

The Perverse Effect of Campaign Contribution Limits: Making the Amount of Money that can be Offered Smaller Increases the Likelihood of Corruption in the Federal Legislature

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abstract: Corruption is an important issue, which poses a special threat to the democratic institutions and integrity of the United States. The purpose of campaign finance regulation is to reduce or eliminate corruption. Congress has enacted substantial legislation for this purpose, yet corruption flourishes. This paper suggests that the campaign finance laws fail to take into account the actual decisionmaking process of a legislator contemplating a corrupt act. By diagramming that process, this paper demonstrates that the legislation, which focuses on limiting the size of individual campaign contributions, actually increases the likelihood of corruption. An understanding of the decisionmaking process points to other directions for meaningful regulation of campaign finance.

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A fundamental purpose of campaign finance reform is to reduce corruption.¹ Other goals and affects attach themselves to campaign reform, of course, such as correcting structural imbalances in representation, and these are important aspirations.² Nonetheless, the Supreme Court of the United States has singled out the prevention of corruption as the “only justifiable interest identified so far” in the federal legislation intended to reform campaign finance.³

This is not an insignificant purpose. “Corruption and democracy are incompatible; corruption and economic prosperity are incompatible; and corruption and equal opportunity are incompatible.”⁴ Akhil Amar points out the special danger corruption poses in the United States: “Bribery – secretly bending laws to favor the rich and powerful – involves official corruption of a highly malignant sort, threatening the very soul of a democracy committed to equality under the law.”⁵ Tragic experience throughout the world demonstrates the corrosive effect that corruption has on the relationship between people and their governments.⁶

For such a serious goal, the legislation enacted by Congress demonstrates a surprisingly unsophisticated understanding of corruption. The series of laws emphasize a simple approach: eliminate or limit campaign contributions. Such an approach does not take into account the real costs faced by a legislator choosing whether or not to enter into a corrupt transaction. When those costs are considered, it becomes apparent that limiting the amount of individual contributions actually increases the likelihood that a legislator will choose to enter into that corrupt transaction. It also becomes evident that the legislation has focused on the wrong aspects of corruption.

This does not excuse the conduct of those legislators who enter into corrupt relationships. Legislators who enter into corrupt transactions know, or should know, that their behavior is wrong, and their choice to act corruptly is inexcusable. This paper is intended not to excuse such

¹ See Meredith A. Johnston, *Stopping Winks and Nods”: Limits on Coordinating as a Means of Regulating 527 Organizations*, 81 N.Y.U. L. REV. 1166, 1186 (2006) (stating that the purpose of current campaign finance reform is to prevent corruption); Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1162-63 (stating that the purpose of campaign finance reform has been to control corruption).

² See Raskin & Bonifaz, *supra* note 1, at 1163 (discussing the remedial purposes of campaign finance reform with respect to structural bias).

³ *Buckley v. Valeo*, 434 U.S. 1, 8 (1976).

⁴ Statement of US Representative to the United Nations on adopting the UN Convention Against Corruption, UN Doc. A/58/PV.50, at 19 (Oct. 31, 2003), *quoted in* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 98 AM. J. INT’L L. 182, 184 (2004).

⁵ Akhil Reed Amar, *On Impeaching Presidents*, 28 Hofstra L. Rev. 291, 302 (1999); see Nancy Zucker Boswell, *Combatting Corruption: Focus on Latin America*, 3 SW. J. L. & TRADE AM. 179, 184 (1996) (“Perhaps the greatest casualty of ... corruption has been the erosion of public trust in public institutions and leaders, the foundation of democracy.”).

⁶ See Susan Rose-Ackerman, *The Political Economy of Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY 31, 44 (Kimberly Ann Elliott ed., 1996) (“Corruption undermines the legitimacy of governments, especially democracies . . . Citizens may come to believe that the government is simply for sale to the highest bidder. Corruption undermines claims that the government is substituting democratic values for decisions based on ability to pay.”).

conduct, but rather to demonstrate that the legislative efforts to contain such behavior, while laudable, probably exacerbate the problem.

Before reviewing those legislative efforts, this paper will briefly discuss the nature of corruption.⁷ After reviewing campaign finance reform legislation,⁸ this paper analyzes the decision to act corruptly⁹ and shows that the legislation does not reflect an understanding of that process.¹⁰

The point of this paper is to demonstrate that failure of current legislation. This paper does not undertake to advocate a particular reform of the campaign finance system. However, the process of breaking down and analyzing the considerations of a legislator facing a corrupt offer casts insights into possible reforms. Those insights are discussed in this paper.¹¹

1. *Corruption*

Public sector corruption is the abuse or misuse of public office or trust for personal rather than public benefit.¹² Many acts that are corrupt are also criminal. Every country in the world, for example, criminalizes bribery of public officials.¹³ In the United States, a legislator convicted of accepting a bribe may be incarcerated for fifteen years, fined US\$ 250,000 or triple the amount of the bribe, and stripped of office.¹⁴

Not all acts that are corrupt are illegal. For example, bestowing the privilege of a face-to-face meeting with a legislator in exchange for campaign contributions may constitute misuse of office and certainly inures to the legislator's rather than public benefit.¹⁵ Nonetheless, in the United States that particular exchange is not prosecuted.¹⁶

Bribery is the corrupt act at which campaign finance reform is aimed. Bribery can occur as a straightforward exchange such as that alleged in the ongoing investigation of Senator Ted Stevens of Alaska, who allegedly awarded millions of dollars worth of federal contracts to an oil pipeline service company in exchange for substantial additions to his dwelling.¹⁷ Campaign

⁷ See *infra* notes 12-22 and accompanying text.

⁸ See *infra* notes 23-72 and accompanying text.

⁹ See *infra* notes 73-124 and accompanying text.

¹⁰ See *infra* note 125 and accompanying text.

¹¹ See *infra* notes 126-154 and accompanying text.

¹² Joseph S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419 n.10 (1967).

¹³ FRITZ HEIMANN, SHOULD FOREIGN BRIBERY BE A CRIME? 4 (Transparency International 1994).

¹⁴ 18 U.S.C. § 201(b) (2000); 18 U.S.C. § 3571(b)(3) (2000); see A. David Pardo, Jonathan Hill & Patrick Alberts, *Public Corruption*, 44 AM. CRIM. L. REV. 855, 857-75 (2007) (discussing prosecution and application of sentencing guidelines to the crime of bribery).

¹⁵ See BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 93 (2001) (describing this transaction as corrupt).

¹⁶ Not all forms of lobbying involve a *quid pro quo* exchange of money for time. See Gajan Retnasaba, *Do Campaign Contributions and Lobbying Corrupt? Evidence from Public Finance*, 2 J.L. ECON. & POL'Y 145 (2006) (differentiating types of lobbying but empirically finding large amounts of corrupt lobbying).

¹⁷ See *Across State Lines*, CAMPAIGNS & ELECTIONS, Sept. 2007, at 20, 20. The process through which a single Senator can award a federal contract, called earmarking, is briefly explained *infra*

finance comes to attention when the benefit given to the legislator goes not directly into her pocket but instead consists of money contributed to her election or re-election campaign fund. Former Representative Tom DeLay, for example, was indicted for distributing favors in exchange for money contributed to organizations that campaigned for his reelection.¹⁸

Senator Stevens and Representative DeLay serve as examples rather than the entirety of corruption in the federal legislature. When sentencing a Congressional aide for corrupt acts, Judge Paul L. Friedman of the Federal District Court spoke openly of the growing culture of corruption in the federal legislature, “an environment that has become, frankly, more and more corrupt . . . corrupted by money. You’ve literally got lobbyists sitting in Congressional offices writing legislation.”¹⁹ Nongovernmental groups that observe the legislature report an increase both in the general inclination toward corrupt acts and in specific and observable acts of corruption.²⁰ Citizens of the United States report in growing numbers that they perceive the federal legislature to be corrupt and that their perception of corruption affects their relationship with their government.²¹

Corruption, therefore, is a matter of special concern in the federal legislature of the United States. Corruption is not confined to other places, and certainly is not confined to developing or transitional economies. Corruption poses a special threat to the functionality of the U.S. democratic system.²² Corruption, therefore, merits thoughtful response. The response by the federal legislature, however, has tended toward a less-refined approach.

2. Federal Campaign Finance Regulation

Congress has attempted to control the influence of campaign contributions for many years. Although academia has generated different proposals, Congress has adhered to a fairly regular formula, which emphasizes limits on (or the elimination of) campaign contributions, as well as disclosure of the persons making contributions.

note _ and accompanying text. [Editor: The Stevens case should be resolved and no longer alleged by the time this goes through editing; if not there are other cases that can be used.]

¹⁸ See Anne E. Kornblut, *The Abramoff Case: The Overview*, N.Y. TIMES, Jan. 4, 2006.

¹⁹ Philip Shenon, *Man Linked to Abramoff Is Sentenced to 18 Months*, N.Y. TIMES, Oct. 28, 2006, at A9, A9.

²⁰ See Gary Ruskin, *The Honest Government Agenda: How Congress Can Clean up Corruption* (2006), available at <http://www.commercialalert.org/issues/government/corruption>; Citizens for Responsibility and Ethics in Washington, *Beyond DeLay: The Twenty-Two Most Corrupt Members of Congress* (2007), available at www.beyonddelay.org; Common Cause, *Money in Politics* (2006), www.commoncause.org; Congressional Accountability Project, Ethics Index, at <http://www.congressproject.org/ethics/index.html>

²¹ Gail Russell Chaddock, *Search of Capitol Hill Office Creates Another Storm*, CHRISTIAN SCI. MON., May 24, 2006, at 1, 1 (reporting surveys that indicate that “[n]early half of Americans believe that most in Congress are corrupt and that corruption affects both parties equally”).

²² See AMITAI ETZIONI, *CAPITAL CORRUPTION: THE NEW ATTACK ON AMERICAN DEMOCRACY* (1988); see Susan Rose-Ackerman, *Political Corruption and Democracy*, 14 CONN. J. INT’L L. 363, 378 (1999) (“Illegal campaign contributions and the bribery of politicians can undermine democratic systems.”).

Regulation of federal campaign finance may have begun with the Pendleton Act of 1883.²³ Although on its face the Pendleton Act simply creates a civil service, independent of political parties,²⁴ that independence in part constitutes independence from a requirement to contribute to the campaign coffers of those parties. From the time of Andrew Jackson²⁵ to that of James Garfield, public officeholders had been assessed a percentage of their wages as a kickback to the party that had given them their office; indeed, the funds generated through this scheme exceeded corporate donations.²⁶ The assassination of James Garfield by a disappointed office seeker goaded Congress into changing this system.²⁷ The Pendleton Act and its successor acts attempt to insulate officeholders from pressure to contribute to the campaign funds of the party or parties in power.²⁸

The Pendleton Act closed off the major source of campaign finance for the major parties.²⁹ Corporations happily filled the void. Elihu Root referred to corporate campaign contributions at the time as “a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government.”³⁰ In 1905 an investigation into the misuse of corporate assets by officers of large insurance companies revealed that, among other things, officers had paid large amounts into the campaign coffers of political parties.³¹ These revelations shocked the public and posed a potential source of embarrassment to recently re-elected President Theodore Roosevelt.³² Roosevelt, in response,

²³ Civil Service Act (Pendleton Act), 22 Stat. 403 (1883).

²⁴ See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2331-36 (2006) (discussing the Pendleton Act).

²⁵ William Learned Macy, governor of New York, summarized the ethos of the Jackson administration with his famous observation “To the victor belong the spoils of the enemy.” MARTIN TOLCHIN & SUSAN TOLCHIN, *TO THE VICTOR* 323 (1971). The Jackson administration’s blatant use of patronage and kickbacks elicited criticism even though administrations before and after relied on the same. *Id.* at 323-25.

²⁶ SMITH, *supra* note 15, at 20

²⁷ Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL’Y 667, 784 (2003).

²⁸ See Peter W. Schroth, *Corruption and Accountability of the Civil Service in the United States*, 54 AM. J. COMP. L. 553, 561-63 (2006) (discussing enactment of the Pendleton Act and its aftermath).

²⁹ MELVIN I. UROFSKY, *MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS* 8 (2005).

³⁰ ELIHU ROOT, *ADDRESSES ON GOVERNMENT AND CITIZENSHIP* 143 (1916), *quoted in* *United States v. United Auto Workers*, 352 U.S. 567, 571 (1957).

³¹ See Adam Winkler, “*Other People’s Money*”: *Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871, 891 (2004).

³² Winkler notes that “[t]he discoveries of the Armstrong Committee that drew the most public attention were those uncovering the large campaign contributions made by insurance company executives with company funds.” *Id.*; see also ROBERT E. MUTCH, *CAMPAIGNS, CONGRESSSES, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW* 2-3 (1988) (stating that the discoveries of the Armstrong Committee caused campaign finance reform); UROFSKY, *supra* note 29 at 14-15 (describing the political consequences of the investigation).

called for legislation to prohibit corporations from making campaign contributions.³³ Two years later, Congress enacted the Tillman Act of 1907, which prohibited contributions from federally chartered corporations.³⁴

Corporations easily circumvented the Tillman Act, not least by making contributions in kind rather than as money. Failure by the government to enforce the act made circumvention even easier. Melvin Urofsky summarizes the outcome of the law: “The first federal effort at campaign finance reform, in short, had little practical effect.”³⁵ Pressure continued to build for meaningful campaign finance reform.

In 1910 Congress enacted the Publicity Act.³⁶ The Publicity Act required post-election disclosure of donors to House candidates of more than one hundred dollars.³⁷ One year later Congress amended the Publicity Act³⁸ to require pre-election as well as post-election disclosure and disclosure of contributions to Senate campaigns; the amendments also imposed spending limits on Senate and House campaigns.³⁹

The federal Supreme Court gutted the Publicity Act in *Newberry versus United States*.⁴⁰ The Court ruled that primaries do not constitute elections for the purpose of Article 1, Section 4 or Amendment Seventeen of the United States Constitution, and thus Congress had no authority to regulate primaries.⁴¹ The Court also ruled that because at the time of the enactment of the Publicity Act Senators were still chosen by the states rather than elected through direct elections, Congress had no authority over their elections. Following the *Newberry* decision, the Attorney General of the United States informed Congress that pursuant to that decision the entirety of the Publicity Act was unconstitutional.⁴²

At around this time, another scandal focused public attention on the financing of political campaigns, and concomitantly engendered pressure on the legislature to act. The progenitor activities of the Teapot Dome scandal involved straightforward bribery,⁴³ but the ensuing investigation revealed – once again – large, hidden contributions to political parties. Congress

³³ UROFSKY, *supra* note 29, at 14; Winkler, *supra* note 31, at 919-20. Robert Sitkoff persuasively argues that corporations instigated or at least supported the legislation as a means of ending extortive contribution demands from political parties. Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103 (2002).

³⁴ Tillman Act of 1907, ch. 420, 34 Stat. 864 (1907), *codified at* 2 U.S.C. § 441(b)(2).

³⁵ UROFSKY, *supra* note 29, at 15.

³⁶ Campaign Expenses Publicity Act of 1910, Pub. L. No. 274, 36 Stat. 822, repealed by Federal Corrupt Practices Act of 1925, ch. 368, § 318, 43 Stat. 1070, 1074.

³⁷ See Justin A. Nelson, Note, *The Supply and Demand of Campaign Finance Reform*, 100 COLUM. L. REV. 524, 536 (2000) (describing provisions of the Publicity Act).

³⁸ Publicity Act Amendments of 1911, Pub. L. No. 32, 37 Stat. 25, 28, repealed by Federal Corrupt Practices Act of 1925, ch. 368, § 318, 43 Stat. 1070, 1074.

³⁹ See Nelson, *supra* note 37, at 536 (describing provisions of amendments).

⁴⁰ 256 U.S. 232 (1921), *overruled by* United States v. Classic, 313 U.S. 299 (1941).

⁴¹ 256 U.S. at 247.

⁴² UROFSKY, *supra* note 29, at 16.

⁴³ See Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 577 (2001) (describing the Teapot Dome scandal).

reacted by enacting the Federal Corrupt Practices Act.⁴⁴ The Federal Corrupt Practices Act required disclosure of donors to all multi-state committees and to Senate and House candidates, including during non-election years, and imposed spending limits on candidates. The Act did not, however, contain any enforcement provisions or penalties for failure to comply, nor did it require publication of or even public access to financial reports.⁴⁵

In *United States versus Classic*,⁴⁶ the Court reversed its position of twenty years prior and held that primaries do indeed constitute part of the election process and thus lend themselves to Congressional authority. This holding itself did not lead to legislation by Congress; that impetus sprang from the fears of Franklin Roosevelt's opponents as he transformed his popularity into political action.⁴⁷ Roosevelt's opponents feared the loyalty to Roosevelt of hundreds of thousands of persons given work through federal programs but not covered under the civil service provisions of the Pendleton Act.⁴⁸ The Hatch Act⁴⁹ extended coverage to almost all federal employees, and also increased strictures on the extent to which those employees could engage in political contests.⁵⁰ Amendments enacted the following year⁵¹ imposed an outright ban on contributions from federal contractors and from employees of state agencies funded in part or in whole by federal monies.⁵² The amendments also revived two traditional techniques of campaign finance reform: campaign contribution limits – contributions to national committees

⁴⁴ Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070 (codified at 2 U.S.C. §§ 241-256), repealed by Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, 20 (codified as amended at 2 U.S.C. §§ 431-455 (1994)).

⁴⁵ See Anthony Corrado, *Introduction to Money and Politics: A History of Federal Campaign Finance Law*, in CAMPAIGN FINANCE REFORM 29 (Anthony Corrado et al. eds., 1997) (describing flaws in the Federal Corrupt Practices Act).

⁴⁶ 313 U.S. 299 (1941).

⁴⁷ See MUTCH, *supra* note 32, at 33 (stating that the Hatch Act specifically targeted Roosevelt's power).

⁴⁸ See UROFSKY, *supra* note 29, at 21 ("The various government employment projects such as the Public Works Administration, the Civilian Conservation Corps, the Tennessee Valley Administration, and the Works Progress Administration had put millions of men and women to work on the government payroll, but outside of the civil service restrictions of the Pendleton Act.").

⁴⁹ An Act to Prevent Pernicious Political Activities, 2 Aug. 1939, 53 Stat. 1147, codified at 5 U.S.C. 1501-1508, 7321-7326.

⁵⁰ See Scott J. Bloch, *The Judgment of History: Faction, Political Machines, and the Hatch Act*, 7 U. PA. J. LAB. & EMP. L. 225, 230-34 (2005) (describing the provisions of the Hatch Act); Developments in the Law – *Public Employment* (Part 1 of 2), 97 HARV. L. REV. 1611, 1650-60 (1984) (describing the provisions of the Hatch Act). In a comprehensive reform enacted in 1993, Congress eased many of these restrictions and allowed federal employees to engage in political activities during time when such persons were not on the federal clock. Act of Oct. 6, 1993, Pub. L. No. 103-94, 107 Stat. 1001 (codified as amended in scattered sections of 5 U.S.C., 18 U.S.C., 39 U.S.C. & 42 U.S.C.); see Bloch, *supra*, at 235 (discussing the reforms).

⁵¹ 1940 Amendments to Hatch Act, ch. 640, 2, 54 Stat. 767 (1940) (current version at 5 U.S.C. 7324-7327)

⁵² See Bloch, *supra* note 50, at 233-34 (describing provisions of the 1940 amendments).

could not exceed five thousand dollars; and spending limits – spending by national committees could not exceed three million dollars.⁵³

The impulse to limit (or eliminate) contributions and the fear of Roosevelt’s power extended to labor unions, which had become powerful and popular entities.⁵⁴ Support for unions dipped, however, after a series of strikes during the second world war and Congress took advantage of union weakness to pass the Smith-Connally Act.⁵⁵ The Smith-Connally Act prohibited direct contributions from labor unions to political parties or campaigns.⁵⁶

Following the war, Congress continued its quest against unions. Some suggest that the impulse sprang from a desire to bring parity to the corporations and unions, while others suggest that it sprang from concerns over fairness to union members who disagreed with union leadership.⁵⁷ The Taft-Hartley Act⁵⁸ made the bans on contributions by unions permanent.⁵⁹ The Act also “for the first time overtly tried to limit the political speech of a particular group”⁶⁰ by prohibiting the use of union funds for any political activity including the publication of newsletters that endorsed political candidates.⁶¹

⁵³ UROFSKY, *supra* note 29, at 21.

⁵⁴ Robert F. Bauer, *When “The Poles Make the Calls”: McConnell’s Theory of Judicial Deference in the Twilight of Society*, 153 U. PA. L. REV. 5, 23 (2004) (stating that Smith-Connally Act was part of effort to counter Roosevelt’s power).

⁵⁵ Smith-Connally Anti Strike Act (War Labor Disputes Act), ch. 144, 57 Stat. 163 (1943) (codified at 50 U.S.C. app. 1501 - 1511 (1997), repealed by Act of June 25, 1948, ch. 645, 21, 62 Stat. 862, Act of Sept. 6, 1966, Pub. L. No. 89-554, 8(a), 80 Stat. 651); *see* Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 612 (2007) (discussing factors that lead to passage of the Smith-Connally Act).

⁵⁶ Craig Holman & Joan Claybrook, *Outside Groups in the New Campaign Finance Environment: The Meaning of BCRA and the McConnell Decision*, 22 YALE L. & POL’Y REV. 235, 237 n.2 (2004) (discussing the provisions of the Smith-Connally Act); *see* Russell D. Feingold, *Representative Democracy versus Corporate Democracy: How Soft Money Erodes the Principle of “One Person, One Vote”*, 35 HARV. J. ON LEGIS. 377, 379 n.5 (1998) (comparing the Smith-Connally Act to the Tillman Act).

⁵⁷ Compare David J. Sousa, *“No Balance in the Equities”: Union Power in the Making and Unmaking of the Campaign Finance Regime*, 13 STUD. AM. POL. DEV. 374, 376 (1999) (stating that the Smith-Connally Act and the Taft-Hartley Act tried to balance the power of unions and corporations) with MUTCH, *supra* note 32, at 157 (stating that concerns for union members constituted the most significant arguments in the debate over the Taft-Hartley Act); Winkler, *supra* note 31, at 928 (suggesting that concerns for dissident union members inspired the Taft-Hartley Act).

⁵⁸ Labor-Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-197).

⁵⁹ MUTCH, *supra* note 32, at 158. Bradley Smith notes that unions generally circumvented these rules by creating the first Political Action Committees and contributing money to them. Bradley A. Smith, *The Siren’s Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & POL’Y 1, 23 (1997).

⁶⁰ UROFSKY, *supra* note 50, at 22.

⁶¹ *See* Joseph E. Kallenbach, *The Taft-Hartley Act and Union Political Contributions and Expenditures*, 33 MINN. L. REV. 1 (1948) (describing provisions of the Taft-Hartley Act).

Congress strayed from its general habit of limiting contributions or requiring disclosure in 1966, with the Presidential Election Campaign Fund Act.⁶² The Act creates a fund that taxpayers can contribute to by indicating a desire to do so on their tax forms, which can be used by presidential candidates and parties under specified circumstances.⁶³ The Revenue Act of 1971⁶⁴ made the fund permanent.⁶⁵

Congress also enacted the Federal Election Campaign Act in 1971.⁶⁶ The Act continues the tactics of limitation and disclosure, albeit in a more sophisticated manner. The Act differentiates between anything of value conferred directly to a candidate, party or committee, which are considered contributions, and anything of value conferred to a third party for the purpose of influencing an election, which are considered expenditures.⁶⁷ Contributions are subject to limits, whereas expenditures are subject to disclosure.

The Bipartisan Campaign Reform Act,⁶⁸ Congress's most recent effort to control corrupt activities related to political campaigns, continues to impose limitations and require disclosure but eliminates "gaping loopholes" in the preceding legislation.⁶⁹ The Act also prohibits the use of general treasury money by businesses or unions for "electioneering communications."⁷⁰ The Supreme Court upheld the constitutionality of the Act, which today remains the foundation of controls on campaign finance.⁷¹

This very brief recitation of campaign finance regulation is not offered as the definitive history. Dozens of scholars have undertaken that project. This explication, instead, underscores a point: Congress repeatedly and consistently turns to limits or prohibitions on campaign contributions for the purpose of controlling corruption. The Court has noted that "We are under no illusion that [the Bipartisan Campaign Reform Act] will be the last congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day."⁷² There is no reason to believe that

⁶² Presidential Election Campaign Fund Act of 1966, Title III § 302(a), Pub L No 89-809, 80 Stat 1587, codified at 26 USC § 6096.

⁶³ See Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 389-90 (1998) (describing the administration of the fund).

⁶⁴ Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 497 (codified as amended in 26 U.S.C. §§991-997).

⁶⁵ See Marty Jezer, Randy Kehler & Ben Senturia, *A Proposal for Democratically Financed Congressional Elections*, 11 YALE L. & POL'Y REV. 333, 334 (1993) (discussing provisions of the Act).

⁶⁶ Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. § § 431-455).

⁶⁷ Lindsey Powell, *Getting Around Circumvention: A Proposal for Taking FECA Online*, 58 STAN. L. REV. 1499, 1507 (2006).

⁶⁸ Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C.).

⁶⁹ Holman & Claybrook, *supra* note 56, at 237.

⁷⁰ Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 131 (2004); see Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1458 (2007) (stating that the term "electioneering communication" is novel).

⁷¹ Benjamin S. Feuer, *Between Political Speech and Cold, Hard Cash: Evaluating the FEC's New Regulations for 527 Groups*, 100 NW. U.L. REV. 925, 938-40 (2006).

⁷² *McConnell v. Federal Election Commission*, 540 U.S. 93, 224 (2003).

Congress will do anything other than continue its habit of limiting campaign contributions. Paradoxically, to do so will contribute to the very corruption that campaign finance laws are intended to combat.

3. *The Decisionmaking Process*

Forcing campaign contributors to give smaller amounts of money to political candidates increases the likelihood of corruption. In order to understand this paradox, one must understand the factors taken into consideration by a legislator faced with an offer of a bribe. One must also understand the actual benefit that is offered when the bribe consists of campaign contributions. Both are more complex than simply “more money means more corruption.”

3.1. *The Cost Side of a Decision to Act Corruptly*

Literally dozens of theories attempt to explain what causes the commission of a crime.⁷³ Many of these theories have little explanatory power with respect to corruption in the federal legislature: strain theory, for example, asserts that individuals commit crime when they lack access to appropriate means of accruing material success – hardly the situation of legislators.⁷⁴ Indeed, federal legislators are fairly homogenous and relatively privileged.⁷⁵ This paper will not look for background differences that may explain different propensities for crime among different types of individuals within the legislature;⁷⁶ rather, this paper borrows Gary Becker’s method of examining the decision to commit a crime.⁷⁷ Becker suggests that individuals consciously or subconsciously weigh the costs and benefits of a crime, and will refrain from committing that crime if the costs outweigh the benefits.⁷⁸ While such rationality is probably not true of all criminals, enough persons act in this way to give the method significant predictive capability.⁷⁹ This is especially true of white collar crimes.⁸⁰

⁷³ These theories are explained in FRED A ADLER, GERHARD O.W. MUELLER & WILLIAM S. LAUFER, *CRIMINOLOGY* 85-223 (6th ed. 2007)

⁷⁴ See SANDRA WALKLATE, *UNDERSTANDING CRIMINOLOGY: CURRENT THEORETICAL DEBATES* 22-24 (1998).

⁷⁵ See Michael S. Rocca & Gabriel R. Sanchez, *The Effect of Race and Ethnicity on Bill Sponsorship and Cosponsorship in Congress*, 36 AM. POL. RES. 130, 131 (2008) (discussing characteristics of members of Congress).

⁷⁶ As might be suggested by personality theories or biological theories of criminality. See ADLER, MUELLER & LAUFER, *supra* note 74, at 96-98, 111-12.

⁷⁷ Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); see Joanna Shepherd, *Blakely’s Silver Lining: Sentencing Guidelines, Judicial Discretion, and Crime*, 58 HASTINGS L.J. 533 (2007) (describing Becker’s method as “one of the primary models for analyzing criminal behavior”).

⁷⁸ Becker, *supra* note 77, at 207-08.

⁷⁹ See Samuel Cameron, *The Economics of Crime Deterrence: A Survey of Theory and Evidence*, 41 KYKLOS 301 (1988); Shepherd, *supra* note 77, at 545.

⁸⁰ Raymond Paternoster & Sally Simpson, *Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime*, 30 L. & SOC’Y REV. 549 (1996).

A bribe is a transaction: on one side of the exchange the bribe-giver gives the bribe, on the other the bribe-taking official gives a favor.⁸¹ To state the obvious, all transactions involve costs.⁸² The costs involved in a corrupt relationship can be differentiated; assigning symbols to each cost allows the creation of a diagram of the decision whether or not to enter into the corrupt relationship.

3.1.1. *Psychic Costs*

The taking of a bribe imposes a psychic cost – C_{psy} .⁸³ Psychic costs consist of several emotional and psychological factors.⁸⁴ One of the most important is the cost of overcoming social controls against acting corruptly.⁸⁵ Social controls include “laws, norms, customs, mores, ethics, and etiquette,” all of the things by which members of a society understand what is right and what is wrong.⁸⁶ Deviating from these controls takes substantial effort, which imposes a cost on the legislator who acts corruptly.⁸⁷

The costs imposed by social controls can be manipulated. “Broken window” theory is based on the idea that the amount of crime and social disorder observed by an individual affects the internalization of social controls by that individual.⁸⁸ Decreasing the frequency of indicators that people are allowed to violate the law, such as graffiti or broken windows, increases the

⁸¹ See Bryan W. Husted, *Honor Among Thieves: A Transaction-Cost Interpretation of Corruption in Third World Countries*, 4 BUS. ETHICS Q. 17, 18-19 (1994) (describing corruption in transaction terms).

⁸² See Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 276 (2006) (stating that transaction costs are inevitable but stressing the profound importance of considering those costs).

⁸³ Sanja Kutnjak Ivkovic, *To Serve and Collect: Measuring Police Corruption*, 93 J. CRIM. L. & CRIMINOLOGY 593, 599 (2003).

⁸⁴ See Reza Fadaei-Tehrani & Thomas M. Green, *Crime and Society*, 29 INT’L J. SOC. ECON. 781 (2002) (“[E]conomists agree that the gains and costs of criminal behavior include psychic elements. These psychic costs and benefits become a net for all kinds of psychological, sociological, and political phenomena.”).

⁸⁵ See Jack P. Gibbs, *Social Control, Deterrence, and Perspectives on Social Order*, 56 SOCIAL FORCES 408, 408-09 (1977) (discussing importance and variety of social controls in personal decisions about crime).

⁸⁶ ADLER, MUELLER & LAUFER, *supra* note 73, at 168.

⁸⁷ The author of this paper investigated the relative absence of corruption in Singapore, and interviewed, among others, public officials and employees. In the author’s opinion, those bureaucrats’ internal revulsion towards corruption contributes far more than any other factor, such as laws or policies, towards maintaining a clean government in Singapore.

⁸⁸ See GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 12-14 (1996) (describing broken window theory); Eric J. Miller, *Role-Based Policing: Restraining Police Conduct “Outside the Legitimate Investigative Sphere”*, 94 CALIF. L. REV. 617, 619 (2006) (describing broken window theory).

strength of social controls.⁸⁹ Conversely, when an individual observes others violating laws and norms, the psychic cost to that individual of committing crime is lowered.⁹⁰ The “culture of corruption” in the federal legislature has probably lowered the psychic cost of entering into a corrupt transaction.⁹¹

Other psychic costs include guilt and shame for doing wrong,⁹² Shame, of course, is closely related to social controls, as they contribute to the standard whereby a person feels that she acted shamefully.⁹³ Virtually all persons perceive corruption as morally wrong; presumably this perception adheres to legislators as well.⁹⁴

3.1.2. *Penalty Costs*

Another set of costs taken into consideration by the legislator considering whether or not to undertake a corrupt transaction consist of penalties imposed on such conduct.⁹⁵ When considering the actual costs that will be borne, the person contemplating the crime will also take

⁸⁹ See Victoria Malkin, *Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center*, 40 AM. CRIM. L. REV. 1573, 1573 (2006) (“The so-called ‘broken windows’ theory links disorder and crime prevention by arguing that signs of social disorder encourage crime and should be managed through coercive social control (policing and the law).”); *but see* Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 277 (2006) (arguing that empirical evidence does not support the claim).

⁹⁰ See Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 366, 369-70 (1997) (stating that observing other crimes lowers the “price” to an individual of committing a crime).

⁹¹ See *supra* note 20; see also Richard A. Hibey, *The Impact of the Abramoff Scandal on Public Corruption Cases*, 52 WAYNE L. REV. 1363, 1363 (2006) (describing the perception of a “culture of corruption that has insidiously enveloped politicians in ways that range from questionable, imprudent, ill-advised, unethical conduct to rule-breaking and outright crime”); Susan Frelich Appleton & Robyn M. Rimmer, *Power Couples: Lawmakers, Lobbyists, and the State of Their Unions*, 24 WASH. U. J.L. & POL’Y 207, 223 (2007) (describing a “culture of corruption” in Washington).

⁹² Harold G. Grasmick & Robert J. Bursik, Jr., *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 LAW & SOC’Y REV. 837, 840 (1990).

⁹³ See J. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604, 644 (1985) (“An individual’s culture provides him or her with psychic rewards for conforming his or her behavior to cultural norms and with psychic costs for doing otherwise, and this psychic calculus takes on a social dimension through communal action: acceptance and praise for appropriate behavior, rejection and scorn for any deviation.”).

⁹⁴ See Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 LAW & POL’Y INT’L BUS. 305, 321-22 (1997) (citing primary sources from Buddhism, Christianity, Confucianism, Hinduism, Islam, Judaism, Sikhism, and Taoism and philosophers that condemn bribery).

⁹⁵ See Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 55 (2005).

into account the perceived probability – p – that the conduct will be discovered and those sanctions imposed.⁹⁶

Criminal sanctions – C_{crim} – impose a cost on the potential criminal.⁹⁷ Most obviously, a legislator convicted of corrupt acts could spend fifteen years in prison and pay a fine of US\$ 250,000.⁹⁸ Associated costs include the anxiety of going through the criminal process, the cost of legal defense, time spent away from family and friends while incarcerated, and lost income and other opportunity costs created by the time spent in prison.⁹⁹

These costs can be manipulated. Indeed, Becker and others suggest increasing penalties as a basic means of changing the costs considered by a potential criminal.¹⁰⁰ Associated costs can also be manipulated. Unfortunately, for example, a legislator pays virtually nothing for criminal defense as those costs are usually paid out of campaign funds or through special funds created by supporters and lobbyists.¹⁰¹ Legislators removed from office often enjoy lucrative careers as lobbyists or consultants, hidden from public view within the federal governmental structures.

Society also imposes costs – C_{soc} – through informal penalties applied through mechanisms less institutionalized than the criminal process.¹⁰² Whereas guilt is generated internally, shame or social approbation are generated by society in general.¹⁰³ While not as

⁹⁶ See Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 10 n.48 (1990) (“the rational person would discount the costs of the criminal sanction by the probability he will actually suffer that sanction in deciding whether to commit the crime”); see also Raaj K. Sah, *Social Osmosis and Patterns of Crime*, 99 J. POL. ECON. 1272, 1274-75 (1991) (discussing the means by which potential criminals accrue perceptions of probabilities).

⁹⁷ Shepherd, *supra* note 77, at 545.

⁹⁸ 18 U.S.C. § 201(b) (2000); 18 U.S.C. § 3571(b)(3) (2000); see *supra* note 14 and accompanying text (discussing prosecution and sentencing).

⁹⁹ See Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 COLUM. L. REV. 595, 605 n.47 (1993) (discussing the costs associated with the criminal process); Shepherd, *supra* note 77, at 546 (discussing many costs, including some imposed by the criminal process).

¹⁰⁰ Becker, *supra* note 77, at 177; Daniel T. Ostas, *When Fraud Pays: Executive Self-Dealing and the Failure of Self-Restraint*, 44 AM. BUS. L.J. 571, 585 (2007).

¹⁰¹ Kathleen Clark, *Paying the Price for Heightened Ethics Scrutiny: Legal Defense Funds and Other Ways That Government Officials Pay Their Lawyers*, 50 STAN. L. REV. 65, 88-106 (1997); see Ken Dilanian, *Campaign Funds Going to Legal Fees*, USA TODAY, May 18, 2007, at A1 (“Two dozen current and former members of Congress caught up in criminal investigations or ethics inquiries spent more than \$5 million in campaign funds on legal fees during the last 27 months covered by campaign-finance records. . . . While campaign donations may not be spent for personal use, the Federal Election Commission (FEC) has ruled that fighting to stay out of jail is a legitimate political activity as long as the allegations of wrongdoing relate to conduct in office.”).

¹⁰² Patrick J. Keenan, *The New Deterrence: Crime and Policy in the Age of Globalization*, 91 IOWA L. REV. 505, 536 (2006).

¹⁰³ Ronet Bachman, Raymond Paternoster & Sally Ward, *The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault*, 26 LAW & SOC’Y REV. 343, 355 (1992).

malleable as criminal penalties, empirical research suggests that social sanctions exert a strong influence on decisions about the commission of a crime.¹⁰⁴

3.1.3. *Cost of Bestowing the Favor*

The potentially corrupt bribe-taking legislator must also take into account the actual cost of the favor to be bestowed – C_{fav} .¹⁰⁵ It is much less costly to bestow the favor of, for example, giving a bribe-giver the opportunity to come to the legislator’s office for a personal meeting than it is to bestow the favor of swinging a vote or quashing a federal investigation, even though both represent an undemocratic abuse of power. Unfortunately, the cost of awarding large contracts or otherwise granting a favor is relatively low; individual legislators can direct substantial amounts of federal monies through the process of earmarking.

The word “earmarking” is used for a variety of practices.¹⁰⁶ As earmarking relates to corruption, it refers to the insertion into spending bills of measures directed at specific recipients or projects by a single legislator, with little or no oversight or debate.¹⁰⁷ A current member of Congress designates earmarks as “the currency of corruption.”¹⁰⁸ Indeed, several of the current investigations into Congressional corruption involve earmarking.¹⁰⁹

¹⁰⁴ Grasmick & Bursik, *supra* note 92, at 853-54.

¹⁰⁵ See Shepherd, *supra* note 77, at 544-45 (discussing the “direct costs” of a crime).

¹⁰⁶ Sandy Streeter, *Earmarks and Limitations in Appropriations Bills* (Congressional Research Service 2004), at <http://www.rules.house.gov/archives/98-518.pdf>.

¹⁰⁷ See Andrew Woellner, *Spending on an Empty Wallet: A Critique of Tax Expenditures and the Current Fiscal Policy*, 7 HOUS. BUS. & TAX L.J. 201, 226 (2006) (defining earmarks). Woellner concludes that “[t]o put it lightly, earmarks are a way for Congressmen and women to secure money for pet projects. . . . Earmarks are also loved by lobbyists.” *Id.* at 226-27.

¹⁰⁸ Jeff Flake, *Earmarked Men*, N.Y. TIMES, Feb. 9, 2006, at A27. Representative Flake elaborates:

Earmarking – in which members of Congress secure federal dollars for pork-barrel projects by covertly attaching them to huge spending bills – has become the currency of corruption in Congress. It is not just the rising number of earmarks (more than 15,000 last year – up from around 1,200 a decade ago), or the dollar amount (\$27 billion) that is troubling. More disturbing is that earmarks are used as inducements to get members to sign on to large spending measures. (The disgraced lobbyist Jack Abramoff was astute when he referred to the House Appropriations Committee as an “earmark favor factory.”) . . . In Congress these days, you establish your priorities by getting money for them. When the carefully designed process of authorization, appropriation and oversight is adhered to, these policies and priorities are given a thorough vetting. But earmarking circumvents that cycle: the Appropriations Committee ensures that earmarks escape scrutiny by inserting them into conference reports, largely written behind closed doors. By the time appropriation bills reach the House or Senate floor, passage by a lopsided margin is virtually assured because every member who got earmarks is obligated to vote for the entire bill. Further, the scope of debate is substantially narrowed,

3.1.4. *The Cost Side of the Corruption Decision*

If C_{psy} represents psychic costs, p represents the perceived probability of being discovered, C_{crim} represents the criminal sanctions, C_{soc} represents social sanctions, and C_{fav} represents the cost of the favor, then the potential cost to the potential bribe-taking official can be represented as follows:

$$C_{psy} + p(C_{crim} + C_{soc}) + C_{fav}$$

3.2. *The Benefit Side of the Decision to Act Corruptly*

The cost side is weighed against the benefit side. A bribe payor could offer several different types of benefits to a legislator, such as cash bribes or business opportunities.¹¹⁰ The benefit at issue in this paper, however, is campaign finance.

Election to the legislature requires a substantial amount of money. In 2006, the average cost of winning election to the House was 1.3 million dollars, to the Senate, 9.6 million dollars.¹¹¹ Money is critical to successful campaigning: more than ninety percent of House candidates who outspend their opponents get elected to office.¹¹²

Contributions form the bulk of campaign funds. For the 2007-2008 election cycle, the National Party could give up to 5,000 dollars, the Local Parties¹¹³ could contribute up to 5,000 dollars, and the Campaign Committee could contribute up to 2,300 dollars for a total of 12,300 dollars.¹¹⁴ This leaves the average House candidate with around 1.29 million dollars to raise every two years in order to compete for a seat, and the average Senate candidate with around 9.59 million dollars to raise every six years.¹¹⁵

with even partisan arguments that would otherwise occur hushed as Republicans and Democrats find common cause: protecting their pork.

Id.

¹⁰⁹ See Woellner, *supra* note 107, at 226-27 (discussing the link between earmarking and corruption); *Match Point for Doctor No*, *ECONOMIST*, Jan. 21, 2006, at 30 (discussing the relationship between lobbying, corruption investigations, and earmarking).

¹¹⁰ See stories about Hastert and Cunningham.

¹¹¹ Brennan Center for Justice, New York University Law School, *Breaking Free With Fair Elections 2* (2007) at

http://www.brennancenter.org/content/resource/breaking_free_with_fair_elections/.

¹¹² *Id.*

¹¹³ Local Parties includes the combined contributions of State, District and Local Party Committees. 11 C.F.R. § 110.5 (2007).

¹¹⁴ 11 C.F.R. § 110.6 (2007).

¹¹⁵ In different terms, a member of the House must raise each year the equivalent of the average household income of thirteen families in the United States; a Senator seeking reelection must raise each year funds equal to the income of *thirty-three* families. To describe this as a burden on candidates is a profound understatement.

This money is raised through contributions from individuals. Raising this money imposes, obviously, transaction costs. Although no data exists on the actual dollar amount of this cost, an average cost for each transaction can be represented as C_{con} . The total cost to the candidate will be C_{con} multiplied by the total number of transactions.

The total number of transactions is strongly influenced by limits on the amount an individual can contribute. For the 2007-2008 election cycle, individuals could contribute no more than 2,300 dollars to a single candidate.¹¹⁶ Divided into the 1.29 million dollars that the average House candidate needs to raise, the average candidate needs to secure donations from at least 561 individual contributors. In other words, at current rates of expenditure and using current limits on donations, the average candidate to the House could need to enter into at least 561 discrete fundraising transactions, for the Senate, 4,170.

In general, the total amount of money needed by a candidate can be represented by A , a subset of that amount by a . The minimum number of transactions that a candidate will have to enter into to raise those amounts can be determined by dividing A or a by the limit on the amount of individual contributions – L . Thus, $N = A/L$ and $n = a/L$. The number of transactions required to raise the necessary funds has an inverse relationship to the size of the limit: if the limit is made smaller, the minimum number of transactions becomes larger.

When making decisions about future fundraising a candidate can think in terms of the average cost of each transaction multiplied by the minimum number of transactions required to raise a given amount of money. Thus, the least it will cost a candidate to raise amount a is nC_{con} .

This suggests the real value to a candidate of an offer of amount a of campaign funds. The value to the candidate is not a – the candidate cannot put a in her pocket. The value of a to the candidate is the amount that the candidate saves by not having to raise a herself. That amount is nC_{con} .

3.3. *The Bribe Offer*

Campaign finance laws limit the amount that a person may donate to a particular candidate. The laws do not, however, prevent that person from asking others to donate to the same candidate.¹¹⁷ The practice of securing contributions from multiple donors and sending them en masse to a candidate, a practice called “bundling,” has flourished since the imposition of limits on contributions.¹¹⁸ A bundler is able to circumvent the contribution limit and offer a candidate large campaign contributions, made up of an aggregate of smaller contributions that do fall within the limit.¹¹⁹

¹¹⁶ 11 C.F.R. § 110.1 (2007).

¹¹⁷ Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1140-41 (1994).

¹¹⁸ John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 616 (2005).

¹¹⁹ Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1, 19 (1996) (“By aggregating the donations of individual contributors, [PACs] have arguably become ‘the new fat cats of American campaign finance.’” (quoting FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* 126 (1992))).

The bundler may be an individual, such as a corporation, seeking benefit for itself. More likely, the bundler will be a broker with skills in bundling, who receives a premium from clients for using bundled donations to induce legislators to bestow favors.¹²⁰ These brokers often fall within the lobbying industry, although it is probable that not all lobbyists are dishonest.¹²¹ Interestingly, the paradigmatic post-contribution-limit case of bribery involved the Speaker of the House and a lobbyist/bundler.¹²² Anecdotal evidence suggests that bundlers exert a great deal of influence on legislators.¹²³

A bundler, therefore, may offer a candidate a bribe. Put in its starkest terms, the offer is an exchange of a large campaign donation in exchange for a favor involving abuse or misuse of the legislative office.

3.4. *The Decision*

Campaign funds are absolutely necessary to obtain or keep a seat in the legislature. The candidate must obtain those funds, whether through their own efforts or by accepting the bundler's offer, or the candidate will not obtain or retain the seat. A "rational" candidate¹²⁴ will

¹²⁰ See Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1321 (1994) (describing bundlers as brokers).

¹²¹ See Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J. L. & PUB. POL'Y 1, 29-30 (2006) (describing extensive and often blatant practices by persons called lobbyists).

¹²² See Jill E. Fisch, *The "Bad Man" Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1606 (2006); William V. Luneburg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. LEGIS. 32, 32 (2006). The lobbyist in question, Jack Abramoff, "bragged that appropriations committees were 'earmark favour factories.'" Woellner, *supra* note 107, at 227.

¹²³ See Blasi, *supra* note 120, at 1321 ("Currently much of the time of candidates is spent courting not the donors themselves but brokers who arrange events at which individual and PAC contributions are made, or who actually collect 'bundles' of such contributions and transmit them to candidates."); William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U.L. REV. 335 (2000) ("This practice allows the bundler to earn the candidate's undying gratitude even more than a contributor who gave the same amount of money to the campaign in pre-limit days."); Wertheimer & Manes, *supra* note 117, at 1140-41 (describing influence of bundlers).

¹²⁴ "Rational" only in the sense that the candidate goes through a coherent thought process, not rational in the sense that acting corruptly is a good choice. A corrupt legislator has made an immoral and often illegal choice and has betrayed a sacred trust. "Political leaders hold greater power and, therefore, bear far greater moral responsibility than ordinary citizens." Ndiva Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation*, 28 VAND. J. TRANSNAT'L L. 48, 95-101 (1995). Nor does "rational" imply that the corrupt legislator consciously go through the steps described herein. Robert Cooter and Thomas Ulen point out that "criminals may not actually reason as in the economic model, but they may act as if they had. By saying that criminals act 'as if' they had deliberated, we mean that, when presented with the opportunity to commit crimes, they respond immediately to benefits and risks

weigh the benefits offered against the cost of acting corruptly. In this case the benefit offered is the amount of transaction costs the candidate will save by not having to raise that amount of money. If the amount saved is greater than the cost, then the legislator will accept the offer and act corruptly.

$$nC_{con} > C_{psy} + p(C_{crim} + C_{soc}) + C_{fav}$$

This formulation is not intended to excuse the conduct of a corrupt legislator. Such a legislator acts illegally and immorally, and inflicts damage on society. There is no excuse for such conduct. Rather, this formulation provides an insight into why legislators may act corruptly, and into the effects that reform policies may have on corrupt acts. Unfortunately, this formulation also demonstrates that contribution limits will increase the likelihood of corruption.

4. Campaign Contribution Limits Increase the Likelihood of Corruption

Limits on the size of campaign contributions do not decrease the amount that a candidate must spend in order to campaign for office. Limits on the size of campaign contributions do, however, affect the transaction costs associated with raising the money necessary to campaign for office. A bundle of contributions represents a certain amount of money – a . Under regulatory conditions that limit the size of an individual contribution it takes a certain number of transactions to raise a . Further reducing the amount that an individual contributor can give increases the number of transactions necessary to raise exactly the same amount of money.

$$n = a/L \quad \text{if } L \text{ decrease then } n \text{ increases}$$

Increasing the number of transactions necessary to obtain a particular amount of money increases the transaction costs imposed by raising that money.

$$\text{transaction costs} = nC_{con} \text{ as } n \text{ increases transaction costs increase}$$

Increasing the transaction costs imposed by raising a particular money makes it more likely that the value of a bribe consisting of bundled campaign contributions, which is measured by the candidate in terms of the cost to the candidate of raising the same amount of money, will exceed the costs associated with the corrupt act.

$$nC_{con} \gg C_{psy} + p(C_{crim} + C_{soc}) + C_{fav}$$

Reducing the amount that an individual can contribute therefore has the perverse effect of increasing the value of bundled campaign contributions.¹²⁵ Increasing the value of the bribe

as if they had weighed them.” ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 463 (2004).

¹²⁵ See Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 869 (1998) (suggesting that bundling increases the likelihood of political corruption); Richard Briffault, *The Return of Spending Limits: Campaign Finance after Landell v. Sorrell*, 32 FORDHAM URB. L.J. 399, 428

increases the likelihood that the “rational” legislator will accept the bribe. Campaign contribution limits increase the likelihood of corruption in the federal legislature.

5. Recommendations

It is difficult to determine whether Congress desires a serious approach to corruption in the legislature. If it does, it would benefit from a thoughtful understanding of the decision to act corruptly. A thoughtful approach would take into account the insights gained from analyzing the decisionmaking process in terms of transaction costs.

The decision to act corruptly weighs the benefit and costs as follows:

$$nC_{con} \vee C_{psy} + p(C_{crim} + C_{soc}) + C_{fav}$$

Imposing stricter limits on the size of donations increases the value of campaign donations, particularly bundled contributions, and thus increases the likelihood of corruption. An understanding of corruption, therefore, leads to a recommendation that Congress consider loosening restrictions on the size of individual contributions.

This paper is specifically concerned with campaign contribution limits. An understanding of the decisionmaking process, however, does cast some insights into the merits of other reform measures. These insights merit some attention.

5.1. Decreasing the Value of the Benefit

The “rational” legislator acts corruptly if the benefit outweighs the cost. One approach to reducing corruption, therefore, is to reduce the value of the benefit conferred by the bundler. The first, and most facially obvious means of doing so is to prohibit bundling. The bundled campaign contributions are valuable to the candidate because they provide a scarce resource at a reduced cost. Bundled contributions are more valuable than a contribution of the same size would be if there were no limitations on the size of contributions because those very limits make campaign money scarcer and more expensive to procure. Eliminating bundled contributions would significantly reduce the benefit that a bribe-offeror can offer to a candidate, and thus makes it more likely that the costs to the legislator of acting corruptly would outweigh that benefit.

Prohibition of bundling raises interesting constitutional questions. The Supreme Court has consistently found *charitable* fundraising to constitute a protected form of speech.¹²⁶

(2005) (noting that contribution limits give contribution intermediaries more influence in Congress); Marshall, *supra* note __, at 343 (noting that bundled contributions are worth more than before contribution limits were imposed).

¹²⁶ See, e.g., Riley v. National Fed’n of the Blind of N.C., 487 U.S. 781 (1989) (striking down regulation of fees charged by professional fundraisers as well as disclosure requirements); Maryland v. Munson, 467 U.S. 947 (1984) (protecting charitable fundraising as expressive speech); Village of Schaumburg v. Citizens For A Better Environment, 444 U.S. 620 (1980) (finding unconstitutional an ordinance prohibiting charitable solicitation by organizations who did not use at least 75 percent of their receipts for charitable purposes).

Political fundraising, however, might be considered commercial speech.¹²⁷ As such, it would be entitled to less protection than would be charitable fundraising.

Even if it passed constitutional muster, however, a prohibition of bundling would be extremely difficult to enforce. The difference between bundling and other types of fundraising is slight.¹²⁸ Even if the actual transfer of a handful of checks were prohibited, that act could be replaced with a promise to raise a specific amount of funding for a candidate, and the effective benefit to a candidate would be the same. Given the onerous demands of fundraising for political campaigns, it is difficult to imagine how fundraising could be prohibited.¹²⁹ Thus, although the prohibition of bundling is facially obvious, it would probably have little effect on corruption in the legislature.

More creative suggestions might have more effect. Bruce Ackerman and Ian Ayres have suggested that all contributions be made anonymously.¹³⁰ Contributions would be made to a trust fund rather than directly to the candidate; monies would be distributed by the fund in accordance with the directions of the various donors.¹³¹ Candidates themselves would not know who contributed to their campaign and information about who contributed to the trust fund would be held confidential.¹³² Thus, a potential bribe offeror could not credibly offer a benefit to a legislator in exchange for corrupt activity.¹³³ Although this reform would clearly diminish the benefit offered by a corrupt actor, it has not been considered by the legislature.

The most commonly suggested campaign reform also goes directly to the offer of a benefit by a bribe offeror to the candidate. Many scholars and public advocates have called for public funding of campaigns, which would eliminate the need for campaign contributions.¹³⁴

¹²⁷ See Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 MINN. L. REV. 289, 307 (1987) (suggesting that political fundraising constitutes commercial speech, entitled to less protection).

¹²⁸ See Geoffrey M. Wardle, *Political Contributions and Conduits after Charles Keating and EMILY's List: An Incremental Approach to Reforming Federal Campaign Finance*, 46 CASE W. RES. L. REV. 531, 549-58 (1996) (extensively discussing bundlers and other third-party fundraisers).

¹²⁹ See Blasi, *supra* note 120, at 1287-1289 (discussing the rigors of fundraising on candidates).

¹³⁰ BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 6 (2002).

¹³¹ *Id.* This paper does not attempt a fulsome explication of Ackerman's and Ayre's proposal; they do a far better job in their book-length treatment. Their proposal was also the subject of a scholarly symposium. See Richard Briffault, *Reforming Campaign Finance Reform: A Review of Voting with Dollars*, 91 CALIF. L. REV. 643 (2003); Pamela S. Karlan, *Elections and Change Under Voting with Dollars*, 91 CALIF. L. REV. 705 (2003); David A. Strauss, *What's the Problem? Ackerman and Ayres on Campaign Finance Reform*, 91 CALIF. L. REV. 723 (2003); see also Bruce Ackerman & Ian Ayres, *The New Paradigm Revisited*, 91 CALIF. L. REV. 743 (2003) (responding to criticisms and observations).

¹³² ACKERMAN & AYRES, *supra* note 130, at 6.

¹³³ Ayres and Jeremy Bulow compare anonymous donations to the fact that voting is done in private and is not disclosed. Ayres & Bulow, *supra* note 125, at 841.

¹³⁴ See, e.g., Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 586 (1999); Yoav Dotan, *Campaign Finance Reform and the Social Inequality Paradox*, 37 U. MICH. J.L. REFORM 955, 1013-14 (2004); Owen M. Fiss, *Money and Politics*, 97 COLUM. L.

Advocates use a variety of arguments to support public financing of campaigns in the United States.¹³⁵ An understanding of corruption, however, allows for an additional analysis of these proposals. Eliminating the need for campaign contributions significantly reduces the benefit side of the decisionmaking equation— to zero – which makes it far more likely that the legislator will not decide to act corruptly. Thus, an understanding of the decisionmaking process lends support to both the creative proposal to make donations anonymous and the more common proposal to publicly finance campaigns.

5.2 Increasing the Costs

Understanding the decisionmaking process also suggests that the cost side be increased. The first cost examined in this particular iteration of the equation is the psychic cost – C_{psy} . Many factors contribute to the psychic cost of a corrupt act; each is worthy of study in any given situation.¹³⁶ As a general proposition, however, it is accepted that internal controls on corrupt acts can be manipulated and persons made less likely to commit crimes or violate rules. In the field of business, managers undergo programs that facilitate “buy-in” – internalization of a firm’s code of ethics.¹³⁷ There is no reason that similar programs could not be devised for Congress.

The next set of costs examined, penalty costs, are conditioned by the probability of detection – $p(C_{crim} + C_{soc})$. Corruption is as hard to detect as any other criminal or otherwise

REV. 2470, 2481 (1997); Edward B. Foley, *Philosophy, the Constitution, and Campaign Finance*, 10 STAN. L. & POL’Y REV. 23, 29-30 (1998); Marty Jezer, Randy Kehler & Ben Senturia, *A Proposal for Democratically Financed Congressional Elections*, 11 YALE L. & POL’Y REV. 333, 360-61 (1993); Theodore Lazarus, *The Maine Clean Election Act: Cleansing Public Institutions of Private Money*, 34 COLUM. J.L. & SOC. PROBS. 79, 140-141 (2000); Raskin & Bonifaz, *supra* note 1, at 1203.

¹³⁵ See, e.g., Fiss, *supra* note 134, at 2481 (advocating public financing on equalitarian principles); Foley, *supra* note 134, at 29-30 (claiming public financing furthers egalitarian principles); Lazarus, *supra* note 134, at 83 (stating that public financing promotes equality and mitigates the influence of money); Raskin & Bonifaz, *supra* note 1, at 1161 (suggesting that public financing would enhance participation in democracy by encouraging candidacies of disadvantaged persons).

¹³⁶ See Yanjing Chen, Yaşar Mahmut & Roderick Rejesus, *Factors Influencing the Incidence of Bribery Payouts by Firms: A Cross-Country Analysis*, 77 J. BUS. ETHICS 231 (2008) (discussing factors that cause a businessperson to choose to act corruptly); Po-Keung Ip, *Corporate Social Responsibility and Crony Capitalism in Taiwan*, 79 J. BUS. ETHICS 167, 176 (2008) (discussing the relationship between corruption and the Taiwanese business ethos, including internationalization of Confucian rules regarding family); Kelly D. Martin, John B. Cullen, Jean L. Johnson & K. Praveen Parboteeah, *Deciding to Bribe: A Cross-Level Analysis of Firm and Home Country Influences on Bribery Activity*, 50 ACAD. MGMT. J. 1401 (2007) (discussing factors in a decision to act corruptly).

¹³⁷ See Marshall Schminke, Anke Arnaud & Maribeth Kuenzi, *The Power of Ethical Work Climates*, 36 ORG. DYNAMICS 171, 174-75 (2007) (discussing the creation of “ethical work climates”).

sanctioned activity.¹³⁸ Detecting and prosecuting legislative corruption presents particular difficulties because of the separation of powers doctrine. The executive, in its role as enforcer of law, might be prevented from fully investigating congressional activities that could arguably fall within its legislative function.¹³⁹ Nonetheless, programs to increase the probability of detection can be envisioned.

With respect to the costs imposed through criminal sanctions, *C_{crim}*, Becker himself suggests that the most cost-effective means of deterring crime is to increase criminal penalties.¹⁴⁰ Many countries or legal systems do impose more severe penalties on acts of official corruption than does the United States.¹⁴¹ As Neal Katyal points out, however, in application to actual crime the relationship between severity of penalty and deterrence is far more complicated than a straight correspondence.¹⁴² The sanction imposed on corruption, therefore, requires thoughtful consideration and study in terms of most effectively reducing the likelihood that a potentially corrupt legislator will find the benefit of accepting a corrupt offer of a bribe to outweigh the costs.

Sanctions, however, are not the only means by which criminal costs are imposed. The costs of defense, for example, are costs that should be contemplated by a potentially corrupt legislator.¹⁴³ Under current rules, a legislator can use campaign funds to pay defense fees when defending against accusations of accepting campaign contributions as a bribe, which substantially reduces or eliminates this cost.¹⁴⁴ Tightening these types of rules would increase the cost contemplated by a legislator facing a corrupt offer.

Social costs for antisocial activities exist in many forms. Arguably, at this time the social costs for legislative corruption are low. Two examples demonstrate this point. For a period of

¹³⁸ Because, of course, the wrong-doer seeks to hide the sanctioned behavior. See Philip M. Nichols, *Corruption as an Assurance Problem*, 19 AM. U. INT'L L. REV. 1307, 1331-32 (2004) (discussing problems in detecting and prosecuting corruption).

¹³⁹ See Linda Greenhouses, *Administration Rebuffed On House Office Search*, N.Y. TIMES, Apr. 1, 2008, at A17, A17 (reporting that the Supreme Court let stand an appellate court ruling that the Justice Department could not search a Congressional office in the course of a corruption investigation on grounds of separation of power).

¹⁴⁰ See Keenan, *supra* note 102, at 520 (discussing Becker's suggestion). Becker argues that imposing harsh sanctions is cheaper than improving the probability of detection, and thus constitutes a more efficient use of society's resources. *Id.*

¹⁴¹ See John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 195 n.58 (1998) (discussing imposition of the death penalty for corruption); Frank E. Vogel, *The Trial of Terrorists Under Classical Islamic Law*, 43 HARV. INT'L L.J. 53, 60 (2002) (discussing the application of the death penalty to corrupt acts under Islamic law).

¹⁴² Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2390-92 (1997). Katyal refers to marginal deterrence effects – the prospect of severe penalties may actually cause a potential criminal to commit the crime on a larger scale, and to substitution – the prospect of severe penalties for one crime may simply cause a potential criminal to commit a different crime. *Id.* Katyal also points out that juries may be less likely to impose harsh penalties, thus perversely reducing the actual penalty imposed on a crime. *Id.*

¹⁴³ See Karlan, *supra* note 99, at 605.

¹⁴⁴ See Clark, *supra* note 101, at 88.

almost ten years, the political party that controlled the legislature actively – and successfully – encouraged lobbyists to hire only members of their party and contribute only to members of their party, on the explicit grounds that contributions to their party would lead to direct access to lawmakers while those who contributed to the opposition party would be denied access.¹⁴⁵ Selling access to legislators, although legal in the United States, fits squarely within the definition of corruption.¹⁴⁶ These activities, called the “K Street Project” by participants, were hardly secret: the *New York Times* reported them in 2002.¹⁴⁷ They evoked no public outcry and little public condemnation; a year later an editorial about the K Street Project decried the “strange disconnect between most political commentary and the reality of” politics at that time.¹⁴⁸ Similarly, a sitting President could say “I think it’s disingenuous for anybody in public life to say that it doesn’t help you to be considered for [a trade mission] if you help the person who happens to win an election . . . And it is a good thing to do. That’s the way – that’s the way the political system works.”¹⁴⁹ This endorsement of the sale of political access, just as the corrupt acts of the K Street Project, engendered virtually no public condemnation. Quite clearly, the social costs of legislative corruption could be increased.

Finally, the cost of bestowing the favor – C_{fav} – can be adjusted. As discussed earlier in this paper, the current rules in Congress render preferential treatment virtually costless to a corrupt legislator.¹⁵⁰ The practice of “earmarking,” through which legislators can insert specific spending directions into legislation with virtually no oversight or debate, allows a corrupt legislator to directly bestow favors or preferential treatment with very little effort. An obvious means of making the bestowal of favors more costly would be to eliminate or prohibit earmarking.¹⁵¹

Another technique could increase the cost of bestowing the benefit. Accurate records are kept on who contributes to which candidate, including bundled contributions or other forms of fundraising.¹⁵² John Nagle suggests that legislators who receive contributions or fund-raising assistance from lobbyists or other interest advocates should be required by law to recuse themselves from voting on issues associated with those persons.¹⁵³ The American Bar Association proposes similar recusal by any elected judge on issues involving litigants who

¹⁴⁵ See William McGeeveran, *Mrs. McIntyre’s Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 16 n.81 (2003) (describing these activities).

¹⁴⁶ See *supra* note 12 and accompanying text.

¹⁴⁷ See *Republicans Track Politics of Lobbyists*, N.Y. TIMES, June 10, 2003, at A18, A18 (describing the K Street Project).

¹⁴⁸ Paul Krugman, *Toward One Party Rule*, N.Y. TIMES, June 27, 2003, at A27, A27.

¹⁴⁹ *Clinton’s Opening Statement and Responses at His News Conference*, N.Y. TIMES, Mar. 8, 1997, at A8, *quoted in* Ayres & Bulow, *supra* note 125, at 838.

¹⁵⁰ See *supra* notes 106-109 and accompanying text.

¹⁵¹ See Woellner, *supra* note 107, at 227 (advocating the elimination of earmarking); Carl J. Woods, *An Overview of the Military Aspect of Security Assistance*, 128 MIL. L. REV. 71, 112 (1990) (suggesting that eliminating earmarks is critical to rationalizing military spending).

¹⁵² Pursuant to the Lobbyist Disclosure Act, 2 U.S.C. §§1601-12; see Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J. L. & PUB. POL’Y 1, 49 (2006) (discussing disclosure requirements).

¹⁵³ John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 71 (2000).

contributed to that judge's campaign.¹⁵⁴ Recusal would increase the cost of bestowing the favor by forcing the legislator to enter into the costly process of trading votes or otherwise procuring something of value to be traded for the campaign contribution.

Conclusion

Corruption is an important issue. The possibility of corruption poses a special threat to the democratic institutions and integrity of the United States. Both the federal legislature and the federal courts recognize this fact. Congress has enacted a plethora of legislation aimed squarely at corruption engendered through campaign contributions, and the Court has recognized the reduction or elimination of corruption as a critical goal. Yet corruption has persisted and by most accounts flourished following that legislation.

Understanding the decisionmaking process behind a corrupt act explains why the mechanisms implemented in that legislation have failed and have in fact exacerbated the problem. A legislator who is offered a bribe consisting of a bundled campaign contribution weighs the benefit of that contribution against the costs imposed by the corrupt act. The benefit is not the aggregate amount of the contribution. The benefit to the legislator is the cost saved by not having to raise that money herself. That cost, in turn, is directly related to limits on the size of individual contributions. The smaller that size is, the more discrete transactions she would have to enter into to raise the aggregate amount of money, and the greater the transaction costs of doing so. Thus, when the rules mandate relatively small individual contributions, the value to a candidate of bundled contributions is greater than the value of exactly the same contribution would be in the absence of limits on the size of individual contributions.

Serious efforts to control corruption in the federal legislature must take consideration of this dynamic. Meaningful rules to reduce corruption will either eliminate or reduce the size of the benefit that can be offered by means of bundled campaign contributions, or will increase the costs of accepting a bribe offer and acting corruptly.

A serious approach to corruption also entails an understanding of the perverse relationship between campaign contribution limits and corruption. Reducing the amount of money that an individual can give to a campaign does not reduce the likelihood that a legislator will become corrupt. Instead, making the amount of money that can be offered smaller actually increased the likelihood of corruption in the federal legislature.

¹⁵⁴ Model Code of Judicial Conduct Canon 3E(1)(e) (2004).