckley*, 424 U.S. at 14–15.

430. Citizens United v. FEC, 130 S. Ct. 876, 950 (Stevens, J., concurring in part and dissenting in the judgment).

a. Political Action Committees, Political Parties, and Nonprofit Organizations

Political action committees, political parties, and nonprofit organizations occupy the middle ground on the corruption spectrum. None of these organizations involve the threat of dissenting shareholders because membership with these groups is entirely optional.[431] Instead, individuals who join or contribute to one of these types of organizations are "fully aware of its political purposes, and in fact contribute precisely because they support those purposes."[432] For example, the use of political action committees "helps assure that those who pay for an electioneering communication actually support its content and that managers do not use general treasuries to advance personal agendas."[433] When analyzing corruption with respect to these organizations, the definition of corruption should be undue influence.

It is difficult to categorize nonprofits because they vary in scope, purpose, and potential to harm the political process. Because nonprofits pose varying risks of corruption depending on their funding and spending habits, the legislature should delineate these organizations based upon their purpose of incorporation. Although these groups are distinguishable from political parties, whose purpose is to further their party's platform, they should still be subject to the same standard of corruption. While they are not entitled to the full range of protection that the First Amendment provides to private citizens, they are still entitled to some protection because they are comprised of individual members.

Under the sliding-scale scheme, corruption would be present if one of these groups tried to use contributions or expenditures in an attempt to procure some level of control over the official. Unlike the current definition, for groups falling into this realm of the spectrum, corruption would be present even in the absence of a quid pro quo agreement.

---

431. Voluntary associations do not pose the threat of corruption. FEC v. Mass. Citizens for Life, 479 U.S. 238, 263 (1986).

432. *Id.* at 260–61.

433. *Citizens United*, 130 S. Ct. at 977 (Stevens, J., concurring in part and dissenting in the judgment).

b. For-Profit Corporations

For-profit corporations lack the underlying natural speech and associational rights essential to the justification for First Amendment protection.[434] Additionally, "unlimited for-profit corporate electoral speech does not promote either speakers' or listeners' First Amendment rights."[435] Accordingly, corporate political speech should only be afforded First Amendment protection to the extent that it is helpful to the electorate's ability to make decisions.[436] Since the speech interests of for-profit corporations are weaker than individuals' and nonprofit organizations', the definition of corruption in the for-profit sphere should be distortion.

Assuming, arguendo, that for-profit corporations are entitled to speech protection at all, their First Amendment rights are "significantly weaker than those of individuals and nonprofit corporations and their individual members."[437] According to Justice Stevens, the Framers "took it as a given that corporations could be comprehensively regulated in the service of the public welfare."[438] As such, the definition of corruption with regard to for-profit corporations should be the most expansive so that corruption or its appearance can more readily be identified and eliminated.

Under this analysis, corruption would involve not only quid pro quo or undue influence (or the appearance of either) but also instances of distortion or its appearance. Because for-profit corporate speech involves special concerns,[439] corruption should be found whenever for-profit corporations dominate (or appear to dominate) the political marketplace. Although political action committees and nonprofit organizations may also be capable of flooding the marketplace, the speech interests of these organizations outweigh the potential for distortion.

---

434. For-profit corporations "lack self-actualization or self-expressive rights, as they have no capacity for self-realization." Levinson, *supra* note 28, at 329–30.

435. *Id.* at 322.

436. *Id.* at 336.

437. *Id.* at 319.

438. *Citizens United*, 130 S. Ct. at 949–50 (Stevens, J., concurring in part and dissenting in the judgment).

439. *See supra* Part III.D.3.c.

3. Anticipated Criticism

The most glaring challenge to this Article's sliding scale proposal is Justice Kennedy's majority opinion in *Citizens United*. According to Justice Kennedy, the government cannot impose restrictions only on those groups it does not wish to hear from.[440] He claims that identity-based restrictions are "all too often simply a means to control content."[441] As a result, the majority held that the First Amendment bars speaker-based restrictions.[442]

This "glittering generality," however, is "not a correct statement of the law."[443] There are multiple examples of the Court having treated speakers differently. The Court has held that "speech can be regulated differentially on account of the speaker's identity."[444] Arguably, these instances were "based on an interest in allowing governmental entities to perform their function,"[445] but that does not change the fact that the government has regulated speakers based on identity on numerous occasions.[446] Further, facilitating orderly elections is an important governmental function.

Additionally, this proposal avoids viewpoint discrimination because the standard remains the same regardless of speaker: corruption or its appearance. This proposal does not advocate for different laws based on the speaker's identity. Instead, the *analysis* of the constitutionality of existing laws should change depending on the speaker through the use of flexible definitions.

V. CONCLUSION

Throughout American history, the public has expressed a fear of corruption in the political realm. In *Buckley v. Valeo* and the cases that followed, the Supreme Court attempted to address these concerns with respect to campaign finance issues without infringing on important First Amendment rights. Unfortunately, whittling a

440. *Citizens United*, 130 S. Ct. at 899.
441. *Id.*
442. *Id.* at 913.
443. *Id.* at 930 (Stevens, J., concurring in part and dissenting in the judgment).
444. *Id.* at 945.
445. *Id.* at 899 (majority opinion).
446. *E.g.*, 2 U.S.C. § 441e(a)(1) (2006); Bethel Sch. Dist No. 403 v. Fraser, 478 U.S. 675 (1986); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977); Parker v. Levy, 417 U.S. 733 (1974); Civil Service Comm'n v. Letter Carriers, 413 U.S. 548 (1973); Public Workers v. Mitchell, 330 U.S. 75 (1947). *Id.* at 945 nn.41–45 (Stevens, J., concurring in part and dissenting in the judgment).

definition of corruption has been less than smooth, and the concept has continuously developed. In *Austin* and *McConnell*, the Court appeared to be advocating for a broader reading of the concept of corruption, but *Citizens United* tapered the definition.

The modern understanding of corruption—quid pro quo—is too narrow. This definition ignores the historical understanding of corruption, societal concerns, and legislative intent, and it involves practical problems in its application. Equalization, public participation, accessibility, time protection, and shareholder protection should all be considered important governmental interests when determining if restrictions in a particular piece of legislation are sufficiently justified. Finally, because speech by different people implicates different fears, the definition of corruption should be flexible.