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Democracy, Deference, and Compromise: Understanding and Reforming Campaign Finance Jurisprudence

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DEMOCRACY, DEFERENCE, AND COMPROMISE: UNDERSTANDING AND REFORMING CAMPAIGN FINANCE JURISPRUDENCE

*Scott P. Bloomberg**

In Citizens United, the Supreme Court interpreted the government's interest in preventing corruption as being limited to preventing quid pro quo—cash-for-votes—corruption. This narrow interpretation drastically circumscribed legislatures' abilities to regulate the financing of elections, in turn prompting scholars to propose a number of reforms for broadening the government interest in campaign finance cases. These reforms include urging the Court to recognize a new government interest such as political equality, to adopt a broader understanding of corruption, and to be more deferential to legislatures in defining corruption.

Building upon that body of scholarship, this Article begins with a descriptive account of campaign finance jurisprudence that identifies various conceptions of corruption found in the case law. The Article then explains how these conceptions of corruption are animated by underlying disagreements about democracy and deference. More particularly, one group of Justices believes that preserving a robust process of public opinion formation is paramount in campaign finance cases, and that individual rights and political process concerns warrant intervention in defining corruption. The other group of Justices believes that the deployment of concentrated wealth in elections impairs legislative responsiveness to public opinion and that the Court should defer to legislative expertise in defining corruption.

Having presented this account, the Article proposes a reform to accommodate both groups of Justices' concerns in campaign finance cases. This reform, which I call the Compromise Methodology, instructs the Court to defer to the legislature's understanding of the anticorruption interest when the

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campaign finance law in question protects either: (a) legislative responsiveness to public opinion; or (b) the process of public opinion formation. If the law protects neither of these concerns, then the Court intervenes and finds that the anticorruption interest cannot justify the law. Aside from this reframing of the anticorruption interest, the Compromise Methodology leaves the Court's ordinary decision-making process intact. The Court can still determine whether a campaign finance law impacts individual rights and whether a law is sufficiently tailored to the anticorruption interest to withstand scrutiny. I argue that the Compromise Methodology locates valuable middle ground in campaign finance jurisprudence.

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INTRODUCTION

The Supreme Court has held that the only government interest that allows legislatures to impose campaign finance restrictions is the interest in preventing corruption.¹ In *Citizens United v. Federal Election Commission*,² the Court interpreted this anticorruption interest as being limited to the prevention of a particularly narrow form of quid pro quo—cash-for-votes—corruption.³ This narrow understanding of the anticorruption interest has drastically circumscribed legislatures’ abilities to regulate the financing of elections,⁴ prompting calls for reform from the public and from scholars. While popular reform groups have focused on overturning the *Citizens United* Court’s holdings regarding money-as-speech and corporate personhood,⁵ many scholars have focused on the Court’s understanding of the anticorruption interest. Amongst this group, some have pushed for a return to the broader understanding of the

1. See, e.g., *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 741 (2008) (collecting cases).

2. 558 U.S. 310 (2010).

3. *Id.* at 357–60; see also LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 241–43 (2011) (explaining that the *Citizens United* Court conceived of corruption only in terms of cash-for-votes corruption and failed to recognize the type of corruption caused by legislative dependence on wealthy campaign financiers).

4. See, e.g., Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 21 (2012) (arguing that the Court’s holding regarding the anticorruption interest in *Citizens United* prevents “almost all government regulation of campaign finance beyond transactions directly involving a political party or candidate” by “narrowing . . . the government interest in the prevention of corruption,” as compared to how that interest had been previously understood).

5. Several of the leading campaign finance reform organizations have centered their campaigns around contesting the idea of corporate personhood and money-as-speech. See, e.g., *About Us*, END CITIZENS UNITED, www.endcitizensunited.org/about [<https://web.archive.org/web/20200201091459/https://endcitizensunited.org/about/>] (last visited Feb. 23, 2020) (seeking to overturn *Citizens United* and describing the decision as “establish[ing] the legal basis for the idea that ‘corporations are people’”); *The Supreme Court Ruling*, PUB. CITIZEN, <https://democracyisforpeople.org/page.cfm?id=18> (last visited April 5, 2020) (describing *Citizens United* as announcing “that corporations have a constitutional right to spend unlimited amounts of money to promote or defeat candidates”); *What Is the Problem?*, FREE SPEECH FOR PEOPLE, <https://freespeechforpeople.org/the-amendment/what-is-the-problem> [<https://web.archive.org/web/20200512020544/https://freespeechforpeople.org:443/the-amendment/what-is-the-problem/>] (last visited May 12, 2020) (explaining that the Court has wrongly “endorsed the dangerous fiction that corporations have the same constitutional rights as living, breathing people” and “that campaign spending is a form of speech protected by the First Amendment”); see also Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 31 (2012) (“The popular reaction to *Citizens United* was swift and overwhelmingly negative. The shorthand version, according to popular perception, was that the Court had added to *Buckley*’s debatable equation that ‘money is speech’ the more pernicious equation that ‘corporations are people.’”).

anticorruption interest advanced by the Court in earlier cases,⁶ such as *McConnell v. Federal Election Commission*⁷ and *Austin v. Michigan Chamber of Commerce*.⁸ Others have argued that preventing corruption is not the only interest at play when a legislature restricts the financing of elections, and so the Court should recognize other government interests, such as electoral integrity, political equality, or political participation.⁹ And, a persuasive article by Professor Deborah Hellman posits that the Court should be more deferential to Congress in campaign finance cases because defining corruption (in the context of the anticorruption interest) requires making subjective democratic judgments best left to the legislative branch.¹⁰

This Article builds upon this body of reform-minded scholarship. The Article first offers a unique descriptive account of campaign finance jurisprudence that places the relationship between the anticorruption interest, democracy, and deference at the forefront. Based on that descriptive account, I offer a reform for deciding campaign finance cases called the “Compromise Methodology.” Accommodating the Justices’ clashing notions of democracy and deference in campaign finance cases, the methodology forces the Court to defer to Congress’ understanding of corruption, but only in some situations.

More particularly, the Article’s descriptive account shows that the Court’s campaign finance jurisprudence includes myriad conceptions

6. See, e.g., *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 143 (2003) (noting that the Court has “not limited [the anticorruption] interest to the elimination of cash-for-votes exchanges”), *overruled by Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659–60 (1990) (interpreting the anticorruption interest to extend beyond quid-pro-quo transactions), *overruled by Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); LESSIG, *supra* note 3, at 230–32 (advancing a conception of corruption that includes legislative dependence on financial support from the wealthy); ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED 276–93 (Harvard Univ. Press 2014) (arguing for a broad understanding of corruption).

7. 540 U.S. 93 (2003), *overruled by Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

8. 494 U.S. 652 (1990), *overruled by Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

9. See, e.g., RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 186–87 (2016) (proposing a new government interest in political equality); ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 61–62 (Harvard Univ. Press 2014); Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259, 1273 (2012) (proposing a new government interest in political participation).

10. See Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1385 (2013).

of corruption, ranging from narrow to broad. The factors that lead the Justices to settle on one conception of corruption over another are largely unspoken, but a careful examination of the case law reveals that the Justices' understandings of corruption are dependent on underlying assumptions about democracy and deference.¹¹ One group of Justices consistently expresses concern about how campaign finance laws impact the process of public opinion formation necessary to maintain democratic self-governance. This group also rejects calls to defer to legislatures in defining corruption, believing that such deference is unwarranted given the individual rights and political process concerns present in campaign finance cases. Accordingly, this group, which I shall call the "Interventionist Justices," defines corruption narrowly and without deference, so that legislatures cannot interrupt the free flow of public discourse, curtail individual rights, or clog political processes. The other group of Justices consistently expresses concern about how the expenditure of large sums of money in elections can degrade legislative responsiveness to public opinion in our democracy. This group also believes that the Court should defer to legislatures in defining corruption given legislatures' expertise in matters of corruption prevention. These "Deferential Justices" accordingly define corruption broadly and deferentially, so that legislatures can protect responsiveness to the public.

Despite these positions being seemingly far apart, I believe finding a middle ground to accommodate both groups of Justices' concerns regarding democracy and deference is possible. The Compromise Methodology that I propose here accomplishes this task by altering how courts define the anticorruption interest. It instructs courts to defer to Congress' understanding of the anticorruption interest when a campaign finance law protects against a practice that impairs *either* legislative responsiveness *or* public opinion formation. If the restriction does not protect either of these "democratic concerns," then the Court must intervene and find that the anticorruption interest does not encompass the law in question. This reform would give legislatures a bigger role in defining corruption while still preserving some space for courts to sculpt the contours of the government interest.

11. My observations in this portion of the Article in particular build upon the exceptional work done by POST, *supra* note 9, at 55–69, and Hellman, *supra* note 10, at 1391–401.

Aside from altering how the Court goes about defining the anticorruption interest, the methodology preserves the Court's ordinary practice of determining whether a campaign finance law impacts individual rights and whether the restriction is sufficiently tailored to the anticorruption interest. Preserving the status quo in these areas helps to accommodate the Interventionist Justices' individual rights and political process concerns.

Importantly, I do not claim in this Article that the Compromise Methodology is normatively the best way to decide campaign finance cases. The Compromise Methodology is just that—a *compromise* designed to forge common ground between two groups of Justices whose positions are seemingly far apart. While I thus leave open the possibility that more drastic reforms may produce better normative results, these reforms are more revolution than evolution. A jurisprudential revolution may someday come to campaign finance law, but reformers also need to be prepared for the possibility that the jurisprudence evolves incrementally through compromise. Changes to the Court's ideological composition, the emergence of a centrist swing-vote Justice, and stare decisis concerns could all drive this result. In such a situation, the Compromise Methodology presents an ideal path forward.

In Part I of this Article I present a descriptive account of the anticorruption interest that explores various conceptions of corruption advanced by the Justices in campaign finance cases. In Part II I unpack this descriptive account to reveal the issues of democracy and deference that animate these myriad conceptions of corruption. I then begin Part III by introducing and explaining the benefits of the Compromise Methodology. Once I have done so, I illustrate how the methodology would work in practice by applying it to two campaign finance cases, I distinguish the methodology from other proposed reforms, and I address potential criticisms. Part IV briefly concludes the Article.

I. THE MANY VARIATIONS OF CORRUPTION

The descriptive account I offer here begins with the seminal case of *Buckley v. Valeo*,¹² where the Court recognized the government's interest in preventing corruption but left important questions about the

12. 424 U.S. 1 (1976).

scope of that interest unanswered. I then proceed to *Austin v. Michigan Chamber of Commerce*.¹³ There, a division emerges on the Court between one group of Justices who conceives of the anticorruption interest broadly and another who conceives of the interest narrowly. This broad-versus-narrow dichotomization, however, does not fully capture the Justices' disagreement over the meaning of corruption in campaign finance cases. Rather, as I shall explain, the case law includes myriad understandings of corruption. These understandings vary depending upon the identities of the corruptor and the corruptee at issue in the case, and the method of corruption involved.

A. Buckley's Imprecision

The seminal case in campaign finance law, and the starting point for most descriptive accounts of the jurisprudence, is *Buckley v. Valeo*. *Buckley* involved a number of challenges to the Federal Election Campaign Act of 1971 and its comprehensive 1974 amendments (FECA).¹⁴ In pertinent part, the Court upheld the law's contribution limitations of \$1,000 to a single candidate per election, and \$25,000 in the aggregate per annum.¹⁵ Further, it struck down FECA's \$1,000 limitation on independent expenditures made "relative to a clearly identified candidate," while circumscribing the meaning of that phrase.¹⁶ In reaching these decisions, the Court held that money used to facilitate political speech constituted speech itself, and not conduct, entitling it to First Amendment protection.¹⁷

13. See *Austin*, 494 U.S. at 652.

14. *Buckley*, 424 U.S. at 6; see also Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

15. *Buckley*, 424 U.S. at 29, 38.

16. *Id.* at 39 (quoting 18 U.S.C. § 608(e)(1) (Supp. IV 1975)). In striking FECA's \$1,000 independent expenditure limitation, the *Buckley* Court found that the phrase "relative to a clearly identified candidate" would be unconstitutionally vague if not limited to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44. Having constricted § 608(e)(1) in that manner, the Court found that the government's anticorruption interest could not justify the restriction since the restriction could be easily circumvented by avoiding words of express advocacy. *Id.* at 45.

17. *Id.* at 15-16. The Court distinguished the expenditure of money from the conduct at issue in *United States v. O'Brien*, a case that "involved a defendant's claim that the First Amendment prohibited his prosecution for burning his draft card because his act was 'symbolic speech' engaged in as a 'demonstration against the war and against the draft.'" *Id.* at 16 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). It wrote that the "expenditure of money simply cannot be equated with such conduct as destruction of a draft card," as the Court "has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *Id.*

Despite *Buckley*'s holding that campaign finance restrictions burdened First Amendment speech rights, the Court left unanswered important questions about the primary government interest offered to justify such restrictions: the anticorruption interest. In evaluating the constitutionality of FECA's \$1,000 contribution limitation, the Court recognized the potential for corruption "[u]nder a system of private financing of elections," and concluded that "[t]o the extent that large contributions are given to secure a political quid pro quo from . . . office holders, the integrity of our system of representative democracy is undermined."¹⁸ It also declared that "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" was of almost equal concern as quid pro quo corruption.¹⁹ Turning to FECA's \$1,000 limit on independent expenditures, the Court remarked that "the independent advocacy restricted by the provision does not *presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."²⁰

These descriptions of corruption left the scope of the government's anticorruption interest largely undefined. Most relevantly, the Court's broad language in the "appearance of corruption" context and its "presently appear" hedge in the independent expenditure context left future Justices enough room to bend *Buckley* to reach their desired results.²¹ Furthermore, *Buckley* did

18. *Id.* at 26–27.

19. *Id.* at 27.

20. *Id.* at 46 (emphasis added).

21. *Compare* *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000) ("In speaking of 'improper influence' and 'opportunities for abuse' in addition to '*quid pro quo* arrangements,' we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." (quoting *Buckley*, 424 U.S. at 27)), *McCormell v. Fed. Election Comm'n*, 540 U.S. 93, 150 (2003) ("Our cases have firmly established that Congress' legitimate interest extends . . . to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'" (quoting *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)), *overruled by* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), *id.* at 191–92 ("[A] plain reading of *Buckley* makes clear that the express advocacy limitation . . . was the product of statutory interpretation rather than a constitutional command."), and *Citizens United*, 558 U.S. at 453 (2010) (Stevens, J., concurring in part and dissenting in part) (noting the *Buckley* Court's conclusion that independent expenditures did not "*presently appear* to pose dangers of real or apparent corruption" comparable to large contributions, and arguing that "*Buckley* expressly contemplated that an anticorruption rationale might justify restrictions on independent expenditures at a later date"), *with* *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 682 (1990) (Scalia, J., dissenting) (describing *Buckley* as holding "that independent expenditures to express the political views of

not address the question of corporate expenditures at all—though some of its plaintiffs were corporations. There too, future Justices would look to *Buckley*'s lack of detail on the topic as a signal, one way or the other.²²

B. Austin's Dichotomization

The *Buckley* Court's imprecision regarding the meaning of corruption and the scope of the anticorruption interest would cause a chasm to develop on the Court fourteen years later. In *Austin v. Michigan Chamber of Commerce*, the Court took up a challenge to a Michigan law that prohibited corporations from using their general treasuries to make independent expenditures in connection with state elections.²³ The majority opinion, authored by Justice Marshall, began by conceding that the campaign finance restriction imposed a First Amendment burden on the Chamber of Commerce.²⁴ It nonetheless upheld the Michigan law, finding the campaign finance restriction justified by the anticorruption interest.²⁵

In reaching this result, the majority offered a broad interpretation of the anticorruption interest. It began by noting the "special advantages" granted to corporations by state law.²⁶ These advantages, including "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets," not only "allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace'

individuals and associations do not raise a sufficient threat of corruption to justify prohibition"), *overruled by* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), *McConnell*, 540 U.S. at 292 (Kennedy, J., concurring in part and dissenting in part) ("*Buckley* made clear . . . that the corruption interest only justifies regulating candidates' and officeholders' receipt of what we can call the 'quids' in the *quid pro quo* formulation."), and *Citizens United*, 558 U.S. at 345 (majority opinion) ("[*Buckley*] emphasized that 'the independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process.'" (quoting *Buckley*, 424 U.S. at 47–48)).

22. Compare, e.g., *Citizens United*, 558 U.S. at 453 (Stevens, J., concurring in part and dissenting in part) ("*Buckley* did not evaluate corporate expenditures specifically."), with *Austin*, 494 U.S. at 683 (Scalia, J., dissenting) (noting that the "plaintiffs in [*Buckley*] included corporations").

23. *Austin*, 494 U.S. at 654 (majority opinion).

24. *Id.* at 657 ("Certainly, the use of funds to support a political candidate is 'speech'; independent campaign expenditures constitute 'political expression at the core of our electoral process and of the First Amendment freedoms.' [*Buckley*, 424 U.S. at 39]. . . . The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment. [*First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978)].").

25. *Id.* at 656.

26. *Id.* at 658.

to obtain ‘an unfair advantage in the political marketplace.’”²⁷ Thus, “the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form.”²⁸

From there, the *Austin* majority concluded that regardless of whether corporate independent expenditures could lead to quid pro quo—cash-for-votes—corruption, Michigan’s law could be justified as preventing a “different type of corruption in the political arena.”²⁹ Namely, “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.”³⁰ Under this conception of corruption, it makes no difference whether the corporation gives money directly to a candidate for office or spends it independently in his support. “Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.”³¹

The dissents, authored by Justices Scalia and Kennedy, both advanced a far narrower understanding of the anticorruption interest. Both attacked the majority’s conclusion that the special advantages conferred on corporations by the state gave the state an interest in preventing corruption that justified restricting corporate independent expenditures.³² Justice Scalia, when discussing the majority’s “new” form of corruption, described it as not being “‘corruption,’ as English speakers understand that term.”³³ Corruption—the way English speakers understand it, according to Justice Scalia—is synonymous with quid pro quo corruption, as discussed in the portion of *Buckley*

27. *Id.* at 658–59 (quoting *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)).

28. *Id.* at 659 (alteration in original) (quoting *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm. (NCPAC)*, 470 U.S. 480, 500–01 (1985)).

29. *Id.* at 659–60.

30. *Id.* at 660.

31. *Id.*

32. *Id.* at 680–81 (Scalia, J., dissenting) (criticizing the majority for concluding that the special advantages conferred upon corporations by the state permitted the state to exact First Amendment concessions in exchange for the advantages); *id.* at 703 (Kennedy, J., dissenting) (characterizing the majority’s “new” government interest of combating the effects of corporate wealth as “novel”).

33. *Id.* at 684 (Scalia, J., dissenting).

dedicated to FECA's contribution restrictions.³⁴ It is the classic image of a politician accepting a briefcase full of cash in exchange for a vote, not a politician being influenced by a corporation's ad-buy in his support.

Justice Kennedy echoed this conception of corruption. He defined the term as “‘a subversion of the political process’ whereby ‘elected officials are influenced to act contrary to their obligations of office *by the prospect of financial gain.*”³⁵ The conception of corruption advanced by the majority did not fit within this definition at all, he argued. It was instead “‘the impermissible [interest] of altering political debate by muting the impact of certain speakers,”³⁶ an interest in speech equalization that the Court had already rejected in *Buckley* and in *First National Bank of Boston v. Bellotti*.³⁷

Two very different understandings of the anticorruption interest arise from *Austin*. One conceives of corporations as posing threats unique from natural persons and believes that independent expenditures carry corruptive potential. The other sees no special threat created by the corporate form and conceives of corruption only in quid pro quo terms, which does not include independent expenditures. Though this disagreement continues to present day, the Justices' divide over the anticorruption interest is far more complex than this straightforward dichotomization suggests.

34. *Id.* at 683–84 (citing *Buckley*'s description of quid pro quo corruption and characterizing the majority's broader conception of corruption—the corrosive influence of corporate wealth—as dangerously broad).

35. *Id.* at 703 (Kennedy, J., dissenting) (alteration omitted) (emphasis added) (quoting *NCPAC*, 470 U.S. 480, 497 (1985)). Interestingly, Justice Kennedy's quotation of *NCPAC* only encompasses part of the definition of corruption articulated by then-Justice Rehnquist in that case. After the phrase “by the prospect of financial gain,” Justice Rehnquist included, “or infusions of money into their campaigns.” *NCPAC*, 470 U.S. at 497. This definitional distinction potentially has tremendous consequences for the constitutionality of contribution limitations. If the only constitutionally cognizable method of corruption is the sale of legislative favors for personal financial enrichment, then contribution limitations are largely prophylactic, and stand on weaker constitutional footing. *E.g.*, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 428–29 (2000) (Thomas, J., dissenting) (describing bribery laws as being more narrowly tailored to address quid pro quo corruption than contribution limitations and arguing that the latter are unconstitutional for that reason). If, however, corruption includes the sale of legislative favors in exchange for campaign donations, then contribution limitations are much more closely tailored to the evil sought to be extinguished.

36. *Austin*, 494 U.S. at 703–04 (referencing *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978)).

37. 435 U.S. 765 (1978).

C. *The Many Variations of Corruption*

To organize the myriad understandings of corruption found in campaign finance cases, I have created three categories of corruption variations. The first category involves variations of corruption dependent on the identity of the corruptor. For example, a corruptor could be a corporation or a natural person. A corruptor could also be a non-profit corporation, a political action committee, or an unincorporated group of natural persons. The second category involves variations of corruption dependent on the identity of the corruptee. It may be an individual legislator who is being corrupted. Or perhaps a political party, or entire electoral system, could become corrupted.

The third category includes variations of corruption dependent on the method of corruption involved. Corruption (or its appearance) may occur through an exchange of cash for legislative favors. I will refer to this method of corruption as “narrow quid pro quo corruption.” Corruption may also occur through *the conferring of a non-cash benefit upon a corruptor* in exchange for a legislative favor. The paradigmatic example of this method of corruption is airing an advertisement supporting an official in exchange for a legislative favor. I will call this “broad quid pro quo corruption,” since—like cash-for-votes corruption—it still includes an exchange of favors. Finally, corruption may occur in less obvious ways, including most prominently the dependence legislators may develop on the financial support of wealthy corporations and individuals. I will borrow a term from Professor Lessig³⁸ and title this latter method of corruption “dependence corruption.”

1. Corruptor Variations

The significance of the corruptor’s identity was at the forefront in *Austin*. As discussed above, the *Austin* Court found that corporations presented a “different” type of corruption, one going beyond quid pro quo and arising from “the corrosive and distorting effects” of corporations’ “immense aggregations of wealth.”³⁹ The Court made clear that its decision to uphold Michigan’s corporate expenditure restriction rested specifically on the unique attributes of corporations,

38. See LESSIG, *supra* note 3, at 228–29.

39. *Austin*, 494 U.S. at 659–60 (majority opinion).

insinuating that it would not have upheld a similar restriction on wealthy individuals. “We emphasize that the mere fact that corporations may accumulate large amounts of wealth is not the justification for [the Michigan law]; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures.”⁴⁰

The *Austin* dissenters, on the other hand, questioned the significance of the potential corruptor’s corporate identity.⁴¹ For example, Justice Scalia opined that “[c]ertain uses of ‘massive wealth’ in the electoral process—whether or not the wealth is the result of ‘special advantages’ conferred by the State—pose a substantial risk of corruption which constitutes a compelling need for the regulation of speech.”⁴² The corporate identity of the corruptor in *Austin* was thus of tremendous consequence to the majority, but completely unimportant to the dissenters.

A second case illustrating the significance of corruptor identity is *Federal Election Commission v. National Conservative Political Action Committee (NCPAC)*.⁴³ At issue in *NCPAC* was a provision of the Presidential Election Campaign Fund Act that made it a crime for any political committee to independently spend more than \$1,000 in support of a presidential candidate who chose to receive public funding.⁴⁴ The Court found the government’s anticorruption interest insufficient to justify the law.⁴⁵

In so holding, the Court distinguished the corruptive danger posed by political committees from that posed by corporations.⁴⁶ It reasoned that Congress was justified in restricting the political speech of even non-profit corporations as a prophylactic measure to address “the evil of potential corruption” from for-profit corporations that “had long been recognized.”⁴⁷ But political committees were “quite different from the traditional corporations organized for economic gain,” as they were “designed expressly to participate in political debate,”⁴⁸ and

40. *Id.* at 660.

41. *See id.* at 682 (Scalia, J., dissenting).

42. *Id.*

43. 470 U.S. 480 (1985).

44. *Id.* at 482.

45. *See id.* at 496–98.

46. *Id.* at 500.

47. *Id.* (citing *Fed. Election Comm’n v. Nat’l Right to Work Comm.*, 459 U.S. 197 (1982)).

48. *Id.*

could only accept donations in accordance with FECA’s contribution limitations.⁴⁹ The *NCPAC* Court accordingly gave Congress much less leash to restrict the speech of political committees—as opposed to corporations—under the specter of preventing corruption.⁵⁰

2. Corruptee Variations

In *NCPAC*, Justice Rehnquist, writing for the majority, described corruption as occurring when “[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.”⁵¹ This legislator-centric conception of corruption is common in campaign finance jurisprudence.⁵² Yet it is hardly manifest that only legislators can be corrupted. Indeed, examples from the case law evince variations of corruption dependent on the identification of institutions as corruptees.

To illustrate the corruptee-based variations of corruption, consider first *Davis v. Federal Election Commission*.⁵³ At issue in *Davis* was the so-called Millionaire’s Amendment provision of the Bipartisan Campaign Reform Act (BCRA).⁵⁴ This provision applied when one candidate financed his campaign with over \$350,000 from their own pocket, and their opponent did not.⁵⁵ In such cases, the non-self-financing candidate could collect campaign contributions in amounts of up to \$6,900, rather than the \$2,300 limit otherwise

49. Though not mentioned explicitly, the *NCPAC* Court alludes to this point by commenting that the “amounts given to the PACs are overwhelmingly small contributions, well under the \$1,000 limit on contributions upheld in *Buckley*.” *Id.* at 497; *see also* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112(2), 90 Stat. 475, 486–87 (establishing a \$5,000 annual limitation for contributions to a “political committee”).

50. *NCPAC*, 470 U.S. at 500 (opining that “deference to a congressional determination of the need for a prophylactic rule” does not justify a provision that “indiscriminately lumps with corporations any ‘committee, association or organization’” (quoting 26 U.S.C. § 9002(9) (2012) (defining “political committee”))).

51. *Id.* at 497 (emphasis added).

52. *E.g.*, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 359 (2010) (“The fact that speakers may have influence over or access to *elected officials* does not mean that *these officials* are corrupt.” (emphases added)); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 144 (2003) (“The idea that large contributions to a national party can corrupt . . . *federal candidates and officeholders* is neither novel nor implausible.” (emphasis added)), *overruled by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

53. 554 U.S. 724 (2008).

54. *Id.* at 729; *see also* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 319, 116 Stat. 81, 109–12.

55. *Davis*, 554 U.S. at 729.

imposed by BCRA.⁵⁶ Additionally, the provision lifted the \$40,900 cap on joint expenditures—expenditures coordinated between the party and candidate—for the non-self-financing candidate, allowing that candidate to get more financial support from their party.⁵⁷

Assessing the constitutionality of the Millionaire’s Amendment under the First Amendment begins with the question of whether it imposes a speech burden at all.⁵⁸ If this threshold question is answered affirmatively, then Congress must have a government interest to justify the speech burden created by the Millionaire’s Amendment. But what is that government interest? If a jurist believes that the government’s anticorruption interest applies solely to prevent the corruption of individual legislators, it is hard to see how that interest could justify the law. How could a candidate become corrupt by spending their own money? In fact, if corruption of the candidate is the jurist’s sole concern, the jurist might think the law to be counterproductive, as it allows the non-self-financing candidate to accept donations in treble the amount of BCRA’s contribution limits. The Millionaire’s Amendment is a corruption-enhancing provision, not a corruption-preventing provision, to the jurist concerned solely with corruption of individual legislators.⁵⁹

56. *Id.*

57. *Id.* at 728–29.

58. There is certainly an argument that it does not. The self-financing candidate is not prevented or in any way restricted from funding additional speech. *See id.* at 753 (Stevens, J., concurring in part and dissenting in part) (“Davis cannot show that the Millionaire’s Amendment causes him . . . any First Amendment injury whatsoever. The Millionaire’s Amendment quiets no speech at all.”). The law, moreover, puts the non-self-financing candidate in a position to create more speech. Thus, the Millionaire’s Amendment arguably increases the speech of the non-self-financing candidate while not decreasing the speech of the self-financing candidate. Of course, there is an argument to the contrary; namely, that the benefit conferred upon the non-self-financing candidate creates a disincentive—or penalty—for speech funded from his own pocket above \$350,000. *See id.* at 740 (majority opinion) (“[A] candidate who wishes to exercise [her right to make unlimited personal expenditures] has two choices: abide by a limit on personal expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits.”).

59. Indeed, this was the exact tack taken by the Court in striking down the Millionaire’s Amendment. Quoting *Buckley*, Justice Alito noted that “[f]ar from preventing these evils, ‘the use of personal funds . . . reduces the candidate’s dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which contribution limitations are directed.’” *Id.* at 738 (alteration omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 53 (1976)). He described *Buckley* as reasoning “that reliance on personal funds *reduces* the threat of corruption, and therefore [the Millionaire’s Amendment], by discouraging use of personal funds, disserves the anticorruption interest.” *Id.* at 740–41 (emphasis in original).

However, the analysis is wholly different if the jurist identifies institutions as corruptees. Then, the advantage held by independently wealthy candidates arguably transforms a normatively egalitarian or meritocratic electoral system into a plutocratic institution. To prevent this transformation—or corruption—of the institution, then, the jurist may consider Congress to be justified in penalizing candidates who self-finance by providing a benefit to their non-self-financing opponent.

The *Davis* dissenters expressed precisely this sentiment, albeit outside the rhetorical parameters of the anticorruption interest. They announced that it was “simply wrong” to suggest that the anticorruption interest “is the sole governmental interest sufficient to support campaign finance regulations.”⁶⁰ Instead, the Court has “long recognized the strength of an independent governmental interest in reducing both the influence of wealth on the outcomes of elections, and the appearance that wealth alone dictates those results.”⁶¹ This principle can easily be understood as existing within the confines of the government’s anticorruption interest, so long as the corruptee is the electoral system.⁶²

First National Bank of Boston v. Bellotti also provides a fitting example of a corruptee-based variation of corruption.⁶³ At issue in *Bellotti* was whether Massachusetts could prevent for-profit corporations from making political expenditures to influence the vote on ballot questions that did not “materially affect” their business interests.⁶⁴ The Court struck the Massachusetts law, reasoning that corporate speech was entitled to First Amendment protection.⁶⁵ However, the Court was careful to circumscribe the reach of its holding. It distinguished Massachusetts’ restriction on corporate expenditures in ballot measure contests from the “quite different context of participation in a political campaign for election to public

60. *Id.* at 754 (Stevens, J., concurring in part and dissenting in part).

61. *Id.* at 755.

62. *See* *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 236 (2014) (Breyer, J., dissenting) (describing the anticorruption interest as “an interest in maintaining the integrity of our public governmental institutions”).

63. *See* *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 767 (1978).

64. *Id.*

65. *Id.* at 784 (“We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for 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 that cannot prove, to the satisfaction of a court, a material effect on its business or property.”).

office.”⁶⁶ Laws prohibiting corporate expenditures in candidate elections were focused on “the problem of corruption of elected representatives through the creation of political debts,” a problem which of course is irrelevant in ballot measure contests.⁶⁷ The defining issue for the *Bellotti* majority, then, was not so much the characteristics of corporations, but the absence of an individual legislator to be corrupted by those corporations.

For the *Bellotti* dissenters, the absence of an individual legislator to corrupt was unimportant. The dissenting Justices recognized a government interest that extended to preventing corruption of “the very heart of our democracy, the electoral process.”⁶⁸ They were concerned with the use of corporate wealth to “acquire an unfair advantage in the political process.”⁶⁹ This conception of corruption, which included the electoral process itself as a corruptee, justified the Massachusetts law. On the other hand, the majority’s narrower idea about corruptees left Massachusetts without a government interest to restrict (what it found to be) protected speech.

Finally, consider the case of *McCutcheon v. Federal Election Commission*.⁷⁰ *McCutcheon* involved the aggregate contribution limitation first instituted by FECA and upheld by *Buckley* nearly forty years earlier.⁷¹ By 2014, the law capped campaign contributions at an aggregate amount of roughly \$120,000 per two-year election cycle.⁷² The Court struck this restriction, finding that it did not prevent corruption or its appearance.⁷³ In reaching this conclusion, Chief Justice Roberts’ reasoning, writing for the Court, proceeded as follows: The base contribution limit—the most a donor can give to an individual candidate—was \$5,200. Thus, Congress believed that contributions of \$5,200 or less would not cause corruption.⁷⁴ And, if

66. *Id.* at 788 n.26.

67. *Id.*

68. *Id.* at 809 (White, J., dissenting).

69. *Id.*

70. 572 U.S. 185 (2014).

71. *Id.* at 193; *see Buckley v. Valeo*, 424 U.S. 1, 38 (1976) (upholding FECA’s “overall \$25,000 limitation on total contributions by an individual during any calendar year”).

72. *McCutcheon*, 572 U.S. at 194 (“All told, an individual may contribute up to \$123,200 to candidate and noncandidate committees during each two-year election cycle.”).

73. *Id.* at 218 (“*Buckley* upheld aggregate limits only on the ground that they prevented channeling money to candidates beyond the base limits. The absence of such a prospect today belies the Government’s asserted objective of preventing corruption or its appearance.”).

74. *Id.* at 210 (“Congress’s selection of a \$5,200 base limit indicates its belief that contributions of that amount or less do not create a cognizable risk of corruption.”).

Congress believed that \$5,200 given to nine candidates would not corrupt any of those nine candidates, giving \$5,200 to a tenth candidate (putting the donor over the aggregate limit) would not corrupt that candidate.⁷⁵ For that matter, giving \$5,200 to one hundred candidates would not corrupt the eleventh through hundredth.⁷⁶ Thus, the aggregate limitation only prevents corruption insofar as it prevents circumvention of the \$5,200 base limit.⁷⁷ For various reasons, the Court found that the aggregate limit did not prevent circumvention of that base limit.⁷⁸

This analysis is dependent upon a conception of corruption in which only individual legislators are corruptees. It neglects the possibility that institutions, such as political parties, can be corrupted. Indeed, the removal of the aggregate limitation allows a single donor to contribute over \$1 million to a political party during an election cycle by giving the maximum base amount to each state party committee and the national party committees.⁷⁹ This figure may be coupled with over \$2 million in donations to federal candidates of the same party.⁸⁰

75. *Id.* (“If there is no corruption concern in giving nine candidates up to \$5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given \$1,801, and all others corruptible if given a dime.”).

76. *See id.*

77. *Id.* (“[I]f there is no risk that additional candidates will be corrupted by donations of up to \$5,200, then the Government must defend the aggregate limits by demonstrating that they prevent circumvention of the base limits.”).

78. *Id.* at 220. The Court rejected two hypothetical scenarios that would allow donors to circumvent the \$5,200 base contribution limit in the absence of an aggregate limitation. The first was the idea that a donor could contribute to a large number of non-connected political action committees, who would all then funnel the donor’s money to a single candidate. *Id.* at 211. The second was the idea that a donor would give a large check to a joint fundraising committee comprised of a candidate’s committee, a national party committee, and a large number of state party committees. The committees would allocate the check as appropriate under the base limits, then transfer the sum total to one committee, who could use the money to engage in coordinated expenditures on behalf of the candidate. *Id.* at 214–15. Justice Roberts concluded that “experience and common sense” foreclosed the possibility of this scenario and described it as being “divorced from reality.” *Id.* at 216. *But see* Letter from Brad C. Deutsch, Counsel to Bernie 2016, Inc., to Debbie Wasserman-Schultz, Chair, Democratic Nat’l Comm. 1–2 (Apr. 18, 2016), <https://web.archive.org/web/20160418213133/https://berniesanders.com/wp-content/uploads/2016/04/bernie-2016-letter-to-dnc-1.pdf> (describing how presidential candidate Hillary Clinton established a joint fundraising committee with the DNC and state Democratic Parties and then used the proceeds of the committee’s fundraising efforts for the benefit of the Clinton campaign).

79. *See McCutcheon*, 572 U.S. at 245, 268 tbl.1 (Breyer, J., dissenting) (illustrating how a single donor can contribute \$1,194,400 to a political party).

80. *Id.* at 247, 268 tbl.2(a) (illustrating how a single donor can contribute over \$2.4 million to a party’s candidates).

Justice Breyer, writing for the dissenting Justices, outlined how much of this over-\$3-million could be funneled to a single candidate, absent the aggregate limitation.⁸¹ But, was this step of Justice Breyer's analysis even necessary? Not under a theory of corruption that includes political parties as potential corruptees. It would be enough that an individual could give such large sums directly to a party.

3. Method of Corruption Variations

The Justices' disagreement over methods of corruption is sometimes framed in terms of "quid pro quo" corruption versus "access and influence" corruption. Indeed, dissenting in part and concurring in part in *McConnell v. Federal Election Commission*, this was exactly how Justice Kennedy framed his disagreement with the majority.⁸² Corruption occurs, according to Justice Kennedy, when a legislator is unduly influenced to vote a certain way by the prospect of financial gain.⁸³ The danger of such corruption is only present when a legislator receives a quid.⁸⁴ The quid—a thing of value—may unduly influence the legislator to vote a certain way, creating a quid pro quo exchange.⁸⁵ To Justice Kennedy, preventing this method of corruption is the only government interest sufficient to restrict campaign financing.⁸⁶

The *McConnell* majority, again according to Justice Kennedy, erred by framing corruption in terms of access and influence. The majority's conclusion that "access peddling by the parties equals corruption by the candidates" errantly relies "solely on the fact that access flowed from the conduct" and ignores the lack of a quid pro

81. *Id.* at 248, 269 tbl.2(b) (describing how a joint fundraising committee could direct at least \$2.37 million from a single donor to a single candidate).

82. *See* *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 295 (2003) (Kennedy, J., dissenting in part and concurring in part), *overruled by* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

83. *Id.* at 294 ("The very aim of *Buckley's* standard, however, was to define undue influence by reference to the presence of *quid pro quo* involving the officeholder.").

84. *Id.* at 295 ("Congress' interest in preventing corruption provides a basis for regulating federal candidates' and officeholders' receipt of *quids*, whether or not the candidate or officeholder corruptly received them. Conversely, the rule requires the Court to strike down campaign finance regulations when they do not add regulation to 'actual or apparent *quid pro quo* arrangements.'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 45 (1976)).

85. *Id.* at 292–93 (characterizing, with approval, the *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) Court's conception of quid pro quo corruption as being limited to "actual corrupt, vote-buying exchanges").

86. *Id.* at 298 (stating that various provisions of BCRA "cannot stand because they do not add regulation to conduct that poses a demonstrable *quid pro quo* danger").

quo exchange.⁸⁷ “Access in itself, however, shows only that in a general sense an officeholder favors someone or that someone has influence on the officeholder. There is no basis, in law or in fact, to say favoritism or influence in general is the same as corrupt favoritism or influence in particular.”⁸⁸

The jurisprudential disagreements surrounding the method of corruption, however, are more complex than Justice Kennedy’s framing of the issue leads on. Even within the quid pro quo method of corruption, the Justices disagree about both what constitutes a quid and what constitutes a quo. The Justices further disagree about whether methods of corruption outside of the quid pro quo framework can justify campaign finance restrictions.

A comparison of Justice Kennedy’s *McConnell* dissent and Justice Stevens’ *Citizens United* dissent illustrates this first point. The primary issues in *McConnell* concerned two provisions of BCRA.⁸⁹ The first was BCRA’s ban on soft money contributions to political parties.⁹⁰ Such contributions could be made in unlimited amounts and because they were used to finance advertisements that did not call for the express election or defeat of a candidate, they were not subject to federal law’s restriction on corporate and union contributions.⁹¹ The second was BCRA’s restriction of “Electioneering Communications”—communications referencing a candidate close to election time funded by a corporation or union.⁹²

Justice Kennedy did not believe that the government’s anticorruption interest justified either provision of BCRA. He framed the inquiry into whether a certain practice has quid pro quo corruption potential as being “functional.”⁹³ As described above, by this he meant that the Court should look to whether a quid has been given to the

87. *Id.* at 295.

88. *Id.* at 296.

89. *Id.* at 114 (majority opinion); see also Bipartisan Campaign Reform Act of 2002, Pub L. No. 107-155, § 319, 116 Stat. 81, 109–12.

90. See *McConnell*, 540 U.S. at 132–33 (describing one of BCRA’s “central provisions” as addressing Congress’ concerns about “the increasing use of soft money” to “influence federal elections”).

91. See generally *id.* at 122–25 (explaining soft money and summarizing the history of its increasing importance in federal elections). See also 2 U.S.C. § 441b(b) (2003) (transferred to 52 U.S.C. § 30118) (prohibiting corporations and unions from making contributions and expenditures in connection with federal elections).

92. See *McConnell*, 540 U.S. at 189–90 (setting out BCRA § 201’s definition of “Electioneering Communications”).

93. *Id.* at 293 (Kennedy, J., dissenting in part and concurring in part).

elected official. If the answer to that question is “no,” then the government has no interest that justifies imposing a burden on the speaker.⁹⁴ Crucially, Justice Kennedy means what he says quite literally. The quid—the thing of value—must actually be *given to* the elected official or candidate. It cannot be an action that accrues to the benefit of the candidate in some way but is never actually transferred to his control. Thus, when a campaign financier donates money to a political party and not to the candidate herself, the donation cannot constitute a quid.⁹⁵ Under Justice Kennedy’s “functional” conception of the quid pro quo corruption method, then, the government cannot restrict soft money contributions or independent expenditures.⁹⁶

While the *McConnell* majority chided Justice Kennedy for limiting his quid pro quo analysis to contributions given directly to candidates,⁹⁷ the more poignant attack on Justice Kennedy’s reasoning came six years later, once his became the majority view. Dissenting in *Citizens United*, Justice Stevens recognized methods of corruption beyond quid pro quo and sought to justify BCRA’s electioneering communications restriction on quid pro quo grounds as well.⁹⁸ Quids, according to Justice Stevens, “encompass the myriad ways in which

94. *Id.* at 294 (“Congress’ interest in preventing corruption provides a basis for regulating federal candidates’ and officeholders’ receipt of *quids*, whether or not the candidate or officeholder corruptly received them. Conversely, the rule requires the Court to strike down campaign finance regulations when they do not add regulation to ‘actual or apparent *quid pro quo* arrangements.’” (quoting *Buckley v. Valeo*, 424 U.S. 1, 45 (1976)).

95. *Id.* at 298–99 (explaining that BCRA’s soft money prohibition cannot be sustained by the government’s anticorruption interest because it “does not regulate federal candidates’ or officeholders’ receipt of *quids*”).

96. This illustrates the interplay of two different elements of corruption theory: the method element and the corruptee elements. If one believes that the parties themselves can become corrupted, then the fact that soft money is given to the parties and not the candidates becomes unimportant. Prohibiting soft money would then become justifiable even under Justice Kennedy’s narrow quid pro quo articulation of the method element.

97. *Id.* at 152 (majority opinion) (“Despite [Congress’s evidence] and the close ties that candidates and officeholders have with their parties, Justice Kennedy would limit Congress’ regulatory interest *only* to the prevention of the actual or apparent *quid pro quo* corruption ‘inherent in’ contributions made directly to, contributions made at the express behest of, and expenditures made in coordination with, a federal officeholder or candidate. Regulation of any other donation or expenditure—regardless of its size, the recipient’s relationship to the candidate or officeholder, its potential impact on a candidate’s election, its value to the candidate, or its unabashed and explicit intent to purchase influence—would, according to Justice Kennedy, simply be out of bounds.” (citation omitted)).

98. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 451–54 (2010) (Stevens, J., concurring in part and dissenting in part) (“There is no need to take my side in the debate over the scope of the anticorruption interest to see that the Court’s merits holding is wrong. Even under the majority’s ‘crabbed view of corruption,’ the Government should not lose this case.” (citation omitted)).

outside parties may induce an officeholder to confer a legislative benefit in direct response to, or anticipation of, some outlay of money the parties have made or will make on behalf of the officeholder.”⁹⁹ The quid need not be given directly to the candidate to cause corruption or its appearance, it just needs to inure to the candidate’s benefit. Independent expenditures and soft money contributions—particularly those made in large amounts—can thus be restricted by the government even under a quid pro quo framework, per Justice Stevens.

Staying within this quid pro quo framework, the *McConnell* and *Citizens United* dissents also illustrate the Justices’ disagreement about quos. That is, in addition to disagreeing about what action taken by the corruptor—what quid—leads to corruption, the Justices disagree about what action taken by the corruptee—what quo—leads to corruption. This disagreement revolves around the question of whether access and influence are themselves quos. Consider Justice Scalia’s *McConnell* dissent. Therein, he writes that “it cannot be denied . . . that corporate (like noncorporate) allies will have greater access to the officeholder, and that he will tend to favor the same causes as those who support him (which is usually *why* they supported him).”¹⁰⁰ Yet this access and influence, per Justice Scalia, is not itself a corruptive quo; to the contrary, it is “the nature of politics—if not indeed human nature.”¹⁰¹ The government, then, has no interest in preventing access and influence, even if that access and influence are purchased.

Justice Stevens’ *Citizens United* dissent takes the opposite position on the purchasing of access: “Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind.”¹⁰² So too on the purchasing of influence. Justice Stevens believes that Congress can restrict campaign financing to ensure that legislators will decide issues ““on the merits or the desires of their constituencies,” and not ‘according to the wishes of those who have made large

99. *Id.* at 452.

100. *McConnell*, 540 U.S. at 259 (Scalia, J., concurring in part and dissenting in part).

101. *Id.*

102. *Citizens United*, 558 U.S. at 447 (Stevens, J., concurring in part and dissenting in part).

financial contributions’—or expenditures—‘valued by the officeholder.’”¹⁰³

In addition to these variations based on the scope of the quid pro quo method of corruption, the Justices also disagree about whether corruption extends beyond quid pro quo exchanges. This type of corruption, which Professor Lessig has aptly dubbed “dependence corruption,” occurs when the influence of money affects legislative conduct even absent any exchange.¹⁰⁴

Justice Stevens’ *Citizens United* dissent describes this method of corruption as one involving “threats, both explicit and implicit.”¹⁰⁵ What Justice Stevens means, and what Lessig explains at length,¹⁰⁶ is that legislators may base their votes on whether wealthy individuals and entities will spend for or against them in future elections, rather than basing their votes on the merits of legislation, or the desires of their constituents. Under a system that permits wealthy individuals and entities to make unlimited expenditures, then, financiers “with large war chests to deploy on electioneering may find democratically elected bodies becoming much more attuned to their interests.”¹⁰⁷ In this way, the financiers have corrupted the legislator simply by virtue of their ability to make such large expenditures or contributions, regardless of whether they actually deploy their wealth to obtain their preferred legislative outcomes. Because dependence corruption does not involve a quid pro quo exchange (however broadly that framework is understood), Justice Kennedy and his like-minded colleagues do not believe the government has an interest in preventing it. Justice Stevens and his compatriots would, of course, disagree.

This descriptive account of the anticorruption interest shows a jurisprudence that lacks any cohesive understanding of the interest. Indeed, depending on a Justice’s beliefs about the identities of the corruptors and corruptees, and the cognizable methods of corruption, the anticorruption interest may be as narrow as ensuring that individual candidates’ votes are not purchased in exchange for direct financial remuneration, or as broad as preventing the electoral system

103. *Id.* at 449 (quoting *McConnell*, 540 U.S. at 153).

104. LESSIG, *supra* note 3, at 230–33.

105. *Citizens United*, 558 U.S. at 455 (Stevens, J., concurring in part and dissenting in part).

106. See LESSIG, *supra* note 3, at 230–46.

107. *Citizens United*, 558 U.S. at 455 (Stevens, J., concurring in part and dissenting in part).

from being corrupted by dependence on concentrated wealth. The obvious importance of the Justices' conceptions of corruption to the outcome of campaign finance cases, coupled with the astounding range of possible understandings of corruption, together beg an incredibly important question: upon what are the Justices' understandings of corruption based? I turn in Part II to addressing this crucial question.

II. DEMOCRACY AND DEFERENCE

In Part II of this Article, I build upon insightful works by Hellman and Post to reveal how two factors animate the Justices' disagreement regarding the meaning of corruption in campaign finance cases. The first factor involves a disagreement about democracy. Corruption is a derivative concept dependent on underlying assumptions about the institution involved. That is to say, whether you think an act is corrupt depends on your understanding of the institution that is supposedly being corrupted. When it comes to political corruption, the relevant institution is our democracy. And, in campaign finance cases, one group of Justices has defined corruption narrowly based on their concern with protecting the *public option formation* aspects of democracy, while the other group has defined corruption broadly based on their concern with protecting the *legislative responsiveness* aspects of democracy.

But these *democratic concerns* do not fully explain the Justices' disagreement about corruption. Instead, there is a second factor on which the Justices disagree: deference. The Justices disagree not only about what corruption means, but who ought to decide what corruption means. The group of Justices concerned with protecting public opinion formation also define corruption without deferring to Congress. These Interventionist Justices believe the Court should define corruption on its own terms given the individual rights and political processes that they believe are at issue in campaign finance cases. The group of Justices concerned with protecting legislative responsiveness believe the Court should defer to legislatures in defining corruption. These Deferential Justices recognize legislatures' expertise in preventing corruption and believe legislatures are best suited to determine whether an act is corruptive.

A. Democracy: Public Opinion or Legislative Responsiveness

In 1992, an eccentric billionaire named Ross Perot ran for President of the United States as an independent candidate.¹⁰⁸ Perot placed third in that race behind then-Governor Bill Clinton and then-President George H.W. Bush, but commanded an impressive 18.9 percent of the popular vote.¹⁰⁹ In 1995, Perot decided to form his own political party, the Reform Party, to prepare for another bid at the presidency in 1996.¹¹⁰

Seven years later, the Court decided *McConnell* and upheld BCRA's electioneering communications restriction and its ban on soft money. In dissent, Justice Kennedy noted—almost in passing—that the soft money ban upheld by the *McConnell* Court would have prevented Ross Perot from spending \$8 million of his own money to create the Reform Party.¹¹¹ Justice Kennedy meant this as a bad thing, but a proponent of BCRA's soft money ban might respond by simply stating, "exactly." Political parties, the BCRA proponent may argue, should be formed when broad swaths of people come together to achieve common political ends. They should not be formed at the whim of a single billionaire. Justice Kennedy, it seems, would suggest that the BCRA supporter's conception of political parties is wrong.

This disagreement between Justice Kennedy and the hypothetical BCRA supporter presents a crucial point. In disputing whether BCRA's soft money ban furthers the anticorruption interest, the two would come to loggerheads over the character of our democracy. Specifically, their disagreement is over how egalitarian or plutocratic the aspects of our democracy concerning the formation of political parties ought to be.

Justice Kennedy's majority opinion in *Caperton v. A.T. Massey Coal Co.*¹¹² illustrates a similar relationship between the anticorruption interest and a Justice's assumptions about democratic norms. At issue in *Caperton* was whether a West Virginia Supreme

108. See Michael Levy, *United States Presidential Election of 1992*, ENCYCLOPEDIA BRITANNICA (Oct. 27, 2019), <https://www.britannica.com/event/United-States-presidential-election-of-1992>.

109. *Id.*

110. See *Reform Party*, BALLOTPEdia, http://ballotpedia.org/Reform_Party (last visited Apr. 5, 2020).

111. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 287 (2003) (Kennedy, J., concurring in part and dissenting in part), *overruled by* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

112. 556 U.S. 868 (2009).

Court Justice's failure to recuse himself violated due process when one of the litigants before him had financed his campaign through independent expenditures.¹¹³ Massey Coal's chairman, Don Blankenship, spent \$3 million on independent expenditures¹¹⁴ in an effort to elect the Justice to West Virginia's highest court. The U.S. Supreme Court held that the West Virginia Justice's failure to recuse himself was unconstitutional.¹¹⁵ The Court reached this conclusion based on the "risk that Blankenship's influence engendered actual bias," an apparent recognition from Justice Kennedy that independent expenditures can improperly influence a beneficiary thereof.¹¹⁶

Why, then, does Justice Kennedy not recognize the same danger when the beneficiary is a legislator and not a judge? The answer has everything to do with Justice Kennedy's assumptions about the legislative and judicial roles in our democracy. Justice Kennedy would argue that judges should not be influenced by anything but the merits of the case before them, making bias created by campaign expenditures an abject evil. Legislators, however, are permitted to favor their electoral financiers. Indeed, per Justice Kennedy, "[f]avoritism and influence are not . . . avoidable in representative politics," and it is natural for an "elected representative to favor certain policies . . . and [the] contributors who support those policies."¹¹⁷ Justice Kennedy's ideas about what corrupts the judge and the legislator, then, are formed by his underlying beliefs about how judges and legislators are supposed to operate in our democracy.¹¹⁸

Two valuable works of scholarship explain this corruption-democracy relationship in a manner that I will draw upon in this Article. The first is Professor Hellman's *Defining Corruption and*

113. *Id.* at 872.

114. More specifically, Blankenship contributed \$2.5 million to a § 527 organization that in turn spent the money to support the Justice. He also directly spent \$500,000 on independent expenditures and contributed \$1,000 to the Justice's campaign committee. *See id.* at 873.

115. *Id.* at 872.

116. *Id.* at 885.

117. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part), *overruled by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

118. *Cf.* Richard Briffault, *On Dejudicializing American Campaign Finance Law*, 27 GA. ST. U. L. REV. 887, 923–24 (2011) (criticizing modern campaign finance jurisprudence for resting on subjective political judgments about democratic values). *But see* Kang, *supra* note 4, at 56 (distinguishing *Caperton* from *Citizens United* based on "the ex post treatment of th[e] corruption risk in *Caperton* [, that is, recusal,] instead of the ex ante treatment of the same risk through campaign finance regulation in *Citizens United* [, that is, restriction]").

Constitutionalizing Democracy.¹¹⁹ Hellman posits that “corruption is a derivative concept,” dependent “on a theory of the institution or official involved.”¹²⁰ She offers, by way of example, the question of whether giving preferential treatment to your brother-in-law is a form of corruption.¹²¹ The answer depends entirely on whether the preferential treatment “violate[s] the norms for the actor and institution involved.”¹²² If you are a government official and hire your brother-in-law for a public position despite the fact that he is less qualified than other applicants, then you have very likely acted corruptly.¹²³ If, on the other hand, you plan a holiday dinner and invite your brother-in-law over a more pleasant dinner guest, then you have not acted corruptly. Family connectedness in the institution of holiday dining is understood as a proper criterion for selecting guests.¹²⁴ For other institutions, whether familial preference is a form of corruption is a murkier question. Preferential familial treatment in the admissions process to an exclusive school, for example, may be a gray area.¹²⁵ Whether the act is corrupt or not “depends on a theory of the institution involved,” in this case, the exclusive school.¹²⁶

When the question involves whether a certain act constitutes “political corruption in a democracy,” then, the answer depends “on a theory of democracy.”¹²⁷ As Hellman ominously puts it, “And therein lies the problem.”¹²⁸ The questions surrounding how a healthy democracy operates are likely to be deeply contested.¹²⁹ It is no

119. See generally Hellman, *supra* note 10.

120. *Id.* at 1389. Hellman was not the first to reach this conclusion. For example, she points to works by Dennis Thompson, Thomas Burke, Daniel Hays Lowenstein, and Bruce Cain that have also concluded that corruption is a derivative concept. See *id.* at 1395 (discussing DENNIS F. THOMPSON, *ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION* 28 (1995); Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127 (1997); Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111; Daniel Hays Lowenstein, *Campaign Contributions and Corruption: Comments on Strauss and Cain*, 1995 U. CHI. LEGAL F. 163); see also POST, *supra* note 9, at 55 (“The nature of the state’s interest in regulating corruption . . . depends upon how we understand the official obligation (or role morality) of elected representatives.”).

121. Hellman, *supra* note 10, at 1392 (discussing whether nepotism is a form of corruption).

122. *Id.* at 1393.

123. *Id.* at 1392.

124. *Id.*

125. *Id.*

126. *Id.* at 1393.

127. *Id.* at 1394.

128. *Id.* at 1396.

129. *E.g., id.* (“[A]n account of what constitutes corruption depends on a theory of democracy; yet there is substantial disagreement about what a commitment to democratic representation

surprise, then, that a multitude of disputed conceptions of corruption, each tracking underlying assumptions about our democracy, have emerged in campaign finance jurisprudence.¹³⁰

The second work of scholarship useful to understanding this corruption-democracy relationship is Dean Post's *Citizens Divided*.¹³¹ Post explains that "a primary purpose of First Amendment rights is to make possible the value of self-government."¹³² To achieve self-governance, Post argues, the First Amendment must ensure two things. First, it must provide for the process of public opinion formation.¹³³ Post labels this process "discursive democracy."¹³⁴ Second, it must ensure that elected officials are responsive to public opinion.¹³⁵ Absent both ingredients in this formula for "democratic legitimation,"¹³⁶ Post argues, the People are incapable of engaging in self-governance.¹³⁷ They are, to use the founding-era metaphor, bound

demands."). See generally David Schultz, *The Case for a Democratic Theory of American Election Law*, 164 U. PA. L. REV. ONLINE 259 (2016), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1179&context=penn_law_review_online (illustrating the complexities in creating cohesion around a uniform, specific, democratic theory).

130. Professor Lori Ringhand's *Defining Democracy: The Supreme Court's Campaign Finance Dilemma* is also relevant to this discussion. See Lori A. Ringhand, *Defining Democracy: The Supreme Court's Campaign Finance Dilemma*, 56 HASTINGS L.J. 77 (2004). She posits that in campaign finance cases, "the rights the judiciary is charged with protecting cannot themselves be defined (and thereby protected) without judicial reliance on some underlying vision of what democracy itself should look like." *Id.* at 79. The Court's "corruption-based analytical methodology" hides this "democracy-defining dilemma" by employing "the superficially democracy-neutral language of rights protection." *Id.* at 80. Ringhand, in other words, attributes the Court's lack of clarity in defining corruption to the relationship between the First Amendment rights at issue in campaign finance cases and democratic theory, rather than the relationship between corruption and democracy.

131. See generally POST, *supra* note 9.

132. *Id.* at 4.

133. See generally *id.* at 23–43 (discussing how the First Amendment provides for the process of public opinion formation by encouraging "uninhibited, robust, and wide-open" speech on public issues).

134. *Id.* at 35–36 (using the term "*discursive democracy*" to mean "communicative processes in which an ever-changing population continuously articulates its ever-evolving experience").

135. *Id.* at 16 ("[R]epresentative government cannot embody the value of self-government without trust and confidence between representatives and constituents, such that the latter believe they are indeed 'represented' by the former. I shall call this relationship *representative integrity*.").

136. See *id.* at 36 ("Discursive democracy postulates that by participating in the ongoing and never-ending formation of public opinion, and by establishing institutions designed to make government continuously responsive to public opinion, the people might come to develop a 'sense of ownership' of 'their' government and so enjoy the benefit of self-government. . . . I shall henceforth call this ongoing process of ownership *democratic legitimation*.").

137. See *id.* at 60 ("Unless there is public trust that elections select officials who are responsive to public opinion . . . First Amendment rights . . . cannot produce democratic legitimation. They cannot connect communication to self-government."); *id.* at 63 ("Americans cannot maintain the

“in chains” to the wills of their elected officials; “slaves” without representation.¹³⁸

Using Post’s First Amendment framework, the narrow conception of corruption championed by Justice Kennedy and likeminded jurists reflects a deeply-seeded need to protect the discursive process of public opinion formation.¹³⁹ For example, these Justices have consistently rejected the proposition that “government may restrict the speech of some elements of our society in order to enhance the relative voice of others.”¹⁴⁰ To them, this concept is

blessing of self-government unless they believe that elections produce representatives who are responsive to public opinion.”).

138. *Id.* at 8 (“[T]he people of England deceive themselves, when they fancy they are free: they are so, in fact, only during the interval between a dissolution of one parliament and the election of another; for, as soon as a new one is elected, they are again in chains, and lose all their virtue as a people.” (quoting JEAN-JACQUES ROUSSEAU, AN INQUIRY INTO THE NATURE OF THE SOCIAL CONTRACT; OR PRINCIPLES OF POLITICAL RIGHT 266 (John James Rousseau trans., London, G.G.J. & J. Robinson 1791) (1762))); *id.* (“Those who are taxed without their own consent, expressed by themselves or their representatives, are slaves. We are taxed without our own consent, expressed by ourselves or our representatives. We are therefore—slaves.” (emphases omitted) (quoting 1 JOHN DICKINSON, THE WRITINGS OF JOHN DICKINSON: POLITICAL WRITINGS 1764–1774, at 357 (Paul Leicester Ford ed., Philadelphia, Historical Soc’y of Pa. 1895))); *see also* McCutcheon v. Fed. Election Comm’n, 572 U.S. 185, 236 (2014) (Breyer, J., dissenting) (“An influential 18th-century continental philosopher had argued that in a representative democracy, the people lose control of their representatives between elections, during which interim periods they were ‘in chains.’” (quoting ROUSSEAU, *supra* note 138, at 265–66)).

139. Moreover, I would add, it reflects a deeply-seeded need to protect a very specific ideal about that discursive process; namely, that it be performed in a purely free-market manner, with no “voice” restricted based on the identity of the speaker or volume of speech. *See, e.g.*, Stephen E. Gottlieb, *Sources of Conservative Thinking on Democracy*, 164 U. PA. L. REV. ONLINE 269, 269–72 (2016), <http://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-269.pdf>; Schultz, *supra* note 129, at 261–62 (and works cited therein). Only the speech with the utmost potential for corruption—money given directly to candidates—can possibly be restricted, per this conception. Even then, the restriction is suspect in light of the interference with free-market public opinion formation it creates. Post is critical of this approach, rejecting a *laissez-faire* approach to public opinion formation in favor of one that distinguishes between voices that can (natural people) and cannot (corporations) experience democratic legitimation. POST, *supra* note 9, at 76–80. The big exception to the Court’s *laissez-faire* dogma is foreign electoral speech, which Justice Kennedy et al. believe the government may prohibit from public discourse. *See* Bluman v. Fed. Election Comm’n, 800 F. Supp. 2d 281, 292 n.4 (D.D.C. 2011), *aff’d mem.*, 565 U.S. 1104 (2012). As Hasen points out, this position in *Bluman* creates an area of significant incoherence in the jurisprudence. *See* HASEN, *supra* note 9, at 113. If the identity of the speaker is irrelevant in determining whether speech is entitled to First Amendment protection, then why can corporations, but not foreigners, participate in the free-market arena of public discourse? *See id.* at 113–17.

140. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976); *see also* *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 741 (2011); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 349–50 (2010); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 324 (2003) (Kennedy, J., concurring in part and dissenting in part), *overruled by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 685 (1990) (Scalia, J., dissenting), *overruled by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

“wholly foreign to the First Amendment, which was designed ‘to secure “the widest possible dissemination of information from diverse and antagonistic sources,”’ and “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.””¹⁴¹ When it comes to corporate expenditures, Justice Scalia explicitly chided the *Austin* majority for departing “from long-accepted premises of our political system regarding the benevolence that can be expected of government *in managing the arena of public debate*.”¹⁴² Further, these Justices have repeatedly focused on the supposed importance of corporate speech to the public, rather than the unique characteristics of the corporation.¹⁴³

Justices White, Breyer, Stevens, and their similarly minded colleagues, on the other hand, have expressed conceptions of corruption that track an emphasis on the responsiveness aspect of self-government identified by Post. These Justices’ concerns over the purchasing of access and influence, and dependence corruption, indicate a fear that legislators will shift responsiveness from their constituents’ prevailing public opinion to the election-financier class.¹⁴⁴ Their fear is that legislators will “decide issues not on the merits or the desires of their constituencies, but according to the

141. *Buckley*, 424 U.S. at 49 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964)).

142. *Austin*, 494 U.S. at 692 (Scalia, J., dissenting) (emphasis added).

143. *E.g.*, *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 775–76 (1978) (rebuking the lower court for framing “the principal question in th[e] case as whether and to what extent corporations have First Amendment rights” rather than “whether [the Massachusetts law in question] abridges expression that the First Amendment was meant to protect”); *id.* at 777 (“The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”); *Austin*, 494 U.S. at 698–99 (Kennedy, J., dissenting) (discussing Michigan’s restriction of corporate independent expenditures in terms of “society’s interest in free and informed discussion on political issues, a discourse vital to the capacity for self-government”); *Citizens United*, 558 U.S. at 349–50 (citing *Buckley* and *Bellotti* and advancing a speech-focused, rather than speaker-focused, analysis of corporate expenditures).

144. *E.g.*, *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 235–37 (2014) (Breyer, J., dissenting) (describing the First Amendment’s function in facilitating political discussion for the purpose of ensuring legislative responsiveness); *Citizens United*, 558 U.S. at 470 (Stevens, J., concurring in part and dissenting in part) (“A Government captured by corporate interests, [citizens] may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing.”); *id.* at 471 (“[U]nregulated corporate electioneering might diminish the ability of citizens to hold officials accountable to the people.” (quotation omitted)); *id.* at 472 (describing “democratic responsiveness” as one of the “fundamental concerns” of the *Austin* Court and legislatures that have passed corporate expenditure restrictions); *McConnell*, 540 U.S. at 144 (describing contributions to a political party as creating “a sense of obligation” from elected officials to the contributors).

wishes of” their financiers—a result that is “troubling to a functioning democracy.”¹⁴⁵

These Justices, moreover, prioritize this responsiveness concern over plausible concerns about public opinion formation.¹⁴⁶ Their willingness to uphold restrictions on large independent expenditures provides a prime example.¹⁴⁷ As the Court has noted on many occasions, restrictions on expenditures eliminate a greater quantity of speech than do restrictions on contributions.¹⁴⁸ Concomitantly, however, expenditures present a substantial threat to democratic responsiveness when wealthy individuals and entities are allowed to make them without restriction. For these Justices, whatever quantity of speech is lost when large independent expenditures are restricted is worth the gains made in responsiveness.

B. Deference: Rights and Processes or Legislative Expertise

The relationship between corruption and democracy does not, however, fully explain the Justices’ disagreement over the anticorruption interest. In addition to the Justices’ underlying disagreements about democracy, a deep divide over the deference owed to legislatures enacting campaign finance laws animates the varying understandings of the anticorruption interest. The group of Justices who prioritize legislative responsiveness also believe that legislative expertise in matters of corruption and democracy justifies deferring to the legislature’s understanding of the anticorruption

145. *McConnell*, 540 U.S. at 153.

146. *E.g.*, *McCutcheon*, 572 U.S. at 237 (Breyer, J., dissenting) (“Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point.”).

147. *See generally* *McConnell*, 540 U.S. at 93; *Citizens United*, 558 U.S. at 393 (Stevens, J., concurring in part and dissenting in part) (holding that challenged sections of the Federal Election Campaign Act of 1971, amended by The Bipartisan Campaign Reform Act of 1992, did not violate the First Amendment); *Austin*, 494 U.S. at 652 (holding that challenged sections of the Michigan Campaign Finance Act did not violate corporations’ First Amendment rights).

148. *E.g.*, *McConnell*, 540 U.S. at 134–35 (citing *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146, 161 (2003) and *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 386–88 (2000)); *Buckley v. Valeo*, 424 U.S. 1, 19–21 (1976) (comparing FECA’s expenditure restrictions with its contribution restrictions and finding that “expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech,” while “a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication”); *id.* at 19–20 (proposition that contribution limits, unlike limits on expenditures, “entail[] only a marginal restriction upon the contributor’s ability to engage in free communication”).

interest (the Deferential Justices). The group of Justices who prioritize public opinion formation, on the other hand, believes that political process concerns and the presence of individual rights justify greater intervention in campaign finance cases (the Interventionist Justices).

Justice White's dissent in *Buckley*, Justice Stevens' dissent in *Citizens United*, and Justice Breyer's concurrence in *Nixon v. Shrink Missouri Government PAC*¹⁴⁹ illustrate the Deferential Justices' position. Though the *Buckley* Court adopted a deferential approach to defining corruption in upholding FECA's contribution limitations,¹⁵⁰ it took a decidedly interventionist approach in striking the law's \$1,000 independent expenditure limitation. The Court refused to credit Congress' judgment that independent expenditures could lead to corruption or its appearance. Such expenditures did not "presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions," according to the Court.¹⁵¹

Justice White's dissent chastised the Court's willingness to supplant Congress' position on the corruptive potential of independent expenditures with its own judgment. He opined,

Congress was plainly of the view that these expenditures also have corruptive potential; but the Court strikes down the provision, strangely enough claiming more insight as to what may improperly influence candidates than is possessed by the majority of Congress that passed this bill and the President who signed it.¹⁵²

149. 528 U.S. 377 (2000).

150. For example, the *Buckley* majority wrote that "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is . . . critical if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley*, 424 U.S. at 27 (alteration omitted) (quoting *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 565 (1973)). The Court also declined the plaintiffs' invitation to question the means that Congress used to further its anticorruption interest, holding that "Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." *Id.* at 28. Likewise, the Court found that Congress was "justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* at 30.

151. *Id.* at 46.

152. *Id.* at 261 (White, J., concurring in part and dissenting in part).

Instead of flouting its finding, Justice White continued, the Court should have deferred to “congressional judgment,” and upheld FECA’s expenditure restrictions.¹⁵³

Justice Stevens in his dissent in *Citizens United* takes a similar position. In response to the Court’s holding that corruption was limited to narrow quid pro quo exchanges,¹⁵⁴ he argued that the Court should “start by acknowledging that ‘Congress surely has both wisdom and experience in these matters that is far superior to ours,’” as it had “explicitly” and “forcefully” done on many prior occasions.¹⁵⁵ This expertise, he continued, had produced a congressional judgment regarding the corruptive potential of corporate expenditures that had remained “essentially unchanged throughout a century of careful legislative adjustment,” creating additional justification for exercising deference.¹⁵⁶ By not acknowledging Congress’ expertise, the majority took a position that “discounts the value of [the anticorruption interest] to zero,” and denies “Congress’ authority to regulate corporate spending on elections.”¹⁵⁷

In *Shrink Missouri Government PAC*, Justice Breyer offers a slightly different justification for deferring to Congress in defining corruption.¹⁵⁸ He characterized campaign finance cases as involving “constitutionally protected interests [that] lie on both sides of the legal equation.”¹⁵⁹ “On the one hand, a decision to contribute money to a campaign is a matter of First Amendment concern.”¹⁶⁰ “On the other hand, restrictions upon the amount any one individual can contribute to a particular candidate seek to protect the integrity of the electoral process,” and “to democratize the influence that money itself may

153. *Id.* at 260.

154. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 357–60 (2010).

155. *Id.* at 461 (Stevens, J., concurring in part and dissenting in part) (quoting *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n*, 518 U.S. 604, 650 (1996) (Stevens, J., dissenting)) (citing *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 158 (2003) and *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146, 155–56 (2003)).

156. *Id.* (quoting *Beaumont*, 539 U.S. at 162 n.9); see also *id.* at 436 (“Congress’ ‘careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations . . . warrants considerable deference,’ and ‘reflects a permissible assessment of the dangers posed by those entities to the electoral process.’” (quoting *Fed. Election Comm’n v. Nat’l Right to Work Comm.*, 459 U.S. 197, 209 (1982))); *id.* at 479 (“In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules.”).

157. *Id.* at 463–64.

158. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 377 (2000).

159. *Id.* at 400 (Breyer, J., concurring).

160. *Id.*

bring to bear upon the electoral process.”¹⁶¹ These competing interests must be weighed against each other, a task best left to legislatures given their “significantly greater institutional expertise . . . in the field of election regulation.”¹⁶² Given that the legislature “understands the problem—the threat to electoral integrity, the need for democratization,” the Court should “defer to its political judgment that unlimited spending threatens the integrity of the electoral process.”¹⁶³

Justice Thomas’s dissent in *Shrink Missouri Government PAC* and Justice Scalia’s dissent in *Austin* illustrate the approach taken by the Interventionist Justices. The *Shrink Missouri Government PAC* Court upheld Missouri’s limitations on contributions to candidates, which ranged from \$275 to \$1,075 depending on the size of the relevant electorate.¹⁶⁴ In doing so, the Court declined to apply strict scrutiny¹⁶⁵ and found Missouri’s law justified by the anticorruption interest.¹⁶⁶ Responding to the Eighth Circuit’s finding that Missouri had failed to produce empirical evidence of actual corruption, the Court struck a deferential stance: “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”¹⁶⁷ The Court continued that, in campaign finance cases, “the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.”¹⁶⁸

161. *Id.* at 401.

162. *Id.* at 402; *see also* *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 137 (2003) (“The less rigorous standard of review we have applied to contribution limits (*Buckley*’s ‘closely drawn’ scrutiny) shows proper deference to Congress’ ability to weigh competing constitutional interests in an area in which it enjoys particular expertise.”), *overruled by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

163. *Shrink Mo. Gov’t PAC*, 528 U.S. at 403–04 (Breyer, J., concurring).

164. *Id.* at 382–83 (majority opinion) (describing Missouri’s contribution limits as ranging from \$1,075 to \$275 and being indexed for inflation); *id.* at 385 (announcing the Court’s reversal of the Eighth Circuit, which had struck Missouri’s contribution limits).

165. *See id.* at 386–89 (discussing *Buckley*’s bifurcation of contribution and expenditure limitations and noting that subsequent cases have made clear that a lower level of judicial scrutiny applies to contribution limitations).

166. *Id.* at 393 (finding that the evidence in this case substantiated “the congressional concerns reflected in *Buckley*” and therefore supported Missouri’s enactment of contribution limitations).

167. *Id.* at 391.

168. *Id.*

Justice Thomas would have taken a different approach. To begin, he would have applied strict scrutiny,¹⁶⁹ given that “[p]olitical speech is the primary object of First Amendment protection.”¹⁷⁰ The Court’s decision to apply “something less—much less—than strict scrutiny” “balance[ed] away . . . First Amendment rights.”¹⁷¹ He then would have found Missouri’s anticorruption interest insufficient to justify the resultant restriction on political speech. Missouri’s contribution limits “are not narrowly tailored to that harm” because they prohibit “all donors who wish to contribute in excess of the cap from doing so and restrict[] donations without regard to whether the donors pose any real corruption risk.”¹⁷² Missouri, per Justice Thomas, was not justified in concluding that more narrow regulations were inadequate to prevent corruption—at least not when speech rights were implicated by its law. Instead, Missouri could have addressed its “interest in curtailing corruption” through bribery and disclosure laws.¹⁷³ Moreover, even if those more narrowly tailored means were insufficient to stamp out corruption, Justice Thomas would not have allowed Missouri to limit contributions to address the evil of corruption. Instead, he opined that “when it comes to a significant infringement on our fundamental liberties, that some undesirable conduct may not be deterred is an insufficient justification to sweep in vast amounts of protected political speech.”¹⁷⁴

Justice Scalia’s dissent in *Austin* illustrates the interventionist Justices’ political process concern.¹⁷⁵ That concern, specifically, is that campaign finance laws are enacted not to prevent corruption, but to protect incumbents. In *Austin*, Justice Scalia speculated that the Michigan legislature that restricted corporate independent expenditures may have had noble objectives, but “governmental abridgment of liberty is always undertaken with the very best of . . . objectives.”¹⁷⁶ Accordingly, “[t]he incumbent politician who says he welcomes full and fair debate is no more to be believed than the

169. *Id.* at 412 (Thomas, J., dissenting) (“[C]ontribution caps . . . should be met with the utmost skepticism and should receive the strictest scrutiny.”).

170. *Id.* at 410–11.

171. *Id.* at 421.

172. *Id.* at 428.

173. *Id.*

174. *Id.* at 429.

175. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 679–95 (1990) (Scalia, J., dissenting), *overruled by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

176. *Id.* at 692.

entrenched monopolist who says he welcomes full and fair competition.”¹⁷⁷ This skepticism is warranted even when the restriction treats incumbents and challengers equally, Justice Scalia argued in *McConnell*, as “any restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents.”¹⁷⁸ Rather than deferring to congressional expertise on matters of corruption, then, Justice Scalia would intervene to protect the political processes that he views as being threatened by campaign finance laws.

In sum, Part II of this Article demonstrated that the Justices’ beliefs about two subsidiary issues animate their various understandings of corruption. First, the Justices’ conceptions of corruption are animated by their beliefs about democracy. More specifically, the broader conceptions of corruption expressed by one group of Justices reflect their desire to protect legislative responsiveness, while the narrower conceptions of corruption expressed by the other group of Justices reflect their desire to protect public opinion formation. Second, the Justices’ conceptions of corruption are animated by their beliefs about judicial deference and intervention. The Deferential Justices—who conceive of corruption broadly and want to protect legislative responsiveness—believe the Court should defer to legislative expertise on matters of corruption and democracy in campaign finance cases. The Interventionist Justices—who conceive of corruption narrowly and want to protect public opinion formation—believe the Court should intervene to protect individual rights and political processes in campaign finance cases.

III. THE COMPROMISE METHODOLOGY

A. *Introducing the Methodology*

Having unpacked the Justices’ disagreement over the meaning of corruption in campaign finance cases, I will now offer a proposal for how that disagreement can be resolved. My aim here is to identify a methodology for deciding campaign finance cases that constitutes a

177. *Id.*

178. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 249 (2003) (Scalia, J., concurring in part and dissenting in part) (emphasis in original), *overruled* by *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

compromise—middle ground whereby the concerns raised by both groups of Justices are reasonably satisfied. This patch of common ground is often left untrodden by proposals to reform how campaign finance cases are decided, which typically involve more drastic reforms that are unlikely to garner support from the Interventionist Justices and their like-minded jurists.¹⁷⁹ These reforms are dependent on the Court's composition changing in a manner that leaves a majority comprised of dedicated Deferential Justices who are willing to disregard plausible *stare decisis* concerns. The Compromise Methodology, on the other hand, is a reform designed for a situation in which power is more balanced between the Deferential and Interventionist Justices, such that finding middle ground becomes necessary or desirable. The emergence of a centrist Justice or of a reform-minded Justice who prefers an incremental approach could, for example, create this dynamic.

To constitute a compromise, the methodology must force the Court to consider the Deferential Justices' views on democracy and deference—views that are currently neglected by the Court's Interventionist majority¹⁸⁰—while still accounting for the Interventionist Justices' public opinion formation, political process, and individual rights concerns. The Compromise Methodology balances these interests by creating a *conditional deference* mechanism that incorporates both groups of Justices' democratic concerns. Specifically, the methodology instructs that when a campaign finance law protects against a practice that impairs either legislative responsiveness or public opinion formation, the Court must defer to Congress' finding that the law was enacted pursuant to the

179. See *infra* Section III.C (discussing proposals to introduce a new government interest in campaign finance cases).

180. For instance, in defining the anticorruption interest in *Citizens United*, the majority made a series of democratic judgments to justify its narrow *quid pro quo* conception of corruption. The Court concluded that “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy.” *Citizens United*, 558 U.S. at 360. It then posited that “the electorate will [not] refuse to take part in democratic governance because of additional political speech made by a corporation,” and that “[i]ngratiation and access . . . are not corruption.” *Id.* (quotation omitted). While paying lip service to the concept of deferring to legislative judgments in general, *id.* at 361, the Court ultimately reached these conclusions without deferring to Congress' very different understandings of corruption and democracy. The Court also minimized the legislative responsiveness issues raised by corporate independent expenditures, reasoning that such issues create “cause for concern,” but that Congress nonetheless cannot address that concern by restricting independent expenditures. *Id.*

anticorruption interest. If not, the Court must instead intervene and find that the law was not passed pursuant to the anticorruption interest.

Except for introducing this conditional deference mechanism, the Compromise Methodology would not alter the Court's ordinary decision-making process: the Court would still determine whether the campaign finance law burdens First Amendment rights and whether the restriction is sufficiently tailored to the anticorruption interest. Preserving these other features of the Court's current decisional process gives the Interventionist Justices latitude to define and protect individual rights and political process.

The Compromise Methodology can be expressed in three steps:

Step I: Determine whether the campaign finance law burdens First Amendment rights.

Step II: Ask whether the campaign finance law protects against a practice that impairs either legislative responsiveness or public opinion formation. If so, defer to Congress' finding that the restriction was enacted pursuant to the anticorruption interest. If not, intervene and find that the restriction was not enacted pursuant to the anticorruption interest.

Step III: Determine whether the campaign finance law is sufficiently tailored to the anticorruption interest.

This proposed reform would accommodate both groups of Justices' perspectives on democracy and deference in campaign finance cases. First, the methodology accommodates the Interventionist Justices' concern with defining and protecting individual rights.¹⁸¹ It does so at Step I, where the Court retains its ordinary authority to determine whether a law burdens First Amendment rights. This will allow the Court to preserve the long-standing principle that money used to facilitate political speech is treated as speech itself under the First Amendment, and that corporations are persons for political speech purposes.¹⁸² Likewise,

181. See *infra* Section III.B.

182. See *Austin*, 494 U.S. 652 at 657 ("Certainly, the use of funds to support a political candidate is 'speech'; independent campaign expenditures constitute 'political expression' 'at the core of our electoral process and of the First Amendment freedoms.'" . . . The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment." (quoting *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) and *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978)); *Bellotti*, 435 U.S. at 784 (finding "no support . . . for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply

Step III of the methodology serves a rights-protection function. At that step, the Court retains its ordinary discretion to assess whether a campaign finance law is sufficiently tailored to the anticorruption interest. If the campaign finance law is not so circumscribed, the Court may strike the law to protect individual rights.

Second, the Compromise Methodology accommodates the Interventionist Justices' political process concerns. A loose nexus between a campaign finance law and the anticorruption interest may signal an ulterior legislative motive, such as incumbency protection. Allowing the Court to conduct its tailoring inquiry without deferring to Congress, at Step III, thus gives the Court an opportunity to intervene where political process concerns may be particularly warranted. Step II of the methodology may similarly be employed to protect political processes. A campaign finance law that neither protects legislative responsiveness nor protects public opinion formation—and thus falls outside the scope of the anticorruption interest under the methodology—may well be driven by incumbency protectionism or another nefarious motive.

Third, the conditional deference mechanism employed at Step II of the methodology vindicates the Deferential Justices' views on democracy and deference. That step treats the Justices' legislative responsiveness concern as legitimate, without disregarding the Interventionist Justices' public opinion formation concern, by framing the anticorruption interest in terms of both concerns. And, Step II will accommodate the Deferential Justices' desire to defer to legislative expertise on matters of corruption in most cases. The methodology obligates the Court to defer to the legislature's understanding of corruption whenever the legislature enacts a campaign finance law that addresses a threat to legislative responsiveness or to public opinion formation. Requiring this deference takes the task of defining corruption largely out of the Court's hands, and places it with Congress and the states.

B. Application to Case Law

To contextualize this somewhat nuanced reform, I shall now demonstrate the methodology's application to two campaign finance

because its source is a corporation"); *Buckley*, 424 U.S. at 16 (“[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.”).

cases: *Citizens United* and *NCPAC*. In *Citizens United*, the Court struck federal law's restriction on independent expenditures funded from corporate general treasuries.¹⁸³ In doing so, it reasoned that corporate political speech was entitled to First Amendment protection, and that the restriction constituted an "outright ban" on protected speech.¹⁸⁴ The Court then applied strict scrutiny and asked whether the speech restriction was narrowly tailored to a compelling government interest.¹⁸⁵ Defining the anticorruption interest in terms of quid pro quo exchanges,¹⁸⁶ the Court concluded that independent expenditures carried no corruptive potential¹⁸⁷ and answered the tailoring question in the negative.¹⁸⁸

Applying the Compromise Methodology to the case would not impact the Court's initial holding that the First Amendment includes protection for corporate political speech; nor would it alter the Court's decision to apply strict scrutiny. However, once the Court begins its strict scrutiny inquiry, the methodology would prevent the Court from limiting the anticorruption interest to narrow quid pro quo corruption. Instead of the Court defining corruption itself, it would assess whether the corporate expenditure restriction protects against a practice that impairs legislative responsiveness or public opinion formation. If so, the Court would defer to the legislature's conception of corruption and determine that the restriction furthers the anticorruption interest.

Though the result would not be certain, the *Citizens United* Court would have been hard-pressed to conclude that the corporate expenditure restriction did not protect against a practice that impairs legislative responsiveness. Indeed, even the Interventionist Justices have conceded that large expenditures raise responsiveness concerns, as legislators will tend to favor those who spend large amounts of money on the legislators' behalves.¹⁸⁹ And, given corporations' abilities to amass large amounts of wealth in the economic marketplace,¹⁹⁰ Congress could have reasonably concluded that removing the favoritism created by the deployment of that amassed

183. See *Citizens United*, 558 U.S. at 365.

184. *Id.* at 337.

185. *Id.* at 340.

186. *Id.* at 359–60.

187. *Id.* at 357.

188. *Id.* ("The anticorruption interest is not sufficient to displace the speech here in question.")

189. See *supra* notes 100, 117.

190. See *supra* note 27.

wealth would improve legislative responsiveness to public opinion. The corporate independent expenditure restriction, then, furthers the anticorruption interest under the Compromise Methodology.

Having reached this conclusion, the *Citizens United* Court would then have taken up the narrow tailoring inquiry. This inquiry would likely have been a matter of considerable debate. In some campaign finance cases, Justices have concluded that small and non-profit corporations can be treated the same as large for-profit corporations, while in other cases Justices have drawn distinctions between those categories.¹⁹¹ And, BCRA—along with 2 U.S.C. § 441b—restricted all corporate general treasury expenditures, even those in small amounts.¹⁹² Perhaps the Court would ultimately find that the corporate expenditure restriction was not narrowly tailored because it applied to small and non-profit corporations, or because it restricted \$1 expenditures as well as \$1 million expenditures.

Regardless of the ultimate conclusion on the tailoring inquiry, applying the Compromise Methodology to the facts of *Citizens United* would narrow the Court's holding substantially. The Court's current quid pro quo understanding of corruption means that Congress has no interest in restricting corporate expenditures, even if doing so is strictly necessary to protect legislative responsiveness. Under the Compromise Methodology, the Court would conclude that the anticorruption interest does extend to corporate expenditures. And, if the corporate expenditure restriction at issue in *Citizens United* were not narrowly tailored to that interest, Congress would have the opportunity to revise the law to make it more exacting. In other words, the Compromise Methodology changes the holding of *Citizens United* from *there is no government interest that allows Congress to restrict corporate expenditures* to *Congress may restrict corporate expenditures, but in this case, it did not sufficiently tailor its restriction*.

191. Compare, e.g., *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 268 (1986) (Rehnquist, J., concurring in part and dissenting in part) (acknowledging that “the threat from corporate political activity will vary depending on the particular characteristics of a given corporation,” but concluding that the differences between non-profit and for-profit corporations are distinctions in degree, not in kind), with *Citizens United*, 558 U.S. at 354–55 (emphasizing the corporate independent expenditure restriction's effect on small and non-profit corporations), and *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 713 (1990) (Kennedy, J., dissenting) (finding the majority's “hostility to the corporate form” irrelevant to non-profit corporations), *overruled by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

192. See *Citizens United*, 558 U.S. at 320–21 (describing BCRA and 2 U.S.C. § 441b).

I turn now to *NCPAC*. The *NCPAC* Court struck a law that prohibited political committees from spending more than \$1,000 in support of a presidential candidate who accepted public funding.¹⁹³ The Court found such expenditures to be protected speech under the First Amendment,¹⁹⁴ and framed the government's anticorruption interest as being centered around the prevention of quid pro quo exchanges.¹⁹⁵ The Court then concluded that political committees' independent expenditures did not cause corruption or the appearance of corruption.¹⁹⁶

Despite the surface-level similarities between *NCPAC* and *Citizens United*,¹⁹⁷ applying the Compromise Methodology to the former leads to a quite different analysis than does its application to the latter. The distinction arises at Step II of the methodology, when the *NCPAC* Court is asked to determine whether the law in question protects legislative responsiveness or public opinion formation. Unlike the expenditures at issue in *Citizens United*, expenditures made by the *NCPAC* political committees could only be funded by relatively small contributions. Contributions to political committees were capped at \$5,000 per annum, meaning that political committees could only amplify their political speech via the expenditure of vast sums of money if a large number of people supported their speech.¹⁹⁸ That is to say, the political committees were “mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to amplify the voice of their adherents.”¹⁹⁹ Indeed, “in 1979–1980 approximately 101,000 people contributed an average of \$75 each to NCPAC and in 1980 approximately 100,000

193. *NCPAC*, 470 U.S. 480, 482 (1985) (“If a Presidential candidate elects public financing, [26 USCS § 9012(f)] makes it a criminal offense for independent ‘political committees’ . . . to expend more than \$1,000 to further that candidate’s election.”).

194. *Id.* at 496 (“Having concluded that the PAC’s expenditures are entitled to full First Amendment protection . . .”).

195. *Id.* at 497 (“The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.”).

196. *Id.* at 497–98.

197. Both cases, for example, involve laws that restrict entities from making independent expenditures in federal elections, and both cases rely on a quid pro quo conception of corruption.

198. *See supra* note 49.

199. *NCPAC*, 470 U.S. at 494 (quotation and alteration omitted); *see also id.* at 495 (noting that the contributions received by the political committees in *NCPAC* were “predominantly small and thus do not raise the same concerns as the sizable contributions involved in [*California Medical Association v. Federal Election Commission*]” (referencing *Cal. Med. Ass’n v. Fed. Election Comm’n*, 453 U.S. 182 (1981))).

people contributed an average of \$25 each to [NCPAC's co-Plaintiff,] FCM."²⁰⁰

This characteristic of political committees makes it far less likely that the Court would find that the law's independent expenditure restriction protects legislative responsiveness. A political committee "speaks" by funding its expenditures with contributions from the public. If it wants to make a \$10,000,000 expenditure, its message must necessarily be supported by *at least* 2,000 people; and, based on NCPAC's \$75-per-contribution average, over 130,000 people. The expenditure is a product of public opinion, and prohibiting it therefore does little-to-nothing to protect legislative responsiveness. Instead, it hinders both responsiveness to, and formation of, public opinion. Under the Compromise Methodology, then, the *NCPAC* Court would likely have intervened at Step II and found that the political committee expenditure restriction did not further the anticorruption interest.

C. Comparison to Other Reforms

Having introduced the Compromise Methodology and demonstrated its applicability to the case law, this subpart distinguishes the methodology from other proposed reforms for deciding campaign finance cases. I begin by comparing the Compromise Methodology to two other decisional methodologies that focus on the issues of democracy and deference. I then address the category of reforms that implore the Court to depart from anticorruption and recognize a new government interest in campaign finance cases. Lastly, I explain that the Compromise Methodology is a better option for reform than pushing for a return to the broad understanding of corruption articulated before *Citizens United*.

1. Democracy-and-Deference Reforms

The first democracy-and-deference reform that I shall compare to the Compromise Methodology is the methodology proposed by Professor Hellman in *Defining Corruption and Constitutionalizing Democracy*.²⁰¹ Hellman persuasively argues that the Court's modern campaign finance jurisprudence fails to air the justifications for deference normally present in cases involving subjective democratic judgments. She accordingly seeks to craft a prescriptive methodology

200. *Id.* at 494.

201. *See generally* Hellman, *supra* note 10.

that accounts for both “the important reasons to avoid intervening in legislative prerogatives to define the role of a legislator in a well-functioning democracy,” and the presence of individual speech rights in campaign finance cases.²⁰² To accomplish this task, she looks to voting rights and apportionment cases such as *Vieth v. Jubelirer*²⁰³ and *Reynolds v. Sims*.²⁰⁴ In these cases, Professor Hellman argues, “we see the Court airing and attending to *both* the reasons for oversight and the reasons for deference.”²⁰⁵ Hellman would have the Court follow suit in campaign finance cases, and balance the justifications for deference against “the degree of intrusion into the individual right” created by the law in question.²⁰⁶

This Article’s descriptive account reveals two problems with Professor Hellman’s methodology. First, the methodology would rarely compel the Court to defer to legislative judgments about corruption and democracy. Professor Hellman’s methodology is a balancing test: the justifications for deference weighed against the degree of intrusion into individual rights. In other words, her methodology makes the level of deference accorded by the Court in defining corruption contingent upon its findings regarding the scope of First Amendment rights. Thus, in cases where the Court finds that the intrusion on individual rights outweighs the justifications for deference, Hellman’s methodology allows the Court to apply its own conceptions of corruption and democracy without constraint.

This will be the result in nearly every campaign finance case. The Court since at least *Austin* has acknowledged that even corporate political speech falls under the ambit of the First Amendment.²⁰⁷ And, more recently, the Court has characterized corporate independent expenditure restrictions as imposing an “outright ban” on political speech rights, which lie at the core of the First Amendment.²⁰⁸ The degree of intrusion on individual rights, per the Court’s understanding, is at its maximum. The Deferential Justices would thus be unsatisfied

202. *Id.* at 1389.

203. 541 U.S. 267 (2004).

204. 377 U.S. 533 (1964). See generally Hellman, *supra* note 10. See also *supra* Section II.B.

205. Hellman, *supra* note 10, at 1418 (emphasis in original).

206. *Id.* at 1421.

207. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990), *overruled by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

208. *Citizens United*, 558 U.S. at 337.

with Hellman's methodology, which leaves the task of defining corruption in the Court's hands.

The Compromise Methodology addresses this shortfall by ensuring that the Court's decision on whether to defer to the legislature's conception of corruption is not contingent on its individual rights assessment. Indeed, the justifications for deferring to legislative conceptions of corruption—legislative expertise and the subjective democratic judgments required in defining corruption—remain present regardless of the degree of intrusion on individual rights. By decoupling individual rights from the decision of whether to defer, the Compromise Methodology would allow the Court to assess a law's individual rights burden as it deems fit, yet would often still require the Court to defer to legislatures when defining corruption.

The second challenge posed by Professor Hellman's methodology is that it does not address the Interventionist Justices' political process concerns. Hellman states that her approach "leaves open the possibility of Court intervention to police for the entrenchment of incumbents,"²⁰⁹ but also cautions against putting too much stock in the Interventionist Justices' incumbency protection concern. "Given the Court's reluctance to review partisan gerrymandering claims with regard to the entrenchment of incumbents," she argues, "the Court should be similarly disinclined to overturn campaign finance laws on these grounds."²¹⁰

Hellman's invocation of the Court's partisan gerrymandering jurisprudence does not necessarily provide a satisfactory defense of her methodology. This defense implies that the Court is right to ignore incumbency protection issues in political gerrymandering cases. Yet, it is arguably more plausible to suggest that the Court is not sufficiently attuned to incumbency protection issues in political gerrymandering cases, and harmonizing campaign finance jurisprudence with that aspect of political gerrymandering jurisprudence would compound the Court's error in the latter.

The second democracy-and-deference-based methodology that I wish to distinguish is Professor Ringhand's methodology in *Defining Democracy: The Supreme Court's Campaign Finance Dilemma*.²¹¹ Professor Ringhand's aim is to rectify the "democracy-defining

209. Hellman, *supra* note 10, at 1416.

210. *Id.*

211. See generally Ringhand, *supra* note 130.

dilemma” created when the Court defines individual rights in campaign finance cases, rather than when it defines corruption.²¹² Nonetheless, her insightful article offers a prescriptive methodology upon which the Compromise Methodology builds.

Ringhand proposes a two-step approach to deciding campaign finance cases. First, the Court should ask “what definition of democracy—what vision of good government—was the challenged statute enacted to enhance or protect, and is that vision constitutionally permissible?”²¹³ This analysis must be performed, “without regard to the purported substantive scope of the First Amendment,” in order to avoid the aforementioned dilemma.²¹⁴ Second, if the vision of democracy is constitutionally permissible, the Court should accept the vision and “ask whether the challenged legislation was sufficiently related to the legislature’s goal of enhancing or protecting its constitutionally acceptable definition of democracy.”²¹⁵

Like Professor Hellman’s methodology, Professor Ringhand’s methodology leaves the task of defining corruption and democracy in the Court’s hands. Professor Ringhand asks the Court to determine whether the definition of democracy on which the campaign finance law is based is constitutionally permissible. But, her methodology does not provide a tool to delineate constitutionally permissible and impermissible conceptions of democracy. This democracy-defining task is left within the Court’s discretion. In other words, her methodology instructs the Court to define the anticorruption interest based on its own definition of democracy—a result the Deferential Justices want to avoid.

Ringhand appropriately recognizes this aspect of her methodology. She states that “[w]hether a particular vision of democracy is constitutionally prohibited or protected, will, of course, be a deeply contested question.”²¹⁶ Thus, she explains that the purpose of the second step of her methodology is to ensure that the democratic issues in campaign finance cases will be addressed “openly and directly, rather than in the *ad hoc* manner seen in the Court’s existing

212. *Id.* at 79 (“[T]he rights the judiciary is charged with protecting cannot themselves be defined (and thereby protected) without judicial reliance on some underlying vision of what democracy itself should look like.”).

213. *Id.* at 112.

214. *Id.*

215. *Id.* at 113.

216. *Id.* at 112.

cases.”²¹⁷ This is an important objective, and one that her methodology likely achieves. But the methodology still leaves the task of defining democracy in the Court’s hands, even if it extends those hands into the open.

The Compromise Methodology builds upon Ringhand’s approach by providing a tool to determine whether the legislature’s conception of democracy is permissible. This tool is the conditional deference mechanism established at Step II of the Compromise Methodology. When a campaign finance law protects legislative responsiveness or public opinion formation, the legislature’s conception of corruption—and, implicitly, the vision of democracy on which that conception is premised—is validated as constitutionally permissible. Otherwise, the legislature’s conception of corruption is deemed impermissible; it cannot justify the campaign finance law at issue.

2. Other Government Interests

Moving beyond democracy-and-deference reforms, the Compromise Methodology compares favorably to reforms that are premised on the argument that campaign finance laws involve government interests aside from anticorruption, such as electoral integrity or political equality.²¹⁸ These “other interests” proposals suffer from two drawbacks that the Compromise Methodology avoids. First, the anticorruption interest has been the only government interest recognized in campaign finance cases, a fact that the Interventionist Justices have repeated on several occasions.²¹⁹ Accordingly, while Congress may well be pursuing other government interests when it enacts campaign finance laws, the Interventionist Justices will be reluctant to sanction a new interest. The Compromise Methodology avoids this problem by operating within the anticorruption interest, rather than attempting to introduce a new interest.

Second and relatedly, other interest reforms are more disruptive than they need to be: introducing a new government interest is not necessary to reforming the jurisprudence to increase legislatures’ latitude in regulating election spending. This Article has explained that whether a given practice is corruptive depends upon underlying

217. *Id.*

218. See HASEN, *supra* note 9, at 36, 186–87 (political equality); POST, *supra* note 9, at 61–62 (electoral integrity).

219. See, e.g., *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 741 (2008) (collecting cases).

assumptions about democracy.²²⁰ The anticorruption interest thus may be, and has been, interpreted in a manner that allows Congress to prevent practices that impair (i.e. corrupt) electoral integrity, political equality, or similar components of a healthy democracy.²²¹ The value of introducing a new government interest, then, is mostly terminological: terms like “electoral integrity” or “political equality” arguably describe the problems intended to be remedied by many campaign finance laws more acutely than does the term “corruption.” But this terminological improvement is not worth the jurisprudential overhaul that would be necessary to introduce new government interests, at least when the anticorruption interest is itself sufficient to encompass those interests.

3. A Return to Broad Corruption

Lastly, the Compromise Methodology is a better option for reform than pushing for a return to the broad understanding of corruption articulated before *Citizens United*.²²² First, while the selection of a broad conception of corruption instead of a narrow one would give Congress more leeway to regulate the financing of elections, it would still require the Court to make a judgment about what is and is not corruption that the Deferential Justices believe is best left for Congress. Second, the reform would allow the Court to continue to define corruption without acknowledging the substantive democratic judgments underlying that determination. So long as the Court is focused on choosing between one definition of corruption or another, its underlying democratic judgments about legislative responsiveness and public opinion formation will remain largely unspoken and unchallenged. Third, the reform frames the Justices’ debate about corruption in campaign finance cases as a choice between two conceptions of corruption—one broad and one narrow. But the choice is more complex, as the careful examination of the case law in Part I of this Article revealed.

220. See *supra* Section II.A.

221. See *supra* Section I.C (detailing how the Justices’ conceptions of corruption in campaign finance cases ranges from narrow quid pro quo transactions to how the deployment of amassed wealth in elections harms democracy).

222. See, e.g., TEACHOUT, *supra* note 6, at ch. 16 (arguing for a broad understanding of corruption); cf. LESSIG, *supra* note 3, at 228–32 (advancing a conception of corruption that includes legislative dependence on financial support from the wealthy).

Finally, the broad-versus-narrow corruption reform arguably raises institutional concerns for the Court. Switching from a narrow to a broad conception of corruption means returning to the understanding of corruption expressed by the *Austin* and *McConnell* Courts. As Professor Hasen has cynically (yet accurately) observed, what changed from *McConnell* to *Citizens United* was that Justice Alito replaced Justice O'Connor on the Court.²²³ That change left five votes for overturning *Austin* and *McConnell* (in part) and replacing the broad conception of corruption found in the earlier cases with the narrow one previously expressed by dissenting Justices in those cases. Should the composition of the Court change in a manner that makes reform possible, it would perhaps be unseemly to reverse course again, and return the jurisprudence to the exact place it was before *Citizens United*. A reform that rests on a new line of reasoning would mitigate the risk of appearing overly ideological, or even indecisive.

D. Potential Criticisms

The Compromise Methodology is subject to criticism from both sides of the debate over campaign finance jurisprudence. First, observers whose beliefs accord with those of the Interventionist Justices may argue that the methodology permits the form of campaign finance restriction that they find most troubling: speech equalization measures. The Interventionist Justices have argued that the government has no interest in “equalizing the relative influence of speakers.”²²⁴ According to them, equalization measures present both public opinion formation and incumbency protection concerns. They argue that such attempts to “shap[e] the political debate by insulating the electorate from too much exposure to certain views is incompatible with the First Amendment,” because “the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.”²²⁵ And, they contend that

223. HASEN, *supra* note 9, at 29.

224. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 704 (1990) (Kennedy, J., dissenting), *overruled by* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

225. *Id.* at 706 (alteration omitted) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 791 (1978)).

laws equalizing the resources available to facilitate speech inherently benefit incumbents.²²⁶

This criticism of the Compromise Methodology would be overstated. To be sure, the methodology would allow the anticorruption interest to encompass one category of campaign finance laws that the Interventionist Justices have deemed speech equalization: restrictions on large independent expenditures funded by a small number of people. Such expenditures may impair legislative responsiveness and thus fall within the anticorruption interest's scope under the Compromise Methodology.²²⁷ However, the methodology would almost certainly not permit the most extreme forms of speech equalization: laws that mandate equal financial resources to campaigns and committees with unequal popular support.

Consider, for example, a regulatory regime that limits contributions to candidates at \$1,000 and also caps the amount candidate committees can spend at \$1,000,000. This is the paradigmatic example of speech equalization that the Interventionist Justices fear. One candidate may enjoy immense popular support and raise millions of dollars from the public. Another may have more tepid support and raise only one million. Despite their unequal popular support, the expenditure limitation would equalize their abilities to facilitate speech.

Were the more popular candidate to challenge this hypothetical committee expenditure restriction, a Court faithfully applying the Compromise Methodology would likely strike down the law. Since the regulatory regime imposes a \$1,000 contribution limitation, the candidates' financial resources necessarily come from the public at large. Therefore, restricting the candidates' abilities to spend those resources does nothing to protect against a practice that impairs legislative responsiveness; the resources come from the very source to whom the candidates are supposed to be responsive. And, the \$1,000,000 spending cap does not protect public opinion formation. On the contrary, it suppresses public opinion by limiting the public's ability to pool its resources to help the candidate of their choice create and amplify political speech.

226. See *id.* at 692–93 (Scalia, J., dissenting) (“[P]erhaps [the Michigan legislature] was trying to assure a ‘balanced’ presentation because it knows that with evenly balanced speech incumbent officeholders generally win.”).

227. See *supra* Section III.B (applying the Compromise Methodology to *Citizens United*).

At Step II of the Compromise Methodology, then, the Court would have to conclude that the anticorruption interest does not encompass the expenditure restriction. Accordingly, the methodology would not allow the government to equalize speech by mandating equal resources for candidates with unequal popular support.

On the other hand, reformers whose beliefs accord with those of the Deferential Justices are likely to criticize the methodology's inability to justify many campaign finance restrictions. As demonstrated by the above hypothetical, the Compromise Methodology makes it difficult to justify expenditure limitations in a campaign finance environment that has in place reasonable contribution limitations. And, even in an environment without contribution limitations, the methodology does not guarantee that expenditure limitations are constitutional. A Court applying the Compromise Methodology would place most such limitations within the anticorruption interest, but the Court could still strike them as not being sufficiently tailored to that interest.

I view this potential criticism as being less about the Compromise Methodology itself and more about applying that methodology within a jurisprudence that equates money with speech, and corporations with natural persons. A less expansive understanding of speech rights would make expenditure restrictions constitutional under most any decisional methodology: at Step I, there would be no First Amendment burden. Reform on this front—to the extent it is desirable—could come through a revolutionary change in the Court's understanding of speech rights, but is not possible to achieve through the type of evolutionary compromise reform that I seek to advance in this Article.

In the end, neither the interventionist camp nor the reform-minded deferential camp is likely to be completely satisfied with the Compromise Methodology. Faithful application of the methodology would render some policies preferred by reformers constitutional, but would continue to prohibit more aggressive restrictions such as the speech-equalization measure described herein. Perhaps the fact that neither side would be entirely satisfied by the Compromise Methodology is indicative of some flaws that I have not identified. Or, perhaps it is a sign of a healthy compromise.

E. Summary

To sum up, the Compromise Methodology locates a middle ground for deciding campaign finance cases by vindicating both the Deferential and Interventionists Justices' concerns in campaign finance cases. It allows the Court to defer to legislative expertise on matters of corruption, while also leaving room for the Court to intervene to protect political processes. The methodology validates the Deferential Justices' concern with legislative responsiveness and the Interventionist Justices' concern with public opinion formation by employing both to determine the scope of the anticorruption interest. And, the methodology allows the Interventionist Justices to protect individual rights by allowing the Court to define the scope of individual rights, and to conduct its tailoring inquiry, without deference to legislatures. For these reasons, the Compromise Methodology presents a promising option for resolving the disagreements surrounding corruption, democracy, and deference at the core of campaign finance jurisprudence.

IV. CONCLUSION

In 2016, Professors Hellman and Schultz introduced a *Special Issue on Campaign Finance* in the *University of Pennsylvania Law Review Online* by calling for more voices in campaign finance scholarship.²²⁸ The *Special Issue* sought to “start a conversation” about campaign finance, democratic theory, self-government, and related issues.²²⁹ This Article advances that conversation in important ways. Its descriptive account persuasively demonstrates the centrality of democracy and deference to the jurisprudence. Its prescriptive methodology offers a reasoned approach to deciding cases in a manner that accounts for the justifications for deference and intervention, and the different theories of democracy, expressed by the Justices in campaign finance cases. Still, the conversation surrounding the relationship between corruption, democracy, and deference in campaign finance jurisprudence remains in its early stages. I echo Hellman's and Schultz's call for more voices to join that conversation

228. See generally Deborah Hellman & David Schultz, *Foreword: Special Issue on Campaign Finance*, 164 U. PA. L. REV. ONLINE 207, 213–14 (2016), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1172&context=penn_law_review_online.

229. *Id.*

so that we may better our understanding of the jurisprudence and our strategy for improving it.