NOTE

THE MISSING THEORY OF REPRESENTATION IN *CITIZENS UNITED*

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Abstract

Restrictions on campaign speech violate the First Amendment unless they are aimed at preventing either corruption or the appearance of corruption. The definition of corruption is thus central to campaign finance jurisprudence. In Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court defined corruption narrowly, to include a quid pro quo exchange and nothing else. In this Note, I examine the viability of that definition by combining two previously dissociated bodies of literature—one exploring the Court's varying definitions of corruption in campaign finance cases and the other addressing the proper role of a representative in a democracy. I argue that, although any viable definition of corruption must be based on an underlying theory of representation, no commonly accepted theory of representation underlies the narrow quid pro quo definition adopted in* Citizens United*. Thus, I suggest the Court take up another campaign finance case soon, so that it can either (1) articulate a theory of representation that justifies its narrow quid pro quo definition of corruption or (2) reconsider that definition.*

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I. INTRODUCTION

One essential feature of a functioning democracy is that citizens may speak out about candidates in advance of elections. Recognizing this, since 1976 the Supreme Court has maintained that only the government's interests in preventing corruption and its appearance can justify restrictions on campaign speech. Thus, the meaning of corruption is central to campaign finance jurisprudence. Yet there is considerable

disagreement over that meaning. In fact, over the past forty years, the Court has adopted three competing definitions of corruption. In *Citizens United v. Federal Election Commission*,[1] it once again embraced the narrow quid pro quo definition it first adopted decades before in *Buckley v. Valeo*.[2]

Citizens United is a much-maligned decision. Four Justices dissented from the majority opinion;[3] many Americans believe it has led to money playing an outsized role in the political process;[4] and academics have criticized it from many angles.[5] Although this Note is written against that backdrop, it does not proceed from the belief that *Citizens United* was wrongly decided. Instead, it is animated by the notion that, given the opinion's enormous practical impact, *Citizens United*—and specifically the Court's return to the narrow quid pro quo definition of corruption—must be carefully examined.

[1] 558 U.S. 310 (2010).

[2] 424 U.S. 1 (1976).

[3] See *Citizens United*, 558 U.S. at 393 (Stevens, J., concurring in part and dissenting in part).

[4] See, e.g., Nicholas Confessore & Megan Thee-Brenan, Poll Shows Americans Favor an Overhaul of Campaign Financing, N.Y. Times (June 2, 2015), https://www.nytimes.com/2015/06/03/us/politics/poll-shows-americans-favor-overhaul-of-campaign-financing.html; Drew Desilver & Patrick Van Kessel, As More Money Flows into Campaigns, Americans Worry about Its Influence, Pew Research Center (Dec. 7, 2015), http://www.pewresearch.org/fact-tank/2015/12/07/as-more-money-flows-into-campaigns-americans-worry-about-its-influence/ [https://perma.cc/U8QW-GCLH] ; Dan Eggen, Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing, Wash. Post (Feb. 17, 2010) http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html; Greg Stohr, Bloomberg Poll: Americans Want Supreme Court to Turn off Political Spending Spigot," Bloomberg (Sept. 28, 2015), https://www.bloomberg.com/news/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot.

[5] Prominent academics were outspoken in their immediate public criticism of the opinion. See, e.g., Ronald Dworkin, The "Devastating" Decision, N.Y. Rev. of Books (Feb. 25, 2010), http://www.nybooks.com/articles/2010/02/25/the-devastating-decision/ [https://perma.cc/JY83-YSNM]; Richard L. Hasen, Money Grubbers: The Supreme Court Kills Campaign Finance Reform, Slate (Jan. 21, 2010), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/money_grubbers.html [https://perma.cc/5J53-X2XD]. Since then, the opinion has spawned a remarkable body of academic literature. Indeed, a Westlaw search reveals well over 1,000 law review articles with "Citizens United" in the title, much of it critical. For an overview of this literature, see generally Robert C. Post, Citizens Divided: Campaign Finance Reform and the Constitution (2014).

In examining the Court's definition of corruption, this Note's central premise is twofold: (1) to understand corruption one must first understand what a pure, or uncorrupted, process looks like; and (2) an uncorrupted process is one in which elected representatives fulfill their proper role. This premise is not novel,[6] but it raises the question: what is the proper role of the representative? Mainstream political theorists offer two competing answers to that question. Those two answers have been channeled into two basic theories of representation, the delegate theory and the trustee theory. Recently, some have suggested a third, hybrid theory, which mixes elements of the delegate and trustee theories.

In this Note, I use these three theories to evaluate the Supreme Court's campaign finance jurisprudence. Ultimately, I conclude that the definition of corruption adopted in *Citizens United* is not grounded in the delegate theory, the trustee theory, or a hybrid theory.

To reach this conclusion, the Note is divided into three parts. In the first Part, I review the Supreme Court's significant campaign finance decisions, identifying the three definitions of corruption adopted along the way. This Part of the Note, though a necessary foundation, is not novel.[7] In the second Part, I identify three theories of representation on

[6] See Thomas F. Burke, The Concept of Corruption in Campaign Finance Law, 14 Const. Comment. 127, 128 (1997); Deborah Hellman, Defining Corruption and Constitutionalizing Democracy, 111 Mich. L. Rev. 1385, 1395 (2013); David A. Strauss, What Is the Goal of Campaign Finance Reform?, 1995 U. Chi. Legal F. 141, 146–47; Dennis F. Thompson, Two Concepts of Corruption: Making Campaigns Safe for Democracy, 73 Geo. Wash. L. Rev. 1036, 1038 (2005).

[7] See, e.g., Gerald G. Ashdown, Controlling Campaign Spending and the "New Corruption": Waiting for the Court, 44 Vand. L. Rev. 767, 769–70 (1991); Richard Briffault, Corporations, Corruption, and Complexity: Campaign Finance After *Citizens United*, 20 Cornell J.L. & Pub. Pol'y 643, 657, 661 (2011); Yasmin Dawood, Classifying Corruption, 9 Duke. J. Const. L. & Pub. Pol'y 103, 127 (2014); Paul S. Edwards, Defining Political Corruption: The Supreme Court's Role, 10 BYU J. Pub. L. 1, 6 (1996); Hellman, supra note 6, at 1398–1400; Jessica A. Levinson, We the Corporations?: The Constitutionality of Limitations on Corporate Electoral Speech After *Citizens United*, 46 U.S.F. L. Rev. 307, 349 (2011); Eugene D. Mazo, The Disappearance of Corruption and the New Path Forward in Campaign Finance, 9 Duke J. Const. L & Pub. Pol'y 259, 268–69 (2014); Zephyr Teachout, The Anti-Corruption Principle, 94 Cornell L. Rev. 341, 385, 388, 394 (2009); Miriam Cytryn, Comment, Defining the Specter of Corruption: *Austin v. Michigan State Chamber of Commerce*, 57 Brook. L. Rev. 903, 934–35 (1991); Andrew T. Newcomer, Comment, The "Crabbed View of Corruption": How the U.S. Supreme Court Has Given Corporations the Green Light to Gain Influence over Politicians by Spending on Their Behalf [*Citizens United*

which the Court could have premised its decision in *Citizens United*. I begin by describing the two theories most commonly accepted in American politics: the delegate theory and the trustee theory.[8] I also discuss the hybrid theory mentioned above. In the third Part of this Note, I explain which of the three definitions of corruption the Court should adopt if it subscribes to the delegate theory, the trustee theory, or a hybrid theory, respectively.[9] At that point, having combined these two

v. Federal Election Commission, 130 S. Ct. 876 (2010)], 50 Washburn L.J. 235, 245, 267 (2010).

[8] Again, these insights are not novel. Scholars have examined these two theories for almost three centuries, since Edmund Burke first introduced them. See 5 Edmund Burke, The Works of the Right Honourable Edmund Burke 200 (1907) [hereinafter The Works of Edmund Burke]. To obtain a sense of the thoroughness of this long discourse, see Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics 31 (1968); Hanna Fenichel Pitkin, The Concept of Representation 165–67 (1967); Letter from John Stuart Mill to James Beal (March 7, 1865), *in* 16 Collected Works of John Stuart Mill: The Later Letters of John Stuart Mill 1849–1873, at 1005 (Francis E. Mineka & Dwight N. Lindley eds., 1972); Susan Rose-Ackerman, Corruption: A Study in Political Economy 17–19 (1978); John C. Wahlke et al., The Legislative System: Explorations in Legislative Behavior 272–80 (1962); Elizabeth F. Cohen, Dilemmas of Representation, Citizenship, and Semi-Citizenship, 58 St. Louis U. L.J. 1047, 1057 (2014); Mark A. Graber, Conflicting Representations: Lani Guinier and James Madison on Electoral Systems, 13 Const. Comment. 291, 292–93, 306 (1996); Saul Levmore, Precommitment Politics, 82 Va. L. Rev. 567, 567 (1996); Daniel H. Lowenstein, Political Bribery and the Intermediate Theory of Politics, 32 UCLA L. Rev. 784, 831–37 (1985); Jonathan Macey, Representative Democracy, 16 Harv. J.L. & Pub. Pol'y 49, 49–50 (1993); Donald J. McCrone & James H. Kuklinski, The Delegate Theory of Representation, 23 Am. J. Pol. Sci. 278, 278 (1979); Pippa Norris, John Stuart Mill Versus Bigotry, Bribery and Beer, 1 Corruption and Reform: An International Journal 79, 83 (1986); Todd E. Pettys, Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?, 86 Wash. U. L. Rev. 313, 353 (2008); Andrew Rehfeld, Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy, 103 Am. Pol. Sci. Rev. 214, 214–15 (2009); Frederick Schauer, Constitutions of Hope and Fear, 124 Yale L.J. 528, 533–34 n.19 (2014); Nicholas O. Stephanopoulos, Aligning Campaign Finance Law, 101 Va. L. Rev. 1425, 1453 (2015); Nicholas O. Stephanopoulos, Elections and Alignment, 114 Colum. L. Rev. 283, 315 (2014).

[9] Although many academics have identified the Court's three competing definitions of corruption and many have discussed the delegate and trustee theories of representation, it seems only Professor Deborah Hellman has explored how these definitions of corruption intersect with these theories of representation. See Hellman, supra note 6, at 1396–1402. Hellman argues that the Court should be hesitant to define corruption in the campaign finance context because doing so would constitutionalize a particular theory of representation. Id. at 1421. By contrast, I accept that precedent requires the Court to define corruption in the campaign finance context, which in turn compels it to embrace a particular

well-established but previously dissociated bodies of literature, I draw the conclusion that is this Note's unique contribution: Although any viable definition of corruption must be based on a theory of representation, the narrow quid pro quo definition adopted in *Citizens United* is not based on any commonly accepted theory of representation. Therefore, the Court should either articulate a theory of representation that justifies its narrow quid pro quo definition of corruption or reconsider that definition.

II. THE DEFINITIONS OF CORRUPTION AT THE HEART OF THE SUPREME COURT'S CAMPAIGN FINANCE JURISPRUDENCE

This first Part of the Note identifies the moment at which the Supreme Court declared corruption central to campaign finance jurisprudence. It then provides an overview of the concept of corruption generally. Finally, it identifies the three definitions of corruption the Court has adopted in campaign finance cases, including the definition adopted in *Citizens United* and the two previously adopted definitions rejected in that case.

A. Corruption Overview

In 1976, the Supreme Court declared in *Buckley v. Valeo* that the only government interests sufficient to justify restrictions on campaign speech are the prevention of corruption and the appearance of corruption.[10] This opinion is the foundation of every campaign finance decision of the past forty years.[11] When someone challenges a campaign

theory of representation. I ask the Court to be explicit about its theory of representation, because that theory is essential to understanding and applying its definition of corruption.

[10] 424 U.S. 1, 25 (1976) ("[T]he primary interest served by the limitations and, indeed, by the Act as a whole, is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office."). Preventing the appearance of corruption is an interest primarily concerning citizens' confidence in their government. This Note does not discuss that interest. But because the appearance of corruption is a concept derived from corruption itself, this Note may aid such a discussion.

[11] See, e.g., Mazo, supra note 7, at 268 ("Once the Supreme Court announced in *Buckley* that the concern over corruption or even its appearance could justify limitations on money in politics . . . the race was on to fill the porous concept of corruption with every conceivable meaning advocates could muster." (quoting Samuel Issacharoff, On Political Corruption, 124

finance restriction—claiming that the restriction abridges her First Amendment right to free speech—those defending the restriction must explain how it furthers the anti-corruption rationale.[12] As a result, it is impossible to ascertain whether a campaign finance restriction is constitutional without first defining corruption.

Before discussing the definitions of corruption the Court has adopted in campaign finance cases, I note some definitions offered elsewhere. Primary dictionary definitions of corruption include "dishonest or illegal behavior especially by powerful people" and "inducement to wrong by improper or unlawful means."[13] These definitions are not particularly useful because they are framed in negative terms; one must first define "honest and legal behavior" and "proper and lawful means" in order for them to have meaning.[14]

The Founders defined corruption as the use of public office to advance private interests.[15] The Supreme Court articulated this definition of corruption in *Trist v. Child*, where it held that courts could not

Harv. L. Rev. 118, 121 (2010))); Teachout, supra note 7, at 383–84 (calling *Buckley* "perhaps the single most influential case in the modern law governing political processes" and noting that it is "the source to which courts turn first when discussing the modern meaning of corruption" and is "often treated as if it were itself its own beginning—sprung from itself, carrying enormous doctrinal weight").

[12] See Lawrence Lessig, What an Originalist Would Understand "Corruption" to Mean, 102 Cal. L. Rev. 1, 13–14 (2014).

[13] Corruption, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/corruption [https://perma.cc/S58H-YAMS] (last visited Feb. 3, 2018).

[14] That dictionary definitions shed little light on the subject is not surprising; if they were useful, there would be less room for disagreement about the meaning of the term in the campaign finance context.

[15] See Robert G. Natelson, The General Welfare Clause and the Public Trust: An Essay in Original Understanding, 52 U. Kan. L. Rev. 1, 48 (2003) ("The term 'corruption' generally was understood at the time to mean, not merely theft . . . but the use of government power and assets to benefit localities or other special interests . . . ."); Teachout, supra note 7, at 347–53, 373–74 (stating that "political corruption referred to self-serving use of public power for private ends"); M. Patrick Yingling, Conventional and Unconventional Corruption, 51 Duq. L. Rev. 263, 282 (2013) ("The term 'corruption,' according to the Framers, represented the use of government power in 'the displacement of the public good by private interest' . . . ." (quoting Ralph Ketcham, Framed for Posterity: The Enduring Philosophy of the Constitution 58 (1993))).

enforce lobbying contracts.[16] But it has not embraced this definition in the campaign finance context.

Instead, it has vacillated between three different definitions of corruption.[17] Initially, in *Buckley*, the Court adopted what I have referred to as the "narrow quid pro quo definition" of corruption.[18] Generally speaking, a quid pro quo occurs where a representative receives money from an individual or a group—the "quid"—in exchange for a promise to act in a specific way—the "quo."[19] According to the narrow quid pro quo definition, corruption includes only such dollars-for-votes agreements and nothing else.[20] In other words, corruption is essentially, although not literally, limited to those acts that would violate a criminal bribery statute.[21] Eventually, in *Citizens United*, the Court would return to the narrow quid pro quo definition it first adopted in *Buckley*.[22]

But in the period between *Buckley* and *Citizens United*, the Court adopted two broader definitions of corruption. At one point the Court adopted what I will refer to as the "broader undue influence definition" of corruption. According to this definition, corruption occurs not only where there is a quid pro quo but also where a contributor is able to gain access to a representative and thereby exert undue influence over the

[16] 88 U.S. (21 Wall.) 441, 451 (1875) ("If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption . . . .").

[17] See Mazo, supra note 7, at 269 ("The Court's campaign finance jurisprudence is a mess, marked by doctrinal zigzags, anomalous distinctions, unworkable rules, and illogical results." (quoting Richard Briffault, On Dejudicializing American Campaign Finance Law, *in* Money, Politics, and the Constitution: Beyond *Citizens United* 174 (Monica Youn ed., 2011))); see also Teachout, supra note 7, at 398 (stating that the "lack of a shared foundational understanding [of corruption] has led to something close to chaos in the law governing political processes").

[18] 424 U.S. at 25, 45–46.

[19] See Teachout, supra note 7, at 388 (stating that quid pro quo corruption is "when a public official takes money in exchange for a political act").

[20] See Hellman, supra note 6, at 1400 (noting that the quid pro quo definition of corruption allows a legislator to do anything "so long as he does not take money (or something else of value) in direct exchange for an official act (a vote, for example)").

[21] See Teachout, supra note 7, at 388 (stating that according to the quid pro quo definition, "[c]orruption comes to mean the crime of corruption as written in federal and state criminal code").

[22] *Citizens United*, 558 U.S. at 359.

representative's independent judgment regarding what is in the public interest.[23] The Court adopted this definition of corruption in *Nixon v. Shrink Missouri Government PAC*,[24] *Federal Election Commission v. Colorado Republican Federal Campaign Committee ("Colorado Republican II")*,[25] and *McConnell v. Federal Election Commission*.[26]

At another point, the Court adopted what I will refer to as the "broader distortion definition" of corruption. According to this definition, corruption occurs not only where there is a quid pro quo but also where a representative's perception of the will of her constituency is distorted because she perceives the opinions of certain of her constituents more clearly than others.[27] The Court adopted this definition of corruption in *Federal Election Commission v. Massachusetts Citizens for Life*[28] ("*MCFL*") and *Austin v. Michigan Chamber of Commerce*.[29] For the remainder of Part I, I discuss these three competing definitions of corruption in more detail.

[23] See Hellman, supra note 6, at 1398 (calling the undue influence version of corruption, "corruption as the deformation of judgment," and arguing that it is based on a concern that powerful interests will distract representatives from ascertaining what is in the public's best interest).

[24] 528 U.S. 377, 389 (2000) (defining corruption to include, "in addition to '*quid pro quo* arrangements,' . . . the broader threat from politicians too compliant with the wishes of large contributors," which it referred to as "improper influence").

[25] 533 U.S. 431, 441 (2001) (defining corruption "not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment").

[26] 540 U.S. 93, 150 (2003) (stating that corruption "extends beyond preventing simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment'" (quoting *Colorado Republican II*, 533 U. S. at 441)).

[27] See Hellman, supra note 6, at 1399 (explaining that according to the distortion definition, corruption occurs when a legislator weighs the preferences of some individuals too heavily, especially when the legislator considers the wishes of wealthy contributors more than others); Teachout, supra note 7, at 394 (concluding that the concern with distortion is that "some voices will be so very loud, that others will be effectively silenced, if not silenced in fact").

[28] 479 U.S. 238, 257–58 (1986) (expressing the view that the "corrosive influence of concentrated corporate wealth" corrupts the political process because whereas the amount of money given to a campaign by an individual is a "rough barometer of public support," money given to a campaign by a corporation is "not an indication of public support for the corporation's political ideas").

[29] 494 U.S. 652, 660 (1990) (stating that corruption occurs where a corporation spends money on an election that has "little or no correlation to the public's support for the corporation's political ideas").

B. The Definition Adopted in Citizens United*: Only a Quid Pro Quo is Corruption*

The Supreme Court's current view, which it first adopted in *Buckley*, is that only a quid pro quo constitutes corruption. In *Buckley*, the Court upheld the portions of the Federal Election Campaign Act ("FECA") that imposed limits on the amount of money individuals could contribute to campaigns[30] but struck down the portions that imposed limits on the amount those same individuals could independently spend to support candidates.[31] In describing why contribution limits were constitutional, the Court said that "to the extent . . . large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined."[32] In describing why independent expenditure limits were unconstitutional, the Court said that "the absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[33] In other words, the *Buckley* Court believed that when individuals or groups give large contributions directly to campaigns, there is an inherent risk that they are doing so in exchange for a favorable vote on a particular issue. On the other hand, when those same individuals or groups attempt to get a candidate elected by spending money independently, there is less risk that such an exchange is occurring. The *Buckley* view—that only a quid pro quo constitutes corruption[34]—was both new[35] and foundational.[36]

[30] *Buckley*, 424 U.S. at 23–38.

[31] Id. at 39–59.

[32] Id. at 26–27.

[33] Id. at 47.

[34] See Cytryn, supra note 7, at 935 (observing that in *Buckley* "the Court unequivocally refused to permit a legislative attempt to 'equalize the relative ability of all citizens to affect the outcome of elections'"); Paul S. Edwards, Defining Political Corruption: The Supreme Court's Role, 10 BYU J. Pub. L. 1, 6 (1996) (noting that in embracing the quid pro quo view, the Court "explicitly denied the equalization justifications offered by the appellees").

[35] See Teachout, supra note 7, at 386 (stating that *Buckley* was the "first Supreme Court decision to mention 'quid pro quo' as the core harm against which anti-corruption measures are fighting").

[36] See Briffault, supra note 7, at 657; Cytryn, supra note 7, at 934 ("[The] narrow [quid pro quo] construction of corruption was critical, not only to the holding in *Buckley*, but to

For more than ten years, the Court adhered to this definition of corruption.[37]

The Court departed from this narrow definition of corruption for a number of years but then returned to it in *Citizens United*.[38] In *Citizens United*, the Court held that the provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") that imposed limits on the amount corporations could independently spend on elections were unconstitutional.[39] As in *Buckley*, the Court did so on the grounds that such independent expenditures simply do not give rise to the possibility of quid pro quo corruption.[40] And again, as in *Buckley*, the Court noted that contribution limits are acceptable because they, "unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption."[41] This return to the narrow view—that only a quid pro quo constitutes corruption—did not go unnoticed by scholars[42] or, for that matter, the D.C. Circuit, which acknowledged that in *Citizens*

subsequent election finance case law as well."); Teachout, supra note 7, at 385 (noting that the *Buckley* Court's decision to equate corruption with quid pro quo "ended up being critically important for defining the direction of the use of the concept in modern cases").

[37] See, e.g., Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 296–97 (1981) ("*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate*: 'To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined . . . .'" (quoting *Buckley*, 424 U.S. at 26–27)).

[38] See Dawood, supra note 7, at 127 (recognizing that the Court's recent campaign finance jurisprudence returns the focus to quid pro quo corruption).

[39] *Citizens United*, 558 U.S. 310, 365–66 (2010).

[40] Id. at 357.

[41] Id. at 359.

[42] See Briffault, supra note 7, at 661 ("The argument that the First Amendment requires a narrow quid pro quo-focused definition of corruption, which lost in *McConnell*, appears to have become the law in *Citizens United* . . . ."); Levinson, supra note 7, at 348–49 (arguing that *Citizens United* "embraced an unnecessarily narrow definition of corruption, finding that it means just *quid pro quo*," and criticizing Justice Kennedy for "cit[ing] his dissent in *McConnell* to argue that influence and access (or the appearance of influence or access) were not sufficient to raise the specter of corruption or its appearance, even though the majority of the Court specifically rejected his view in *McConnell*"); Mazo, supra note 7, at 269 ("In *Citizens United*, the Court dramatically narrowed its understanding of corruption, explicitly overruling *Austin* and rejecting the anti-distortion standard [and] partially overruling *McConnell* as well . . . .").

United the Supreme Court rejected decades of campaign finance jurisprudence by returning to its earlier definition of corruption.[43]

Since *Citizens United*, the Court has reaffirmed its view that only quid pro quo corruption can justify restrictions on campaign speech. In *McCutcheon v. Federal Election Commission*, the Court struck down a provision of the FECA that imposed limits on the amount of money individuals could contribute to political parties.[44] The Court reasoned that "[s]pending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to . . . *quid pro quo* corruption."[45] This finding was fatal to the regulation because "[a]ny regulation must . . . target what we have called '*quid pro quo*' corruption or its appearance."[46] Thus, as it currently stands, the Court has clearly returned to the definition of corruption first adopted in *Buckley*. Today, corruption is defined to include only a quid pro quo—"a direct exchange of an official act for money."[47]

C. One Definition Rejected in Citizens United*: Undue Influence is Also Corruption*

For a few years in the early 2000s, the Court adopted a broader definition of corruption. Specifically, it defined corruption to include both a quid pro quo and undue influence. This definition was primarily articulated in three cases: *Nixon v. Shrink*, *Colorado Republican II*, and *McConnell*. A minority of the Court—including the dissenters in both *Citizens United* and *McCutcheon*—continues to embrace this definition today.

In *Nixon v. Shrink*, the Court upheld a Missouri law restricting campaign contributions,[48] despite the fact that, adjusting for inflation, it imposed a lower limit on maximum contributions than the restriction

[43] SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 694 (D.C. Cir. 2010) ("The *Citizens United* Court retracted this view . . . [and] returned to its older definition of corruption that focused on *quid pro quo* . . . .").

[44] 134 S. Ct. 1434, 1462 (2014).

[45] Id. at 1450.

[46] Id. at 1441.

[47] Id.

[48] 528 U.S. at 397–98.

upheld in *Buckley*.[49] The Court reached this conclusion by adopting a broader definition of corruption than the one adopted in *Buckley*. The *Nixon* Court pointed out that the *Buckley* Court, while focusing primarily on quid pro quo corruption, stated that "Congress could constitutionally address the power of money 'to influence governmental action' in ways less 'blatant and specific' than bribery."[50] Seizing upon this language, the *Nixon* Court defined corruption to encompass, "in addition to '*quid pro quo* arrangements,' . . . the broader threat from politicians too compliant with the wishes of large contributors."[51] It termed that threat "improper influence."[52] Although the Court portrayed this definition of corruption as consistent with the definition articulated in *Buckley*, it was in fact much broader.[53]

The Court crystallized the broader undue influence definition of corruption the next year in *Colorado Republican II*,[54] where it refused to find limits on coordinated expenditures by political parties facially invalid, noting that coordinated expenditures present more of a corruption risk than independent expenditures.[55] In so holding, the Court defined corruption "not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence."[56]

Two years later, in *McConnell v. FEC*, the Court again adopted the broader undue influence definition of corruption while upholding most provisions of the BCRA.[57] In *McConnell*, the Court reiterated that the government's interest in preventing corruption "extends beyond preventing simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'"[58]

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[49] Id. at 382.
[50] Id. at 389 (quoting *Buckley*, 424 U.S. at 28).
[51] Id.
[52] Id.
[53] See Mazo, supra note 7, at 268 (pointing out that the undue influence standard captures a broader range of actions than the quid pro quo standard).
[54] *Colorado Republican II*, 533 U.S. at 440–41.
[55] Id. at 437.
[56] Id. at 441.
[57] *McConnell*, 540 U.S. at 224.
[58] Id. at 150.

As of 2003, then, the Court had clearly defined corruption to include both a quid pro quo and undue influence.[59]

Although the Court returned to the narrow quid pro quo definition of corruption in *Citizens United*, some of the Justices would continue to adopt the undue influence definition today. Indeed, four Justices dissented in both *Citizens United* and *McCutcheon* on the ground that the quid pro quo definition is too narrow an understanding of corruption. The dissenters in *Citizens United* called the quid pro quo definition a "crabbed view of corruption" that was "squarely rejected" in *McConnell*.[60] They pointed out that in three previous cases the Court had "recognized Congress' legitimate interest in preventing the money that is spent on elections from exerting an 'undue influence on an officeholder's judgment' and from creating 'the appearance of such influence,' beyond the sphere of *quid pro quo* relationships."[61] And they argued that "[c]orruption operates along a spectrum," repudiating "the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences," as one that "does not accord with the theory or reality of politics."[62]

Similarly, the dissenters in *McCutcheon* objected to the plurality's view that corruption "does not include efforts to garner 'influence over or access to' elected officials or political parties," calling this "significantly narrower definition of 'corruption'" "flatly inconsistent with *McConnell*."[63] Thus, although the Court has returned to the narrow quid pro quo definition of corruption, some of the Justices would continue to define corruption more broadly to include undue influence.

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[59] See Newcomer, supra note 7, at 267 (arguing that, in light of the Court's adoption of the "undue influence" definition in both *Colorado Republican II* and *McConnell*, the claim that "'[f]avoritism and influence' are not corruption is at odds with [the] historical understanding of corruption").

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

[61] Id. (citing *McConnell*, 540 U.S. at 150; *Colorado Republican II*, 533 U.S. at 441; *Nixon*, 528 U.S. at 389).

[62] Id. at 448.

[63] *McCutcheon*, 134 S. Ct. at 1466, 1470 (Breyer, J., dissenting) (emphasis omitted).

D. Another Definition Rejected in Citizens United*: Distortion is Also Corruption*

In addition to the quid pro quo and undue influence definitions, for a short time in the late 1980s, the Court adopted a third definition of corruption, which I will refer to as the "broader distortion definition." According to this definition, corruption occurs both when there is a quid pro quo and "when aggregations of wealth have dominated the political process to the point that decisions no longer reflect the will of the public."[64] The Court first introduced this definition in *MCFL* before crystallizing it in *Austin*. More recently, the dissenters in *Citizens United* defended the distortion definition.

In *MCFL* the Court found a provision of the FECA that imposed restrictions on independent expenditures by corporations unconstitutional as applied to a nonprofit that encouraged individuals to vote "pro-life" in upcoming elections.[65] In so holding, the Court declared that corruption occurs when money spent on behalf of a particular candidate or position does not accurately reflect public support for that candidate or position. The Court said that corporations present a particular risk of this type of corruption because whereas the amount of money given to a campaign by an individual is a "rough barometer of public support," money given to a campaign by a corporation is "not an indication of popular support for the corporation's political ideas."[66] The Court expressed concern that this "corrosive influence of concentrated corporate wealth" might damage the "integrity of the marketplace of political ideas."[67]

A few years later, in *Austin*, the Court expounded upon this idea from *MCFL*, expressly adopting the broader distortion definition of corruption.[68] The *Austin* Court upheld provisions of the Michigan Campaign Finance Act that prohibited corporations from using their treasuries to fund independent expenditures on behalf of candidates for statewide office.[69] It found the provisions constitutional because they

[64] See Newcomer, supra note 56, at 245.
[65] *MCFL*, 479 U.S. at 241.
[66] Id. at 258.
[67] Id. at 257.
[68] *Austin*, 494 U.S. at 660.
[69] Id. at 654–55.

were targeted at the corruption caused 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."[70] This "new and different" view[71], that corruption occurs whenever expenditures do not "reflect actual public support for [a corporation's] political ideas,"[72] was a significant departure from the Court's earlier view in *Buckley*.

Ultimately, the broader distortion definition, like the broader undue influence definition, was rejected by the Court in *Citizens United*.[73] However, the dissenters in *Citizens United* also advocated for this definition, if not quite so strongly as they advocated for the broader undue influence definition.[74] The dissenters maintained that *Austin* was still good law and that its rationale—that distortion is a form of corruption—was still sound.[75] In explaining why, they expressed concern about the "drowning out of noncorporate voices."[76] Thus, although the broader distortion definition of corruption has been defended less often and less vigorously than the other two definitions,

[70] Id. at 660.

[71] See Gerald G. Ashdown, Controlling Campaign Spending and the "New Corruption": Waiting for the Court, 44 Vand. L. Rev. 767, 769 (1991).

[72] *Austin*, 494 U.S. at 660.

[73] Indeed, in returning to the narrow quid pro quo definition of corruption in *Citizens United*, the Court explicitly rejected both other definitions. It first rejected the broader distortion definition. See *Citizens United*, 558 U.S. at 349–56. The first problem with this definition, the Court said, was that it necessarily requires imposing restrictions on the speech of certain individuals or entities but not on other individuals or entities. It held that such an approach conflicts with the "premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity." Id. at 350. The Court's second opposition to the distortion view was even more fundamental: the Court found it "irrelevant" that "corporate funds may 'have little or no correlation to the public's support for the corporation's political ideas.'" Id. at 351. Next, the Court rejected the broader undue influence definition, saying "[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt" because "[i]ngratiation and access . . . are not corruption." Id. at 359–60. The Court took the position that "favoritism and influence" are an unavoidable aspect of democratic politics, and that therefore the broader undue influence definition of corruption simply cannot be correct. Id. at 359.

[74] In *Citizens United,* the government chose not to defend the broader distortion definition. Therefore, the dissent did not rest its analysis solely on that definition. See id. at 410 (Stevens, J., concurring in part and dissenting in part).

[75] Id. at 408–14 (Stevens, J., concurring in part and dissenting in part).

[76] Id. at 470 (Stevens, J., concurring in part and dissenting in part).

the Court did adopt it for a time, and some of the Justices would continue to do so today.

III. THREE THEORIES OF REPRESENTATION POSSIBLY UNDERLYING THE COURT'S DEFINITION OF CORRUPTION

Remember the ultimate aim of this Note: to demonstrate that although any viable definition of corruption must be based on a theory of representation, the Court's current definition of corruption is not based on any commonly accepted theory of representation. Having identified the Court's current definition of corruption, I now explore commonly accepted theories of representation. First, I consider the two theories of representation most widely accepted in American politics: the delegate and trustee theories. Some suggest that neither of these theories fully captures how an ideal representative should behave. Therefore, endeavoring to consider every theory that might underlie the Court's opinion, I also consider a third, thus far undertheorized, hybrid of the two theories.

A. Overview of the Delegate and Trustee Theories

The delegate and trustee theories offer competing visions of the proper role of the representative. The first person to articulate these two theories was Edmund Burke.[77] According to Burke's delegate theory, a representative should follow the preferences of her constituents by doing what her constituents would want her to do in any given circumstance. A delegate should even follow her constituents' preferences when her independent judgment tells her not to. According to Burke's trustee theory, by contrast, a representative should always use her own independent judgment to decide what to do. A trustee should even use her independent judgment when doing so means ignoring her constituents' preferences.[78]

[77] See The Works of Edmund Burke, supra note 8 at 200. See also Schauer, supra note 8, at 533 n.19 ("The distinction between delegate (or mandate) and trustee models of representation owes it origins (albeit in different terms) to Edmund Burke.").

[78] See, e.g., Cohen, supra note 8, at 1057 n.54; Thomas Molnar Fisher, Note, Republican Constitutional Skepticism and Congressional Reform, 69 Ind. L.J. 1215, 1232–33 (1994); Lowenstein, supra note 8, at 831–37 (1985); Justin M. Sadowsky, The Transparency Myth:

Although Burke was the first to articulate these two theories, other political theorists have elaborated upon them since.[79] Professor A.H. Birch acknowledges the enormous influence of both theories. On the one hand, he says, "innumerable writers and speakers" have subscribed to the delegate theory, "maintain[ing] that elected representatives have a duty to act as agents for their constituents," whereas on the other hand, some of "the most influential theorists in the Western world" have subscribed to the trustee theory, "stress[ing] the need for elected representatives to do whatever they think best for the nation as a whole."[80]

In elaborating on the two theories, theorists have offered different conceptions of the relevant distinction between them. For instance, Professor Mark Graber argues the theories present the question of "whether electoral systems should minimize or maximize the impact of public opinion on public policy."[81] Dennis Murphy suggests the theories diverge on whether representatives should behave according to "the will of their constituents" or "their own will."[82] Professor Bruce Jennings believes the theories disagree about whether a representative should represent the "subjective preferences (or self-defined interests) of [her] constituents" or the "objective needs (or enlightened interests) of [her] constituents."[83] Professor George Carpinello argues the theories differ with respect to whether representatives should be "guided strictly by their constituents' desires," or should "act in their constituents' best interest."[84] Finally, and perhaps most evocatively, Professor Saul Levmore says the question that divides the theories is whether

A Conceptual Approach to Corruption and the Impact of Mandatory Disclosure Laws, 4 Conn. Pub. Int. L.J. 308, 313 (2005).

[79] See, e.g., Pitkin, supra note 8, at 177; Wahlke et al., supra note 8, at 272–80; Rehfeld, supra note 8, at 217.

[80] A.H. Birch, Representation 20 (1971).

[81] Graber, supra note 8, at 306 (describing this choice as "[t]he central question of representative government").

[82] Dennis L. Murphy, Note, The Exclusion of Illegal Aliens from the Reapportionment Base: A Question of Representation, 41 Case W. Reserve L. Rev. 969, 987 (1991).

[83] Representation and Responsibility: Exploring Legislative Ethics 160 (Bruce Jennings & Daniel Callahan eds., 1985).

[84] George F. Carpinello, Should Practicing Lawyers Be Legislators?, 41 Hastings L.J. 87, 87 (1989).

representatives should be "autonomous or automatons."[85] Having thus identified the origin, prevalence, and basic contours of the delegate and trustee theories, I next explore both in more detail.

B. The Delegate Theory

As outlined above, the basic premise of the delegate theory is that a representative must act as her constituents would,[86] even when her independent judgment tells her not to.[87] Theorists have analogized the delegate's role to other roles including, most notably, the role of the agent. Professor Hannah Pitkin calls the delegate an agent who must "do what his principal would do."[88] Professor Judith Reed suggests the delegate is a "spokesperson" for her constituents in much the same way an agent is for her principal.[89] And Grayson Sieg expresses a similar idea, calling delegates "proxies" who must act according to the will of their constituents.[90]

At first blush, the delegate theory appears elegantly simple. One slight complication, however, is that a representative can act only one way in a given situation. In other words, she cannot—absent complete agreement among her constituents—do what *each* of her constituents wants her to do in that situation. The typical solution to this problem is majoritarianism. In a majoritarian democracy, the delegate must do what

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[85] Levmore, supra note 8, at 567.

[86] Susan Rose-Ackerman, Corruption: A Study in Political Economy 17–19 (1978); Issacharoff & Karlan, supra note 8, at 1719; Macey, supra note 8, at 49–50 (noting that a delegate generally views himself as bound by the expressed views of his constituents); McCrone & Kuklinski, supra note 8, at 278 ("The delegate theory of representation . . . posits that the representative ought to reflect purposively the preferences of his constituents."); Sadowsky, supra note 78, at 313; Stephanopoulous, Elections and Alignment, supra note 8, at 314 (stating that "a delegate must align his own preferences with those of his constituents").

[87] Stephanopoulous, Elections and Alignment, supra note 8, at 314 (concluding that a delegate "must not deviate from his constituents' views even if he is urged to do so by his party or personal ideology").

[88] Pitkin, supra note 8, at 144.

[89] Judith Reed, Sense and Nonsense: Standing in the Racial Districting Cases as a Window on the Supreme Court's View of the Right to Vote, 4 Mich. J. Race & L. 389, 443 (1999).

[90] Grayson Keith Sieg, Note, A Citizen's Guide to Redistricting Reform Through Referendum, 63 Clev. St. L. Rev. 901, 920 (2015).

she believes the majority of her constituents wants her to do.[91] The problem with this, of course, is that no representative has the time and means to inquire into *each* of her constituents' preferences each time she is presented with a decision. Although a delegate may "figuratively" poll her constituency in order to glean the will of the majority,[92] more often she will simply attempt to act "generally in accord with" their goals as she perceives them.[93]

Over the course of American history, the view that representatives should act like delegates has become increasingly popular.[94] In fact, Professor Nicholas Stephanopoulos argues forcefully that most Americans today believe representatives should act like delegates. In a recent article he points to two surveys, each of which found that "a substantial majority of Americans support the delegate model of representation . . . over the trustee model."[95] Professor Bruce Cain agrees, arguing that "no evidence exists that all or even most Americans want their representatives to act" as trustees and calling the delegate theory "more widely accepted."[96]

And scholars have noted that representatives themselves often seem to assume they should act like delegates. Stephanopoulos argues that, "even if trustee theories are theoretically alluring, their practical applicability to modern politics is highly limited."[97] He supports that argument by pointing to "abundant empirical evidence that, at least in contemporary American politics, representatives very rarely behave as trustees," instead "often respond[ing] to the policy preferences of their constituents."[98] Professor Elizabeth Cohen shares this view, claiming that "public officials view the job of representation to be responding to,

[91] Stuart M. Brown, Jr., Black on Representation: A Question, *in* Representation, at 144, 147 (explaining that the delegate model "implies a view of democracy in which the interest and will of the majority are to prevail without restriction.").

[92] Dixon Jr., supra note 8, at 31.

[93] Reed, supra note 89, at 443.

[94] Cf. James S. Fishkin, The Voice of the People: Public Opinion and Democracy 62 (1995) (arguing that the "*elite democracy* of the Founders . . . has given way in successive battles and innovations to . . . mass democracy").

[95] Stephanopoulos, Aligning Campaign Finance Law, supra note 8, at 1453.

[96] Bruce E. Cain, Moralism and Realism in Campaign Finance Reform, 1995 U. Chi. Legal F. 111, 120.

[97] Stephanopoulos, Elections and Alignment, supra note 8, at 323.

[98] Id.

and even mirroring, the stated preferences of their constituents."[99] At least according to these scholars, many Americans—especially today—believe representatives should act like delegates.

C. The Trustee Theory

There is also reason to believe, however, that many Americans today think representatives should act like trustees. As outlined above, a trustee must follow her independent judgment regarding what is best, even when doing so means ignoring her constituents' preferences.[100] The premise of the trustee theory is that a representative is particularly well suited—due to superior intelligence, knowledge, character, and so forth—to judge the right thing to do in a given situation. Recognizing this, constituents entrust their representative with the power and responsibility to act according to her own independent judgment.[101] A trustee is afforded the flexibility to form that judgment using whatever inputs she wishes, including her view of what is in her constituents' best interests as well as her view of what is more generally good, right, or just. A trustee is even free to consider her constituents' preferences. If, however, a trustee's independent judgment regarding what is best conflicts with those preferences, she must ignore their preferences and follow her judgment.

Scholars have analogized the role of the trustee to various other roles, including the roles of judge, juror, and guardian. For instance, Professor Joel Fleishman describes the trustee as a judge who must scrutinize her constituents' preferences but act on them only if they are in her

[99] Cohen, supra note 8, at 1057 (arguing that both elected officials and most constituents report having this view).

[100] See e.g., Sieg, supra note 90, at 920 (explaining that trustees "are independent agents, free to act as they please with no responsibility to carry out the will of the majority").

[101] See, e.g., Dixon Jr., supra note 8, at 31 ("[U]pon due study and reflection, [the trustee] is to make an independent judgment on the merits of the issue at hand, including any necessary accommodation of constituency interest and national interest, and vote accordingly—the so-called free-agent model of representation."); Cain, supra note 96, at 120 (noting that the trustee "exercises his or her best judgment based upon moral reasons and guidelines"); Marci A. Hamilton, The People: The Least Accountable Branch, 4 U. Chi. L. Sch. Roundtable 1, 9 (1997) ("The Constitution frees representatives from direct control by the people during the term of representation so that they may make the decisions that are in the country's best interest. During the term of representation, they are given decisionmaking power that is independent of the people.").

constituents' and society's best interests.[102] Daniel Walker Howe describes the trustee as a juror who represents the interests of the community by doing what she thinks is best, rather than by doing what she thinks others in her position would do.[103] And Professor Jonathan Macey likens the trustee to a guardian who must promote "the broader interests of society as a whole."[104]

John Stuart Mill is a historical example of a representative who believed he was a trustee. When Mill ran for the British Parliament in 1865 he openly avowed that his "only object in Parliament would be to promote [his own] opinions."[105] Mill saw no issue with this, because he believed the representative's role was to be an "independent judge, rather than [a] mere mouthpiece of his constituents."[106] Mill was not the only British individual to view the role this way. In fact, Professor Henry Chambers calls the view that the legislature is "the body through which the country is governed rather than the body through which the people are directly given voice," "historically British and European."[107]

There is considerable evidence that early Americans, like their British and European counterparts, believed representatives should act like trustees. The Federalist Papers, in particular, seem to envision representatives as trustees.[108] Perhaps for this reason, many scholars

[102] Joel L. Fleishman, Self-Interest and Political Integrity, *in* Public Duties: The Moral Obligations of Government Officials 52, 63, 66 (Joel L. Fleishman et al. eds., 1981).

[103] See Daniel Walker Howe, Anti-Federalist/Federalist Dialogue and Its Implications for Constitutional Understanding, 84 Nw. U. L. Rev. 1, 4 (1989) (referring to this approach as the "Anti-Federalist" model).

[104] Macey, supra note 8, at 50.

[105] Mill, *in* 16 Collected Works of John Stuart Mill: The Later Letters of John Stuart Mill 1849–1873, supra note 8, at 1005.

[106] Norris, supra note 8, at 83.

[107] Henry L. Chambers, Jr., Enclave Districting, 8 Wm. & Mary Bill Rts. J. 135, 151 n.67 (1999).

[108] See, e.g., The Federalist No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961) ("[The Constitution is intended to ensure that] the best men in the country will not only consent to serve, but also will generally be appointed to manage [the polity]."); Id. No. 10, at 82 (James Madison) (declaring that the purpose of representation is "to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country" and that "it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves"); Id. No. 57, at 350 (James Madison) ("The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of society.");

have suggested that the drafters of the Constitution subscribed to the trustee theory of representation.[109]

Scholars have also suggested, however, that the trustee theory is less popular today than it once was. At least one scholar believes the Founders' view of the ideal representative is directly at odds with the view most Americans hold today.[110] Other scholars seem to agree that over time Americans have moved away from the trustee theory.[111] In any event, it is clear that over the course of American history many Americans have subscribed to the trustee theory of representation.

Id. No. 63, at 384 (James Madison) (stating that the Senate "may be sometimes necessary as a defense to the people against their own temporary errors and delusions"); Id. No. 71, at 432 (Alexander Hamilton) (stating that "[t]he republican principle . . . does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests," and noting that when public opinion and public interest conflict, "it is the duty of the persons whom [the people] have appointed to be the guardians of those interests to withstand the temporary delusion [of the people] in order to give them time and opportunity for more cool and sedate reflection").

[109] See Cohen, supra note 8, at 1058 (arguing that Madison "saw representation as primarily an act of independent interpretation rather than simply the relaying of an expressed preference"); James A. Gardner, Madison's Hope: Virtue, Self-Interest, and the Design of Electoral Systems, 86 Iowa L. Rev. 87, 130 (2000) (concluding that the Founders saw the purpose of electing representatives as "select[ing] leaders" rather than "involv[ing] the public in affairs of government"); Graber, supra note 8, at 299–301 (stating that "[e]lections, in Madison's opinion, served to identify those persons who could best transcend the parochial concerns of their electorates," and noting that "[b]ecause no person could 'authentically' represent a heterogenous district, Madison assumed that voters in the constitutional order would select the person with the best reputation for political judgment," looking especially for "men who possess the most attractive merit and the most diffusive and established characters," who were "expected to exercise their independent judgment on most issues and not to be tethered to the particular interests of their electorates").

[110] See Bryan Garsten, Representative Government and Popular Sovereignty, *in* Political Representation 90, 91 (Ian Shapiro et al. eds., 2009) ("Counterintuitive as it sounds, a fundamental purpose of representative government, as . . . Madison saw it, is to *oppose* popular sovereignty in the sense that it is usually understood.").

[111] See Cain, supra note 96, at 120–21 (claiming "no evidence exists that all or even most Americans want their representatives to act" as trustees and calling the delegate model "more widely accepted"); Strauss, supra note 6, at 147 (arguing that few people actually think of representatives as trustees). But see Pettys, supra note 8, at 353 ("The American people recognize that public majorities sometimes favor ill-advised courses of action. They acknowledge that either their own preferences or the preferences of a majority of their fellow citizens are sometimes regrettable, and that the will of political majorities is thus sometimes best ignored.").

D. A Possible Hybrid Theory

Although the delegate and trustee theories are undisputedly the most commonly accepted theories of representation, recently some have introduced the possibility of a third theory of representation—one that incorporates elements of both the delegate and trustee theories.[112] This is sometimes referred to as a hybrid theory.

When people claim to subscribe to a hybrid theory, one of two things might be occurring. First, they might be mistaking what is actually the delegate or the trustee theory for a hybrid theory. For instance, some people might believe a representative should act according to her own independent judgment but should consider her constituents' preferences as one factor when formulating that judgment. These people believe constituents' preferences are relevant. But because they believe the representative's judgment should always prevail, they actually subscribe to the trustee theory. Others might believe a representative should spend time thinking about issues and formulating an independent judgment but should ultimately defer to her constituents' preferences. These people believe a representative's independent judgment is relevant. But because they believe the constituents' preferences should always prevail, they actually subscribe to the delegate theory. In other words, those who have a view about whether the representative's judgment or the constituents' preferences should prevail where the two conflict actually subscribe to the delegate or the trustee theory, and not to a hybrid theory.

The second possibility, however, is that some people do subscribe to a true hybrid theory. A true hybrid theory might look like this: a representative *must* follow her constituents' preferences to the extent those preferences fall within a certain range (i.e., where most constituents agree with each other), but where those preferences do not fall within that range (i.e. where there is considerable disagreement among constituents), the representative *must* follow her independent judgment. For example, a theory might require a representative to follow her constituents' preferences if greater than seventy-five percent of them share that preference but require the representative to use her own

[112] See, e.g., Calvin v. Jefferson Cty. Bd. of Comm'rs, 172 F.Supp.3d 1292, 1308 n.14 (N.D. Fla. 2016) ("[I]n practice most representatives fall somewhere between pure trustee and pure delegate."); Pitkin, supra note 8, at 165–67.

judgment if the constituents' preferences are not so extreme. This *true* hybrid theory is one to which some people might actually subscribe. Thus, it is worth considering the possibility that the Court subscribes to a hybrid theory of representation.

IV. THE DEFINITION OF CORRUPTION ADOPTED IN *CITIZENS UNITED* DOES NOT COMPORT WITH ANY OF THESE THREE THEORIES OF REPRESENTATION

Here's the rub: whether the Court believes a representative should act like a delegate, a trustee, or some hybrid of the two, the narrow quid pro quo definition of corruption adopted in *Citizens United* is not viable. To be sure, proponents of all three theories can agree that a quid pro quo is one form of corruption. When a representative promises to vote based on a bribe, she promises not to act according to her independent judgment, her constituents' preferences or any combination of the two. Perhaps for this reason, every Supreme Court Justice since *Buckley* has agreed that the definition of corruption must include a quid pro quo. But proponents of each theory should *also* agree that corruption must be defined to include *more than just a quid pro quo*. As illuminated below, proponents of the delegate theory should adopt the view that distortion is also a form of corruption; proponents of the trustee theory should adopt the view that undue influence is also a form of corruption; and proponents of a true hybrid theory should adopt the view that both undue influence and distortion are also forms of corruption. In other words, the narrow quid pro quo definition of corruption adopted by the Supreme Court in *Citizens United* is inconsistent with any commonly accepted theory of representation.

A. A Court That Subscribes to the Delegate Theory Should Define Corruption to Include Distortion

If the Court believes representatives should act like delegates, it should embrace the view that corruption occurs not only where there is a quid pro quo but also where there is distortion. Indeed, although the delegate theory requires a representative to respond solely to her

constituents' preferences,[113] where distortion occurs a representative cannot accurately assess those preferences.

This reasoning alone should convince proponents of the delegate theory to include distortion in their definition of corruption. But in case it does not, it is worth noting that distortion is a concern inherently *based on* the delegate theory. According to the Supreme Court, distortion occurs when the amount of money spent in support of a political idea does not "reflect actual public support" for that idea,[114] or when certain constituents "drown[] out" other constituents.[115] These two conceptions of distortion are clearly based on the delegate theory. For one, whether money spent reflects actual public support for a political idea is relevant only if the representative's role includes assessing actual public support for a political idea. Of course, according to the delegate model, this is precisely the representative's role. Likewise, whether certain constituents voice their preferences so loudly as to drown out other constituents' preferences is relevant only if the representative's role includes assessing her constituents' preferences. Again, according to the delegate model, this is precisely the representative's role. In other words, distortion is not merely one form of corruption according to the delegate theory; distortion is a concept born of the delegate theory.

The following hypothetical illustrates the point. Imagine a legislative district in which the death penalty is a divisive issue. Fifty-five percent of residents support the death penalty; forty percent oppose it; five percent are undecided. Now imagine that a nonprofit whose sole purpose is to oppose the death penalty supports a legislative candidate. The nonprofit contributes enormous sums of money to the candidate's campaign and airs daily television commercials urging people to vote for the candidate. The nonprofit comes to have such an outsized voice during the campaign cycle that the representative has trouble accurately assessing the preferences of her constituents. In the language of the

[113] See supra Part III.B.

[114] Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990). See also Fed. Election Comm'n v. Mass. Citizens for Life [MCFL], 479 U.S. 238, 258 (1986) ("The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas.").

[115] *Citizens United*, 558 U.S. at 441, 470 (Stevens, J., concurring in part and dissenting in part).

Court, distortion has occurred, as the money spent does not "reflect actual public support" for the abolition of the death penalty; the anti-death penalty advocates have simply "drown[ed] out" the other constituents. Because of this distortion, even a representative who sees herself as a delegate may misperceive her constituents' preferences, mistaking the pervasive anti-death penalty rhetoric for her constituents' preference that she vote to abolish the death penalty. As a result, she may vote to abolish the death penalty even though she wishes to follow the preferences of her constituents, who support the death penalty. This example only confirms what the Court's opinions have already made evident: those who subscribe to the delegate theory should define corruption to include distortion.

B. A Court That Subscribes to the Trustee Theory Should Define Corruption to Include Undue Influence

Alternatively, if the Court believes representatives should act like trustees, it should embrace the view that corruption occurs not only where there is a quid pro quo but also where there is undue influence. The trustee theory requires a representative to act according to her own independent judgment.[116] But where certain individuals have undue influence over the representative, the representative's independent judgment has been altered.[117] For this reason, proponents of the trustee theory should include undue influence in their definition of corruption.

In fact, just as distortion is a concern inherently based on the delegate theory, undue influence is a concern inherently based on the trustee theory. The term "undue influence" is shorthand; what the Supreme Court actually said in *Colorado Republican II* was that corruption occurs where certain individuals are able to exert "undue influence on an officeholder's judgment."[118] This conception of undue influence is

[116] See supra Part III.C.

[117] See supra Part II.C.

[118] See Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm. [Colorado Republican II], 533 U.S. 431, 441 (2001); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 150 (2003); *Citizens United*, 558 U.S. at 447 (Stevens, J., concurring in part and dissenting in part); see also Dawood, supra note 7, at 124–25 (characterizing the "undue influence" concern as about the "effects of the donation on the judgment and decision-making of the legislators").

clearly based on the trustee theory. Indeed, whether the representative's independent judgment is skewed is relevant only if the representative's role is to exercise her independent judgment. Of course, according to the trustee theory this is precisely the representative's role. In other words, just as distortion is a concept born of the delegate theory, undue influence is a concept born of the trustee theory.

Here too a hypothetical may help illustrate the point. Imagine a representative who must vote on a bill that would define new computer crimes. The bill would criminalize the daily conduct of certain tech entrepreneurs, including one who contributed an enormous sum of money to the representative's campaign and spent millions of dollars on television advertisements to help her get elected. The entrepreneur's generous contributions gained him access to the representative at fundraisers and other events, but the representative promised the entrepreneur nothing in return for his generosity. Although there is no concern about quid pro quo corruption in this hypothetical, the entrepreneur may have undue influence over the representative in one of two ways. First, the representative may recognize that voting for the bill will harm the entrepreneur and, acknowledging feelings of sincere gratitude toward him, choose to vote against it. Such conduct is corrupt according to the trustee theory because the representative is affirmatively choosing to ignore her independent judgment. Although this conduct does not amount to a quid pro quo—there has been no explicit exchange—it involves a conscious dereliction of duty on the part of the representative and is, therefore, the more nefarious type of undue influence.

The entrepreneur may also have undue influence over the representative in a second, less nefarious, way. Imagine that, at one of the events where the entrepreneur gained access to the representative, he discussed this issue with her, shaping her perception of the issue in a way the victims of computer crimes had no opportunity to do. In this hypothetical, access has afforded the self-interested entrepreneur the opportunity to manipulate the honest representative. If the representative's perception of the issue is unduly influenced by the entrepreneur, she is no longer capable of exercising her independent judgment to do what she thinks is best. Although this is a less nefarious type of undue influence—because it involves no conscious dereliction of duty on the part of the representative—it is still a form of corruption

according to the trustee theory. Again, this example only confirms what the Court's opinions make clear: those who believe representatives should act like trustees should define corruption to include undue influence.

C. A Court That Subscribes to a Hybrid Theory Should Define Corruption to Include Both Distortion and Undue Influence

Finally, if the Court believes a representative should act like a hybrid between a delegate and a trustee, it should embrace the view that corruption occurs not only where there is a quid pro quo but also where there is both undue influence *and* distortion. Recall that a true hybrid theory requires a representative to act like both a delegate *and* a trustee. Indeed, according to a true hybrid theory, a representative must follow her constituents' preferences when those preferences are sufficiently uniform, while exercising her independent judgment when those preferences are not.[119] In other words, one part of the hybrid representative's job is to perceive her constituents' preferences. Because distortion will prevent her from doing so,[120] distortion is a form of corruption according to a true hybrid theory. The other part of the hybrid representative's job is to exercise her own judgment. Because undue influence will prevent her from doing so,[121] undue influence is also a type of corruption according to a true hybrid theory. Thus, those who subscribe to a true hybrid theory should define corruption to include both undue influence and distortion.

D. The Narrow Quid Pro Quo Definition of Corruption Adopted in Citizens United *Does Not Comport with Any Commonly Accepted Theory of Representation*

The foregoing demonstrates that the definition of corruption the Court adopted in *Citizens United* is inconsistent with any commonly accepted theory of representation. Indeed, if the Court subscribes to any such theory, it should define corruption to include *both* a quid pro quo *and* something else. If it subscribes to the delegate theory, it should include

[119] See supra Part III.D.
[120] See supra Part IV.A.
[121] See supra Part IV.B.

distortion in its definition of corruption. If it subscribes to the trustee theory, it should include undue influence in its definition of corruption. And if it subscribes to a hybrid theory, it should include both distortion and undue influence in its definition of corruption. The position the Court took in *Citizens United*—that corruption includes only a quid pro quo—does not comport with any of these three theories. In my view, this leaves the Court with two options. It can either articulate a theory of representation that does comport with its narrow quid pro quo definition of corruption or it can reconsider that definition.

V. CONCLUSION

The practical impact of *Citizens United* is undeniable. Many believe that impact has been negative and are motivated to criticize the opinion for that reason. I do not believe the opinion's practical impact means it must be criticized. I do, however, believe it means the opinion must be carefully examined. A careful examination reveals that the Court's definition of corruption—the linchpin of the entire opinion—does not comport with any commonly accepted theory of representation. This is a problem, for any viable definition of corruption must be based on an underlying theory of representation. Therefore, I suggest the Court take up another campaign finance case soon, so that it can either (1) articulate a theory of representation that justifies its narrow quid pro quo definition of corruption or (2) reconsider that definition.