

# Votes, Money, and Good Politics: The Ground Rules of American Political Finance

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## ABSTRACT

While efforts to regulate campaign finance in the United States of America date back to the early 20th century, current policies date from the 1960s and were critically influenced by the Watergate scandal of the early 1970s. American laws are aimed primarily at preventing bribery by large individual contributors, and thus rely heavily upon disclosure of contributions and expenditures. Individual contributions are limited, both in the aggregate and in the amounts that may be given to particular candidates. Contributions from Political Action Committees to particular candidates are limited, but total donations are not. Public funding is available only for presidential candidates, and total campaign expenditure limits apply only to presidential candidates who accepting public funds. Relatively little attention is given to the state of political competition; to the question of whether there is enough campaign money, broadly enough distributed. Even less attention is given to *extortion*: while the legislation, and most public concern, are based on the assumption that donors hold considerable power over candidates, the reverse is more likely the case – particularly for incumbent officials. This factor, together with disclosure requirements, make it more difficult for challengers to fund competitive campaigns. Other current issues of concern include "soft money" – funds given to parties outside the scope of the current regulations – and "issue advertising" – media expenditures by interest groups that do not count as campaign contributions. In this paper I explore a range of policy options, including the use of subsidies to enhance competition; alterations to the disclosure system, and "blind trusts" which would end public disclosure of contributions altogether; and ways of enhancing competition by applying different rules to individual and PAC contributions, and to incumbents and challengers. Campaign finance reforms should enhance the overall openness and competitiveness of politics, as well as prevent bribery and extortion, and must be integrated with broader reforms of the state.

## 1. INTRODUCTION

New and established democracies alike confront the challenge of defining and maintaining acceptable relationships between private wealth and public power. Open and competitive political and economic processes, and well-institutionalized relationships between them, are necessary for broad-based, sustainable democracy, and for economic growth. Two decades of liberalization around the world has been aimed at these goals. But markets and democratic politics differ in fundamental ways. Democracy presupposes a degree of equality (“one person, one vote”) and rules of procedure aimed at aggregating private interests into broadly supported public policies. Democratic institutions draw legitimacy from the consent of the governed – who have the power to change governments -- and are presumed to be accountable to the population as a whole. Political competition is vital, but is restricted to certain times, processes, and kinds of outcomes; a democratic state remains the state and possesses sovereign power. Markets, by contrast, involve active competition, few if any presumptions of equality, and attempt to serve diverse private interests without aggregating them. Actors are accountable to shareholders, lenders and their own best interests; most of the rules applying to them are aimed at encouraging orderly market processes, not particular kinds of results. Most people have little say regarding the identity or activities of major economic decision makers. Political regimes hold power over a fixed territory and population; markets are increasingly global. As a result, markets are influenced by forces and interests well beyond national boundaries, and this in turn can constrain government in ways that override political mandates. While open and legitimate links between them are essential to development, the differences between political processes and markets mean that relationships between them must be carefully conceived in order to protect the values and vitality of each domain, and to deny either the power to exploit the other. What sorts of connections between wealth and power should be encouraged and protected, and which are to be prevented and penalized?

Nowhere do these questions become more pressing than in the area of campaign finance regulations. Democracies of all sorts are grappling with the question of how to fund the

expensive, yet essential, processes of electoral politics without allowing excessive influence by financial interests, or starving the political process and impeding free and open debate. None has yet found conclusive answers. In this paper, I will review the origins and essentials of the current political finance system in the United States, emphasizing both its virtues and its problems, and drawing out the implications of the choices we have made. My goal is not to make judgments about the people and parties involved in the Chilean politics. Even less do I suggest that the United States represents an ideal. Rather, I hope to identify ways in which campaign finance regulations might prevent or inhibit corruption, *and* encourage and reward good politics.

The significance of corruption is clear to all. Serious corruption can reduce and distort economic growth, reward economic and bureaucratic inefficiency, weaken the accountability of government, and damage the confidence of the people in those who rule. Corruption is a serious concern not only because of the resources that are stolen and the political opportunities that are lost; it is also a symptom of deeper problems in both politics and the economy. Moreover, corruption tends to benefit privileged people and groups while leaving few economic or political options for the poor and politically weak. For these reasons, serious corruption can become entrenched among political and economic elites and, facing little direct opposition, can last a long time.<sup>1</sup>

Good politics is not just politics free of corruption. It is a valuable process in its own right, enabling people to have a say in decisions that affect their lives, adding to the vitality of civil society, building links between society and elites, enhancing the political skills of the people, and helping the poorest and weakest become less vulnerable. Yet it received relatively little attention as American legislators debated and enacted current policies. While most agreed on

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<sup>1</sup> Michael Johnston, "What Can Be Done About Entrenched Corruption?", pp. 149-180 in Boris Pleskovic (ed.), *Annual World Bank Conference on Development Economics 1997*. Washington, DC: The World Bank, 1998). Originally presented, 9th Annual World Bank Conference on Development Economics, Washington, DC, April 30, 1997.

the practices that were to be fought, there was little consideration of what ought to be encouraged and rewarded. As a result major opportunities to enhance the vitality of politics, and to restore public trust, were lost.

Good politics upholds important values, but also involves several paradoxes:

- Good politics is open and competitive with electoral outcomes that are not foreordained, yet yields results that are decisive and enjoy broad-based support
- Good politics engages self-interest, yet takes place within a broad consensus regarding acceptable rules, procedures, and goals
- Good politics offers citizens genuine alternatives, yet not so many that mandates are fragmented and winners cannot govern
- Good politics mobilizes broad segments of society – not just elite factions -- yet does not confer total power (or permanent defeat) upon any of them; playing the role of Opposition does not amount to accepting permanent powerlessness or poverty
- Good politics confers real governing power upon winners, yet holds them accountable for their actions; winners respect the rights of losers, and use state power and resources to govern the whole society, not just to reward themselves and their backers

As these five points suggest, good politics involves a balance among vitality and order, openness and decisiveness. Clearly these are ideals, not realities: in the United States we fall short of several of these standards, notably the third and fifth. Many citizens believe the political process is not particularly open to their participation or receptive to their views, and that between elections officials do not care about citizens or the promises they have made. A 1997 Gallup survey found that more respondents said elected officials in Washington are influenced by

pressure from contributors (77%) than by the best interests of the country (19%), and that more saw elections as “for sale to the candidate who can raise the most money” (59%) than as “generally won on the basis of who is the best candidate” (37%). Finally, 59% said that even if major reforms are enacted, “special interests will always find a way to maintain their power in Washington”.<sup>2</sup>

Such perceptions are common to many democracies;<sup>3</sup> indeed, they reflect the inequalities of society itself, and the fact that while all may participate not everyone can win. But there are also aspects of the American system that intensify these misgivings. Political parties are weak, poorly organized, and exert relatively little discipline upon elected officials. The separation of powers, and federalism, mean that election results are often less than decisive, and promised changes do not occur. Expensive, media-intensive campaigns – a must, in a system of weak parties, low levels of participation, and an increasingly suburban and exurban population – require major financial resources, and yet do little to engage the electorate. Thus, most voters confront a system that raises their expectations in symbolic ways but usually yields up weak mandates, and that delegates power to distant people and poorly understood processes. It is a fundamental error to say that elections make no difference; still, American campaigns often do not bring out the differences an election *will* make, nor clarify the connection between the votes people cast and the policies they get.

In this paper I assess current policies regulating campaign finance in the United States of America from the standpoint both of preventing corruption and enhancing good politics. I will suggest that while we have been generally successful at inhibiting direct bribery of elected

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<sup>2</sup> Gallup Poll Archives, “Americans Not Holding Their Breath on Campaign Finance Reform”. “The results are based on telephone interviews with a randomly selected national sample of 872 adults, 18 years and older, conducted October 3-5, 1997.” Estimated margin of error was  $\pm 3\%$ . Results are reported at [http://www.gallup.com/POLL\\_ARCHIVES/971011.htm](http://www.gallup.com/POLL_ARCHIVES/971011.htm).

<sup>3</sup> Michael Johnston, “Disengaging from Democracy”, *International Social Attitudes: The 10th BSA Report*. (Aldershot: Dartmouth, 1993).

officials by private interests, we have done little to foster good politics. Indeed, in important respects the current reforms have reduced political competition, increased public distrust, and inhibited the responsiveness of the system. Moreover, the American laws do little to prevent *extortion* – that is, the ability of elected officials to put pressure upon private interests. Disclosure – the most pervasive, and most broadly-supported, aspect of the current system – ironically may worsen these problems. Current contribution and matching-fund limits, fixed since 1976, have been so eroded in real value by inflation that candidates must make fundraising nearly a full-time project. Other issues of more recent origin – "soft money" and "issue advertising" chief among them – also illustrate problems with, or controversial aspects of, the current legislation. The current debate over how to "reform the reforms", I suggest, should consider ways to free up the flow of political funds, particularly to challengers. This could be done by raising contribution limits substantially for individuals, and more moderately for Political Action Committees (PACs), by providing campaign subsidies linked to evidence of broad-based support (particularly to challengers, early in the campaign), and by offering tax incentives to individual contributors. We should revise disclosure systems too limiting the publication of contribution data to large contributions only. The idea of "blind trusts", a scheme that would end public disclosure of contributions altogether, may offer some advantages in an American context, and even more for Chile. We should consider innovative ways in which public and private money could be combined to fund campaigns, and in which different rules might apply to individual and PAC contributions, and to incumbents' and challengers' campaigns. Finally, we must devote particularly careful attention to dangers of extortion. Any new approaches to campaign finance regulation, I argue, should be aimed at fostering good politics as well as at curbing abuses, and must be integrated into broader strategies for anti-corruption reform of the state – an issue to which I will return at the conclusion of this paper.

## 2. THE GROUND RULES OF AMERICAN POLITICAL FINANCE

Efforts to reform American political finance have generally come in response to scandals. The reforms enacted in the wake of Teapot Dome in the 1920s, or amended in major ways as a

response to Watergate during the 1970s, would not have prevented those scandals. But they have had major effects of other sorts – not all of them positive, and many of them unintended. Today outright bribery and abuse are by far the exception, not the norm, and the vast majority of campaigns do not break the law. Moneyed interests are powerful, but they have long been powerful in society at large for reasons that have little to do with political contributions as such.<sup>4</sup> Still, the role of money is a legitimate concern. “Soft money” (unregulated campaign donations and expenditures), the sheer cost of campaigns, the range of choices on offer at elections, and the role of ordinary citizens are important issues for anyone concerned about the health of democratic politics, and all are affected by current policy. Protecting the electoral system from corruption remains an important goal, only imperfectly realized. But fostering good politics is in many respects a more urgent challenge.

2.1 An Enduring Issue. Concern over the role of money in politics predates the Republic. Early campaigns for the Virginia House of Burgesses by such luminaries as George Washington featured widespread distribution of food and spirits<sup>5</sup> – a process some saw as vote-buying. The role of the Bank of the United States in underwriting Henry Clay’s 1832 presidential campaign gave President Andrew Jackson – seen by Bank directors as hostile to its charter renewal – an issue he used effectively in winning re-election.<sup>6</sup> The first federal law on political finance, enacted in 1867, “prohibited Federal officers from soliciting Navy Yard workers for contributions”.<sup>7</sup> The late nineteenth and early twentieth centuries were the heyday of organized machine politics in many large cities and in some states as well. Their campaigns featured widespread vote-buying and ballot fraud, the employment of “floaters” who voted many times, and physical

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<sup>4</sup> For a classic account, see E. E. Schattschneider, *The Semisovereign People*. ( ,1960).

<sup>5</sup> Thayer, *Who Shakes the Money Tree...*; Michael Johnston, *Political Corruption and Public Policy in America*. (Monterey, CA: Brooks-Cole,1982), Ch 6.

<sup>6</sup> CQ, *Money Politics*, p 3; Federal Election Commission, *Twenty Year Report*. <http://www.fec.gov/pages/20year1.htm>, Chap. 1, p. 1.

<sup>7</sup> *Ibid.*, Chapter 1, p. 5 at note 1.

intimidation of voters, activities financed by kickbacks and bribes from business interests as well as by outright theft of public funds. Perhaps the most notorious intrusion of private money into national politics came in the 1896 presidential election, when financier Mark Hanna and his wealthy friends raised an unprecedented \$3.5 million on behalf of William McKinley.<sup>8</sup> This led to the first serious proposal for public funding of federal elections, advanced by President Theodore Roosevelt in 1905. The 1907 Tillman Act did not provide for public funding, but did bar contributions by corporations and national banks – a prohibition that remains in force today. In 1910 House campaigns were required by law to disclose financial information – a requirement extended to the Senate in 1911.<sup>9</sup>

After the Teapot Dome scandals of the Harding administration, Congress enacted the Federal Corrupt Practices Act of 1925. In theory, this law imposed strict spending limits upon House and Senate campaigns – so strict that there was little hope of their ever being obeyed. But they applied only to campaign committees operating in two or more states, and no limit was set upon the number of committees a candidate could have. As a result it became common to set up hundreds of committees that existed on paper only, and whose life ended once the maximum contribution had been made in their name. Provisions for disclosure and public access to information were weak, and candidates could exempt themselves from spending limits and disclosure by claiming they had no knowledge of expenditures on their behalf. Finally, the law did not apply to primary election<sup>10</sup> campaigns at all – a major drawback in regions where winning the dominant party’s nomination was tantamount to election.<sup>11</sup> Despite its obvious weaknesses, or perhaps because of them – no candidate was ever prosecuted under its provisions, and no less a political operator than Lyndon Johnson termed it “more loophole than

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<sup>8</sup> FEC, *Twenty Year Report*, Ch. 1, p. 1.

<sup>9</sup> Ibid.

<sup>10</sup> “Primary elections” are those in which candidates are nominated for office, in which delegates are chosen for nominating conventions, or in which voters express a preference as to the nominee they would prefer. They are held in advance of the general election, which actually fills the office.

<sup>11</sup> Johnston, *Political Corruption*, Ch. 6.

law”<sup>12</sup> – the 1925 Act remained the legal basis for federal campaign finance for nearly half a century.

The Hatch Act of 1939 (amended in 1940, and again in 1993) extended federal regulations to primary elections and revised contribution and expenditure limits for Congressional campaigns. But its most sweeping provisions regulated political participation by federal employees (and by others, such as state and local officials and even some private citizens employed in federally-funded programs).<sup>13</sup> While the 1993 amendments loosened some of these restrictions, complex rules still restrict political participation by appointed officials. The Taft-Hartley Act of 1947, while aimed primarily at weakening labor unions, also made it illegal for both unions and corporations to make federal campaign expenditures in their own names. In 1966, Congress enacted legislation providing for public funding of presidential general election campaigns through payments to political parties.<sup>14</sup> This law was repealed a year later, but some of its major provisions – notably, a checkoff box on the individual federal income tax return allowing taxpayers to earmark a portion of their taxes voluntarily for the election-subsidy fund – were later implemented. Finally, in 1970 Congress enacted legislation that would have regulated campaign spending for television time; this bill was vetoed by President Nixon on freedom-of-speech grounds.

## 2.2 The Current Ground Rules

Like the 1925 legislation, the current law was heavily influenced by scandal – in this case, Watergate, which led to the resignation of President Richard Nixon. And like the earlier legislation, the current laws would have done little to prevent the scandal that shaped them. The

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<sup>12</sup> Anthony Lukas, *Nightmare*, p. 186.

<sup>13</sup> For a comprehensive discussion of the Hatch Act, see U. S. Office of Special Counsel, *Political Activity ("Hatch Act")*, <http://www.access.gpo.gov/osc/>

<sup>14</sup> Federal Election Commission, *Public Funding of Presidential Elections*, <http://www.fec.gov/pages/pubfund.htm>

story actually begins before Watergate: the Revenue Act of 1971<sup>15</sup> reinstated the \$1.00 income tax checkoff option, creating a presidential election campaign fund available to campaign committees, rather than to the parties themselves. The checkoff was implemented in 1973, and the first funds were distributed in 1976. The Revenue Act limited campaign spending by presidential nominees who accepted public funding to the amount of the public grant, and barred them from accepting private donations. At about the same time, Congress enacted the 1971 Federal Election Campaign Act (FECA).<sup>16</sup> It mandated extensive disclosure of campaign contributions and expenditures in all federal elections, both primary and general; placed limits upon media spending and the use of candidates' own personal funds; and repealed the 1925 legislation. The FECA also established a means by which any group, including labor unions and corporations, could pool voluntary individual contributions. This was the origin of the Political Action Committee (PAC) in the form we know today.<sup>17</sup>

These two laws laid down a new financial foundation for federal campaigns, and promised to produce information about campaign finance on a scale, and with an ease of access, that was unprecedented. But not before an interesting episode transpired: while the 1971 legislation set a fixed date for repeal of the 1925 law, its own provisions did not come into effect until sixty days after it was signed. President Nixon waited as long as possible before signing the bill, on February 2, 1972; as a result, the new law did not take effect until April 7, nearly a month after the old law's repeal on March 10. There was thus a period during which the country had no federal law on private campaign contributions, and during that time Nixon's Committee to Re-Elect the President engaged in corporate fundraising on an unprecedented scale.<sup>18</sup>

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<sup>15</sup> Public Law 92-178; 26 USC 9001 *et. seq.*

<sup>16</sup> Public Law 92-225; 2 USC 431 *et. seq.*

<sup>17</sup> While it was launched by labor union leaders in the 1940s, rather than created under the FCPA rules, many observers regard the AFL-CIO's Committee on Political Education (COPE) as the first political action committee.

<sup>18</sup> Lukas, *Nightmare*, 186-7.

2.3 Post-Watergate Amendments. Watergate led to widespread demands for a general cleanup of politics and, in 1974, to comprehensive amendments extending the 1971 legislation. The scandal helped create a general sense that there was too much money in politics, that both its sources and uses should be disclosed and regulated, and that ordinary citizens needed some way to make their influence felt. In this view the political process was basically sound – a common view was that while Watergate was bad the system had worked -- and would remain so if protected against excessive influence by moneyed interests. The state of political competition, the ease of entry for new groups and ideas, levels of public trust and participation, the role of political parties, accountability, and the decisiveness of election results were not extensively debated. Neither was the question of whether there really was too much money -- or too little, too unequally distributed, to allow healthy competition.

The amendments enacted in 1974<sup>19</sup> thus dealt mostly with the flow of funds. Limits were set on contributions from individuals, PACs, and parties, and upon spending by campaign committees. A provision for matching the first \$250 of individual contributions to presidential candidates during the primary phase was added too. While the 1971 FECA created major new law-enforcement and administrative functions, it had not created an agency to carry them out: functions were fragmented among the Clerk of the House, the Secretary of the Senate, the General Accounting Office, and the Justice Department. The 1974 amendments remedied this by creating a politically independent Federal Election Commission (FEC) described in the summary table following page 12. A final provision provided funds from the income-tax checkoff to political parties to cover the costs of their national conventions.

2.4 Campaign Finance and the Freedom of Expression. The major good-politics debate – and a limited one at that -- came in the course of a legal challenge to the 1974 amendments. Critics

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<sup>19</sup> Public Law 93-443; XX USC XX

saw limits on contributions and spending as curbing political expression, and thus as a violation of the First Amendment to the Constitution. They also raised separation-of-powers questions based upon the method of appointing FEC commissioners. The challenge was eventually taken up for review by the U. S. Supreme Court, in the case of *Buckley v. Valeo*.<sup>20</sup> On 30 January 1976 the Court largely upheld the 1971 law and its 1974 amendments, but still held some key elements unconstitutional. Limits on contributions were acceptable, in the Court's view, because of the government's interest in safeguarding the electoral process from corruption.<sup>21</sup> Public funding and disclosure likewise passed Constitutional muster. The First-Amendment issues, however, were more problematical: limits on expenditures, the Court held, "impose significantly more severe restrictions on protected freedoms of political expression and association than do ... limitations on financial contributions."<sup>22</sup> Ceilings on campaign spending were thus abolished for candidates not receiving public funding. Subsidies could still be limited, as could spending by those accepting subsidies, so long as the law allowed the option of refusing public funds. In practice, this meant that overall campaign spending ceilings would apply only to presidential candidates accepting public funding. Because no public funds were provided for Congressional races, no limits could apply to them. On the separation-of-powers issue – that is, questions related to the division of powers and equality among the branches of the federal government – the court ruled that the 1974 provision empowering Congress to appoint four of the six FEC commissioners was invalid, as the commissioners would be carrying out executive-branch duties.

*Buckley* invalidated significant portions of the federal campaign law just as the nation was embarking upon the first presidential campaign after Watergate. But the Court gave clear signals as to the changes needed, and Congress moved relatively quickly. Its 1976 FECA

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<sup>20</sup> 424 US 1 (1976).

<sup>21</sup> For an analysis of the Court's conception of corruption, see Thomas F. Burke, "The Concept of Corruption in Campaign Finance Law", *Constitutional Commentary* 14:1 (Spring, 1997), pp. 127-149.

<sup>22</sup> *Buckley v. Valeo*, .

amendments, removing expenditure limits for candidates not receiving public funds, and establishing presidential nomination and Senate confirmation for the six FEC commissioners, were enacted in May and quickly signed into law. These amendments also restricted the procedures by which PACs could solicit contributions and treated all PACs established by a particular corporation or labor union as a single entity for purposes of applying donation limits.

Since 1976 the law has been revised on several occasions. In 1979, amendments<sup>23</sup> were enacted to strengthen state and local political party activities, increase funding for presidential conventions, and make disclosure less complicated. Later changes banned honoraria for federal officials, repealed a loophole that allowed Members of Congress elected before 1980 to put leftover campaign funds to personal use, and again increased convention funding. A Supreme Court decision in 1983 (*Immigration and Naturalization Service v. Chadha*)<sup>24</sup> changed the way FEC commissioners and their counterparts in other regulatory agencies made their rulings. Previously, a Commission ruling had the force of law unless Congress specifically voted to override it; the Court, seeing this as violating the separation of powers, forbade such “legislative veto” arrangements. Separate legislation gave the FEC responsibility for implementing the “motor-voter” act – the National Voter Registration Act of 1993, intended to ease registration by linking it to processes such as applying for a driving license. And in 1993, in response to concerns that the voluntary income-tax checkoff was not yielding sufficient revenue, it was increased to \$3.00 per individual taxpayer.

## 2.5 The Present Law

Here are the essentials of the current laws regulating the financing of federal election campaigns:

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<sup>23</sup> Public Law 96-187

<sup>24</sup> 462 US 919.

## Major Elements of United States Federal Campaign Finance Regulations

August, 1998

### Contribution Limits:

- Individuals:

- may contribute up to \$1,000 to a given candidate for federal office once during the primary-election process and once during the general election campaign (with the exception of party nominees for President who accept public funding – see below)

- may contribute up to \$20,000 per calendar year to a national party committee, and up to \$5,000 per year to a state or local party in support of federal election candidates

- are limited to a total of \$25,000 in contributions per calendar year

- Multicandidate Committees (party committees or PACs)

- may donate up to \$5,000 to a candidate in the primary election phase, and up to \$5,000 in the general election campaign (again, with the exception of presidential nominees accepting public funding)

- may contribute up to \$15,000 to a national party committee, and \$5,000 to a state or local party committee, per year, and are not limited in their total contributions

- Contributions in cash may not exceed \$100

- Other political committees have the same limits as individuals for their contributions to candidates and party committees, but no overall limit upon contributions

- Corporations, labor unions, and federal contractors are not allowed to make contributions or expenditures at all, but may establish organizations (Political Action Committees, or PACs) to pool voluntary donations

- Contributions to committees making independent expenditures are limited in the same way as all other contributions, and count toward the overall annual limits for individuals

- Contributions to issue advocacy groups are not limited

- Foreign nationals may not contribute at all

## Spending Limits:

- Spending limits for candidates apply only to presidential candidates who accept matching funds, and to party nominees for President who accept public funding (see section on “Public Funding”)
  - candidates for party presidential nominations who accept matching funds are restricted to the National Spending Limit (\$30.91 million in 1996) during the primary-election phase, and to a state-by-state limit of \$200,000 plus a cost adjustment, or 16 cents times the Voting Age Population (VAP) plus a cost adjustment, whichever is greater
  - party nominees are offered a grant (\$61.82 million for 1996) from the Presidential Election Campaign Fund, and if they accept, may spend only those funds
  - candidates accepting matching funds, and nominees accepting public funding, may spend no more than \$50,000 of their own funds in the primary election phase, and the same amount in the general election campaign
  - party nominees accepting public funding may not accept private donations for campaign expenditures, but may accept private donations, and may spend a limited amount outside of the limits of the federal grant, to cover the costs of complying with the federal law
- No spending limits apply to House or Senate candidates, or to presidential candidates who decline public funding
- Independent Expenditures -- spending for “communication that expressly advocates the election or defeat of clearly identified candidates” -- by individuals, groups, and committees are allowed, and are not limited
- No federal limits apply to “soft money” -- contributions to party-building or get-out-the-vote activities, or to campaigns within individual states under the laws of those states
- National party spending on behalf of presidential nominees accepting public funds (“coordinated

## Public Funding:

- Applies only to presidential campaigns
- Candidates for party nominations may receive matching funds. To qualify:
  - candidates must register with the Federal Election Commission and agree to abide by contribution and spending limits, and by disclosure requirements
  - must demonstrate a base of support by raising at least \$5,000 in individual contributions of \$250 or less in each of twenty states
  - once qualified, candidates receive public funds matching up to the first \$250 of each individual contribution, up to a total of fifty percent of the National Spending Limit
  - contributions must be in the form of a check or money order to qualify for matching funds; contributions in kind, purchase of banquet tickets, independent expenditures, and similar support do not qualify for matching funds
  - candidates who cease active campaigning may still receive matching funds
- Party nominees for president are offered grants from the Presidential Election Campaign Fund
  - major party nominees are offered the full grant (\$20 million plus a cost adjustment for major party nominees, or a total of \$61.82 million in 1996) and, if they accept public funds, may spend only those funds
  - minor party nominees (those of parties receiving between 5 and 25% of the most recent presidential vote) are offered a pro-rated grant
  - independent and new-party candidates who receive more than 5% of the vote may receive funds, on a pro-rated basis, after the election
  - minor-party nominees accepting public funds may receive private donations but are subject to the same spending limit and disclosure requirements as major-party nominees
- Parties receive public funds (\$12.364 million for major parties in 1996) to cover the costs of their nominating conventions, and may spend only those funds; minor parties receive a pro-rated grant
- The Presidential Election Campaign Fund is generated by contributions from individual taxpayers who check a box on their federal income tax return; initially the contribution was \$1.00 per individual taxpayer, but was increased to \$3.00 in 1993. Funds are

## Reporting and Disclosure:

- Candidate Committees, Party Committees, and PACs must report all contributions, all expenditures exceeding \$200 per year, and all debts, to the FEC
- All Independent Expenditures totaling over \$200 in a calendar year must be reported to the Federal Election Commission (FEC)
- Candidates for President and Vice President must also file disclosures of their personal finances with the FEC; incumbents of those offices file annual personal disclosures with the Office of Government Ethics (OGE)
- Reports are publicly accessible, within 48 hours of filing, at the FEC's Public Records Office and online

## The Federal Election Commission:

- Established by Congress in 1974; began operations in 1975
- Appointment procedures reconstituted after *Buckley v. Valeo*, 1976
- Consists of six Commissioners:
  - nominated by the President and confirmed by the Senate, serving 6-year terms with two Commissioners appointed every two years
  - no more than three may belong to the same political party
  - four votes are required for a Commission action
  - Chair and Vice-chair posts rotate annually, with each Commissioner holding each position once during a six-year term
- Makes regulations clarifying Federal Election Campaign Act (formerly subject to "legislative veto"; changed by *Immigration and Naturalization Service v. Chadha*, 1983)
- Carries out monitoring and enforcement activities:
  - review of and publication of disclosure reports
  - civil enforcement
  - criminal investigations, enforcement, litigation
- Engages in public education activities; receives and reviews citizen complaints

2.6 Partial Reforms at Best. Perhaps the most notable aspect of the current American law is its relatively heavy emphasis upon disclosure and donation limits – and by extension, upon the vigilance of the press and public -- rather than upon public funding or overall limits on campaign expenditures. As the Supreme Court made clear in *Buckley*, the state's interest in preventing corruption could not override First Amendment guarantees. Thus donation limits, set at what was a fairly high level at the time the legislation was enacted, apply only to individuals – reflecting a general concern about the influence of large donations<sup>25</sup> -- and campaign spending is limited only for presidential candidates accepting public funding. There is also significant asymmetry between the financial rules of presidential politics and those applying to Congress; for the latter, no public funding is available and no spending limits apply. Congressional incumbents are well-served by this state of affairs, as I will discuss below. Full public funding encountered incumbent resistance, and others saw it as undermining voluntarism or as giving the state too large a role in the electoral process. There was also concern about the expense involved: full funding would require sizable general appropriations, as the income tax checkoff has only limited potential as a fundraising device. Even though contributing in this way does not increase one's tax or reduce any refund, few taxpayers (only about 15%) participate. Some may prefer to choose the recipients for any donations they might make -- a factor that would likely intensify with increases in the checkoff amount -- while others may be skeptical of the process do not understand it. Still others cannot participate because their tax liability is zero. In absolute terms, the cost of full public funding for all campaigns at all levels -- about \$2.8 billion in 1996 - - would not be particularly large as federal programs go. But it would be a widely unpopular policy, with many citizens regarding it as an effort by politicians to appropriate public funds for their own benefit.

Disclosure, applied across the board, was much more widely acceptable. The reformers' basic outlook was that American politics was essentially sound but threatened by the excessive influence of moneyed interests. Precisely who those interests were, and what dangers

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<sup>25</sup> Burke, "Concept of Corruption", *passim*.

they posed, were rarely spelled out in detail. I have argued elsewhere<sup>26</sup> that the laws were based on a “fat cat myth” defining large individual contributors as the main threat. Had that been the situation, a legal regime imposing individual contribution limits, relying heavily upon disclosure, and creating PACs as a means for pooling small contributions would have made considerable sense. Wealthy individual donors, however, play a relatively small role in the process – often, ironically, helping challengers (at times, themselves) to become competitive rather than buying the allegiance of incumbents. PACs, on the other hand, are now widely (but wrongly, in my view) regarded as agents of legalized bribery.

"Good politics" as such did not receive extensive attention. Perhaps it was seen as beyond the reach of campaign reforms, or of the mandate driving them; or, perhaps this was because the laws were shaped by people with sizable stakes in the established system. In any event, the reforms are strikingly narrow in some respects -- notably, in the extent of public funding -- and very broad in others, as in the scope of disclosure required and the breadth of dissemination of data. Similarly, the political power of wealth was understood in narrow terms: wealthy interests were presumed to exert influence primarily through campaign contributions, in the process preventing the voices of ordinary people from being heard. There may be considerable truth to that notion if we look only at the sources of political funding, but market processes are so powerful and pervasive that wealth, and those who possess it, exert influence (for better or worse) in many other ways. The notion that popular sovereignty would be restored once campaigns were insulated from the influence of large individual donors, and once disclosure enabled ordinary voters to see and respond to the flow of campaign funds, is open to considerable doubt.

2.7 How Well Have the Laws Worked? Taken on its own terms, the FECA has worked well. Contribution limits and disclosure requirements are widely accepted and obeyed within the scope of activities to which they apply (it is also true that they are more and more frequently

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<sup>26</sup> Johnston, *Political Corruption*: Ch. 6

*circumvented*, an issue to which I will return). Immense amounts of data have been amassed by the FEC, and have been a boon to some journalists and many scholars, although the public view of money in politics is still not particularly detailed or sophisticated. The FEC administers the laws and disseminates information effectively, and its political independence has never been seriously questioned.

But there are problems too. Some have to do with the passage of time: most of the dollar figures have not been changed despite more than twenty years of inflation. The increase in the Income Tax checkoff to \$3.00, in 1993, reflected a concern that the Presidential Election Campaign Fund would soon be unable to fund its obligations.<sup>27</sup> But the maximum individual contribution to a single candidate -- \$1,000 in 1976 -- was worth only \$324.03 (adjusted for inflation) in 1997.<sup>28</sup> In addition, the costs of advertising, consultants, polling, direct mail, and other elaborations of the campaign process may well have risen even faster than prices of basic consumer goods. The effects of this gradual tightening of limits through inflation have not all been negative: with the average campaign for a contested House seat now costing over a half-million dollars, a single PAC giving the maximum donation of \$5,000 -- a level few contributions actually reach -- is likely to be funding only one percent or less of the campaign<sup>29</sup> -- a fact that many critics of "PAC power" do not mention. For Senate campaigns and presidential campaigns the share is even less. But the gradual devaluation of maximum donations and matching funds also means candidates must spend more and more time raising money -- a fact that does nothing for the responsiveness of representation.

This erosion of the value of contributions increases the incentive to find ways around the limits. That, and the growing ingenuity of donors and campaigners, have given rise to a range of

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<sup>27</sup> Corrado, *Paying for Presidents*

<sup>28</sup> Source: MFS Consumer Price Inflater/Deflator, [http://www.mfs.com/education/work\\_calc/infldef.html](http://www.mfs.com/education/work_calc/infldef.html)

<sup>29</sup> I am grateful to Bertram Levine for this point.

practices not covered by the current law. Two are particularly controversial. One is the traffic in “soft money”: donations to political parties rather than to candidates, ostensibly for “party-building” and get-out-the-vote activities, or donations made indirectly to candidates via committees in states with less strict regulations. The other is “issue advertising”: a national anti-abortion group, for example, can broadcast unlimited advertisements in a district in which one candidate opposes, and the other supports, liberalized abortion, and need not report its expenditures so long as the advertisements refrain from naming specific candidates. Critics argue that such messages amount to Independent Expenditures -- spending by independent committees or individuals on behalf of, or in opposition to, candidates who are specifically named in the course of a given campaign activity, and which must be reported to the FEC -- and thus should be regulated. More will be said about these two issues below.

2.8 Building Good Politics? A variety of other issues have to do with the law’s broader consequences, intended and otherwise. One lasting problem has grown out of the fact that the reforms fostered expectations of an era of cleaner politics. This happened in part because of the claims of reformers, in part because of the view that while politics needed protection from excessive money the process was essentially sound, and in part because of links between the reform push and Watergate. But the public was given little real preparation for the law’s effects, two of which have proven particularly important. First, disclosure revealed for the first time flows of funds that very likely had been going on for a long time, but which seemed to embody a new trend. The FEC notes that “In 1968, still under the old law, House and Senate candidates reported spending \$8.5 million, while in 1972, after the passage of the FECA, spending reported by Congressional candidates jumped to \$88.9 million.”<sup>30</sup> The increase was more apparent than real, but reflects the power of disclosure to change perceptions. Indeed, it is possible that the coincidence of such disclosures with the scandals of 1972-74 contributed to the perception of a corrupting surge of money, and to the emphasis in the 1974 and 1976 amendments upon donation and expenditure limits rather than upon measures encouraging

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<sup>30</sup> FEC, *Twenty Year Report* Ch. 1, p. 2.

broader political competition. In any event, a widespread (if diffuse) perception that national politics has been debased by the power of money is one of the most serious problems undermining trust in the system today, and ironically it is partially a result of the *success* of disclosure.

A second consequence, more important in the long run, has been the way FECA benefits House and Senate incumbents and inhibits change in the party system. Just how “unintended” this really was is open to dispute, since incumbents wrote the laws. But reform advocates did not describe their proposals as incumbent-protection legislation, nor did citizens support them with that in mind. FECA did not create these advantages by itself; and we should remember that high incumbency re-election rates might reflect their effectiveness as representatives and providers of constituent services. But the law does make life more difficult for challengers because, while incumbents and challengers are treated essentially as equals in terms of the flow of funds in any one election, incumbents have many other advantages – some growing out of incumbency itself, and others out of other aspects of the law. The former include extensive name recognition from past campaigns and from their news-making potential while in office, and established networks for raising funds and running campaigns. Full-time staff members on the public payroll, both in Washington and in constituency offices, perform casework and communication functions. Incumbents have free access to television and radio studios, free mailing privileges, and federally subsidized Internet sites.

These advantages are part and product of representing and communicating with constituents, and in no way are they corrupt. But they are advantages nonetheless, worth hundreds of thousands of dollars, and they mean that an incumbent and a challenger running under the same rules and spending exactly the same amounts of money are still running an unequal race. Over time, the inequalities reinforce themselves. Most incumbents running for re-election are likely to win (this is somewhat less true in the Senate than in the House), which

makes them better bets for contributors while discouraging donations to challengers, which makes the incumbents even more likely to win. And so it goes. Incumbents find it easier to raise campaign funds than do challengers; PAC contributions in particular flow to incumbents over challengers by a wide margin. (For House races during the 1995-96 election cycle, Corporate PACs gave \$45.84 million to incumbents, as compared to donations of \$1.99 million to challengers and \$5.33 million on open-seat races. For Trade, Membership, and Health PACs, the figures were \$33.93 million for incumbents, \$3.84 million for challengers, and \$6.10 million on open seats, and for Labor PACs, \$22.25 million, \$11.92 million, and \$6.01 million.)<sup>31</sup> Money alone does not guarantee victory, and incumbents are re-elected for many reasons besides their campaign expenditures. But the current system of disclosure and contribution limits, together with large inequalities in other political resources, systematically favors incumbents – and thus may inhibit accountability and change.

Not only does the FECA not compensate for incumbents' advantages (it is difficult to imagine Congress's ever passing legislation that did so); the legislation itself also works in their favor. Public funding, for example, could help challengers launch credible campaigns and raise private donations. Spending limits combined with public funding could limit incumbents' ability to outspend challengers. But neither applies to Congressional races. Thus, challengers must launch a campaign under contribution ceilings that make it difficult to amass a significant war chest, must follow the same elaborate reporting requirements as incumbents, and are allowed no public funding. Disclosure has more subtle effects as well. Under the pre-1970s system donors did give most of their contributions to incumbents, but many also gave at least small amounts to any challenger who seemed likely to be competitive. "Playing both sides of the street" ensured access after the election, no matter who won. Under disclosure, however, gifts to challengers are a matter of public record, and many donors find it prudent to give to incumbents only – thus making challengers' chances even slimmer. Incumbents have also learned to use the disclosure

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<sup>31</sup> U.S. Federal Election Commission, "PAC Contributions to House Campaigns by Type of Campaign", <http://www.fec.gov/finance/pachseye.htm>

process to discourage potential challengers (and their backers) by raising and reporting large amounts of “early money”. A would-be candidate who sees that the incumbent already has raised several hundred thousand dollars may well decide to stay out of the race. A strong sense that incumbents have become too secure and have lost touch with their constituents has been a major focus of public discontent in the 1990s, generating proposals for new reforms such as term limits. Whether or not this is an accurate view of incumbents is beyond the scope of this discussion. Few of those demanding new legislation, however, make the connection between incumbent security and the logic of the last round of reform.

Incumbent advantage is less decisive at the presidential level, where the high profile of the office attracts politically-established challengers and major donors, and where incumbents are limited to two terms. Here the FECA does not so much enshrine incumbents as it props up the present party system. A solid majority of Americans support the idea of forming new parties (although they do not agree as to what the new parties should be). But new parties and independent candidates face a high threshold in qualifying for even a portion of the public funding given the two established parties. It is much easier to campaign for the Republican or Democratic nomination than to challenge the formidable advantages -- not all created by FECA, to be sure -- that those labels command. Change in the party system is discouraged, while major-party nominations -- and the funding and voter loyalty that accompany them -- are available to whoever can win them, regardless of policy agendas.<sup>32</sup> Had today's rules been in place in 1860, Abraham Lincoln might well have run as a Whig.

## 2.9 Solutions in Search of Problems: False Perceptions of Campaign Finance

With political opportunities for major reform coming so seldom, why did FECA fail to address the basic health of the political system? This question has many answers. One is that from the

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<sup>32</sup> In a state legislative primary election in the early 1980s, California Democrats nominated an ex-Nazi while the Republicans nominated an inmate of a mental institution.

viewpoint of most who played a major role in drafting the law, the system was functioning well. Protecting it from the excessive influence of money, and maintaining a predictable state of affairs in their own careers, were overlapping goals. Also, the early 1970s marked the first major overhaul of campaign laws in fifty years, and perhaps the first effort at serious reform ever; the extended consequences of what were then new ideas were less than apparent. Similarly, legislators sought to preserve important values in the system, such as voluntarism and the open contention of interests and ideas, and were reluctant to enact laws so extensive as to threaten them.

At a more fundamental level, though, many of the issues the reforms did address were often misunderstood. As suggested earlier, the FECA and amendments were based upon strong apprehensions about the power of large private contributors. Since then, such perceptions have hardened into a view that private money strongly influences officials' behavior, that candidates and representatives -- needing money in order to survive politically -- are dependent upon donors, and that PACs can thus buy the policies they want. Such arguments are politically useful for the advocates of reform, but are almost surely wrong on each point.

First, perceptions of campaign spending as out of control are off the mark. Increases have not been continuous; as the Graph 1 shows, total House campaign spending in constant 1996 dollars increased from \$161.8 million in 1972 to \$478.1 million in 1996. But during that period, phases of rapid increase have alternated with

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Graph 1 goes here  
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periods of relative stability. Spending per capita has increased even less dramatically -- from about \$1.15 for each person of voting age in 1972 to about \$2.40, in constant dollars, in 1996 (see Graph 2). If adjusted for growth in GDP, or for the costs of new

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Graph 2 goes here

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campaign technology -- computers, more extensive polling, focus groups, consultants -- the increases would be less dramatic yet. It is undeniable that campaign spending has increased in real terms. But the trends are hardly consistent with the image of an uncontrolled money chase, and the amounts spent per voter are quite small. Indeed, the times of rapid increase arguably have had more to do with incumbent insecurity -- due to the advent of FECA, the rise of anti-incumbent sentiment, and the changing partisan balance of the mid-1990s -- than with any trend toward systemic corruption.<sup>33</sup> Similarly, the number of PACs -- often described as proliferating in dangerous ways -- was about the same in 1995 as it was in 1984, and has actually decreased in some corporate and labor categories (See Graph 3). Most citizens would find it surprising to learn that in the 1995-96 election cycle, a full third of all registered PACs made no contributions at all to federal election candidates, while another twenty percent spent \$5000 or less.<sup>34</sup>

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Graph 3 goes here

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What, if anything, do campaign contributions buy? Who has the leverage in a donor-candidate relationship? I suggest that donors are not nearly as powerful, nor are candidates and elected officials as vulnerable, as the common view suggests. Money alone does not guarantee election, and winners typically have many political assets besides money. As noted, even maximum donations fund only a small share of most campaigns. Most incumbents know they can win with or without a given contributor, can match or outspend most challengers with relative ease, and therefore owe that contributor nothing. For this reason, seasoned lobbyists and frequent individual contributors virtually never make *quid pro quo* offers, and scorn anyone

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<sup>33</sup> Christopher J. Anderson, "Running Scared: Incumbent Security and Campaign Spending in the House of Representatives, 1972-1996", unpublished ms., Colgate University, 1998.

<sup>34</sup> U. S. Federal Election Commission, "PACs Grouped by Contributions to Candidates 1995-96", <http://www.fec.gov/finance/pacgrpc.htm>. Among corporate PACs, 375 (20.4%) reported no contributions at all, and 377 (20.5%) reported \$5000 or less; for labor PACs the figures were 122 (34.1%) and 81 (22.6%).

who would (many are themselves critical of the current system and of the donor-politician relationships it creates)<sup>35</sup>. Indeed, one study concluded that donor “leverage” was so small that contributions resembled protection payments, not legalized bribes.<sup>36</sup> This suggests we should worry less about "legalized bribery" than about extortion -- particularly by top legislative leadership, whose power to rewrite portions of bills late in the lawmaking process has grown significantly in recent years.<sup>37</sup> While we should raise contribution limits to encourage competition and free speech, and to restore the value lost to inflation, we should not do away with them altogether, for they can be valuable protection against extortion.

Scholars who have studied the connection between donations and legislators’ behavior have found little clear evidence that contributions buy votes on legislation. Donations do seem to have more clout at less visible levels -- for example, as subcommittees mark up bills, and as politicians open up connections to other officials -- particularly on small issues where neither the legislator nor constituents have strong sentiments. But opportunities to provide such services do not exist all the time, and generally cannot be created by individual members -- although party and committee leaders are considerably more powerful in this regard. Moreover, "opening doors" is by no means the same thing as guaranteeing results; if a contributor's financial leverage is small with respect to politicians, it is even smaller with appointed officials. Assessing the influence of contributions also runs into some logical problems: many groups give to candidates and officials who are receptive to their interests to begin with, and refrain from giving to opponents. A representative from a dairy-farming district may receive money from dairy PACs, but would likely support their interests anyway. Many well-connected interests are not so much

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<sup>35</sup> John Green et. al., "Individual Congressional Campaign Contributors: Wealthy, Conservative -- and Reform-Minded". Chicago: The Joyce Foundation, 1998.

<sup>36</sup> Keim, Gerald, and Zardkoohi, Asghar, "Looking for Leverage in PAC Markets: Corporate and Labor Contributions Considered" Public Choice, 1988.

<sup>37</sup> Barbara Sinclair on leadership changes to legislation –

seeking change as hoping to prevent or minimize it, and it is impossible to show that donations are the cause of events that *did not* happen.

Lobbyists, contributors and most candidates generally agree that while contributions do not buy legislative votes or lead representatives to repudiate their constituents, they do buy *access* -- the opportunity to make a case on a given issue. Access is limited, and in no way guarantees results, but on most issues nothing can be accomplished without it. It is a valuable commodity -- if it were not, no one would spend money on it -- and it is indeed unequally distributed as between organized interests and ordinary citizens. But this will be true under any democratic procedures we can imagine. Moreover, nearly all agree that politicians find fundraising the most distasteful part of their jobs -- not what we might expect if it were the path to riches, or if politicians were in thrall to donor interests. One controversial practice that might increase donors' leverage is *bundling*. While FECA limits donations, it does not limit the amounts a person can raise; thus, a well-connected lobbyist might arrange for several PACs to contribute to a candidate, perhaps by staging public fundraising events in her behalf. Under disclosure, the lobbyist can claim credit, but this does not necessarily alter the balance between donors and candidates. If contributing one percent of a campaign's cost does not buy decisive influence, it is unlikely that "bundling" three or four percent does. And if one-percent donations were as powerful as critics claim they are, no one would need to "bundle". Leverage remains on the side of the candidate, and in a way the security of incumbents might be an anti-corruption aspect of the system, not a corrupting one.

Some of the corrupting influence of money might be intangible: a pervasive concern with fundraising can divert attention from the groups and issues, and from the constituency work, that should be top priorities. The focus of political activity shifts from the grassroots to dealings with contributors. The cumulative effects of spending most of one's spare time in the company of wealthy people, and of their particular view of the world, and corresponding expectations among the wealthy that they should have a special place, likewise do little for the quality of representative democracy. Popular perceptions that money dominates politics, even if not

literally accurate, reduce the level of political trust and degrade relationships between representatives and citizens.

It would be naive to deny that there is potential for corruption in relationships between private interests and politicians. But their interactions are influenced by many political incentives other than money. Further, it is difficult to distinguish in practice between illicit connections and legitimate advocacy, service and representation activities. Given these complexities, we should be very cautious about further restricting these interactions. A better approach would be to raise contribution limits to encourage the flow of funds, and to reduce the amount of time devoted to fundraising. Organized interests are likely to have broader legislative agendas, and deeper pockets, than most individual contributors, and given the potential importance of individual contributors in funding challengers' campaigns (consider, again, the figures on page \_\_\_ reporting PAC support for incumbents), we should consider lifting the limits higher for individual contributors than for PACs. Limiting individual contributions to \$100,000 per campaign, for example, might well help challengers become competitive; raising the PAC limit to \$25,000 per campaign would restore the value of contributions lost to inflation (and then some), but would still prevent any one PAC from dominating financing in a competitive race. Doing away with limits altogether, however, would be risky: extremely well-funded contributors might underwrite entire campaigns, and – more likely – a valuable barrier against extortion would be lost.

### 3. DISCLOSURE AND TRANSPARENCY

Disclosure is a basic and widely supported element of the law. The almost totally ineffective disclosure requirements of the 1925 law gave added impetus to efforts to write extensive reporting procedures into the FECA. The FEC gathers regular and comprehensive reports on virtually all money donated and spent on federal election campaigns, audits those reports, and publishes the data within 48 hours after they are filed. Where data reveal problems, the FEC can engage in further investigation, and may impose civil penalties or carry out criminal investigations and litigation. The FEC is widely regarded as effective and nonpartisan. Its

political independence is taken seriously: efforts by a prominent Senate Republican to place a special term limit upon the FEC's General Counsel, who has been critical of many uses of "soft money", were recently thwarted by the party leadership.<sup>38</sup> Nonpartisanship is reinforced by the legally mandated party balance among Commissioners and the requirement of a four-vote majority in order to take action. For these reasons, partisan bias on the part of the FEC has rarely if ever arisen as a serious issue, and the disclosure aspects of the law have been broadly effective.

The ways FEC data are *used* during a campaign, however, are more problematical. As already noted, the sheer volume and complexity of information are daunting to the relatively few citizens who look into them directly. Few know enough about donors to form detailed judgments of the ways particular campaigns raise funds. News reports of campaigns tend to focus upon the "horse race" aspects -- who is leading in the polls, and whether or not the margin is closing -- or upon personalities and campaign gaffes.<sup>39</sup> When campaign money hits the news it is likely to be in the form of aggregate figures on spending, or donations, or a particular candidate's financial woes. Detailed reports of questionable dealings with donors are the exception during most campaigns, particularly below the presidential level. Allegations of irregularities on the part of both parties did arise during the 1996 presidential campaign, but most details did not surface until after the election. One reason for this is, again, the amount and the complexity of data to be analyzed; another is the horse-race structure of the campaign story and the emphasis upon personalities. Campaign staff, for the most part, are too busy to devote much time to investigating the other side -- though some will at least take a cursory look at reports and pass on tips to journalists. Most press organizations are reluctant to appear to favor one side or the other in their news coverage, and thus delve into financing in depth only if there is evidence of a major scandal. Levels of attention are often even lower for Congressional races.

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<sup>38</sup> *New York Times*, 8 September 1998, p. A24.

<sup>39</sup> Jamieson, 19??; Patterson, 199?.

All of this raises serious doubt about one of the key assumptions behind disclosure -- that not only violators of the law, but those who had fallen too much under the influence of large donors or suspect interests, will be unmasked by disclosure, taken to task by competitors and the press, and punished at the polls. More realistic is the hope of a retrospective judgment, with one campaign's financing becoming an issue at the next election. But as a restraint against misconduct, this will affect only those challengers or incumbents who run repeated campaigns, and it is less likely to be effective across a six-year Senatorial term than in a two-year House cycle. If disclosure makes it more difficult for challengers to fund credible campaigns, competitiveness is undermined, the range of viable choices available to voters is reduced, and their ability to reward or punish candidates at the polls is further diminished. In any event, voter concerns over political money tend to be general rather than focused upon specific candidates or interests (presidential races, and a few high-profile interests such as the National Rifle Association, being partial exceptions). For most, partisan loyalties and symbolic or policy issues rarely balance out closely enough to allow any but the most sensational financial revelations to tip the balance between candidates. It is more likely that concern about money in politics leads some voters to tune out campaigns and to abstain from voting. If so, here again is a way reform may have helped deepen America's political malaise.

Still, few have suggested ending or significantly limiting disclosure (although one innovative proposal -- that for "blind trusts" -- would reduce donor influence by keeping their identities secret from candidates; more about this below). While many of the current reform proposals focus upon donation and spending limits, there is a lively market in disclosure proposals as well. What are the major issues?

3.1 "Issue Advertising" The FECA includes definite and well-enforced rules regarding Independent Expenditures. A conservation organization may spend funds on television advertising or billboards, for example, advocating the election of Candidate X or the defeat of

her opponent. While expenditures on such activities are not limited, current law requires that beyond a small threshold they be reported, and that they be truly independent. The organization is forbidden to coordinate its activities with Candidate X's campaign, to take advice from its staff, or even to use the same vendors as the campaign has used. The intent is to allow independent political activity while preventing campaigns from evading the law by channeling campaign activity and funds through front organizations, as was common under the 1925 legislation.

"Issue ads", however, are different. They avoid FECA requirements by *not* naming specific candidates. As already noted, a group might buy advertising on the abortion issue in a congressional district where one candidate favors and another opposes it. Critics contend that even though such messages do not name candidates, their intent and effect are clearly to aid one side or to defeat another, just as with Independent Expenditures, and that the absence of disclosure requirements for such spending is a significant loophole in the law. Others contend that "issue ads" enable national groups to intrude into state or local politics, drowning out local groups, preempting voluntarism, and diverting attention from issues specific to those jurisdictions. A few have proposed direct limitations on such expenditures, though in the wake of *Buckley* it is unlikely that these would meet First-Amendment standards. More common are proposals that would subject issue advertising expenditures to lesser forms of regulation. In addition to disclosure of spending on issue ads, expenditures might be restricted to money raised within the state or district in which each is disseminated, or more prominent public statements of the source of funding might be mandated as part of each message.

Issue advertising is big business: a database compiled by the Annenberg Public Policy Center at the University of Pennsylvania lists 67 organizations sponsoring such messages during the current campaign, and estimates (based on the groups' own claims) that over the 1997-98 election cycle their expenditures will total between \$260 million and \$330 million. Such a total would roughly double the estimated \$135-150 million spent on such messages in 1995-96, a

presidential election year.<sup>40</sup> Issue ads also have many critics. Incumbents in particular do not like them because challengers can obtain the backing of out-of-state or out-of-district groups without the disincentives created by disclosure. But it is difficult to make a persuasive case for regulation. The impact of issue advertising is often overstated: in two of the most widely-cited cases of 1998 -- a special Congressional election in California, and a House primary in Illinois -- extensive advertising by anti-abortion groups did not enable abortion opponents to win. The argument about the intrusion of national interests into local politics also is dubious: most "issue advertising" deals with issues -- abortion, gun control, federal health care policy, to name a few -- that are national or regional in nature. On those issues legislators make policy on a national scale. Perhaps most important is a good-politics argument: what Constitutional or political case can be offered for *limiting* debate and the exchange of views, or for creating obstacles to political participation on the part of committed citizens and groups in civil society, at a time when many citizens feel the political system does not address the issues they care about most?<sup>41</sup> Many arguments for regulating "issue advertising" amount to assertions that it must be regulated simply because it is now unregulated, or to the assumption that all political spending is suspect. The benefits of further regulations for citizen choice, or for the health of the broader political process, have yet to be specified.

3.2 More Selective Disclosure Requirements. If disclosure produces an unusable mountain of information, why not make it more selective? We might require disclosure only of very large contributions -- for example, those over \$100,000 -- or of those that make up such a large proportion -- say, five per cent -- of a candidate's spending that they might signal excessive dependence upon a particular donor. Any such step would entail raising contribution limits

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<sup>40</sup> Annenberg Public Policy Center, University of Pennsylvania; <http://www.asc.upenn.edu/appc/issueads/release1.htm> (for the database, see <http://www.asc.upenn.edu/appc>). See also "Groups Spending \$260 Million on Ads to Promote Agendas", *New York Times*, 15 October 1998, p. A27.

<sup>41</sup> Stanley C. Brubaker, "The Limits of Campaign Spending Limits", *The Public Interest* 133 (Fall, 1998), pp. 33-54.

significantly -- a significant policy question in its own right. But the result might be a more *useful* disclosure system, and a process sensitive enough to reveal potential abuses without discouraging contributions. Such a regime might also aid challengers by allowing them to jump-start a campaign with a few large contributions while reducing the administrative burdens of disclosure.

Selective disclosure does raise a number of questions. The most obvious problem is with a percentage threshold: without pre-set spending limits -- forbidden by *Buckley* -- there is no way of knowing the percentage of funding provided by a particular donor to a given campaign until after the election. A sensible way around this problem might be to use the average cost of past campaigns as a baseline. Because campaigns can vary considerably in cost, for the House we could use the average cost of the past two campaigns for a given seat as our standard, or compare that figure to the average for similar *types* of district (urban or suburban versus rural, open seat versus a race with an incumbent) and use the higher of the two averages as the baseline. For Senate races, average costs of past campaigns for a given seat could be compared to national figures on average expenditure *per capita* of voting-age population, with the higher figure again being the standard.

Selective disclosure, if coupled with higher limits, might encourage large donors to break their contributions down into smaller amounts that nonetheless exceed the disclosure threshold when added together. We might thus keep *reporting* procedures more or less as they are now -- perhaps raising somewhat the threshold figure for reporting donations -- but only *publish* the data for contributors who exceed a given figure or percentage of a given campaign's funding, either with a single contribution or through aggregate giving. Full data on financing would still be available to FEC investigators and prosecutors as needed, to investigate (among other things) the possibility of a donor's funneling significant sums into a campaign under the names of others -- a frequent practice under the 1925 law. Here again, for the reasons discussed above, we might choose to treat individual and PAC contributors differently. PACs are likely to contribute to larger numbers of campaigns, and could thus spend major amounts of money without

exceeding the publication threshold for any one campaign. Thus, we might publish PAC donations that exceed a lower threshold -- say, \$25,000 or \_\_\_\_\_% of a given campaign, as judged against the baseline figures suggested above. The goal is to make disclosure information easier for voters and journalists to use.

#### 4. CURRENT LEGISLATIVE INITIATIVES

A variety of serious proposals to "reform the reforms" are now under consideration. But while the current system has few defenders, there is little consensus as to what the real problems are, or what would solve them. Incumbents are reluctant to enhance the prospects of challengers, and the two major parties do not want to risk strengthening each other. The most visible reform effort has been the McCain-Feingold bill, named after its Senatorial sponsors -- Republican John McCain and Democrat Russell Feingold. This bill and a companion House measure would control on "soft money" and "bundling", reduce or eliminate PAC contributions, create incentives (via the provision of free television time and postage) for candidates to accept voluntary spending limits, and would require fundraising to take place primarily within candidates' home states or districts.<sup>42</sup> McCain- Feingold was introduced in both the current Congress and the one preceding it; while a very similar bill (Shays-Meehan) did pass the House it is unlikely to become law. A revised McCain-Feingold bill will likely be re-introduced in 1999, but here I will focus upon proposals for more fundamental changes.

##### 4.1 Liberalization, Information, and Disclosure: The Doolittle Bill.

In 1997 Representative John T. Doolittle, a California Republican, introduced his "Citizen Legislature and Political Freedom Act" (HR 965). Citing the incumbent advantages of the current law, and strongly criticizing the regulatory and funding presence of the federal government in campaigns, Doolittle proposes to repeal existing limits upon contributions by

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<sup>42</sup> Bertram J. Levine, "Campaign Finance Reform Legislation in the United States Congress: A Critique", *Crime, Law, and Social Change* 28:1 (1997), p. 7.

individuals, PACs, and parties, and to end public funding of presidential campaigns. He would tighten reporting requirements for reporting the sources of contributions, require campaigns to file reports electronically every 24 hours during the final ninety days before an election, and would make disclosure data available on the Internet.<sup>43</sup>

Corruption was scarcely mentioned in Rep. Doolittle's speech introducing the bill in March, 1997. Instead, the rationale is that private initiative, not the Federal government, should bear the main responsibility for funding and policing the political process, and that political expression via contributions is to be encouraged -- and widely disclosed -- rather than limited. Doolittle also claims his bill helps challengers by ending contribution limits and benefits the political process by removing federal subsidies for fringe presidential candidates. The bill is laudable for overcoming the blanket assumption that political money is corrupting in and of itself, and for addressing the problem of overly-restrictive contribution limits. Doolittle's proposals for disclosure are more debatable: data are available on line now, and daily reporting would impose a large administrative burden upon campaigns -- one that incumbents may find easier to meet than will their challengers. The bill does not address the pro-incumbent implications, or the data-glut problems, of disclosure. And it is unclear how much it would actually help challengers: removing contribution limits might enable more challengers to launch campaigns, but in a no-limits, rapid-disclosure environment incumbents might find it easier to raise money later on. Indeed, incumbents facing better-funded challengers in a no-limits situation might, if hard-pressed for reelection, find it even more tempting to put pressure upon contributors than at present. Also, a policy of no contribution limits would probably help Republicans in both Congressional and presidential races, given their more extensive links to business, while ending public funding in presidential races would likely hurt Democrats' chances at that level.

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<sup>43</sup> <http://www.house.gov/doolittle> (Doolittle www site)

Nonetheless, Rep. Doolittle's bill does represent a distinctive option -- indeed, given its reliance upon disclosure and private initiative, it represents a kind of "pure" American model. Its desirability depends upon how one weighs the corruption risks of unlimited donations and the increased financial inequalities that removing limits and ending public funding would likely produce, against the benefits of more aggressive disclosure. On that balance, my assessment is pessimistic. Reliance upon the already-doubtful ability (and inclinations) of the electorate to police the process with their votes, and to redress inequalities with their own contributions, would have to increase; meanwhile, the data-glut problem, and the voters' vulnerability to dubious *uses* of disclosure data, would be made worse. Rep. Doolittle's critique of the federal role in campaign finance seems to be based more on ideology than on demonstrated harm to the political process, with the main exception being his argument for removing contribution limits on First-Amendment grounds.

Could Doolittle be improved by coupling it with the idea of restricting disclosure to very large contributions? This would certainly make disclosure data more useful and relieve much of the administrative burden of daily reporting. On the other hand, any corruption dangers posed by unlimited donations would remain, as would the possible partisan and pro-incumbent biases of the bill.

4.2 Blind Trusts: Not Disclosure, but Secrecy. A significantly different approach is based upon the notion of secrecy, not disclosure. So long as candidates know who their donors are, the argument runs, even low contribution limits leave the door open to corrupt influence by donors and extortion by politicians. Moreover, disclosure discourages contributions to challengers, as already discussed -- a problem that could be viewed as "soft extortion" on the part of incumbents. A remedy would be the creation of *blind trusts* -- funds administered by the FEC to which donors would contribute anonymously, with no public disclosure even after an election -- and from which funds would be disbursed to campaign committees in lump sums. As Levine describes it,

The logistics for such a system need not be complicated. A blinded account for each congressional candidate could be established at the FEC. All contributions would be forwarded to the Commission for deposit in the selected candidate's account. Periodically the Commission would write checks to each candidate drawing upon funds deposited in his or her account. Accounts would be reviewed by designated federal investigators and secrecy would be breached only for law enforcement and adjudicatory purposes.<sup>44</sup>

The blind trust scheme rests on two principles: keeping the identity of donors secret from candidates, and honest administration by a credible authority such as the FEC. Donors who are unknown to candidates are in no position to demand *quid-pro-quo* favors, or even to exert more indirect pressure. Dangers of extortion would be reduced as well, since a candidate could not know whether pressuring a potential contributor actually produced a contribution. (A further bar against extortion would be to provide a grace period of ten business days during which a contributor could withdraw a contribution by notifying the FEC.) Blind trusts would also remove the incentives to "bundle" contributions. They would not prevent the organized expression of interests: a candidate taking strong stands on major issues could see whether the overall flow of funds ebbed or increased. Indeed, the plan might sharpen incentives to take clear-cut public positions. Meanwhile donors would not drown out other voices, and fundraising would cease to be a full-time preoccupation. Another benefit, particularly important in countries that have only recently returned to electoral democracy, is that blind trusts would help guarantee the secrecy of the ballot. Some contributors might fear that even in a secret ballot system, publication of one's contributions amounts to publication of their votes; under a well-administered blind trust system, however, this disincentive would be removed, with possible benefits in terms of enhanced citizen participation both at the polls and in campaign funding. Moreover, to the extent that disclosure discourages support for challengers, blind trusts would also be beneficial. In the end, access to representatives would have to be based on criteria other

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<sup>44</sup> Levine, "Campaign Finance Reform", p. 21.

than contributions, and that, say proponents of blind trusts, would be a significant step toward good politics.

Critics fear that preventing donors from identifying themselves would cause donations to dry up, starving the political process of needed funds. (Proponents respond that *quid pro quo* support should be driven out of the system.) The implications here depend upon how much money one assumes is given on a *quid pro quo* basis, and in that there is an irony: if such contributions really are a major share of the total, then blind trusts could cause a funding crisis and subsidies would be needed. But if *quid pro quo* giving is limited enough to avoid a money crunch, we might ask whether the reform effects of blind trusts are worth the effort. (Motives for giving are inherently difficult to establish, but one study<sup>45</sup> suggests that even frequent donors of significant sums do not like the current system -- not the result we would expect if it allowed them to practice *quid pro quo* influence.) Another problem is that the trusts might not be as blind as they seem. Some issues are "owned" by a few well-known groups; thus, a candidate who came out strongly against gun control, and saw his or her campaign fund flourishing, would have little difficulty figuring out whence the money had come -- in this case, the National Rifle Association. A system that "smoothes out" payments to campaigns over time -- instead of disbursing funds more or less as they are contributed -- could make the connections between particular campaign events and trends in funding less overt. Where support on an issue is more broad-based, anonymity would be more effective, but then the donors might not have been so influential to begin with.

Such a system would have to be backed up by mechanisms preventing "back-channel" identification of donors or demands for funds. Preventing all possible indications of past or future financial support, or demands for funds, might be a law-enforcement nightmare. (Advocates of blind trusts respond that if the system were well-enforced, such concerns would be minimized, as promises of support would not be verifiable, and therefore, would not be

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<sup>45</sup> Joyce Foundation, "Individual Congressional Campaign Contributors".

believable.) Finally, donors prevented from taking credit for direct contributions would likely divert their resources to "issue advertising" and independent expenditures, where they are at present free (in the case of issue ads) and *required* (for independent expenditures) to identify themselves. Both would compromise the confidentiality of blind trusts -- making the system, in effect, optional for donors that can afford such expenditures -- and might ironically make such groups even more prominent in campaigns than they are now.

But blind trusts do represent an idea worth considerable thought, if only because it requires us to think through the processes and value of politics from a new perspective. Particularly in a country that is completing a process of democratic consolidation and is enacting campaign finance legislation *de novo*, blind trusts might be an effective way to bring more individual donors into the process by protecting them from pressure (from politicians or from others), thus encouraging more broad-based and fluid political competition. They could also shape a changing elite political culture in beneficial ways while enabling politicians and interest groups to demonstrate their probity and to prevent *the appearance* of corruption, thus building confidence in the credibility of democratic processes. Voluntary blind trusts in combination with subsidies, and without limits (or perhaps with relatively high limits), might be an effective way to avoid both the pro-incumbent biases -- thus encouraging political competition -- and the dangers of extortion and *quid pro quo* influence that flow from disclosure.

## 5. SUBSIDIES AND THE PROBLEM OF FAIR COMPETITION

Earlier in this discussion I suggested that the current regulatory regime favors incumbents over challengers, and established parties over new parties and independents. FECA did not create these advantages by itself, and challengers and new parties have almost always had an uphill climb. But if the law enhances existing incumbent advantages, that is a serious concern.

At the federal level, the only direct aid to challengers and new parties comes in presidential races via the Presidential Election Campaign Fund. Support for campaigns and

nominating conventions is provided to major-party challengers as well as to incumbents; in theory it is available to others as well, although they must obtain five percent or more of the vote to qualify -- a high threshold, made higher for new-party and independent qualifiers by the fact that they receive no funds until after the election. Like major-party candidates who decline public funding, new-party and independent candidates do not have overall spending limits, but they are subject to the same contribution limits and reporting requirements that apply to others.

Congressional incumbents seem unlikely to enact any legislation that would materially aid their challengers. But there would be many options. Raising the ceilings for contributions and the threshold for disclosure (or doing away with both) might aid the entry of challengers somewhat (though whether they might help incumbents even more is an interesting, if speculative, question). Early subsidies would be particularly valuable challengers who meet some threshold of support. Where to set that threshold is a sensitive question: there is little point in subsidizing all who might like to run for office, but setting the requirements too high would eliminate the benefits of subsidies. Similarly, a subsidy that is generous in a compact urban House district might be utterly insufficient in a large rural district where television and transportation costs are much higher.

Any proposal for public subsidies raises questions regarding the roles of the state and civil society in politics. Full public funding would remove the need for candidates to appeal to people and groups in society for financial support, and would deprive private interests of an important way of expressing their political views; neither result would aid the cause of good politics, in my view. But other approaches could turn subsidies into incentives: we could guarantee a minimum subsidy, and then provide a decreasing percentage matching grant for funds raised beyond that level. All House candidates meeting a threshold of demonstrated support might be given \$100,000; then, an additional twenty-five cents for each of the next \$50,000, twenty cents for each of the next \$50,000, and so forth on a decreasing scale. Such a proposal could be further refined by matching only those funds raised within a candidate's own district or state, or perhaps even with a "tax" requiring campaigns to pay a small portion of

contributions above a certain threshold to the FEC. The latter arrangement could inhibit runaway spending and limit incumbents' ability to outspend their challengers, and could help finance subsidies. Candidates would always be better off building an active organization and raising money, challengers could qualify for the *early* funding so important to establishing a competitive campaign, and the amount of the subsidy would at least roughly reflect the real costs of running in a given district. (A Senate formula could be drafted on a per capital basis to reflect the differing population of the states.) There are many possible variations on such schemes; the most important point is that subsidies offer ways to provide positive incentives for competitive politics, and opportunities for innovative combinations of public and private resources.<sup>46</sup>

In the United Kingdom all political parties fielding at least fifty parliamentary candidates across the country's 651 constituencies receive free television time on both commercial television and the state-owned BBC. These Party Political Broadcasts (PPBs) are allocated to parties in a rough proportion to the number of candidates they have; the major parties (Labour and the Conservatives), and in many elections the Liberal Democrats too, receive five ten-minute slots during a campaign, which typically lasts four to five weeks. Minor parties generally receive one each; in recent elections parties as diverse as the Greens, the Natural Law Party, the Referendum Party, and the openly-racist British National Party have had an opportunity to make their case to the public. Parties bear the cost of producing their programs, and most broadcast five-minute rather than ten-minute messages -- partly for reasons of cost, but also because of fears of "viewer fatigue" and resentment over interruptions of popular programs. There are radio PPBs as well. This policy is linked to other controls: local constituency campaigns operate under very low expenditure ceilings, and no one may buy broadcast time in any form. A laudable if less well-known aspect of the British system is that the three big parties continue to receive free time for periodic PPBs between elections as well.

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<sup>46</sup> Many thanks to Bertram Levine for his comments on this issue.

More extensive regulations are in the offing for Britain: a Parliamentary committee recently recommended legislation that would limit major-party spending to £20 million pounds each (a considerable reduction from the £53.5 million total of Labour and Conservative spending in 1997), require public disclosure of donations to national parties in excess of £5000 (and of donations to local party groups of £1000 or more), and provide tax deductions for contributions of up to £500. Companies making political donations would have to seek the permission of their shareholders, and no foreign contributions would be allowed. Other changes would include the creation of a new national Election Commission, and possible increases in the subsidies currently provided to Opposition parties' shadow cabinets. Blind trusts -- used experimentally by the Labour Party in its 1997 campaign -- would be banned, on grounds both of transparency and public information, and because of problems encountered in the 1997 trial. These new rules are likely to be enacted in 1999.<sup>47</sup>

Just how much current or proposed British policy might enhance competition is hard to say, if only because the first-past-the-post electoral system is brutally slanted in favor of the two main parties, and the proportion of "safe seats" for those two parties has generally increased in recent decades. Nonetheless, this sort of subsidy is worth careful thought. Free television time (arranged by making it a requirement for broadcast licenses) is often proposed in the United States as a way to make candidates less dependent upon donors, and of making challengers more competitive.<sup>48</sup> But the anti-corruption value of such proposals is doubtful if, as suggested above, leverage lies with candidates -- particularly incumbents -- rather than with donors. Free television time may be more attractive as a competition-enhancing policy. But television costs do not play as large a role in spending as we often assume: while presidential and senatorial campaigns find it useful, many urban and suburban House candidates use little or no television at all, as their districts make up only a small part of expensive metropolitan media markets. A

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<sup>47</sup> *The Daily Telegraph*, London (<http://www.telegraph.co.uk/et?ac=000453444665293&rtmo=wMt5lfbw&atmo=lllllllx&pg=/et/98/10/14/nfund114.html>); see also "Britain: Campaign Funds Would Be Capped", *New York Times*, 14 October 1998, p. A6.

<sup>48</sup> See, for example, Larry J. Sabato, ...

journalistic analysis of House incumbents' spending in 1990, 1992 and 1994 found that broadcast advertising accounted for an average of only 20-25% of total expenditures.<sup>49</sup> Practical problems would arise in urban and suburban areas with numerous jurisdictions, plus issue advertisements, where the resulting glut of political television might alienate the audience while drowning out any one candidate's message.

## 6. SOFT MONEY AND POLITICAL PARTIES

Most proposals for new reforms revolve around the notion of limiting spending and further restricting giving. This approach draws upon widespread suspicion of the role of money, and of organized interests, in politics, and often draws considerable support. But it may well be misguided. As pointed out above, the maximum contributions allowed under FECA -- devised under the assumption that overall spending limits would apply -- have now been shrunk in real terms to very low levels by two decades of inflation. Even if we were to choose to keep limits, raising them to realistic levels -- say, \$5,000 or \$10,000 for individuals per election, and \$100,000 for individuals per year, and perhaps \$25,000 for PACs per election -- would be a useful first step. Similar adjustments are called for in the arrangements for presidential matching funds -- perhaps the first \$1000 of individual contributions could be matched -- but this, in turn, might require another increase in the income-tax checkoff. This raises a question of diminishing returns: higher checkoffs -- even though they do not increase one's tax or reduce one's refund -- might turn off citizens who wish to choose where their political money goes rather than finance all qualifiers at once. Even now, according to Rep. Doolittle, only fifteen percent of taxpayers contribute via the checkoff.

Current policy weakens parties by channeling funding directly to campaign committees, reducing parties' role as a source of funding and with that their ability to impose discipline upon

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<sup>49</sup> Anderson, "Running Scared..."; Dwight Morris, "The Myth of Exploding TV Advertising Costs", *The Washington Post*, September 17, 1996, available at <http://www.washingtonpost.com/wp-s..igns/money/archive/money091796.htm>

their nominees. (A related problem is that the legislation places the major burdens of compliance, and liabilities to prosecution, upon campaign chairpersons or treasurers, rather than upon candidates themselves.) There are many forces weakening American political parties – early-1970s reforms in the nomination process have been another major factor, particularly for the Democrats – and the decline has been going on since at least 1960. But strengthening parties via new campaign finance rules has its dangers. For example, powerful legislative leaders such as House Speaker Newt Gingrich, and Willie Brown, during his tenure as Speaker of the California State House, have created "personal PACs"; these receive contributions that are then distributed to the leaders' political supporters as contributions to *their* campaigns. The result is a patron-client system that at the very least gives top leaders extensive influence over their "client candidates", and that could conceivably become the basis for a network of vertically integrated corruption.<sup>50</sup> Funneling too large a share of funding through such PACs, or through party leadership, could create "one-stop-shopping" opportunities for unscrupulous contributors -- or, perhaps more likely, major opportunities for extortion on the part of unscrupulous leaders. Similarly, removing all contribution limits, or setting them too high, could remove an important barrier to extortion, particularly with respect to candidates' dealings with PACs. While the current legislation has done little for the health of the party system, for the range and coherence of choices offered to voters, or for the accountability of elected officials, there are some signs that party organizations are reviving -- particularly in the case of the Republicans. Steps to speed that process through major infusions of funding -- as opposed, say, to rewarding greater efforts at the grassroots level -- should be undertaken only with great caution.

A more controversial issue is "soft money" -- as noted above, money donated without restrictions to political parties for get-out-the-vote and party-building activities, or money routed to candidates' operations in some states under the less-strict laws that apply there. The amounts at stake are large: during the 1995-96 election cycle, the Democratic part raised \$123.9 million

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<sup>50</sup> Johnston, WB '98, on vertically integrated corruption

in soft money -- a 242% increase over the previous presidential campaign -- and the Republicans raised \$138.2 million, an increase of 178%.<sup>51</sup> Such funding is poorly monitored -- if at all -- and undoubtedly offers ways to circumvent current regulations. But critics often leave unstated just what the value of those regulations is, or how politics would be improved by extending them. Another approach might to enact legislation encouraging donations to parties, rather than candidates, within limits linked to documented voter-education and citizen participation efforts: a dollar spent on genuine get-out-the-vote activities might entitle a party to receive \$1.50 in direct contributions. Not only might this strengthen parties; it might actually increase their effectiveness in areas now viewed with a nudge and a wink -- that is, voter registration and turnout, and connecting citizens to the political process.

Policy ends and means in this area are open to much debate: should soft money be combined with subsidies to put financial floors under minor parties? Would tax incentives be needed to channel meaningful sums to genuinely "civic" functions such as get-out-the-vote activities, rather than to direct advocacy? The magnitude of soft-money flows means that disclosure would be required; this might fewer drawbacks in terms of competition than does disclosure of donations to candidates, but the data-glut problem would worsen. New forms of disclosure -- to confirm that funds actually have been spent on party- and participation-building activities -- might become necessary. Overall limits to soft-money donations, while politically popular, would raise First-Amendment objections, but perhaps a new form of limits -- allowing some proportion of soft-money donations to be passed on to a party's candidates, and the rest to be channeled to party- and participation building -- might be necessary. Reliably distinguishing among these uses, of course, would be difficult in practice.

## 7. CONCLUSION

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<sup>51</sup> U. S. Federal Election Commission, "FEC Reports Major Increase in Party Activity for 1995-96", March 19, 1997; <http://www.fec.gov/press/ptyye1.htm>

How successful, then, have the contemporary reforms been? The answers depend upon the questions we asked. There is little overt, abusive, *quid pro quo* bribery between contributors and federal election candidates in American politics; such problems are likely more pronounced at the state and local level (where, ironically, levels of public trust are higher). Critics of the current situation might say that bribery is uncommon because the present law makes it unnecessary -- that PACs now do what bagmen used to do, and do it legally. That sort of argument, while a popular one, is overstated, as suggested above. Dangers of corruption undoubtedly exist at that level -- particularly in terms of the pressure incumbents might place upon possible contributors -- and it can be difficult to distinguish between legitimate, versus corrupt, dealings between private interests and politicians. The difference often lies at the level of intentions and unspoken understandings -- a risky basis for imposing far-reaching limitations upon political expression and the freedom of association.

Indeed, explicit corruption between donors and candidates has gradually been receding for the past century. While no hard data can be produced to confirm that trend, given the covert and consensual nature of many corrupt dealings and the absence of immediate victims to make complaints, a look at politics in the 19th Century is instructive in this regard.<sup>52</sup> And to the extent that this claim is valid, a gradual reduction in corruption would seem to owe more to the vitality of political contention than to reform as such. In an open, competitive political system, opponents can take officials to task for their deeds -- corrupt and otherwise -- and the press and groups civil society are free to join in the process, as well as to monitor each other. Incumbents have credible reasons to think that corrupt behavior can cost them their seats, and that risk -- a much more immediate constraint than the threat of fines and imprisonment -- can restrain corrupt activity.

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<sup>52</sup> Mark Wahlgren Summers, *The Plundering Generation: Corruption and the Crisis of the Union, 1849-1861*. (New York: Oxford University Press, 1987); Summers, Mark W. *The Era of Good Stealings*. (New York: Oxford University Press, 1993); Eisenstadt, A. S., A. Hoogenboom, and H. L. Trefousse, *Before Watergate: Problems of Corruption in American History*. (Brooklyn, N.Y.: Brooklyn College Press, 1978).

Thus reformers should think twice, and twice again, before imposing further restrictions upon the vitality of politics. Politics will always be an undignified process; self-interest will always be its driving force. And that is precisely as it should be: so long as officials do not feel completely secure or extremely insecure in their hold on office, as long as citizens and groups can effectively argue their case during campaigns, and as long as the process itself is open to scrutiny, politics itself can place significant restrictions upon corruption. This is not to argue that politics is totally self-regulating. Rather, I suggest that the process is of immense value, and that we ought to focus on increasing its vitality and levels of competitiveness, and on rewarding and protecting free debate and the exchange of views, rather than upon restricting these activities or starving them of funds to prevent abuses whose causes and extent remain debatable.

#### 7.1 Integrated Strategies Against Corruption: Campaign Finance and State Reform.

Campaign finance laws must be integrated into a broader set of anti-corruption policies -- particularly when a country is just embarking on major reforms. Reforms may deter corruption and open up the political process during campaigns, but what the winners do with state power between elections -- and the ways losers play the role of Opposition -- are critical issues. Even in states with relatively limited roles in the economy, decision makers confer or withhold major political resources by their actions, and can pre-empt or buy off political competitors -- thus making it less likely that corruption will be effectively challenged. The US has been fortunate through much of its history in having generally competitive national politics, both with respect to limiting corruption somewhat, and to enabling a campaign finance system based heavily on disclosure (as we shall see) workable. In a more dysfunctional political setting, the current law would be little more than a smokescreen for business as usual. Where incumbents exploit public resources or private wealth, they can not only reward themselves but harass their opponents, starve them of funds, and maintain voters in a state of dependency. In that sort of setting, campaign finance issues are largely beside the point.

The United States has had several examples of governing parties or coalitions able to engage in such abuses. Our history of state and local political machines, and their patronage

systems, is well known: virtually everything government did, from putting up a stop sign to awarding major contracts and franchises, became a gift given on a political basis. Not only did these favors make large parts of civil society dependent upon the machine; opponents had little to offer potential supporters and even less hope of honest election procedures. Political favors were paid for in the form of the votes of the poor, and money from businesses small and large; the votes enabled the machine to hold power while the money was divided between the needs of the machine organization and the pockets of the top leadership. One little-known source of such money, even down to recent times, was the awarding of no-bid contracts for insurance on government employees or property; many politicians ran insurance businesses on the side. Many machines eventually collapsed not so much because reformers destroyed them, but because the top leadership took too much money for themselves and left too little for the rest of the organization.

Two types of corruption were particularly common. The first -- extracting cash directly from state activities -- was reduced more successfully than the second -- favoritism in policy making. One reason for this is historical: machines engaged in the first because it was so easy to do so, and because the nature of policies they administered -- more distributive than regulatory -- encouraged such wrongdoing as well. They did engage in policy favoritism -- notably, by not enforcing labor laws -- but this was secondary in most places. Thus, when an anti-machine reform movement did gain strength, it moved mostly against the theft or misappropriation of resources with a transparency-oriented agenda.<sup>53</sup> There were political reasons for this contrast too, however: the business interests who ended up backing reform stood to benefit from policy favoritism but got little good out of official theft. Legal considerations entered in as well: policy favoritism is harder to prosecute, and to portray as corruption in the legal sense, than outright theft or graft. Cause and effect are difficult to show; policy favoring particular interests in all but the most clumsy ways can be passed off as lying within the discretion of the legislature. At times,

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<sup>53</sup> See, for a comprehensive discussion, Frank Anechiarico and James B. Jacobs, *The Pursuit of Absolute Integrity*. (Chicago: University of Chicago Press, 1997).

the expectations of support in exchange for favorable policy were so well-known that no one needed to make overt demands.

What eventually limited such corruption? Healthy political competition is a major deterrent, and the worst cases of both kinds of corruption have tended to be in low-competition parts of the country. The main reform measures have been aimed at transparency and sound administration. These began in the late 19th century, and continue today. They include:

--Political independence of the bureaucracy maintained by Civil Service legislation based on merit principles (the federal Pendleton Act, and its federal and state successors) and prohibiting politically-motivated hiring, dismissal and discipline; by the Hatch Act, forbidding political activity by federal employees and others, as well as political demands upon those employees by their superiors; anti-patronage legislation, lately aggressively supported by the courts (as in *Rutan v. Illinois*)

--Transparency policies, including auditing and controls over cash and supplies, sealed-bidding requirements, public tenders of contracts, and the like; controls over interactions among Principals, Agents, and Clients;<sup>54</sup> and a growing emphasis upon professionalism in the bureaucracy. Reform was reinforced by solid (if not splendid) wages for bureaucrats, and by the fact that the state has typically had a limited and primarily technical role in the economy for the last century, rather than running an extensive network of parastatal enterprises.

Political independence and transparency are worthy goals, but they can cause problems if carried too far. The first can make bureaucrats unresponsive and un-accountable, and the second can so burdening agencies with transparency requirements that personnel and resources end up being diverted from the actual missions of the organizations. For example, Anechiarico and Jacobs describe New York City building inspectors who must return to the office and file a report after every inspection, rather than traveling from job to job, and whose productivity is thus much-reduced.<sup>55</sup>

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<sup>54</sup> Robert Klitgaard, *Controlling Corruption*. (Berkeley: University of California Press, 1988).

<sup>55</sup> Anechiarico and Jacobs...

Other kinds of reforms include limited regulation of private clients: an example is the way New York City "pre-qualifies" contractors, weeding out those with past corruption links or connections to organized crime (this process, too, has its critics). Conflict-of-interest legislation has also been very important (and again can be carried too far); this is one way to prevent politicians from siphoning off no-bid insurance business, for example.

Finally, federalism has been a major factor: opponents of corruption in state or local governments have been able to appeal to the next higher level for support. New York State played a major role in reforming New York City, for example. Those higher jurisdictions are often more socially and politically diverse, and thus more competitive, than the lower ones, making it difficult for any one group to gain the kind of hegemony needed to feed upon the state. Obviously, there is no upward appeal from the Federal level, but there political competition is most open and the bureaucracies the best-paid and most professional. The net effect has been to restrain (though by no means to eliminate) the two kinds of corruption mentioned above.

Thus, campaign rules are only one piece of a complex policy challenge, and cannot by themselves create good politics or better policy. Problems such as crime, education, jobs, the environment, and racial difficulties are intrinsically difficult; even in a totally clean system there will be many reasons for discontent. Indeed, it is possible to undermine some values in the course of protecting others, and to build walls around a system that is not working well to begin with – and in so doing, to squander rare political opportunities for needed change. Many of today's reformers seek to capitalize upon popular resentment to building support for their proposals, raising further expectations that reforms cannot meet. Thus, much of the current debate consists of exaggerated claims of danger and equally inflated claims for the benefits of new proposals. A reasoned and subtle appraisal of those issues has not been a part of the debate, and seems unlikely to become one.

## 7.2 Building Public Trust.

There is, of course, another meaning of "corruption" -- one that dates back at least to Thucydides. It focuses, not on specific people or actions, but on the capacity of a state to elicit the loyalty and trust of its citizens.<sup>56</sup> Corruption, in this view, is not a characteristic of a deed, but rather a collective state of being: when the leaders of Athens gave in to the impulse to invade the island nation of Melos, all of Athens -- not just officials -- fell into a state of corruption and of lost virtue. This idea is captured, imperfectly perhaps, in the dilemma discussed at the beginning of this paper -- that of how to liberalize both politics and markets without allowing the former to become a mere extension of the latter. A political system that has fallen into that trap loses the loyalty and active support of most citizens who, lacking the resources to compete with the wealthy, must depend upon a just and fair political system for their liberty and wellbeing. It also loses its ability to *aggregate* private preferences into legitimate, genuinely public policies that will be broadly accepted and obeyed. In such a setting, policy *making* becomes an auction, and policy *implementation* either a matter of coercion or an exercise in cynicism. Much of the current popular discontent with American politics, and with the state of political finance in particular, recalls this classical conception of corruption. The problem is not bribery or extortion as actual events -- at the federal level, both remain by far the exception, not the rule. Rather, it is the widespread perception that the whole system, and the guarantees it supposedly provides its loyal citizens, have been debased by money.

The issue is not whether this has actually happened, but rather that so many *believe* it has. This kind of discontent cannot be addressed through legislation alone: the entire political process will have to earn the increased trust of the citizens. To be sure, more extensive education of the public is needed, and the temptation to play to its fears in demagogic ways will have to be resisted. But if the past two decades have taught us anything at all, it is that the best approach may be to worry not only about preventing corruption, but also about fostering competitive, open politics. Doing this will enhance the anti-corruption advantages of democratic politics, both in the sense of deterring corrupt behavior and of engaging the renewed loyalty of

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<sup>56</sup> J. Patrick Dobel, "The Corruption of a State", *American Political Science Review*, 1978; Euben...

the public. It will also return our focus to the democratic values and processes that are the main reason why bribery, and the regulation of money's role in politics, are important to begin with.