

DEFINING CORRUPTION AND CONSTITUTIONALIZING DEMOCRACY

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INTRODUCTION

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

¹ See, e.g., *Ariz. Free Enterprise v. Bennett*, 180 L. Ed. 2d 664, 686 (2011) (noting that the type of corruption with which our case law is concerned is *quid pro quo*); *Citizens United v. FEC*, 130 S.Ct. 876, 909-10 (2010) (noting that government interest in preventing corruption is limited to “*quid pro quo* corruption,” and that “[i]ngratiation and access . . . are not corruption.”); *McConnell v. FEC*, 540 U.S. 93, 150 (2003) (“Congress’ legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing ‘undue influence on an officeholder’s judgment, and the appearance of such influence.’”) (citation omitted); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990) (noting that the government’s interest in preventing corruption includes “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”); *FEC v. Nat’l Conservative Pol. Action Comm.*, 470 U.S. 480, 498 (1985) (“The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption.”).

² See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 25-27 (1976) (holding that preventing “corruption and the appearance of corruption” was a compelling governmental interest and rejecting other goals such as equalizing the influence of citizens over elections or limiting the influence of money in elections as insufficiently compelling to justify a regulation on speech); *Nat’l Conservative Pol. Action Comm.*, 470 U.S. at 496-97 (“[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”); *Randall v. Sorrell*, 548 U.S. 230, 268 (2006) (Thomas, J., concurring) (noting “the interests the Court

in campaign finance cases. This has been a mistake. While the Court has vacillated between broader and narrower conceptions of corruption,³ it has missed the significance of the fact that defining legislative corruption entangles the Court in defining the legislator's role in our democracy. This is a task the Court should be hesitant to take up.

Yet the Court has not been hesitant at all. Instead, the Court has addressed the issue with gusto. For instance, the Court's most recent campaign finance cases precisely define corruption. In *Citizens United v. FEC*, the Court asserted that corruption is "limited to *quid pro quo* corruption"⁴ and explicitly emphasized that "[i]ngratiation and access, in any event, are not corruption."⁵ In *Arizona Free Enterprise v. Bennett*, decided just last year, the Court struck down an Arizona law it found burdened speech because that burden was not justified by the state's interest in avoiding corruption.⁶ The Court conceived of corruption as including only the exchange of money for votes or favors,⁷ and therefore found the law not narrowly tailored to the goal. Spending by candidates of their own money and uncoordinated spending both triggered the allocation of matching funds yet neither can lead to *quid pro quo* corruption as a candidate cannot sell votes to himself, and uncoordinated spending by

has recognized as compelling, *i.e.*, the prevention of corruption or the appearance thereof"); *Davis v. FEC*, 554 U.S. 724, 741 (2008) (dismissing the notion that the state has a compelling interest in equalizing electoral opportunities and emphasizing that preventing corruption or the appearance of corruption were the only acceptable governmental interests); *Citizens United*, 130 S.Ct. at 900 (holding that the anti-distortion rationale is not a compelling governmental interest and reaffirming that *quid pro quo* corruption or the appearance of *quid pro quo* corruption are the only sufficiently compelling governmental interests in the context of campaign finance regulation).

³ Compare *Nat'l Conservative Pol. Action Comm.* 470 U.S. at 497 ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors"), and *Citizens United* 130 S.Ct. at 909 ("When Buckley identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption."), with *Austin*, 494 U.S. at 659-60 (defining corruption broadly to include "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."), and *McConnell*, 540 U.S. at 153 ("Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.").

⁴ *Id.* at 909.

⁵ *Id.* at 910.

⁶ *Ariz. Free Enterprise*, 180 L. Ed. 2d 664.

⁷ *Id.* at 686. I call this conception of corruption, *corruption as the sale of favors*. See *infra* part I.B.iii.

outside groups, if truly independent, cannot be the basis of a *quid pro quo* deal.⁸

There are, however, other ways to understand corruption. A legislator who decides how to vote based on a calculation of the likely effect of taking a particular position on his ability to raise funds could be considered corrupt.⁹ A legislator who weighs the preferences of wealthy constituents more heavily than poor constituents could be considered corrupt.¹⁰ If corruption were defined in either of these ways, a matching fund law designed to encourage candidates to take public funding and thereby sever the link between private money and public office would be justified.

The constitutional permissibility of most campaign finance cases has turned on how the Court understands corruption. But, as I argue, the Court should instead be hesitant to define it *at all*. In doctrinal areas of constitutional law outside of campaign finance, the Court is appropriately cautious and modest in its efforts to define good government. For the most part, the Republican Guarantee Clause is treated as nonjusticiable.¹¹ While the Equal Protection Clause has been used to ensure that states provide an acceptable form of democracy, even there the Court has been careful.¹² Recently, for example, the Court declined to adjudicate a claim of partisan gerrymandering.¹³ These cases press us to answer this question: why

⁸ *Id.*

⁹ See *infra* part I.B.i (defining corruption as the deformation of judgment).

¹⁰ See *infra* part I.B.ii (defining corruption as the distortion of influence).

¹¹ See *e.g.* *Luther v. Borden*, 48 U.S. 1, 51 (1849) (holding the Guarantee Clause to present a nonjusticiable political question); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (holding nonjusticiable a claim that the initiative and referendum violated the guarantee of a republican form of government); *Marshall v. Dye*, 231 U.S. 250 (1913) (holding that the Guarantee Clause presents a nonjusticiable political question under *Pacific States Tel. & Tel.*); *Colegrove v. Green*, 328 U.S. 549 (1946) (same, plurality view); *Ohio ex. rel. Bryant v. Akron Metro Park Dist.*, 281 U.S. 74, 79-80 (1930) (“As to the guaranty to every state of a republican form of government, it is well settled that the questions arising under [this clause] are political, not judicial, in character, and this for the consideration of the Congress and not the courts.”).

¹² See *Baker v. Carr*, 369 U.S. 186, 258 (1962) (Douglas, J., concurring) (“The truth is that -- although this case . . . has been most carefully considered over and over again by us in Conference and individually -- no one, not even the State nor the dissenters, has come up with any rational basis for Tennessee's apportionment statute.”) and *Reynolds v. Sims*, 377 U.S. 533, 586 (“[L]egislative reapportionment is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.”).

¹³ *Vieth v. Jubelier*, 541 U.S. 267 (2004). *Vieth* is a fractured opinion. Justice Scalia, writing for a plurality, held that claims of partisan gerrymandering are simply not

refrain from constitutionalizing a view of good government in some cases (e.g., partisan gerrymandering) while asserting in others (e.g., campaign finance) that the Court knows corruption of good government when it sees it? The two are but flip sides of the same coin.

The tension between these two bodies of law, which has been neglected by both courts and commentators, derives from the fact that corruption is a derivative concept, which means it depends on a theory of the institution or official involved. This Article explores the implications of this insight for campaign finance cases. Because defining legislative corruption requires a theory of the legislator's role in a democracy, the Court should look to other areas of its constitutional law for guidance about when and whether it properly constitutionalizes theories of democracy. Apportionment and gerrymandering cases are helpful here. They suggest that there are two important concerns that must be recognized and considered;¹⁴ there are individual rights issues that point toward judicial oversight and questions of democratic theory that point toward deference. Recognizing that theorizing corruption entails theorizing democracy suggests that our campaign finance cases are deficient in failing to air *both* the reasons for judicial oversight and the reasons for judicial deference.

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

The Article proceeds as follows. Part I begins by describing the widely held view that corruption is a derivative concept. This part both documents the fact that the idea of corruption is widely understood to depend on an antecedent view about the proper functioning of the institution or official in question and explores what this view means in the context of democratic

justiciable. Justice Kennedy, concurring in the judgment, found the particular claim presented “must be dismissed” but “would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.” *Id.* at 306 (Kennedy, J., concurring in the judgment). On the other hand, Justice Kennedy did not say that partisan gerrymandering claims *are* justiciable and that the case before him simply failed to present a claim of violation.

¹⁴ See *infra* Part II.B.

institutions. Part I then looks in more detail at how the Supreme Court defines corruption in its campaign finance decisions. It identifies three distinct conceptions of corruption and the views of proper legislative role that are implied by each.

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

Part III turns to reasons for more robust judicial supervision. This Part considers the arguments against the view presented in Part II, including that protecting the legislative process is quintessentially the Court's function and that defining rights always implicates the Court in defining democracy. This Part both replies to these concerns and goes on to argue that when courts weigh the reasons counting for and against intervention, they should take into account the degree to which the law at issue infringes on the individual right. The Article concludes that consideration of the important reasons for deferring to legislative judgment about the legislator's role in a well-functioning democracy shifts the balance of reasons in campaign finance cases and should make invalidation of these laws much less common.

Part I: Corruption is a Derivative Concept

A. In Theory

Dennis Thompson explains, “[i]n the tradition of political theory, corruption is a disease of the body politic.”¹⁵ But to know what is disease, one must know what is health for the organism in question. As the metaphor illustrates, corruption is, in this sense, a derivative concept.¹⁶ If

¹⁵ DENNIS F. THOMPSON, *ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION* 28 (1995).

¹⁶ To say that corruption is a derivative concept implies that the conception of the

corruption is a disease of the body politic, it depends on an antecedent idea of the healthy state of the political system.

Of course, officials or actors in all sorts of institutions – not only political ones – can be corrupt. So perhaps we ought to say that corruption is the disease-state of an institution or individual.¹⁷ Tellingly, what rightly counts as corruption of one type of institution or official within it is not the same as what counts as corruption of another type of institution or official. When we recognize this fact, we see that to define corruption requires articulating the standards of proper functioning of the institution or individual involved. Consider the following familiar example -- nepotism. Suppose I am a public official hiring someone for a public job. If I give the job to John, despite the fact that he is less qualified than other applicants, because he is my brother-in-law, this constitutes a classic case of corruption. Here I act corruptly because the benefit I allocate is supposed to be awarded on the basis of criteria that exclude family connectedness. Contrast this example with the following one. Suppose I decide to invite John to a holiday dinner at my house. I invite him, even though he is a less gifted conversationalist than other possible dinner invitees, because he is my brother-in-law. Here I do not act corruptly. The criteria that apply to this decision (whom to invite to holiday dinners) are either completely within my discretion or, properly understood, include family-connectedness as a valid criterion.

In the case of still other institutions (we have so far considered the institutions of government and the family dinner), the institution's internal norms and values do not clearly approve or disapprove of family-connectedness as a criteria for use in decision-making. Consider the following example. Suppose an admission's official at a private or public high school accepts John, even though his grades are lower than other candidates who are not accepted, because John's sister Jane is currently at the school. Here, the school official may not act corruptly if the school allows consideration of family connectedness to play a role in admissions.

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

¹⁷ See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 373 (2009) (arguing that "corruption" has two meanings: "It has a broad meaning, describing all kinds of moral decay, and a more specific meaning in the context of politics").

And the school may do so, as there are good reasons to keep children of the same family in the same school -- reasons that redound to the benefit of the children, the family and the school. This sibling preference may be explicitly part of the admissions criteria used by the school or may be implicit, understood as part of the school's ethos or values. I describe this case as controversial because some critics of this policy may argue that a school, properly conceived, should consider only academic credentials in deciding whom to admit.¹⁸ In other words, whether an act is corrupt depends, at least in part, on whether the official's action or exercise of judgment comports with the standards of appropriate decision-making for an actor within the particular institution. In this sense, actors are corrupt or not depending (at least in part) on whether they violate the norms for the actor and institution involved. Corruption derives from and depends upon a theory of the institution involved. Corruption of an actor within an institution derives from standards of correct behavior for the actor within that institution.

The claim that a theory of corruption relies on an account of the norms of the institution involved is only a partial theory of corruption. For an action to be corrupt, other factors are likely to be necessary.¹⁹ For example, perhaps the action must be motivated by the desire for some sort of personal gain or perhaps there must be a gain to the individual (or his family, associates or party) that is linked in some way with the norm-breaking action.²⁰ I do not intend to offer a complete theory of corruption. Rather I am arguing that on any plausible theory of corruption, a corrupt act is one that violates a norm or standard of the proper functioning of the institution.²¹ Thus, an account of corruption for any particular institution

¹⁸ Controversies over whether legacy preferences at colleges and universities are appropriate replay this same debate. *See also* *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701 (2007), in which a preference in school assignment based on race was held unconstitutional but a sibling preference was not even considered controversial.

¹⁹ Most theories agree that corruption requires both the violation of the normative standard, some benefit (personal and possibly political) and some connection between the two. *See e.g.* John G. Peters & Susan Welch, *Political Corruption in America: A Search for Definitions and a Theory*, 78 AM. POL. SCI. REV. 974 (1978) (describing different theories of corruption).

²⁰ For example, Zephyr Teachout describes the Framers' conception of corruption as follows: "To the delegates, political corruption referred to self-serving use of public power for private ends..." Teachout, *supra* note 17 at 373.

²¹ One of the few scholars who appear to disagree with this claim is Laura Underkuffler. *See e.g.* Laura Underkuffler, *Captured by Evil: The Idea of Corruption in Law*, Duke Law Sch. Legal Research Series, Research Paper No. 83, 2005) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=820249. For Underkuffler corruption

depends on a theory of that institution.

The above examples focus on corruption in different institutions – government, family and school – but the claim holds true when we restrict the discussion to political corruption. What constitutes political corruption in a democracy depends on a theory of democracy. To put the point in a more grounded fashion: what constitutes corruption of legislators depends on a view about the proper basis for decision-making by elected officials. A simple and stylized example will illustrate this idea. Consider the classic disagreement in political theory between the trustee and delegate conceptions of the legislative role.²² According to the trustee conception of legislative role, the legislator ought to be guided by her best judgment about the merits of bills before the legislature. Her constituents elected *her* and therefore she ought to use her own judgment to assess various courses of

“is the idea of *capture by evil*, the *possession of the individual by evil* in law.” *Id.* at 2. Underkufler objects to those theories of corruption which leave open the possibility that “corrupt” acts could be good from an all-things-considered standpoint. *Id.* She finds this result problematic because, in her view, it fails to comport with how we understand the term “corruption.” *Id.* There are two avenues of reply to this objection. First, one could argue that an action can be corrupt, given the obligations derived from the institution, and yet morally good, all things considered. Officials of Nazi Germany who accepted money from Jews in exchange for letting them escape were acting corruptly – violating the norms of the state and their obligations within it and doing so for their own benefit – and yet these corrupt actions were good, all things considered. Of course, it would have been better still to let the Jews out without accepting bribes or to have fought against the evil state. But still, these corrupt acts are to be commended.

Underkufler would agree that the actions are to be commended, but would disagree with attaching the label “corruption” to them. I think this is a mistake. The Nazi official accepts money for private use in exchange for violating his official duties under law. I am not sure there is any more that one can say -- or at least not in the context of this paper – about which position is correct about corruption as a concept. It may simply be a matter of competing intuitions. While her view is possible, the better view, I think, is to accept the Nazi’s taking of the bribe as an instance of corruption.

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

²² Dennis Thompson describes both of these accounts as providing a “functionalist basis for legislative ethics.” *See, e.g.*, DENNIS F. THOMPSON, *POLITICAL ETHICS AND PUBLIC OFFICE* 99 (1987). Thompson cites the following sources as “classic examples” of trustee, delegate and mixed theories: EDMUND BURKE, *BURKE’S POLITICS*, (Ross Horrman & Paul Levack eds., Knopf 2nd ed. 1959); 2 Jean Jacques Rousseau, *Gouvernement de Pologne*, in *POLITICAL WRITINGS*, 434, (C. E. Vaughan ed., Basil Blackwell 1962), and 19 JOHN STUART MILL, *Considerations on Representative Government* in *COLLECTED WORKS*, 371 (John M Robson ed., Toutledge and Kegan Paul 1977). *Id.* at 225 n.7.

action. According to the delegate conception of legislative role, by contrast, the legislator ought to vote as she thinks her constituents would want her to vote on each piece of legislation presented to her. Suppose one believes that the trustee conception of legislative role is the best account of how representatives ought to act, and thus that legislators ought to act as trustees, and only as trustees, when voting on bills that come before the legislative body. On this view, a legislator who votes in a way that conflicts with her independent judgment of the merits of the bill, and does so because she believes that is what her constituents desire, may well act corruptly. Voting as constituents want when it conflicts with a legislator's independent judgment about the best course of action violates the normative standards of the good legislator (by hypothesis). If the legislator does so in order to derive the personal benefit of increasing the likelihood of re-election, this looks like a quintessential case of corruption. As this example makes clear, classic disagreements about what good representation entails give rise to different views of what constitutes political corruption in the legislative context.

This is not a novel idea; indeed, it is widely shared. For Dennis Thompson, “[a] complete conception of [legislative] corruption for our time would require a full-blown theory of democracy.”²³ Thomas Burke makes the same point: “Any adequate standard of corruption [in politics], I argue, must be grounded in a convincing theory of representation.”²⁴ Scholars of political corruption as diverse as Daniel Hays Lowenstein and Bruce Cain both acknowledge that pinning down what constitutes corruption, or political corruption more specifically, depends on an analysis of what good or desirable politics entails. For example, Lowenstein claims that while the concept has “a descriptive core on which users of the concept can agree roughly,” it is “so intertwined with controversial normative ideas that general agreement on the features of the concept is impossible.”²⁵ Cain too sees the debate about what constitutes corruption between himself on the one hand and Thompson and Lowenstein on the other as reducing to a debate about political theory. In his view: Lowenstein and Thompson “offer a defensible basis for reform to those who equate representation with

²³ Thompson emphasizes the same claim in a more recent article. See Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1038 (2005) (arguing that “[t]he form the virus [corruption] takes depends on the form of government it attacks” and thus that in democracies “[t]he essence of corruption is in this conception is the pollution of the public by the private”).

²⁴ Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127, 128 (1997).

²⁵ Daniel Hays Lowenstein, *Campaign Contributions and Corruption: Comments on Strauss and Cain*, 1995 U. CHI. LEGAL F. 163, 163.

legal trusteeship or to those who find ethical formulations of democracy persuasive.”²⁶ As he rejects the theory of democratic politics on which their accounts are based, Cain adopts different conclusions about what constitutes corruption.²⁷

David Strauss even uses the term “derivative” to describe the concept of corruption, though he means this in a debunking rather than illustrative way.²⁸ Strauss’s argument for why campaign finance reform is ill-advised emphasizes that an account of corruption depends on a theory of democratic politics. Like me, he begins his argument with an observation that actions that are corrupt in one institutional setting are not corrupt in another, the same point I stress in the example developed above. He uses a more controversial sort of case to make essentially the same claim about the relationship between a conception of corruption and a theory of the institution involved.²⁹ Strauss notes that the Federal Communications Commission (“FCC”) permissibly auctioned off the right to use certain frequencies while a judge or legislator could not properly sell her decision in a similar way. From this fact, Strauss argues that what distinguishes the FCC example from that of a judge selling outcomes is that a judge’s decision is supposed to be governed by certain norms while the FCC decision is not.³⁰ Of course, the market context is also governed by norms, so perhaps his point is better expressed by saying that the cases are governed by different norms, justice versus market norms. He then asks which example is closer to the case of legislative decision-making. Is legislative decision-making best conceived as governed by a norm like “serve the public interest” or instead by a market-like idea of responsiveness to voters’ wishes or preferences, as expressed through their contributions. Deciding between these two models of democratic decision-

²⁶ Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 122.

²⁷ *Id.* (finding that “democracy is procedurally, not ethically, defined,” and arguing that this conclusion leads to a narrow view about what constitutes corruption).

²⁸ David Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994) (arguing that “it is far from clear that campaign finance reform is about the elimination of corruption at all” because “corruption – understood as the implicit exchange of campaign contributions for official action – is a *derivative* problem”) (emphasis added). For Strauss, the real problem is unequal wealth. In his view, if wealth were equalized, then the fact that the potential for raising contributions from citizens motivates legislative behavior would not be problematic. Strauss’s debunking view of corruption thus rests on normative views both about fair participation in democratic politics and about what representation entails.

²⁹ See David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 146-47.

³⁰ *Id.* at 147.

making calls upon foundational questions of democratic theory.

If political corruption is a disease of the body politic, then it depends on a conception of the healthy functioning of the political institution involved. And therein lies the problem. Unlike health and illness in the body, where there is substantial agreement among doctors and others about what bodily health and illness consists in, a “healthy” political system is far more difficult to define. For one, should it be a democracy or can other political systems also be healthy? Even if we limit ourselves to democratic political systems such as our own, we are likely to disagree about how a healthy democracy operates.³¹ We disagree about what corruption is, therefore, at least in part because we disagree about what democratic politics, when healthy and well, entails. Thus, an account of what constitutes corruption depends on a theory of democracy. Yet there is substantial disagreement about what a commitment to democratic representation demands.

B. *In Practice*

Unsurprisingly, given disagreements about what good democratic politics requires, our campaign finance case law contains at least three distinct conceptions of legislative corruption. A conception of legislative corruption depends upon a conception of the proper way for a legislator to make decisions in a democracy.³² The case law thus contains three different and competing visions of proper legislator role. In what follows in this Part, I describe the three conceptions of corruption that are most prominent in the campaign finance case law.³³ I call these “corruption as

³¹ Ronald Dworkin explains this phenomenon by claiming that “[t]he concept of democracy is an interpretive and much contested concept.” RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 379 (2011).

³² Each of these types is a conception of individual rather than institutional corruption. One could also conceive of legislative corruption by focuses on the institution as a whole, the incentives its operation creates, etc. I focus exclusively on individual corruption because the Court has so far done so. My point is to show that even as to individual corruption, there are several distinct ways of conceiving of it, each of which relates to a different conception of a democracy.

³³ In a recent Comment in the *Harvard Law Review*, Samuel Issacharoff identifies two conceptions of corruption. See Samuel Issacharoff, *On Political Corruption*, 124 *HARV. L. REV.* 118 (2010). These two conceptions are similar to my second two. He describes his as “actual quid pro quo arrangements” and the “distortion of political outcomes as a result of the undue influence of wealth.” *Id.* at 122. Zepher Teachout identifies five modern conceptions of corruption. Teachout *supra* note 17. Her first, “corruption as ‘quid pro quo’ and ‘the creation of political debts’” is similar to my third (*corruption as the sale of favors*), her second and third “unequal access” and “drowned voices” could be seen as variants of my second (*corruption as the distortion of influence*), her fourth, “dispirited

the deformation of judgment,” “corruption as the distortion of influence,” and “corruption as the sale of favors.” I then explain how each conception of corruption depends upon a distinct view about the proper way for a legislator in a democracy to make decisions.

In *FEC v. National Conservative Political Action Committee* [*NCPAC*],³⁴ in which the Court struck down expenditure limits on uncoordinated expenditures by Political Action Committees (PACs), the Court acknowledged that corruption is a derivative concept. The Court began “[c]orruption is a subversion of the political process.”³⁵ Tellingly, the Court then emphasized that this interconnection between a conception of corruption and a view about the proper functioning of the political process means that any particular conception of corruption entails a particular view about how legislators ought to make decisions. The Court thus continued its explanation of corruption as follows: “Elected officials are influenced to act *contrary to their obligations of office* by the prospect of financial gain to themselves or infusions of money into their campaigns.”³⁶ What the Court neglects to fill in, however, is its view about what *are* the “obligations of office”³⁷ of a legislator in a democracy. Below I describe three variants that are present in the Court’s campaign finance cases.

i. Corruption as the Deformation of Judgment

On one view, a legislator ought to exercise her own independent judgment about each decision she faces. This view represents one classic conception of the legislator’s role.³⁸ The legislator, according to this view, should consider only the merits-based reasons that bear on the decision at hand. The fact that X number of people support or object to that action or that the legislator’s ability to raise funds or be reelected will be helped or hindered by this action should not play a role. If proper legislative decision making is merits-based in this way, then improper or corrupt decision making occurs when the legislator’s judgment is influenced by nonmerits-based factors. Corruption, according to this view, resides in the deformation of judgment.

public” is lacking from my topology as I focus on legislative role, and her fifth, “loss of integrity” has similarities to my first “corruption as the deformation of judgment.”

³⁴ 470 U.S. 480 (1985).

³⁵ *Id.* at 497.

³⁶ *Id.* at 498 (emphasis added).

³⁷ The Court in *FEC v. NCPAC* does provide some suggestive thoughts, which are discussed *infra*.

³⁸ See *supra* note 22 and accompanying text.

The idea that a legislator's role requires her to exercise independent judgment is one important vision of proper legislative conduct. It was recognized in *McConnell v FEC*,³⁹ where the Court claimed that "Congress's legitimate interest extends beyond preventing simply case-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'"⁴⁰ While the continued vitality of that ruling and thus the rationale on which it is based may be uncertain,, *corruption as the deformation of judgment* also animates the long history of recusal rules that prohibit legislators from voting on legislation in instances where their judgment may be compromised by a conflict of interest. *Nevada Commission on Ethics v. Carrigan*, decided just last year, recognized this history,⁴¹ as well as the ubiquity of such standards today: "Today, virtually every State has enacted some type of recusal law, many of which, not unlike Nevada's, require public officials to abstain from voting on all matters presenting a conflict of interest."⁴²

This conception of corruption is close to the conception of corruption that Zephyr Teachout attributes to the framers.⁴³ Political virtue for the framers, according to Teachout, is as much about attitude as actions,⁴⁴ it is "an orientation toward the public interest,"⁴⁵ and thus shares much with a conception of corruption that dictates that legislators should exercise independent judgment. Like *corruption as the deformation of judgment*, the framers' conception of corruption that Teachout describes sees a corrupt official as one who "is tempted by narcissism, ambition, or luxury, to place private gain before public good in their public actions."⁴⁶

This conception of corruption is consistent with the Court's view that corruption is of no concern in the context of ballot initiatives.⁴⁷ Since there

³⁹ 540 U.S. 93 (2003).

⁴⁰ *Id.* at 150 (emphasis added).

⁴¹ 180 L.Ed. 2d at 158-9 (finding no first amendment violation in state ethics rules that require legislators to abstain from voting on legislation when conflicts of interest are present).

⁴² *Id.*

⁴³ Teachout, *supra* note 17 at 373-383.

⁴⁴ *Id.* at 374 (explaining that corruption, for the framers, relates to the "moral attitude" of the person).

⁴⁵ *Id.*

⁴⁶ *Id.* at 375.

⁴⁷ For example, in *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), in which the Court considered the constitutionality of a Massachusetts statute that restricted corporations' ability to make contributions or expenditures to influence the outcome of a vote on any ballot initiative, the Court explained: "[t]he risk of corruption perceived in

is no legislator or other public official whose judgment can be deformed, there is no possibility of corruption.⁴⁸ While some scholars view this conception of legislative role as antiquated,⁴⁹ it continues to exert influence, as the affirmation of the constitutionality of recusal rules in *Nevada Commission on Ethics* demonstrates.

ii. Corruption as the Distortion of Influence

Corruption as the distortion of influence sees the legislator as properly attentive to the desires and preferences of those she represents. In a well-functioning democracy, the legislator responds to these desires and preferences. If responsiveness to constituents' wishes is the political virtue, its corresponding vice is a distortion in the manner in which these preferences are weighed. In particular, corruption occurs when a legislator weighs the preferences of some too heavily, especially when the legislator counts the wishes of wealthy contributors more than others. This conception of corruption is again illustrated in *McConnell* in a passage that also recognizes *corruption as the deformation of judgment*: "Just as troubling to a functioning democracy as *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder."⁵⁰

In another variant of *corruption as the distortion of influence*, it is corporate contributions that are particularly worrisome. In these cases, the Court tends to assume that contributions to candidates serve as a rough proxy for actual support for the candidate or his ideas.⁵¹ Corporate

cases involving candidate elections, ... simply is not present in a popular vote on a public issue." *Id.* at 790 (citations omitted). This language from *Bellotti* is quoted by the Court in *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) in similarly finding that ballot initiatives and referenda are not subject to corruption. *Id.* at 298. The statute at issue in *Berkeley* prohibited contributions of more than \$250 to committees formed to support or oppose ballot measures that would be submitted to popular vote. The Court held that the statute violated the First Amendment, and reasoned that while committee advertising may persuade the electorate to vote a certain way, it does not rise to the level of corruption. *Id.* These cases are also consistent with the third conception of corruption – *corruption as the sale of favors* – and so are not distinct of that view of this one.

⁴⁸ Interestingly, Teachout points out that the Framers considered citizenship to be a political office and thus that citizens too could be corrupt. Teachout, *supra* note 17 at 374.

⁴⁹ See e.g. Teachout, *supra* note 17 at 397 (arguing that this conception of corruption does not make sense to many modern judges).

⁵⁰ *Id.* at 153.

⁵¹ See e.g. *FEC v. Mass Citizens for Life*, 479 U.S. 238, 258 (1986) (explaining that "relative availability of funds is after all a rough barometer of public support").

contributions raise special problems however because “[t]he resources in the treasury of a business corporation ... are not an indication of popular support for the corporation’s political ideas.”⁵² *Austin v. Michigan Chamber of Commerce*,⁵³ which was overruled by *Citizens United v. FEC*,⁵⁴ espoused this conception of corruption most clearly. In *Austin*, the Court upheld the regulation of corporate expenditures on the grounds that otherwise there will be too much influence exerted by “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”⁵⁵

Critics of this conception of corruption say it is grounded in a view that each person should be equally able to influence legislative decision-making⁵⁶ or that each candidate should have an equal chance to win. Indeed, it is for this reason that the Court’s most recent campaign finance case, *Arizona Free Enterprise v. Bennett*, again rejects this conception of corruption.⁵⁷ But it need not. *Corruption as the distortion of influence* could simply rule out some reasons for weighing the views of some constituents more than others, i.e. that they are wealthier and thus more able to contribute to campaigns than their poorer neighbors, without adopting the view that each person must have an equal change to influence legislative outcomes.

iii. Corruption as the Sale of Favors

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

⁵² *Id.*

⁵³ 494 U.S. 652 (1990), *overruled by* *Citizens United v. FEC*, 130 S.Ct. 876, 909 (2010).

⁵⁴ 130 S.Ct. 876 (2010).

⁵⁵ *Id.* at 660.

⁵⁶ *See* Strauss, *supra* note 28 at 1384.

⁵⁷ 180 L. Ed. 2d at 685 (arguing that “leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election”).

This view of legislative role clearly undergirds the Court's decision in *Citizens United*.⁵⁸ There Justice Kennedy, writing for the Court, says that corruption is "limited to *quid pro quo* corruption"⁵⁹ and explicitly emphasized that "[i]ngratiation and access, in any event, are not corruption."⁶⁰ *Corruption as the sale of favors* also grounds the Court's repeatedly reaffirmed view that limits on personal expenditures cannot be justified by the aim of avoiding corruption. Spending one's own money cannot be corrupt because one can hardly make a backroom deal with oneself. Consistent with this view of corruption, the Court in *Davis v. FEC*⁶¹ found that "reliance on personal funds *reduces* the threat of corruption."⁶²

Corruption as the sale of favors also explains the Court's view that independent, uncoordinated, expenditures cannot be corrupting. If the expenditures are truly uncoordinated with the candidate, the "circuit is broken," which thereby "negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which our case law is concerned."⁶³ The political virtue envisioned by this conception of corruption is very limited. A legislator need merely avoid bribery or its very close cousins.

iv. Permutations

These three conceptions of corruption are offered as exemplars of possible alternatives, not as a complete list. They demonstrate that there are several quite distinct ways of thinking about the corruption of legislative actors and that our campaign finance case law includes elements of these various types. Campaign finance case law in fact offers variations on these alternatives as well that complicate this stylized picture. For example, there are different views about whether legislators are properly influenced by political parties. For some, the fact that political parties are able to influence candidates' positions on issues is an integral part of a well functioning political process.⁶⁴ For others, this influence is troubling.⁶⁵ We

⁵⁸ 130 S.Ct. 876 (2010).

⁵⁹ *Id.* at 909.

⁶⁰ *Id.* at 910.

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

⁶² *Id.* at 740-41.

⁶³ *Ariz. Free Enterprise*, 180 L.Ed. 2d at 670.

⁶⁴ See e.g. *Colo. Republic Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 648 (1996) (Thomas, J., concurring in the judgment and dissenting in part) (arguing that "[p]arties and candidates have traditionally worked together to achieve their common goals, and when

also see a debate about whether special access to candidates or officeholders can be a form of corruption. Both positions on this question rely upon or relate to the first conception of corruption: *corruption as the deformation of judgment* and yet still stake out opposing views. To some, access simply enables the contributor to persuade the office holder to change her position, and therefore cannot constitute corruption as it is the strength of the ideas, rather the size of the contribution, that matters.⁶⁶ Others find special access is problematic because it creates “undue influence on an officeholder’s judgment, and the appearance of such influence.”⁶⁷ While access may enable persuasion and thus work via the intellect rather than the pocketbook, still corruption is possible. This second view envisions officeholders as vulnerable to repeated presentation of one view at the expense of the other.

This brief survey of the various conceptions of corruption embedded within our campaign finance law and the accounts of proper legislative decision-making implied by each demonstrates that there are several different conceptions of a well-functioning democracy implicated by the conceptions of corruption that compete with each other in the case law. Each conception of corruption relies upon a different view about how a legislator ought to make decisions and what factors may properly influence that process. By choosing one conception of corruption, the Supreme Court in each of these cases thus implicitly adopts one particular, contested conception of a legislator’s role in a well-functioning democracy. Defining corruption therefore implicates the Court in defining democracy.

C. *In Tension*

The Court’s failure to recognize that it defines good government when it defines corruption creates tension within constitutional law. A search for internal “integrity” of the kind that Ronald Dworkin sees as the hallmark of justification,⁶⁸ requires some modification to existing doctrine. Two cases decided just last year -- *Nevada Commission on Ethics v. Carrigan*⁶⁹ and

they engage in that work, there is no risk to the Republic”).

⁶⁵ *Id.* at 548 (Stevens, J., dissenting) (arguing that the fact that a “party shares a unique relationship with the candidate it sponsors because their political fates are inextricably linked” ... “creates a special danger that the party – or the persons who control the party – will abuse the influence it has over the candidate by virtue of its power to spend”).

⁶⁶ Justice Kennedy, writing for the Court in *Citizens United*, remarks that “[i]ngratiation and access, in any even, are not corruption.” 130 S.Ct. at 910.

⁶⁷ *McConnell v. FEC*, 540 U.S. 93, 150 (2003).

⁶⁸ RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011)

⁶⁹ 180 L. Ed. 2d 150 (2011).

Arizona Free Enterprise v. Bennett,⁷⁰ -- illustrate this tension, as well as the Court's blindness to it. Tellingly, each appears to open the door to broad changes in the ability of the legislature or the people to control what they perceive as corruption – the first seeming to make such efforts dramatically easier and the second dramatically harder.

In *Nevada Commission on Ethics v. Carrigan*, a unanimous Supreme Court, in an opinion written by Justice Scalia,⁷¹ upheld the ability of the Nevada legislature to ensure that its process is not tainted by conflicts of interest. The Court held that voting is not an activity protected by the First Amendment and thus state ethics rules requiring recusal in cases of conflict of interest raise no First Amendment issue.⁷² The opinion is written very broadly. The Court holds that “a legislator’s vote is the commitment of his apportioned share of the legislature’s power” and thus “is not personal to the legislator but belongs to the people.”⁷³ Having no personal right to it, a legislator has no cause for complaint when it is restricted. As a result, the state legislature of any state, and presumably Congress as well, could write ethics rules that require members to recuse themselves from voting on any piece of legislation where the ethics rules identify a conflict of interest. Such an approach could, in principle, disable legislators from voting on bills when they have received contributions from people, groups, or companies that stand to benefit from the legislation.

Despite this seeming protection of legislative prerogatives to determine the ethical standards governing its own body, an opinion issued just two months later, and decided on a five-four vote, seriously impedes legislature’s efforts to define legislative corruption for itself. In *Arizona Free Enterprise*, the Court struck down the matching fund provisions of an Arizona state law which were designed to encourage participation by candidates for state office in the public funding system. The majority, in an opinion written by Chief Justice Roberts, conceived of corruption very narrowly, and in so doing even raised some doubts about the constitutional permissibility of public funding systems.⁷⁴ In particular, while the Court

⁷⁰ 180 L. Ed. 2d 664 (2011).

⁷¹ The judgment was unanimous. Seven Justices signed on to Justice Scalia’s opinion; Justice Kennedy filed a concurring opinion, and Justice Alito filed an opinion concurring in part and concurring in the judgment.

⁷² 180 L. Ed. 2d 150.

⁷³ *Id.* at 159.

⁷⁴ The majority explicitly declines to question the constitutionality of public funding systems, 180 L. Ed. 2d at 688, but in a post to the N.Y. Times online discussion forum, Room for Debate, Guy-Oriel Charles questioned the viability of this disclaimer. See <http://www.nytimes.com/roomfordebate/2011/06/27/the-court-and-the-future-of-public->

breaks no new ground in refusing to see the goal of “leveling the playing field” with regard to the impact of money in politics as an interest important enough to justify restrictions on speech, it strikingly characterizes that interest as “a dangerous enterprise.”⁷⁵ This language suggests that the Court may see the goal of attempting to neutralize the disproportionate influence that wealthy individuals and businesses have in the political process as an illegitimate governmental interest, rather than merely as a non-compelling one. Such an approach could have far-reaching consequences.

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

II. DEFINING DEMOCRACY

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

[financing/the-courts-battle-of-ideology.](#)

⁷⁵ *Id.* at 685.

reasons to refrain from constitutionalizing a particular contested conception of representative democracy.

A. *The Republican Guarantee Clause*

Once we notice that campaign finance cases implicitly define good government when they define corruption, we must ask when and whether the Court should define the proper role of a legislator in a well-functioning democracy. In asking whether the Court appropriately constitutionalizes a particular conception of democracy, the natural place to begin is with the Republican Guarantee Clause. The Republican Guarantee Clause provides that “The United States shall guarantee to every State in this Union, a Republican Form of Government...”⁷⁶ While the Clause designates the United States as the guarantor of a republican form of government, the Court has interpreted this power or responsibility as one that rests with Congress.⁷⁷ Moreover, determining whether Congress has fulfilled this obligation is usually treated as a non-justiciable political question.⁷⁸ In order to ensure that the states have a republican form of government, Congress must, at least implicitly, employ criteria for representative democracy. If Congress’s determinations in this regard are not reviewable by courts, then it is for Congress to determine what, at a minimum, representative democracy requires.

The non-justiciability of that clause is itself controversial, as is the political question doctrine itself.⁷⁹ Nonetheless, one way to explain what

⁷⁶ U.S. CONST. art. IV, §4.

⁷⁷ See Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849, 863 (1994) (noting that since *Pacific States*, the Supreme Court has held that the enforcement of the constitutional guarantee of a republican government is for Congress).

⁷⁸ See cases cited *supra* note 11.

⁷⁹ See e.g. Martin H. Redish, *Judicial Review and the ‘Political Question*, 79 NW. U. L. REV. 1031 (1984) (arguing for the abolition of the political question doctrine); Richard L. Hasen, *Leaving the Empty Vessel of “Republicanism” Unfilled: An Argument for the Continued Nonjusticiability of Guarantee Clause Cases* in THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT 75 (Mortada-Sabbah and Cain, eds. 2007) (arguing that the political question doctrine ought to be retained, especially in the Republican Guarantee Clause cases); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002) (arguing for more deference by the Court to the coordinate branches of government both via Political Question cases and in its interpretation of other substantive doctrines as well); Chemerinsky, *supra* note 77 (arguing that courts should enforce the Republican Guarantee Clause because not doing so renders it a dead letter and because there is no reason to think courts are ill-suited to enforce what it requires).

animates it is the view that there are many reasonable ways to instantiate democratic form. Our constitution does not mandate only one, though it may rule out some. Choosing among reasonable options is for the elected branches of government – the states in adopting the forms they choose and Congress in policing them for constitutional permissibility. This principle – that Congress may choose among reasonable conceptions of democracy – is illustrated by *Pacific States Telephone & Telegraph v. Oregon*.⁸⁰ There the Court refused to hear a challenge to a law enacted by referendum in Oregon on the grounds that deciding whether referenda violate the Republican Guarantee Clause is a non-justiciable political question.⁸¹ The law was challenged on the ground that referendums are inconsistent with a republican form of government.⁸² While different conceptions of democracy might rule the initiative process in or out, the Court held that it was for Congress to decide whether the form of government adopted by Oregon voters was acceptable.⁸³

Of course there are other ways of understanding the normative underpinnings of the nonjusticiability of the Republican Guarantee Clause. In addition to the view described above, it could instead be based on a view about which branch of government is best suited to make certain sorts of judgments, or on prudential considerations like the pitfalls of courts intruding too dramatically into the inner workings of the legislative branches,⁸⁴ or as an instance of the larger phenomenon of “underinforced constitutional norms,”⁸⁵ or on a combination of these reasons. Nevertheless, there are good reasons – to be discussed later – to leave the

⁸⁰ 223 U.S. 118 (1912).

⁸¹ *Id.* at 151.

⁸² *Id.* at 136.

⁸³ *Id.* at 151.

⁸⁴ In *Colegrove v. Green*, 328 U.S. 549, 556 (1946), Justice Frankfurter famously referred to the interference by courts in legislative affairs as a “political thicket.” See also *Baker v. Carr*, 369 U.S. 186, 277-78 (1962) (Frankfurter, J., dissenting) (noting that cases that held that the guarantee clause was nonjusticiable demonstrated “a predominant concern. . . with avoiding federal judicial involvement in matters traditionally left to legislative policy making . . .”).

⁸⁵ See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). According to Sager, the Court regularly declines to enforce the full scope of constitutional norms, for a variety of reasons. When it does, the norms still operate as a constraint. As a result, other branches of government have a duty to regulate their actions to comport with these norms. See also Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1309 (2006) (“by holding a category of cases nonjusticiable, the Court establishes a rule of decision, mandating dismissal, that leaves a constitutional norm completely judicially unenforced”).

elected branches with discretion to choose among reasonable forms of democracy. And that view finds support from the Republican Guarantee Clause.⁸⁶

The Republican Guarantee Clause is not the only relevant doctrinal guidepost however. While that clause suggests that it is for the elected branches to determine what democracy requires, the Court will intervene where the particular instantiation of democracy intrudes on an individual right.

B. The Equal Protection Clause

In *Baker v. Carr*,⁸⁷ the Court found that a challenge to a state apportionment statute was judiciable, on the grounds that equal protection issues were raised.⁸⁸ In other words, while the Court in *Baker* recognized that the case raised issues regarding democratic form, the fact that it also

⁸⁶ Mark Alexander argues that the interpretation of the Republican Guarantee Clause as nonjusticiable imposes a duty on Congress to insure that states have a republican form a government. Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 WASH. & LEE L. REV. 767, 804 (2003). Using this claim, Alexander also uses the Republican Guarantee Clause to shed light on campaign finance doctrine. *Id.* at 804-23. He argues that when Congress acts under this power, the permissibility of its actions may be nonjusticiable. *Id.* at 784. Alternatively, he argues that Congressional action aimed at insuring a republican form a government satisfies strict scrutiny under the First Amendment. *Id.* at 828 (arguing that there can be no doubt that acting to protect the republican form of government is a compelling governmental interest). Finally, he makes a claim that is similar to the view I advance here: that the republican guarantee clause provides a reason for judicial deference to congressional understandings of corruption. *Id.* at 832 (arguing that “[p]rotecting the republican form of government may be directly equated with preventing corruption, not on the micro level, but rather on the macro level”).

⁸⁷ 369 U.S. 186 (1962).

⁸⁸ *Id.* at 209. Many scholars have noted that the switch to Equal Protection from the Republican Guarantee Clause is a bit of dodge. See e.g. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 118 n. * (1980) (noting that “[f]riend and foe alike have come to recognize the obvious, that although the various state voting rights cases decided by the Warren and Burger Courts have been styled as Equal Protection decisions, they cannot comfortably be understood without a strong injection of the view that the right to vote in state elections is a rather special constitutional prerogative, a view that cannot be teased out of the language of equal protection alone and in textual terms is most naturally assignable to the Republican Form Clause”). Moreover, the switch of doctrinal category has significant implications. Indeed, ones that may be unfortunate. See also Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HAR. J.L. & PUB. POL’Y 103 (2000) (arguing that “[b]y conceiving the issue as arising under the Equal Protection Clause, the Court committed itself to the norm of equipopulous districts, without proper consideration of whether that is the proper standard”).

implicated the individual right to vote and to participate equally in the political process was a reason for the Court to find the case justiciable. Later, in *Reynolds v. Sims*,⁸⁹ the Court adopted the equal population per representative (one person-one vote) standard as a constitutional requirement. While one can certainly object that switching constitutional clauses is simply to dodge the issue of whether apportionment questions ought to be decided by the Court,⁹⁰ the *Baker* court's appeal to the Equal Protection Clause and the right to vote can be understood as an assertion that there are individual rights at issue there, in addition to the questions of democratic form.⁹¹ Where that is the case, says *Baker*, the Court has a role to play.

In apportionment cases, the Court recognizes the dual pressures at work. There is an individual right at stake, calling for judicial oversight. At the same time, this oversight will require the Court to articulate and defend a controversial conception of democratic form, a task that the Republican Guarantee Clause suggests ought to be left to the elected branches.⁹² This side of the coin is never absent in the Court's assessment, whether or not one thinks it balances these concerns appropriately in *Baker*, *Reynolds* or

⁸⁹ 377 U.S. 533 (1964).

⁹⁰ See McConnell, *supra* note 88 at 104 (arguing that the issue of malapportionment should have been addressed via the Republican Guarantee Clause and that the "the Court adopted a legal theory for addressing the issue that was wrong in principle and mischievous in its consequences"). John Hart Ely makes a similar point. See ELY, *supra* note 88 at 122 (arguing that "to be intelligible, *Reynolds v. Sims*, its majority and dissenting opinions alike, must be approached as the joint product of the Equal Protection and Republican Form Clauses").

⁹¹ In other words, those forms of government that intrude on individual rights are ruled out. In this sense, the form of government is justiciable when it falls below a threshold delineated by the infringement on the right.

⁹² Daniel Ortiz calls this claim the "Got theory?" argument and is largely critical of it. See Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV.459 (2004). In his view, this approach is flawed because "[i]nstead of deepening consideration of the political concerns underlying the cases, the argument has been used to foreclose such consideration." *Id.* at 461. While he may be correct that making the claim that the Constitution should allow the elected branches of government to choose among competing theories of democracy does not necessarily promote dialogue about questions of democratic theory, it is also not clear that it is the "conversation stopper" that he claims. *Id.* Moreover, the argument for such deference need not rest on the claim that deference engenders conversation. Deference permits alternative arrangements over time, whether thoughtfully debated or not. Finally, in the context of campaign finance rather than apportionment and gerrymandering, there appear to be thoughtful debates about what constitutes corruption which animate campaign finance laws. When the Court strikes these laws down without attending to the reasons to defer to legislative judgment about what good government entails, it is the Court itself that acts as the conversation stopper.

later cases.⁹³ For example, Justice Frankfurter emphasizes this point, among others, in his dissenting opinion in *Baker*: “What is actually asked of the Court in this case is to choose among competing bases of representation – ultimately, really, among competing theories of political philosophy – in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union.”⁹⁴ In *Reynolds*, Justice Warren, writing for the Court defends the Court’s intervention in the issue in the following way: “We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less...”⁹⁵

In an important recent foray into this area, the Court very explicitly wrestled with the twin pressures exerted by the Republican Guarantee Clause and the Equal Protection Clause. In the 2004 case, *Vieth v. Jubelirer*,⁹⁶ the Court dismissed a claim of partisan gerrymandering with four Justices finding, in an opinion written by Justice Scalia, that such claims non-justiciable.⁹⁷ Justice Kennedy, concurring in the judgment, wrote a somewhat obscure opinion in which he seemed to assert that, in his view, such claims were not justiciable *for now*⁹⁸ but that he would “not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution

⁹³ Richard Hasen describes it as a “dilemma” facing judges deciding these cases. RICHARD HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* (N.Y. Univ. Press 2003). As he explains, “most observers agree that Court intervention in the political process is dangerous (because it leaves important decisions about the structuring of democracy in the hands of unaccountable judges) yet sometimes necessary (because the courts are the only bodies able to police fundamental unfairness in the allocation of political power).” *Id.* at 75.

⁹⁴ *Baker v. Carr*, 369 U.S. 186, 300-01 (1962) (emphasizing also that “[t]o divorce ‘equal protection’ from ‘Republican Form’ is to talk about half a question”).

⁹⁵ *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

⁹⁶ 541 U.S. 267 (2004).

⁹⁷ *Id.* at 305. Whether the plurality opinion rightly or wrongly defers to legislative judgment about the democratic theory issues embedded in the issue of partisan gerrymandering has been the subject of debate by scholars. See e.g. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002) and Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002).

⁹⁸ 541 U.S. at 313 (explaining because “we have no standard by which to measure the burden appellants claim has been imposed on their representational rights, appellants cannot establish that the alleged political classifications burden those same rights”).

in some redistricting cases.”⁹⁹ The very ambiguity and tension in Justice Kennedy’s pivotal opinion exhibits the pull both to refrain from constitutionalizing a contested theory of democracy and to vindicate violations of individual rights. In that part of the opinion in which Justice Kennedy expressed sympathy with the plurality’s approach, he cautioned that while it might seem that “courts could determine, by the exercise of their own judgment, whether political classifications are related to [fair and effective representation for all citizens] or instead burden representational rights,” the “lack, however, of any agreed upon model of fair and effective representation makes this analysis difficult to pursue.” Thus, Justice Kennedy, like the plurality, was cautious about embracing any particular, contested theory of representation on which a standard of excessive partisan gerrymandering must rely. On the other hand, Justice Kennedy was loath to abandon the individual rights claim altogether.¹⁰⁰ Rather he also stresses that “[i]t is not in our tradition to foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied.”¹⁰¹

Vieth sits comfortably in line with *Baker* and *Reynolds*, in that all are cases in which individual rights are asserted¹⁰² in a context in which the Court recognized that there are also strong reasons for deference to the elected branches of government. These cases thus demonstrate an important point. Where individual rights *and* questions of democratic theory are both implicated in the same case, there are reasons to intervene and reasons for judicial restraint. Both should be considered and aired. If, as the first part of this Article argues, defining corruption similarly implicates the Court in defining democracy, our campaign finance case law is deficient as the reasons for deference are largely ignored. Because the Court’s articulation of a conception of corruption implicates the Court in defining good government, these decisions are as soaked in democratic theory as are *Baker*, *Reynolds* and *Vieth*. While in the first two, the reasons

⁹⁹ 541 U.S. at 306 (Kennedy, J., concurring in the judgment).

¹⁰⁰ *Id.* at 309 (Kennedy, J. concurring in the judgment) (emphasizing that the reasons for the Court to find claims of partisan gerrymandering non-justiciable “are not so compelling that they require us now to bar all future claims of injury from a partisan gerrymander”).

¹⁰¹ *Id.* at 309-10.

¹⁰² What these rights are, however, is the subject of dispute. For example, the individual right could be the Equal Protection based right to a non-diluted vote, as Justice Souter claims, *Vieth*, 541 U.S. at 343 (Souter, J., dissenting), or it could be a First Amendment based right to be free from “disfavored treatment by reason of their views,” according to Justice Kennedy, concurring in the judgment. *Id.* at 314 (Kennedy, J., concurring).

for judicial oversight outweighed the reasons for deference and in the latter the balance tipped in the other direction, in all three the Court recognized that reasons for intervention and for deference were present and argued the case in these terms.

C. Implications For Campaign Finance Doctrine

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

Second, the apportionment and gerrymandering cases make clear that there are two important concerns at issue, both of which need airing. There are the individual rights issues that point toward judicial oversight and the questions of democratic theory that point toward deference.¹⁰³ Recognizing that defining corruption entails defining democracy suggests that our campaign finance cases are deficient in not also airing both the reasons for judicial oversight *and* the reasons for judicial deference.

Third, attending to the *reasons* offered for deference in the apportionment cases is instructive on their own terms. The reasons that critics and dissenters in *Baker*, *Reynolds*, and *Lucas v. The Fourty-Fourth General Assembly of the State of Colorado*,¹⁰⁴ a companion case to *Reynolds*, objected to the constitutionalization of questions of democratic form focused on prudential concerns, including the dangers of wading into the proverbial "political thicket" that Frankfurter warned against,¹⁰⁵ but in addition, these critics worried that it was a mistake constitutionally, practically and morally to see the Constitution as adopting a particular contested theory of democracy. Justice Stewart, dissenting in *Lucas* makes the point most forcefully and is worth quoting at length. He writes,

¹⁰³ Some scholars prefer to think of the reasons for judicial supervision in structural terms rather than as grounded in individual rights. See e.g., Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 645 (1998). Nonetheless, they too recognize that there are both reasons for and against judicial supervision of democracy that should be considered. *Id.*

¹⁰⁴ 377 U.S. 713, 739 (1964) (holding that the unequal apportionment of seats in the Colorado Legislature violated the Equal Protection Clause).

¹⁰⁵ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

What the Court has done is to convert a particular political philosophy into a constitutional rule, binding upon each of the 50 States, from Maine to Hawaii, from Alaska to Texas, ... My own understanding of the various theories of representative government is that no one theory has ever commanded unanimous assent among political scientists, historians, or others who have considered the problem. But even if it were thought that the rule announced today by the Court is, as a matter of political theory, the most desirable general rule which can be devised as a basis for the make-up of the representative assembly of a typical State. I could not join in the fabrication of a constitutional mandate which imports and forever freezes one theory of political thought into our Constitution, and forever denies to every State any opportunity for enlightened and progressive innovation in the design of its democratic institutions, so as to accommodate within a system of representative government the interests and aspirations of diverse groups of people, without subjecting any group or class to absolute domination by a geographically concentrated or highly organized majority.¹⁰⁶

The facts of *Lucas* make this point especially sharply. The voters of Colorado had approved via a referendum the redistricting challenged in *Lucas*.¹⁰⁷ In addition, the redistricting plan had been approved by a majority of voters in each district, even those that would be disadvantaged by the numerical under-representation.¹⁰⁸ While the majority did question the meaningfulness of this vote,¹⁰⁹ these facts about the way the redistricting plan came into existence surely make it more difficult to claim that judicial oversight is needed to protect the voters who are disadvantaged by the redistricting.

Justice Stewart's concerns are reminiscent of Justice Holmes's warnings in his famous dissent in *Lochner v. New York*.¹¹⁰ Just as the Constitution is

¹⁰⁶ *Lucas*, 377 U.S. at 748–49 (Stewart, J., dissenting).

¹⁰⁷ *Id.* at 731 (majority opinion).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (noting that the choice presented to the Colorado electorate was not clear-cut and that the alternative choice in an apportionment scheme had many drawbacks).

¹¹⁰ 198 U.S. 45 (1905).

“made for people of fundamentally different [economic] views,”¹¹¹ so too the Constitution should be able to serve people of different but reasonable views about the ways that elected representatives best serve their constituents.¹¹² Moreover, the analogy between the Court’s constitutionalization of a particular, contested theory of democracy in *Baker, Reynolds* and its progeny and the Court’s constitutionalization of a particular, contested account of legislative role in its campaign finance cases counsels caution, given the wisdom of hindsight regarding the success of that first endeavor. The “one person-one vote” standard is not obviously correct as a matter of political theory.¹¹³ In addition, the test was originally thought to have practical virtues including that it would reign in partisan gerrymandering and would be easy to administer. The first has clearly not materialized¹¹⁴ and the second is of doubtful value if that is all that can be said for the standard.¹¹⁵ Critics have questioned why it is population that matters rather than voters, giving voters in districts with large populations

¹¹¹ *Id.* at 76 (Holmes, J., dissenting).

¹¹² The philosopher Joshua Cohen makes essentially the same point in a public lecture delivered recently in which he argues that the error of *Citizens United* lay in “the imposition of a contested philosophical position about democracy, as the *Lochner* Court imposed a contested philosophical position about economic liberty.” See Joshua Cohen, Marta Sutton Weeks Professor of Ethics in Society and professor of political science, philosophy, and law at Stanford Univ., Address at the Safra Center for Ethics at Harvard University (Mar. 11, 2011) (Text of lecture on file with author).

¹¹³ See e.g. DWORKIN, *supra* note 31 at 388 (arguing against the normative appeal of what he terms and “equal impact” conception of political equality); Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269 (2001-2002) (arguing that descriptively we do not follow this mantra in that children, felons and non-citizens are persons yet do not vote and that the real principle we use [which he terms the “one voting representative/one constituent model”] is not obviously defensible from the perspective of political theory); Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 CHI. L. REV. 339, 345 (1993) (arguing that the “difficulties of applying the one person/one vote doctrine to local governments illuminate the multiple functions and sometimes conflicting conceptions of local government at work in our system and raise questions about the place of the person/one vote doctrine itself as the bedrock norm in our theory of representation”).

¹¹⁴ See e.g. McConnell, *supra* note 88 at 103 (arguing that “freed from these traditional constraints [like respecting political boundaries] by the Supreme Court’s ‘precise mathematical equality rule,’ legislative line-drawers were able to draw maps to produce the results they desired, rendering elections less a reflection of popular opinion than of legislative craftsmanship”).

¹¹⁵ Rick Hasen makes a similar point in arguing for the virtues of unmanageable, and therefore less constraining standards. See HASEN *supra* note 93 at 48 (arguing that “[p]recisely because these cases require the Supreme Court to make at least implicit normative judgments about the meaning of democracy or the structure of representative government, the danger of manageable standards is that they ossify new rules and enshrine the current Court majority’s political theory.”).

of people who can't vote (children, felons, non-citizens) significantly more influence than voters in districts with small populations of ineligible voters.¹¹⁶ Others have argued that some issues of local government are stymied by the equal population requirement.¹¹⁷ If eligible voters are disengaged and therefore do not vote, at least in part, because district boundaries do not track traditional political boundaries, it hardly matters that if they did their vote would have equal force as all others.

At a more foundational level, Ronald Dworkin questions the normative appeal of a conception of political equality that requires equal impact, where by "equal impact" he means "that the opinion each finally forms in the process will be given equal weight."¹¹⁸ The one-person, one-vote standard of *Reynolds* relies upon an equal impact conception of political equality. Dworkin proposes instead that political equality requires "that no adult citizen's political impact is less than that of any other citizen for reasons that compromise his dignity – reasons that treat his life as of less concern or his opinions as less worthy of respect."¹¹⁹ I mention Dworkin's view not to argue in its favor; Dworkin has done that already himself and the reader will have to judge whether he succeeds.¹²⁰ Rather I refer to his rejection of an equal impact conception of political equality in favor of a view in which "[p]olitical equality is a matter not of political power but of political standing"¹²¹ in order to show that there are alternative, reasonable conceptions of political equality other than the equal impact view that animates *Reynolds* and thus that the Court should take care when it finds one of these conceptions constitutionally required.

There are many reasonable ways to instantiate representative democracy. Disagreements about how a representative should conceive of her role, what responsiveness requires and whether money functions as a proxy for voter support are all reasonable disagreements. Thus we should

¹¹⁶ See e.g. Levinson, *supra* note 113 at 1271-72.

¹¹⁷ See Briffault, *supra* note 113 at 419, 423 (arguing that "[p]opulation equality is not the only factor relevant to assessing the fairness of a representative scheme," and that advocating that "[g]overnance structures that combine representation of regional population majorities with extra attention to the interests of component local governments – and, concomitantly depart from pure equal population representation – might not be seen as inherently negating fair representation but rather as part of the complex process of reconciling the competing roles of population, pre-existing communities, economic and social interests, and state political and policy preferences").

¹¹⁸ DWORKIN, *supra* note 31 at 388.

¹¹⁹ *Id.*

¹²⁰ DWORKIN, *supra* note 31 at 388-92.

¹²¹ *Id.* at 390.

eschew judicial actions that adopt a view of representative democracy from among reasonable alternatives as the constitutionally mandated account.¹²² Because judicial pronouncements about what constitutes corruption entail commitments to contested conceptions of democracy, there are strong reasons for courts to avoid defining corruption.

This last, straightforwardly normative, argument for deference to the elected branches about questions of democratic theory is offered in a tentative vein. Perhaps judicial supervision is needed to ensure that the theory of democracy adopted by the legislature, and the concomitant theory of corruption needed to police it, is not intended to or does not succeed in merely (overly?) entrenching incumbents. If so, then perhaps the democratic process cannot be depended on to bring about change and the judiciary must step in to perform the function John Ely described as “clearing the channels of political change.”¹²³ Maybe so.¹²⁴ If this is right – and I offer some reasons for caution here as well – still, this justification for judicial oversight suggests a role for the courts that is limited in scope. This process-protecting concern thus provides a *reason* for the Court to reject a particular conception of corruption adopted by a legislature. On this basis, courts could reject campaign finance laws and the conceptions of corruption and legislative role embedded within them, on the grounds that the law in question unduly entrenches incumbent lawmakers. If, as some political scientists argue, well-funded opponents can reduce the size of the

¹²² Guy-Uriel Charles offers a defense of the constitutionalization of democracy on pluralistic grounds that makes a similar claim. See Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103 (2001-02). In Charles’s view, “Constitutionalization of democratic politics – and consequently judicial supervision of the political process – finds its strongest justification when democratic practices do not serve any legitimate democratic ends and violate multiple democratic principles. Conversely, judicial supervision of the political process is least justified (if at all) where democratic practices serve democratic ends and judicial review does not vindicate any democratic principles.” *Id.* at 1106. However, in working out this view, Charles ends by adopting a stance far more permissive of intervention than would have initially seemed. “Judicial review is legitimate,” according to Charles, “when the Court interferes with the democratic process to enforce a core democratic principle.” *Id.* at 1163. This constitutional pluralism justifies intervention on pluralistic grounds rather than requiring deference to any reasonable conception of democracy.

¹²³ ELY, *supra* note 88 at 105.

¹²⁴ Cases of extreme malapportionment adopted by the very legislatures that benefit from the apportionment schemes at issue may well be an example. On this basis, one could defend *Baker* and *Reynolds*. Joshua Cohen makes this point in distinguishing his argument for the view that choosing among competing reasonable conceptions of democracy should be left to the people. Cohen, *supra* note 112 at 26.

advantage that incumbents enjoy,¹²⁵ then campaign finance laws that limit too much the ability of challengers to garner financial resources might be rejected for this reason. Note however, that if the Court may only reject conceptions of corruption for *this reason*, the ability of the Court to reject campaign finance laws will be substantially limited. Moreover, this principle provides guidance to those who wish to reform the influence of money in politics. Such efforts must insure that incumbents are not (or not unduly) advantaged.

Notwithstanding the process-protecting reasons for a court to oversee whether campaign finance law serves to overly entrench incumbents, there are reasons for caution here. It is not easy to articulate a workable and defensible theory of when a conception of corruption *overly* or *unduly* entrenches incumbents. Should we think about this issue in subjective terms, focusing on whether the legislators intend to entrench themselves? Of course, legislators legitimately try to get reelected and their desire to do so, at least on many accounts, is a proper motive influencing their decisions. It is difficult to define when this subjective intent is legitimate and when it is illegitimate. Perhaps, then, we should think about this question in objective terms, focusing on whether a particular law produces an effect that overly or unduly entrenches incumbents? But here too there are problems. How much entrenchment is too much? Surely, in part this is a question for the electorate themselves to answer. I do not mean to suggest that these questions are unanswerable, only that they are difficult. Moreover, and perhaps more importantly, their difficulty is familiar. It is precisely concerns of this sort that led the plurality in *Vieth* to conclude partisan gerrymandering issues are non-justiciable¹²⁶ and that dominate the scholarly literature about that issue.

The same sorts of concerns that make it difficult to articulate “manageable and discernable”¹²⁷ standards to police for the undue entrenchment of incumbents in the context of partisan gerrymandering also make it difficult to articulate workable and defensible standards to police for undue entrenchment of incumbents in the context of campaign finance laws. Moreover, gerrymandering is likely to be a far more effective way to

¹²⁵ See e.g. Ronald Keith Gaddie and Lesli E. McCollum, *Money and the Incumbency Advantage in U.S. House Elections*, in THE U.S. HOUSE OF REPRESENTATIVES: REFORM OR REBUILD? 71, 84 (Zimmerman and Rule, eds., 2000) (arguing that “the key to reducing the incumbency advantage appears to be increasing the financial quality of the challengers in congressional elections”).

¹²⁶ *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004)

¹²⁷ *Id.*

insulate incumbents from robust reelection challenges than are laws that restrict campaign giving or spending. Therefore unless or until courts are ready to police gerrymandering on these grounds, they should refrain from using a concern about the entrenchment of incumbents to strike down campaign finance laws.

Lastly, one can not help but note that the same justices who are hesitant to constitutionalize questions of democratic theory in *Vieth* are nonetheless willing to do precisely this in *Citizens United*. At the same time, those justices who argue for judicial oversight and the constitutionalization of questions of democratic theory in *Vieth* may well argue on the side of judicial deference when the same questions are raised implicitly in *Citizens United*. So for example, then-Chief Justice Rehnquist and Justices O'Connor and Thomas joined Justice Scalia's plurality opinion in *Vieth*.¹²⁸ Justice Kennedy filed an opinion concurring in the judgment.¹²⁹ The plurality argued forcefully for the view that courts should defer to the elected branches of government when questions of democratic theory are raised. Indeed, Justice Scalia castigated the dissenters on precisely this point, arguing that are in the "difficult position of drawing the line between good politics and bad politics."¹³⁰ Of those justices still on the Court when *Citizens United* was decided (Justices Scalia, Thomas, and Kennedy), all three took the contrary view when the issue of constitutionalizing questions of democratic theory arose in less obvious form. Once we recognize that *Citizens United's* definition of corruption implicates the Court in adopting a particular, contested theory of democracy in the same way as does *Vieth*, this fact provides these justices with a reason to change their views about one case or the other.

Similarly, Justices Stevens, Souter, Ginsburg and Breyer all dissented in *Vieth*¹³¹ on the grounds that each thought that the Court could and should rule out some redistricting as insufficiently democratic to meet constitutional requirements.¹³² In other words, these justices thought that

¹²⁸ *Id.* at 270.

¹²⁹ *Id.* at 306 (Kennedy, J. concurring).

¹³⁰ *Vieth* at 229.

¹³¹ 541 U.S. at 317 (Stevens, J., dissenting); *Id.* at 343 (Souter, J. and Ginsburg, J., dissenting); *Id.* at 355 (Breyer, J., dissenting).

¹³² Justice Stevens, for example, finds that impartiality is a minimum requirement of governmental action in a democracy. *Id.* at 333 (explaining that "the Equal Protection Clause implements a duty to govern impartially that requires, at the very least, that every decision by the sovereign serve some nonpartisan public purpose"). Justice Breyer defends a conception of justified versus unjustified entrenchment by delineating legitimate factors that may influence legislators from those that are illegitimate in his view. *See id.* at 360-61

the Court should intervene to insure that the redistricting meets at least some minimally required conception of democratic form. Yet of those justices still on the Court when *Citizens United* was decided (Justices Stevens, Breyer and Ginsburg), these justices were on the side of upholding the law at issue. Here it is not so clear that the justices adopt an inconsistent position on the question of whether courts should supervise or defer to the elected branches when questions of democratic theory arise. There are two possibilities. First, these justices may think that courts should require that the theories of democracy embedded within law meet minimum standards but find that this requirement is satisfied in the context of the campaign finance restrictions. The conception of corruption implicit in the restrictions on corporations and unions using money from general treasury funds at issue in *Citizens United* rests on a theory of representative democracy that these justices may find constitutionally permissible. Alternatively, these justices could think that the fact that this case requires the court to constitutionalize a question of democratic theory provides a powerful reason to defer to the elected branches. If so, their views conflict with those they adopted in *Vieth*.

III. The Court's Role Reexamined: Objections and Replies

A. Safeguarding Process

The suggestion that courts ought to defer to the elected branches of government regarding questions of democratic form may, at first blush, seem to be turning the insights of John Hart Ely on their head.¹³³ Ely famously argued that courts ought to refrain from striking down laws when constitutional interpretations rest on controversial substantive moral claims.¹³⁴ Instead, he argued, the Court acts most legitimately in striking down laws when it acts to remedy one of two process defects: unclogging democratic channels or insuring the representation of minorities.¹³⁵ The argument offered in this Article may seem, ironically, to suggest that courts

(“By *unjustified* entrenchment I mean that the minority’s hold on power is purely the result of partisan manipulation and not other factors. These ‘other’ factors that could lean to ‘justified’ [albeit temporary] minority entrenchment include sheer happenstance, the existence of certain representational bodies such as the Senate, or reliance on traditional [geographic communities of interest, etc.] districting criteria.”) (alteration in original). He does not explain why geographic communities produce justified entrenchment but partisan manipulation does not however.

¹³³ ELY, *supra* note 88 .

¹³⁴ *Id.* at 102-03.

¹³⁵ *Id.* at 103.

should defer to legislatures in one of the two types of instances where even Ely, a staunch defender of legislative prerogatives, suggested that court intervention was called for. When the Court substitutes its own conception of corruption for that of the elected branches of government, isn't the Court acting to improve the workings of our democracy? And if so, isn't this precisely and, in fact quintessentially, the sort of role for the Court in a democracy?

This objection is overstated for two reasons. First, Ely's theory is often described as a "process perfecting view,"¹³⁶ suggesting that actions taken pursuant to it do not rest on controversial substantive judgments but instead *merely* on improving the process by which these values are debated and acted upon. However, when the Court substitutes its conception of corruption for that of the elected branches, the Court does not speak only to process but also to substance. If a conception of political corruption depends upon a conception of good government, then when the Court substitutes its conception of corruption for that of a legislature, it substitutes its conception of good government for that adopted by our elected representatives. In doing so, not only does the Court thus substitute its own controversial moral views for ours but it does so about one of the central moral questions about which we may reasonably disagree. Following Ely, one could easily argue that the Court ought to be especially deferential in this sort of case.

Ely himself saw the question presented by *Reynolds v. Sims* as both substantive and procedural in this way. In his view, the decision should be seen as the "joint product of the Equal Protection and Republican Form Clauses."¹³⁷ On the one hand, he suggests that the Constitution could not accept wildly disparate weighting of votes but on the other thought that the particular rule adopted by *Reynolds* was not constitutionally required.¹³⁸ He

¹³⁶ See Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) (describing Ely's vision as a process-perfecting view).

¹³⁷ Ely, *supra* note 90 at 122.

¹³⁸ In Ely's view neither the Equal Protection nor Republican Guarantee Clauses require this rule. *Id.* Ely notes that disparate weighting of votes was not irrational *Id.* at 121, (explaining that "Chief Justice Warren's opinion for the Court in *Reynolds* tried to suggest that any deviation from a one person, one vote standard was irrational, but that is nonsense"). Moreover, he does not see the problem as lying in the fact that the standard "is incapable of meeting the rightfully stronger demand the Court has imposed in the voting area." *Id.* 121-22. Neither does he view the problem with disproportionately weighted votes as lying in a conflict with the Republican Guarantee Clause. *Id.* at 123 Rather, in his view, "'One person, one vote' is certainly a principle the Republican Form Clause is capable of containing, but so is Stewart's weaker 'simply don't systematically frustrate the

ends up defending it, but not in purely process terms. Rather, based on a living Constitution idea more familiar to current constitutional debates, he argues that the trending toward equality in the distribution of important goods and the expansion of the franchise suggest “a general ideal” of “at least rough equality in terms of one’s influence on governmental choices.”¹³⁹ However, he recognizes that this value could be instantiated in very different rules regarding how electoral districts must be drawn.¹⁴⁰ Ultimately, he defends *Reynolds* in pragmatic terms. It would be unseemly for the Court to make explicit the different ways in which different parties influence the process in order to thereby justify differential weighting of votes. Thus Ely defends *Reynolds* on the grounds that it is better than alternative possibilities.¹⁴¹ His careful treatment of what might be seen as the poster-child case for his process-based view illustrate how he too recognized that apportionment issues present important reasons for judicial deference as well as oversight.

Second, the view I propose allows that the reasons to defer on questions of democratic theory can be outweighed by the individual rights issues identified, as we saw in *Baker* and *Reynolds*.¹⁴² Third, the view I propose leaves open the possibility of Court intervention to police for the entrenchment of incumbents, an Ely-esque concern. However, I recommend caution in bringing this concern to bear. Given the Court’s reluctance to review partisan gerrymandering claims with regard to the entrenchment of incumbents, the Court should be similarly disinclined to overturn campaign finance laws on these grounds.

B. Defining Rights

One might object to the account presented above by noting that any time the Supreme Court defines the scope of a constitutionally protected right it implicitly relies on a particular theory of democracy. Indeed, in the case of First Amendment rights in particular, this connection will be especially

majority will’ approach.” *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ In Ely’s terms, “[s]ometimes more is less.” *Id.* at 125.

¹⁴² Of course Ely would not have conceived of these cases in this way. For Ely, the right to vote is protected not because of its individual rights dimension but rather because of its implications for protecting democratic processes. In his view, “[a] more complete account of the voting cases is that they involve rights (1) that are essential to the democratic process and (2) whose dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo.” ELY *supra* note 88 at 117.

close.¹⁴³ For example, before the Court reaches the question of whether a restriction on the First Amendment right to free speech is justified by the statute's role in preventing corruption or its appearance, the Court must decide that a restriction on giving or spending money on political activity is in fact a restriction on speech under the First Amendment. But, one might argue, deciding whether a restriction on giving and spending on speech implicates questions of democratic theory in that this decision relates to the proper role of money in the political sphere.¹⁴⁴ Moreover, classic First Amendment cases like *Brandenburg v. Ohio*¹⁴⁵ and *New York Times v. Sullivan*¹⁴⁶ could also be seen as implicating theories of democracy. For example, *Brandenburg* depends on a theory of the stability of democracy in holding that only speech advocating imminent lawless action can be regulated and *New York Times v. Sullivan* depends on a theory of the importance of even false speech about public officials to self-government.

This objection is correct, to some extent. The critique rightly points out that many decisions the Court makes require the Court to decide questions that implicitly rely on contested theories of democracy, perhaps especially First Amendment cases. However, they do so to varying degrees. Indeed many individual rights cases – upholding the right of women to abort a pre-viable fetus¹⁴⁷ or deciding that the constitution does not protect a right to physician-assisted suicide,¹⁴⁸ for example – have only an attenuated connection to democratic theory. Of course, they do depend on the view that democratic decision-making is appropriately limited by individual rights, but that is hardly debatable in our constitutional order. Moreover, they also implicate theories of how courts should determine what these

¹⁴³ I am grateful to Richard Fallon for pressing this point with me.

¹⁴⁴ Indeed, I make such an argument myself. See Deborah Hellman, *Money Talks But It Isn't Speech*, 95 MINN L. REV. 953 (2011) (arguing that the decision whether a particular good ought to be provided via the market or instead via a non-market mechanism ought to be left to democratic decision-makers and thus that only rights which require market-traded goods to be effective include within their ambit a concomitant right to spend money to exercise them). However, as I argue above, the degree to which defining rights implicates questions of democracy varies.

¹⁴⁵ 395 U.S. 444, 447-48 (1969) (striking down an Ohio law that criminalized those who “advocate or teach the duty, necessity or propriety” of violence on the grounds that mere advocacy cannot be made a crime and holding that the state may proscribe advocacy of violence only “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

¹⁴⁶ 376 U.S. 254, 279-80 (1964) (holding that false statements of fact about public officials related to official conduct are protected by the First Amendment unless made with actual malice).

¹⁴⁷ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

¹⁴⁸ *Washington V. Glucksburg*, 521 U.S. 702 (1997).

rights are but this question relates more to a theory of constitutional interpretation than a theory of democracy itself. First Amendment cases tread more closely to issues of democratic theory but here too some do so more than others. So for example, the issue presented in *New York Times v. Sullivan* more clearly implicates a theory of democracy as it implicates the conditions for self-government than does *Brandenburg*, at least in my view. While others may disagree about how to arrange these cases in terms of how much or how little they raise issues that implicate questions of democratic theory, all but the most ardent deconstructivist is likely to agree that there are differences in degree.

Defining corruption is different from these other questions in degree rather than in kind. In that sense the objection is correct. But the difference in degree is significant enough to be meaningful. Corruption is special because in order to define corruption of democratic politics one simultaneously must put forward a particular contested theory of democracy. The two are but flip sides of the same coin. This reciprocal relationship between corruption and democratic theory is not present when the Court delineates an individual right, even a First Amendment right. In part this is because First Amendment rights are commonly understood as justified by several different theories, only one of which relates to democracy in a straight-forward way. So, for example, a First Amendment right could be either recognized or not on the basis of the importance of the right to self-government or the same right could be recognized or not on the basis of its importance to self-expression and individual dignity. If so, then a decision that either recognizes or rejects the right in question need not implicate a contested theory of democracy. Moreover, to the extent that alternative accounts of the normative underpinnings of the First Amendment are overlapping rather than competing, a particular decision that includes considerations related to self-government might also rest on other normatively significant factors such that one cannot say that the decision entails a particular theory of democracy. Finally, even when the First Amendment decision seems to rest exclusively on a self-government rationale, the decision may be justified by several different theories of democracy and thus not require the Court to define the proper functioning of a democracy to the same degree as does an account of corruption for democratic politics.

But why should the Court refrain from constitutionalizing issues of democratic theory but not questions of rights?¹⁴⁹ Here, the answer is, at

¹⁴⁹ Again, I am grateful to Richard Fallon for pressing this objection.

least in part, that the Republican Guarantee Clause and the doctrine it has generated makes a difference.¹⁵⁰ Our constitution has been interpreted to leave questions of democratic form largely to Congress. The point of the discussion of *Baker*, *Reynolds* and *Vieth* is to emphasize that while there are reasons for judicial supervision as well as reasons for deference when questions of democratic form are raised, the Court should, for the sake of consistency, keep both sides in mind when deciding campaign finance cases, as it does when deciding apportionment and gerrymandering cases.

C. Rights and Burdens

In the voting rights and apportionment arena, we see the Court airing and attending to *both* the reasons for oversight and the reasons for deference. But how does it do so?¹⁵¹ On the one hand, we have an individual right at issue, which would seem to call for strict scrutiny. But on the other hand, we do not have an ordinary state interest. Rather, the fact that deciding whether a particular districting scheme violates the Constitution implicitly will require the Court to adopt a particular theory of democracy is a reason for the Court to defer to the legislature. While the Court is not clear exactly how it weighs these two concerns, deciding that judicial oversight is called for in *Reynolds* and deference is called for in *Vieth*, something other than regular strict scrutiny appears to be at work.

One way to balance these competing concerns would be to focus on the degree to which the individual right is infringed.¹⁵² Since weighty concerns

¹⁵⁰ A more difficult question from the perspective of constitutional interpretation is why the Court can develop theories of individual rights but not economic rights that constrain legislative decisionmakers.

¹⁵¹ In an interesting article, Yasmin Dawood develops a provocative account of how courts ought to weigh reasons for judicial intervention versus deference. See Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO L. J. 1411, 1434 (2007-08). In her view, courts ought to focus on whether domination occurs, which she defines as comprised of four factors: the entrenchment of power, the procedural abuse of power, the substantive abuse of power and the appearance of domination. *Id.* Because domination can occur as a result of both legislative action and judicial intervention, courts should adopt what she terms a “minimizing democratic harms approach,” choosing to strike down laws only when doing so minimizes domination by the legislature and the judiciary. *Id.* at 1450. One important similarity between her approach and the one I present here is that for Dawood “the decision to intervene is treated as an institutional tradeoff.” *Id.* at 1470. She overtly balances the reasons for judicial oversight against the reasons for judicial deference (though she thinks of these in different terms) just as does the view I propose.

¹⁵² Richard Hasen’s view about when courts ought to intervene in cases in which democratic theory is implicated also tries to balance individual rights concerns with the importance of allowing the elected branches fairly wide latitude developing their own

point both for judicial oversight and against it, the Court could look at how much the right is affected by the law at issue in determining whether oversight is called for or not. The Court employed this sort of approach in the 2008 case, *Crawford v. Marion County Election Board*,¹⁵³ which upheld an Indiana law requiring voters to show photo identification. The Court's decision rested on the fact that producing a photo id is not a significant burden on the right to vote.¹⁵⁴ The Court looked at the burdens on the ordinary person who lacks photo id and concluded that “[f]or most voters who need them, the inconvenience of making a trip to the BMV [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting,”¹⁵⁵ and that a “somewhat heavier burden [that] may be placed on a limited number of persons” including “elderly persons born out of state, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed.”¹⁵⁶ As to all of these classes of persons, the Court finds that the law does not impose an undue burden.¹⁵⁷ Whether or not one thinks the Court weighed these burdens appropriately, the majority, concurring and dissenting opinions appear to agree that the key factor to consider is the degree of burden on the right to vote.¹⁵⁸

political theory. See e.g. RICHARD HASEN, *THE SUPREME COURT AND ELECTION LAW* (2003). In his view, this is accomplished by distinguishing core principles that enjoy wide social consensus from disputed theories of democracy. *Id.* at 74-100. Court intervention is called for, in Hasen's view, when it acts to uphold one of these principles. *Id.* Otherwise, the Court ought to be deferential to the elected branches of government. *Id.* at 102 (arguing that “in the case of a legislative body's voluntary imposition of a *contested* vision of political equality, the court should be *deferential to (but not a rubber stamp of) the value judgments about the balance between equality and other interests* made by the legislative body while at the same time be *skeptical about the means by which the legislative body purports to enforce the contested political equality right*”).

¹⁵³ 553 U.S. 181 (2008).

¹⁵⁴ *Id.* at 198.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 199.

¹⁵⁷ The Court's conclusion rests, in part, on the fact that the small burden that is imposed is due. As the Court explains: “It is unlikely that such a requirement would pose a constitutional problem unless it is wholly unjustified.” *Id.*

¹⁵⁸ See *supra* notes ____ and accompanying text; *Crawford*, 553 U.S. at 205 (Scalia, J., concurring) (noting that the first step in the inquiry is determining whether a law “severely burdens the right to vote.”); *Id.* at 223, 237 (Souter, J., dissenting) (disagreeing with the majority because the law's burden on the right to vote is “far from trivial” and

It is significant that *Crawford* employs an approach that looks to the degree of infringement on the right because *Crawford*, like the cases I have been discussing here, must weigh the infringement on the right to vote against the sort of state interest that has significant implications for questions of democratic form. The state interest put forward in *Crawford* was preventing fraud.¹⁵⁹ Preventing fraud, like its close cousin preventing corruption, implicates democratic theory, albeit less so. While some commentators thought the Court was wrong to address the case as raising an issue of individual rights and instead argued that it ought to be approached through a structural lens,¹⁶⁰ others commended the Court for retaining the focus on individual rights.¹⁶¹ The case is noteworthy, however, because it deals with a situation in which the Court recognized and balanced the fact that an individual right was at issue along with a question of democratic form and structure. In this context, the Court looked to the degree of burden on the individual right.

In one sense campaign finance doctrine already recognizes that the degree of infringement on the free speech right is constitutionally relevant. In *Buckley v. Valeo*,¹⁶² the seminal campaign finance case that sets the

that it imposes an “unreasonable and irrelevant burden” on voters); *Id.* at 237 (Breyer, J., dissenting) (finding that the law was unconstitutional because it imposed a large burden on voters without a driver’s license or other valid form of identification).

¹⁵⁹ *Id.* at 187 (noting the complaint alleges that the law “is neither a necessary nor appropriate method of avoiding election fraud”).

¹⁶⁰ See, e.g. Dan Tokaji, *Crawford: It Could Have Been Worse*, ELECTION L. @ MORTIZ (Apr. 29, 2008), <http://moritzlaw.osu.edu/blogs/tokaji/2008/04/crawford-it-could-have-been-worse.html> (arguing that the biggest problem with the decision is its “focus on the individual voter misses the likely systemic impact of the law”); See also Rick Hasen, *Airtalk with Larry Mantle*, Southern California Public Radio (Apr. 28, 2008)(listened to at <http://www.fluctu8.com/podcast-episode/airtalk-formonday-april-28-2008-hour-2-4320-25805.html>) (arguing that the “most troubling” aspect of the decision is that its reasoning ignores whether legislators enacted the law in order to skew the electorate in a partisan fashion). These views draw on the structural approach to voting issues put forward by Issacharoff and Pildes. See Issacharoff & Pildes, *supra* note __ at 645 (arguing that it is wrong for the Court to “avoid confronting fundamental questions about the essential political structures of governance and instead apply sterile balancing tests weighing individual rights of political participation against countervailing state interests in orderly and stable processes.”).

¹⁶¹ See e.g. Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L. J. __ (forthcoming 2011) draft available at <http://ssrn.com/abstract=1742642> (arguing that the so-called “structuralist” turn in voting rights cases leaves out the important interest in equal citizenship enacted through voting and that the *Crawford* court was correct to frame the issue as a balancing of the individual right to vote against the state’s interest of preventing fraud).

¹⁶² 424 U.S. 1 (1976).

framework that essentially endures today, the Court distinguishes expenditure limitations from contribution limitations on the basis that the latter impose less on the First Amendment right at issue. As the Court explained, “[b]y contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication ... [for] it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor’s freedom to discuss candidates and issues.”¹⁶³ Perhaps we should say that, in the Court’s view, contributions limits are not an undue burden on the right of free speech.

Arizona Free Enterprise invalidated the matching fund law because, in its view, the allocation of matching funds to opponents “substantially burdens” a privately financed candidate’s first amendment right.¹⁶⁴ What is missing from the assessment of whether this burden is indeed substantial is an appreciation of what counts on the other side. If there is no good reason for a burden, almost any burden on a right will be too great. However, if, as this article argues, the Court were to recognize that like in apportionment and gerrymandering cases, there is more than the individual right at stake, this case and other campaign finance cases might come out differently.

CONCLUSION

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

In this respect, campaign finance cases are importantly similar to apportionment and gerrymandering cases, as these too implicate the Court in articulating a particular theory of democracy. But unlike those cases, the

¹⁶³ *Id.* at 20–21

¹⁶⁴ 180 L. Ed. 2d at 671 (2011).

Court's campaign finance cases fail to make explicit the fact they implicate the Court as deeply into constitutionalizing questions of democratic form as do cases dealing with the drawing of district lines. The appropriate role of money in politics, like the drawing of districts, addresses foundational questions about the form of our democracy. If the latter provide reasons for judicial deference to legislative judgment, then so do the former.

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

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