

REPRESENTATION REINFORCEMENT REVISITED: *CITIZENS UNITED* AND POLITICAL PROCESS THEORY

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INTRODUCTION

The perennial presence of campaign-finance and campaign-speech cases on the Supreme Court's docket reflects a doctrine that even experts in political law consider incoherent.¹ The public debate since *Citizens United v. Federal Election Commission*² highlights the need for a sound theory of the judicial role in regulation of the political process. A starting point is John Hart Ely's influential theory of constitutional interpretation, "representation reinforcement," which focuses judges on failures in the democratic process.³ This Article provides the first thorough analysis of how Ely would view *Citizens United*. Ely did not address campaign-speech restrictions, and it is debatable how process theory should handle *Citizens United*, a hard case with arguments on both sides about reinforcing democracy.

This Article applies Ely's theory of constitutional interpretation to *Citizens United* by analyzing what Ely explicitly said as well as what he implicitly assumed. It finds that Ely would side with the majority in *Citizens United*, but that a deconstruction of Ely's main work, *Democracy and Distrust*, reveals more about the substantive judgments—namely, his distrust of judges—that entered Ely's ostensibly process-based theory than it does about the way a process-based theory must handle campaign speech. This Article argues that critics of *Citizens United* should recognize the appeal of *Democracy and Distrust* and reformulate a representation-reinforcement theory of constitutional interpretation that trusts judges and legislators to regulate the political process and protect democracy.

This Article fills a number of important gaps in the existing literature. First, this Article is the first piece fully to connect Ely's process theory with

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1. See Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 621–22 (2011) (arguing that post-*Citizens United* campaign-finance doctrine is legally incoherent).

2. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

3. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87 (1980).

the Court's approach to restrictions on campaign speech. Second, this work complements a recent piece by Jane Schacter that reexamines process theory through the lens of the same-sex marriage debate.⁴ Schacter's article concerned one branch of Ely's theory, prejudice against minorities, while this Article discusses the other major branch, direct regulation over the political process.⁵ In conjunction with her piece, this Article provides a contemporary reconsideration of Ely's process theory.

This Article begins in Part I with a summary of *Democracy and Distrust*. Part II examines *Citizens United* and the parties' arguments, and emphasizes how rationales related to fostering democracy fit into the Court's reasoning. By looking at a sampling of criticisms of the *Citizens United* majority, this paper explores how critics' fears are related to political participation. Part III asks, "What would Ely do?" and extrapolates from Ely's work to find that Ely would side with the *Citizens United* majority. Part IV deconstructs *Democracy and Distrust* to examine Ely's conception of democracy. This deconstruction, which includes an examination of statements in Ely's other works, reveals the substantive views that enter Ely's process theory. Part V suggests tweaks that critics of *Citizens United* could make to Ely's theory to reformulate a theory of representation reinforcement that embraces political integrity as a substantive goal that is worth pursuing to enhance representation. This Article concludes by recognizing that the fundamental difference between critics of *Citizens United* on the one hand, and Ely and the *Citizens United* majority on the other, is the trust that they accord to judges and other legal actors.

For those primarily concerned with campaign-finance reform, this Article identifies one of the fundamental sources of debate over the issue and shows that legislative regulation of the political process must satisfy judges with more skeptical views of legislative self-regulation. For those interested in political process theory, this Article's findings bring new understanding to Ely's theory and show that Ely's distrust affected his views of democracy and, hence, the entire project of *Democracy and Distrust*.

4. Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1369 (2011) [hereinafter Schacter, *Ely at the Altar*].

5. For a discussion of the two branches of Ely's theory, see *infra* text accompanying notes 19–25.

I. DEMOCRACY AND DISTRUST

Democracy and Distrust is a canonical work of twentieth century constitutional theory. It has been a prominent point of discussion in at least six legal symposia⁶ and sparked an “avalanche” of responsive scholarship.⁷ It has been called “the most important constitutional theory book in the past fifty years”⁸ and even critics of Ely’s theory concede “[f]ew, if any, books have had the impact on constitutional theory of John Hart Ely’s *Democracy and Distrust*.”⁹

Democracy and Distrust is the culmination of Ely’s position in the debate over originalism and the proper method of constitutional interpretation. Ely’s core argument is that a clause-bound originalist or textualist interpretation of the Constitution inadequately accounts for the “open-textured”¹⁰ provisions of the Constitution (for example, the Eighth Amendment’s prohibition of “cruel and unusual punishments”¹¹ or the Fourteenth Amendment’s Equal Protection Clause) because these provisions’ “invitation to look beyond their four corners . . . cannot be construed away.”¹² Ely surveys the other competing interpretive theories of the day and finds each of these approaches fatally flawed—often for elevating the values of a judge or an elite to constitutional status.¹³

Ely makes a structuralist argument that when the Constitution is viewed as a whole, its primary concern is not enshrining substantive rights,

6. *Symposium: Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1 (1981) (focusing on discussions of Ely’s and Jesse Choper’s theories); *Symposium: Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981) (featuring discussions of Ely’s theory prominently); *Symposium*, 77 VA. L. REV. 631 (1991) (focusing on *Democracy and Distrust*); *Symposium, A Tribute to John Hart Ely*, 58 U. MIAMI L. REV. 953 (2004) (focusing mainly on Ely’s life); *Symposium in Honor of John Hart Ely*, 57 STAN. L. REV. 695 (2004) (focusing mainly on Ely’s war theory); *Symposium, On Democratic Ground: New Perspectives on John Hart Ely*, 114 YALE L.J. 1193 (2005) (focusing on Ely’s work).

7. Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 737 (2004) [hereinafter Schacter, *Idea of Democracy*].

8. Sanford Levinson, *Assessing the Supreme Court’s Current Caseload: A Question of Law or Politics?*, 119 YALE L.J. ONLINE 99, 104 (2010) (internal quotation marks omitted); cf. JOHN H. GARVEY, T. ALEXANDER ALEINKOFF & DANIEL A. FARBER, *MODERN CONSTITUTIONAL THEORY: A READER* 1, 2 (5th ed. 2004) (referring to *Democracy and Distrust* as “probably the most influential book on constitutional law in the past few decades”); Akhil Amar Reed, *Intratextualism*, 112 HARV. L. REV. 747, 779 (1999) (referring to the book as “the most widely read work of constitutional law of the last three decades”).

9. E.g., Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 721 (1991).

10. ELY, *supra* note 3, at 13.

11. U.S. CONST. amend VIII.

12. *Id.* (quoting U.S. CONST. amend. VIII).

13. *Id.* at 43–72.

but creating a system that encourages representative democracy. He argues that judges should abandon the search for appropriate values and instead “ensure that the political process—which is where such values *are* properly identified, weighed, and accommodated—[is] open to those of all viewpoints on something approaching an equal basis.”¹⁴ Judges should strengthen the democratic process by using a “participation-oriented, representation-reinforcing approach to judicial review.”¹⁵ Ely’s approach attempts to offer a solution to Bickel’s “[c]ounter-[m]ajoritarian [d]ifficulty,”¹⁶ by arguing that representation-reinforcing judges are not Platonic guardians but are simply acting as referees by “[c]learing the [c]hannels of [p]olitical [c]hange.”¹⁷ He likens his approach to an antitrust rather than a traditional regulatory approach—only intervening when necessary to break up a political situation approaching an oligarchy.¹⁸

Ely provides two major branches to his theory of when courts should intervene. First, he discusses direct regulation over the political process and concerns that “the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out.”¹⁹ Falling under this branch are controversies such as First Amendment rights of dissidents,²⁰ malapportionment of electoral districts,²¹ and delegation of legislative power.²² The other branch of theory argues that protecting “discrete and insular minorities”²³ via the use of strict scrutiny review serves to root out prejudice that impairs minority participation in the political process.²⁴ The prejudice portion of *Democracy and Distrust* is important for the overall theory, but because this Article will focus on Ely’s more direct channel-clearing ideas related to the First Amendment, the nuances of his account of minority representation and protection will not be addressed here.²⁵

14. *Id.* at 74.

15. *Id.* at 87.

16. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (Yale Univ. Press 2d ed. 1986) (1962). Ely conceptualized his work as a step towards solving Bickel’s quandary. ELY, *supra* note 3, at 71–72.

17. ELY, *supra* note 3, at 105.

18. *Id.* at 102–03.

19. *Id.* at 103.

20. *Id.* at 105–16.

21. *Id.* at 116–25.

22. *Id.* at 125–24.

23. *Id.* at 76 (quoting *United States v. Carolene Prods., Co.*, 304 U.S. 144, 152 n.4 (1938)).

24. *Id.* at 77, 135–79; cf. Hiro N. Aragaki, *Arbitration’s Suspect Status*, 159 U. PA. L. REV. 1233, 1293–97 (2011) (providing Ely-influenced logic on how strict scrutiny roots out prejudice and arguing that this method should be used to curtail discrimination against arbitration by state judges).

25. For a recent examination of Ely’s approach to political malfunctions related to prejudice and a proposal to inject modern doctrine with more attention to the political power of minorities, see Schacter, *Ely at the Altar*, *supra* note 4, at 1371, 1402–11.

To summarize, Ely's theory of "representation reinforcement" is useful for situations when the Constitution is unclear. In these situations, the theory suggests that judges defer to the political process unless there is some evidence that a "political market . . . is systematically malfunctioning."²⁶ When this evidence exists, judges should seek a solution that encourages broad political participation to reinforce representation.

Part III will discuss the nuances of Ely's theory and his critics, but this Part provides a rough outline of "representation reinforcement." The next Part explains *Citizens United* so as to tee up the arguments of the Court and its critics for an Elysian²⁷ analysis.

II. *CITIZENS UNITED* AND ITS CRITICS

Citizens United revolutionized campaign-speech doctrine. While today the term *Citizens United* could often be confused for a pejorative rather than a court case, this Part will begin by discussing the facts of the case and the arguments put forward by each side. Part II.B will look at the majority's opinion to see how its narrowed version of the anticorruption interest combined with its approval of disclosure requirements reveal a preference for a form of pluralism in which the role of the state is limited to providing information and punishing bribery. In Part II.C, the views of the dissent and other critics of the Court are briefly canvassed to understand their worries over democracy and the political process.

A. *The Case*

1. The Facts

Citizens United was a nonprofit corporation that wished to make *Hillary: The Movie* (a film critical of presidential candidate Hillary Clinton) available to the public and promote it in the weeks leading up to the 2008 primary. Although the Federal Election Commission (FEC)—the agency charged with implementing the Federal Election Campaign Act (FECA)—had not taken action, *Citizens United* sued to restrain the FEC from subjecting it to penalties pursuant to section 441b(b)(2) of the FECA,²⁸ as amended by the Bipartisan Campaign Reform Act of 2002.²⁹ At

26. ELY, *supra* note 3, at 102–03.

27. Ely made clear that "Elysian" was his preferred adjectival form. JOHN HART ELY, ON CONSTITUTIONAL GROUND 466 n.17 (1996).

28. 2 U.S.C. § 441b(b)(2) (2012).

29. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203(a), 116 Stat. 81, 91 (2002).

issue were the applicability and the constitutionality of the prohibition on “[e]lectioneering communication,” which regulated corporations engaging in not only express advocacy for or against a candidate (for example, *vote for Ely*), but also communications “refer[ring] to a clearly identified candidate for Federal office” (for example, *I trust Ely*).³⁰

2. The Arguments

Citizens United, represented by Ted Olson, framed its argument by stating that the bureaucratic regime created by the FECA impaired the First Amendment’s protection of political participation.³¹ However, the overall focus during initial argument was on the particularities of *Hillary: The Movie*³² and the distinction between express advocacy that can be regulated and protected informative communications.³³ The Government resisted the broader constitutional argument and focused on statutory interpretation³⁴ and the doctrinal question about what amounts to express advocacy or its functional equivalent.³⁵ In hindsight, the Government made a major mistake during oral argument when stating that, under its view of congressional power, Congress could even prohibit books if they advocate for a candidate and were published by a corporation using treasury funds.³⁶

30. 2 U.S.C. § 434(f)(3)(A)(i) (2012). Section 434(f)(3)(A)(ii) provided a more moderate backup provision in case the earlier definition was held to be unconstitutional. This backup provision defined an electioneering communication as one that promotes or attacks a candidate and “is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.” *Id.* § 434(f)(3)(A)(ii).

31. See Transcript of Oral Argument at 3, *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010) (No. 08-205) [hereinafter Initial Argument], available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205.pdf (“Participation in the political process is the First Amendment’s most fundamental guarantee. Yet that freedom is being smothered by one of the most complicated, expensive, and incomprehensible regulatory regimes ever invented . . .”).

32. See *id.* at 8–9 (emphasizing that Citizens United is a “small, nonprofit organization” and acknowledging that it is a “big step” to apply Citizens United’s argument to General Motors).

33. See *id.* at 9–11, 14–16 (discussing why a difference in the length of the communication is meaningful).

34. See, e.g., *id.* at 39 (“Our position is not that the Constitution would permit it. Our position is that BCRA wouldn’t prohibit it . . .”).

35. Only speech that is express advocacy or its functional equivalent can be regulated by the FEC. *Fed. Election Comm’n v. Wis. Right to Life, Inc. (WRTL)*, 551 U.S. 449, 456 (2007); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 206 (2003). It is understandable that the Government would focus on this question since this was the basis for the lower court’s decision. See *Citizens United v. Fed. Election Comm’n*, 530 F. Supp. 2d 274, 278 (D.D.C. 2008) (“[T]he first question under Chief Justice Roberts’ *WRTL* opinion—and as it turns out, the last question—is whether the film is express advocacy or its functional equivalent.”).

36. Initial Argument, *supra* note 31, at 27.

The Court granted reargument to explore the constitutional issues more fully. On reargument, then-Solicitor General Elena Kagan stated that the Government's position regarding the potential regulation of books had changed,³⁷ but the damage was done. Seeing its opportunity, Citizens United pushed a broader constitutional argument,³⁸ while the Government struggled to explain the limits of the government interests that justified prohibitions on campaign expenditures by corporations.³⁹ Citizens United more effectively invoked the goals of democratic participation, while the Government struggled to identify a manageable rationale that justified restraints on speech.

B. The Court

The majority opinion written by Justice Kennedy takes on the facial validity of the law due to both the uncertainty about what speech would pass an as-applied challenge and “the primary importance of speech itself to the integrity of the election process.”⁴⁰ The Court criticized the administrative system used to regulate political speech, saying the FEC's “business is to censor”⁴¹ and analogizing its power to that of the licensing boards of colonial-era England, which the First Amendment was intended to protect against.⁴² In the Court's view, the uncertain results of a court challenge and the complexity of the regulatory system combine to chill speech “that is beyond all doubt protected.”⁴³

The Court used highly critical language saying that the restriction is a “ban on speech,” and its “purpose and effect are to silence entities whose voices the Government deems to be suspect.”⁴⁴ The Court then echoed shades of Ely:

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of

37. Transcript of Oral Argument at 64–65, *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010) (No. 08-205) [hereinafter *Reargument*], available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205%5BReargued%5D.pdf.

38. Compare *id.* at 3 (referring to “any corporation”), with *supra* notes 32–33 (emphasizing that Citizens United was unlike General Motors and that *Hillary: The Movie* was more like a documentary than a campaign advertisement).

39. *Reargument*, *supra* note 37, at 45–49; see *id.* at 48 (referring to quid pro quo interest, anticorruption interest, shareholder interest, and antidistortion interest in a single sentence).

40. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 895 (2010).

41. *Id.* at 896 (quoting *Freedman v. Maryland*, 380 U.S. 51, 57–58 (1965)).

42. *Id.*

43. *Id.*

44. *Id.* at 898.

citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment “has its fullest and most urgent application’ to speech uttered during a campaign for political office.”⁴⁵

Using strict scrutiny, the Court determined that some of the interests in regulating campaign speech that the Government argued for were not compelling, and also determined that only a narrow view of the anticorruption interest was compelling.⁴⁶ The Court rejected the antidistortion interest from *Austin v. Michigan Chamber of Commerce*⁴⁷ as well as the shareholder-protection interest that the Government proposed the court adopt⁴⁸ in *Citizens United*.⁴⁹

The Court considered the anticorruption interest to be a compelling government interest, but drew a line and decided that the type of corruption that justifies this interest is quid pro quo corruption rather than a more capacious understanding of corruption.⁵⁰ The Court did not find the restriction at issue to be narrowly tailored to meet this interest, because “independent expenditures . . . do not give rise to corruption or the appearance of corruption.”⁵¹ This statement sounds conclusory and has been criticized.⁵² But by the Court’s logic, the statement is justified because

45. *Id.* (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)).

46. *Id.* at 904, 908, 909, 911.

47. *See Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 659–60 (1990). In *Austin*, the antidistortion interest justified upholding corporate campaign-speech regulations which the Court said prevent “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.” *Id.* at 660. An obvious problem with this rationale is the incongruity between *Austin*’s reference to “public support” and the idea that the First Amendment protects expression regardless of public support. *See* Reargument, *supra* note 37, at 3 (statement during opening argument by Ted Olson referring to the “radical concept of requiring public support for the speech before you can speak”).

48. In the briefing for *Citizens United*, the Government proposed an interpretation of *Austin* in which “public support” referred “not to popularity within the community at large, but to support among those in whose name the message is propagated—*i.e.*, the shareholders whose resources are funding the electioneering.” Supplemental Reply Brief for the Appellee at 7 n.3, *Citizens United*, 120 S. Ct. 876, No. 08-205, 2009 WL 2564671, at *7 n.3 (citation omitted).

49. *Citizens United*, 130 S. Ct. at 904, 911.

50. *Id.* at 909.

51. *Id.*

52. *See* LAWRENCE LESSIG, *REPUBLIC, LOST* 243–44 (2011) (arguing that the statement is not based on evidence and has logical flaws); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 28–32 (2011) (criticizing this statement as being emblematic of the type of non-record fact that appellate courts should avoid introducing into their opinions); Rick Hasen, *Facts? We Don’t Need No Stinking Facts: The Montana Supreme Court, SCOTUS, and Citizens United*, ELECTION LAW BLOG (Jan. 1, 2012, 12:11 PM), <http://electionlawblog.org/?p=27232> (stating

the corruption the Court is referring to is quid pro quo corruption. This is distinguishable from influence or access, both of which it sees as unavoidable⁵³: “[A] substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.”⁵⁴ In other words, if representatives give the appearance of being responsive by giving influence or access, this “will not cause the electorate to lose faith in our democracy” because seeking favor with elected officials is an understood premise and an unavoidable aspect of our democracy.⁵⁵

However, eight members of the Court⁵⁶ rejected a complete laissez-faire approach to campaign-finance regulation and upheld the disclosure requirement as a means to encourage accountability.⁵⁷ “[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”⁵⁸ The Court said that allegations of harassment by amici are “cause for concern,” but on an as-applied basis there was no evidence that Citizens United’s donors might face retaliation.⁵⁹

C. The Critics

In evaluating criticisms of the Court’s decision in *Citizens United*, this Part will start with Justice Stevens’s dissent, which was joined by Justices Ginsburg, Breyer, and Sotomayor. Justice Stevens repeatedly worried about

that the court’s statement is a legal fiction and if the Court were being honest it would have said, “We don’t care whether or not independent spending can or cannot corrupt; the First Amendment trumps this risk of corruption”; see also *supra* notes 70–71 and accompanying text.

53. *Citizens United*, 130 S. Ct. at 910 (“Favoritism and influence are not . . . avoidable in representative politics.” (alteration in original) (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 297 (2003) (Kennedy, J., dissenting))).

54. *Id.* (internal quotation marks omitted) (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., dissenting)).

55. *Id.*

56. The lone dissent from this part was Justice Thomas. See *id.* at 982 (Thomas, J., concurring in part and dissenting in part) (“Disclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights.” (emphasis in original)).

57. *Id.* at 886; *id.* at 931 (Stevens, J., concurring in part and dissenting in part).

58. *Id.* at 916.

59. *Id.*

the “integrity”⁶⁰ of elected institutions and ominously warned “[t]here are threats of corruption that are far more destructive to a democratic society than the odd bribe.”⁶¹ At its core, the dissent disagreed with the majority’s decision to draw a line based on quid pro quo corruption.⁶² Justice Stevens asserted that legislatures could constitutionally distinguish between kinds of speech based on identity or content as long as there is not a “solid basis” to believe the distinction was “motivated by the desire to protect incumbents or that it will degrade the competitiveness of the electoral process.”⁶³ An equality rationale undergirds Justice Stevens’s reference to power and competitiveness⁶⁴ even as he declined to embrace an equality-oriented reading of *Austin*.⁶⁵ Justice Stevens worried about what corruption of the democratic process would lead to because citizens “may lose faith in their capacity, as citizens, to influence public policy. . . . The predictable result is cynicism and disenchantment: an increased perception that large spenders ‘call the tune’ and a reduced ‘willingness of voters to take part in democratic governance.’”⁶⁶

Other critics likewise were concerned about the integrity of democratic institutions. Ronald Dworkin likens political advertising to beer ads and says they threaten the integrity of political debate.⁶⁷ Lawrence Lessig is

60. Justice Stevens used the word fourteen times. *Id.* at 931, 940, 956, 957, 960, 960, 961, 963, 968, 969 n.68, 974, 975, 975, 977 (Stevens, J., concurring in part and dissenting in part).

61. *Id.* at 962.

62. Justice Stevens called it the majority’s “‘crabbed view of corruption’ that was espoused by Justice KENNEDY in *McConnell* and squarely rejected by the Court in that case.” *Id.* at 961 (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 152 (2003)). The *McConnell* majority used a broader definition of corruption that looked for “subtle but equally dispiriting forms of corruption.” *McConnell*, 540 U.S. at 153, such as “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.” *Id.* The Court in *McConnell* used this definition to justify approving prophylactic measures meant to prevent this type of undue influence by removing the temptation from politicians. *Id.* Although Teachout interprets this statement as support for her corruption as loss of political integrity conception, Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 396 (2009), this was likely an instance of “incompletely theorized agreement[.]” CASS R. SUNSTEIN, ONE CASE AT A TIME 13 (1999). In dissent in *McConnell*, Justice Kennedy summarized the *McConnell* majority’s view of corruption to be “any conduct that wins goodwill from or influences [a covered official].” *McConnell*, 540 U.S. at 294 (Kennedy, J., dissenting).

63. *Citizens United*, 130 S. Ct. at 969 (Stevens, J., concurring in part and dissenting in part).

64. *See id.* (stating the Court has a “vital role to play in ensuring that elections remain at least minimally open, fair, and competitive”).

65. *Id.* at 970, 971 n.69.

66. *Id.* at 974 (quoting *McConnell*, 540 U.S. at 144). Similarly Justice Stevens states, “[a] democracy cannot function effectively when its constituent members believe laws are being bought and sold.” *Id.* at 964.

67. Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. OF BOOKS, May 13, 2010, <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/>.

concerned with the integrity of Congress⁶⁸ and refers to the Court's factual claims—such as “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy”⁶⁹—as blind *Lochnerisms*.⁷⁰ Other critics echo the equality rationale. Michael Waldman from the Brennan Center for Justice says “the ruling points toward a truly dystopian future, when candidates, campaigns, and parties are drowned out by special interest funding as loud as it is stealthy.”⁷¹ There are of course other critics,⁷² but fundamentally, critics believe limiting the concept of justiciable corruption to quid pro quo corruption does not protect their concern for democratic representation.

III. WHAT WOULD ELY DO?

A. Framing Citizens United Within Democracy and Distrust

So, what would Ely do with *Citizens United*? First, Ely certainly would agree that courts are justified in looking closely at a restriction on speech related to political activity and not leaving these determinations to the more political branches by invoking the political question doctrine.⁷³ Second, Ely explicitly mentioned the First Amendment as the type of constitutional provision that clause-bound originalism and textualism cannot sufficiently explain,⁷⁴ and he considered the “central function” of the First Amendment

68. See Lawrence Lessig, *Democracy After Citizens United*, BOSTON REV. (September 4, 2010) [hereinafter Lessig, *Democracy After Citizens United*], available at <http://bostonreview.net/BR35.5/lessig.php> (“[T]his is ‘corruption’ because it weakens the integrity of the institution, of Congress itself.”); Lawrence Lessig, *Institutional Integrity: Citizens United and the Path to a Better Democracy*, HUFFINGTON POST (Jan. 22, 2010), http://www.huffingtonpost.com/lawrence-lessig/institutional-integrity-c_b_433394.html (“Thursday’s decision by the Supreme Court denies to Congress the same institutional integrity enjoyed by the Court.”).

69. *Citizens United*, 130 S. Ct. at 910.

70. Lessig, *Democracy After Citizens United*, *supra* note 68 (referring to *Lochner v. New York*, 198 U.S. 45 (1905), a vilified case that prohibited labor regulations meant to protect bakers out of concern for individuals’ liberty to contract).

71. Michael Waldman, *Supreme Court’s Citizens United Decision Will Warp Policymaking*, US NEWS (Sept. 27, 2010), <http://www.usnews.com/opinion/articles/2010/09/27/supreme-courts-citizens-united-decision-will-warp-policymaking>.

72. President Obama even took time during the 2010 State of the Union Address to chastise the Court. President Barack Obama, 2010 State of the Union (Jan. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> (“I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities. (Applause.) They should be decided by the American people.”).

73. ELY, *supra* note 3, at 106 (“Courts must police inhibitions on expression and other political activity because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out.”).

74. “[T]he First Amendment’s prohibition on congressional laws ‘abridging the freedom of speech’ seems to need more” than a “dictionary function.” *Id.* at 13. Ely recognizes that while the First

to be “assuring an open political dialogue and process.”⁷⁵ Accordingly, *Citizens United* is fertile ground for application of Ely’s theory.

In the chapters of *Democracy and Distrust* in which Ely applied his theory to a few controversies, the First Amendment’s protection of speech is the first constitutional provision that he addressed.⁷⁶ The speech restrictions that Ely focuses on are of the basic sort—radicals speaking against the state, lynch mobs urging vigilantism, and sound trucks blaring at 3:00 a.m.—in which the restriction seeks to prevent immediate harm, and the government interest is not of constitutional magnitude on par with the First Amendment.⁷⁷ For these types of restrictions, Ely proposes a uniting of the “specific threat” and “unprotected messages” approaches that begins by looking at the type of harm that is meant to be prevented.⁷⁸ If the harm meant to be prevented arises regardless of the actual content of the message—for example, the sound truck at 3:00 a.m. is problematic whether it promotes armed revolution or Girl Scouts membership—then the Court should look at the context and assess the threat.⁷⁹ On the other hand, if the harm would result from the content, such as advocacy “inciting or producing imminent lawless action,”⁸⁰ then “the hazards of political distortion and judicial acquiescence are at their peak.”⁸¹ Unless the message was one that the Court had clearly defined beforehand as unprotected, the restrictions must be struck down.⁸² This approach to the First Amendment has been likened to a Ulysses pact in which the Court binds itself “to the mast of robust protection for free expression, calculating that in subsequent times of crisis [it] will be tempted by the siren song of alarmists.”⁸³

Amendment is more clear than the Eighth, Ninth, and Fourteenth Amendments, “the First Amendment will come down to much the same thing.” *Id.* at 14.

75. *Id.* at 112.

76. *Id.* at 105.

77. *Id.* at 107–10.

78. *Id.* at 111 (internal quotation marks omitted).

79. *Id.* The idea of content neutrality is famously slippery. See generally Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 46 (1987) (describing basic concept and discussing doctrinal complications). Ely acknowledges that “content-neutral” restrictions, such as a ban on soundtrucks at 3:00 a.m., may disproportionately affect the poor and any political views they may hold. ELY, *supra* note 3, at 111. In addition, a threat assessment will not always be clear and difficult cases may arise, but Ely argues that some contextualization and content-neutral threat assessment is necessary. *Id.*

80. ELY, *supra* note 3, at 115 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

81. *Id.* at 111.

82. *Id.* at 112.

83. Michael C. Dorf, *The Coherencism of Democracy and Distrust*, 114 YALE L.J. 1237, 1273 (2005). What seems unclear from Ely’s theory is how further categories of speech would become unprotected. While Ely made the point that this “approach cannot guarantee liberty,” ELY, *supra* note 3, at 112, he neglected to illustrate what might be a legitimate cause for weakening of First Amendment protections in the future. If a category of speech such as the corporate speech at issue in *Citizens United*

B. Applying Ely's Theory to Citizens United

We can now apply Ely's First Amendment framework to *Citizens United*. The communication at issue is only problematic due to the content of the message,⁸⁴ which puts us in the realm of "unprotected messages." Can a critic of *Citizens United* fit any restrictions on electioneering communication into a "clearly and narrowly bounded category" that the Court has recognized and that would fit Ely's theory?⁸⁵ Someone wanting to argue that campaign speech is unprotected under modern doctrine would need to start with *Buckley v. Valeo*.⁸⁶

Ely's treatment of *Buckley* is ambiguous. In an endnote to *Democracy and Distrust*, he criticized *Buckley* for employing a weaker substantive test to campaign-contribution limits, even after the opinion recognized that these limits tread upon First Amendment rights.⁸⁷ This suggests that the Court should have been bolder and struck down the contribution limits. On the other hand, in a lecture, Ely criticized *Buckley* in a different way—acknowledging that money has a distorting impact on democracy and stating that this is why *Buckley* is "questionable."⁸⁸

Previous commentators have concluded that Ely would be opposed to the restrictions on campaign speech in *Buckley*. Brian Boynton directly addressed how Ely would respond to *Buckley* and predicted that Ely would be opposed to the decision.⁸⁹ Pamela Karlan and Kathleen Sullivan discussed how Ely would have responded to *McConnell v. Federal Election Commission* and found that while "not entirely self-evident," Ely would have struck down the restrictions on "soft money."⁹⁰ Sullivan and Karlan

was determined to be poisonous to democratic representation, it could be consistent with Ely's theory to define this type of speech as unprotected. How exactly that determination would be made is an open question in Ely's theory. A critic of *Citizens United* could use this as a toehold to fit their substantive views within Ely's theory, but as discussed *infra* Parts III–V, there are more fundamental differences between Ely and critics of *Citizens United*, so the fit would be procrustean.

84. If *Hillary: The Movie* had been about Hilary Duff, rather than Hillary Clinton then the only people at the FEC that would have raised an eyebrow would have been lingering *Lizzie McGuire* fans.

85. ELY, *supra* note 3, at 112.

86. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

87. *Id.* at 234 n.27.

88. ELY, ON CONSTITUTIONAL GROUND, *supra* note 27, at 13–14.

89. See Brian Boynton, Note, *Democracy and Distrust after Twenty Years: Ely's Process Theory and Constitutional Law from 1990 to 2000*, 53 STAN. L. REV. 397, 409 (2000) ("He would have found the core political speech curtailed in *Buckley* to be absolutely protected, despite what might seem to be countervailing process values on the other side of the argument, e.g., the need to prevent corruption of the political process.")

90. Kathleen M. Sullivan & Pamela S. Karlan, *The Elysian Fields of the Law*, 57 STAN. L. REV. 695, 701 (2004). See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 185 (2003) (upholding limits on soft money).

based their conclusion on two aspects of Ely's theory. First, because Ely believed that courts should actively police the political process,⁹¹ the argument that the Bipartisan Campaign Reform Act was a blatant entrenchment effort would have resonated with Ely.⁹² Second, Ely was wary of restrictions on speech that were not "clearly and narrowly bounded,"⁹³ and the soft-money restrictions were anything but.⁹⁴

This fear of indeterminate standards is the key to understanding why Ely could recognize the distorting effect of money on representation while also being critical of judicial decisions approving of regulations on political speech. Ely had little patience for judicial indeterminacy regarding political speech.⁹⁵ Ely advocated for clear boundaries between protected and unprotected speech⁹⁶ and clear treatment once speech was found to be protected.⁹⁷ This reflects Ely's fears of judicial slippage and his awareness of the manipulability of categorical approaches that are not enforced categorically. Due to his preference for clearly defined areas of protection and fears of judicial capitulation, Ely would likely come out on the majority's side of *Citizens United*.⁹⁸

Recent articles that discuss the relationship between Ely's theory and *Citizens United* give insufficient attention to Ely's preference for bright-line rules. Steven Calabresi goes the furthest, stating that "[i]t would be hard to imagine a more clear-cut case where Ely's theory of judicial review would be applicable than with campaign finance cases" and arguing that the decision in *Citizens United* is "almost compelled by Ely's theory of judicial review rather than being foreclosed by it."⁹⁹ While the first half of Calabresi's statement is correct, the second half misunderstands Ely's theory. The analysis below shows that far from compelling the result in *Citizens United*, a theory of representation reinforcement could support a more nuanced role for judges in determining which campaign-speech

91. ELY, *supra* note 3, at 106 ("Courts must police inhibitions on expression . . . because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out.").

92. Sullivan & Karlan, *supra* note 90, at 702 (citing *McConnell*, 540 U.S. at 248–50, 261–62 (Scalia, J., concurring in part, dissenting in part, and concurring in the judgment in part)).

93. ELY, *supra* note 3, at 112.

94. Sullivan & Karlan, *supra* note 90, at 702–03.

95. *Id.* at 699.

96. *Id.*

97. ELY, *supra* note 3, at 231 n.10 ("It's not entirely clear why some First Amendment rights should be absolutely protected and others not . . .").

98. For critics of *Citizens United* whose hope springs eternal that I am reading the tea leaves of Ely wrongly, I will just suggest that the best toehold that critics of *Citizens United* might find in the four corners of *Democracy and Distrust* would be the possibility of having this type of speech defined beforehand as unprotected as discussed in *supra* note 83.

99. Steven G. Calabresi, *The Constitution and Disdain*, 126 HARV. L. REV. F. 13, 19–20 (2012).

restrictions help foster democratic governance.¹⁰⁰ Jack Balkin suggests that the application of the theory of representation reinforcement depends on one's political priors, and accordingly, *Citizens United* is a conservative version of *Democracy and Distrust*.¹⁰¹ As discussed below, Balkin is correct that substantive judgments enter Ely's theory, but Balkin fails to account for Ely's worries about indeterminate standards. Because Ely would have sided with the *Citizens United* majority, it is problematic to say that *Citizens United* is a conservative *Democracy and Distrust*. Pamela Karlan notes Ely's criticism of *Buckley* from *Democracy and Distrust* and suggests that *Citizens United* was decided consistent with Ely's theory if one takes a libertarian as opposed to egalitarian view of the courts role in assessing the constitutionality of campaign-speech restrictions.¹⁰² Karlan is correct, but she does not fully explore why Ely criticized *Buckley* and how a theory of representation reinforcement could be reconstructed.

C. There May Still Be Hope for the Critics and Ely

But what about the idea that Ely's approach was an "antitrust" approach?¹⁰³ He praised *Carolene Products* for asking judges to focus on "whether the opportunity to participate . . . in the political processes . . . has been unduly constricted."¹⁰⁴ Isn't this exactly what critics allege the Court failed to do in *Citizens United*?

One response to the critics is simply to say, "Sorry, Ely just doesn't have your faith that Congress or the Court can be trusted to decide which speech's content helps representation and which is harmful, so government has to stay out of it." If the critics of *Citizens United* are seeking an ally in Ely, they may simply be wise to move on. But, on the other hand, the critics may be able to modify Ely's theory to create a political process theory that accommodates their concerns related to campaign-finance reform. This Article shows how this could be done as a way to better understand Ely's theory and suggest a principled way forward for critics of *Citizens United*.

100. See *infra* Part V.

101. Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1156–60 (2012).

102. Pamela S. Karlan, *Democracy and Disdain*, 126 HARV. L. REV. 1, 30–31 (2012).

103. ELY, *supra* note 3, at 102–30.

104. *Id.* at 77.

IV. DECONSTRUCTING *DEMOCRACY AND DISTRUST*

This Part surveys some criticisms of *Democracy and Distrust* to locate weaknesses in the theory. By poking under the hood of Ely's theory, this Part reveals some of his substantive views about democratic representation and his trust in the judiciary. This Part concludes that because Ely's vision of democracy and the role of judges is not preordained, modifications to his theory can be consistent with a political process approach.

A. *Criticisms of the Process Veil of Democracy and Distrust*

Critics of *Democracy and Distrust* have seized upon a few major flaws in Ely's theory. Probably the most common point made by Ely's critics is that he explicitly scorned the substantive judgments of others,¹⁰⁵ while implicitly relying on his own values. As Laurence Tribe put it, "[t]he process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values—the very sort of theory the process-perfecters are at such pains to avoid."¹⁰⁶ In a point relevant to a discussion of election law, Daniel Ortiz pointed out that even the malapportionment standard of "one person, one vote" (of which Ely approved¹⁰⁷) requires a substantive judgment, because "[t]he proper degree of influence to give an individual or group relative to others . . . does not fall from the heavens."¹⁰⁸ Further, Ely stretched to fit rights that many would think of as substantive (for example, the Eighth Amendment's prohibition on "cruel and unusual punishments") into his process theory.¹⁰⁹ For this reason, one could also fit fundamental-rights cases—such as *Roe v. Wade*,¹¹⁰ of which Ely was skeptical¹¹¹—into this framework.¹¹² Thus, the argumentative force of

105. ELY, *supra* note 3, at 44–48 (arguing against a methodology based on the "judge's own values" and stating that interpretive methodologies are often veiled attempts at importing a theorist's own values).

106. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980); *cf.* Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945) (challenging distinction between substance and process).

107. ELY, *supra* note 3, at 121–24. Ely found the standard problematic but believed that its administrability was its major strength. Ortiz, *supra* note 9, at 121.

108. Ortiz, *supra* note 9, at 728.

109. ELY, *supra* note 3, at 97 (quoting U.S. CONST. amend. VIII).

110. See *Roe v. Wade*, 410 U.S. 113, 114 (1973) (providing a classic example of a fundamental rights case).

111. See John Hart Ely, *On the Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 944–45 (1973) (referring to the work the Court is doing in cases like *Roe* as "Lochnering").

112. See Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 137–39 (1981) (framing *Roe v. Wade* within Ely's theory).

process purity is lost. The academic consensus is established,¹¹³ and even Ely-supporters concede that his theory cannot be considered purely procedural.¹¹⁴ As Paul Brest said, “in his heroic attempt to establish a value-free mode of constitutional adjudication, John Hart Ely has come as close as anyone could to proving that it can’t be done.”¹¹⁵

Similarly, critics have pointed out that Ely is not explicit enough about his conception of democracy and where it originates. Dworkin emphasized that Ely’s view of democracy can only be justified based on desirable outcomes and that a substantive theory is needed to choose among possible outcomes.¹¹⁶ Although in an earlier article Ely described his substantive views about the case for representative democracy,¹¹⁷ Ely chose not to include this section in *Democracy and Distrust*, perhaps because invoking a moral theory like utilitarianism would be inconsistent with the book’s central argument.¹¹⁸ But to understand how Ely would handle *Citizens United*, it is necessary to understand Ely’s vision of democracy.

B. Ely’s Vision of Democracy

Ely saw democracy as a type of applied utilitarianism, and as in all forms of utilitarianism, equity is an issue.¹¹⁹ By Ely’s own standard, his

113. As Schacter notes, the claim of substance-free process theory “has long since been eviscerated.” Schacter, *Ely at the Alter*, *supra* note 4, at 1365.

114. See Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 785 (1991) (“Ely’s critics have, in my view, been devastatingly successful in demonstrating that Ely’s ‘procedural’ theory of prejudice is riven with substantive judgments.”); Luke P. McLoughlin, *The Elysian Foundations of Election Law*, 82 TEMP. L. REV. 89, 109 (2009) (arguing that Ely could not ultimately point to a pure process theory, but was successful at bringing the conversation to his court concerning judicial review’s role in supplementing democracy).

115. Brest, *supra* note 112, at 142.

116. RONALD DWORKIN, *The Forum of Principle*, in A MATTER OF PRINCIPLE 33, 60 (1985) (“Ely concedes (as he must and has) that the Court must define the best conception of democracy for itself, and thus make fresh political judgments of some kind.”) (citing Commentary, 56 N.Y.U. L. REV. 525, 528 (1981) (remarks of J. Ely) (admitting that “there will come a point at which my judge . . . will be left substantially on his or her own” in elaborating a procedural model of democracy)).

117. John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 405–11 (1978) [hereinafter Ely, *Constitutional Interpretivism*]. Ely also later discussed similar views. See John Hart Ely, *Professor Dworkin’s External/Personal Preference Distinction*, 1983 DUKE L.J. 959, 979–81; John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 833 n.4 (1991) (describing his philosophical approach as rooted in a Rawlsian liberal approach that favors majoritarianism with side constraints to protect minorities and the process of political transformation).

118. See Dorf, *supra* note 83, at 1248 (“Ely is estopped from invoking a comprehensive moral view like utilitarianism.”).

119. See, e.g., ELY, ON CONSTITUTIONAL GROUND, *supra* note 27, at 11 (arguing that utilitarianism and democracy each flow from the same impulses and noting equity-based criticisms of utilitarianism).

theory takes care of equity issues sufficiently.¹²⁰ A common criticism of the argument that majoritarian democracy is a form of utilitarianism is the criticism that voting is unable to account for intensities of preference.¹²¹ However, Ely believed people can express intensities by persuading other voters and voting for candidates whose positions are aligned with the issues a voter cares the most about (even if the candidate takes a position contrary to a voter's position on another issue).¹²² Ely recognized that "[t]he reflection of intensity is certainly far from perfect, money being the most obvious distorting element,"¹²³ and that certain side-constraints on majoritarianism may be "necessary to the successful functioning of the democratic process."¹²⁴ However, as discussed in Part III.B, Ely insisted on clear rules regarding speech restrictions. If Congress believed something less than a categorical rule was required, Ely thought the judiciary should reject the rule rather than risk acquiescence. According to Ely's view, a side-constraint consisting of curtailed First Amendment protection is not necessary to curtail the inequitable side of utilitarian democracy.

Ely's conception of democracy does not find that campaign-finance reform has the same degree of necessity as addressing prejudice against minorities, to which he devotes a substantial portion of *Democracy and Distrust*. For problems related to prejudice, Ely trusts judges to engage in motivational analysis using the means of heightened scrutiny. Shachter reads Ely's prejudice theory as hinting at a Toquevillian conception of democracy that combines social equality with political equality to create the social infrastructure of democracy.¹²⁵ However, Ely's goals for judicial review are not fostering a greater sense of public awareness or community inclusion,¹²⁶ but simply making sure that minorities have the opportunity

120. Ely, *Constitutional Interpretivism*, *supra* note 117, at 406 & n.29. In *On Constitutional Ground*, Ely goes even further and says that not only does his theory account for equity issues, but also that equity-based objections cannot be legitimately directed at utilitarian accounts of democracy. ELY, ON CONSTITUTIONAL GROUND, *supra* note 27, at 11.

121. ANDREI MARMOR, *LAW IN THE AGE OF PLURALISM* 79 (2007).

122. See Ely, *Constitutional Interpretivism*, *supra* note 117, at 407–08 (arguing that when someone will not be affected by an issue, they are unlikely to persuade others to vote on an issue and that when choosing between candidates' differing bundles of issues, voters choose candidates based on the issues that the voter cares most about).

123. ELY, ON CONSTITUTIONAL GROUND, *supra* note 27, at 13–14. Ely had earlier made essentially the same statement in Ely, *Constitutional Interpretivism*, *supra* note 117, at 407–08.

124. Ely, *Constitutional Interpretivism*, *supra* note 117, at 406 n.29.

125. Schacter, *Idea of Democracy*, *supra* note 7, at 746–47, 752–55.

126. Ely saw these types of goals as confusing the means and ends of democracy. See Ely, *Constitutional Interpretivism*, *supra* note 117, at 405.

for “wheeling and dealing”¹²⁷ and are not being “barred from the pluralist’s bazaar.”¹²⁸

In summary, once we peel away the layers of Ely’s thinking and look at substantive positions that underlie *Democracy and Distrust*, we can see that while Ely thought that money can distort the utilitarian basis for majoritarianism, for him, the equity issues are not powerful enough to trust judges to wade into the political thicket of campaign-finance reform. According to Ely’s theory, it is better for judges to stand on the sidelines policing speech categorically and sticking to more easily administrable standards.

V. REPRESENTATION REINFORCEMENT REVISITED

Now that we can recognize that Ely’s substantive views about democracy are by no means a given for a representation-reinforcing theory, a tweaked version of his account may be able to supply critics of *Citizens United* with an attractive approach for judicial review of First Amendment challenges to campaign-finance regulation that minimizes (without eliminating) the counter-majoritarian difficulty. This Part analyzes how a reconstructed theory of representation reinforcement can be formed that is responsive to the critics of *Citizens United*. A note about scope: in reconstructing Ely’s theory, this Article is going to bisect the theory, revamping the branch about regulation of the political process and leaving the prejudice branch for others.¹²⁹

The two questions that we need to be able to answer for the reconstruction are: (1) When should the judiciary intervene? and (2) What should guide a judge’s interpretive decisions?

127. ELY, *supra* note 3, at 151.

128. *Id.* at 152. In a later work Ely more explicitly discusses his views on pluralism in the context of the debate between whether the Constitution is best understood as embodying Madisonian pluralism or a more republican form of government. Ely, *Another Such Victory*, *supra* note 117, at 840 n.15. Ely found the pluralist account more convincing, but shied away from “bare-knuckled pluralism” based on his theory of prejudice. *Id.* As this Article argues, Ely’s embrace of only public values related to “discrete and insular minorities” says more about Ely than it does the requirements of a political process approach.

129. See, e.g., Schacter, *Ely at the Alter*, *supra* note 4, at 1371, 1402–11 (distinguishing the two branches, and updating prejudice branch in light of the same-sex marriage debate).

A. The Trigger Question

Ely would answer the first question by saying the judiciary should intervene when the “political market . . . is systematically malfunctioning.”¹³⁰ In *Democracy and Distrust*, Ely discusses a spectrum of activities that could be grouped under the rubric of the ins staying in.¹³¹ As Ely moved from core First Amendment issues to nondelegation, his argument becomes more attenuated.¹³² A full reconstruction of *Democracy and Distrust* would need to address this issue, but because this Article is primarily concerned with looking at judicial review of campaign-finance reform, the bounds of judicial intervention do not need to be theorized fully. If the concern is legislators entrenching themselves by regulating political speech via campaign-finance regulation, there can be little doubt that judicial scrutiny is appropriate.

B. Defining the Goals of Campaign-Finance and Campaign-Speech Regulation

The goal of this reconstruction will still be representation reinforcement. It would be hard to define any approach that chose another goal as even roughly Elysian. This reconstruction will be more explicit than Ely at this point about what substantive judgments are entering the analysis. The critics of *Citizens United* seek a more egalitarian democracy that values something beyond “one person, one vote” on Election Day. For example, Lessig argues that a vote matters little, if candidates depend on powerful interests to even stand for election.¹³³ There are aspects of American democracy that could support some form of deliberative democracy, but the problem lies in conceptualizing what form or aspects

130. ELY, *supra* note 3, at 103.

131. See ELY, *supra* note 3, at 103 (expressing concern that “the ins” will manipulate the political process to “stay in”); see also *supra* notes 19–22 and accompanying text.

132. McLoughlin, *supra* note 114, at 101. For McLoughlin, “Ely’s argument started to break down when it moved away from paradigmatic cases of political blockage and toward cases involving breakdowns in democratic deliberation.” *Id.* at 120. McLoughlin ultimately argues for a structural approach to election law with greater use of empirical evidence showing “superior alternatives and extremities of unfairness” by lawyers in election law cases. *Id.* at 148. According to his proposal, this would allow judges to address the worst inequities, develop standards, and “explain[] decisions in terms of outcomes rather than abstractions.” *Id.* at 131. This approach would seem to please Judge Posner based on his criticism of *Democracy and Distrust*. Richard A. Posner, *Democracy and Distrust Revisited*, 77 VA. L. REV. 641, 650 (1991) (“[M]atters central to the construction and evaluation of a participation-oriented representation-reinforcing jurisprudence are issues in social science.”). While McLoughlin’s approach might appease some critics of *Citizens United*, it sacrifices the benefit of a bright-line rule while failing to address the fundamental issue of what judges are trusted to handle.

133. LESSIG, *supra* note 52, at 244–45.

judges could administer. This puzzle is a difficult one, and herein lies much of the heavy lifting for the critics. Critics need to introduce an account of American democracy beyond laissez-faire pluralism that can be adjudicated.

1. Competition Alone Will Not Work

One approach would be to focus upon the need for competition in elections. This appears to be closest to the antitrust vision to which Ely appeals¹³⁴ and even the democratic minimalist Joseph Schumpeter saw competitive elections as a necessary condition of democracy.¹³⁵ However, the obvious problem with a competition-centered view is that often congressional districts are solidly red or blue for reasons unrelated to campaign-finance law. What should the government do to make Harlem more hospitable to Republicans or eastern Tennessee less red?

In addition, there is a feedback loop between competition and spending. Competitive races attract the big campaign expenditures that critics worry about.¹³⁶ In turn, campaign spending by challengers increases the degree of competition in a race.¹³⁷ While there are good arguments that public campaign financing is necessary to overcome the advantage of incumbency and spark the competitive cycle,¹³⁸ a competition-oriented

134. See ELY, *supra* note 3, at 102–03 (describing Ely’s antitrust model).

135. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 271–72 (1942) (cited in ELY, *supra* note 3, at 240 n.76). For a discussion of Schumpeter’s ideas in the context of the modern debate over campaign-finance regulation and an argument for a competition-oriented government interest, see Stephan Stohler, Comment, *One Person, One Vote, One Dollar? Campaign Finance, Elections, and Elite Democratic Theory*, 12 U. PA. J. CONST. L. 1257, 1270–78 (2010).

136. See, e.g., Owen G. Abbe & Paul S. Herrnson, *Campaign Professionalism in State Elections*, 3 ST. POL. & POL’Y Q. 223, 234–35 (2003) (finding that campaign spending was higher in competitive elections for state legislature). In one recent study the amount of campaign spending was used to measure the degree of competition in elections. Shaun Bowler & Todd Donovan, *Electoral Competition and the Voter*, 75 PUB. OP. Q. 151, 153 (2011).

137. See Alan I. Abramowitz, *Incumbency, Campaign Spending, and the Decline of Competition in U.S. House Elections*, 53 J. POL. 34, 48 (1991) (finding that “the most important determinant of the level of competition in House elections is the challengers’ campaign spending”). It should be noted though that campaign contribution limits have also been found to increase competition. Thomas Stratmann & Francisco J. Aparicio-Castillo, *Competition Policy for Elections: Do Campaign Contribution Limits Matter?*, 127 PUB. CHOICE 177, 198 (2006). *But see* John R. Lott, Jr., *Campaign Finance Reform and Electoral Competition*, 129 PUB. CHOICE 263, 292 (2006) (finding campaign contribution limits result in less competition).

138. See, e.g., Kenneth R. Mayer, *Public Financing and Electoral Competition in Minnesota and Wisconsin*, UNIV. S. CAL. (April 1998), <http://www.usc.edu/dept-00/dept/CRF/RS/mayer.html> (“Minnesota’s public finance system has made legislative elections more competitive by providing significant resources to challengers” and therefore “incumbents in Minnesota are . . . less likely to win in landslides, and more likely to lose.”).

view faces difficulty in justifying restrictions on campaign speech and would not satisfy the critics of *Citizens United*.

2. Utilitarianism, Government Interests, and Political Integrity

The most promising approach is to build on “one person, one vote” by drawing upon Bentham’s basic utilitarian rationale of “each to count for one and none for more than one”¹³⁹ to justify a government interest in regulating campaign finance. Because *Citizens United* recognized a conception of the anticorruption interest as a compelling government interest, the best approach is to focus on the concept of corruption.

i. Potential Conceptions of Corruption

The interest in preventing corruption is the strongest government interest. The problem is that corruption can be what Ely called a “mushword.”¹⁴⁰ However, Zephyr Teachout’s framework brought enough clarity for us to work with the conceptions.¹⁴¹ Because the critics of *Citizens United* seek something beyond quid pro quo corruption—which is certainly the core conception of corruption—the other conceptions will be examined.

a. Inequality

Corruption as inequality is concerned with what is more generally referred to as “undue influence.”¹⁴² Commentators such as David Strauss,¹⁴³ Ronald Dworkin,¹⁴⁴ and Dan Tokaji¹⁴⁵ have described this view.

139. ELY, *supra* note 3, at 238 n.54.

140. *See id.* at 153 (referring to prejudice as mushword).

141. *See* Teachout, *supra* note 62, at 387. The following analysis omits Teachout’s conception of “drowned voices.” *Id.* at 394. The idea of “drowned voices” is simply that when some parties have too much influence, other voices are drowned out, and thus, their First Amendment rights are impaired. *Id.* Teachout sees the essential difference between drowned voices and inequality as the source of the value: While inequality weighs an anticorruption principle against a First Amendment value, drowned voices weighs two competing First Amendment values against one another. *Id.* However, the essence of this balancing test is the same as the inquiry related to inequality, so for present purposes, this conception adds little analytically and can be collapsed into the conception of inequality.

142. *Id.* at 392 (internal quotation marks omitted).

143. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994). Strauss’s criticisms of the inequality conception will be discussed below. *See infra* notes 173–75 and accompanying text.

144. Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. OF BOOKS, Oct. 17, 1996, <http://www.nybooks.com/articles/archives/1996/oct/17/the-curse-of-american-politics/>.

The major shortcoming of this idea by itself is that first someone has to evaluate what influence is *due* before one can say what influence is *undue*. For example, is the influence of beautiful and charismatic celebrities undue? If we could distinguish old money donors and successful rags-to-riches entrepreneurs, would that alleviate fears of the “donor class?”¹⁴⁶ In other words, the problem with an inequality conception of corruption is that the issues it raises quickly turn into fundamental issues of moral and political philosophy. What is equality? What role should the state play in redistribution? What type of influence over the state do people deserve? These are all important questions for campaign-finance regulation, but they are the type of issues that political process theories say judges should stay out of lest adjudication turn into a philosophical dispute.¹⁴⁷ While the concept of corruption is inherently derivative of one’s concept of good government,¹⁴⁸ the inequality conception brings highly contested questions to the fore.

A second challenge to implementing this conception is the powerful countervailing language from *Buckley*: “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.”¹⁴⁹ More recent statements by the Court leave this conception in an even weaker position. Even putting *Citizens United* to the side, *Arizona Free Enterprise*

145. See Daniel P. Tokaji & Allison R. Hayward, Debate, *The Role of Judges in Election Law*, 159 U. PA. L. REV. PENNUMBRA 273, 280 (2011) (Tokaji, Opening Statement) (“The real significance of *Citizens United* is its rejection of political equality as a justification for imposing limits on campaign spending.”); Daniel P. Tokaji, *The Obliteration of Equality in American Campaign Finance Law (and Why the Canadian Approach Is Superior)* 1 (The Ohio State Univ. Moritz Coll. of Law Pub. Law & Legal Theory Working Paper Series, Paper No. 140, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1746868 (expanding on this idea).

146. Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 102 (2004) [hereinafter Overton, *The Donor Class*] (reporting data from 2000 election cycle showing that, of those who made donations over \$200, “70.2% are male, 70.6% are age 50 or older, 84.3% have a college degree, 85.7% have family incomes of \$100,000 or more, and 95.8% are white.” (footnote omitted)); see also PUBLIC CAMPAIGN ET AL., COLOR OF MONEY: THE 2004 PRESIDENTIAL RACE 3 (2004) (finding that in the 2004 presidential election approximately 90% of contributions over \$200 came from majority non-Hispanic white neighborhoods). The \$200 cutoff is based on the floor for disclosure requirements set by the Federal Election Campaign Act, 2 U.S.C. § 434(e)(2)(C) (2006).

147. Ely parodies this vision for the role of the Court as: “We like Rawls, you like Nozick. We win, 6-3. Statute invalidated.” ELY, *supra* note 3, at 58 (internal quotation marks omitted).

148. See Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1391 (2013) (summarizing the widely shared view that corruption is a derivative concept that depends on a theory of the institution involved).

149. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam).

Club's Freedom Club PAC v. Bennett, plainly stated that the government's interest in "leveling the playing field" is not compelling.¹⁵⁰

An inequality conception would appeal to many critics of *Citizens United* who see the fundamental problem as the power that wealth provides.¹⁵¹ However, equality is better addressed via spending rather than prohibition on speech.¹⁵² Even if most people can agree on certain standards like "one person, one vote" in malapportionment cases, campaign-speech restrictions arise under the First Amendment, which invites facial challenges and questions of overbreadth.¹⁵³ Accordingly, even a weak implementation of corruption as inequality quickly turns into a question of political morality when facing a hard case like *Citizens United*.

b. Dispirited Public

"Dispirited public" is an effects-oriented conception of corruption. On this view, the fear is not cash-for-votes or some other form of undue influence, but instead that citizens may lose faith in our democratic system of government.¹⁵⁴ The problems with this view are twofold. First, if it is being raised in the context of an analysis of corruption, then the cause and the effect have been conflated. The concern with the effect on the public would justify masking corruption just as much as it would prohibiting corruption. Second, as other commentators have observed, "public" opinion often serves as a Rorschach for the Justices' own views about democratic politics.¹⁵⁵ Functionally, this conception provides few constraints on judges

150. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825 (2011) (internal quotation marks omitted).

151. *See, e.g., Waldman, supra note 71* (stating that anonymous funding "will warp policymaking"); *see also Obama, supra note 72* (referring to "America's most powerful interests").

152. *See, e.g., Spencer Overton, The Participation Interest*, 100 GEO. L.J. 1259, 1294, 1306 (2012) (proposing ways that participation, and hence equality, could be increased by spending); Overton, *supra note 146*, at 77 (same); *see also BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 77* (2002) (proposing public funding of elections through "Patriot" program which would give individuals "Patriot dollars" that could be anonymously given to candidates). Any spending scheme would have to pass muster under *Bennett's* holding that the government cannot effectively penalize a candidate who has a privately funded campaign by giving money to this candidate's opponents. *See Bennett*, 131 S. Ct. at 2828.

153. RICHARD H. FALLON, JR., ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 168-74* (2009) (discussing the relationship between facial challenges and overbreadth in First Amendment cases).

154. Teachout, *supra note 62*, at 394-95.

155. *See Nathaniel Persily & Kelli Lammie, Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 120, 122, 133-34 (2004) (noting that judges have cited public-opinion polls to justify campaign-finance regulations, yet finding that trends in public attitudes towards corruption "seem unrelated to anything happening in the campaign finance system").

imposing their own judgments about the effect of a regulation. This is not a fatal flaw—this reconstruction accepts this type of role for judges—but the conception of dispirited public needs a stronger basis lest it be satisfied by providing less information about lobbyists and campaign contributions. Because eight members of the Court supported the provision of information interest,¹⁵⁶ dispirited public is a weak basis to build a theory upon.

c. Loss of Political Integrity

At this point in the analysis it may seem as though *quid pro quo* corruption is the only workable conception of corruption. The purpose of the previous discussion though has not been to demonstrate the futility of a judicial role, but instead to show that both inequality and dispirited public each share many of the same liabilities as the conception of corruption that Teachout calls “loss of integrity.”¹⁵⁷

“Loss of integrity” is a moralistic view of the responsibilities of citizens and politicians to govern with integrity.¹⁵⁸ This view of corruption comports with the maxim that “public office is a public trust”¹⁵⁹ and that those who hold office do so as trustees of the public good. Unlike other vague, moralistic standards such as the duty of a fiduciary,¹⁶⁰ courts have not embraced this conception and developed a doctrine around it, so corruption as loss of integrity currently lacks analytical clarity.

Lawrence Lessig provides a less moralistic version of essentially the same interest when he talks about “dependence corruption.”¹⁶¹ He argues that Congress should be dependent upon “the people alone” and any other dependence harms the integrity of government.¹⁶² Lessig’s view puts emphasis on institutions rather than individuals,¹⁶³ but in his proposal for reform, the conception of corruption as loss of political integrity still

156. See *supra* notes 56–59 and accompanying text.

157. Teachout, *supra* note 62, at 395.

158. See *id.* at 374–75 (discussing Montesquieu-esque ideas of public virtue held by Framers); see also *id.* at 395 (“The cluster of corruption ideas that would have the most meaning for the Framers are those that deal with corruption as a loss of political integrity, and systems that predictably create moral failings for members of Congress.”).

159. *E.g.*, KY. REV. STAT. ANN. § 11A.005 (LexisNexis 2008); Pennsylvania Public Official and Employee Ethics Act, 65 PA. CONST. STAT. ANN. § 1101.1(a) (West 2013).

160. See, *e.g.*, *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (“A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”).

161. LESSIG, *supra* note 52, at 231–32, 245–46.

162. *Id.* at 128 (quoting THE FEDERALIST NO. 52, at 354 (James Madison) (Jacob E. Cooke ed., 1961)).

163. *Id.* at 231.

provides the core justification for a governmental role in campaign-finance or campaign-speech regulation.

The conception of loss of political integrity is moralistic, but it concerns the type of public morality that strengthens representative democracy. The interest and the concern that fuel ethics scandals, such as the crimes of Jack Abramoff, is not that Abramoff and his clients simply had too much influence or that this hurts the public's perception of Beltway politics.¹⁶⁴ The concern is that people like former Representative Tom DeLay did not act with the integrity that Americans deserve from their representatives.¹⁶⁵

Teachout focuses much of her article on the Founding-era sense of morality that pervaded public life.¹⁶⁶ This part of her discussion has many parallels with Bruce Ackerman's account of the Founding and public virtue.¹⁶⁷ For Ackerman, much of the Constitution's wisdom is that it enabled citizens to relegate their responsibilities for public morality to the back burner,¹⁶⁸ except during periods of "constitutional politics" when the people reclaim their sense of public morality and assert popular sovereignty.¹⁶⁹ Yet, Ackerman's account of the wisdom of allowing "normal politics" among the citizenry does not free our representatives from their responsibility for public virtue.

A government comprised of "the people" has an interest in ensuring that their representatives can restrict behavior that encourages public office to be used for public good. Admittedly, this conception is somewhat "mushy," but just as legal doctrines have been developed around indeterminate equitable concepts, such as the duty of a fiduciary, clarity could be established through the common-law process of focusing on the facts at issue and weighing the interests involved. This view comports well with the critics' vision of democracy, which is comfortable with more of a

164. *Investigating Abramoff – Special Report*, WASH. POST, <http://www.washingtonpost.com/wp-dyn/content/linkset/2005/06/22/LI2005062200936.html> (last visited Nov. 24, 2013) (reporting that lobbyist Jack Abramoff pled guilty to fraud, tax evasion, and conspiracy to bribe public officials).

165. *Id.* (explaining that the Abramoff scandal caused DeLay to give up his leadership post).

166. Teachout, *supra* note 62, at 379–80.

167. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1016–26 (1984).

168. One of the Court's criticisms of Teachout was that her account of the Founding-era conception of corruption also touched on the responsibilities of private citizens. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 928 (2010). This concern can be addressed by Ackerman's dualist view, even if one is skeptical of his post hoc view of locating "constitutional moments." Ackerman, *supra* note 167, at 1022. For a discussion of when political action by private citizens may become state action for constitutional purposes when serving a political role, see Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 432 (2012).

169. Ackerman, *supra* note 167, at 1022–26.

role for the state in limiting the influence of the wealthy and maintaining faith in representative democracy. Concerns about inequality and dispirited public could be additional factors, but advocates of campaign-finance reform would be better served by inserting a more powerful interest at the core of their arguments for the constitutionality of regulations on speech. This would avoid the situation then-Solicitor General Kagan found herself in when she was juggling multiple interests, while Ted Olson could point to a basic principle of free political speech.¹⁷⁰ For critics of *Citizens United*, the conception of corruption as loss of integrity can provide a foundation for incorporating representation reinforcement into judicial review of campaign-finance regulation.

ii. Criticisms of a Broad View of Corruption

The idea that a broad view of corruption should be a concern has been criticized,¹⁷¹ and the spectre of *Lochner* has been raised.¹⁷² David Strauss's influential article *Corruption, Equality, and Campaign Finance Reform* argues that corruption is a derivative problem and that the real issues are wealth inequality and the nature of democratic politics, by which he means the tendency of pluralistic democracy to privilege interest groups at the expense of the common weal.¹⁷³ Strauss recognizes the core theoretical problems with an expanded view of corruption and correctly points out that the difficulty is not in conceptually separating the public good from private gain, but from empirically determining in practice whether a given decision is in the public interest.¹⁷⁴ However, Strauss's mistake is to move from this recognition to the position that if courts began making motivational determinations, then the judiciary would be forced to sort out every conflict down to those between opticians and optometrists.¹⁷⁵ Heightened review could be reserved for liberty cases such as those that arise under the First Amendment. In these cases, courts could consider an integrity-based conception of corruption to justify the political branches' restricting

170. Reargument, *supra* note 37, at 3, 45–50.

171. See, e.g., *Citizens United*, 130 S. Ct. at 928 (“[I]f speech can be prohibited because, in the view of the Government, it leads to ‘moral decay’ or does not serve ‘public ends,’ then there is no limit to the Government’s censorship power.”).

172. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 513 (2d ed. 2002) (“*Buckley* and its companion cases drew tremendous criticism as part of the ‘*Lochnerization*’ of the First Amendment.”).

173. Strauss, *supra* note 143, at 1370, 1378.

174. *Id.* at 1378.

175. Cf. *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 486 (1955) (representing classic formulation of rational basis review of legislation in considering a law that appeared designed to benefit optometrists at the expense of opticians).

campaign financing, so long as the restriction will have the net effect of reinforcing representation rather than protecting incumbents. This analysis would not be easy, but it would serve to increase the effectiveness of the utilitarian basis that underlies majoritarian decisionmaking.

Kathleen Sullivan has argued that justifying restrictions based on a particular conception of democracy is a form of content restriction for those with other conceptions of democracy.¹⁷⁶ For Sullivan, restrictions that reject laissez-faire pluralism and instead embrace another conception of democracy are just another form of content restriction that is challenging to find a compelling interest to justify.¹⁷⁷ Sullivan makes a valid point, but any conception of democracy that would fit the American experience could include an egalitarian representation-reinforcing interest.¹⁷⁸

In discussing the restrictions on corruption, we essentially are discussing a content restriction that requires strict scrutiny but would be justified based on the government interest in preventing corruption as loss of integrity. The closest relative of this approach is described by Justice Breyer in *Active Liberty*.¹⁷⁹ Justice Breyer supports an approach to judicial review of campaign-finance regulation based on proportionality between speech-enhancing and speech-restricting consequences.¹⁸⁰ Functionally, Justice Breyer's approach and the reconstructed version of representation reinforcement would result in the same balancing test for the type of restriction at issue in *Citizens United*. However, if this reconstruction were to be expanded into other issues, an Elysian approach would be more restrained than Justice Breyer's interpretive theory.

3. Constructing Representation Reinforcement Revisited

This reconstruction of *Democracy and Distrust* has essentially made one tweak by inserting an anticorruption principle to protect a more public-spirited conception of democracy that the judiciary should be charged with enforcing. When the Court plays its role of "clearing the channels of political change,"¹⁸¹ it should acknowledge that some laws that reduce

176. Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 681–82 (1997).

177. *Id.*

178. Cf. Frank Askin, *Political Money and Freedom of Speech: Kathleen Sullivan's Seven Deadly Sins—An Antitoxin*, 31 U.C. DAVIS L. REV. 1065, 1078 (1998) (objecting to Sullivan's proposal because it would justify a plutocratic conception of American democracy).

179. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION* 38, 42–43 (2008).

180. *Id.* at 42–44. In passing, Justice Breyer reaffirmed this approach even after *Citizens United*. STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* 164 (2010).

181. ELY, *supra* note 3, at 74, 105.

liberty may increase representation and therefore pass review. At this point though it is valid to ask, is there any Ely left in this Elysian analysis? It could be said that at the point that we acknowledged that we were making substantive choices and not just relying on pure process, we moved away from Ely and could have found another theorist to use in adjectival form. But this misunderstands the persistence of Ely.

This Article introduced the theory via Ely and stuck with him for his core concern—a theory of “participation-oriented, representation-reinforcing” judicial review.¹⁸² In explaining Ely’s continuing relevance despite his theoretical inconsistencies, Tushnet suggests that perhaps we should re-conceptualize Ely as identifying a rhetorical trope rather than expounding a constitutional theory.¹⁸³ The word “trope” though downplays the aspirational goal of Ely to connect judicial review with America’s democratic foundation. The interpretive approach developed in this Article is called *representation reinforcement revisited* to reverberate with this goal and to show how a small shift could change the application of an Elysian theory.

VI. ASSESSING REPRESENTATION REINFORCEMENT REVISITED

One weakness of the reconstruction is the administrability of a corruption-based standard. This reflects the classic tension between rules and standards, and the debate about the degree of predictability and certainty necessary for the Rule of Law.¹⁸⁴

The issues related to judicial application of standards and the Rule of Law bring to mind the section of *Democracy and Distrust* that quotes Justice Stewart’s argument for a test for malapportionment based on the “will of [the] majority.”¹⁸⁵ Ely’s resistance to this type of broad standard is due to the many ways that influence can be felt and his skepticism towards

182. *Id.* at 87.

183. Mark V. Tushnet, *Foreword*, 77 VA. L. REV. 631, 638 (1991).

184. Compare Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989) (arguing that balancing tests resemble fact-finding less than the determination of law and urging that “the Rule of Law, the law of rules, be extended as far as the nature of the question allows” (emphasis in original)), with Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 8–9 (2008) (de-emphasizing predictability and emphasizing the procedural aspects of the Rule of Law which focus more on the integrity of institutions and “value opportunities for active engagement in the administration of public affairs”). See generally Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997) (discussing ideal-types of differing conceptions of the Rule of Law and arguing that no single strand should be dominant).

185. *Lucas v. Colo. Gen. Assembly*, 377 U.S. 713, 753–54 (1964) (Stewart, J., dissenting) (quoted in ELY, *supra* note 3, at 122).

a judicial inquiry into the dynamics of political power.¹⁸⁶ The difficulty of this inquiry is certainly true, but his statement that it would be “unseemly”¹⁸⁷ reflects his lack of dedication to addressing the potential pernicious power of interest groups. Ely would have had little patience for segregationists who found it unseemly to integrate a school. Would it be better for the judicial branch to leave corruption to the political branches and allow the democratic system to be undermined? If Ely had put the same weight on corruption that he put on prejudice,¹⁸⁸ this would be answered in the negative. But if one injects a conception of democracy that values political integrity and provides judges with a modicum of trust, then even if administrability will be difficult, it will be preferred over inaction, and thus, be the best justification of a judge’s role in our system.

This issue of trust is the fundamental issue on both sides. While democracy is the constant compass of *Democracy and Distrust*, distrust shares an equal place in the title and underlies Ely’s thinking. The final sentence of *Democracy and Distrust* emphasizes the role of trust in his conception of constitutionalism: “constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can.”¹⁸⁹ Yet, because Ely’s book pays little thought to constitutional law outside the courthouse, it would be more accurate to amend the first phrase to say, “constitutional law appropriately exists for those situations where representative government cannot be trusted *but judges can*.” For Ely, generally judges are not to be trusted, so the role for constitutional law is limited. The argument of this Article is that in the field of campaign-finance regulation, representatives cannot be trusted but judges can—or at least that it’s better to trust judges to oversee some regulation than to have no regulation.

Frederick Schauer, the only commentator to focus on Ely’s distrust, considers distrust to be part of the prevailing American political consciousness, but notes that “[t]o distrust a decisionmaker is to adopt, usually *sub silentio*, a comparatively rosy view of the status quo.”¹⁹⁰ A

186. ELY, *supra* note 3, at 123–24.

187. *Id.* at 124.

188. Although he ultimately chooses an approach to minority rights that focuses on motivational prejudice rather than some definition of “discrete and insular minorities,” Ely dismisses an objection to courts becoming involved in the practical political analysis that would be needed to determine whether a minority is discrete and insular, because no other institution would be better situated. *Id.* at 151 (“If the approach makes sense, it would not make sense to assign its enforcement to anyone but the courts.”). If one values political integrity at the same level as political equality for minorities, there is no reason this same logic shouldn’t apply to First Amendment issues related to campaign-finance regulation.

189. *Id.* at 183.

190. Frederick Schauer, *The Calculus of Distrust*, 77 VA. L. REV. 653–66 (1991).

starting point of trust or distrust is not preordained, and distrust is perhaps Ely's most substantial substantive view because it affects his conception of democracy and thus his goal.

Based on this Article's deconstruction of Ely, statements by critics of *Citizens United*, and an analysis of the varying conceptions of the anticorruption principle in American democracy, the main difference between Ely and this reconstruction—as well as the majority and dissenting members of the Court in *Citizens United*—is the degree of trust that each side accords voters in viewing advertisements and judges in balancing a broad view of corruption and individual liberty. As for voters, Kennedy refers to a “proper” way to react to corporate political speech and trusts that voters will inform themselves given transparency,¹⁹¹ while critics like Dworkin believe that “the great mass” is less trustworthy and needs to be protected from the beer ad-esque advertisements lest the electorate becomes dispirited and loses faith in democracy.¹⁹² As for judges, Ely affords them little trust in the field of the First Amendment,¹⁹³ while Stevens trusts that judges can engage in motivational analysis.¹⁹⁴

Perhaps once we reach this issue of trust, then we are beyond the useful point of argumentation. The resolution may depend more on the Justices' faith in lower court judges than the historical record. For example, considering Justice O'Connor's expressed faith in the lower courts' judiciaries,¹⁹⁵ her relative comfort vis-à-vis her colleagues with judicial inquiries into political power,¹⁹⁶ and her position as swing vote on earlier campaign-finance decisions,¹⁹⁷ she probably would be closer to the *Citizens*

191. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 916 (2010).

192. Dworkin, *The Decision*, *supra* note 67.

193. See ELY, *supra* note 3, at 112 (referring to “judicial capitulation” and quoting Judge Learned Hand's fears about “Tomdickandharry, D.J.” having too much latitude (quoting Letter from Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921), in Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 749–50 (1975))).

194. *Citizens United*, 130 S. Ct. at 969. For a discussion of problems with motivational analysis in past campaign-finance decisions by the Court, see Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 32 (2004).

195. See e.g., SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 78 (Craig Joyce ed., 2003) (discussing the growth of public trust in the judiciary by highlighting judges that Justice O'Connor admires, such as “the Four” Fifth Circuit judges that operationalized *Brown*).

196. Compare *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 61 (1994) (O'Connor, J., dissenting) (arguing that whether an entity is an “arm of the State” for sovereign immunity purposes should depend on an analysis of practical political control), with *Hess*, 513 U.S. at 47–52 (Ginsburg, J.) (worrying about the judicial manageability of an inquiry into control and adopting instead an inquiry focused on the state's financial responsibility over the entity).

197. See, e.g., *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

United dissent and a reconstructed version of representation reinforcement than the majority and Ely's views. But once we can isolate the key issue in campaign-finance doctrine, we can have a more effective conversation about the risks and benefits of regulating speech in the name of democracy.

A theory of constitutional interpretation could be developed that makes implicit ideas of trust explicit and better protects representative democracy by recognizing Congress's power to regulate the political process while the judiciary ensures representation is reinforced, not restrained. While this theory is developed, the *Citizens United*-era will produce empirical data about just what effect deregulation will have on spending, influence, public participation, and most importantly, trust.¹⁹⁸ If the fears of *Citizen United*'s critics come true, a process-theory approach could provide a principled way forward.

CONCLUSION

The analysis has started from the first word in Ely's title, "Democracy," and reached the last word, "Distrust." In understanding how Ely would respond to a hard case like *Citizens United*, this Article furthers the critical understanding of Ely's theory and constitutional theory related to campaign-finance regulation. This analysis has shown that assumptions of trust play a critical role in judicial review of election law. One lesson from this analysis is to reaffirm the critical consensus that Ely's "process" theory relies on implicit substantive judgments. A second lesson is that because an easily administrable standard is doubtful, commentators should more explicitly discuss trust when proposing solutions in this political thicket. If the feared effects of *Citizens United* prove true, critics of *Citizens United* should recognize the appeal of Ely's participation-oriented goal and develop a representation-reinforcing theory for the twenty-first century.

198. See, e.g., PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, CITIZENS UNITED AND THE 2010 MIDTERM ELECTIONS 2 (December 2010), available at <http://advocate.nyc.gov/files/12-06-10CitizensUnitedReport.pdf> (providing empirical data regarding post-*Citizens United* campaign spending).