The Transparency Myth: A Conceptual Approach to Corruption and the Impact of Mandatory Disclosure Laws

JUSTIN M. SADOWSKY[†]

I. INTRODUCTION

> Corruption (n):
> 1: Perversion or destruction of the integrity in the discharge of public duties by bribery or favour; the use or existence of corrupt practices, esp. in a state, public corporation, etc.
> 2. The perversion of anything from an original state of purity.
> 3. The perversion of an institution, custom, etc. from its primitive purity.[1]
> 4. You know it when you see it.[2]

This article sets out to challenge some of the modern conceptions of the nature of corruption in the political arena.[3] Currently, there is conflict over a simple definition of corruption in modern day political

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[1] THE OXFORD ENGLISH DICTIONARY 973-74 (2d ed. 1989).

[2] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (referring to pornography). Pornography and corruption share this characteristic: corruption

> may be, like pornography, hard to define, and particularly hard to define in ways that permit us to separate it from desirable speech; and this is a characteristic that lends itself to exploitation. 'I know it when I see it' is both inadequate, and expressive of a certain truth, in my judgment.

Peter Strauss, *unpublished correspondence*, on file with author.

[3] The article will focus on legislative corruption within the United States government. However, many of the issues will be clearly relevant to corruption in other arenas. However, corruption in other societies, particularly non-Western societies, may be of a completely different nature as their norms toward expected public behavior changes. *See, e.g.*, ROBIN THEOBALD, CORRUPTION, DEVELOPMENT AND UNDERDEVELOPMENT 1-5 (1990). Likewise, corruption in local governments, non-public arenas, and in non-democratic regimes may be of a nature that is not completely reflected in this article.

hierarchies. This article asserts that, regardless of such conflict, when one examines what corruption is in comparison to our traditional notions of democratic principles, there is a well-placed concern over the influence of campaign contributions over political decision-making in the (here, federal legislative) process of developing law. The core reasoning behind such an assertion is based on the idea that theories of democracy only permit a just legislator to make decisions based on a narrow set of principles such as her own morality and the popular opinion of her constituents. As a result, relying on other factors such as the effect of her decision on her ability to obtain campaign contributions, would be unacceptable, and therefore corrupt. Next, this article shows that the concern over corruption is different from the issue of inequality in the federal campaign finance regime. Finally, the article explains why solutions that focus on disclosure as a way of solving the problem have a limited impact on corruption. This lack of impact can be seen as a consequence of information asymmetries resulting from systematic flaws in the American legislative and electoral processes. The article also explains why such asymmetries prevent mandatory disclosure laws from effectively removing corruption from the system. Therefore, reformers should focus on efforts that understand the reasons for the supply and demand of campaign donations that lead to corruption and, as a result, develop reforms that make buyers and sellers of influence less interested in corrupting the political process.

Defining corruption becomes particularly important in light of the court's reasoning in a series of cases beginning with *Buckley v. Valeo*[4] and continuing through *McConnell v. FEC*.[5] In these decisions, the court relied on the need for the government to prevent "corruption and the appearance of corruption" as "the only legitimate and compelling government interests . . . for restricting campaign finances."[6] Unfortunately, the Court has been rather vague about what it actually means when it says corruption.[7] Quid pro quo is corrupt,[8] and this entails more than bribery and the "threat from politicians too compliant

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[4] 424 U.S. 1 (1976).
[5] 540 U.S. 93 (2003).
[6] Fed. Election Comm'r. v. Nat'l. Conservative PAC, 470 U.S. 480, 496-97 (1984). *See* Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L. J. 147, 162 (2004).
[7] Briffault, *supra* note 6.
[8] *Id; see also Buckley*, *supra* note 5, at 26-27.

with the wishes of large contributors."[9] Even "special access" has been included into the Court's definition in their most recent attempt to define the subject.[10] In another context, however, the Court has ruled that corruption is not so broad as to include all government action that is "not in the public interest."[11] Ultimately, neither the reach of quid pro quo nor any test that can determine what actions fall outside the definition of quid pro quo has been specified. If the Court continues to attempt to balance corruption and its appearance against other considerations like the First Amendment, it should establish a more comprehensive description of what corruption entails and how pressing a problem it presents for good governance.

Part II of this article develops a practical definition of corruption. It begins by examining basic classical views of corruption and representation. Next, those definitions are used to develop a theoretical but simple model that defines corruption in result-oriented terms. Finally, this section concludes by comparing the simple model to some of the leading academic efforts to develop a contrasting understanding of political corruption, and defending the use of the model to the extent that it contradicts other academic views concerning the nature of corruption.

Parts III and IV take the simple model and explain its application to the lawmaking process in the United States Congress. More specifically, Part III focuses on the legislative process. In doing so, the article sheds some light on ways in which the legislative system is vulnerable to corruption, particularly campaign contributions as a quid pro quo for legislative decision-making. It also illuminates how such corruption can exist so long as voters do not have complete knowledge and understanding of a lawmaker's official activities, a standard that is impossible to fully satisfy. Part IV then examines the electoral system and explains how inherent barriers to transparency leads to a prisoner's dilemma that entrenches corruption into the political system.

Part V concludes by returning to the academic debate over an understanding of corruption. It then considers the relative importance of corruption in the modern political system, and examines particular proposals in addressing the concerns over corruption to predict whether such proposals can limit the ability of donors to get the influence they

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[9] Briffault, *supra* note 6; *see also* Nixon v. Shrink Mo. Gov't. PAC, 528 U.S. 377, 389 (2000).

[10] *See* McConnell, *supra* note 5, at 664.

[11] City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 377 (1991) (in an antitrust enforcement action).

currently receive and limit the effectiveness of candidates to use the campaign finance system to make undemocratic decisions.

II. DEFINING CORRUPTION

One of the more difficult issues in determining the impact of campaign finance regulatory systems on government corruption is coming up with a clear understanding of what corruption is. When various academics disagree about whether certain regulations help abate corruption, often their disagreements come down to applying the term "corruption" to different social and political phenomena, what Ronald Dworkin calls a "semantic sting."[12] This section will put forth a separate concept of corruption, and then provide reasons why using this concept as a definition of corruption makes for a superior analytical tool than other conceptions provided in the past.

A. The Classical Definition of Corruption

> The interest of the dealers, however, in any particular branch of trade or manufactures, is always in some respects different from, and even opposite to, that of the public… The proposal of any new law or regulation of commerce which comes from this order ought always to be listened to with great precaution, and ought never to be adopted till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention. It comes from an order of men whose interest is never exactly the same with that of the public, who have generally an interest to deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it.[13]

In the above quotation, Smith outlines the classical definition of corruption, a phenomenon that predates the foundation of the modern republic. In warning about the corruption of regulations by narrow interest groups, Smith was developing a larger argument against the use of regulation generally. Although the United States has rejected Smith's

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[12] *See* RONALD DWORKIN, LAW'S EMPIRE 45-68 (1986).
[13] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 267 (R.H. Campbell & A.S. Skinner eds., Liberty Classics 1981) (1776).

laissez-faire form of governance in developing the regulatory state, the inherent existence of corruption in the regulatory state remains. Adam Smith's worries outline the "classical view" of corruption, which is the deviation of law from that which represents the unadulterated public good.

This definition correlates with the dictionary definition of corruption generally, that is, "the perversion of anything from an original state of purity."[14] In order to use this definition to describe political corruption, one must first come to understand the "pure" political process unaffected by corruption. This may be difficult to do in practice,[15] but is a routine exercise in theoretical interpretations of democracy.

B. The Simple Model of Corruption

For the sake of simplicity, one can narrow the "pure" decision-making process down to those factors that we presuppose the perfectly untainted lawmaker uses to make official decisions. It is unnecessary, for the purposes of this note, to come to a perfect and unassailable list of acceptable factors. It is sufficient to come to a basic agreement that some factors that go into an official's decisions would be acceptable and others would not be, and that a determination of what those factors are can occur separately from a determination of whether those factors have been followed.[16] For the sake of simplicity, this article uses the two most commonly accepted theories of uncorrupt political decision-making. The first allowable factor, known as Burkean, or "trusteeship"

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[14] THE OXFORD ENGLISH DICTIONARY, *supra* note 1.

[15] BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 128 (2001); Daniel Hays Lowenstein, Frameworks of Analysis and Proposals for Reform: A Symposium on Campaign Finance, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 313-23 [hereinafter Lowenstein 1]. Smith argues that this is proof that corruption does not exist within the campaign finance reform system, whereas Lowenstein reaches an opposite conclusion.

[16] Dan Lowenstein once commented that a non-corrupt, or pure, decision is one where you can explicitly explain the reasoning to the public without a major backlash. He includes the two basic principles that I endorse, as well as a third, which is party loyalty. Whether party loyalty is acceptable as a basis of representation in itself is one that is too complex to be addressed here, and I shall ignore it. The reason is that the reliance on another individual entity that in itself is at risk of corruption becomes problematic. On the other hand, if one accepts that candidates should consider their donors' preferences in decision-making, then there would be no corruption by donors: but this presupposition seems to me to be strikingly circular in its logic.

decision-making, permits a lawmaker's own concepts of right or wrong to act as an agent for her constituents.[17] In this system, elected officials use their own judgment about what actions are best for their constituents.[18] Generally, such decisions tend to be ideological in nature. The other allowable factor is the pluralist, or public choice theory of decision-making.[19] In this system, the lawmaker should only consider the popular opinion of the public.[20] These decisions tend to be pragmatic, the types of legislation that are popular in public opinion.[21] In making a decision, our ideal lawmaker may make a decision based on either factor or more likely a combination of the two factors, but will not consider any outside factors such as personal gain.[22]

Now, assume that a "graph" of all the possible outcomes of the entire sum of all decisions a lawmaker faces can be created. Each spot at on the graph would represent the entire history (over any given time-span, including the entire life of a legislator) of a particular lawmaker's possible actions in her official capacity.[23] This not only includes final votes, but also every way in which she influences the law, from votes on amendments and in committee, to decisions in choosing how to draft

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[17] *See, e.g.*, Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784, 831-37 (1985) [hereinafter Lowenstein 2]. *See also* Edmund Burke, S*peech to the Electors of Bristol*, *in* II WORKS OF THE RIGHT HONORABLE EDMUND BURKE 89-98 (3d ed. Boston, Little, Brown &Co. 1869).

[18] *Id*.; Thomas Molnar Fisher, *Republican Constitutional Skepticism and Congressional Reform*, 69 IND. L. J. 1232-33 (1994).

[19] *See, e.g.*, SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY, 17-19 (1978). *See also* Lowenstein 2, *supra* note 17, at 837-43; Samuel Issacharoff and Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX L. REV. 1705, 1719 (1999).

[20] ROSE-ACKERMAN, *supra* note 19.

[21] Lowenstein 2, *supra* note 17, at 834.

[22] ROSE-ACKERMAN, *supra* note 19, at 17, represents a lawmaker using solely public choice theory as "amoral" and assumes they lack any "independent ideological positions on any issues they are called upon to decide." This may sound like it is impossible to reconcile with a lawmaker who has ideological values (essential to the Burkean model), but in reality making such a jump is quite simple. For instance, a candidate may use Burkean principles as much as possible so long as she can capture the public opinion of the 51% of her voting constituents who most agree with her.

[23] The model incorporates the collective decision-making of the lawmaker rather than each individual decision for good reason. Since the graph is outcome (rather than ideology) oriented, a collective position can include sets of decisions made in context, such as legitimate interoffice *quid pro quos* between official agents. Assuming that a legislator is completely free of corruption does not mean the same as assuming that he makes decisions in a total vacuum.

particular pieces of legislation, to her choices of words to use in sessions, hearings, and even private meetings. How she budgets her time between different legislative activities and constituent casework is also included in the plot so long as this has some effect on her cumulative impact on society.[24] Because such a broad collective outcome can be measured over a variety of factors, such a plot would be multi-dimensional. However, for simplicity's sake it may help to picture it a more traditional two-dimensional form.[25]

On the plot, two points can be identified. One point (point B) represents the unadulterated Burkean position of a specific lawmaker, and another point (point P) may represent the unadulterated public choice position of the lawmaker's constituency.[26, 27] Thus, when plotting a third point (point O), representing the actual outcomes of our ideal

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[24] Since it would be a stretch to believe a Congressman would have direct control over everything her office, the term lawmaker itself should be defined broadly to include her staff. This is a fair assumption, because members of her staff are agents of the Congressman's office. Even if they have their own "Burkean" interests in mind, these interests can be incorporated into the total ideology of the office.

[25] For an example of a basic two-dimensional (ideology-based) model, see http://www.politicalcompass.org. This model only assumes the simplest of dimensions, economic and social. Of course, some outcomes, such as whether to grant a limited resource to one particular organization or another, might come across different preferences than simply the total level of economic and social control the state should have.

[26] Of course, people's views change over time; for simplicity's sake, we shall assume that preferences remain static. Samuel Issacharoff and Pamela Karlan argue that changes in voters' preferences is as important to the political system as being responsive to them. *Supra* note 19, at 1724. This is indisputable, but it is my belief that the two are separate beasts entirely, particularly in the context of the campaign finance system. The issue shall be discussed in more detail in parts III and IV of this article.

[27] This poses an interesting question about what point P actually represents. Does it represent the constituency as a whole? Just the voting block of a particular group of just enough voters in order to gather the necessary votes to win a particular election? There are, to be sure, very difficult questions about what it actually means, in principle, to represent the position of an elector's constituents. Part of the answer, of course, will depend on the relationship between representative and constituent; in a parliamentary system in which candidates vote for parties rather than individuals, a representative might be more theoretically beholden to the group of people whose ideology supported the candidate into office than in the representative system the United States Congress relies on. In that sense, the very principles of democracy are different in the two systems. If one were to literally try to plot this theoretical position into a model graph (a rather Herculean endeavor), this would become a key element necessary to provide detail. For the purposes of this article, then, P simply represents the subjective view of what the official thinks her constituency entails.

lawmaker, it would be placed somewhere on the line BP. The lawmaker would consider no option positioned outside BP.

Thus, any position off the line would be influenced by factors that the uncorrupt legislator would not consider. Corruption would then be any and all factors that would cause an individual lawmaker to deviate herself away from the BP line. Bribery, clearly, would be one factor. However, because public choices in the United States are predicated on the model of one-person, one-vote and not one-dollar, one-vote, any campaign contribution that has the effect of altering a lawmaker's decision-making should rightly be considered a corruption of the political system.

The result is that any decision made off the BP line is *per se* corrupt. Whether decisions affected by individual donors that remain on the PB line are corrupt or not is a difficult question. On one hand, if a voter chooses a candidate because she has experience with the candidate's judgment about balancing her own values against the values of her constituents, a campaign donation or other non-democratic force which moves the official from her original viewpoints to a new position on the BP line might still be considered corrupt. On the other hand, the democratic system may be more open to a persuasion that simply alters the balance between the voter's preferences and the candidate's ideals than one that moves a candidate towards its own undemocratic values. Furthermore, there is less of a risk of constituents who could pinpoint the B and P loci of an official from being subjected to unanticipated decisions when the decision remains on the BP line. Since the answer is ambiguous and the result does not alter the overall point of the article, this article assumes that corrupt decisions are only those that are entirely off the BP line.[28]

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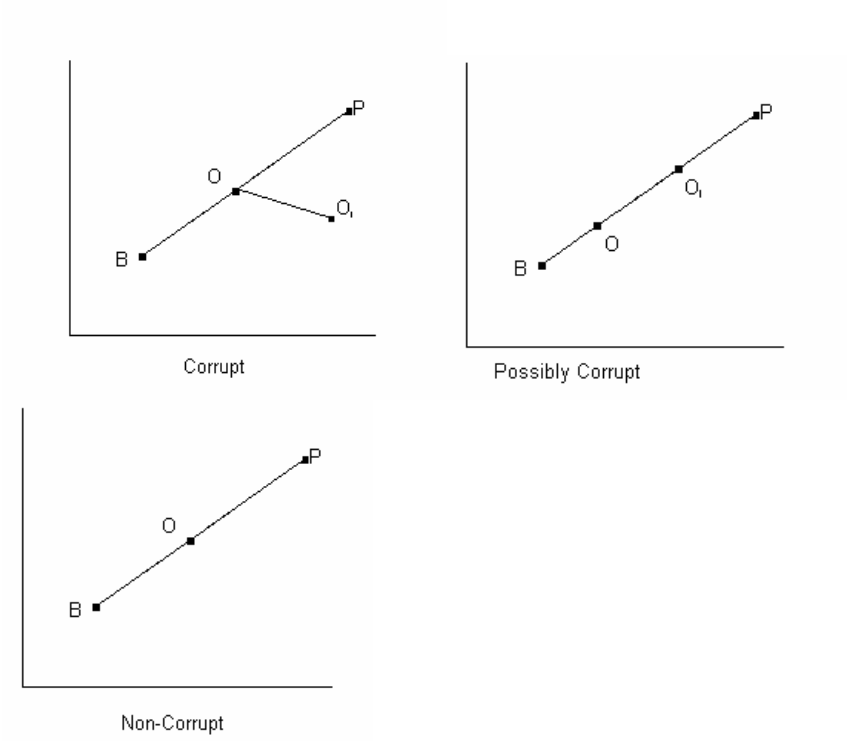
[28] If one were to presuppose three or more principles of "pure" democratic decision-making, one would have an "area" rather than a line. Such a presupposition would make the question of whether any decision within that area uncorrupt, regardless of how that decision is made, a more pressing concern. This would be particularly true if one of the principles used, such as party loyalty, was somehow less legitimate than another of the principles. However, the underlying idea, that decisions be made only by considering those principles deemed acceptable within the democratic process, remains valid.



A. A Defense of the Simple Model Against Alternative Theories of Corruption

There are two basic theories of corruption that have been developed among leading academic scholars. The first theory, put forth by a group that includes Katherine Sullivan,[29] David Strauss,[30] and to a lesser degree Samuel Issacharoff and Pamela S. Karlan,[31] is that corruption is not about the perversion of the democratic process but simply the issue of inequality of political voice between constituents. The second, put forth most famously by Bradley Smith, is that corruption

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[29] *Edward L. Barrett, Jr. Lecture on Constitutional Law: Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 678-82 (1997).
[30] *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1371-75 (1994) [hereinafter D. Strauss].
[31] *Supra* note 19, at 1726.

does not exist, at least not in a form that would include legitimate campaign donations as a corrupting force.[32]

The corruption-as-inequality argument results from the idea that contributing to a campaign is simply an alternative method of voting.[33] This theory asserts that campaign contributions and votes have the same essential impact: to increase by a certain amount the likelihood that a particular candidate gets elected.[34] It would follow, therefore, that there is no difference between quid pro quo for monetary contributions and quid pro quo for votes.[35] In fact, continues this line of thinking, voting by dollar is superior in some respects, as one can allocate the intensity of one's vote, giving her a range of options rather than simply for, against, or abstain.[36] The real force behind campaign finance reform is that people have differentiated abilities to dispense money, whereas all people have the same ability to dispense votes.[37]

Strauss and Sullivan, who submit to this theory, are right in that corruption in terms of campaign contributions would not exist if constituents were given equal ability to donate campaign contributions to candidates,[38] so long as contributions could only come from constituents.[39] However, this note disagrees that this means that inequality and corruption should be considered the same phenomena. The difference can be seen by breaking down what a campaign contribution does and does not represent. In some cases, a contribution may be a quid pro quo to try to convince a lawmaker (or future lawmaker) to move her decision-making from the BP line. This is

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[32] *Supra* note 15, at 122-36.
[33] D. Strauss, *supra* note 30, at 1373.
[34] *Id.*
[35] *Id.*
[36] *Id*. at 1374.
[37] Sullivan, *supra* note 29 at 679 ("[T]he 'corruption' argument is really a variant on the problem of political equality: unequal outlays of political money create inequality in political representation.")
[38] Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1214-20 (1994)
[39] Although unlikely, one could imagine a scenario in which a district with no competitive elections, say Vermont, banded together their "Patriot Dollars" to influence a lawmaker in another, more competitive district, in say, New Hampshire. In that scenario, if that lawmaker was influenced to take the preferences of Vermonters over the preferences of New Hampshirites, this would clearly be corruption in the model the article puts forth. Campaign contributions raised from outside a congressional representative's constituency will always raise this type of concern, particularly in state (as opposed to federal) elections.

particularly true in cases when a contributor is willing to donate to any candidate, regardless of ideology; such cross-party donors are common.[40] Yet in other cases, this might not be the intent of the contribution at all. For instance, when a right to life group donates money to candidates it supports, this is probably more because they endorse the candidate's worldview rather than because they want to get that candidate to deviate away from it. Of course, such donations may give them access, and that access may require the lawmaker to move in some degree off the BP line in order to preserve a relationship (and in that case, such movement can accurately be described as corruption), but the danger of significant corruption is less. On the other hand, such money may make that lawmaker more likely to attract voters and win elections.[41] In this sense, the money represents a phenomenon that can be described as inequality, but not corruption.[42] While "inequality" is a concern in criticizing campaign finance regulation, it is a separate concern than "corruption," which is concerned less with influencing public opinion than

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[40] Foley, *supra* note 38, at 1230 (1994); *See* IAN AYRES AND BRUCE A. ACKERMAN, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002); Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance,* THE AMERICAN PROSPECT, Spring 1993, at 71.

[41] Issacharoff and Karlan argue that money gives a candidate "a greater opportunity to get their message across and mobilize their supporters. This point rests on a well-known feature of American political participation: there is a strong positive correlation between an individual's income and education level and the likelihood that she will go to the polls." *Supra* note 19 at 1724-25. The answer, according to them, is to increase voter turnout. *Id*. at 1725-26. However, this does not address an additional power of campaign contributions, one that Issacharoff and Karman themselves state but then fail to provide elaborating details. While money does help get out the vote, it can also be used to "get their message across" to people who would vote regardless but have not chosen a candidate as of yet, either because they are unsure which candidate most closely represents their own values or because, in their own words, "[p]olitics . . . changes, rather than simply recognizes, people's prepolitical preferences." *Id.* at 1724. Thus, money can be used to create or preserve an ideological or party advantage within a district, particularly over long periods of time. Increased voter participation may not assist against this part of the problem. In fact, if nonvoters are less politically aware and therefore more easily persuadable by money, it could even exacerbate it to a limited extent.

[42] There is dispute as whether equality as a principle of governance is good or bad. *See, e.g.,* Foley, *supra* note 38, at 1213-26, Ronald Dworkin, The Curse of American Politics, N.Y. Rev. Books, Oct. 17, 1996, at 19, 19-24, Richard Briffault, *Point/Counterpoint: Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 573-79, *contra* Issacharoff and Karlan, *supra* note 19, at 1722-23, D. Strauss, *supra* note 30, at 1382-86, SMITH, *supra* note 15, at 137-66. This is a fascinating debate, but is not fundamental to the corruption question at hand.

undermining it. Since the inequality model acts in an overbroad manner and represents a basis for regulation the Supreme Court has rejected,[43] the simple model provided in this article allows for a more contained analysis of the impact campaign finance delivery systems have on corruption.

On the other hand, there is a section of critics, most famously current FEC Chairman Bradley Smith, who argue that there is no "corruption" in campaign contributions at all. Smith's argument is that campaign contributions, although they do provide "access," are "just one factor among many,"[44] and that these factors, which include regular acquaintances, noncontributing lobbyists, key constituents, and endorsements by newspapers, are equally undemocratic in that they are "completely unrelated to the value of the idea [they] propel" and give power to those who are not in positions to "persuade voters or deliver blocks voters."[45] Because, Smith continues, candidates for office are not expected to live in a bubble, "[t]he truth is that there appears to be no more a cultural norm against private campaign contributions than there is a cultural norm against driving 68 miles per hour in a 65-mile-per-hour zone."[46]

This argument is unpersuasive. While regular acquaintances and noncontributing lobbyists may have access to lawmakers, this access is predicated on a different power relationship than one a lawmaker has with contributors, particularly large contributors.[47] Society expects lawmakers to have friends and expects lawmakers' worldview to be influenced by her environment; society also expects a lawmaker to educate herself on the issues and to consult with those who will be negatively affected by her decisions. However, when the friend or the unpaid lobbyist approaches the lawmaker, she must do so on the merits alone, hoping to appeal to either P or B. Absent holding something of value over her, neither the friend nor the unpaid lobbyist can influence

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[43] Buckley v. Valeo, *supra* note 4, at 48-51

[44] SMITH, *supra* note 15, at 128.

[45] *Id*. (quoting E. Joshua Rosenkranz*, Faulty Assumptions in 'Faulty Assumptions: A Response to Professor Smith's Critiques of Campaign Finance Reform*, 30 CONN. L. REV. 867, 894 (1998)).

[46] *Id*. at 130. Smith goes on to state that "[t]his helps to explain why polls consistently show that reform of the campaign system is an extremely low political priority for voters." I disagree with Smith's explanation about priority, although will present the reasons for this later.

[47] *See* Lowenstein 1, *supra* note 15, at 323-25.

the lawmaker off the BP line.[48] If, on the other hand, the friend or lobbyist does hold something of value (unrelated to the public choice doctrine of political representation) to trade for, this would indeed be corruption as well. The attractive friend who offers companionship in return for political favors and the corporate lobbyist who offers to prevent the disclosure of embarrassing information in return for political favors are clearly instances of corruption. In fact, we have a name for them: prostitution and blackmail.

Even if all the donor does receive is access, and cannot even unconsciously obtain deference beyond the force of her arguments and expertise on the subject of the legislation, this situation would still be corrupt. This is because it changes the natural distribution of access. For example, imagine an official in a society where a perfect wall prevents any candidate from giving her tangible, corruptible benefits. She might seek out all sorts of information from a variety of sources, relying on their experience and their arguments to make a well-informed decision. In fact, it is this type of model that government agencies use to seek out information before proceeding in rulemaking.[49] However, an official who eschews such a system and instead gives priority access to donors is making a corrupt decision in the first instance. There simply is no justifiable reason that a particular provider of information should become naturally more credible or worthy of the official's time because the provider also donated money to that candidate's campaign, or that a provider of information who decided not to provide the official with a contribution should be viewed as less credible. Thus, it would be corrupt even if a donor's extra access came with no special promise of obedience over other sources of information that the official may ultimately consult.

On the other hand, it is true that key constituents and newspaper editorialists may have the power to make a lawmaker move away from the Burkean focal point. However, unlike campaign contributions, their ability to influence voters is directly related to the popularity of their positions. A union leader who tells her union to vote for a certain candidate is only sending the message that the candidate is good for the union; without the money component, it simply is a description of public choice theory at work. If union leaders make their endorsements based

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[48] Lowenstein sees the difference as a "reality of conflict of interest." *Id*. at 326-28.

[49] Administrative Procedure Act, Pub, L, No. 404-79, 60 Stat. 237 (codified at 5 U.S.C. § 501 (1946)); *see generally* PETER STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES (2d ed. 2002).

on other factors, such as in return for calling off an investigation on the union leader,[50] this too is corruption, but it hardly means that campaign contributions are not.

Furthermore, the value of an endorsement goes to the credibility of the endorser, established over time, and is worthless if the endorser lacks credibility. Editorial endorsements are a more convincing argument, although they present less of an issue because editorialists also gain a certain reputation over time that a thirty-second spot ad does not. Readers who do not agree that such reputation has merit are not likely to be persuaded by the endorsement.[51] The essence of the public choice theory relies on the idea that one's voice is valued by a proper perception of one's trustworthiness. Money is not corrupt to the degree that it does so. However, because we cannot accurately gauge the connection between a campaign advertisement and what the candidate did to pay for it the way we can endorsements from The New York Times, Rush Limbaugh, and the Sierra Club, money presents a risk of corruption unique from that of a non-monetary endorsement. Instead, money can be used in ways that circumvent the public choice theory in terms of why the money was originally received. A candidate who receives a donation from a labor union can use the money to advertise her record on the death penalty, or use the money for generic things such as get-out-the-vote drives.[52] Even so, some scholars critical of campaign contributions argue that editorial endorsements are similar to contributions.[53] Once again, that one may be corrupt does not make the other not corrupt.

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[50] *See* John B. Judis, *Dirty Deal: What the Teamsters Want from George W.*, THE NEW REPUBLIC, Apr. 1, 2002, at 20.

[51] *See, e.g.*, Herb Klein, *The Power and the Promise: Editorial Endorsements in a Multimedia Age*, NATIONAL REVIEW ONLINE, Oct. 18, 2004, *at* http://www.nationalreview.com/comment/klein200410180930.asp.

[52] One thing Smith does not bring out, that is similar in its corrupting influence to campaign contributions, is well-organized interest groups whose endorsement is wanted for their ability to provide valuable services that could be valued in cash (such as phone banks and foot soldiers). There seems to be little difference between working X hours for a candidate for free and working X hours for a wage, and then contributing the wages to a candidate. The only difference, from a practical point of view, is that mobilization pledges are somewhat less likely than large contributions to be *quid pro quo* and more likely to simply be in support of the candidate's Burkean focal point. There are clearly some exceptions, such as labor unions and perhaps the National Rifle Association, but it is hardly surprising that the Tobacco Institute does not have a strong grassroots movement of its own.

[53] Foley, *supra* note 38, at 1252-53.

Smith concludes by stating that corruption through campaign giving is "unproven empirically and relies and [sic] a dubious theory of democratic politics, the anticorruption rationale fails to justify existing, let alone additional, regulation of campaign speech and contributions."[54] To the degree that quid pro quo does take place in return for campaign contributions, this section has shown that it does not require a dubious theory of democratic politics to define it is as corrupt.[55] As to whether such corruption exists, the next part of the article will use the simple model to show where in the legislative processes the quid pro quos take place, and why they remain "unproven" empirically.[56]

III. CORRUPTION AND THE LEGISLATIVE PROCESS

> Relying specifically on social choice theory as developed by Kenneth Arrow and others, [Judge] Easterbrook maintains that it is often difficult, if not impossible, to aggregated individual legislators' preferences into a coherent collective decision, and that legislative outcomes frequently pivot on seemingly arbitrary (or at least nonsubstantive) factors, such as the sequence of alternatives presented (agenda manipulation) and the practice of strategic voting (logrolling[57]). . . . If legislative outcomes turn on procedural maneuvers and strategic behavior, judges cannot reconstruct what a legislature would have "intended" to achieve if it had explicitly settled a point that was not clearly resolved in the statutory text.

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[54] Smith, *supra* note 15, at 136.

[55] Nor, as Smith implies, does the current campaign finance system have to have a strong political dislike for it to be corrupt, as corrupt and unpopular (or undemocratic) are two completely different concepts. The article will go into more detail in Part IV.

[56] Smith's argument in this case is similar to Sullivan's argument that "[v]arious studies of congressional behavior suggest that contributions do not strongly affect congressional voting patterns, which are for the most part dominated by considerations of party and ideology." Sullivan, *supra* note 29, at 679. Regardless, there have been empirical studies that have been done which have proven that corruption in the form described in this article exists. *See* DAVID B. MAGLEBY & CANDICE J. NELSON, THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 77-78 (1990); FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE 169-70 (1992).

[57] "The exchanging of political favors, especially the trading of influence or votes among legislators to achieve passage of projects that are of interest to one another." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1029, (4th ed. 2000).

. . . .

> [T]extualists have decidedly felt the pull of the interest group branch of public choice theory, which argues that legislation is an economic good purchased by interest groups, and that statutory outcomes often reflect little more than bargains struck among those groups. Actual statutory language is the dearest legislative commodity, and so once legislators become aware that legislative history influences courts, they and their agents (the staff) will try to achieve desired outcomes through the lower-cost mechanism of legislative history.[58]

What Manning describes above as "public choice theory" is not exactly public choice theory in the sense previously used in this article. Instead, Manning is referring to legislators-as-agents in any manner in which the legislator is acting on behalf of a group, regardless of whether that group is influencing her through legitimate democratic means or through promises of non-democratic assistance that can be described as political corruption.[59]

Manning's concern is that lawmakers can use the legislative process to obscure what the actual results of legislation are (over time, the exact location of Congress's "collective" focal point O), as well as to obscure their individual role in obtaining that legislation (the individual O of the lawmaker). Thus, since a lawmaker can manipulate "legislative history" more easily and with lower personal cost than he can manipulate the statutory text, legislative history has a greater chance than simple statutory text of being negatively affected through non-democratic principles.[60] While this note is not particularly concerned with the debate over the appropriate role of legislative history in statutory interpretation, this section will explain that other procedures that lawmakers partake in have the same characteristics as Manning's

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[58] John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L REV. 673, 685-88 (1997).

[59] *Id*. at 686-88. *See generally*, LEGISLATION, (William N. Eskridge, Jr. et. al., eds. 2001) at 48-65 for a view of public choice theory in the legislative, rather than the electoral, model. Of course, the theories enjoy a nexus as they are based on the same general principles of public choice.

[60] This may, of course, include the lawmaker's personal (non-corrupt) ideology as well as decisions made based on corrupting factors.

problems with legislative history.[61] Having shown that, it will then show that these procedures are the most suspect to corruption and therefore are where the types of corruption most damaging to good governance occur. It will also show that disclosure laws focused on the campaign finance system itself rather than on the legislative process cannot adequately remedy this corruption, and that laws focusing on legislative transparency could never achieve perfect legislative transparency.

A. Public Scrutiny and the Legislative Process

Susan Rose-Ackerman provides a utopian view of a perfectly functioning representative democracy.[62] In this view,

> [r]epresentatives all act independently in deciding how to vote on issues-thus no collusive behavior or logrolling occurs within the legislature. Representatives care both about the proportion of the popular vote they receive and about their income. Legislators, however, are quite amoral: They neither have qualms about accepting bribes nor independent ideological positions on any issues they are called upon to decide. Finally, in calculating the tradeoff between money and votes, legislators have perfect information about the preferences of their constituents on the issues that come before the legislature.
>
> Voters in turn are knowledgeable, issue-oriented individuals who have preferences on every issue, which do not change over time, and who also know how their representative votes on every piece of legislation. . . . They are more likely to vote for incumbents the greater the volume of benefits they would have generated had they been in the majority on every issue.[63]

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[61] In fact, there is ample evidence that the text of the bill has at least some vulnerability to corruption due to lack of visibility. *See* LEGISLATION, *supra* note 59, at 962-63. *See also* Paul Campos, *The Chaotic Pseudotext*, 94 MICH L. REV. 2178 (1996), *contra* In re Sinclair, 870 F.2d 1340 (7th Cir. 1989).

[62] ROSE-ACKERMAN, *supra* note 19, at 17-19.

[63] *Id*. at 17.

In this situation, there would be no corruption, because voters would be able to punish lawmakers who deviated from the voters' preferences (focal point P).[64]

However, corruption can occur when we eliminate even one of the above utopian factors.[65] Even if the term "vote" (when describing lawmaking official action) refers solely to the final vote on legislative bills by a particular house of Congress, it is still unlikely that every voter has the incentive to research every vote his representative made in order to determine a full understanding of the effect of the "volume of benefits" he received if the lawmaker "had been in the majority on every issue."[66] Furthermore, lawmakers can affect bills in other ways than simply their final vote.[67] Since the Rose-Ackerman model uses "vote" in terms of how lawmakers influenced or tried to influence the law, these can be described as "votes" as well. In some of these instances, this is simply a matter of additional information cost to the voter; votes on amendments, for instance, are of public record, and could theoretically be researched in the same manner a bill could be. In other instances, the information is simply impossible to find; even if one lawmaker is listed as an author of the bill, it would be impossible to find out what logrolling has occurred in private, and thus impossible to find out the exact manner in which each lawmaker "voted" on any particular piece of legislation.

Nor is this the only method in which lawmakers act in order to raise the costs of (or completely bar access to) acquiring full information about a particular lawmaker's influence on the law (her O point). A legislature might also combine multiple issues into one bill, preventing voters from getting an on the record vote from their representative on each position.[68] Such bills are particularly problematic when one of the issues is highly politicized,[69] or when pragmatic concerns or procedural

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[64] *Id*. at 18-19.
[65] *Id.* at 19.
[66] *Id.* at 38-40.
[67] Briffault, *supra* note 42, at 580.
[68] Some states have constitutional or statutory barriers, known commonly as "single subject rules." The Line Item Veto Act, Pub L. No. 104-130, 110 Stat. 1200 (1996) (ruled as unconstitutional in Clinton v. New York, 524 U.S. 417 (1998)) could be described in part as addressing this concern as well. Various states also have line item vetoes as an alternative to or in combination with single subject rules. *See generally* LEGISLATION, *supra* note 59, at 327-60.
[69] *See* Jennifer G. Hickley, *Working to Find an Advantage*, INSIGHT ON THE NEWS, Sept. 30, 2002, at 10. Rich Lowry, *Department of Federal Job Security*, NATIONAL REVIEW ONLINE, Aug. 19, 2002, *at* http://www.nationalreview.com/lowry/lowry081902.asp.

inefficiencies make the final vote a formality rather than an educated and voluntary position on the merits of the legislation as a whole.[70] Furthermore, sometimes the information that voters can access at the lowest cost may not indicate a lawmaker's actual position on the bill. A lawmaker, for instance, may be persuaded (either by an interest in procuring campaign funds or by personal ideology) to strengthen (or weaken) particular legislation in one or another way despite such action being unpopular. Hypothetically, she may try to do so in ways in which voters would not likely detect, and then, knowing the bill's passage does not rely on her particular vote, vote against (or for) full passage of the bill.

Finally, information supply is not the only factor in determining what information a voter has in evaluating her representative. Voters also have varied demands for information. Some voters find it worth their time to be aware of a lawmaker's actions, whereas other voters may find the costs to be too high.[71] Demands for different types of information even vary amongst individual voters. Each voter will have a higher demand for information on the actions of the lawmaker that the voter believes, according to her imperfect understanding of the law and the legislative process, will likely to have a greater effect on her. Thus, not only will a lawmaker seeking to balance non-democratic gains[72] against informed voter oversight examine the cost of voters obtaining the requisite information, she will also consider the voters' willingness to pay.[73]

Therefore, the legislative system as a whole has the same attributes that Manning attributes to legislative history. Some lawmaking has characteristics providing for great voter awareness, such

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[70] *See* Sorenson v. Secretary of the Treasury, 475 U.S. 851, 866-67 (Stevens, J., dissenting); *see also* Francis X. Clines, *O'Neill Ready to Rejoin Battle Over Budget*, N.Y. TIMES, July 1, 1981, at A16; LEGISLATION, *supra* note 59, at 47-48.

[71] It is important to note that this demand variance is not necessarily a variance of political apathy. A voter who is politically apathetic may have greater knowledge of her lawmaker's actions than a voter who values this information more highly, if the second voter has less access to information because, for example, she has less access to the information because she cannot afford his local market's price internet access, she lacks the same level of intellectual capacity, or her time is more constrained by job and family.

[72] Once again, this may include increased utility from making the law more in line with her personal ideology as well as corruption.

[73] Although Rose-Ackerman stays away from the "information" model used here in analyzing her model, her analysis examining voter apathy may add important insight. ROSE-ACKERMAN, *supra* note 19, 38-40.

as a controversial amendment to the Constitution, which would be likely to draw fairly extensive media attention and have a relatively straightforward effect on the law.[74] On the other hand, other actions a lawmaker makes, such as shape (or even vote for) budget reconciliation acts,[75] may go largely unnoticed. This sets the framework of democratic oversight that a legislator faces when considering whether and to what level corrupting factors will influence her decision-making.

B. Corruption and Strategic Actions of Lawmakers

Lawmakers react to the discrepancy between an official action and the voter's knowledge of such action in a fashion consistent with economic choice theory. They will analyze the potential benefits and costs of individual action and choose the option that provides them with the greatest utility.

A lawmaker's possible benefits from a particular decision can be classified in one of three groups. The first are those actions in which, by the action itself, will make the public more likely to vote for her in an uncorrupt fashion. The benefit in these cases would be greater likelihood of re-election. This part of an official decision that considers this benefit could be best attributed to capitulation to public choice (and is referred to in the article as a p value – not to be confused with a P locus).

The second classification a lawmaker would consider represents the Burkean principle (b value). A candidate who bases a decision on Burkean considerations gets some value from doing what she believes is the right thing. This is the same sort of utility one gets from doing a good deed, such as giving to charity. A completely non-corrupt lawmaker would consider only these two values in her decision-making.

We could also classify all the external effects of her decision into a third category. This category represents any personal benefit to the lawmaker from the decision, independent of pure ideological motives or the signaling effect to voters (as voters, not as contributors). For

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[74] Of course, even then lawmakers may attempt to find ways to use voter confusion to misrepresent legal actions and thus make their position more acceptable to their constituents (viewed broadly) than if voters readily understood the actual effect of the proposed law. For instance, the Federal Marriage Amendment, 2003 Bill Tracking H.J. Res. 56 (108th Congress) sparked debate over whether it would ban democratically enacted civil unions. Eric Shumsky, *The Amendment Speaks for Itself*, WASH. POST, Feb. 29, 2004, at B05.

[75] Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L.97-35, 95 Stat. 860; *see also supra* note 68.

instance, a personal bribe would fall under this category, as would a distribution of public funds to her finances.[76] So too would be decisions based on obtaining optimal levels of campaign contributions. The influence of these decisions would push us away from the BP line, and thus such decisions can be accurately described as corruptive (c value).

The lawmaker will thus have a total utility curve which considers the impact of all three varieties of utility, leading to a curve of U = po + bo + co for all potential outcomes of his decision, choosing the decision that leads to the highest overall value of U.

The comparative impact of p, b, and c will change depending on the particular details of a decision, as well as the relative values the candidate places on a variety of things such as re-election, doing good deeds, personal profit, etc.[77] Once again, it is not important to evaluate the validity of these values so long as we accept that they exist in some form or another. What is important is to see the impact of voters' interests, the decision's transparency, and the ability of the lawmaker to extract rents on her decision-making.

The result is that those decisions most likely to be detected or relied on by the public are ones that are most likely to be swayed by public choice. Unless she places great value on a certain ideological stance, a lawmaker is likely to be very unwilling to vote for a piece of

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[76] Independent, of course, from ideological principles of good governance. Thus, a lawmaker might rationally and without corrupting influences institute a tax cut that happens to help her, but one that the lawmaker would still support even if it would not apply to her. Or a lawmaker might rationally support a pay increase ifs he truly believed that such a pay increase would attract more capable people into public service. However, a candidate voting for a pay increase simply because she herself preferred more money to less would fall into this third category.

[77] This leads to an alternative way of describing the lawmaker's utility curve. One could imagine that a candidate can only gain three things from a decision: higher chances of re-election, doing good for society, and personal profit. Thus, depending on how a lawmaker differs the importance of these three things, her utility curve would be U = ar + bg + cp (where r, g, and p are the three factors, and a, b, and c are their comparative weights). The problem with this model is that it is completely independent of our established democratic principles, and thus there is no difference between a decision that helps re-election because the people support it and one that gives a lawmaker a completely separate good (such as money) which can be used to support one's chance at election independently. Removing the Burkean factor from this model will give you a model of the type contemplated by ROSE-ACKERMAN, *supra* note 19, at 34-45.

legislation that is so unpopular that it would assure the end of her political career.[78]

On the other hand, as a candidate's decision moves outside the public eye, it becomes more susceptible to influence from both ideological and corrupt influences. A decision a lawmaker was sure never to be detected, such as whether or not a lawmaker would choose one set of language or another in a paragraph of an appropriations bill that the lawmaker knows will never be read by any of her constituents, will be made solely by the lawmaker comparing her personal ideological preference to any rent she could obtain from deciding one way or another. This is because she gains no direct benefit in such instances from deferring to the position of her constituency when voters cannot notice or evaluate the official's actions.

Even more problematic is the possibility of a correlation between the ideological value a lawmaker places on a decision and the value her voters place on it. Thus, those decisions that may have little p value may also have little b value, at least to the degree that the small value of p is a cause of voter's comparative disinterest as opposed to a voter's inability to detect the decision. This leads to even greater influence of corruption among what many would call "minor" decisions.[79]

Furthermore, a candidate can better "sell" a decision that varies from the public majority if that decision can be seen as Burkean in nature rather than corrupt in nature. In fact, voters may even respect a candidate for taking an unpopular stance, to such a great degree, that the candidate will be put in a greater position for re-election than if she took the popular position.[80]

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[78] On the other hand, a lawmaker who never plans to run for re-election would have great freedom to pursue whatever ideological stand she wants. She could also be more willing to extract non-ideological personal rents for her decisions. However, such a lawmaker would be unlikely to place much value on campaign contributions, excepting certain circumstances, such as being able to direct those contributions to somebody whose election would provide the lawmaker satisfaction. *See* Deb Price, *Michigan's Smith Fuels Ethics Fight; Inquiry About Alleged Bribe Offer to Representative Revives Push for Independent Policing of Congress*, DET. NEWS, Apr. 11, 2004, at 13A.

[79] Of course, these decisions may not be minor at all. *See, e.g. infra* note 84.

[80] Some politicians like to have it both ways. A humorous story was once related to me about former New York City Mayor Ed Koch. While running for office, he had found out that New Yorkers in general both supported the death penalty and felt that most people opposed it. He then ran ads saying that he supported the death penalty regardless of public opinion. Ironically, the Mayor of New York has no legal influence on the death penalty, whose legality is determined at the state and federal level and

Logically, one would expect that corruption influences lawmakers most on decisions unlikely to influence voters anyway, and even more so, on decisions that are less likely to be detected regardless. Despite Smith's argument that campaign contributions have not been proven empirically to affect lawmakers' actions,[81] his examinations of roll call voting would be ineffective at discovering corrupt tendencies. This is because "roll call votes are the most visible actions of legislators, and therefore are the least likely settings in which legislators will be willing to prefer the desires of contributors to those of constituents."[82]

On the other hand, "[t]here is . . . a scholarly consensus that contributions do have an impact on voting when 'the issues under deliberation [tend] to be low-visibility, nonpartisan ones on which other voting cues [are] lacking.'"[83] Nor are these actions limited in scope. In fact, "[s]uch votes 'have very real results for particular special interests' and 'constitute a significant portion of what occurs on Capitol Hill.'"[84] Minor, it turns out, may be entirely the wrong word to describe these decisions that are the most susceptible to corruption, particularly since the scholarly consensus can only view a fraction of lawmakers' behavior that exists in this arena.[85]

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enforced by the state Attorney General and District Attorneys, who have complete independence from the mayor in New York.

[81] SMITH, *supra* note 15, at 136.

[82] LOWENSTEIN 1, *supra* note 15, at 315.

[83] BRIFFAULT, *supra* note 42, at 580 (quoting MAGLEBY & NELSON, *supra* note 56, at 77-78).

[84] *Id*. (quoting MAGLEBY & NELSON, *supra* note 56, at 78).

[85] Campaign contributions can have "an impact on the thousand-and-one decisions that determine whether and what exactly will be voted on: the precise wording of a bill or an amendment; the decisions of a legislator when a bill is being marked up in committee to move or withdraw an amendment, or to accept or oppose modification; whether to press for one bill or amendment rather than another, especially when time for action is drawing to a close; the voting procedure used in consideration of the measure; or, simply, how vigorously to push or resist a proposal. Without deciding how legislators vote, campaign contributions can affect what matters become law." BRIFFAULT, supra note 56, at 78. It should be pointed out that Briffualt's description of low-visibility actions are all difficult to evaluate the affect of campaign contributions on more than anecdotally, and they do not even include backroom actions such as logrolling that are allegedly common but almost impossible to evaluate by their very nature. Other examples can be found in these articles: *Ex-Official Says United States Government Covered Up Spill*, Reuters (Apr. 1, 2004), *available at* http://www.forbes.com/markets/commodities/newswire/2004/04/01/rtr1321176.html (last visited April 17, 2004); Tim Weiner, *Battle Waged in the Senate Over Royalties by Oil Firms*, N.Y. TIMES, Sept. 21, 1999, at A20.

This is not to say that laws designed to increase transparency in the system are bad. Quite the contrary, any attempt to provide for more transparency, such as single-issue laws and the line item veto, will reduce the areas in which corruption can play a part in decision-making.[86] Issacharoff and Karlan write that "[m]oney, like water, will seek its own level. The price of apparent containment may be uncontrolled flood damage elsewhere."[87] However, just like there is no way to keep money perfectly out of the system, there is no way to keep voters perfectly informed of all official decision-making. The unfortunate corollary to Issacharoff and Karlan's hydraulics of money theory is that corrupt decision-making will also seek its own level, flowing to whichever areas that remain unregulated.

IV. STRATEGIC ACTION AND ELECTIONS

Transparency in the legislative process is not an effective way to prevent corruption in the campaign system. What about transparency in the fundraising system? Are disclosure laws effective ways to mitigate the threat of corruption in legislative decision-making? The argument in favor of disclosure is that, if a candidate accepts campaign contributions in a system with full disclosure, the voter can analyze where the money is coming from. If they feel that this flow of money presents a risk of the legislator being unacceptably corrupt, then they can vote out the official, limiting the legislator's incentives to be corrupt.

However, the problem is that the election system quickly dissolves into a prisoner's dilemma for voters. As voters cannot really determine the true impact of any particular legislator's corruption on their job performance, they will systematically undervalue the possibility of a candidate being corrupt unless they can find some other signal within the candidate's campaign donations that can separate corrupt candidates from non-corrupt ones. This note argues that such a signal cannot generally be gleamed from the campaign finance disclosures. Thus, other attributes of the candidate, which make better-funded candidates more attractive to voters than lesser-funded candidates almost entirely irrespective of whether the candidate is corrupt, dominate the

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[86] William Sage, *Regulating Through Information: Disclosure Laws and American Healthcare,* 99 COLUM. L. REV. 1701, 1802-04 (1999). It should be noted, however, that too much transparency could potentially be a bad thing if it creates disincentives towards useful communication.

[87] Issacharoff & Karlan, *supra* note 19, at 1713.

voter's decision-making process. Since a candidate's openness to corruption increases their ability to obtain campaign funds, the result is that the candidates themselves are systematically encouraged to permit corrupt quid pro quo donations.[88] As a result, legislators, even though they would prefer to be free of corruption, are thus required to act corruptly in order to maintain office.

A. Voters Inability to Obtain Useful Information from Disclosure

The problem starts with the failure of transparency discussed above. Candidates cannot accurately grasp all the decisions a lawmaker makes in office, particularly those decisions that are most likely to be viewed as corrupt. In fact, as Rose-Ackerman notes, a completely rational lawmaker will only make corrupt decisions when the benefits (for instance, the ability of money to win needed votes) exceed the costs in lost votes.[89] Therefore, they cannot judge whether the candidate was overly corrupt simply by their examinations of the legislator's past activities. [90]

Taking this further, for each individual lawmaker, voters cannot accurately grasp what each donor's contribution received for their vote, nor the cost to them of that decision. They may know that a candidate who receives large sums of campaign contributions year after year is more likely to result in overall corruption, but unless the candidate can show that these donations came from such small amounts that it would be impossible for the legislator to show that the donors received nothing for their contributions. Furthermore, the information costs of trying to figure out which donors are more likely to result in corrupt behavior is too high to become an effective source of information for the voter.[91]

Without actually understanding the real effect of corruption on the legislative process, the result is that voters simply have normative

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[88] This value is represented in the previous section as part of the legislator's "c" value in decision-making.

[89] ROSE-ACKERMAN, supra note 19, at 38-40.

[90] Of course, when I examine whether voters can judge the views of the lawmaker, this examination does not occur directly; very few voters are likely to actually examine the data provided by the FEC. What I refer to is the ability of voters to receive and understand information from intermediary sources, such as the press and other political candidates, which originated from an examination of the information provided by campaign finance disclosure rules. *See* Issacharoff and Karlan, *supra* note 19, at 1737-38.

[91] D. STRAUSS, *supra* note 30, at 1377-79.

views of contributors based on preset political preferences.[92] As Strauss argues, "[b]oth [civil rights groups and the agricultural lobby] are well-organized groups. Both purport to be concerned with the good of society and to be trying to implement a vision of social justice, not just promoting their own selfish interest."[93] Of course, one could reasonably judge the difference between civil-rights groups and the agricultural lobby based on the results they get from those candidates to whom they donate. Unfortunately, the flaws in the legislative process fail to detect any impact of the donation on the candidate's choices absent the donation. This is because when candidates take a position that the lobby would support, is in line with the public's view of good governance, or within her own Burkean view of right or wrong, this is not corruption: the candidate probably would have done so anyway. The actions of the lawmaker that are not on the BP line, on the other hand, are the ones that are most likely to be the quid pro quo for the donation. However, as explained in the section above, it is these decisions that are precisely the most difficult for the public to notice and comprehend.

Therefore, there is no way for the voter to understand the disclosed donor information in terms of how the donations will affect the law. So long as the legislator acts rationally in balancing his personal political preferences, the preferences of his electorate, and his personal "extraction" of benefits from decisions, no signal will develop tying donations to corrupt actions. Instead, it simply allows voters an understanding of what groups support the candidate. Without knowing how it affect's the lawmaker's ultimate (or past) decision-making or her position, the information that disclosure provides simply permits the voter to associate the candidate with their pre-enforced normative views of large donors.[94] It does not permit them to re-evaluate these normative views of whether or not these donors help create law that the voter supports outside of high-visibility lawmaking unlikely to be subject to corruption regardless.

Furthermore, because donors whose contribution is in return for non-democratic favorable lawmaking want to hide the result of their action, they will have an interest in evading disclosure rules.[95] They may

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[92] *Id*. at 1378.
[93] *Id*.
[94] *Id*.
[95] Logically, this is because a detected "corrupt" donation could lead to higher costs for the legislator of receiving it, and thus it being less value as a tool to extract favorable

do this in several ways, including channeling the money through organizations (often with very positive-sounding names such as "Coalition for Family Safety" that have nothing to do with the organizations real goals or identity) that hide the purposes of the donations, or through avoiding the disclosure requirements entirely.[96] Regardless of the manner in which disclosure laws are undermined by donations, these actions continue the process of raising the costs of voters to use disclosure to examine legislative action.[97]

In sum, disclosure laws are ineffective because the story it tells will be incomplete. Without an understanding of exactly who is donating, what their goals are, and how their donation actually has an effect on the law, there is no way to understand the result in a way to properly judge the candidate who receives the donation. Voters may understand that corruption is "bad," in the sense that less corruption is better than more corruption, but they have no clue exactly how "bad" it is compared to other characteristics they may like or dislike in a candidate. They may know that candidates who receive no assistance from large donors are unlikely to respond to donors in lawmaking, but they cannot tell whether a candidate who does receive assistance from large donors will respond to them in lawmaking or not, even given an available legislative record. They also cannot tell which of two candidates for office with different groups of large contributors would be more likely to be responsive to those donors once in office. This zone of ignorance leads voters to deemphasize a candidate's capacity for corruption when selecting candidates. So long as tolerance for corruption systematically assists candidates, democratic elections will encourage rather than discourage such tolerance.

B. Strategic Action in Competitive Elections

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lawmaking; this may alternatively be a natural preference when undergoing actions that society generally considers immoral.

[96] *See* Issacharoff and Karlan, *supra* note 19, at 1720-21. Issacharoff and Karlan believe that campaign finance laws might be amended to prevent such evasion. *Id*. at 1737. However, it seems like regulating reporting for where the money comes from would be no easier than regulating the money itself. Nor would donors become too apathetic to make an attempt to do so. After all, the donor expecting an official he is donating to change behavior in return for his donation could not do so if the candidate loses as much political support from the disclosure as he would gain from the money. Thus, if a rule mandating disclosure *was* effective at preventing corruption, then, the corrupt donor would have just as much incentive to get around that rule as he would getting around a rule limiting the money in the first place.

[97] *See id*. at 1737.

This is quite a handicap for the legislator. Since, as of late, only candidates with comparatively radical political messages have amassed a reasonably large campaign chest made primarily of small donations,[98] most serious candidates will have two distinct choices. They can allow all donations, including quid pro quo donations, or reject any large donation that might even have the appearance of quid pro quo potential, and suffer a major competitive funding disadvantage in their campaign. The strategic choice that a winning candidate will consistently make is to allow for corruption.

Think of a typical, competitive election in a two-party, one representative per district, system. In this election, let us assume eighty percent of the voters are party-line voters. That is, they have an ideological belief in what a legislator shall do that is in line with party A or party B. Forty percent of the electorate has ideology A and forty percent has ideology B. The other twenty percent do not know whether they prefer ideology A or ideology B; these are the swing voters. All voters would prefer a non-corrupt candidate to a corrupt candidate, but all voters, including the swing voters, consider their ultimate preference of A or B more valuable than their preference of corrupt or non-corrupt.

This is not an unreasonable set of assumptions. Think of the 2002 elections. There were fairly important decisions being debated before those elections. These included whether the tax cuts were beneficial for the economy, a proposed constitutional amendment on gay marriage, and whether war on Iraq was justified.[99] If a voter could somehow construct a perfect candidate, deciding whether the candidate should be pro-war, support tax cuts, oppose gay marriage, or whether the

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[98] Howard Dean is the most recent example. John Anderson and Patrick Buchanan are other examples of candidates who funded themselves primarily through large aggregates of small donations.

[99] While those who opposed the Bush administration's stance on tax cuts and the war on Iraq would often use the language of corruption to convince voters of the impropriety of these actions these actions probably do not really fit into our description of corrupt activities. Not only are they ideologically cohesive, and thus not in themselves off the BP line, but they were fairly high-visibility legislation, the type which are least likely to be subject to corruption. On the other hand, the minutiae of the bill, such as some of the more arcane details of the tax cuts and the contracts for rebuilding Iraq were likely to be influenced by corruption. (*see* David Axelrod, *The Presidency, Round 1: A Bought President; A Strong Bow to the Right Marks First Months*, CHICAGO TRIBUNE, Apr. 1, 2001 at C1; Victor Lama, *Community View: Special Interests are Pushing for War with Iraq*, THE JOURNAL NEWS (WESTCHESTER), Feb 1, 2003, at 6B).

candidate should be influenced by large donations, they would be able to pick their candidate of choice on the war, social issues, and the economy, and still end up with a corruption-free candidate. However, in an election between a candidate whose general ideology a majority of the electorate opposes, but who has signaled that he is corruption-free, and a candidate whose ideology the majority supports but may be corrupt, the corrupt candidate will win as voters deemphasize the importance of a corrupt free candidate.[100]

Now assume that money can be used to convince those "swing voters" that they support either ideology A or B before Election Day.[101] That is, it is not simply that swing voters are apathetic about war or tax cuts. They simply do not know what side of these "issues of the day" is important. Campaign money can be used to advocate their position in the public, and while it may not be the only factor that determines if more voters ultimately prefer a particular ideology (and thus a certain candidate), it is an important one.[102] Money, then, plays a large part in helping swing voters to a candidate.

As a result, the choices a candidate for election faces is to take no large donations, have a smaller war chest, win the respect of everyone for not being corrupt, and risk losing the election on the issues, or take the contributions, not utilize a credible "corrupt-free" strategy, and attempt to win the election on the issues of the day. The second strategy becomes dominant and pursued by both sides. This is a variable of the

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[100] See Part IV A, *supra*. Indeed, the ultimate scenario played itself out in 1991 when ex-Klansman David Duke ran for Governor against "self-confessed rapscallion" Edwin Edwards, "who [had] only recently won acquittal on two charges of political corruption." Edwards, whose campaign included the slogan "Vote for the crook: it's important," won the election. *See* Marci McDonald, *Showdown in Dixie*, MACLEAN'S, Nov. 25, 1991, at 32; Michael Riley, *Louisiana: The No Win Election: The neo-Nazi and the rapscallion slug it out, and in the end, decency and the pocketbook prevail*, TIME, Nov. 25, 1991, at 43.

[101] There are a variety of reasons why it might be that campaign money can be used to influence votes. *See, e.g.*, Issacharoff and Karlan, *supra* note 19, at 1726-29. For the purposes of the article, it is only important that additional funds can be used in some way to equal additional votes; how and why this happens is irrelevant.

[102] Otherwise, why would Presidential candidates want money? It certainly is not simply awareness of existence. Even the most cynical observer should believe that every voter will know come November that the two major candidates in November were named Bush and Kerry, and that the major issues were national security, gay rights, and the economy. The money is used to fill in the details, to convince candidates that their position is a good one, and their opponent's position is not.

prisoner's dilemma.[103] Furthermore, since the candidate will be seen as corrupt regardless of whether or not campaign contributions actually affect her decision-making, the electoral process will not act as a shield against corruption.

C. Strategic Action and Primaries

The primary system does not do anything to solve the dilemma. At first, the primary system seems exactly the place in which corrupt candidates would be cleansed from the electoral system. After all, in primaries, all voters are likely to have some level of consensus on the "great" issues, and since all candidates prefer "ideology A plus no corruption" to "ideology A plus corrupt," one would assume that candidates who want to win primaries might find their optimal strategy to not be corrupt.

However, there is no particular benefit to winning the primary if you are going to lose the general election, and both primary voters and candidates realize this. Thus, the preferences of voters, given that all the candidates roughly support ideology A, are an electable candidate over a non-electable one, and then a corrupt-free candidate over a corrupt one.[104] Since corrupt-free candidates lack the necessary money to signal their electability, they will not win in the primary election either.

D. The Noncompetitive Election

Despite sounding intuitively wrong, the incentives shown above requires one to consider the hypothesis that non-competitive elections, as opposed to competitive ones, may provide protection against corruption. The reasoning behind this is that a lack of any danger of challenge may leave a lawmaker with little incentive to trade legislative action for campaign contributions. However, under the current system, such a hypothesis still fails. Uncompetitive elections are ineffective as a way to protect against corruption. This is because lawmakers in noncompetitive elections have other reasons to value campaign contributions.. Even though contributions may provide less benefit to a lawmaker who faces no electoral competition, the lack of democratic accountability lowers

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[103] AVINASH DIXIT AND SUSAN SKEATH, GAMES OF STRATEGY, 85-87 (1999).

[104] Indeed, in the 2004 primary, the key word was "electability." *See* Delia M. Rios, *That Certain Something is "Presidential"; In Race for White House, Voters Seek Elusive Aura of "Electability,"* TIMES PICAYUNE (NEW ORLEANS), Mar. 5, 2004, at 1.

the costs of corruption as well. As a result, a viable "market" for corruption remains.[105]

Before one can see how candidates facing noncompetitive re-election campaigns have an incentive to obtain campaign contributions, it is useful to see why lawmakers obtain safety from voter scrutiny in the first place. The main reason this happens is that districts themselves are becoming increasingly "safe" for one party or another through a combination of redistricting[106] and the increasing geographic polarity of the country.[107] Primaries in these districts have likewise not solved the problem; significant primary challenges are simply too rare.[108] Thus, for an increasing amount of electoral districts, once a candidate wins her first term, she receives what is practically life tenure. The second reason that lawmakers become insulated from electoral challenges has to do with a candidate's ability to bring money ("pork") to the district. Voters

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[105] For a perspective on examining campaign finance reform through concepts of supply and demand, see Justin Nelson, *The Supply and Demand of Campaign Finance Reform*, 100 COLUM. L. REV. 524 (2000).

[106] Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 623-24 (2002).

[107] David Brooks, *One Nation, Slightly Divisible*, THE ATLANTIC MONTHLY, Dec. 2001, at 53. Jill Lawrence, *Values, Votes, Points of View Separate Town – and Nation*, U.S.A. TODAY, Feb. 18, 2002, at 10A.

[108] Nathaniel Persily disagrees, pointing out that 32 Congressional candidates received 60 percent or less in primary elections in 2000, his use of the 1992 primary challenge numbers notwithstanding. (Using 1992 numbers are suspect in this context as elections immediately after redistricting often draw incumbents against each or move incumbents to significantly more susceptible districts where a candidate of considerably different political views may see an opening in a primary having little or nothing to do corruption). *Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 661 (2002). However, as Samuel Issacharoff notes, "the political science literature defines a *landslide* as an election in which the winner receives more than sixty percent of the vote," and, even including successful general elections, incumbents still won 98.5% of their re-election campaigns that year. *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 623 (2002) (emphasis added). Persily's thirty-two non-landslides translate into a measly 7.35%, hardly enough to imply serious competition when considering the 60% percent of incumbents in that election who either had no opposition at all or were able to outspend their opponents by a 10 to 1 margin. Richard Briffault, *The Future of Reform: Campaign Finance after the Bipartisan Campaign Finance Reform Act of 2002*, 34 ARIZ. ST. L. J. 1179, 1212 (2002) [hereinafter Briffault 2]. Even if we assume that every single non-landslide primary came in an election that was uncompetitive in the general election, an unlikely claim, that still leaves over half of elections completely noncompetitive in either the general or the primary election. And you thought that the 98.5% number was just sheer luck.

will be wary of voting out a candidate who holds an important position on a valuable committee in favor of a freshman legislator who may not be able to bring in the goods.[109] Incumbency advantages exacerbate the problem regardless of the reason.[110]

However, incumbents have several reasons to value campaign contributions. For one, candidates may be risk-adverse; they may be wary of the risk that a viable challenger may present circumstances or districts might change to make the district more competitive, or they may overestimate the odds a potential challenger actually has of unseating the Congressman. A second, related reason for desiring campaign contributions is to dissuade potential challengers. Holding a large sum of money may be the equivalent of a monopolist firm holding excess production capacity to prevent new entrants. Potential challengers, seeing the odds considerably against them, are less likely to challenge the incumbent. A third reason is that a candidate may desire to run for another office in the future. For example, a large campaign chest may be necessary for a Congresswoman from a safe House district to run for Governor. A fourth reason is that a large campaign chest can be used to assist other candidates whose prospects are less safe, exchanging campaign currency in return for valuable political currency.

For these reasons, candidates value campaign contributions even if they do not face significant competition for re-election. In fact, to the degree that many of these candidates receive large amounts of contributions,[111] there should be more concern for these candidates than others that they may be making decisions based on campaign donations rather than votes.[112] This is because the candidate in a competitive

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[109] Einer Elhauge, *Are Term Limits Undemocratic?* 64 U. CHI. L. REV. 83, 85-86 (1997).

[110] *Id*. at 85.

[111] Briffault 2, *supra* note 108, at 1212-13; Jason Miles Levien and Stacy L. Fatka, *Cleaning Up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Reform*, 2 MICH L. & POL'Y REV. 71, 91 (1997).

[112] There is some consideration that these candidates, assured of their election, may be extorting the contributors in exchange for lawmaking that they would enact anyway and only if the contribution does not materialize will the candidate alter her lawmaking behavior. D. Strauss, *supra* note 30, at 1380-82, Ian Ayres and Jeremy Bulow, *Law and the Political Process: The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 846 (1998) (it is unlikely that candidates in more competitive elections have as much extortion power, as the interest group being extorted as an alternate can back the opposing candidate, and thus not only eliminate the threat but have favor with an incoming candidate). However, there is no reason to believe, if this is true, that candidates only extort those

election will naturally receive large sums of money from ideological groups whose interest is electing one candidate over another rather than extracting favors from their candidate should they win. On the contrary, those donors who only want to support the candidate without trying to influence her have little reason to donate to candidates who are assured victory regardless. Only contributors who are interested in influencing the candidate will provide more than a nominal donation.

This is not to say that lawmakers who face noncompetitive re-election are more (or less) likely to be corrupt than lawmakers who face substantial competition for re-election. The candidate assured re-election has less reason to procure campaign funds, but substantial reasons exist regardless. The candidate in a competitive election is subject to a level of voter scrutiny in a way the candidate assured re-election is not, but that voter scrutiny is not likely to punish (and in fact, likely to reward) the candidate for engaging in quid pro quo behavior. The main lesson in comparing lawmakers in competitive and noncompetitive election is not a comparative one. It is simply to show that, even with the use of mandatory disclosure laws, Dan Lowenstein essentially had it right:

> The legislative process is not corrupt. Legislators, by and large, are not corrupt. Neither are lobbyists. They are doing what they must to carry out their roles in the system as it presents itself to them. They are not corrupt, though sometimes they are corrupted. The campaign finance system is corrupt.[113]

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whose policies they support anyway. At least some, if not most, of the legislative action, particularly in low-visibility lawmaking, may happen simply when the lawmaker is not particularly passionate about the decision one way or another. This is true, if for no other reason, because the threat of negative action is more credible when the negative action has no self-destructive impact on the lawmaker. In these cases, listening to the donor because she donated money should be seen as corrupt if the donor's interests vary from that of the general public. The fact that the hypothetical language is "give me money or" as opposed to "if you give me money" is then irrelevant.

[113] Lowenstein 1, *supra* note 15, at 335.

V. CONCLUSION

A. How Problematic is Corruption?

One of the reasons we grapple with the concept of corruption is the normative value we place on it. Corruption, in the sense of public policy, is a "bad" phenomenon, and because of this, we feel a need to exterminate it from public life. With this in mind, it is understandable (although still incorrect) that scholars would prefer to equate corruption with inequality. Such a theory would be a more comfortable way to explain the normative problem we have with corruption. It is that corruption allows some more political power than others, and only that, which is the source of why corruption is "bad." Since we are much more satisfied with the idea that society is naturally unequal than it is naturally corrupt, it becomes a way of accepting natural corruption that helps us sleep at night.

As previously explained, however, corruption is *not* the same as inequality. Arguing that they are the same further complicates our understanding of both concepts, and damages our ability to evaluate either. Of course, the two phenomena share certain characteristics. Once we realize that corruption and inequality are distinct problems, analyzing their characteristics in common may provide understanding about the nature of corruption itself. Corruption and inequality are both normative "bad" events, and both still exist naturally in society. In part, this is because both human nature and the democratic system are imperfect. More importantly, though, this is because corruption is one normative "bad" in a world of lots of normative "bads." Given our imperfect society, we have no choice but to allow it. Through this article's definition of corruption, the normative "bad" of corruption comes in the sense of its departure from the idealistic view of a democratic society. Yet, this idealistic system, completely uncorrupted, could still present us with great problems, because it is just one normative "bad" amongst many others. Even the pure state of decision-making described above will have its "bads." For instance, James Madison warned of the danger of great reliance on the choices of the public will.[114] The destruction of individual rights and the destruction of the positives of Burkean decision-making are two particular normative

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[114] "It is much more to be dreaded that the few will be scarified to the many." *James Madison to Thomas Jefferson*: *17. Oct. 1788*, 11 THE PAPERS OF JAMES MADISON 297-300 (William T. Hutchinson, et. al. eds. 1977).

"bads" that may often conflict with the tyranny-of-the-majority in pure public choice decision-making. It is important, when discussing corruption, to understand that uncorrupt results are not by definition better than corrupt results, although democracy would not survive long if there was not the tendency for the former to be superior.

Slavery, for instance, would not have been avoided by a corrupt-free society. For some time of its existence, public will (at least in the South) would certainly not have sufficed to cause its end. One could imagine, on the other hand, a single wealthy individual who was determined to spend her wealth on the goal of abolishing slavery. She may have found that spending money undemocratically influencing those in power to abolish slavery was more effective than simply using her wealth on educating the public about her views. This would be undemocratic, and thus corrupt; but if successful would have cured our nation of a great evil. If the democratic process is singularly sacred, then corruption still maintains its natural condemnation, but if it conflicts with other normative "bads" in our imperfect world that are even more worthy of condemnation, the lesser of two evils could be considered a "good" thing.

This is not to say that corruption as defined in the article should attach no normative valuation. So long as our system of government relies on established principles of democratic representation, then corruption is not simply descriptive, it deserves a normative condemnation. Furthermore, corruption does entail serious pragmatic problems. It leads to outcomes that benefit narrow interests at the expense of the public good as a whole.[115] One could only contemplate the effect of corruption on our nation's resources, and the things we could accomplish if we could apply better controls on such resources. Even though our democratic principles may be imperfect, we would not maintain them if their preservation was not a goal that should be aimed for. Remember, as Adam Smith said of those that may try to corrupt the government, they "have generally an interest to deceive and oppress the

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[115] LEGISLATION, *supra* note 59, at 54-62; *See* JAMES WILSON, POLITICAL ORGANIZATIONS (1974). *See also* MICHAEL HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS (1981); MANCUR OLSON, LOGIC OF COLLECTIVE ACTION (1965). Furthermore, it will often do so in a way in which the winners of the undemocratic result do not win as much as the losers will lose. This is inefficient (another normative bad) in the Kalder-Hicks model of efficiency.

public, and accordingly have, upon many occasions, deceived and oppressed it."[116]

B. Disclosure as Reform

There is nothing inherently pro-corrupt about disclosure requirements, although there are certain arguments against it outside the corruption debate, such as a right to privacy.[117] Furthermore, despite the argument above that information costs to understanding the connection between disclosed contributions and legislative behavior are too high to be a cure to the problem of corruption, those costs are not absolute barriers, and thus there are some anti-corruption gains from disclosure, compared to a system that does not regulate information at all.[118] However, it is important to note that, for the most part, disclosure is a demand-side, not a supply-side, argument.[119] If this article is correct about the lack of transparency in the legislative and electoral processes, the question is not whether disclosure leads to an end to corrupting campaign contributions, but instead simply how big the magnitude of the reduction of demand actually is. The conclusion is simply, "not all that much." This answer is the same as the one came to by Ian Ayres and Jeremy Burlow.[120] If this is true, then we should contrast pro-disclosure, demand-side benefits against alternative proposals with conflicting processes that focus on reducing on the supply side.

The primary conflicting remedy to mandatory disclosure is mandatory anonymity. This idea, proposed by Ayres and Burlow in their article "The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence,"[121] base their idea on the same

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[116] *Supra* note 13. *But see* Issacharoff and Karlan, *supra* note 19, at 1723-24.

[117] William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1 (2003); Trevor Potter, *Buckley v. Valeo, Political Disclosure and the First Amendment*, 33 AKRON L. REV. 71 (1999). There's also other reasons why disclosure might have positive benefits not directly related to corruption, such as the ability for voters to discern legitimate candidates from ones who may be illegitimate. *See* Issacharoff and Karlan, *supra* note*19* at 1722-23,(although the voter's view of the monetary endorser is of course based on normative and incomplete understandings of donor interest groups), and accountability of PACs and other middlemen to their original contributors. Ayres and Burlow, *supra* note 112, at 878-79.

[118] Issacharoff and Karlan, *supra* note 19 at 36-38, 1719-24.

[119] Nelson, *supra* note 105, at 550.

[120] *Supra* note 112 at 844.

[121] *Id.*

principles of anonymity that our modern system of voting relies on.[122] If a system can be found to effectively accomplish the goal of preventing donors from credibly indicating to candidates their contributions, then there is no way for an official to provide legislative action in a way that would increase her donor base.[123] Actions that reward donations would fail because the official would not know whom to reward; actions to induce donations would fail because the donor can free ride on the lack of information.[124] Nor could candidates threaten potential donors with adverse legislative action to compel donations under the same principles.[125] While donors, of course, could still donate to candidates who have promoted their causes in the legislature in order to keep them in office, the threat of the corrupting influence of donations would significantly lessen as the costs of donors communicating a credible commitment to providing that assistance would rise. As such, no substantive difference would exist between the agricultural lobby and the civil rights group that provides donations to candidates of like mind without expecting action in return.[126] In terms of providing access or action, donor candidates can only guess as to whether or not a particular group actually provided donations or not. In that sense, since the c value declines significantly, the candidate is much more likely to follow actions based on her p and b values. An equality problem may still remain, and there might be good reasons to address it, but the corruption problem is substantially reduced.[127]

Of course, there is always the risk that mandatory anonymity would be no more effective at preventing credible information from flowing from donors to candidates as disclosure laws have been at

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[122] In Ayres and Burlow's proposal, a nominal donation, up to $200, will still have some sort of disclosure (they prefer optional disclosure; this note opines that it should perhaps be mandatory). *Id*. at 854. This will allow for the minor part of contributions that have speech components, and allow voters to know what organizations support the candidate. The degree of support may not be known, but it will still provide a voter enough normative information to be as valuable in many ways as a full disclosure system.

[123] *See id.* at 847-53.

[124] *Id*. at 850-51.

[125] D. Strauss, The Brennan Center Jorde Symposium on Constitutional Law, *What's the Problem? Ackerman and Ayres on Campaign Finance Reform*, 91 CALIF. L. REV. 723, 734-36 (2003).

[126] See Part IV § A, *supra*. D. Strauss, *supra* note 30, at 1378.

[127] There may also be a problem that the campaign finance system is under-funded. See Ayres and Burlow, *supra* note 112, at 877-79, for a summary of the problems of mandatory nondisclosure and possible solutions to those problems.

allowing credible information to flow from candidates to voters.[128] It may be that stopping the flow of information is as difficult as stopping the flow of money in the campaign finance system.[129] However, such problems, absent real evidence, are conjectural. Only empirical testing will give us a real idea of the success of mandatory anonymity programs. In that sense, there are several programs already in place worth monitoring, including programs for state judges.[130] If these programs designed to prevent one of the more dangerous forms of corruption are successful at preventing corruption,[131] they should be expanded to legislative and even executive elections, as any substantial success is likely to accomplish more than the minor benefits that mandatory disclosure has accomplished.

C. Other Proposals

This is not to say that regulation should simply be along the lines of complete disclosure versus mandatory anonymity. Current disclosure laws work along a host of regulations, particularly expenditure limits.[132] Ayres and Bruce Ackerman have currently developed a plan to provide public funds to the election based on providing donation vouchers, known as "Patriot Dollars," to citizens.[133] Other proposals to publicly fund and provide other non-private funds to candidates exist, and public funds have assisted in federal Presidential elections[134] as well as in elections in some states and municipalities.[135] Contribution limits, although criticized for their effectiveness,[136] have had at least limited success in limiting the supply of large donations in political campaigns.[137] Public funding can be effective, on the other hand, in

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[128] Pamela S. Karlan, *The* Brennan Center Jorde Symposium on Constitutional Law, *Elections and Change Under Voting with Dollars*, 91 CALIF. L. REV. 705, 707-15 (2003).
[129] *Id*. at 712.
[130] Ayres and Burlow, *supra* note 112, at 870-75.
[131] Judges, unlike legislators, are more likely to make decisions that affect particular individuals.
[132] Bipartisan Campaign Reform Act of 2002, Pub. L. 107-55, 116 Stat. 81.
[133] AYRES & ACKERMAN, *supra* note 40.
[134] Federal Election Campaign Act of 1971, Pub. L. 92-178, 85 Stat. 563, codified at 26 U.S.C.S. §§ 9001–9042.
[135] *See, e.g.,* Theodore Lazarus, *The Main Clean Election Act: Cleansing Public Institutions of Private Money*, 34 COLUM. J. L. & SOC. PROBS. 79 (2000).
[136] *See* Issacharoff and Karlan, *supra* note 19.
[137] Levien & Fatka, *supra* note 111, at 91.

limiting the demand for private donations, particularly if one accepts the notion that decreasing marginal value principles apply to recipient candidates. This will be particularly true if candidates do not have to trade for accepting public funds by limiting private donations. The reason for such is two-fold; for one, the measure will have no beneficial effect if people opt out of the system en masse. Secondly, if Issacharoff and Karlan are right and artificial donor limits do not limit the supply of money in any real sense,[138] this "quid pro quo" money will just fly in larger amounts to the remaining candidates who are receptive to them (as well as to unregulated types of "contributions" that will defeat a rule designed at limiting publicly funded candidates).

Other possibilities for solving the problem may exist and deserve consideration. These proposals may alter the campaign finance system, or they may alter the legislative system in a way that increases the cost to lawmakers in engaging in quid pro quo lawmaking (for instance, by finding more efficient ways of making the legislative process transparent). The point of this article is not to make proposals themselves, although its logic does invite openness to reforms based on mandatory anonymity. Instead, it provides a framework to understand what actions lead to corruption and where those actions occur in our governmental systems. By doing so, we can focus on how potential proposals can increase the costs and lower the benefits of undemocratic behavior in which both lawmakers and private interests currently engage.

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[138] Issacharoff and Karlan, *supra* note 19, at 1708-17.