CLASSIFYING CORRUPTION

YASMIN DAWOOD*

Why is corruption wrong? This Article argues that there are two main approaches to conceptualizing the "wrong" of corruption: first, corruption as an abuse of power; and second, corruption as inequality. In addition, I claim that there is a conceptual convergence between these two approaches. As a result, many forms of corruption can be framed as either an abuse of power and/or as a violation of equality. I show that even quid pro quo corruption can be framed in equality terms—a surprising outcome given the Supreme Court's acceptance of quid pro quo *corruption and rejection of equality-based corruption.*

This Article also considers Lawrence Lessig's theory of dependence corruption, which does not seem to fit readily in the two approaches described above. I suggest, first, that dependence corruption is not fully consistent with an originalist understanding of corruption, and second, that the "wrong" at issue in dependence corruption is ultimately a concern about representation.

In addition to developing a conceptual map of corruption, this Article also focuses on the theoretical puzzles and challenges posed by corruption. For corruption as inequality, I identify seven forms that it could take, and I show how some of these forms have manifested in the Court's campaign finance decisions. For corruption as the abuse of power, I consider three conceptual challenges: the distinction between acceptable and corrupt political gain the distinction between the public interest and private interests; and the distinction between acceptable and corrupt legislative responsiveness. I argue these conceptual challenges make it difficult to distinguish corruption from ordinary democratic politics.

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* Associate Professor of Law and Political Science, University of Toronto; Ph.D. (Political Science), University of Chicago; J.D., Columbia Law School. My thanks to Guy Charles, Jim Gardner, Rick Hasen, Ellen Katz, Gene Mazo, Zephyr Teachout, and the participants at the Future of Campaign Finance Reform symposium at Duke University School of Law for very helpful comments and conversations. I would also like to thank Will Messick, Todd Noelle, and the editors of the *Duke Journal of Constitutional Law & Public Policy* for their superb editorial work. I can be reached at yasmin.dawood@utoronto.ca.

INTRODUCTION

The concept of corruption is central to the United States Supreme Court's campaign finance decisions, yet despite its significance, the meaning of corruption is deeply contested. The Court has offered a number of definitions of corruption over the years.[1] These definitions are not only inconsistent from case to case but they have also given rise to considerable disagreements between the majority and dissent in individual cases. In *Citizens United v. FEC*,[2] the majority settled on a narrow quid pro quo understanding of corruption,[3] yet it is not completely clear what this quid pro quo approach means, either in theory or in practice. Notwithstanding these disagreements, there is little doubt that the meaning and scope of the concept of corruption has profound consequences for democratic government; indeed, the concept of corruption was scrutinized yet again in *McCutcheon v. FEC*.[4]

This Article intervenes in this debate by asking the following question: Why is corruption wrong? Is there some common activity or problem that underlies the different varieties of corruption? Or, to put it another way, what is it about the different varieties of corruption that make them corrupt? In addition to developing a conceptual map of corruption, this Article seeks to shed light on some of the deep-seated theoretical difficulties with the concept of corruption.

This Article proceeds in four parts. Part I sets out two main approaches to conceptualizing the wrong of corruption. The first approach is that corruption amounts to an abuse or misuse of public power; that is, it involves the use of public power for private ends. The second approach is that corruption violates the principle of political equality. In addition, Part I argues that there is a point of convergence between corruption as the abuse or misuse of public power and corruption as inequality. Because of this conceptual convergence, these two strands of corruption are simultaneously present in many of the Court's categories of corruption, including bribery and quid pro

1. For a discussion, see Richard L. Hasen, Buckley *is Dead, Long Live* Buckley: *The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 PENN. L. REV. 31, 35–46 (2004).

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

3. *Id.* at 909.

4. 134 S. Ct. 1434, 1441 (2014) (describing quid pro quo corruption as the only constitutional target for campaign finance regulations and detailing activities not considered 'corruption').

quo corruption. For this reason, various forms of corruption can be framed as both a violation of public power-based arguments and a violation of equality-based arguments.

Part I also considers Lawrence Lessig's theory of dependence corruption, which does not seem to fit readily in either of the two categories described above. In a highly influential book, Lessig has invited the nation to consider and redress the problem of dependence corruption.[5] Although I wholeheartedly support Professor Lessig's project to reform the democratic process by addressing corruption, I have two observations about dependence corruption as a concept. My first claim is that dependence corruption is not fully consistent with an originalist understanding of corruption, and my second suggestion is that the "wrong" at issue in dependence corruption is ultimately a concern about representation.

Part II turns to quid pro quo corruption. Even though the Court makes a distinction between equality-based corruption arguments, which it rejects, and quid pro quo corruption arguments, which it accepts, I show that both corruption as an abuse or misuse of public power and corruption as inequality are the wrongs at issue in quid pro quo corruption.

Part III addresses corruption as inequality, with a particular focus on the Supreme Court's campaign finance decisions. I identify seven forms of corruption as inequality, which help to distinguish "anti-distortion" and "undue influence" understandings of corruption. This Part also discusses the doctrinal challenges that result from the Court majority's hostility to equality-based corruption arguments.

Part IV focuses on corruption as the abuse or misuse of public power. I describe three genuinely difficult conceptual problems that arise when we conceive of corruption as the use of public power for private ends. These problems are: first, the distinction between acceptable and corrupt political gain; second, the distinction between the public interest and the private interest; and third, the distinction between acceptable and corrupt legislative responsiveness. I argue that these conceptual challenges make it very difficult to distinguish corruption from ordinary democratic politics.

5. LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011).

I. CONCEPTUALIZING CORRUPTION

Scholars have categorized various kinds of corruption. Thomas Burke has distinguished three kinds of corruption: quid pro quo, monetary influence, and distortion.[6] Zephyr Teachout has identified five categories: criminal bribery, inequality, drowned voices, a dispirited public, and a lack of integrity.[7] Deborah Hellman has described three principal kinds of corruption: corruption as the deformation of judgment, corruption as the distortion of influence, and corruption as the sale of favors.[8]

Although there are various approaches in the literature to classifying corruption, I argue that there are two general approaches to conceptualizing the "wrong" of corruption. The first approach is that corruption amounts to an abuse of power. The second approach is that corruption violates the principle of political equality. This Part also considers Lawrence Lessig's theory of dependence corruption, which offers an alternative approach to understanding corruption.

A. Corruption as an Abuse of Public Power

The first approach is that corruption amounts to an abuse or misuse of public power. This abuse of power is specifically rooted in the use of public power for private ends. When understood as the use of public power for private ends, corruption has a long historic tradition, one that extends into the current period. As Dennis Thompson notes, corruption consists of the "pollution of the public by the private."[9] On this view, corruption takes place when public power is being used for private gain. Samuel Issacharoff observes that "the corruption concern is really a concern with ensuring public—rather than private—outputs from the policymaking process"[10] A problem arises when special interests "seek to capture the power of government, not to create public goods, but to realize private gains through subversion of state authority."[11] It is important to note that this approach—corruption as an abuse of public power—is not

6. Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127, 131 (1997).

7. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 387 (2009).

8. Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1396–97 (2013).

9. Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1038 (2005) [hereinafter Thompson, *Concepts*].

10. Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 121 (2010).

11. *Id*. at 127.

necessarily connected to the form of government. For example, we may describe a monarchical system of government as corrupt because it has degenerated into a tyranny.

What does the "use of public power for private ends" mean? As Zephyr Teachout explains in her seminal work on the anti-corruption principle (discussed below),[12] this concern about corruption (the use of public power for private ends) was at the heart of the republican tradition.[13] Philip Pettit, who is the leading contemporary theorist of the republican tradition, has provided the most extensive theoretical treatment of why the use of public power for private ends is wrong.[14] Pettit argues that republican theory is primarily concerned with what he calls freedom as non-domination.[15] According to Pettit, domination is the capacity to interfere on an arbitrary basis in certain choices that another person is in a position to make.[16] Arbitrariness occurs when an agent's actions are subject only to the will or judgment of the agent; that is, the actions are chosen without reference to the interests of those affected by the acts.[17]

When translated to the level of the state, what is required is that the state "is forced to track the common good."[18] In order for state action to be non-dominating, Pettit argues that power must be exercised in "a way that tracks, not the power-holder's personal welfare or world-view, but rather the welfare and world-view of the public."[19] A host of constitutionalist constraints, such as the rule of law and the separation of powers prevent the state's power from being used for private ends. The key idea is that, under the republican tradition, state actors engage in dominating behavior if they advance private interests instead of the common good.

Pettit's arguments draw together a long republican tradition that includes Thucydides, Plato, Aristotle, Machiavelli, and Rousseau.[20]

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12. *See infra* Part I.D.

13. Teachout, *supra* note 7, at 350–51.

14. This discussion is drawn from Yasmin Dawood, *The Anti-Domination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411 (2008).

15. PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 52 (1997).

16. *Id*.

17. *Id*. at 55.

18. Philip Pettit, *The Common Good*, *in* JUSTICE AND DEMOCRACY 150, 156 (Keith Dowding et al, eds., 2004).

19. PETTIT, *supra* note 15, at 56.

20. *See e.g.* PETTIT *supra*, note 15 at ch. 1. (describing and explaining certain contributors to the republican tradition). Sources for Pettit's understanding of the republican tradition

Corruption for these philosophers meant the moral incapacity of rulers and citizens alike to make reasonably disinterested commitments that would benefit the common welfare.[21] John Locke's *Second Treatise of Government*, which had a formative influence on the theories of the founding period, likewise warned of the dangers of self-serving actions on the part of a ruler.[22] For Locke, tyranny involves the "use of the Power any one has in his hands; not for the good of those, who are under it, but for his own private separate Advantage."[23] Power is abused when the ruler's "Commands and Actions are not directed to the preservation of the Properties of his People, but the satisfaction of his own Ambition, Revenge, Covetousness, or any other irregular Passion."[24] In sum, one approach to the wrong of corruption is that it involves an abuse of power, understood specifically as the use of public power for private ends.

B. Corruption as Inequality

The second reason that corruption is wrong is that it violates the principle of political equality.[25] This approach is particular to the democratic form of government. The democratic form of government is premised on the equality of its citizenry—not only an equality before the law but also an equal right to participate in the political process. As Mark Warren argues, corruption results in "duplicitous exclusion" because it excludes those who have a right to be included in democratic decision-making, and does so in a manner that cannot be publicly justified.[26] Citizens are disempowered by corruption

include: Thucydides, *The Peloponnesian War*, *in* THE COMPLETE WORKS OF THUCYDIDES (Robert Crawley, trans., 1934); PLATO, THE REPUBLIC (Alexander Dunlop Lindsay trans., Heron Books 1957); ARISTOTLE, POLITICS (trans. Ernest Barker, 1962); Niccolo Machiavelli, *Discourses on the First Decade of Titus Livius*, *in* MACHIAVELLI: THE CHIEF WORKS AND OTHERS (Allan Gilbert trans., 1965); Jean-Jacques Rousseau, *Discourses on Inequality*, *in* ROUSSEAU: THE DISCOURSES AND OTHER EARLY POLITICAL WRITING (Victor Gourevich ed., 1997).

21. *See* J. Patrick Dobel, *The Corruption of a State*, 72 AM. POL. SCI. REV. 959, 959–60 (1978).

22. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 284 (Peter Laslett, ed., 1960) (1690).

23. *Id*. at 398–99.

24. *Id*.

25. There is another connection between inequality and corruption, but this connection is better thought of as a cause-and-effect relationship. As I argue elsewhere, the divide between the rich and the poor, and its connection to the corruption and collapse of the society and the government, was a central challenge for the Framers when they devised the institutions of republican government. *See* Yasmin Dawood, *The New Inequality: Constitutional Democracy and the Problem of Wealth*, 67 MD. L. REV. 123, 128 (2007).

26. *See, e.g.*, Mark E. Warren, *What Does Corruption Mean in a Democracy?*, 48 AM. J.

because they lose the equal opportunity to participate in the process through which government outcomes are determined. David Strauss argues that corruption is a "derivative problem" because a concern about corruption is actually a concern about inequality and the dangers of interest group politics in the democratic process.[27] He writes: "Those who say they are concerned about corruption are actually concerned about two other things: inequality and the nature of democratic politics. If somehow an appropriate level of equality were achieved, much of the reason to be concerned about corruption would no longer exist."[28]

There are significant conceptual challenges to defining the equal right to participate in the political process. Does it mean an equal right to vote? Or does it mean an equal right to influence public policy? As discussed in more detail in Part III below, corruption as inequality can take many forms.

C. Convergence between the Power and Equality Conceptions of Corruption

It is also worth noting that a point of convergence emerges between corruption as an abuse of power and corruption as inequality—but only when discussing corruption in a democracy. This point of convergence arises, I suggest, because of the conceptual overlap between the ideal forms of the two approaches to corruption.

As scholars have observed, it is impossible to speak of corruption in political life without implicitly referring to an ideal state.[29] For Thomas Burke, corruption is a "notion that something pure, or natural, or ordered has decayed or become degraded."[30] For this reason, one cannot use the concept of corruption without "some underlying notion of the pure, original or natural state of the body politic."[31] A standard of political corruption must therefore "be grounded in a convincing theory of representation."[32] In a similar vein, Deborah Hellman describes corruption as "derivative" because it

POL. SCI. 328, 333 (2004).

27. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994).

28. *Id*.

29. Burke, *supra* note 6, at 128.

30. *Id*.

31. *Id*.

32. *Id*.

"depends on a theory of the institution or official involved."[33]

For corruption as an abuse of power, the ideal at stake is the use of public power for the public interest (Ideal 1). For corruption as inequality, the ideal at stake is an equal right to participate in the political process (Ideal 2). When we say that public power ought to be used to forward the public interest (Ideal 1), there is an implicit reference to the ideal of equal participation in the political process (Ideal 2). This is because our modern conception of the public interest tends to be procedural rather than substantive. For philosophers such as Rousseau and Locke, there was a "common good" that had a substantive content distinct from private ends.[34] In our post-Rawlsian world, however, we tend to focus on the *process* by which the public interest is determined.[35] The procedural approach holds that as long as we have a legitimate process then whatever substantive outcome is produced will constitute the public interest.[36]

What is needed for this process to be legitimate? The process is legitimate if it is inclusive of all individuals who will be affected by the decision. That is, the process by which the public interest is determined is legitimate provided there is a right to equal participation in that process. This is, of course, a simplified version of the distinction between procedural and substantive accounts of the public interest, but the general point is that under a procedural approach to determining the public interest, there is an implicit baseline of equal participation in that process.

The implication of the conceptual overlap between Ideal 1 and Ideal 2 is that there will also be a conceptual overlap between the corrupted versions of these ideals. That is, corruption as inequality and corruption as an abuse of power will also have points of convergence. Indeed, these points of convergence have long been noted in the context of campaign finance regulation. As Stephen Gottlieb observes, "corruption is abhorrent because it permits disproportionate influence."[37] The corruption argument is thus "a variant on the problem of political equality: unequal outlays of political money

33. Hellman, *supra* note 8, at 1389.

34. *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (1762), *reprinted in* 2 THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 60 (Victor Gourevitch, ed., 1997).

35. JOHN RAWLS, A THEORY OF JUSTICE 73–77 (1971).

36. *Id.*

37. Stephen E. Gottlieb, *The Dilemma of Election Campaign Finance Reform*, 18 HOFSTRA L. REV. 213, 229 (1989).

create inequality in political representation."[38]

The remainder of this Article will demonstrate how these two strands of corruption are simultaneously present in many of the Court's categories of corruption, including quid pro quo corruption (discussed in Part II). With respect to corruption an inequality (discussed in Part III), a significant challenge is doctrinal as a result of the current Court majority's intolerance for any commitment to equality (however defined) in the realm of speech. Corruption as an abuse of power raises genuinely difficult conceptual challenges for distinguishing between corrupt democratic activity and non-corrupt democratic activity (discussed in Part IV). Because of the conceptual overlap between the two approaches to corruption, these challenges also apply to some forms of corruption as inequality.

D. Dependence Corruption

In his landmark book, Lawrence Lessig identifies another form of corruption—"dependence corruption."[39] After providing a brief description of dependence corruption, this section considers the question of why dependence corruption amounts to a form of corruption. It canvasses various possibilities including the idea that dependence corruption falls into the "corruption as inequality" category. Next, this section claims that dependence corruption is not fully consistent with an originalist understanding of corruption. Finally, this section suggests that the "wrong" at issue in dependence corruption is ultimately a concern about representation.

Dependence corruption arises when a political institution has become corrupted "because the pattern of influence operating upon individuals within that institution draws them away from the influence intended."[40] Lessig claims that dependence corruption is an originalist understanding of corruption. According to Lessig, the Framers intended for Congress to be "dependent on the people alone."[41] This dependence on the people becomes corrupted when Congress becomes dependent on another set of political actors, namely contributors and lobbyists.[42] Dependence corruption does not

38. Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 679 (1997).

39. LESSIG, *supra* note 5, at 16.

40. *Id.*

41. *See* THE FEDERALIST NO. 52 (James Madison).

42. As Guy-Uriel Charles points out, dependence corruption is based on an unstable notion of who counts as "the People." Guy-Uriel E. Charles, *Corruption Temptation* 120 CALIF.

take place via bribery or quid pro quo transactions, but is instead rooted in a complex set of relationships and mutual obligations.[43] This kind of corruption arises as a result of a gift economy based on the giving and receiving of political favors.[44] Dependence corruption operates at the level of the institution; political actors are do not need to be corrupt themselves in order for dependence corruption to operate.[45]

Why is dependence corruption a form of corruption? Lessig argues that dependence corruption is distinct from bribery and quid pro quo corruption. He also resists the idea that dependence corruption amounts to an argument about political equality. For instance, Lessig observes that dependence corruption leads to distortions in policy because the objectives of donors are most likely different than the objectives of the people.[46] For this reason, Richard Hasen has suggested that the term "dependence corruption" is actually referring to "a *distortion* of policy outcomes, or *skew*, caused by the influence of money, channeled through lobbyists, on politics."[47] And the Court once found, in *Austin v. Michigan Chamber of Commerce*, that large expenditures have "corrosive and distorting effects" since they do not necessarily reflect public support for the corporation's political ideas.[48]

However, the difficulty with this distortion argument, as Hasen points out, is that the Court subsequently rejected *Austin*–type distortion arguments in *Citizens United* on the grounds that such arguments are actually about equality.[49] In any event, Hasen notes, Lessig himself thinks that *Austin* was wrongly decided and that dependence corruption is not an egalitarian argument.[50] According to Hasen, the other possibility is that dependence corruption is an anti-rent seeking interest.[51] Although Justice Stevens in his dissenting opinion in *Citizens United* seemed to be favoring an anti-rent seeking or national economic welfare rationale for corporate spending limits,

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L. REV. 25, 30–32.

43. LESSIG, *supra* note 5, at 110.

44. *Id*. at 107, 110.

45. Lawrence Lessig, *What An Originalist Would Understand "Corruption" to Mean*, 102 CAL. L. REV 1, 1 (2014) [hereinafter Lessig, *Originalist*].

46. LESSIG, *supra* note 5, at 232–33.

47. Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550, 571 (2012).

48. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990)

49. *Id*. at 572.

50. *Id*. (referring to LESSIG, *supra* note 5, at 240–41).

51. *Id*. at 574.

Hasen is very doubtful that the Court would adopt such a justification.[52]

In response to Hasen, Lessig argues that distortion is only a consequence of the pathology of dependence corruption.[53] The government suffers from dependence corruption because it "either, strictly speaking, has become 'dependent' upon an influence other than 'the people,' or, less strictly, that it has become dependent upon an influence that is inconsistent with a dependence upon 'the people.'"[54] Lessig writes that politicians are now "dependent upon their funders," who are not the people.[55] Without the support of these funders, candidates would not be able to run for office.[56] In addition, this dependence on the funders conflicts with a dependence upon the people alone.[57] The funders constitute a "tiny slice of the 1%, and that dependence plainly conflicts with a 'dependence on the people alone.'"[58]

Although I am very much in favor of Lessig's visionary project to tackle corruption in the political process, I query whether dependence corruption is fully consistent with an originalist understanding of corruption. Lessig's argument about dependence corruption is based on a reading of the Constitution. The idea that the House is supposed to be "dependent upon the people alone" is taken from *Federalist No. 52*. In addition, Lessig relies on Zephyr Teachout's highly influential work on the anti-corruption principle to make the case that dependence corruption is an originalist form of corruption. I think there are important aspects of dependence corruption that are originalist, in particular the idea that corruption is a systemic institutional problem.

Yet there are two important ways in which Lessig's account of dependence corruption seems to differ from Teachout's arguments about the Framers' understanding of corruption. The first is that Lessig's definition of dependence corruption seems to exclude the central understanding of corruption in the republican tradition—an understanding of corruption that is also reflected in Teachout's

52. *Id*. at 575.
53. Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. FORUM 61, 64–65 (2013) [hereinafter Lessig, *Reply to Hasen*].
54. *Id*. at 65.
55. *Id.*
56. *Id*.
57. *Id*.
58. *Id*. at 66.

discussion of the influence of that tradition on the Framers. This central understanding, shared by republican theorists including the Framers, is that corruption consists of the use of public power for private ends.[59] Second, and relatedly, it seems as though Lessig's use of the concept of "dependence," while overlapping with Teachout's use of dependency, also differs from it in a significant respect.

Teachout argues that the anti-corruption principle informs the theory, substance and structure of the Constitution.[60] The Framers were influenced by various thinkers, including Montesquieu and Machiavelli, who focused considerable attention on the dangers of corruption.[61] Several features of the House and Senate were explicitly designed to act as a bulwark against corruption.[62] The Framers were particularly concerned about the corrupting effects of the perks of office, which led to the adoption of the Ineligibility Clause, the Emoluments Clause, and the Foreign Gifts Clause.[63] The division of power within government, and the large size of the republic, were also thought to protect against corruption.[64]

Teachout defines political corruption (as understood by the Framers) as the "self-serving use of public power for private ends."[65] She observes that for the Framers, an "individual is corrupt if he uses his public office primarily to serve his own ends."[66] Political corruption takes various forms. Teachout identifies four forms of political corruption: (1) bribery; (2) public decisions to serve private wealth made because of dependent relationships; (3) public decisions to serve executive power made because of dependent relationships; and (4) the use by public officials of their positions of power to become wealthy.[67] Teachout's description of corruption falls squarely within the republican tradition.[68]

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59. Teachout, *supra* note 7, at 373–74.

60. *Id.* at 342–43.

61. *Id*. at 351.

62. For example, it was considered to be more difficult to "buy, or create dependency, across a large body" which meant that the "sheer size and diversity of the House would present a formidable obstacle to someone attempting to buy its members." *Id*. at 356.

63. *Id*. at 359.

64. *Id*. at 369–71.

65. *Id*. at 373–74.

66. *Id*. at 374.

67. *Id*. at 373–74.

68. For a debate over the scope of the anti-corruption principle, *see* Seth Barrett Tillman, Citizens United *and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. U. L. REV. COLLOQUY 1 (2012); Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 NW. U. L. REV. COLLOQUY 30 (2012); Seth Barrett Tillman, *The Original Public Meaning of the Foreign*

The concept of dependency is important in Teachout's theory. The trouble with improper dependence, as I read Teachout's account, is that it gives rise to corruption. Teachout defines one kind of political corruption as "public decisions to serve private wealth *made because of* dependent relationships."[69] That is, corruption takes place when public officials make public decisions that serve the private ends of wealthy people. The corrupt act is the use of public power for private ends. These public officials serve the interests of the wealthy people because they are "dependent," i.e., they have received money from these wealthy people. The dependency of the public officials on the wealthy people is what gives rise to the corrupt act. Th dependency, ishowever, does not have to be financial because the benefit could be the offer of government offices and presidential appointments.[70]

As an example of dependency, Teachout refers to the problem of a wealthy man buying off public officials. Although a wealthy man "might be tempted to create dependent Senators," it would be too difficult for that man "to buy off enough of [the] members" of the Senate, House, Judiciary and Presidency.[71] To use this example as an illustration, the bought-off Senators would be "dependent" on the wealthy man. This dependency is worrisome because the Senators would likely engage in corrupt decision-making by serving the private interests of the wealthy man instead of serving the public interest. In another example, the Presidential Emoluments Clause was designed to "prevent the President from becoming overly dependent upon Congress (and thereby corrupted by them) or a particular state."[72] Once again, it seems as though the dependency gives rise to the corruption—the President would be "thereby corrupted" as a result of the financial dependency on Congress. It could be that corruption (i.e. the use of public power for private ends) necessarily follows from improper dependence, but it is unclear to me why the improper dependence *is* corruption.

By contrast, Lessig seems to be saying that "corruption is the improper dependence."[73] Dependence corruption takes place when

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Emoluments Clause: A Reply to Professor Zephyr Teachout, 107 NW. U. L. REV. COLLOQUY 180 (2012); Zephyr Teachout, Closing Statement, *Constitutional Purpose and the Anti-Corruption Principle*, 108 NW. U. L. REV. COLLOQUY 200 (2014).

69. Teachout, *supra* note 7, at 373–74 (emphasis added).

70. *Id*. at 364.

71. *Id*. at 381.

72. *Id*. at 365.

73. In an amicus brief for *McCutcheon v. FEC*, Lessig writes that the "Framers had a very

the government has become dependent on an influence other than the people alone. The government has become dependent on the funders who only constitute 0.05 percent of the population, and this improper dependence conflicts with the dependence on the people alone.[74] Lessig admits that although corruption for the Framers included "our modern sense of individual corruption—the abuse of public office for private gain," it also included an understanding of corruption at the level of the institution.[75] This institutional sense of corruption is dependence corruption. The corruption seems to lie in the conflict itself—the conflict between improper and proper dependence.[76] Lessig writes that "the way we fund elections has created a dependency that conflicts with the dependency intended by the Constitution. That conflict is a corruption."[77]

I am puzzled by Lessig's description of the "use of public power for private ends" idea as being about individual corruption in sharp distinction to dependence corruption, which is about institutional corruption. Corruption, understood as the use of public office for private ends, was *not* an exclusively individual concept for republican theorists including the Framers; it was institutional as well.[78] For philosophers such as Locke, Machiavelli, Montesquieu, and Rousseau among others, corruption (understood as the use of public power for private ends) existed not only at the individual level but also at a systemic institutional and societal level.[79] Indeed, they believed that an entire society and government could collapse because of

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specific conception of the term "corruption" in mind, one at odds with McCutcheon's more modern understanding of that term. For the Framers, "corruption" predicated of institutions as well as individuals, and when predicated of institutions, was often constituted by an "improper dependence." Brief of Amicus Curiae of Professor Lawrence Lessig in Support of Appellee at 2, *McCutcheon v. FEC*, 134 S. Ct. 1434, No. 12-563 (July 25, 2013).

74. Lessig, *Originalist, supra* note 45, at 6.

75. *Id.* at 7.

76. Lessig writes that the independence of Congress (understood as a dependence on the people alone):

> [G]ets corrupted when a conflicting dependency develops within Congress. A dependency that draws Congress away from the dependence that was intended. A dependency that makes Congress less responsive to the people, because more responsive to it. In this second sense of corruption, it is not individuals who are corrupted within a well-functioning institution. It is instead an institution that has been corrupted, because the pattern of influence operating upon individuals within that institution draws them away from the influence intended.

LESSIG, *supra* note 5, at 231.

77. Lessig, *Originalist, supra* note 45, at 6.

78. THE FEDERALIST NO. 63 (James Madison) (assessing the possible corruption of the Senate, state legislatures, House of Representatives, and the people at large).

79. Dobel, *supra* note 21, at 959–64.

corruption.[80] This threat of a republic collapsing because of corruption was one of the central challenges that Madison faced when designing the Constitution.[81]

I also find it puzzling that Lessig has divorced dependence corruption from the "use of public power for private ends" understanding of corruption—an understanding that is evident in Teachout's discussion of dependency and that is also a core feature of the Framers' approach to corruption and the republican tradition more broadly. By equating corruption with improper dependence, Lessig seems to have excluded a long tradition that has defined individual and institutional corruption as "the use of public power for private ends." It seems to me that an improper dependence (on the funders) does not constitute corruption itself but instead gives rise to corruption, in the same way that the intended dependence (on the people alone) serves a bulwark against corruption.[82] Lessig may have excluded "the use of public power for private ends" from his definition of dependence corruption because he wishes to characterize the institution, and not the public officials working in the institution, as corrupt. Yet this characterization of corruption is based on a distinctively modern post-Foucaultian understanding of human agency. Given the centrality of the "use of public office from private ends" concept within the Framers' understanding of systemic institutional corruption, Lessig needs to explain why dependence corruption does not contain this key aspect of corruption.

My second question is about the "wrong" at issue in dependence corruption. According to Lessig, the problem with dependence corruption is that the people have influence "only after the funders of campaigns have exercised their influence first."[83] This prior influence of the funders leads to the following problems:

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80. According to the republican tradition, the wealthy and powerful subvert public office in order to protect themselves from the envy of the lower classes. In response, the disempowered majority lose their loyalty to the community and act selfishly to gain what they can. Ordinary citizens mistrust the political system so severely that they cease to voluntarily support the primary structures of governance or to make any commitments to the common welfare. The factional conflict eventually engulfs the government itself. The relationship between the wealthy and the poor disintegrates into violence and polarization, leading to a cycling between demagogic and anarchical popular uprisings, on the one hand, and autocratic control, on the other.

81. THE FEDERALIST NO. 10 (James Madison).

82. It may be the case that the term "improper dependence" was sometimes used as a shorthand for "corruption," since such a dependence created the motivation and opportunity for the subversion of public power.

83. Lessig, *Reply to Hasen*, *supra* note 53, at 4.

> [A] reasonable citizen could reasonably believe that the candidates have become distracted. The reasons for an ordinary citizen (who is not also a large funder) to engage with his government have been weakened. The influence of the ordinary citizen [is] diminished. The dynamic of representative government—in which representatives are responsive to all citizens—has been undermined by a system that makes representatives responsive to funders first, and only then to citizens. This is a plain corruption of the system of influence the Framers intended.[84]

This explanation, though shedding helpful light on dependence corruption, raises additional questions. As a start, the idea that the undermining of the dynamic of representative government is "a plain corruption of the system of influence the Framers intended" may be true, but here Lessig seems to be using the word "corruption" in a somewhat different way than political corruption. This different usage is also evident in his characterization of the conflict between the intended dependence on the people and the improper dependence on the funders as amounting to "*a* corruption."[85] Corruption in Lessig's usage means something like corruption as "decay" or "degeneration."[86] Whereas the concepts of decay and degeneration were associated with a more general definition of "corruption," as Teachout explains, this usage is not the same as "political corruption" as understood by the Framers, which had as its central idea the use of public power for private gain.[87]

Lessig writes that representative government "has been undermined by a system that makes representatives responsive to funders first, and only then to citizens."[88] Dependence corruption has undermined the dynamic of representative government "in which representatives are responsive to all citizens."[89] (As an aside, it is unlikely that the Framers intended the representative system to be responsive to all citizens.[90]) Although it is true that the Framers

84. *Id*.

85. Lessig, *Originalist*, *supra* note 45, at 6 (emphasis added).

86. In his presentation at the *Duke Journal of Constitutional Law & Public Policy* spring 2014 symposium, Professor Lessig relied on the Oxford English Dictionary's definition of "corruption" as involving erosion from a pristine state.

87. Teachout, *supra* note 7, at 373.

88. Lessig, *Reply*, *supra* note 53, at 4.

89. *Id*.

90. *See* Bruce Cain, *Is Dependence Corruption the Solution to America's Campaign Finance Problem?* 102 CALIF. L. REV. 37, 40 (2014).

intended for citizens to have the power to boot officials from office via elections, it is not evident that the Framers intended that representatives would be responsive on policy matters to all citizens.[91]) The system of representation is also undermined because citizens may reasonably be worried that the candidates have become "distracted" because these candidates are preoccupied with the wishes of the funders. Indeed, the problem is that the "influence of the ordinary citizen [is] diminished"—an argument that seems close to a level-the-playing-field approach.

It seems, then, that the "wrong" of dependence corruption is a deep-seated concern about the structure of representation. On this view, the wrong of dependence corruption is that it violates the principle of representation. Guy-Uriel Charles argues, for instance, that "dependence corruption is best understood as a problem of political participation and not a problem of corruption."[92] Charles notes that dependence corruption is not necessarily an equality problem because "Lessig is concerned that the state has delegated a public function, the financing of campaigns, to private parties, which have in turn created a barrier for political participation, wealth, that some citizens will never be able to overcome."[93] Though Lessig agrees with Charles that dependence corruption "is a problem of representation,"[94] Lessig states that dependence corruption is "also a corruption problem, and there's no reason it can't be both."[95] In addition, Lessig argues that the negative effects on representation should be viewed as the *consequences* of dependence corruption, not the wrong of dependence corruption.

The difficulty, though, is pinpointing the "wrong" of dependence corruption as a "wrong" about corruption.[96] Lessig's definition of

91. According to Madison, the device of representation "refine[s] and enlarge[s] 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 whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." THE FEDERALIST NO. 10, at 50 (James Madison). Rather than simply implementing the wishes of their constituents, representatives are charged with distilling the disparate interests of the people until the public good is discovered. See Bernard Manin, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 94 (1997) for a discussion of the "aristocratic effect" of Madisonian representative government.

92. Charles, *supra* note 42, at 8.

93. *Id*.

94. Lawrence Lessig, *A Reply to Professors Cain and Charles*, 102 CALIF. L. REV 49, 51 (2014).

95. *Id*.

96. Guy-Uriel Charles points out that there are at least three definitions of dependence corruption. Charles, *supra* note 42, at 3.

improper dependence does not contain within it a key ingredient of corruption according to the Framers—namely the use of public power for private ends. Without the Framers' key ingredient, I am not sure that dependence corruption amounts to an originalist understanding of corruption. Nor does dependence corruption contain within it an understanding of corruption that involves a violation of equality. Nor is dependence corruption co-extensive with bribery and quid pro quo corruption.

Dependence corruption—understood either as an improper dependence (on the funders) or as the conflict between the intended dependence (on the people alone) and the improper dependence (on the funders)—is principally about a set of relationships between public officials, funders, and citizens. In its current form, this set of relationships (which is another way of saying, this system of representation) gives rise to the problem of corruption. Dependence corruption is a very important theory for understanding the pathologies of the system of representation. Although Lessig characterizes representational harms as the consequences of dependence corruption rather than the wrongs of dependence corruption, it could be the case that we can recognize a new wrong of corruption, namely, that corruption consists of the subversion of representation. Putting aside these conceptual questions, there is no doubt that the pathologies of the system of representation are crucially important to remedy, which is why Lessig's scholarly work is so essential.

II. QUID PRO QUO CORRUPTION

In *Buckley v. Valeo*,[97] the Court struck down the restrictions on spending in the Federal Election Campaign Act (FECA) on the basis that such limits constituted direct restraints on speech in violation of the First Amendment.[98] By contrast, the Court upheld FECA's restrictions on *contributions* on the basis that such limits prevented corruption and the appearance of corruption.[99] The Court did not define either corruption or the appearance of corruption. Instead, it declared that unlimited contributions are corrupting when they "are given to secure a political quid pro quo from current and potential

97. Buckley v. Valeo, 424 U.S. 1 (1976).
98. *Id*. at 19–20.
99. *Id*.

office holders."[100] The Court described a political quid pro quo as including, but also extending beyond, the act of bribery.[101] Laws criminalizing bribery "deal with only the most blatant and specific attempts of those with money to influence governmental action."[102]

Corruption as political quid pro quo involves more than simple bribery, but the Court has struggled to consistently define this extra conceptual space. For instance, in *FEC v. National Conservative Political Action Committee*,[103] the Court stated that "[c]orruption is a subversion of the political process."[104] Corruption subverts the democratic process because 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."[105] The Court stated that the "hallmark of corruption is the financial quid pro quo: dollars for political favors."[106]

Why is quid pro quo corruption wrong? It might help to first consider why bribery is wrong. Bribery has a relatively simple structure:

A citizen gives:	cash or other private benefit
A citizen receives:	a political outcome (particular action taken or avoided)
A public official provides:	a political outcome
A public official receives:	a private benefit such as cash

What makes bribery wrong is that a public official is using her office to obtain a private benefit. Specifically, public officials use their offices to enrich themselves; that is, they convert "public office into private wealth."[107] Bribery is wrong because it involves an abuse of public power for private gain. The private gain belongs to the official. This is the first kind of corruption—corruption as an abuse or misuse of power.

Bribery is wrong for a second reason. It is wrong because those citizens who provide bribes are rewarded with special and

100. *Id*. at 26–27.
101. *Id.* at 27–28.
102. *Id.*.
103. 470 U.S. 480 (1985).
104. *Id.* at 497.
105. *Id*.
106. *Id*.
107. Strauss, *supra* note 27, at 1373.

disproportionate responsiveness from government as compared to those citizens who do not provide bribes. Interestingly enough, the Court in *Buckley* described bribery by focusing on the inequality aspect and not on the illicit private gain aspect. According to the Court, bribery is the most blatant example of "those with money [attempting] to influence governmental action."[108]

Quid pro quo corruption is often described by the shorthand "cash for votes" exchange. One difficulty with this shorthand approach is that it truncates the transaction by only focusing on one side of the equation: a citizen gives a donation and receives a political favor. We should also consider the gain achieved by the elected official. For this reason, I think it is helpful to consider both sides of the equation:

A private donor gives:	a campaign donation
A private donor receives:	a political outcome
A public official provides:	a political outcome
A public official receives:	political gain in the form of an electoral support or win

Is it the private donor's private interest that is the problem? Or is it the public official's private interest that is the problem? If we focus on the private donor, then quid pro quo corruption is wrong because it provides the donor special and disproportionate responsiveness from government as compared to those citizens who do not donate to the official's campaign. This is the equivalent of corruption as inequality. The wrong is that the equal right to participate in the political process has been undermined.

If we focus on the public official, then quid pro quo corruption is wrong arguably because she is converting her public office into political gain. This is close to corruption as the use of public power for private gain but one important difference, as David Strauss points out, is that the gain by the public official is political rather than private.[109] This issue will be discussed further in Part IV.

The more immediate observation to be made is that even quid pro quo corruption—which at this moment is the only kind of corruption recognized by a majority of the Court as a sufficiently important governmental interest to override the First Amendment—has an equality aspect to it. The difficulty, of course, is that the Court in

108. Buckley v. Valeo, 424 U.S. 1, 27–28 (1976).
109. Strauss, *supra* note 27, at 1372.

Buckley disavowed equality as a relevant government interest. In *Buckley* the Court rejected an equalization rationale, stating in a key phrase that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[110] Granted, the equality at issue in quid pro quo corruption is not level-the-playing field equality. Instead it is inequality of legislative responsiveness to constituent concerns. That being said, a central conceptual difficulty with the Court's position in *Buckley* is that one of the wrongs of quid pro quo corruption is that citizens who donate large amounts to elected officials exert greater political influence when they request certain favors than they otherwise would do in the absence of such donations.

III. CORRUPTION AS INEQUALITY

Corruption as a violation of the principle of political equality has at least seven forms. The inequality may rest in: (1) the capacity of citizens to speak; (2) the capacity of citizens to be heard; (3) the capacity of candidates and political parties to speak; (4) the capacity of candidates and political parties to be heard; (5) citizens' access to representatives; (6) the ability of constituents to influence public officials; or (7) the responsiveness of government policy to constituent wishes. Many of these forms of inequality have been at issue at one time or another in the Court's campaign finance cases.

A. Anti-Distortion

The slippage between corruption (understood as the use of public power for private ends) and corruption (understood as a violation of equality) became more pronounced in the Court's cases after *Buckley*. As early as 1982, the Court noted that "substantial aggregations of wealth" could be translated into unequal political influence.[111] In *FEC v. Massachusetts Citizens for Life*,[112] the Court observed that the "corrosive influence of concentrated corporate wealth"[113] may make "a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas."[114]

110. *Buckley*, 424 U.S. at 48–49.
111. *See* FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 207 (1982).
112. 479 U.S. 238 (1986).
113. *Id.* at 257.
114. *Id*. at 258.

Profit seeking corporations pose a danger of distortion because of the "potential for unfair deployment of wealth for political purposes."[115] The resources available to a corporation "are not an indication of popular support for the corporation's political ideals."[116]

A few years later, in *Austin v. Michigan State Chamber of Commerce*,[117] the Court recognized a new kind of corruption distinct from quid pro quo corruption.[118] This new kind of corruption arises as a result of the "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 ideals."[119] In *Nixon v. Shrink Missouri Government PAC*,[120] Justice Breyer in a concurring opinion stated that "[in] limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process."[121]

The Court's understanding of corruption broadened to include a commitment to anti-distortion. The anti-distortion rationale was at base a concern about equality, and in particular a concern about leveling the electoral playing field. The problem, as David Cole notes, is that concentrated wealth gives "certain voices inordinate influence, not because of the power of their ideas, but because of the volume they can generate for their voices with dollars earned through commercial activities."[122] Hence, the Court's anti-corruption justification is "simply a repackaging of the equalization goal."[123]

B. Undue Influence

The "undue influence" approach to corruption, while also a concern about equality, has a slightly different emphasis than *Austin*'s leveling the playing field rationale. Instead of focusing on the unrepresentative nature of corporate speech and its potential effect on electoral outcomes, the main issue is the effects of the donation on

115. *Id.* at 259.
116. *Id*. at 258.
117. Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).
118. *Id*. at 659–60.
119. *Id*.
120. Nixon v. Shrink Mo. Gov't. PAC, 528 U.S. 377 (2000).
121. *Id*. at 401 (Breyer, J., concurring).
122. David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236, 266 (1991).
123. Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 SUP. CT. REV. 105, 109.

the judgment and decision-making of the legislators.

In *McConnell v. FEC*,[124] a five-member majority upheld the soft money and issue advertising provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA). The Court expanded the definition of corruption beyond "cash-for-votes exchanges"[125] to encompass the "undue influence on an officeholder's judgment, and the appearance of such influence."[126] The majority stated that "[j]ust 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."[127] According to the Court, undue influence was apparent in the way that political parties sold special access to officeholders.[128] By selling access to officeholders, political parties created the perception that "money buys influence."[129] The Court asserted that even if the sale of access did not secure actual influence, it gave rise to the appearance of undue influence.[130] The undue influence standard triggers both corruption as inequality and corruption as an abuse or misuse of power. The wrong of undue influence from an equality perspective is that elected officials are disproportionately responsive to the wishes of large donors as compared to other constituents. Undue influence is also wrong because public power is being used to forward the private interests of large donors instead of the public interest.

The Court has recognized that preventing the appearance of corruption is also an important governmental interest. Richard Hasen helpfully describes this interest as the "public confidence" interest.[131] It stands for the idea that if "the public believes that large donors are bribing candidates, large donors have undue influence over candidates/elected officials, large donors have unfair access to candidates/elected officials, or large donors have disproportionate influence over the outcome of elections, the public could lose

124. McConnell v. FEC, 540 U.S. 93 (2003).
125. *Id*. at 143.
126. *Id*. at 150.
127. *Id*. at 153.
128. *Id*. at 151.
129. *Id*. at 154.
130. *See id*. at 153–54.
131. Richard L. Hasen, *Super Pac Contributions, Corruption, and the Proxy War Over Coordination*, 9 DUKE J. CONST. L. & PUB. POL'Y 1, 4 (2014).

confidence in the fairness of the electoral process."[132] Hasen also identifies three additional interests at stake in individual contribution limits: the antibribery interest, the anti-undue influence interest, and the equality interest.[133]

C. Equality on Hold

A majority of the Court significantly narrowed the definition of corruption in *Citizens United*.[134] The majority struck down provisions of BCRA that prevented corporations and unions from making independent expenditures from their general treasury funds to support or oppose candidates for political office.[135] The majority held that the only governmental interest strong enough to overcome First Amendment concerns is preventing quid pro quo corruption or the appearance thereof.[136] In a marked departure from *McConnell*, the majority held that "[i]ngratiation and access, in any event, are not corruption."[137] In addition, independent expenditures, in the absence of prearrangement and coordination, do not give rise to quid pro quo corruption nor do they create the appearance of corruption.[138]

The majority also overturned the *Austin* decision, thus rejecting the antidistortion rationale. According to Justice Kennedy, *Austin*'s antidistortion rationale was an equalization rationale that was inconsistent with *Buckley*'s central tenet that the First Amendment prevents government from restricting the speech of some in order to enhance the voice of others.[139] As Richard Hasen argues, the Court's new position is in tension with prior decisions which had justified contribution limits on a broader understanding of corruption.[140] The antidistortion argument "did not deserve to be orphaned, and remains . . . a key animating principle in thinking about the desirability of campaign finance laws."[141] The Court confirmed its hostility to

132. *Id*.
133. *Id*. at 2–3.
134. Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011) [hereinafter Hasen, *Illusion*].
135. Citizens United v FEC, 130 S. Ct 876, 913 (2010).
136. *Id*. at 909.
137. *Id*. at 910.
138. *Id*. at 909–10.
139. *Id*. at 904 (quoting *Buckley*, 424 U.S. at 48–49).
140. Hasen, *Illusion*, supra note 134, at 616.
141. Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 990 (2011).

equality arguments in *Arizona Free Enterprise Club v. Bennett*,[142] by striking down a law that provided matching funds to publicly financed candidates on the grounds that the law impermissibly leveled the playing field in violation of the First Amendment.[143] In short, as James Gardner observes, the Court has adopted an anti-regulatory absolutism in the campaign finance arena.[144]

Although it is beyond the scope of this Article to provide a detailed analysis of *McCutcheon v. FEC*,[145] it is worth mentioning that the meaning of corruption was central to the Court's decision to strike down federal limits on aggregate contributions.[146] The plurality opinion reprised the narrow definition of corruption announced in *Citizens United*. It stated that any regulation of political speech must only "target what we have called 'quid pro quo' corruption or its appearance."[147] Quid pro quo corruption "captures the notion of a direct exchange of an official act for money."[148] The plurality also confined the appearance of corruption to the appearance of quid pro quo corruption.[149] Indeed, the plurality explicitly rejected the idea that the appearance of influence or access could amount to the appearance of corruption.[150] In sum, a majority of the Court has not only rejected equality-based arguments for campaign finance regulations, it has also narrowed the definition of corruption to something akin to bribery.

IV. CORRUPTION AS AN ABUSE OF POWER

The challenges presented by corruption as an abuse power are highly complex and difficult to resolve. This Part discusses the following three challenges: (1) the distinction between acceptable and corrupt political gain; (2) the distinction between the public interest and the private interest; and, (3) the distinction between acceptable and corrupt legislative responsiveness. The upshot of these challenges,

142. 131 S. Ct. 2806 (2011).

143. *Id.* at 2813.

144. James A. Gardner, *Anti-Regulatory Absolutism in the Campaign Arena:* Citizens United *and the Implied Slippery Slope*, 20 CORNELL J. L. & PUB. POL'Y 673, 675 (2011).

145. McCutcheon v. FEC, 134 S. Ct. 1434 (2014). The decision was handed down shortly before this Article was sent to press.

146. The result reached by a four-member plurality of the Court was joined by Justice Thomas in his concurring opinion.

147. *Id*. at 2.

148. *Id*. at 2–3.

149. *Id*. at 19.

150. *Id*.

I suggest, is that it is very difficult to distinguish corrupt democratic activity from non-corrupt democratic activity. Because of the conceptual overlap between public power-based corruption arguments and equality-based corruption arguments, these challenges would also apply to some forms of corruption as inequality.

A. The Pursuit of Political Gain

We often speak of corruption as involving the use of public office for "personal or political gain," but it is important to retain a distinction between personal gain and political gain. As David Strauss observes, there is an important difference between bribery and corruption.[151] Bribery involves the use of public office for personal non-political gain. By contrast, quid pro quo corruption involves the use of public office for political gain. The public official receives a campaign donation, and in exchange, provides a political outcome sought by the donor. The public official is motivated by political gain; specifically, the prospect of re-election.[152] An elected representative's chance of getting re-elected is helped by campaign contributions because these contributions can be used to pay for electoral advertising.

This distinction is similar to the distinction drawn by Dennis Thompson between individual corruption and institutional corruption.[153] Individual corruption refers to bribery, extortion, and simple personal gain. Institutional corruption takes place when "the gain a member receives is political rather than personal, the service the member provides is procedurally improper, and the connection between the gain and the service has a tendency to damage the legislature or the democratic process."[154]

Although the pursuit of political gain is self-interested, it is not necessarily a wrong. Indeed, the difficulty posed by corruption is that it consists of the same mechanism that undergirds democratic accountability. As Strauss argues, it is not necessarily a bad thing for an official to use "the power of her office, not for personal enrichment, but in order to remain in office longer."[155] According to

151. Strauss, *supra* note 27, at 1372.
152. *Id*. at 1373.
153. DENNIS F. THOMPSON, ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION 7 (1995) [hereinafter THOMPSON, ETHICS].
154. *Id*.
155. Strauss, *supra* note 27, at 1373.

the Framers, the desire of elected officials to get re-elected will provide a safeguard against these officials abusing their power.[156] In other words, elected officials are supposed to be motivated by the prospect of political gain. Elected officials acting for political gain is not the problem; indeed, it is meant to be the solution to the problem of public officials not acting in the public interest.

It is very difficult, however, to identify the point at which the use of public office for political gain transforms into corruption. This is because corrupt activity overlaps with conduct that is expected in politics.[157] According to Thompson, what makes certain conduct corrupt is that "it violates principles that promote the distinctive purposes of the institution."[158] One possibility is that we can recognize corruption when the public interest is taken over by private interests. This approach begs the question: What is the public interest?

B. The Public Interest and Private Interests

The next conceptual puzzle involves the problem of the public interest. How do we know what the public interest entails? Is the public interest always separate from private interests? Or is the public interest just a collection of private interests? If the political process produces a private output, does this constitute corruption? The proceduralist approach holds that the public interest is the outcome that is arrived at through a legitimate decision-making process. A legitimate decision-making process is one in which all persons affected by the decision ought to have an equal right to participate in the process. Yet there are two main ways in which we can conceive of this participation. These two approaches are the aggregative and deliberative models of democracy.[159]

Under the aggregative model, citizens' preferences are identified, aggregated, and translated into a selection of laws.[160] A key idea is that the democratic process must accord equal consideration to the interests of each citizen. The role of the state is to employ a neutral device, such as majority rule, to transform citizen preferences into policy. By contrast, under the deliberative model, citizens and public

156. THE FEDERALIST NO. 52 (James Madison).
157. THOMPSON, ETHICS, *supra* note 153, at 7.
158. *Id*.
159. The following discussion is drawn from Yasmin Dawood, *Second-Best Deliberative Democracy and Election Law*, 12 ELECTION L.J. 401 (2013).
160. CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 7 (2001).

officials engage in deliberation to determine which laws should be adopted. Policies are chosen on the basis that they are supported by the best reasons. The deliberative account differs from the aggregative account in a crucial respect because it holds that individuals' judgments may not be motivated by self-interest. Thus, the aggregative account is associated with self-interested preferences while the deliberative account is associated with public-regarding judgments. The state must ensure that all those affected by the decision-making are included in the deliberation on equal terms.[161]

The upshot is that on the aggregative account, the public interest can consist of those private preferences that have been approved through a neutral mechanism such as a majority vote. The fact that private citizen preferences have been enacted into law is not on its own evidence of corruption. For Thompson, private interests become legitimated through the democratic process by the process of deliberation.[162] That is, private interests can be transformed into public purposes provided that these private interests are subjected to the democratic process.[163] By contrast, private interests contaminate the public interest when they influence decision-making outside of the democratic process.[164] These private interests are corruptive because they have not gone through the democratic process.[165]

On this view, corruption takes place when private interests have not been subjected to the democratic process. The difficulty is that private (or special) interests are routinely subjected to the democratic process and have been enacted into law.[166] It is very difficult to distinguish this kind of corruption from the ordinary political process in which private interests are transformed into the public interest.

C. Legislative Independence and Legislative Responsiveness

How independent should legislative decision-making be from constituent wishes? Or as Hanna Pitkin put it, "[s]hould (must) a representative do what his constituents want, and be bound by mandates or instructions from them; or should (must) he be free to

161. IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 23 (2000).
162. THOMPSON, ETHICS, *supra* note 153, at 28.
163. Thompson, *Concepts*, *supra* note 9, at 1039.
164. THOMPSON, ETHICS, *supra* note 153, at 28.
165. *Id*.
166. Stephen Sachs argues, for instance, that "protecting the government from private influence is too diffuse a goal." Stephen E. Sachs, *Corruption, Clients, and Political Machines: A Response to Professor Issacharoff*, 124 HARV. L. REV. F. 62, 62 (2011).

act as seems best to him in pursuit of their welfare?"[167]

Under the independence (trustee) approach, legislators make decisions only based on an objective view of what the public interest demands. In other words, the decision should be made only on the merits, independently of all other considerations. On this view, any influence by constituents would be improper.[168] Under the mandate approach, by contrast, legislators are responsive to the views of their constituents. The question, though, is which constituents should be influential? Should the legislator follow all the constituents' wishes, or only a segment of the constituents? As Pamela Karlan and Samuel Issacharoff observe, what is required is some theory of what a "clean" process would produce in terms of policy outcomes.[169]

The ideal position is most likely some combination of independence from constituents' wishes and responsiveness to their wishes. Indeed, Pitkin describes a range of in-between options.[170] In the event the legislator is responsive to her constituents' wishes, at what point does this responsiveness become corruption? Corruption arguably takes place when representatives are too closely tied to their constituents' wishes; that is, when there is not enough independent judgment.[171] The "undue influence" standard in *McConnell* seems to capture the idea that certain kinds of responsiveness amount to corruption. The majority described the "danger that officeholders will decide issues not on the merits [independence/trustee model] or the desires of their constituencies [mandate model]."[172] Instead, officeholders will decide issues "according to the wishes of those who have made large financial contributions valued by the officeholder."[173] It would seem that satisfying the wishes of large donors is corruptive, while satisfying the wishes of constituents is not. Justin Levitt describes the problem as follows: "A corporation trades substantial expenditures for favorable legislation, which is unremarkable when the legislation also benefits the voting constituency, and pernicious

167. HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION 145 (1967).

168. Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 833 (1985). There are, of course, many forms of influence in addition to campaign finance donations. *See* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1077 (1996).

169. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1718–19 (1999).

170. PITKIN, *supra* note 167, at 146.

171. Strauss, *supra* note 27, at 1375.

172. McConnell v FEC, 540 U.S. 93, 153 (2003)

173. *Id.*

when the broader constituency is harmed, particularly if the harm is not sufficiently severe to provoke a collective response from the broader constituency."[174] As Daniel Lowenstein points out, the legislative process is also tainted by the legislator's conflict of interest between serving the constituency and serving his or her own self-interest to secure campaign funds.[175]

At the same time, it is not immediately apparent how political responsiveness to constituents who make campaign donations differs from good democratic accountability. The key distinction between the two seems to be that elected officials are "influenced to act contrary to their obligations of office."[176] The inference is that in the absence of the campaign donation, the elected official would not have taken the particular action to assist the donor. The problem is not that legislators are responsive to citizen demands because this responsiveness is the hallmark of democratic accountability. Instead, the argument is that the legislator would not have met the wishes of that particular constituent but-for the donation the legislator received from that constituent.

CONCLUSION

Corruption is a highly contested concept. The good news is that corruption can be defined in any number of ways. The bad news is that a majority of the Supreme Court has the final say on where the line should be drawn between ordinary democratic politics and corruption. The majority's line-drawing has restricted corruption to a very narrow strip of the conceptual landscape. The Court's approach has meant that ordinary democratic politics now occupies space that many would describe as "corruption."

What ought to be done? One approach, as argued by Deborah Hellman, is that the Court should be wary of defining corruption because to do so inevitably involves defining democracy—a task that the Court has rightly avoided in other election law contexts.[177]

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174. Justin Levitt, *Confronting the Impact of* Citizens United, 29 YALE L. & POL'Y REV. 217, 230 (2010).

175. Daniel H. Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 323–26 (1989).

176. FEC v. Nat'l Conservative Pol. Action Comm., 470 U.S. 480, 497 (1985).

177. Hellman, *supra* note 8, at 1388, 1402; *see also* Richard Briffault, *On Dejudicializing American Campaign Finance Law*, 27 GA. ST. U. L. REV. 887, 891 (2010) (arguing that the Court" should take a reduced role and be more deferential to the decisions of elected representatives or the people themselves").

Another approach, defended by Guy-Uriel Charles, is that we should resist "corruption temptation," which he describes as the urge to refract all campaign finance issues through the lens of corruption.[178] Instead, we should be talking about the real issue, which is the problem of political participation.[179] Finally, Richard Hasen argues that "the best way to change the First Amendment is to change the Supreme Court."[180] He urges that in the meantime, those who believe in reasonable campaign finance regulation should be putting together equality-based arguments that could convince future justices.[181]

Although this Article does not answer Hasen's call directly, it seeks to provide a conceptual map of the concept of corruption, with a particular emphasis on the theoretical puzzles and challenges posed by corruption. I have argued that there are two main clusters of ideas about why corruption is wrong. One cluster of ideas focuses on the use of public power for private ends. This approach raises a number of thorny conceptual problems about where to draw the line between ordinary democratic politics and corruption. The second cluster of ideas focuses on the violation of equality, understood in various ways.

In addition, I have suggested that there is a conceptual connection between these two approaches (but only for corruption in a democracy), which is why so many forms of corruption can be framed either as a violation of the proper use of power or as a violation of equality. Even bribery and quid pro quo corruption, I suggest, have this dual conceptual structure. One implication of this convergence is that some forms of equality-based corruption arguments will be vulnerable to the three conceptual challenges associated with public power-based corruption arguments. These three challenges are: (1) the distinction between acceptable and corrupt political gain; (2) the distinction between the public interest and private interests; and (3) the distinction between acceptable and corrupt legislative responsiveness. Future work in the field could develop standards to enable better line-drawing between corrupt and clean democratic activity.

178. Charles, *supra* note 42, at 26.

179. *Id*. at 8.

180. Richard L. Hasen, *Is "Dependence Corruption" Distinct From A Political Equality Argument for Campaign Finance Laws? A Reply to Professor Lessig*, 12 Election L.J. 305, 19 (2013).

181. *Id*. at 19–20.