On Campaign Finance Reform: The Root of All Evil is Deeply Rooted

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I. INTRODUCTION

Alexander Heard, in his great treatise on campaign finance, identifies money as a unique political resource because it can be converted into many other political resources, as need may dictate. This observation is often invoked by reformers when skeptics of campaign finance reform object that there is no justification for regulating the use of money in politics more stringently than other resources, such as celebrity, ownership of or access to the mass communications media, or even personal qualities such as good looks or articulateness. The reformer's response, in Heard's words, is that money "is a universal, transferable unit infinitely more flexible in its uses than the time, or ideas, or talent, or influence, or controlled votes that also constitute contributions to politics."


3. A. Heard, supra note 1, at 90; see also D. Adamany & G. Agree, Political Money 3 (1975) (discussing the liquidity and flexibility of money as a political resource). In fact, money can be used to achieve other, less flexible resources:

| Money can buy most non-economic political resources. It can pay canvassers, or skilled campaign managers, or publicists, or researchers. It cannot endow a candidate with intelligence, but it can buy him a brain trust. It cannot change his voice or face, but it can hire a make-up man, a voice coach, and a clever film editor. Those with money can buy virtually any of the resources that other citizens give directly. |

Levinson makes no response to Heard's point. See Levinson, supra note 2. Many of Levinson's examples of anomalies that can result from campaign finance reform are ingenious, but most of them seem to be either overdrawn or of little practical significance. Pointing to inconsistencies in the manner of the law school class discussion is not helpful in discussion of broad reforms unless it can be shown that the inconsistencies have systemic significance. In this
The special qualities of money have broader implications than this snippet from the standard debate over campaign finance reform suggests. There is a sense, related to money’s peculiar qualities, in which the problem of campaign finance is a very simple one. The payment of money to bias the judgment or sway the loyalty of persons holding positions of public trust is a practice whose condemnation is deeply rooted in our most ancient heritage. This condemnation, together with the recognition that money has the power to tempt men and women to stray not only from their ethical responsibilities, but from their own highest interests, gives rise to that strain in our culture that perceives money as the root of all evil. To the extent that campaign finance practices are corrupt in the traditional sense, a central goal of reform must be to root out and eliminate the practices to the maximum extent practicable.

Of course, in a different sense, the campaign finance problem is an inordinately complex one. The complexity derives from the infinite flexibility that Heard identified as money’s distinguishing attribute as a political resource. Because of its flexibility, money is everywhere in our political system, and almost unimaginably diverse in its uses and effects. This means that efforts to regulate the flow of money, whether to root out corruption or for any other purpose, are likely to affect the system and its participants in innumerable ways, large and small, foreseeable and unforeseeable.

The inevitability of unforeseeable effects, the so-called law of unanticipated consequences, has become a rhetorical focal point for opponents of reform. These opponents cite common sense and past experience for the proposition that campaign finance reforms are

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5. See infra notes 26-154 and accompanying text (analyzing whether campaign finance practices actually are corrupt).

6. See A. HEARD, supra note 1, at 90 (discussing the unique characteristics of money).

7. See, e.g., Malbin, Looking Back at the Future of Campaign Finance Reform, in MONEY AND POLITICS IN THE UNITED STATES 232, 238-443 (M. Malbin ed. 1984) [hereinafter MONEY AND POLITICS] (discussing the unintended consequences of proposed campaign finance legislation); Sabato, Real and Imagined Corruption in Campaign Financing, in ELECTIONS AMERICAN STYLE 155, 164-67 (A. Reichley ed. 1987) (warning of possible adverse consequences should political action committees’ contributions be limited).
likely to have surprising results. If the law of unanticipated consequences is interpreted as an injunction to think through the consequences of reform proposals as best we can, it becomes a benevolent bromide that can go on the shelf between "tell the truth" and "do not forget to brush after every meal." Caution and a degree of skepticism are always appropriate when dealing with questions of far-reaching significance. But this "law" derives its point from the opponents' assumption that the unanticipated consequences of campaign finance reforms are far more likely to be harmful than beneficial. This assumption, which has no basis in logic and has not, to the best of my knowledge, been demonstrated with the empirical rigor these opponents demand that reformers provide for their assumptions, is supposed to create a strong presumption against adoption of new reforms, and to chastise those of us who have had a finger in past reforms.

Such a strong presumption cannot be imposed for two reasons. First, the argument has no stronger force in the field of campaign finance reform than in any other major field of human endeavor, each of which is subject equally to the inscrutability of the future. The law of unanticipated consequences is not an argument against campaign finance reform; it is an argument against any significant departure from the status quo. Second, the status quo itself is subject to the law of unanticipated consequences. Since change is a constant in human affairs, the consequences of a governing arrangement in one portion of the political system (or any other human system of importance) will change drastically as the environment changes, even if the particular governing arrangement is unaltered. The unanticipated consequences of failing to change can be as unpleasant as

8. The consequences were not really unanticipated in some of the past experiences which such opponents cite. In particular, some of the consequences of the 1974 amendments to the Federal Election Campaign Act were warned against by reformers who opposed some provisions but supported the package as a whole in the belief that the benefits would outweigh the drawbacks. See, e.g., Wertheimer, The PAC Phenomenon in American Politics, 22 Ariz. L. Rev. 603, 605-06 (1980) (arguing that certain elements of the 1974 amendments to the Federal Election Campaign Act were never truly intended as a "reform").

9. I was one of the drafters of the California Political Reform Act of 1974, see Cal. Gov't Code §§ 81000-91000 (West 1987), an initiative statute adopted by the California electorate in 1974. In addition, I served as the first appointed chairman of the California Fair Political Practices Commission from 1975-1979. To complete my confession of past sins, I had the pleasure of serving on the National Governing Board of Common Cause from 1979-1985. I continue to be an enthusiastic supporter of Common Cause, though readers of Lowenstein & Steinberg, The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?, 33 UCLA L. Rev. 1 (1985), will attest that my views do not always coincide with those of Common Cause.
the unanticipated consequences of changing. (Just ask a dinosaur, if you can find one!) Since the law of unanticipated consequences therefore counsels equally against action and inaction, it would be a guide to complete immobilization if it were taken seriously. Of course, it is not taken seriously. It is nothing but a rhetorical ploy, and one that deserves to be discredited.

The serious problem for reformers is not the unforeseeable consequences of their proposals, but the foreseeable ones. The pervasiveness of money in politics assures that analysis of any far-reaching reform proposal will reveal a diverse array of foreseeable consequences for a host of participants, interests and values in the political system. Generally speaking, the very flexibility and pervasiveness of money make it possible to adjust reform proposals to avoid or minimize foreseeable consequences that are deemed harmful and to promote those deemed beneficial. The problem is that even among those who join in the desire to expunge corrupt campaign finance practices, there is not, and never will be, a consensus on how to evaluate the numerous additional foreseeable effects the reforms will have on politics.

This is the fundamental strategic problem that has frustrated campaign finance reform efforts. Sit most people down individually, and you can devise a reform package that is likely to reduce the corruption in our system and that will be at least acceptable in its other consequences. It is exceedingly difficult, however, to come up with a single package that is agreeable even to a majority, not to mention the near-consensus that our system of checks and balances, combined with divided party government, requires for enactment. Any package will have foreseeable effects on the major parties, on the party system as a whole, on incumbency, on the nature of election campaigns, and on whole classes of society as well as on

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10. For a discussion of the foreseeable consequences of the reforms proposed by this Article, see infra notes 258-66 and accompanying text.
11. "Divided party government" refers to the situation in which no single party controls the presidency and both chambers of Congress. See generally Cutler, Party Government Under the American Constitution, 134 U. Pa. L. Rev. 25 (1985-86) (discussing the lack of party government and its relation to the decline in party loyalty).
12. See infra notes 182-91, 258-61 and accompanying text.
13. See infra notes 194-195 and accompanying text (discussing why people choose a given political party); infra notes 240-45 and accompanying text (discussing generic party advertising).
14. See infra text accompanying notes 263-64.
15. See infra text accompanying notes 262-64 (discussing the effect of this Article's proposal on the way challengers and incumbents will conduct campaigns).
a variety of more specific economic and other interests, and on par-
ticular officeholders, candidates, and other participants in the sys-
tem. The consequences of campaign finance reforms cut across a be-
wildering array of dimensions.

The strategic problem resulting from the pervasive, diverse and
manipulable consequences that must attend any serious reform pro-
posal cannot be solved or avoided. It can only be contended with.
Part Three of this Article demonstrates the far-reaching effects this
strategic problem has had on the way we debate the campaign fi-
ance issue.17 This Part shows that the intertwining of levels of argu-
ment, ranging from the most pure public-interest orientation to the
level of pure self-interest,18 is complex, but need not be a cause of
extreme confusion or discomfort if things are sorted out properly.

Prior to discussing this strategic problem, a preliminary issue
must be considered. As stated earlier, the central problem of cam-
paign finance reform is a simple one to the extent that present prac-
tices are corrupting in the traditional sense. Although I believe this
premise is accepted by the overwhelming majority of Americans, it
has been contested by some scholars.19 Part Two of this Article ex-
plains why I believe these scholars are wrong and lays some of the
groundwork for the discussion in Part Three.19

Part Four broadly outlines a reform package for legislative gen-
eral elections.20 This package consists of a relatively low aggregate
limit on the amount of contributions over $100 a candidate may re-
ceive from all sources, except certain qualified political action com-
mittees (PACs);21 a separate aggregate limit the same size as the
first on the amount a candidate may receive from qualified PACs,
which qualify by not accepting contributions over $50;²² public financ-
ing, to be allocated in amounts determined by the partisan leadership of the legislative houses to candidates of their own parties, with the amount provided to each party in each house set at a level high enough to permit the parties to fund a significant number of challenges while allocating enough to permit incumbents to defend themselves against challenge;²³ and a separate public financing fund made available to the partisan house leaders for expenditure on generic advertising, which supports the party as a whole rather than specific party candidates.²⁴

Few, if any, parts of this package are new, although some of them have received relatively little attention. The overall configuration may be distinctive. I set forth and defend this package in order to contribute to the ongoing debate, but with no expectation that it will be adopted, nor even more than a tentative commitment to it myself. Elaboration of the package is intended to support the more general theme of this Article by showing that a variety of values and interests, including some that often have been regarded as inexorably in conflict with campaign finance reform, in fact are compatible with serious efforts to reduce corrupt practices.²⁵

Campaign finance reform is like a very long menu in a restaurant that requires everyone at the table to order the same meal. There is something on the menu that will satisfy almost any taste. If you do not see what you want, the chef may be able to prepare something special for you. The trouble is that the longer the menu, the harder it is to get everyone to agree on a single selection.

II. THE CAMPAIGN FINANCE SYSTEM IS CORRUPT

At the outset of his treatise, Alexander Heard recognized that a major dissatisfaction with campaign finance in America was the perception that candidates' need for money "opened opportunities to swap party and public favors for the cash."²⁶ Cautious attentiveness to the degree of contributor influence over public decision-making is a pervasive theme in Heard's book.

²². See infra text accompanying notes 247-48.
²³. See infra text accompanying notes 216-26.
²⁴. See infra text accompanying notes 228-32.
²⁵. See infra notes 257-68 and accompanying text (discussing the effect of the proposals suggested by this Article on various interested parties).
²⁶. A. HEARD, supra note 1, at 8. The other major dissatisfaction was the unequal resources available to election contestants. Id.
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In contrast, Frank Sorauf’s recent text, *Money in American Elections*, does not give serious attention to the possibility that campaign contributions might affect public actions, other than through their possible effects on election outcomes, until the 307th of its 384 pages. Sorauf devotes ten pages to the subject and concludes:

[T]he evidence simply does not support the more extravagant claims about the “buying” of the Congress. Systematic studies indicate at most a modest influence for PAC contributors, a degree of influence usually far less important than the voting constituency, the party, or the values [of] the legislator. Moreover, several other studies suggest that the goals and capacities of most PACs are not congruent with assumptions that they set out to change congressional votes. In fact, both the extent of their influence and the nature of their operations fit much better their own stated goal of access. Finally, the development of PAC pluralism—both in the increase of countervailing PACs and in the wide dispersion of their contributions in small sums—also leads one to a more modest assessment of PAC influence. Such conclusions may serve few demagogues, but they are the only ones that serve the facts as we know them.

Similarly skeptical views have been expressed by Michael Malbin.

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Although Sorauf’s discussion of the influence issue is rather one-sided, this in itself might be stimulating and provocative for students, most of whom probably approach the subject with assumptions contrary to Sorauf’s. It is not his treatment of the merits of the issue, but relegation of the issue to peripheral status in a textbook on this subject which is likely to be disorienting for students and, in my opinion, puts the entire treatment of campaign finance out of joint. It is for this reason that, despite its many impressive virtues and its author’s unchallenged stature, I cannot regard *Money in American Elections* as an altogether worthy successor to Heard’s *The Costs of Democracy*.

A teacher searching for campaign finance texts might also wish to consider *Political Money*, written by David Adamany and George Agree. Though not as seriously dated as Heard’s book, parts of *Political Money* are, of course, no longer current. Other portions have survived well, such as the chapter on campaign finance disclosure, see D. Adamany & G. Agree, supra note 3, at 83-115, which probably remains the best treatment of this subject. Although *Political Money* is broadly conceived, its focus is on reform proposals and it does not aspire to the comprehensiveness of Heard’s and Sorauf’s works.

28. F. Sorauf, supra note 27, at 316.

29. See Malbin, supra note 7, at 247-52. Malbin concludes as follows:

[T]he fact that a contributor intends his money to have a certain effect does not mean that it was received in the same spirit, even if the recipient behaves as the contributor might have wished. The world is too complicated to be encapsulated by such simple analysis. Anyone who wants to say something precise about the independent effect of contributions will have to pursue a different line of research from the ones we have seen so far.
Other scholars, including Gary Jacobson, Larry Sabato, Kay Lehman Schlozman and John Tierney, have reviewed the same literature as Sorauf and Malbin and have given greater credence, in varying degrees, to the claim that special interest contributions influence legislative behavior.

A. Do Contributors Seek Influence?

Let us begin with Sorauf's suggestion that PACs may not even attempt to influence legislative behavior with their contributions. It has been widely recognized that interest groups making campaign contributions might use either or both of two strategies to influence public policy. Under the "electoral" strategy, they make contributions to enhance the chances of victory of candidates who are likely, if they are elected, to pursue the policies the contributors favor. Under the "legislative" strategy, they make contributions to whom-ever they think is likely to be elected, in the hopes of influencing the likely winner to pursue the favored policies by reason of gratitude, a desire to encourage future donations from the same or additional groups, or similar motivations.

A group pursuing an electoral strategy would make contributions in races where they are likely to be of the greatest electoral value, which means in races regarded as close. It would be irrational, within an electoral strategy, to contribute either to hopeless

Id. at 252.

30. See Jacobson, Parties and PACs in Congressional Elections, in CONGRESS RECONSIDERED 131, 151-52 (I. Dodd & B. Oppenheimer eds. 3d ed. 1985) [hereinafter Jacobson, Parties and PACs] (noting that some connection exists between contributions and voting, but warning that "[m]uch more work is needed before we can have a clear idea of how commonly PAC contributions influence congressional behavior.").

31. See Sabato, supra note 7, at 159-61 (agreeing that "PAC money buys access to congressmen" but rejecting allegations of "vote-buying").

32. See K. SCHLOZMAN & J. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 253-56 (1986) (evaluating the effect of contributions, noting that the "evidence . . . gives cause for concern, though not hysteria," and calling for more studies).

33. See F. SORAU, supra note 27, at 316 (stating that "the goals and capacities of most PACs are not congruent with assumptions that they set out to change congressional votes.").

34. See K. SCHLOZMAN & J. TIERNEY, supra note 32, at 206-07 (noting that an assumption often made by interested groups is that the mere election of a like-minded candidate will promote the causes of that organization without any further efforts); Welch, Patterns of Contributions: Economic Interest and Ideological Groups, in POLITICAL FINANCE, 199, 200-01 (H. Alexander ed. 1979) (explaining this hypothesis in terms of "ideological group contributions").

35. See K. SCHLOZMAN & J. TIERNEY, supra note 32, at 207.

36. See Welch, supra note 34, at 213 (reaching the conclusion that an "ideological group . . . will aid candidates in close races.").
candidates or to those assured of victory.\textsuperscript{37} Like the electoral strategy, the legislative strategy dictates against contributing to likely losers.\textsuperscript{38} Similarly, both strategies call for contributions in close races. It is true that for the legislative strategist such a contribution is risky, since there is no benefit in influencing the policy pursuits of the recipient of the contribution if he or she fails to get elected. This consideration is offset by the possibility of a higher payoff, since the gratitude of a candidate who had a real need for the contribution may be especially great. Furthermore, a close contest may indicate a serious challenge in future elections, in which case the incumbent will be under pressure to retain the favor of contributors.

Where the difference between the two strategies is most likely to reveal itself is in contributions to sure winners. A pure electoral strategist should never make contributions to such candidates, whereas a legislative strategist should do so frequently.\textsuperscript{39} In addition, an electoral strategist will always contribute to candidates whose existing policy views are compatible with the group's, or at least substantially more compatible than the views of the candidates' opponents. The relation between the candidate's policy views and the dictates of a legislative strategy are equivocal. Since the legislative strategist is interested in the change that the group's contribution may induce in the candidate's policy views, rather than in the absolute location of those views, there is no reason to expect the legislative strategist to limit contributions to those whose initial views are particularly compatible with those of the group.

According to most scholars who have considered the question, economic interest contributors tend to follow a legislative strategy.\textsuperscript{40} They reach this conclusion on either theoretical or empirical grounds. The theoretical basis stems from the collective choice consideration that the benefits of an electoral strategy would be shared with all other groups favored by the candidate's overall policy views whereas a legislative strategy can be more particularized to the nar-

\textsuperscript{37} See K. Schlozman & J. Tierney, supra note 32, at 207 (arguing that the strategy of electing "ideologically congenial candidates" avoids wasting scarce resources on sure winners or sure losers).

\textsuperscript{38} See id.

\textsuperscript{39} See id. (noting that "since the goal is to ensure that officeholders feel compelled to be responsive, organizations active in electoral politics frequently aid certain winners, even candidates running without opposition."); Welch, supra note 34, at 213 (arguing that the legislative strategist "will make its largest gifts to likely winners.").

\textsuperscript{40} See sources cited infra note 42.
rower goals of the contributor. The empirical basis is an analysis of contributor patterns.

Sorauf based his contrary conclusion on a study by John R. Wright that dealt only with PACs controlled by trade associations. Wright's analysis is unpersuasive, even when limited to the type of PAC he was studying.

The fact that labor union PACs have supported Democrats almost exclusively has been taken as an indication that they are fol-


43. See F. Sorauf, supra note 27, at 313 n.27 (citing Wright, PACs, Contributions, and Roll Calls: An Organizational Perspective, 79 Am. Pol. Sci. Rev. 400 (1985)).

44. Wright reported that Washington officials of the PACs approved without modification 80 to 90% of the recommendations from locally active PAC members regarding candidates to whom PAC funds should be donated. See Wright, supra note 43, at 404. Aside from the fact that Wright seems to have relied solely on the PAC officials' word for these figures, he does not say in what percentage of cases such local recommendations were received, nor whether the local members may have consulted with the Washington staffs prior to making recommendations. See generally id. However, in the belief that he has demonstrated that trade association PAC contributions are controlled locally rather than coordinated centrally by the lobbying staffs, Wright goes on to conclude that in consequence the contributions will be guided by an electoral strategy rather than by a legislative strategy. See id. at 405-06. He supports this conclusion by asserting that local PAC members "are much more likely to be familiar with electoral politics of geographic constituencies than with the mechanics of influencing legislation in the Congress." Id. at 406. This statement is not at all self-evident, especially since local PAC members have ready access to the Washington staff who presumably are willing and able to give them advice on the Congressional situation, and Wright makes no effort to support his statement empirically. He says that the supposed local domination of contribution decisions will force legislators to curry favor with the local PAC activists rather than with the Washington staff, see id. at 406, but his conclusion that this will undermine a legislative strategy is mysterious, since the local PACs presumably share the legislative goals of the Washington staff, and nowadays "grass-roots lobbying" is widely regarded as an especially potent form of lobbying.

Wright tests his theory by considering whether his five PACs were more likely to contribute to a rank-and-file, ideologically compatible incumbent from a competitive district (electoral strategy), or to an influential, ideologically hostile candidate from a secure district (legislative strategy). See id. at 406-08. Three of his PACs tended to give more to the former type of candidate, while two of them favored the latter. Id. Wright regarded this as confirmation of his theory, but his results are unimpressive, especially in light of the demonstration in the text above that a legislative strategy would lead to contributions to both candidates, whereas any contribution at all to the second type is inconsistent with a pure electoral strategy.

45. See K. Schlozman & J. Tierney, supra note 32, at 233 (noting that labor PACs gave an average of $20,200 to Democrats in 1980, but a mere $1,000 to Republicans); F. Sorauf, supra note 27, at 100 (noting that 94.7% of labor PACs' contributions went to Democratic candidates in 1984 and 92.5% in 1986).
lowing an electoral strategy, at least partially. There is empirical support for the proposition that some business-oriented PACs also are at least partially driven by an electoral strategy. However, there are several practices commonly engaged in by interest group contributors that are either inconsistent or in tension with the idea that they are engaged in a pure electoral strategy.

First, although business leaders are not entirely homogeneous in their political views, they are generally imagined to be heavily Republican. Yet, a very substantial percentage of business PAC contributions in House elections has gone to Democrats, who as the majority party are the most crucial targets of a legislative strategy. Reportedly, fifty-five percent of business PAC contributions in 1988 House elections went to Democrats. It is hard to explain these facts if the business PACs are following a pure electoral strategy. Brooks Jackson has given a more plausible explanation:

46. See K. Schlozman & J. Tierney, supra note 32, at 236-37 (concluding that both labor and corporate PACs also "seek out like-minded candidates who can be trusted to be supportive, even if left to their own devices.").

47. See Gopoian, What Makes PACs Tick? An Analysis of the Allocation Patterns of Economic Interest Groups, 28 Am. J. Pol. Sci. 259 (1984). The main thrust of Gopoian's study considers whether certain economic-group PACs pursued broad ideological goals or narrow, particular goals. His conclusion was that they pursued the latter primarily, but among oil industry PACs, there was a substantial element of the former. See id. at 279. Gopoian's research was based on the 1978 House of Representative elections, see id. at 259, and it would be interesting to see whether his results would stand following the later drive by Democrats in the House to increase their share of business-PAC donations in general, and of oil industry contributions in particular. These events are reported in E. Drew, Politics and Money (1983) and B. Jackson, Honest Graft: Big Money and the American Political Process (1988).

Gopoian also claims that his data show that the PACs he studied were not following a legislative strategy. See Gopoian, supra, at 266. This claim, if valid, would tend to support Sorauf's assertion in his textbook. The claim, however, is based on fallacious assumptions about legislative strategy. Gopoian assumes that a legislative strategist must pursue either "access," calling for disproportionate contributions to sure winners, or "power" over legislators, calling for contributions to candidates in electoral jeopardy. Id. at 264. To the contrary, the legislative strategist is likely to give to any candidate other than a likely loser. Since almost no incumbents fit into this category, it is consistent with a legislative strategy to find no particular correlation between the incumbent's electoral vulnerability and his or her likelihood of receiving a contribution. Such a lack of correlation is exactly what Gopoian found. See Gopoian, supra, at 266-67. Since a pure electoral strategy would call for contributions only to candidates in close elections, Gopoian's data actually undercut rather than support Sorauf's conclusion.

48. See K. Schlozman & J. Tierney, supra note 32, at 233 (examining the relationship between corporate PACs and Republicans).

49. See F Sorauf, supra note 27, at 100.

The reason that Democrats... received significant support from business and professional PACs was that the donors cared more about particular bills than about any broad philosophy of free-market economics. Vander Jagt [head of the Republican House fund-raising committee] thought businessmen had a moral commitment to fostering free enterprise and minimal government. Coelho [head of the Democratic House fund-raising committee] figured that corporate managers were interested in preserving their companies' short-term, after tax profits. When Republicans talked about being pro-business, they were speaking of freedom from government regulation. When Democrats said they were pro-business, they more often were touting federal subsidies or tax loopholes. Coelho appreciated, as Vander Jagt at first did not, that business PACs gave mostly to open the doors of the lawmakers who controlled the good things the federal government had going.61

Second, economic-group PACs commonly give to opposing candidates in the same election.62 Internal pressures in a PAC can cause this to occur, but often it is a sign of a legislative strategy at work, albeit a rather heavy-handed one.83

Third, the practice of contributing to a winner after the election is over is even more heavy-handed and unambiguous as an indicator of a legislative strategy. Larry Sabato reports that following the 1986 elections in which seven incumbent Republican senators were defeated by Democrats, "there were 150 instances in which a PAC gave to the GOP candidate before the election and then made a contribution to the victorious Democrat after the votes were counted.54

In summary, although it would be an overstatement to suggest that economic interests always or nearly always contribute to influence official conduct rather than to influence the outcome of elections, it is probably correct to say that they usually follow this strat-

51. B. JACKSON, supra note 47, at 87.
52. See K. SCHLOZMAN & J. TIERNEY, supra note 32, at 241 (noting that 58% of corporate PACs, 57% of trade association PACs, and 43% of labor PACs had engaged in cross-giving). Alexander Heard, writing in a more benighted age, found that the practice of giving to candidates of both parties had a bad reputation, although only a fraction of such contributions went to opposing candidates in the same election. A. HEARD, supra note 1, at 58-67.
53. See generally K. SCHLOZMAN & J. TIERNEY, supra note 32, at 241-42 (providing an excellent discussion of the cross-giving issue).
54. Sabato, supra note 31, at 155; see also Lowenstein, Political Bribery and the Intermediate Theory of Politics, 32 UCLA L. REV. 784, 827 n.157 (referring to a successful 1982 Democratic candidate for governor of Texas who received 90 post-election contributions in amounts ranging from $10,000 to $50,000 from contributors who had supported his Republican opponent before the election).
For the purposes of this Article it is necessary only to put forth a weaker claim, that whether or not it is their predominant strategy, economic-group contributors often are driven by a legislative strategy when they make their contributions. There can be no reasonable denial of that claim.66

B. Do Contributors Get Influence?

1. A review of the evidence.— A considerable amount of the money that goes to candidates from economic-group contributors is motivated by a desire to influence the performance of officeholders rather than to influence who is elected.67 A more controversial issue among academics has been whether the legislative strategy works. Are the legislators influenced by contributions? Several studies have appeared using various econometric methods to explore the relationship between contributions, almost invariably PAC contributions, and congressional roll call votes.68 Some of these studies have reported no statistically significant relationship between PAC contributions to House members and their votes on bills of interest to the PACs;69 some have reported unavoidably ambiguous results;70 some

55. Oddly, not even Sorauf disagrees with this, except when he is intent on belittling the idea that campaign contributions may have a significant effect on legislative behavior. Sorauf, referring to the legislative strategy, writes: “This is perhaps the dominant strategy for all of the PACs with parent organizations. It is reflected primarily in their overwhelming support for incumbents running for reelection. It is reflected as well in patterns of support for members of the leadership and members of specific committees.” F. SORAUF, supra note 27, at 103.

56. Writers skeptical of campaign finance reform usually concede at least this much. In Daniel D. Polsby's cogent formulation: “Evidence that politicians are regularly bought by malefactors of great wealth is hard to come by. But there is plainly an enormous amount of shopping going on.” Polsby, Buckley v. Valeo: The Special Nature of Political Speech, 1976 Sup. CT. REV. 1, 23.

57. See supra note 33-56 and accompanying text.

58. Compare Frendreis & Waterman, PAC Contributions and Legislative Behavior: Senate Voting on Trucking Deregulation, 66 SOC. SCI. Q. 401, 410 (1985) (finding that campaign contributions affect legislative votes on certain kinds of issues) and Welch, Campaign Contributions and Legislative Voting: Milk Money and Dairy Price Supports, 35 W. Pol. Q. 478, 493 (1982) (finding that “[c]ongressmen who received contributions from the dairy PACs in 1974 were more likely to vote for higher milk price supports in 1975 than congressmen who did not.”) and Willhite & Theilmann, Labor PAC Contributions and Labor Legislation: A Simultaneous Logit Approach, 53 PUB. CHOICE 267, 274 (1978) (concluding that “labor PACs are able to affect legislation.”) with Chappell, supra note 42, at 83 (reporting that it is not possible to conclude contributions have a significant impact on voting) and Grenzke, PACs and the Congressional Supermarket: The Currency is Complex, 33 AM. J. Pol. SCI. 1, 19 (1989) (concluding that PACs “do not maintain or change House members' voting patterns.”).

59. See, e.g., Grenzke, supra note 58, at 19-20 (concluding that “[l]imiting PAC contributions will not significantly change the power of these organizations because when they do

egy, with the possible and partial exception of labor unions.65
have reported statistically significant but modest effects; and some have reported effects both substantial and statistically significant.

These divergent results may be due to the fact that the researchers were looking at different events. Perhaps contributor influence was present in some and not in others. The divergent results may also result from differences in methodology. Although this Article will not comment on the more technical aspects of the controversies that have emerged, a number of more general observations are offered.

One point that has been made in many of the studies themselves is that the roll call vote is not necessarily the place where contributor influence is likely to be strongest. The reason most commonly given is that 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. Contributor influence might therefore be greater in committees and other less visible roles and settings, such as agenda-setting, scheduling, and informal negotiation over legislation. Rather like the

influence legislators, it is because they can mobilize votes in the district.

60. See, e.g., Chappell, supra note 42, at 83 (explaining that "it is probable that [the] rather poor overall explanatory power in the equations explaining contributions leads to imprecision of these estimates in the voting equation.").

61. See, e.g., Welch, supra note 58, at 479, 493 (stating that "our results indicate that the influence of contributions is 'small,' at least relative to the influences of constituency, party, and ideology."). Welch concluded that dairy contributions enhanced by 1.5% the probability that a House member would vote for increased milk price supports in 1975. Id. at 491. This would translate to about seven members, or a potential swing of fourteen votes.

62. See, e.g., Frendreis & Waterman, supra note 58, at 409-11 (arguing that the "impact of contributions is most felt by representatives with neither a strong positive nor a strong negative disposition toward the contributor."); Ginsberg & Green, supra note 42 at 80-84 (finding a correlation existed between contributions of an important, interested lobbying group, and the voting of senators considering the 1980 Motor Carrier Act); Willhite & Theilmann, supra note 58, at 272-75 (finding that "the tendency of a representative to support labor issues was directly related to the size of the campaign contributions from labor PACs.").

63. The methodologies used in studying contributor influence include from a focus on roll call voting on particular bills, see, e.g., Welch, supra note 58, at 478-79; on the influence of contributions on a collection of otherwise unrelated bills regarded as important by the contributors, see, e.g., Willhite & Theilmann, supra note 58, at 274; and on the effectiveness of contributions as a means of gaining access to the representatives themselves, see, e.g., Herndon, Access, Record and Competition as Influences or Interest Groups' Contributions to Congressional Campaigns, 44 J. Pol. 996, 1000 (1982).

64. See, e.g., Ginsberg & Green, supra note 42, at 78-79; Grenzke, supra note 58, at 3; Welch, supra note 58, at 493.

65. See, e.g., Welch, supra note 58, at 493.

66. See, e.g., K. Schlozman & J. Tierney, supra note 32, at 255; Malbin, supra note 7, at 248-49; Wright, supra note 43, at 400-01 n.3.
fabled inebriate who searched for a lost key at night at the opposite end of the block from where he dropped it because the light was better there, most of the econometric studies have ignored these activities, because they are harder to measure, while acknowledging they may be more important loci of contributor influence than floor votes.

One study has measured committee action, and found a strong relationship between co-sponsorship by committee members of the Bank Underwriting Bill, which would have permitted commercial banks to compete with securities firms, and a surprisingly crude indicator consisting of contributions received from banking interests less contributions received from securities interests. It has long been believed that more lobbying is directed to committees than to floor activities, and in the past decade, members of the House of Representatives have increasingly sought membership on committees, such as Energy and Commerce, that affect moneyed interests and therefore generate large amounts of PAC contributions for their members.

It is sometimes suggested that even if contributors obtain heightened influence over committee actions and other less visible activities, matters decided in these settings are of little importance:

[While contributions may influence who gets the contract to build a particular missile, whether anyone gets the contract and the broad outlines of how much is spent are the more critical decisions for the American public. The latter decisions are generally surrounded by publicity and are decided by roll call votes on the House floor.]

This suggestion overlooks the fact that many floor votes are not close, so that in effect, all the crucial decisions regarding much legislation are made in committee or in less formal settings. In many cases, the contributor's objective may be to prevent a bill from ever

67. See Schroedel, Campaign Contributions and Legislative Outcomes. 39 W. Pol. Q. 371 (1986). One strength of this study, relative to many of the others, is that Schroedel did not limit the contributions considered to PAC contributions. In addition to PACs, she included contributions from individuals who could be identified with either the banking or the securities industry. See id. at 377 (listing the sources of contributions in the Schroedel study).


69. See B. Jackson, supra note 47, at 90.

70. Grenzke, supra note 58, at 18 (emphasis in original).

71. Cf. Ginsberg & Green, supra note 42, at 78 (stressing that roll call voting is not the most important congressional activity).
being brought to the floor. Even with regard to bills that ultimately do face a sharply contested roll call vote, many matters of considerable significance will have been settled in committee. Schlozman and Tierney have noted cogently that "[a]ffecting the details of policies is not merely a trivial form of influence. The world of pressure politics is a world of compromises and half-loaves."

Aside from the likelihood that contributor influence is greater off the floor than on, there are other reasons for believing that statistical analyses of roll call votes may be an infertile field for measuring such influence. The roll call vote of a member may not be what it seems. It is not uncommon for a member to vote one way on the floor when his or her committee or other actions have leaned in the opposite direction.

The assumption of the statistical studies of floor votes, and especially of some of the interpretations of these studies, has been that if contributions are an effective lobbying device, a large number of the votes of recipients of contributions should be influenced on each matter of interest to the contributors, and non-recipients of such contributions should be uninfluenced. This reflects an unrealistic conception of lobbying, which often is not directed at large numbers of the members:

It may well be true that the average congressman neither is approached by, nor pays much attention to, interest group representatives. But the average congressman is unimportant in a strategic

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72. Grenzke, supra note 58, at 18 (noting the role of campaign contributions in blocking legislation at the committee level).
73. See id. (criticizing PAC studies because “[t]o the extent that PAC contributions help interest groups bury issues in committee, the findings underestimate the impact of money.” (citation omitted)).
75. See, e.g., Jackson & Birnbaum, Rep. Matsui is Finding It Hard to Roll Back Break He Gave Utilities, Wall St. J., July 13, 1989, at A1, col. 1. The Wall Street Journal reported that Representative Cardiss Collins, who co-sponsored a bill in 1987 to deprive utilities of a tax benefit, received $17,500 in contributions from utility PACs for her 1988 reelection, and declined to co-sponsor similar legislation in 1989. Id. at A4, col 6. Nevertheless, according to a staff member, she would probably vote for the bill if it reached the floor. See id.
Lest I be accused of "suffer[ing] fatally from too simple a model of legislative decision-making," F. Sorauf, supra note 27, at 311, I hasten to add that these facts do not prove that Representative Collins was influenced by the contributions she received. They do illustrate, however, that a floor vote is a very incomplete indicator of a legislator’s total performance on a matter.
76. See, e.g., Grenzke, supra note 58, at 4 (noting that the article’s “research conceptualizes the relationship between member's voting behavior on issues and PAC contributions as reciprocal and simultaneous.”)
sense. The crucial one is undecided, on the committee, or otherwise in a pivotal position. Such congressmen do receive a good deal of attention.\textsuperscript{77}

One reason that interest groups can and do target their lobbying efforts on a few key members is that one of the greatest sources of influence on members' floor votes is the lead of, or advice from other members, especially other members who sit on the committee that heard the bill.\textsuperscript{78} If a key member on a particular issue is influenced by campaign contributions, and if that member influences the votes of several others, many of whom may not have received contributions, considerable static will be created for the econometrician who attempts to discern the influence of contributions on the roll call. Nevertheless, the influence may be great. If logrolling exists, the amount of static for the econometrician will increase accordingly.

Another questionable assumption, basic to several of the econometric studies, is that the contribution must precede the floor vote to provide influence.\textsuperscript{79} To the contrary, a legislator might just as plausibly vote in order to increase the chance of receiving future contributions.\textsuperscript{80} Furthermore, as Jacobson has pointed out, the legislator might be influenced even if he or she never receives a contribution, if casting an occasional vote in favor of a generally hostile group might be a means of avoiding that group's strong support for a challenger in the next election.\textsuperscript{81}

2. \textit{A call for a game-theoretic approach.---} Another way of thinking about the validity of studies of floor votes as an indicator of influence generated by campaign contributions is to hypothesize a legislative process in which contributors do seek influence, and legislators are willing to be influenced to enhance their prospects of getting increased contributions in the future. As is usual in this sort of exercise, contributors and legislators are assumed to act rationally in

\begin{itemize}
\item \textsuperscript{77} J. Kingdon, \textit{supra} note 68, at 164.
\item \textsuperscript{78} Id. at 72-109.
\item \textsuperscript{79} But see Grenzke, \textit{supra} note 58, at 4 (purporting to analyze "whether PAC contributions influence legislator's voting and/or legislator's voting influences PAC contributions."); Welch, \textit{supra} note 58, at 479 (noting that "contributions may be given to reward congressmen for past favors or to ingratiate congressmen who vote their way on future legislation.").
\item \textsuperscript{80} The truth of this statement is implicit in one PAC manager's comment: "'There is no question that if we went to them time after time and never showed any support for them when they came to us at election time, we'd wear out our welcome pretty fast.'" B. Jackson, \textit{supra} note 47, at 89.
\item \textsuperscript{81} See Jacobson, \textit{Parties and PACs}, \textit{supra} note 30, at 151-52.
\end{itemize}
pursuit of their objectives,\textsuperscript{82} and information is assumed to be costly.\textsuperscript{83}

In this hypothetical process, contributors are more concerned with the change they can induce in legislators' performance than with the absolute level of that performance. We can think of any given legislator's performance with respect to a particular contributing group as located on a scale running from zero to one hundred, with a higher score representing performance more beneficial to the group than a lower score. Zero and one hundred are limits that can be approached but not reached, since it would always be possible for a legislator to devote even more energy and ingenuity to assisting or opposing a group's interests. One way of moving up or down the scale is to vote on the floor on one or more bills of interest to the group. Whether these will be large or small moves will depend on the importance of the floor vote to the group, the closeness of the vote and many other factors.

If the political system did not allow for contributions, each legislator's position on the scale would be determined by considerations such as constituency, ideology and party. The positions determined in this manner will be referred to as the legislators' "natural" positions. The natural position for each legislator, of course, is different. However, since our hypothetical process includes contributions, legislators may depart from their natural positions. Not to put too fine a point on things, a departure from a natural position will be called "cash-motivated."

Movement anywhere along the scale may be as beneficial (or harmful) to the contributing group as movement anywhere else. Suppose Andy, an influential member of the Ways and Means committee who has long been hostile to an industry, is cash-motivated not to offer an obscure amendment to a tax bill that would cost that industry hundreds of millions of dollars.\textsuperscript{84} Andy may vote consistently against the industry in committee and on the floor, but this single act of restraint may be of great value to the industry, perhaps enough to raise Andy on the scale from a five to a thirty. Barbara, who some-

\textsuperscript{82} See generally P. Ordeshook, \textit{Game Theory and Political Theory} (1986).

\textsuperscript{83} See J. Kingdon, \textit{supra} note 68, at 227-41 (analyzing the importance of information in congressmen's decision making).

\textsuperscript{84} Cf. Fritz & Houston, \textit{Amid Scandal and the New Accent on Ethics, Senators Tread Carefully}, L.A. Times, Feb. 11, 1990, at A26, col. 4 (reporting that one Senator is being investigated for dropping "junk bond legislation opposed by Drexel Burnham Lambert Inc. after receiving $70,000 in political contributions from the firm's executives and clients.").
times supports the industry and sometimes opposes it, may be cash-motivated to vote on the floor for a bill the industry is sponsoring and that passes by a safe margin. Barbara may move only from 50 to 52 on the scale. If the industry could make a single contribution and knew that its contribution would influence one of these actions, surely it would contribute to Andy.

Certainly, the notion of a scale is artificial, and an interest group might find it difficult to weigh the precise benefits of disparate legislative actions. However, what makes the contributor’s strategy difficult is not this problem, but the fact the contributor’s goal is not to assess each legislator’s present spot on the scale. The goal is to move the legislators up the scale (or prevent them from moving down). Furthermore, contributors operate in an environment of imperfect information. They cannot know whether Andy ever seriously intended to introduce the hostile amendment. Equally significant, they must bear in mind the incentives created by the patterns of their contributions, and recognize that the information of other legislators besides Andy will be limited. If Andy receives a large contribution while Barbara does not, other legislators ignorant of the circumstances may think it is futile to support the group.85

Legislators who wish to maximize their contributions from the group also face a tricky situation. With the understanding that what is important to the group is their cash-motivated movement on the scale rather than their absolute position, their goals will be to make sure contributors are aware of any cash-motivated legislative benefits they provide to the group, and to mislead the contributors into believing they are providing cash-motivated benefits when they are not, either because they are not really providing the benefits, or because they are but it is natural for them to do so. The incentive they have to engage in deception and the contributors’ recognition of that incentive greatly increase the difficulty of succeeding in making any

85. A third legislator, Carl, may have a rating of 98, because he cooperates with the industry energetically at virtually every opportunity. Since it would take prohibitive efforts for him to do even more, the industry can expect little or no direct benefit from contributing to him. Furthermore, the nature of Carl's district may be such that he cannot turn against the industry. Welch argued that although interest groups contribute under such circumstances, they act irrationally in doing so. Welch, supra note 58, at 493. Perhaps interest-group contributors know their business better than Welch. The industry must contribute generously to Carl, both to create appropriate incentives for other legislators and to prevent Carl from backsliding, either as a means of extorting contributions or to pursue opportunities to earn contributions from others. Given the costs of information, it is unlikely he will suffer in his district if he slips from 98 to, say, 90.
genuine, cash-motivated movement on the scale known. Such diffi-
culties are probably a major reason that lobbyists frequently com-
plain that they are the victims of extortion in the campaign finance
system.

What can be expected to result from this array of incentives and
uncertainties? Technical methods exist for analysis of the prob-
lem; unfortunately game theorists have not developed models to pre-
dict strategies for making and responding to campaign contributions.
PENDING their assistance, an untutored guess is that contributors
would tend to make contributions to incumbents across the spec-
trum, since they have an equal interest in moving all incumbents up
the scale or keeping them from dropping. There would, however,
tend to be an upward tilt. Contributions would get larger as the in-
cumbents' past performance placed them higher on the scale. Legisl-
ators would always have an incentive to move higher, thereby serv-
ing the contributor's purposes. This method does not discriminate
between natural and cash-motivated benefits provided by legislators,
but the cost of information may make it impossible to incorporate
such discrimination into a general strategy.

If this is the rational contributor strategy, then the rational leg-
slator willing to be influenced would move up the contributor’s scale
to the point at which the increased expected contribution equalled
the cost, in whatever units of value are salient to the legisla-
tor—electoral risk by offending constituents, loss of in-house influ-
ence from deserting a party position, loss of expected contributions
by virtue of moving down on the scale of contributors with conflict-
ing interests, or conscience.

Contributors might diverge from the basic pattern for various
reasons. For example, they might give more to legislators who hold
leadership positions or who sit on key committees, since moving them
up the scale by a fixed amount would be worth more than moving
the average legislator the same amount. More idiosyncratic reasons

86. Andy may have devised the tax amendment with the intention of dropping it, purely
as a means of moving up on the industry's scale and attracting contributions, or so the industry
may suspect. Barbara, after mulling the situation over, may be tempted to move down to 30
for a while, or to make the industry think she may do so.

87. See B. Jackson, supra note 47, at 78-79.

88. Rather than increasing the amounts to candidates higher on the scale, contributors
could increase the probability of their receiving a contribution, or these two methods could be
combined.

89. Because this would be the case, contributor demand for influence over the influential
members would be high, and would be reflected in the price of moving the influential mem-

http://scholarlycommons.law.hofstra.edu/hlr/vol18/iss2/2
also could come into play, such as special ties with the legislator, or a plant in the legislator's home district.

Finally, the contributor would give more when there existed a specific reason to believe the legislator had extended cash-motivated benefits. As we have seen, legislators would do what they could to make such actions known to the contributor.\textsuperscript{80} A special case of a reward given for benefits rendered would be the explicit deal—an agreement to perform a specified legislative service (or refrain from a harmful action) for a specified contribution. Abscam\textsuperscript{81} and other scandals tell us that such deals occur.\textsuperscript{82} Social scientists, if they refer to such deals at all, are reassuring. "All knowledgeable Capitol Hill observers agree that there are few truly corrupt congressmen," they tell us.\textsuperscript{83} They are probably correct—they rely on "knowledgeable observers," after all—but this is another instance of a non-axiomatic proposition being accepted without the rigorous proof that is demanded of campaign finance reformers.

Whether or not the foregoing speculations—on the behavior of rational participants in a legislative process where information is imperfect and influence is both sought after and available—are accurate, there is no reason to believe that in such a system roll call votes would bear particularly great significance. Wherever a legislator is located on a contributor's scale, the contributor's goal is to move the legislator somewhat higher and to avoid the legislator moving somewhat lower.\textsuperscript{84} Thus, the area surrounding the legislator's natural lo-

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\textsuperscript{80} See generally Grenzke, Candidate Attributes and PAC Contributions, 42 W. Pol. Q. 245 (1989) (presenting evidence that when other factors are controlled, interest groups contribute more to legislators in positions of power over legislation of importance to the groups).

\textsuperscript{81} See B. Jackson, supra note 47, at 98-100 (discussing cases where politicians seemingly "advertised" for PAC contributions); supra note 86 and accompanying text.

\textsuperscript{82} See J. Noonan, Jr., supra note 4, at 604-19 (discussing the ABSCAM scandal in detail).

\textsuperscript{83} For example, Brooks Jackson reported that on the second day after young Tony Coelho became administrative assistant to Representative B.F. Sisk, a lobbyist asked Coelho for Sisk's support in getting a bill to the floor, and handed Coelho an envelope containing $500. After consulting with the congressman and receiving equivocal instructions, Coelho returned the money, whereupon the lobbyist became indignant. See B. Jackson, supra note 47, at 29-31. This was but a single incident, but the lobbyist's conduct was inexplicable if the incident was an isolated one.

\textsuperscript{84} Sabato, supra note 7, at 162. The reader is invited to contemplate the role of the adverb "truly" in Sabato's sentence.
cation can be regarded as the contributor's potential range of influence for that legislator. Since a roll call vote will fall within a contributor's range of influence for only a fraction of the members of the legislature, measuring influence over roll calls will undervalue the total influence the contributor is exerting.95

This provides another reason for skepticism regarding the econometric studies. When one takes into account all the defects and difficulties inherent in these studies, it becomes increasingly difficult to regard their mixed results as a clean bill of health for the campaign finance system.

C. What Is Meant By Influence?

Ironically, the inability of the econometric studies to answer whether campaign contributions have measurable effects on legislators' actions may result, in part, from the single-mindedness with which they have asked the question. Apparently believing that the extent of such measurable effects is of overriding importance, econometric analysts have attempted to tease out answers from data and mathematical tools ill-suited for the task. These analysts might make greater progress if they conducted a more open-ended inquiry into the dynamics of how campaign contributions enter into the legislative process and how they interact with other influences, rules and institutional factors to guide the conduct of individual legislators and the legislature as a whole.96 They would be well-advised to do

95. It may appear that this is merely a restatement of the earlier point that legislators may be more susceptible to influence when they engage in activities less visible than roll call votes. See supra notes 70-74 and accompanying text. Actually, the two points are distinct. The earlier discussion suggested that legislators may be more resistant to influence in visible activities than in less visible ones, so that measurement of influence on a visible activity may yield a deceptively low result. Id. The present point suggests that even if legislators are equally susceptible to influence in all their activities, roll call votes will not come within the range of influence of many or most legislators for a given contributor or group of contributors. Of course, the two points are not mutually exclusive. To the extent the first point is true, the second is reinforced, as the probability that a roll call vote falls within the range of influence is lowered by reason of the higher cost to the legislator resulting from greater visibility.

96. In doing so, econometric analysts might draw inspiration from Gary Jacobson's work over the past decade on the workings of money in congressional elections. Jacobson began with the narrow but significant insight that to assess the effects of campaign spending, it might be more useful to consider the absolute spending levels of challengers and incumbents than to consider their relative spending levels. See, e.g., Jacobson, The Effects of Campaign Spending in Congressional Elections, 72 Am. Pol. Sci. Rev. 469 (1978). Over the years, Jacobson has constructed a rich, complex, and subtle explanation of how numerous factors interact to form the dynamics of congressional elections. He could not have done this if he had assumed his only task was to isolate and quantify the incremental effects of spending on election outcomes.
so, not only to produce better social science, but because the degree of measurable aggregate influence of campaign contributions over legislative activity does not have the crucial normative significance that they have assumed.

It is commonly observed that any influence over legislative behavior generated by campaign contributions is intertwined with other influences. Michael Malbin, for example, points out that it is “difficult to separate the importance of PAC contributions from the lobbying efforts they are supposedly meant to enhance.” 87 Some writers conclude that because it is impossible to be confident that legislative actions favorable to contributors have been caused by contributions, concern over contributions may be minimized. 88 Their premise of intertwining is correct and important, but the conclusion they draw from it is wrong by 180 degrees.

The conclusion is wrong because the question of campaign finance is a question of conflict of interest. A conflict of interest exists when the consequences of a decision made in the course of a relationship of trust are likely to have an effect, not implicit in the trust relationship, on either the interests of a person with whom the decision-maker has a separate relationship of trust 89 or on the decision-maker’s self-interest. 100 It is the latter situation we are concerned with here.

Often, and in various contexts, we take institutional steps to

97. Malbin, supra note 7, at 249; see also F. Sorauf, supra note 27, at 310 (stating that “[i]t is . . . very hard to separate the effects of lobbying and of constituency pressures from the effects of a campaign contribution.”). John Kingdon quoted a House member who stated: “A close friend of mine, who’s been associated with me for years and is an important campaign contributor, is in the oil business. I had no idea how this bill would affect the oil people until I heard from him.” J. Kingdon, supra note 68, at 34. Would the friendship have been sufficient to make this legislator pay such heed without the contributions? If so, why did the member mention the fact that the friend is a contributor? Would the friendship be as close without the contributions? Could the legislator answer these questions with certainty?

98. The quotations from Malbin and Sorauf cited in the previous footnote occur in a context in which they point to this conclusion. See supra note 97.

99. This is the situation Jesus referred to in his famous statement that a servant cannot serve two masters. Luke 16:13 An example would be a legislator voting on a bill affecting a charity of which he or she is a board member.

100. It is possible to use the term “conflict of interest” in a context which carries no ethical significance. For example, one could consider whether a quarrel between two nations reflected a genuine conflict of interest. By incorporating the concept of a relationship of trust into my definition, I limit the use of the term to ethically significant situations. See generally A. Scott & W. Fratcher, Scott on Trusts 170 (1987) (stating that the holder of a trust may not place himself in a position where a violation of a duty owed to his beneficiaries would inure to his benefit).
minimize the occurrence of conflicts of interest, or we disqualify a person from acting when a conflict of interest arises.\textsuperscript{101} Why do we do so? Part of the reason, and not necessarily the most important part, is our concern that the individual may deliberately set aside his or her obligations of trust in favor of self-interest. Even if we were sure we could identify all such cases of overt dishonesty, we would continue to regulate conflicts of interest because of the probability that even an honest person's judgment will be impaired when in a position of conflict. Centuries before terms such as “selective perception” were current, it was understood that an individual whose own self-interest is at stake finds it difficult to view a situation dispassionately and objectively.\textsuperscript{102} That is why we refer to a person without conflict as “disinterested.”

Some people in a conflict situation may be able to act in the position of trust without being the slightest bit moved by the potential effects on self-interest. Others may find that considerations of self-interest are present in their minds but may be able, nonetheless, to struggle through to a conclusion based only on proper considerations. Still other people may be biased in their judgments in situations not conventionally regarded as conflicts of interest.\textsuperscript{103} The reason these situations can, and commonly do exist, is that conflict of interest is a concept based on the average person. Sometimes individuals are unusually resistant to being moved by self-interest, sometimes they are unusually susceptible, and sometimes their goals and preferences are sufficiently idiosyncratic that what constitutes self-interest is unusual. Therefore, conflict of interest regulation sometimes disqualifies an individual who is \textit{not} biased, while at other times it fails to disqualify an individual who \textit{is} biased. This does not mean that the regulation is faulty. It happens because there is no alternative to regulating on the basis of what we believe are typical human reactions.

What is the significance of the fact that the campaign finance question is a question of conflict of interest? First consider this statement from one of the econometric studies: “It is useful to imagine

\begin{quote}
\textsuperscript{101} See, e.g., Payne, Devices and Duties: Corruption and Ethical Seriousness, in Public Duties 175 (J. Fleishman, L. Liebman & M. Moore eds. 1981) (stating that “illegal or irregular acts by public officials, motivated by their own self-interest, are at odds with prevailing conceptions of public interest.”).
\textsuperscript{102} See generally J. Noonan, Jr., supra note 4 (chronologically discussing in detail the 4,000 year history of corruption).

\end{quote}
that the exogenous variables [such as party, ideology and constituency] determine an "initial position" on the issue for a candidate, and that contributions cause shifts away from that position."\textsuperscript{104} As a heuristic device, this is often a useful procedure.\textsuperscript{105} As a description of reality it is woefully inadequate because of the intertwining of campaign contributions with other influencing factors.\textsuperscript{106} From the beginning of an issue's life, legislators know of past contributions and the possibility of future ones from the interest groups that are affected, just as the legislators know of relevant constituency effects, party positions, various aspects of the merits of the issue and so on.\textsuperscript{107} All of these combine in a manner no one fully understands to form an initial predisposition in the legislator.\textsuperscript{108} Thereafter, the legislator may receive new information on any or all of these factors. The new information may modify the legislator's initial position, but the information that is received and the manner in which it is processed will themselves be influenced by the initial position.

In reality, then, the influence of campaign contributions is present from the start, and it interacts in the human mind with other influences in an unfathomable but complex dynamic. It affects the "chemistry" or the "mix" of the legislator's deliberations. It may or may not affect the legislator's ultimate actions, but setting aside the most flagrant cases, no one can be sure, perhaps not even the legislator in question. For this reason, to say that campaign contributions "taint" the legislative process is to use the language with precision. It is not that the entire legislative process or even a great deal of it is corrupt; rather, it is that the corrupt element is intermingled with the entire process, in a way that cannot be isolated.

The conflicts of interest caused by campaign contributions are illustrated routinely in nearly every daily newspaper. For instance, the following example appeared in the Los Angeles Times while these paragraphs were being written. It is from an article about six
Democrats, mostly from the south, on the House Ways and Means Committee. At the time of the article, it was believed that these six members of Congress might swing the committee to report out a reduction in the tax on capital gains, supported by President Bush and the Republicans but opposed by a majority of the Democrats:

Whatever the outcome, Bush has laid bare a deep split between Democrats' traditional ideology of opposing special treatment for the wealthy and the party's growing dependence on contributions from a host of business special interest groups, particularly real estate developers, that would benefit from the tax cut.

"We've got wealthy Democrats in this country too," said a longtime supporter of a capital gains cut, Beryl Anthony Jr. (D-Ark.), who is a key party fund-raiser as head of the Democratic Congressional Campaign Committee.

A common way of describing this type of situation is to say that there is an "appearance of impropriety." While not exactly wrong, discussion of the campaign finance question in terms of appearances is misleading. It suggests that there is an underlying reality that is either proper or not proper, and if we could only look behind the locked door or, perhaps, into the legislator's head, we would know. Used as a rationale for reform measures, the argument is that the appearance of impropriety is a sufficient justification for reform, because it undermines popular confidence in government. Depending on who is speaking and who is listening, there may be an implied wink to the effect that impropriety is really very unlikely but that some sop must be thrown to the ignorantly suspicious public. Alternatively, the implied wink may suggest that of course there is impropriety, but it would be impolitic to say so directly.

Rather than saying there is an appearance of impropriety in the Democrats' dependence on contributions from interests demanding a capital gains reduction or in similar situations, it is more precise to say that there is a reality of conflict of interest. There was no meeting, behind closed doors or otherwise, not even a moment in a single legislator's mind, in which a decision was made either to succumb to the contributors or not to succumb. The pressure from the contributors is simply part of the mix of considerations out of which a posi-

110. Id.
111. See Jacobson, Parties and PACs, supra note 30, at 152.
tion evolves. At best, one can exercise a judgment as to whether the outcome would have been different if there had been no contributions and no possibility of contributions. Even if the hypothetical outcome would have been the same, however, it does not change the fact that the real outcome results from an actual, tainted process. That is why the question of how much contributions affect legislative outcomes, while surely important, is not normatively crucial.

It may be objected that the conflict of interest argument applies equally to many of the major influences on the legislative process other than campaign contributions. Legislators who are highly responsive to their constituents, for example, most likely act in that manner because they believe it will help them get reelected—a self-interested reason. Legislators who adhere to the party position or the wishes of influential colleagues may do so because they hope for reciprocity in the future, or for advancement within the legislative chamber. They also act out of self-interest.

The fallacy in this objection is its assumption that all considerations of self-interest are equal. No one ever claimed that systems

112. My own judgment is that campaign contributions probably had little effect in the case of the Democrats and the capital gains cut, despite Representative Anthony's position as head of the DCCC and the statement attributed to him in the Los Angeles Times. See supra text accompanying note 113. For one thing, the Democratic leadership has staunchly opposed the capital gains tax cut. Redburn, supra note 109, at 12, col. 2. For another, there are other pressures besides fund-raising needs that push some Democrats to vote with the Republicans. Some apparently are moved by the fact that the tax cut is expected to bring additional revenues in the short term, and thus alleviate the immediate budget deficit problem (at the expense of the long term). Id. at cols. 2-3. This response to fiscal problems may be shameful, but it is not corrupt. In addition, timber and farming interests that are important to southern Democratic districts stand to benefit. Id. at col. 3.

113. This fallacy runs rampant in Michael Malbin's writing. See Malbin, supra note 7, at 254-55, 268-69. For example, Malbin describes as his "main point" in one portion of his essay that "[n]either public financing nor strict expenditure limits nor even the complete exclusion of private contributions from the general election can eliminate interest groups from the electoral process." Id. at 255. This statement follows several examples, such as the endorsement of President Carter in the 1980 New Hampshire primary by leading chiropractors at the time that the Carter administration changed certain portions of his national health insurance proposal to benefit chiropractors Id. at 254-55. It may be mentioned in passing that Malbin's assumption that the two events were causally connected is based on anecdotal evidence of the sort he scorns when relied on by reformers as evidence of the effects of campaign contributions. See id. at 247-49.

Malbin mistakenly assumes that the goal of campaign finance reform is to eliminate interest groups from elections, as if that were even imaginable. The central goal of campaign finance reform is to eliminate corrupt practices. President Carter's deferral to the chiropractors may not have been an example of the highest statesmanship, but it was well within the range of acceptable politics. It is hard to see how a democracy could function if politicians had no incentive to seek the electoral support of constituent groups.

Despite this and other criticisms of Malbin in this Article, his essay is still one of the
are corrupt simply because they contain incentives. If this were the case, there would be a conflict of interest any time an employer paid an employee a salary, since the employee who did a good job in hopes of keeping the job or being promoted would be acting corruptly. Such incentives are not conflicts of interest because they are implicit in the relationship of trust, in this case between the employer and employee.

A variety of pressures characterize political life in America. Sorting out which pressures are proper and which are not is difficult.114 There are, however, some easy cases. Constituency influence is an example. One side of the Burkean debate maintains that while legislators should regard constituent opinions as relevant data for public policy, they should be guided only by their own best judgments.115 There is no consensus in favor of that position. Accordingly, some degree of responsiveness to constituents’ views is at least permissible in legislative positions of trust in this country.

The paradigm case of improper influence is the payment of money to the official for the official’s benefit.116 That is what a campaign contribution is. Indeed, the distinction between a campaign contribution and a payment for the recipient’s personal use can be blurred or nonexistent. Nevertheless, there are some differences. Campaign contributions, under current conditions, are more likely to be indispensable to an elected official than personal payments. This makes campaign contributions the more dangerous, though not the more unethical practice. A second difference is that the contributor may be motivated not to influence the recipient but to promote a cause that the recipient represents. In other words, contributors may follow an electoral rather than a legislative strategy. My discussion in this Part is not concerned with contributions to the extent they are so motivated, and I have shown that the set of contributions that are not so motivated is far from being an empty set.117 Nevertheless, the fact that many contributions are ideological may affect the way people think about all contributions.

Despite differences, it is clear that our culture regards it as in-

more penetrating writings one can find in the campaign finance literature.
114. See generally Lowenstein, supra note 54 (exploring difficulties associated with the efforts of bribery laws to define certain improper pressures on politicians).
116. To say this is the paradigm case is not necessarily to say it is the worst. For example, threatening officials with violence might be regarded as a worse way of exercising influence than offering them bribes. Incumbents might be especially attracted to this view.
117. See, e.g., supra notes 33-56 and accompanying text.
appropriate for public officials to be influenced by campaign contributions. We need not look to Common Cause,\textsuperscript{118} Elizabeth Drew, and Brooks Jackson to establish this point. Stronger evidence comes from the scholars with whom I have joined issue in this part. Frank Sorauf,\textsuperscript{119} Michael Malbin,\textsuperscript{120} and others with similar views would not be at such great pains to characterize the influence of campaign contributions as minimal if they did not believe that it would be wrong if the contributions were influential, or at least that the overwhelming majority of their fellow citizens believe that it would be wrong.

Further confirmation can be found in the fact that a campaign contribution made with the intent to influence official conduct constitutes bribery, as that crime is defined in most American jurisdictions.\textsuperscript{121} It is true that the typical special interest bribe in the form of a campaign contribution is very rarely prosecuted.\textsuperscript{122} I doubt that this reflects approval of the practice as much as recognition of its pervasiveness, which in turn results from the fact that the receipt of special interest contributions is more or less a practical necessity for most legislators. This necessity may constitute an excellent reason for not prosecuting such routine transactions as bribes, but it does not justify preservation of the system that creates the necessity.

It is a fact of our political culture that although a great variety of the pressures brought to bear on politicians embody forces that are regarded as more or less democratic and therefore legitimate, this is not true of pressure imposed by payments of money to politicians, either for their personal benefit or for campaign use. At best, the existence of such pressures is tolerated as a necessary evil. The evil is necessary within the existing campaign finance system, but the existence of the evil provides a compelling reason for reforming that system.

D. Anecdotal Evidence and Simple Correlations

In anti-reform writing, and in much of the social science litera-

\textsuperscript{118} Common Cause is a “self-styled people’s lobby [which] has mounted a campaign against PACs . . . .” F. SORAUF, supra note 27, at 8. For an explanation of this Author’s connection to Common Cause, see supra note 9.

\textsuperscript{119} See F. SORAUF, supra note 27, at 326.

\textsuperscript{120} See Malbin, supra note 7, at 267-68.

\textsuperscript{121} See Lowenstein, supra note 54, at 808-09, 826-28.

\textsuperscript{122} See id. at 789 (noting that “many . . . of the transactions identified . . . as definite or likely bribes are engaged in by public officials and those who deal with them on virtually a daily basis, with only the remotest chance of triggering a bribery prosecution.”).
ture on campaign finance regardless of orientation, it is nearly *de rigueur* to refer in a belittling way to "anecdotal" evidence of the effects of special interest campaign contributions of the sort provided by Elizabeth Drew,\(^{123}\) Brooks Jackson,\(^{124}\) and other journalists, and to the simple correlations published from time to time by Common Cause and other groups, matching campaign contributions received with votes rendered on matters of interest to the contributors.\(^{126}\) I have already shown that the social science research that is offered as an alternative is only slightly informative\(^{126}\) (a point that is more or less conceded by many of the critics and social scientists, who have admitted the fragmentary and contradictory quality of the results to date) and not as central as has been imagined to the normative question.\(^{127}\) I shall conclude this Section by explaining briefly why I believe that the anecdotal evidence and simple correlations are persuasive and pertinent, and that therefore the investigative journalists and public interest groups perform a valuable service in bringing information about campaign finance before the public in the manner that they do.\(^{128}\)

The point about anecdotal evidence, of course, is that it is only anecdotal. Knowing about a specific incident does not tell us how representative that incident is. What is impressive about the anecdotal evidence, however, is how much of it there is. As Larry Sabato has said: "The horror stories about campaign finance seem to flow like a swollen river, week after week, year in and year out."\(^{129}\) But how horrible are the stories? What do they prove? Let us consider a typical example.

In the *Wall Street Journal*, Brooks Jackson and Jeffrey H. Birnbaum recently reported on efforts of Representative Bob Matsui to reverse a tax provision that he himself had sponsored in 1986.\(^{130}\) Utility customers pay fees reflecting anticipated future taxes of the utility companies. The corporate tax rate reduction in 1986 caused

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125. See F. Sorauf, *supra* note 27, at 308. As usual, Jacobson is more judicious. He writes that such evidence should not be dismissed "out of hand," though it is "hardly conclusive." Jacobson, *Parties and PACs*, *supra* note 30, at 151.
126. See *supra* notes 57-81 and accompanying text.
127. See *supra* notes 96-122 and accompanying text.
128. Naturally, in defending the genre, I do not defend every specimen of the genre.
129. Sabato, *supra* note 7, at 156.
these future taxes to be reduced by a total of $19 billion.\textsuperscript{131} In the normal course it would have been up to state regulatory commissions to decide the manner of refunding customers. In 1986, however, Representative Matsui inserted a provision into the tax reform legislation calling for repayment over periods as long as 30 years.\textsuperscript{132} This provision attracted little attention at the time, but within a few months after its passage, many legislators, including eventually Matsui, concluded that it was unjustifiable.\textsuperscript{133}

Repeal has been strongly resisted by the utility companies and their associations. For example, the U.S. Telephone Association listed defeat of the repeal measure as its most important legislative goal\textsuperscript{134} and, according to Jackson and Birnbaum, "brought waves of company executives to Washington" to try to influence representatives from their states.\textsuperscript{135} In addition, the utilities and their associations gave more than $5 million in contributions during 1987-88 to individuals who were members of the House in 1989, including $510,000 to members of the Ways and Means Committee, as well as a total of $446,000 in speaking fees to Representatives and Senators in amounts up to $2,000 each.\textsuperscript{136} Jackson and Birnbaum quote Representative Matsui as stating: "I have been told a number of times by [House] members whom I have sought as co-sponsors that my bill makes good policy sense but dangerous political sense to them. . . . Rich in honorariums and campaign contributions . . . [the utility lobbyists'] talk is pretty loud in the halls around here."\textsuperscript{137}

A lobbyist for Pacific Telesis was quoted by Jackson and Birnbaum as giving this explanation of the utilities' tactics: "It's the way you do business in this town. . . . We're not trying to buy votes; we're trying to get our point of view across. It takes a long time. . . . And sometimes we need a member's undivided attention."\textsuperscript{138}

The \textit{Wall Street Journal} article contains considerable information regarding the benefits received by certain legislators from the

\begin{itemize}
  \item \textsuperscript{131} \textit{Id.}
  \item \textsuperscript{132} \textit{Id.}
  \item \textsuperscript{133} \textit{Id.} at A4, col. 5.
  \item \textsuperscript{134} \textit{Id.} at A1, col. 1, A4, col. 5.
  \item \textsuperscript{135} \textit{See id.} at A1, col. 1.
  \item \textsuperscript{136} \textit{Id.} at A4, col. 5.
  \item \textsuperscript{137} \textit{Id.} at A1, col. 1 (brackets in original).
  \item \textsuperscript{138} \textit{Id.} at A4, col. 5. This Section has not addressed the usual claim of the defenders of the campaign finance system that the only thing contributors get for their money is access to legislators. This claim was addressed previously in Lowenstein, \textit{supra} note 54, at 827-28. For an excellent discussion, see K. \textsc{Schlozman} & J. \textsc{Tierney}, \textit{supra} note 32, at 164-65.
\end{itemize}
utilities and their developing positions on the repeal bill. For instance, it was reported that:

Democrat Terry Bruce of Illinois co-sponsored the Dorgan [repealer] bill but signed the ["dear colleague"] letter arguing against it. Rep[resentative] Bruce received a $1,000 honorarium from the telephone association on Jan. 28, 1987. He received another $250 honorarium from Edison Electric Institute three days before the letter.

On April 9, he took the highly unusual step of rising on the floor of the House to ask unanimous permission for his name to be removed from sponsorship of the refund bill. The next month he got a $2,000 appearance fee from Illinois Bell, followed, in August, by $1,000 from Pacific Telesis. And before the end of his successful 1988 reelection campaign, he got from the utility PACs $28,158 in political contributions.\textsuperscript{3}

The \textit{Journal} article presents policy arguments for and against the repealer in some detail, and recounts the history of the repeal efforts up to the time the article appeared, and its apparent prospects.\textsuperscript{4} Finally, it quotes Representative Matsui on his meetings with utility lobbyists during the period he was beginning to reconsider his position:

I had at least three or four meetings with the utility coalition and asked them to provide me with an analysis about why their position was pro-consumer. Each time, they would say they would try to come up with something, and on the way out someone from the USTA [U.S. Telephone Association] would want to talk to me about fund-raising. \ldots{} The first time I kind of sloughed it off, the second and third time it got to be a little trying.\textsuperscript{4}

What can be said about this article, which is a typical example of the genre? Does it prove that legislators adopted a position solely to receive more contributions and speaking fees from the utilities? No. The article itself provides other factors that could have been influential. Some legislators may have been persuaded by the utilities' substantive arguments and visits by the heads of local telephone companies.\textsuperscript{4} Furthermore, the article does not attempt to compare contributions received by those who supported the utilities' position,

\begin{thebibliography}{142}
\bibitem{139} Jackson & Birnbaum, \textit{supra} note 75, at A4, col. 5.
\bibitem{140} \textit{See id.}
\bibitem{141} \textit{Id.} at col. 6 (brackets in original).
\bibitem{142} \textit{See id.}
\end{thebibliography}
and by those who opposed it. Similarly, although the article provides considerable information about the amount of utility contributions and other benefits to members during the period of the controversy, it does not indicate whether this constituted an increase over previous periods.  

Does the Journal article rely solely on correlations between contributions and legislative votes to arouse suspicions? No. There is additional evidence, both circumstantial and testimonial. First, there is the fact that whatever the merits of the industry's arguments, and however prestigious the telephone company executives pressed into action as lobbyists, the industry was asking congressmen to intervene over the objection of state officials in matters ordinarily left to the states, in order to permit telephone and electric companies to withhold money belonging to their customers for great lengths of time. On its face, this is not an attractive political position.

Second, there is Matsui's characterization of his colleagues' remarks to the effect that the bill makes "good policy sense but dangerous political sense." In light of the first point, indicating that on its face the bill seemed to make excellent political sense, it is hard to see what these colleagues could have been getting at other than that voting for the bill might offend major contributors. Third, the timing of some of the contributions and other benefits seemed close in some instances to legislative actions supporting the industry, although not enough instances are given to negate the possibility of coincidence. Finally, Matsui's account of his meetings with utility lobbyists described repeated attempts to rely directly on fund-raising as a lobbying tool.

What the Jackson-Birnbaum article and others of its genre do is illustrate and flesh out the validity of the conflict of interest approach. There is no "smoking gun" in this, or in most cases, but neither is there reason for anyone other than a criminal investigator

143. See id. at cols. 5-6.
144. For what it is worth, this distinctly non-expert reader found the industry's arguments neither frivolous nor extremely persuasive.
145. See id. at A1, col. 1.
146. See supra text accompanying note 137 (quoting Representative Matsui's remarks).
147. See supra text accompanying note 144.
148. See F. SORAUF, supra note 27, at 309. Sorauf entitled an inset in his section on the influence of contributions on official behavior, "The Search for the Smoking Gun." See id. This is a pun based on the fact that the incident Sorauf is analyzing involved legislation affecting the National Rifle Association. See id. at 309-10. Nevertheless, casting the issue in these terms is symptomatic of Sorauf's lack of consideration of the conflict of interest problem.
to search for one. The campaign contribution is pervasive. It is present in legislators' talks among themselves, in their meetings with lobbyists and in lobbyists' evaluations of their own tactics and strategies. Contributions come before a legislative issue arises and contemporaneously with the legislative deliberations, and will continue to come after the particular issue is forgotten. Are contributions the only consideration in the legislative deliberations? Of course not. Are they the dominant consideration? Probably not in most cases. But they are always there, and their effects can never be isolated or identified with precision. Anecdotal evidence, because it is contextual and, when presented by the better journalists, conveys the complexity and the ambiguities in the process, enhances our understanding of the campaign finance problem.

Similarly, publication by groups such as Common Cause of correlations between contributions received by legislators from interest groups and their votes on matters of interest to those groups is an entirely legitimate and constructive contribution to the campaign finance debate. Admittedly, the fact that members of Congress received contributions from used car dealers and then voted against a requirement that those dealers disclose known defects to their customers does not prove that they were motivated solely or predominantly or at all by the contributions.\(^{149}\) It is open to elected members to persuade the public that they are indifferent to contributions. It is open to the used car dealers to explain that their practice is simply to watch and wait for candidates to come along who have an ideology that opposes disclosure of defects to used car buyers.\(^{160}\)

Publication of such simple correlations is criticized on the ground that they create unfounded implications that legislators are for sale.\(^{161}\) The correlations also are said to be misleading because, unlike the econometric studies I have already discussed,\(^{182}\) they make no effort to see whether the votes in question might be explica-

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150. Another common argument of anti-reform writers is that whatever influence interest group contributors have is offset by the contributions of opposing groups. See, e.g., Malbin, supra note 7, at 266-69. Apparently, then, we may assume that used car dealer money was matched by used car buyer money. Given the assurances of the anti-reform writers on this score, see id., I have not deemed it is necessary to search the records of the Federal Election Commission to find out how many used car buyers' PACs there are, or how much they have contributed to congressional campaigns in recent years.

151. It is important to note that the studies and correlations published by public interest groups typically do not focus on individuals, in McCarthyite fashion. Usually they emphasize the defects in the system as a whole.

152. See supra notes 57-95 and accompanying text.
ble without reference to the contributions.

These criticisms are themselves unfounded once it is understood that the allegation need not be that the legislators are for sale, but that they routinely act within a position of conflict of interest. Perhaps it is likely that legislators would have acted in the same manner if the conflict of interest had not been present. That likelihood does not change the fact that, when they did act, the conflict existed. The studies of the public interest groups show the breadth of the conflict of interest problem; the investigative journalists' anecdotal evidence shows its quality.

The legislative process is not corrupt, but it is tainted with corruption.

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.

III. How To Talk About Campaign Finance Reform

Gary Jacobson, after arguing in one of his essays that the present system of campaign finance benefits the Republicans, stated that reforms favored by House Democrats, whose "ostensible purpose was to reduce the influence that special interests supposedly exercise through the campaign finance system, ... would also reverse trends that have strengthened Republicans and threatened Democratic officeholders." Republican counter-proposals, Jacobson said, were similarly defended as a way to weaken PACs, but "would also obviously give Republicans an enormous financial advantage."

When President George Bush announced his recent campaign finance reform package it provoked diverse reactions, but one theme was universal: the Bush plan was a partisan Republican plan.

154. Id.
155. Id.
156. A typical description appeared in the lead paragraph in the Washington Post, which reported that "President Bush unveiled a package of campaign finance proposals yesterday that he said would help 'free our electoral system from the grip of special interests,' but many Democrats and campaign reform groups said the package was too narrow and was crafted to help Republicans." Devro & Dewar, Bush Unveils Campaign-Regulation Package, Wash. Post, June 30, 1989, at A11, col. 1. The Bush proposals were summarized by Congressional Quarterly as follows:
These examples are typical. They show that when entering discussions of campaign finance reform, people bring with them considerations going well beyond a simple desire to limit corruption. Indeed, serious discussions of the subject, especially among political practitioners, canvass and are driven by every imaginable ideological, political and personal concern—although not necessarily in that order.¹⁵⁷

Are people wrong to interject particularistic concerns and self-interest into their deliberations and debates over campaign finance? Does the preoccupation with particularistic effects provide cause for depression or grounds for cynicism? Are public interest concerns irrelevant to these deliberations and debates, as a practical matter? In this Section, I argue that each of these questions may be answered in the negative. An issue like campaign finance reform can and should be considered on many levels, including the broadest public interest level but not excluding particularistic interests. The answer to the question of how to talk about campaign finance reform is that it depends on whom you are talking to.

To say that a policy or practice is in the public interest is to say that it is justified on grounds that may be expected to appeal to members of the public generally.¹⁵⁸ In an insightful essay by

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Eliminate corporate, union and trade association PACs.
Retain non-connected, or ideological PACs, but reduce their contribution limits from $5,000 to $2,500. More than double the amount parties may spend in 'coordinated expenditures' on behalf of a candidate. Eliminate transfers of campaign funds between committees of elected federal officials.
Ban the practice of 'bundling' individual contributions by all organizations except political party committees.
Add disclaimers for advertising paid for by independent expenditures.
Require candidates and members of Congress to empty their campaign treasuries at the end of each election cycle.
Prohibit members of Congress from converting campaign funds to personal use.
Ban the use of the frank for unsolicited mass mailings.
Increase disclosure of 'soft money,'
Impose new criteria for redistricting to end the practice of gerrymandering.

Alston & Craney, *Bush Campaign-Reform Plan Takes Aim at Incumbents*, Cong. Q. Weekly Rep., July 1, 1989, at 1648 (emphasis omitted). If President Bush wanted to make absolutely certain that he would arouse solid Democratic opposition, his addition of the last item to his list was well-calculated to accomplish his objective.

¹⁵⁷. For example, when two competing campaign finance initiatives, Propositions 68 and 73, were on the ballot in California in the 1988 primary election, I participated in lengthy discussions the main focus of which was the likely impact of either or both on the anticipated redistricting controversies of the 1990s.

¹⁵⁸. See generally R. FLATHMAN, THE PUBLIC INTEREST (1966) (discussing the meaning of "public interest" and its relation to such political concepts as "rights," "duties" and "authority"). Of course, questions of how the term "public interest" should be defined and what
Anthony Downs, supplementing his much better-known book *An Economic Theory of Democracy*, he described a related but distinct concept which he called the minimal consensus. The existence of such a consensus is necessary for the continued existence of a democracy. Downs regarded it as including the basic rules of personal conduct and democratic decision-making, as well as very broad agreements on the goals that government should pursue. Downs notes several characteristics of the minimal consensus that tend to limit its practical significance in political controversies:

In the first place, although some of the personal-conduct rules and political principles in it can be described specifically, much of its content consists of policy principles statable only in a vague and generalized form. Second, over the long run its content changes as new rules or policies become almost universally accepted and others are gradually abandoned. Third, even though a great many people may agree on general principles, there is almost sure to be a wide variety of views concerning how to apply those principles to concrete situations. Since many decisions that affect society in general—and therefore lie within the realm of the public interest—concern choices among extremely detailed policy alternatives, the minimal consensus underlying democracy cannot be used as a guide in making such decisions, except in a very general way.

Despite these limitations, Downs notes that the minimal consensus "embodies part of the basic value structure of a democratic society" and, therefore, no policy that contradicts the minimal consensus it should serve have been debated extensively. For a brief summary with extensive references to the pertinent literature, see K. Schlossman & J. Tierney, supra note 32, at 27.

The definition of 'public interest' in the above text could be criticized from various points of view. For example, some would say that what matters is not whether the justification really would appeal to the actual public, but whether it would appeal to an informed, rational public with a full understanding of its real interests. From this point of view, it could be said that racial desegregation was in the public interest in the South in the 1950s, because although many whites opposed it, they would have supported it if they had understood properly the dictates and benefits of living in a just society. For the most part, the nuances of how to define the public interest are not of central importance to my argument.

161. See id. at 5-7. Political theorists more commonly agree with Downs regarding the need for consensus on questions of democratic procedure, than on the substantive goals of government. See, e.g., Sorauf, *The Public Interest Reconsidered*, 19 J. Pol. 616, 633 (1957) (discussing the common values Americans share about democracy and the process of government).
163. Id.
sus can be regarded as being in the public interest for that society. Jonathan Steinberg and I have described a few of the components of the minimal consensus that exists in contemporary American society:

A democracy cannot function unless certain principles are generally accepted as constituting the ground rules of the political struggle, and therefore not subject to fundamental change by temporary majorities. In our society these principles... include the right of all to vote and speak their minds freely, the right of the controlling groups to govern, accompanied by their duty to tolerate dissent, and the duty of loyalty by the opposition.

Applying this framework to the question of campaign finance reform, the proposition that the minimal consensus condemns corrupt practices should command general agreement. This is not simply a matter of empirical observation. The idea of deserving condemnation is built into the very meaning of the term corruption. What is controversial is not whether corrupt practices should be condemned, but whether certain practices should be regarded as corrupt. However, the analysis in Part Two of this Article attempted to show that the practices of making contributions with the intent of placing the recipient in a position of conflict of interest, and of accepting contributions with the understanding that one is placed in such a position, are generally regarded as corrupt practices. It follows that current policy, which tolerates and even structures the corrupt campaign finance system, contradicts the minimal consensus and therefore is contrary to the public interest.

Does it also follow that everyone is duty-bound to support any change in policy that promises to eliminate these corrupt practices? Plainly not. For one thing, such a policy might conflict with other portions of the minimal consensus, such as freedom of speech. Freedom of speech unquestionably is part of the minimal consensus in this country and probably in any democracy, but to say the least, there is no consensus on the application of the concept of freedom of speech to campaign finance reform. Nevertheless, those who be-

164. See id. at 8.
165. Lowenstein & Steinberg, supra note 9, at 75.
166. See Lowenstein, supra note 54, at 802-05 (discussing the concept of corruption).
167. See id.
168. See supra notes 118-22 and accompanying text.
169. For a sampling of opinion, see BeVier, Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform, 73 CAL. L. REV. 1045 (1985); Clagett & Bolton, Buckley v. Valeo, Its Aftermath and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing, 29 VAND. L. REV. 1327 (1976);
lieve a particular method of eliminating corrupt practices contradicts the freedom of speech portion of the minimal consensus as they understand it cannot be expected to assent, simply because their view of the application of that portion of the minimal consensus is controversial.

Even if an anti-corruption proposal cannot plausibly be regarded as contradicting any portion of the minimal consensus, the proposal will be resisted by those who believe other interests they regard as important will be sacrificed. Those who accept the argument in Part Two\textsuperscript{170} ought to support some anti-corruption policy, but nothing requires them to support any particular anti-corruption policy.\textsuperscript{171} Unfortunately, a kind of prisoner's dilemma results. Assuming that most people would find value in preventing corruption, they may hold out for a remedy that also suits their other values especially well, so that no majority can be formed behind a single proposal. This may be the case even though there is at least one remedy whose anti-corruption benefits would outweigh modest costs to other values for most people.\textsuperscript{172}

If we are to understand the relation of the campaign finance debate to the concept of the public interest, it is important to realize that although policies that contradict the minimal consensus are not in the public interest,\textsuperscript{173} the minimal consensus is by no means congruent with the public interest. In Downs' framework, democracy implies the premise that all citizens are of equal "ultimate" value, at


\textsuperscript{170} See supra notes 26-152 and accompanying text.

\textsuperscript{171} It would be possible to concede the taint injected into democratic government by campaign finance-induced conflict of interest, but to hold that \textit{any} remedial device would harm other interests (whether or not those interests are a part of the minimal consensus) to a degree that the anti-corruption benefits would be outweighed. This seems to me unlikely, given the breadth of remedial possibilities and their versatility. See infra notes 216-57 and accompanying text (suggesting remedial possibilities).

\textsuperscript{172} The prisoner's dilemma is not a true one, for the parties (this term may be taken specifically as referring to the political parties or generally as referring to all interested participants in the political process) can negotiate with each other through the legislative process. Nevertheless, the complexities, uncertainties, rigidities and suspicions that prevail in politics, create sufficient obstacles to negotiation that the problems presented are similar to those in pure prisoners' dilemma situations.

\textsuperscript{173} This does not mean that the content of the minimal consensus cannot be changed. See Downs, supra note 160, at 7; see also supra text accompanying notes 160-62.
least so far as the political and legal systems are concerned.\textsuperscript{174} It follows that while people can and will pursue their own individual interests, to characterize a policy as in the public interest, the policy must further values that serve the whole community. However, outside the bounds of the minimal consensus, there is no reason to expect one person's conception of the public good to correspond to another's.\textsuperscript{176}

Plainly, differing conceptions of the public interest come into conflict in the debate on campaign finance. One way to view the campaign finance debate is as a reflection of two competing visions of the government's rights and obligations regarding the political process.\textsuperscript{177} One of these visions emphasizes the individual's or group's right to be free from government interference with political participation. Vast inequalities in political resources resulting from unequal distribution of wealth, or from structural advantages and disadvantages in the ability of different interests to organize, are either regarded as benign or accepted as the possibly unavoidable cost of protecting rights of speech and association.\textsuperscript{178}

In the opposing vision, the right to political participation may be infringed not only by government suppression, but also by structural inequalities in access to the resources that are necessary for effective participation.\textsuperscript{178} In this vision, government intervention to offset such inequalities is permissible if not obligatory, because an individual's or group's good fortune in the economic sector does not

\begin{itemize}
  \item 174. Downs, \textit{supra} note 160, at 3.
  \item 175. \textit{See id.} Later in his essay, Downs explains how and why people's conceptions of the public interest may be expected to differ from one another in a society characterized by division of labor. \textit{Id.} at 18-25.
  \item 176. \textit{Compare Polsby, Buckley v. Valeo: The Special Nature of Political Speech, 1976 S. Ct. Rev. 1 with Fiss, Free Speech and Social Structure, 71 Iowa L. Rev. 1405 (1986).} What is especially striking about these two articles, other than the extraordinary eloquence of each of them, is the similarity of their descriptions of the theoretical conflict, notwithstanding the authors' adoption of diametrically opposing positions.
  \item 177. \textit{See generally Polsby, \textit{supra} note 176, at 1 (noting a "collision" between the Federal Election Campaign Act and the first amendment).}
  \item 178. As the reader may already have observed, this Article is out of kilter with much of the recent legal writing on campaign finance in its emphasis on corruption rather than equality. \textit{See, e.g.,} Fleischman & McCorkle, \textit{Level-Up Rather Than Level-Down: Towards a New Theory of Campaign Finance Reform, 1 J. L. & Pol. 211 (1984) (discussing campaign finance reform as it relates to political equality); Levinson, \textit{supra} note 2 (discussing campaign activity and economic equality in political debate); Wright, \textit{Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?} 82 Colum. L. Rev. 609 (1982) (discussing the growing impact of concentrated wealth on the political process and political equality).}
\end{itemize
create a right to a corresponding advantage in the political sector.\textsuperscript{279}

Whatever one may think of these visions, each surely reflects a plausible conception of the "public interest." Yet, they lead to sharply different ideas about how to deal with campaign finance. The second is reflected in what might be regarded as the mainstream of reform thought, although some of the proponents of the former vision energetically contend that it too is compatible with effective reform.\textsuperscript{180} Although an anti-corruption reform goal is in the public interest, differing conceptions of the public interest result in strenuous debates over the content of that reform.

Let us now turn to the kind of debate we saw at the beginning of this Part between Republicans and Democrats.\textsuperscript{181} The Republicans and Democrats favor sharply differing reform proposals because the two parties are differently situated with respect to incumbency in Congress and in any given state legislature, and because they have differing prospects, both short and long term, for raising money from various sources and by various methods.\textsuperscript{182} In brief, Republicans do better than Democrats among high-end individual contributors, so they often favor raising the limits on individual contributions. The Republicans are way ahead of the Democrats in raising money for the national party committees by direct mail and may have a long term advantage by reason of the greater affluence of Republicans generally.\textsuperscript{183} Accordingly, Republicans tend to favor loosened limits or the elimination of all limits on the use of party funds in campaigns. Labor PACs have been heavily Democratic from the start,\textsuperscript{184} but within a few years after the adoption of the 1974 Federal Election Campaign Act (FECA) amendments,\textsuperscript{185} they had been greatly

\textsuperscript{179} See generally Fiss, supra note 176, at 1412-13 (discussing social power in terms of economic power in capitalist societies). For an exposition of a version of this vision expressed in terms of proposed constitutional doctrine, see Nicholson, Campaign Financing and Equal Protection, 26 STAN. L. REV. 815 (1974).

I have recycled these descriptions of the two visions from a paper I wrote recently for publication in the forthcoming ENCYCLOPEDIA OF AMERICAN POLITICAL PARTIES AND ELECTIONS. See D. Lowenstein, Campaign Finance and the Constitution, Social Science Working Paper 695, at 8 (California Institute of Technology, Pasadena, California, 1989) (on file at Hofstra Law Review).

\textsuperscript{180} See generally Fleischman & McCorkle, supra note 178, at 234-47.

\textsuperscript{181} See supra notes 153-66 and accompanying text.

\textsuperscript{182} See id.

\textsuperscript{183} See Jacobson, Party Organization and Distribution of Campaign Resources: Republicans and Democrats in 1982, 100 POL. SCI. Q 603, 610 (1985-86) [hereinafter Jacobson, Republicans and Democrats].

\textsuperscript{184} See F. Sorauf, supra note 27, at 100.

overshadowed by business-oriented PACs. These have divided between a legislative strategy supporting incumbents almost exclusively, and an electoral strategy in which challengers supported are usually Republicans. In the late 1970s and early 1980s, many Democrats were seeking further restrictions on PACs, while most Republicans opposed tightened restrictions. In the early and mid-1980s, the Democrats succeeded in increasing their share of business PAC funds. Although very little of this has gone to Democratic challengers, where it would do the party the most good, PAC money has become a source of electoral security for Democratic incumbents. At present, sharp restrictions on PACs are regarded as a Republican rather than a Democratic reform, and the Bush proposals go far in this regard.

Any credible reform package must include some significant restrictions on PACs. Since Democrats are generally at a disadvantage in fund-raising from individuals, they stand to benefit from any new infusions of money going equally to candidates of the two parties. However, increases in the money available to help challengers relative to incumbents are a drawback to the Democrats, who hold a majority in Congress. Consequently, Democrats have tended to favor a combination of public financing and spending limits for congressional campaigns, which would give them the twin benefits of more equalized funds and protection of incumbents.

Does this sketch support the cynical view that while academics

186. See supra notes 48-53 and accompanying text.
187. PAC money helped the Republicans win a majority in the senate in 1980. See Sabato, supra note 7, at 158.
188. In 1984, the national Democratic platform advocated banning PAC funds in federal elections. See id. at 156.
189. See supra text accompanying notes 50-51.
190. See Jacobson, Republicans and Democrats, supra note 183, at 619-20.
191. See supra note 156 (outlining Bush's campaign finance reform proposals). The proposals may not go far enough, however. Although PACs affiliated with economic organizations would be barred, they might be able to reconstruct themselves as formally independent. See Alston & Craney, supra note 156, at 1649.
192. See Sabato, supra note 7, at 164-65.
dispute differing conceptions of the public interest, in the real world of party politics it is self-interest that counts? Only if partisanship is equated with self-interest. By and large, the party positions on this type of issue are shaped by the party public officeholders and they undoubtedly have a personal interest in advantaging their own party. Yet, the party positions tend to be supported by Republicans and Democrats who are not politicians. People support the Democratic or Republican Party because they believe in the way their party will deal with matters such as social and economic justice, the environment, taxes, education and the conduct of international affairs. Party loyalists may not be completely disinterested. The Republican who looks to his party to reduce taxes may not be indifferent to the fact that his own taxes will be lower. The Democrat who looks to her party to defend the right of privacy and freedom of choice may contemplate her own possible need for an abortion. However, conceptions of the public interest make up a large part of most people’s choice of party. Thus, because people believe that the success of their party is important for the public interest in a variety of fundamentally important ways, they do not believe it will serve the public interest for their party’s interests to be sacrificed, even if the sacrifice is carried out in the name of purity in government.

Party politicians, who have much more at stake personally, may still be moved, like ordinary voters, by a genuine belief in what the party stands for. Furthermore, given a political system that evolved quickly into a two-party system, party competition is an integral part of democracy in the United States. Party interest, to the extent it is self-interest, is thus contemplated by the system. It may create complex and difficult pressures, but because it is implicit in the relationship of trust that is created by the holding of partisan elective office, responsiveness to party interest does not create a conflict of interest of the sort analyzed in Part Two of this Article.

None of this denies that strong elements of unadulterated self-interest are present perennially in campaign finance reform deliberations. The interest of incumbents in reelection has been a major element of the political feasibility or non-feasibility of various proposals, and is predominantly a concern based on self-interest. In addition, at any given time there will be innumerable idiosyncratic concerns, many of which are self-interested on the part of a given
politician, group of politicians, party faction or interest group that pull the debate in one direction or another.

Up to this point this Article has looked at the broad cleavages in the campaign finance debate: egalitarians vs. libertarians, Republicans vs. Democrats, incumbents vs. challengers. Once the finer points of designing a reform proposal are considered, a vast array of new issues arise: between those who believe reforms should strengthen political parties and those who either disagree or are indifferent to the idea; between those who believe reform should extend to the way campaign money is spent and those who believe reform should leave the campaigns themselves untouched; between those who believe independent spending should be inhibited and those who believe it should be left alone; and so on. These and dozens of other issues have broad public interest dimensions as well as particularized effects on many individual interests and participants in the political system.

With the existence of such divergence, is there any hope for constructive dialogue between political opponents on campaign finance reform? To paraphrase Justice Holmes:

To admit of rules that give the opposing party a chance of victory seems to indicate that you think elections impotent, as when a person runs for president of a social club, or that you do not care wholeheartedly for the result, or that you doubt either your party or your premises. But when people have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by fairly conducted elections—that the best test of political principles is the power of the party that stands for them to get itself accepted in the competition of the ballot box, and that freely expressed popular support is the only ground upon which their wishes safely can be carried out.196

In short, our hope lies in the minimal consensus. We all recognize that whatever our substantive political goals, everyone benefits from democratic procedures. Permitting our opponents to compete fairly is a price worth paying for the assurance that we shall have the opportunity to compete fairly. However, even when everyone accepts this principle, finding common ground with our opponents is not as easy as it may seem.

There is a temptation to divide the political arena into procedural and substantive issues. Procedural issues, it is sometimes supposed, can and should be (though admittedly they are not) discussed and resolved in a nonpartisan manner. This supposition is false. Controversies over political procedures have all the characteristics that make political issues political. They have broad ideological dimensions, they affect different interests differently, and they involve complex judgments on cause and effect of the sort over which reasonable people can and do differ. Controversies over political procedures are no more intrinsically non-partisan than controversies over taxation.

The fact remains that Republicans and Democrats, egalitarians and libertarians, incumbents and challengers, and all the others with conflicting interests at stake in the campaign finance controversy, must come together and find a sheltered area within which they can discuss issues of democratic procedure, despite their differences. They can find common ground in the minimal consensus, and they should engage in a dialogue that begins from the premise that the favoring of one side or the other in any of the major cleavages represented in the dialogue is not a valid reason for adopting a policy. This does not mean the participants may not favor a policy for just that reason, but some other justification must be offered in a cross-cleavage discussion. The situation is similar to a meeting of senators from several states to divide up highway funds. Senators may have devised their strategies and arguments with the sole objective of getting the most for their own states. Nevertheless, when they meet with their counterparts from other states, it is not a permissible defense of a proposal that it gives a disproportionate share to the proposer's state.

197. This approach is implicit in the “political processes” prong of the Carolene Products doctrine. See United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938). The analysis in the text that follows points to a difficulty that is not dispelled adequately in John Hart Ely's celebrated modern elaboration of what he called the “representation-reinforcement” portion of Carolene Products. See J. ELY, DEMOCRACY AND DISTRUST 77-88 (1980).

198. Although the contexts are quite different, there are some parallels between the assertions in the text and the analysis in Schauer, The Role of the People in First Amendment Theory, 74 CAL. L. REV. 761, 778-85 (1986). In the context of first amendment theories promised on freedom of speech as a prerequisite to popular sovereignty, Schauer notes that there is no obvious reason why the bounds of freedom of speech itself should not be an appropriate object for the exercise of popular sovereignty. See id. at 779-80. Unlike much legal scholarship, Schauer's article declines to regard government as a black box; rather, it takes account of the democratic processes, admittedly imperfect, from which government decisions derive. See id. at 787.
This is not much of a constraint since it usually is possible to frame an argument for a proposal, however biased, that does not rely explicitly on flagrant favoritism. Still, it is some constraint. And if one side of the controversy does not have the votes to ram its proposals through, it joins with a much stronger constraint: the need to win the assent of different groups with different interests. This constraint does not guarantee the outcome will be fair in any objective sense, since beyond the very limited confines of the minimal consensus' clear dictates, the outcome is likely to reflect the relative power of the participants, with whatever unfairness that may contain. However imperfect, we have no good alternative for resolving the political controversies about how democracy should be organized.

How then, should we talk about campaign finance reform? Depending on whom we are talking to, we must simply build on whatever common ground exists and do the best we can.

Reformers may be fairly accused of wanting to have it both ways. When they speak to conservatives, they state their case as one of good government. When reformers speak to liberals (or when they speak among themselves, if they are liberals), they state their case as one that will promote the interests of the poor against the rich, or of consumers and the environment against selfish business interests.9 Yet, wanting to have things both ways is not necessarily a sin. There is nothing wrong with seeking to promote good government and equality simultaneously. However, liberal reformers must recognize

199. Sanford Levinson is correct when he claims that reformers are motivated by a desire to reduce the relative power of the rich, and that in that sense reform proposals are not "content neutral." See Levinson, supra note 2, at 945. However, he is wrong to regard his claim as undermining the reformers' position. If a group of reformers believe that excessive political power in the rich is a serious source of injustice or is itself an injustice, what is wrong with their attempting to reduce that power? By their lights, is it not their civic obligation to do so? What they cannot do is expect to persuade, on these grounds, people who do not believe the rich have excessive political power or who do not believe political procedures should be designed with such purposes in mind. Furthermore, if there is strong opposition to reducing the political power of the rich, these reformers will have great difficulty in getting their proposals through, no matter on what grounds they are defended. If Levinson's observations are intended as a warning to the rich and the allies of the rich, they are very much in order. But his observations do nothing to discredit the reform position.

While on the subject of the power of the rich and others who make campaign contributions, it may be helpful to make this distinction. From the standpoint of the consensual policy of reducing or eliminating corruption, contributions made under a legislative strategy present the problem, whereas contributions made under an electoral strategy do not. See supra notes 33-95 and accompanying text. From the standpoint of an egalitarian policy, favored by many but surely not consensual in our society, both types of contributions present problems, so long as the means and structural ability to make contributions are unequally distributed.
that when they are dealing with conservatives who are against redistribution of wealth and who believe business is already being regulated into the ground, it may be necessary to settle for good government without equality.

All of us want to have it both ways. Not only do we strive for the most we can get when we deal with others, but we are prone to deluding ourselves to avoid confronting unpleasant choices and realities. I shall not attempt to speak for other reformers, but at various times I have discounted the side effects of various reforms that I felt were essential. Perhaps I am still doing so, despite efforts not to. It is comforting to believe that the costs of what one finds necessary are modest. Similarly understandable self-deceptions may also underlie the refusal of some to acknowledge the corruption that is inherent in the campaign finance system.

As argued in Part One of this Article, the pervasiveness of money in politics assures that any significant modification of the campaign finance system will have far-reaching effects. People need not be blamed for seeking to defend their private interests and their particular conceptions of the public interest, nor even for seizing the campaign finance issue to promote their interests. People act properly when, within groups and sub-groups, the commonly-minded explore possibilities for promoting equality, the sanctity of private property, the program of party renewal, the interests of the Republicans or of the Democrats, or any other political program by manipulation of campaign finance. When the groups come together, the common interest of a democracy freer from corruption may be all that they have in common.

The various levels on which the campaign finance debate occurs are legitimate. Bringing out into the open the fact that it occurs on these levels, as this Part has attempted to do, may help dispel a degree of confusion and hypocrisy. Recognition that there is a great deal of divided ground, but also some common territory, may promote sufficient moderation in pursuing side interests to permit effective action for the common good. Optimism would be foolish after the experience of the last fifteen years, but continuing efforts for re-

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200. See supra notes 6-16 and accompanying text.
201. See B. Jackson, supra note 47, at 300. Although many of the specifics of Jackson's reform proposals differ sharply from those espoused in this Article, see generally id. at 294-315, his acknowledgment that proposals must be formulated with recognition of the legitimate needs of the groups and interest that make up American politics is very much in the spirit I am espousing here. See id. at 300-01.
form, pressed in a conciliatory spirit, is our best hope.

In any event, that is the spirit in which I have attempted to fashion the package of proposals summarized in the final Part.

IV. A REFORM PROPOSAL

A. The Problem

A major theme of this Article has been that because of the pervasiveness of money in politics, any regulation that effectively limits conflicts of interest will necessarily affect numerous other interests and values, so that reform proposals inevitably encounter a cross fire of conflicting demands and objections. Over the decade and a half since adoption of the FECA amendments, a particular set of difficulties have come to be regarded as centrally important in both the academic literature and political debate. These are based on the following circumstances, as to which there probably is little serious disagreement:

1. Although American legislative elections retain a significant partisan cast, they have become increasingly candidate-oriented. The identities, records and policy views of legislative candidates are not well known to voters. Nor do most voters do much to seek out such information. Accordingly, to have a chance to win a competitive election, most candidates need to spend large sums of money to get information into the minds of voters.

2. By and large, money that Americans acting individually are willing to contribute in small amounts to legislative candidates falls far short of the sums necessary to run a competitive campaign.

3. Under our current system, the only sources of funds available to fill this gap are larger contributions from individuals and funds collected through organizations, most commonly at present through PACs. An unknown but substantial portion of funds from these sources is contributed in accordance with a legislative rather than an electoral strategy, and in this sense may be denominated special interest funds.

4. In the majority of districts, truly competitive elections proba-


203. See Sabato, supra note 7, at 158 (reviewing the expenses of campaign communication).

204. See Jacobson, Republicans and Democrats, supra note 183, at 610.

205. See supra notes 40-55 and accompanying text.
The problem essentially is that of campaign finance reform, which is deeply rooted. Categorization of districts as “safe” or “competitive” is possible, but not according to any fixed or simple criterion. It is a matter of expert judgment, and experts sometimes make mistakes or disagree among themselves.

5. Typically, the effects of campaign spending in a potentially competitive district are not symmetric. Incumbents, by reason of their status and assisted by the substantial subsidies they receive for communication with voters, tend to be better known than their challengers at the beginning of the campaign. Whether for this reason, or because some voters tend to vote for the incumbent in the absence of information suggesting otherwise, or for other reasons, challengers usually need to spend large amounts to have a chance to win. On average, challengers receive a higher percentage of the vote as the amount they spend increases. Incumbent spending has a much smaller effect on the election results on average, and although the relatively small number of votes, a large amount of spending by the incumbent may influence can mean the difference in a close election.

Given these circumstances, it has been widely supposed that an insoluble conflict exists between the anti-corruption goal of campaign finance reform and the value of maintaining (or restoring) vigorous competition in legislative elections. The dilemma arises from the following elements:

1. To accomplish the anti-corruption goal, candidates’ demand for special interest contributions must be reduced drastically. This may take the form of limits on the size of contributions, limits on the
aggregate amount of special interest money that may be accepted, or expenditure limits consented to as a condition of accepting public financing.

2. Because small contributions from individuals do not come close to providing the amount needed for competitive campaigns, limits alone, regardless of their form if sufficient to substantially limit the element of corruption in the finance system, would so reduce the flow of funds that challengers, for whom the absolute amounts they can spend are more important than their spending relative to incumbents, would find their hopes of victory seriously impaired.

3. Public financing is proposed to close the gap between what candidates need to spend and what they can raise in "clean" money. As a practical matter, however, the gap is too large for public financing to fill. If a flat amount is given to major-party candidates in each district, most of the money will be wasted on races that have little prospect of being competitive. If public financing is given on a matching basis, raising the private contributions eligible for matching may be difficult. As a result the matching of public funds makes private contributions more valuable, and may, to some extent, subsidize the efforts of contributors following a legislative strategy. The size of the gap and the practical limits on the amount of public financing that can be made available assure that a compromise between the goals of restricting special interest money and permitting competitive races will end up accomplishing neither. In Gary Jacobson's words, "enough" money for a challenger to run a competitive campaign is likely to be "too much" money to be compatible with reform goals.

The dilemma that is assumed to exist turns on the assumption that public funds cannot be allocated to particular races in differing amounts other than through the matching device, which is an imperfect measure of the true competitiveness of an election and which tends to undercut the goals of reform. No one is likely to propose that government officials should make judgments as to which are the competitive races and allocate funds accordingly.

This dilemma can be solved by recognizing that the political parties constitute an excellent conduit for the allocation of public funds. By and large, the parties can be expected to place the funds

213. See Sabato, supra note 7, at 168-71 (discussing the rationale for public financing).
214. See Jacobson, Enough Is Too Much, supra note 193, at 192-94.
where they will do the most good. Public financing, then, can provide the greater part of the funds needed in competitive elections, obviating the need for private funds in amounts that come only from special interests. Public financing that is sufficient to fill the gap between what is needed and what can be raised in "clean" money, need not be prohibitively expensive because the parties will avoid wasting money in hopeless districts. The package proposed in this Article is not a cheap one, but it is no Rolls Royce.

The following Section describes the major elements of a reform package built around the political party allocation mechanism. The proposal is sketched in broad outline. Filling in the details will present technical difficulties and, more importantly, fracture whatever support the proposal might be able to generate, as different interests and values are served or disserved by resolving details one way or another.

**B. The Proposal**

1. **Public Financing Allocated by Legislative Party Leadership to Candidates.**— This is the heart of the proposal. It is important that the money be sufficient to provide most of the needed spending in districts seriously contested. Suppose we assume a House challenger needs $500,000 to run a competitive race. Assume also that serious challengers could be expected to raise at least $100,000 in private funds in light of the regulatory provisions of the proposal. This means that for $20,000,000, a party could fund fifty strongly competitive challenges. A similar amount should be provided for the defense of incumbents and another similar amount should be available for other races. Thus, a crude estimate of the amount that might be made available for allocation under this proposal would be $60,000,000 for each party in the House. Senate elections are held in two-thirds of the states each election year. Allowing for economies of scale in Senate campaigns, a total appropriation of half that for the

215. Some money may be wasted by allocations to incumbents who are safe. See infra text accompanying notes 222-24.

216. For the years 1972-84, Jacobson found that challengers who spent $500,000 in 1984 dollars had a 37% chance of winning. See Jacobson, *Enough is Too Much*, supra note 193, at 180 table 2.

217. The proposal in this Section does not require the parties to allocate the funds in accordance with this breakdown, which is offered only in rough justification for the amounts suggested. In a bad election year, a party would be likely to allocate more money to the defense of incumbents, and in a good year it could afford to risk allocating more to challengers. See id. at 183-84.
House, or $30,000,000 for each party, is a similarly crude estimate. Thus, for the two major parties, a cost of $180,000,000 would be involved, or $90,000,000 per fiscal year. In addition, all limits on party participation in federal campaigns, either by contributing privately raised funds to candidates or by direct spending, would be repealed.

The public funds would be allocated by the party leadership in the respective houses rather than by the Democratic and Republican National Committees.\(^{218}\) This is not essential to the overall thrust of the plan, and some might disagree with this feature out of a desire to centralize party power in a single entity. I favor the Congressional leadership for several reasons. First, although the package's greatest political weakness is that its overall thrust does not benefit incumbents,\(^{219}\) there is no reason to increase its unpalatability to incumbents gratuitously. Incumbents cannot be expected to be cheerful about handing considerable influence over their own destinies to any party group, but the pill should be less bitter when the group is directly accountable to the incumbents. Second, the in-house leadership is most directly concerned with the party's prospects in the particular chamber and presumably is most in touch with the ongoing political situation. Furthermore, the leadership has a more direct incentive to seek the use of public funds to win elections and, therefore, is less likely than the party national committees to be distracted by bureaucratic concerns.\(^{220}\) Third, as Michael Malbin has argued, at least in the case of the party that controls the White House, giving control to the party national committee could impinge on Congressional independence.\(^{221}\)

An objection to lodging control in the in-house party leadership could be made on the ground that the result will be that all or most of the money will be allocated to incumbents, many of whom do not need it. Jacobson, while conceding that each incumbent member of a party benefits from the party increasing its membership in the chamber, argues that collective good problems will prevent the incumbents

\(^{218}\) The leadership would be free to delegate the allocation to any other entity. Presumably they would do so to the respective Senate and Congressional Campaign Committees. However, if intra-party politics resulted in party leadership delegating allocation to the Democratic and Republican National Committees, that would be permissible under the proposal.

\(^{219}\) It is hard to see how any plan could benefit incumbents, and at the same time comply with the demand of many for more competitive elections.


\(^{221}\) See Malbin, supra note 7, at 241-42.
from allocating party funds to challengers. Each incumbent enjoys all the benefit of the enhanced security, however slight, from spending on his or her own campaign, while the benefit of increased party strength is shared with all the other incumbents.

Jacobson's analysis, uncharacteristically, appears to be mistaken. It would be correct if the incumbents had to decide individually whether to give up funds for challengers, but by virtue of the decisions being centralized in the leadership, the incumbents are spared the 'free rider' problem. Each incumbent gives up a particularized benefit with the knowledge that others similarly situated are committed to doing the same. Suppose a party in the House has 200 members, and receives $60,000,000 for allocation. If the money were allocated to incumbents equally, with nothing for challengers, each incumbent would get $300,000. Suppose 150 of the incumbents face no realistic prospect of a serious electoral threat. If these 150 were asked individually to give up $200,000 each for a challenger's fund, Jacobson would be correct that they might be reluctant to comply. However, if the centralized leadership decides to put $200,000 for each of the 150 into a challenger's fund, each gets $30,000,000 worth of collective benefits for a $200,000 individual sacrifice. If the collective good really is a collective good, then by definition, this is a good deal. This is especially so, since the leadership could hold a portion of the public funds in reserve until the late stages of the campaign, to be able to come to the aid of any incumbent facing unanticipated difficulties.

Another possible objection is that the proposal would give rise to "bossism" by giving too much power to the leadership. It is easy to exaggerate the extent to which this would happen. First, the membership has the ultimate ability to unseat the leadership, so that the power relationship would be a two-way street. Second, the leadership's main concern is always likely to be to elect and reelect party members, so that it may be reluctant to exercise the sanction of withholding funds from recalcitrant members. Furthermore, to the

222. See Jacobson, Republicans and Democrats, supra note 183, at 603-05. Jacobson defines a collective good problem as one that occurs when "rational individual behavior produces inferior collective results." See id. at 609.

223. See id. at 604.

224. See id. at 604 (stating that the principal interest of each candidate is winning and that the party's collective-interests are secondary).

225. See Jacobson, 1980-82 Congressional Elections, supra note 193, at 51 (stating that "leaders are not about to risk losing congressional seats by withholding support and thereby deliberately weakening their incumbents.")
extent strengthening of the party legislative leadership does occur, it may be more good than bad. For many years, observers have been calling for an increase in the cohesiveness and discipline of political parties. Indeed, in a different way, the next portion of the reform package is intended to move in precisely that direction.

2. Public Financing to Legislative Party Leadership for Generic Party Advertising.—This portion of the proposal supplements the previous one by promoting competition in Congressional elections, and to that extent helps resolve what has been seen as the insoluble dilemma of campaign finance reform. However, as just indicated, its main rationale is to strengthen the party system, and in that sense it is, admittedly, somewhat gratuitous as a portion of this package.

Generic advertising is advertising urging a vote for candidates of the party generally rather than for a specific candidate. The Republicans used generic advertising in the 1980 and 1982 campaigns, as did the Democrats to a lesser extent, but the practice appears to have declined. To stimulate a revival, each party in each chamber would receive an appropriation, perhaps amounting to $10 million each.

The hope would be that by assuring a substantial amount of campaign communication focused more on party performance as a whole than on the personal qualities of the candidates, the partisan element in legislative voting might increase and the personal element decrease. If this were to occur, legislative incumbents would have

226. For a review of the extensive literature, see L. Epstein, Political Parties in the American Mold 3-8 (1986).
227. See supra notes 214-15 and accompanying text.
228. See F. Sorauf, supra note 27, at 131-32 (describing the Republican's generic advertising campaign in the 1980 election); see also Jacobson, 1980-82 Congressional Elections, supra note 193, at 50 (noting that in the 1982 election, the Republican Party spent $11 million on a national advertising campaign urging voters to "stay the course").
229. If funds were appropriated solely for generic advertising, a more precise definition of the term would be essential. One approach would be to prohibit any candidate's name from being mentioned. This would be unduly restrictive, for the most effective party advertisements might include praise or criticism of the chamber's leaders or of other prominent members. Another possibility would be to prohibit the ad from running in the district of any candidate mentioned. This would be cumbersome and petty. If the Democrats produce an ad praising Speaker Foley, or the Republicans produce one criticizing him, does it make sense to say that it cannot run in the Washington media market including his district? The best statutory definition of generic advertising probably would require that no more than, say, 25% of the money spent to run the ad be for airing or distribution in a single state. Additional details would need to be worked out, covering, for example, the treatment of media markets covering more than one state.
a greater incentive to work for party accomplishment rather than simply for personal positioning and posturing in a manner intended to satisfy constituents who are only slightly attentive.\textsuperscript{231} Adoption of the proposal would be nothing more than an experiment, but one that has considerably greater potential for moving the political system in the direction of responsible party government than some of the proposals of the party renewal movement.\textsuperscript{232}

3. \textit{Aggregate Limit on (Relatively) Unrestricted Contributions}.— The idea of putting an aggregate limit on the total amount a candidate can receive from special interest sources first attracted prominence when it was incorporated into the Obey-Railsback bill\textsuperscript{233} that was approved by the House in 1979, only to be killed by a threat of filibuster in the Senate in 1980.\textsuperscript{234} The Obey-Railsback bill applied only to contributions received from PACs.\textsuperscript{235} The present aggregate limit applies to all contributions that are not permitted by either of the next two portions of the proposal. $50,000 could be received by a House candidate under this heading.\textsuperscript{236}

The purpose of an aggregate limit is to reduce the pressure imposed by contributions. An artificial limit is put on the demand for


\textsuperscript{234} See Malbin, supra note 7, at 235.

\textsuperscript{235} See 125 Cong. Rec. 21162 (daily ed. July 27, 1979) (statement of Representative Obey noting that the bill was designed to restrict the role of special interest money); see also Malbin, supra note 7, at 235 (stating that the purpose of the Obey-Railsback bill was to add new PAC limits to the Federal Election Commission authorization bill).

\textsuperscript{236} I do not suggest dollar amounts for the aggregate limits for Senate campaigns. Presumably, they would be on a sliding scale, depending on the size of the state. The main point is that the limits should be considerably lower than what an ordinary incumbent would expect to be able to raise in funds subject to the aggregate limit.
contributions, while the supply presumably remains constant. The result is that the "price" of the contribution in pressure or influence declines. In ordinary English, the hope is that the candidate will not feel overly indebted to the special interest contributor if there are dozens more lined up outside the door, ready to contribute in case the first contributor becomes dissatisfied. In line with this theory, the goal is to make it as easy as possible for the candidate to get to the limit. Accordingly, there is much to be said for allowing contributions within the aggregate limit from all sources, including corporate and union treasuries, and without limit as to size. However, the conventional antipathy to contributions of very large size or from corporate or union sources suggests that it is most politic to stipulate that within the aggregate limit, the currently existing contribution limits are applicable.\textsuperscript{237}

It may be asked why there should be any provision at all for special interest contributions if the objective is to eliminate conflict of interest. The answer is that in the spirit of moderation described in Part Three,\textsuperscript{238} competing considerations must be balanced. Here, the relevant consideration is the desire to provide some foothold for the candidate who, for whatever reason, is allocated little or no money by the party leadership.\textsuperscript{239} This and the following two portions of the package make it possible, although difficult, to raise enough funds to put on at least a barely credible campaign.

If we think of legislative elections as party affairs to a large extent, as this package is designed to encourage us to do, then the notion that the party leadership should allocate resources in legislative elections becomes a natural one. But the doctrine of responsible party government never will and probably never should entirely displace the American traditions of progressivism and individualism, which demand that a man or woman have at least a chance of getting elected even if rejected by the party leaders. It is true that independently wealthy candidates able to finance their own campaigns would be some check on the party leaders' monopoly of resources. Progressivism and individualism, however, should not be limited to

\begin{itemize}
\item \textsuperscript{237} I believe all the major aspects of the package in this Part are constitutional, but have not attempted to engage in constitutional analysis in this essay. The aggregate limits are probably most susceptible to attack under current doctrine. For a brief and informal analysis of the constitutional considerations applicable to aggregate limits, see Lowenstein, Campaign Finance and the Constitution, \textit{supra} note 179, at 7.
\item \textsuperscript{238} See \textit{supra} notes 153-201 and accompanying text.
\item \textsuperscript{239} See Jacobson, \textit{Republicans and Democrats}, \textit{supra} note 183, at 606 (discussing why party leadership would deny funds to candidates).
\end{itemize}
the upper fraction of the upper one percent. The aggregate limit on special interest contributions is intended to be small enough to minimize pressure from this source, while at least permitting a candidate to raise seed money on which to try to build on the basis of the small individual contributions permitted by the next portion of the package.

4. $100 Limit on Individual Contributions.— In addition to the general aggregate limit just discussed, the reform package contains a second aggregate limit for "qualified" PACs, to be described below. Except within these two aggregate limits, no contributions could come from anyone but individuals, and then in amounts not greater than $100.

This suggestion runs against the grain of proposals to increase the current individual contribution limit of $1,000.240 Often, these proposals are explained as a means to reduce the relative significance of PAC contributions.241 This approach confuses form with substance. There is nothing about the PAC form that makes PAC contributions any worse than other contributions. The problem is the money contributed in pursuit of a legislative strategy. This can be money from individuals just as easily as money from PACs, especially when contributions of significant size can come from a large number of individuals in the same firm or industry.242

The rhetorical question is often asked, can a legislator be bought for $1,000?243 The answer is that such a contribution can exert pressure when it is the largest that can be made and, as we have just seen, it can be multiplied without limit by contributions from others with similar interests. A $100 limit will make it much more difficult to use individual contributions as part of a legislative strategy. The limit also serves the egalitarian goal of reducing, though by no means eliminating, the disparate ability of people of different income levels to influence policy by means of an electoral strategy. It does this with a minimal effect on libertarian values.

240. See, e.g., Fleischman & McCorkle, supra note 178, at 288 (suggesting a $5,000 contribution limit).

241. See, e.g., id. (explaining that "[h]igher levels for individual contributions to parties and directly to candidates means that more money will bypass the PAC contribution channel.").

242. See Sabato, supra note 7, at 178 (stating that "the root of the problem in campaign finance is not PACs, it is money.").

243. Of course, the $1,000 figure understates the situation under current law. An individual and spouse can each give a total of $4,000 to a candidate who runs in a primary and general election. See E. Drew, supra note 47, at 12.
First, people are free to express themselves by making contributions that always will lend incremental assistance to the campaign. Second, the existence of public funding assures that ample resources will be available for debate where it is most relevant. Third, the outlet of independent expenditures would still be available.

5. Aggregate Limit on Contributions from Qualified PACs.—Given the degree to which the public debate over campaign finance has tended to center almost entirely on PACs, it is surprising that there has not been more objection to the fact that PACs have been permitted to contribute $5,000 to candidates whereas individuals have been limited to $1,000. There is a justification for this discrepancy, but it applies only to certain PACs. Individuals who make very small contributions may need to pool their contributions to have any effect. Otherwise, the costs of determining to whom to contribute, and writing a check and sending it might consume a large percentage of the contribution itself. In such instances, pooling, if not a necessity, is at least a great convenience. Those able to make larger contributions are better able to make their contributions as individuals.

There are two major types of PAC that receive their funds in small contributions. The first is composed of labor union PACs. Labor PACs are often in competition with business PACs, whether they are pursuing a legislative or electoral strategy. If there were no provisions permitting extra contributions by PACs whose receipts come from small contributions, labor would be placed at a disadvantage compared to business. Business and labor would have an equal opportunity to contribute within the basic aggregate limit. Beyond that, individual business managers could give substantial sums collectively in amounts of $100 each. The provision for a separate aggregate limit available only to PACs relying on small contributions is intended at least partially to offset that inequality.

The second type of political action committee relying on small contributions is composed of ideological PACs. These groups ordinarily pursue an electoral strategy, and they provide an additional avenue of expression for individuals who support their goals. They

244. This would not be true under expenditure limits if the campaign had already raised as much as it was allowed to spend.
246. See id. § 441a(a)(1)(A).
247. See generally Latus, Assessing Ideological PACs: From Outrage to Understanding, in Money and Politics, supra note 7, at 142 (stating that ideological PACs have electo-
have been subject to criticism, some of which is less applicable to the extent they contribute to candidates rather than make independent expenditures. This proposal would, within limits, permit them to make such contributions.

Specifically, a PAC would qualify by accepting contributions only from individuals, and only in amounts of fifty dollars or less. A candidate could accept contributions from qualified PACs up to $5,000 each, and up to $50,000 in the aggregate. It should be noted that although it is assumed this device would be most convenient for labor and ideological groups, other groups such as businesses and trade associations would be free to employ it as well.

6. Independent Spending.— The debate over independent spending has been particularly polarized. Some regard independent spending as an outlet for individual expression and a potential source for introducing new subjects and ideas into a campaign debate. Others see it as an evasion of whatever reform limits are in place that is unfair to the targeted candidate at best, and potentially corrupting at worse. Plainly, independent spending can be any of these, though at the small or medium-sized levels it is more likely to wear its benevolent aspect than at very large levels.

To date most independent spending has been by ideological groups. Although two trade associations have been among the larger independent spenders, by and large independent spending seems to have been engaged in as an electoral rather than a legislative strategic device. This could change if other avenues for a legislative strategy are closed off.

Aside from the question of pressure, when large amounts of in-

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248. See, e.g., Sabato, supra note 7, at 174-76 (noting that “the frequent use of negative, even vicious, messages and tactics by independent groups makes any sort of civility in politics much more difficult to achieve.”).

249. An increased contribution limit for PACs that receive only small contributions has been proposed before. See, e.g., California Comm'n on Campaign Fin., The New Gold Rush: Financing California's Legislative Campaigns 228-29 (1985).

250. See, e.g., Buckley v. Valeo, 424 U.S. 1, 47-48 (1975) (holding that a proposed ceiling on independent expenditures failed to serve any substantive government interest and were therefore unconstitutional under the first amendment).

251. See, e.g., E. Drew, supra note 47, at 134-35.

252. See generally Latus, supra note 247, at 142-47, 149-50 (discussing ideological PACs and the large independent expenditures among such PACs).

253. See F. Sorauf, supra note 27, at 113.

254. See Jacobson, Parties and PACs, supra note 30, at 140; Latus, supra note 247, at 142-63.
dependent spending occur on one side of a campaign, it seems unfair to the opposing candidate, especially since independent spending often goes for negative advertising.\textsuperscript{265} It is true, as Malbin has pointed out, that independent spending may not help the beneficiary as much as direct spending, and that in some cases it may be of no help at all or even counter-productive.\textsuperscript{266} He concludes that it is unfair to the beneficiary for the government to match the independent spending with grants to the opposing candidate.\textsuperscript{267}

Although Malbin is correct in his premise that independent spending is not always helpful, his conclusion does not follow. Ordinarily, independent spending will be helpful, at least to some degree. On average, providing offsetting payments to the opposing candidate should be fairer than not doing so.

A final reason for doing something about independent spending is that doing so is one of the major attractions of campaign finance reform for incumbents, whose votes are needed to pass legislation.

For all these reasons, my package matches independent spending, but only above a high threshold. The rough idea should be that independent spending amounting to one or two full page newspaper advertisements throughout the jurisdiction, or a few spot advertisements on television or on the radio should not trigger matching payments, but much more than that should. A possible approach would be that in a House race, up to $15,000 would not be matched, from $15,000 to $30,000 the opposing candidate would receive two dollars for every three dollars of independent spending, and above $30,000, the independent spending would be matched dollar for dollar.

This matching proposal should not be offensive to libertarians. Independent spenders would have considerable leeway to disseminate their ideas before matching begins. Even after matching begins, it is hardly a sympathetic ground for objection that speaking has the effect of triggering resources permitting one’s opponent to reply.

C. Something for Everyone

The package I have proposed commends itself on three major grounds. First, it drastically reduces the opportunity for contributors
to employ a legislative strategy, and thereby reduces the corruption inherent in the campaign finance system. Second, it promotes electoral competition, and does so in an efficient manner by permitting the parties to channel public funds to the districts where they can be used most effectively. Third, it holds forth, if not the promise, at least the potential for shifting our system in the direction of responsible party government by assuring that a significant portion of campaign debate will be cast in partisan terms. This, as a consequence, encourages voters to hold candidates accountable, at least in part, on the basis of party performance.

Consistent with these broad purposes, and in the spirit outlined in Part III, I have attempted to include in the package something for everyone. The following is a brief comment on how the polar positions of each of the major cleavages in the campaign finance debate are affected.

1. Egalitarians.— Several of the major inegalitarian features of the current system are ameliorated. Reducing the individual contribution limit to $100 does not level the playing field much for the poor, but it does for the broad middle class. More importantly, because the proposal reduces private contributions to a more supplemental role, those who cannot or do not contribute may find their relative position improved.

More fundamentally still, party renewal enthusiasts claim that parties in a system of responsible party government will be better able to promote the interests of the poor than in a candidate-oriented system. If so, there could be substantial egalitarian gains. Admittedly, these chickens are a long way from being hatched.

Finally, though perhaps it is not strictly an egalitarian gain, if the narrow interests that employ a legislative strategy in their contributions are losers, dispersed interests such as those of the environment, consumers and small business might be gainers. This too is speculative, for as Heard and others have warned, concentrated wealth finds many avenues for the pursuit of power, and removing one of them, even if that can be done, may not have dramatic effects on overall outcomes.258

2. Libertarians.— The only losses for libertarians in this package are the reduction in the individual contribution limit and the new aggregate contribution limits. Except for the most doctrinaire, these losses do not seem severe. For those willing to look beyond

258. See A. Heard, supra note 1, at 90.
form to real consequences, the gains in genuine debate and dialogue resulting from a substantial inflow of money where it can be used most effectively will offset these minor losses. The best news for libertarians is what is not included in the package: spending limits. Those mythical candidates who, in the fantasies of libertarians, can raise massive sums in contributions of one dollar each are free to run their mythical campaigns free of interference from this proposal.

3. Republicans.— If Republicans are serious about their proclaimed desire for campaign reforms that will expand the role of the parties in federal elections, this proposal should make them ecstatic. If this proclaimed goal is simply a front for wanting to enlarge the advantage that superior fund-raising has given them over the Democrats, this plan will not meet their needs. However, they cannot hope to obtain a plan that accomplishes that objective from a Democratic Congress. In the plan proposed here, the equalizing effect of the public funding would dilute the Republican advantage, but this would be offset to some extent by the repeal of limits on party assistance to candidates. Furthermore, as the minority party, the Republicans gain from the assurance of a continuous and generous flow of funds for challenges to incumbents.

4. Democrats.— The Republican advantage in party fund-raising is not eliminated, but the assurance of significant funding for both parties means that the Democrats' absolute disadvantage is much higher on the curve of diminishing returns. The assured money for serious challenges might increase slightly the chances of the Democrats losing their majority in the House. However, compared to other possible changes that could have the same effect, such as a liberalization of party spending without public financing, or an increase in the amounts wealthy contributors can inject into campaigns, this proposal contains an important benefit for Democrats. It was only because the Democrats were the majority party that they were able to increase their share of business PAC contributions during the 1980s. If they were to lose their majority, they would face a financial disaster. The proposed plan is a form of disaster insurance for the Democrats.

5. Challengers.— It might seem that some challengers will be

259. See Fleischman & McCorkle, supra note 178, at 279.
260. See Jacobson, Republicans and Democrats, supra note 183, at 624.
261. See id. at 603; supra text accompanying note 183.
262. See supra text accompanying notes 49-51.
263. See, e.g., Jacobson, Parties and PACs, supra note 28, at 141.
better off and some worse off, since some will have access to a major new source of funding, while others will face new restrictions and get none of the new money. However, most challengers who receive little or no money from the party leadership will be the same ones who receive little in large contributions under the present system, and for the same reason, namely, that their cause is nearly hopeless.

The concern here is not really for challengers as a group, but for the public interest in a competitive system. That public interest exists for two reasons, described by Jacobson as "keeping legislators responsive" and "letting voters change the direction of policy by replacing elected officials." Most observers would agree that the first interest is amply satisfied by our present candidate-oriented system. The second goal requires more than a challenger's ability to mount a competitive campaign. So long as campaigns remain candidate-oriented and isolated from other campaigns in other districts, the second goal will not be met, even if several dozen congressional seats change hands every election. The present plan, because it promotes party discipline and encourages campaigns based on party performance rather than on candidate idiosyncracies, holds out a prospect not only of increased competition, but of competition that can fulfill the purpose for which it is touted.

6. Incumbents.— Here's the rub. Most people who are not incumbent legislators believe that increased competition would be desirable under present circumstances. Plainly, any plan that increases competition will be inconvenient for incumbents. In addition, the proposed plan gives decision-making power to the parties over resources that are vital to the incumbents and the parties. Nothing can be done about this, and if these features assure that the plan can never seriously be considered, so be it. However, if these features are not fatal, the plan contains others intended to sweeten the bitter pill for incumbents.

First, the control is in the hands of the party leaders in the chamber, and therefore ultimately in the hands of the incumbents. Second, although the plan assures the funding of numerous serious challenges, it also assures ample resources for the defending incumbents. Although the increased spending is of greater benefit to challengers, the increased spending of incumbents can make a difference. Furthermore, incumbents can expect to defeat even well-

264. Id. at 194.
265. See supra text accompanying notes 208-09.
266. See supra text accompanying notes 210-11.
funded challengers most of the time. Third, in contrast with public financing plans that assure funding to all challengers, the plan assures incumbents who are not targeted by the opposing party that they will not have to face publicly subsidized opponents who, although they may have little chance to win, can still create a nuisance for the incumbent. Fourth, the plan protects incumbents in the event of a massive influx of hostile independent spending. Finally, by greatly reducing the importance of special interest contributions, the plan relieves incumbents from systematically placing themselves in positions of conflict of interest.

D. Comparison With Other Proposals

Final insight into the nature of the proposal can be gained by comparing it with two competing ideas that have received considerable discussion in recent years.

1. Tax credits.— Prior to the tax reforms of 1986,\textsuperscript{267} a tax credit, up to an individual limit of $100, could be taken in an amount equal to fifty percent of any campaign contribution to candidates in federal, state or local elections.\textsuperscript{268} Recurrent proposals are heard for restoration of the tax credit, including proposals that the amount of the credit be raised to one hundred percent.\textsuperscript{269} The theory is that if people understand that the government will reimburse much or all of a contribution, they will be encouraged to make small contributions, causing candidates to solicit those small contributions, resulting in a significant new source of clean money.

No one knows to what extent tax credits induce increased contributions.\textsuperscript{270} One thing that is clear is that tax credits represent an extremely inefficient method of publicly financing election campaigns. We know from current experience that a number of people do make contributions in the absence of tax credits. If tax credits are reinstated, a significant percentage of the lost revenues—possibly almost all of them—will be paid not for new campaign funds but as a gratuitous tax benefit. In short, tax credits are not worth it. In 1984, tax credits totaled $257.4 million.\textsuperscript{271} This is more than the roughly

\textsuperscript{270} See F. Sorauf, \textit{ supra} note 27, at 51.
\textsuperscript{271} \textit{Id.}
estimated cost of my proposals—$220 million over a two year cycle, consisting of $180 million for public funds to candidates allocated through the parties and $40 million for generic advertising—without nearly the benefits. While that $257.4 million was lost, the serious problems that gave rise to this Symposium were in full swing.272

2. Level-up.— In an article that has attracted considerable attention, Joel Fleischman and Pope McCorkle advocated what they called the “level-up” approach rather than the “level-down” approach they attributed to traditional reformers.273 By “level-up,” they refer to government action that provides resources to those in need, and “level-down” refers to government action that prevents those with extra resources from using them to gain advantage.274 This idea, like so much that is worthwhile in the campaign finance field, goes back to Alexander Heard, who expressed a preference for “positive action by government” over “the negative restrictions of the past.”275

Heard’s insight was good, and Fleischman and McCorkle show that as a theory, it has many attractive features.276 But the burden of this Article has been that the campaign finance problem is too deeply rooted, too intertwined with a host of values and interests, to be resolved by any theory that looks at the problem from only one angle. Fleischman and McCorkle provide some unwitting empirical confirmation of this, for their good theory leads them to a bad proposal. The core of their proposal is to provide an amount of public financing in a range of $50,000 to $75,000 to each major party candidate for the House277 and to increase the contribution limit for individuals from $1,000 to $5,000.278

The grants they would give are hardly more than tokens com-

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272. A 100% tax credit would waste twice as much in tax relief for people who would make contributions in the absence of tax incentives. It might induce more contributions than the 50% credit did, but to the extent it succeeded, its cost in lost revenues would soar. It is sometimes proposed to deal with this problem by limiting the credit to those who contribute to federal elections. This would only exacerbate the problem of campaign finance at the state and local levels, where the problem is sometimes at least as serious as in federal elections. Tax credits are a bad idea, but if they are adopted, they ought to be applicable to all federal, state and local elections, including ballot measure elections.

273. See Fleischman & McCorkle, supra note 178, at 215.

274. See id. at 294-95 (explaining how a “level up” framework gives a boost to challengers or otherwise poor candidates, while a “level down” system seeks to cut off the disproportionate participatory influence of the wealthy in the campaign finance process).

275. A. Heard, supra note 1, at 431.

276. See Fleischman & McCorkle, supra note 178, at 275-98.

277. Id. at 277.

278. Id.
pared with what it takes to run a competitive campaign for the House. Their grants would yield a marginal increase in the quantity of campaign debate, but no other benefits. Any increase in competitiveness would be barely noticeable. This is because the greatest share of the money they would give away would go either to safe incumbents with no need for it, or to hopeless challengers. The increase in the individual contribution limit would simply aggravate existing problems of corruption and inequality.

In contrast, by providing for allocation of public funds to the districts where they are needed, the present proposal would be far more effective in increasing competitiveness. It would be a big progressive step rather than a modest regressive step against corruption and inequality. And unlike the Fleishman-McCorkle proposal, it at least aspires to improve competitiveness in a manner that serves the broader needs of the political system, rather than as an end in itself.

V. CONCLUSION

The American people have long believed what some scholars have vigorously denied. Our campaign finance system is corrupt and its poison is a serious blight on American government, not necessarily because its tangible consequences are great, but precisely because its consequences can never be known. The scholars have assumed that the public suffered from an unsophisticated understanding of how government works. This Article contends that the scholars have suffered from an unsophisticated understanding of the nature of corruption.

If I am right in this contention, one of the goals of campaign finance reform, the reduction of corruption, should be clear and the object of universal agreement. But the campaign finance system cannot be modified for that, or any other purpose, without affecting many diverse interests and values. Solving the problem of corruption in a manner that can win the assent of those standing behind those interests and values has proved to be an excruciatingly difficult task.

The proposals in Part Four demonstrate that if the task of

279. It is also true that their program is cheaper than mine. If the $120,000,000 I proposed in grants to House candidates were divided equally among all major party candidates, each candidate would receive about $138,000. This would buy somewhat more campaign debate and might bring about a noticeable, though slight, increase in the number of competitive campaigns. However, it would still do nothing to alleviate the central problem of conflict of interest created by the campaign finance system, and it would do nothing to move the system in the direction of responsible party government.

280. See supra notes 216-57 and accompanying text.
accommodating so many conflicting and cross-cutting demands is hard, at least the implement of campaign finance reform is a very flexible one. This flexibility is its curse, since demands are made from every direction. It is also a source of opportunity. Some of the dilemmas that seem most intractable can be resolved with sufficient effort and ingenuity.

It is unlikely the proposals espoused in this Article will sweep the ground before them. Even I shall not be prepared to commit myself to them wholeheartedly until they go through the crucible of criticism from various quarters. At a minimum they will need modification and refinement.

Even if, as is likely, the proposals fall of their own weight, such exercises are necessary. Alexander Heard wrote that those “who would work significant reforms must count their time in decades.”281 It has been fifteen long years since the successes and the failures that originated in the FECA amendments. No one can say how long it will be before the people will require their elected leaders once more to clean house. No one can say when, but the time will come.

281. A. Heard, supra note 1, at 455-56.