Political Corruption

Concepts & Contexts

Third Edition

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editors

Transaction Publishers
New Brunswick (U.S.A.) and London (U.K.)

This book is printed on acid-free paper that meets the American National Standard for Permanence of Paper for Printed Library Materials.

Library of Congress Catalog Number: 2001041596
ISBN: 0-7658-0761-2
Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Political Corruption : concepts and contexts / Arnold J. Heidenheimer and Michael Johnston, editors—3rd ed.
p. cm.
Includes bibliographical references.
Contents: v. 1. Newspaper culture.
ISBN 0-7658-0761-0 (pbk. : alk. paper)
1. Political corruption. I. Heidenheimer, Arnold J. II. Johnston, Michael, 1949-

JF1525.C66 P65 2001
364.1' 323—dc21 2001041596

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Notes

* All data and documentation necessary to replicate this analysis is available from the authors.

1. Thomas Holbrook, a co-author of the original article, was unable to take part in this revised version.
2. We should reiterate that we find the immigration hypothesis both silly and xenophobic. The idea that certain types of immigrants are likely to be more corrupt than others is without empirical foundation as far as we can tell.
3. The Erikson, Wright, McIver measure excludes Alaska and Hawaii. In order to include these states, public opinion conservativism was estimated using the roll-call liberalism of the state's congressional delegation (Holbrook-Provow and Poe 1987).
4. The results of the factor analysis are available from the authors.
5. We are skeptical that these data do not exist. A prosecution is an activity that takes place in an open court on the record. As a result there are no confidentiality concerns. While the federal court data system does not report information on the race of the defendant, the Federal Bureau of Investigation does maintain this information on arrests.
6. Three explanations exist for this general lack of pattern. The first is that the Clinton prosecutions are not targeted in any sense, that is, they are generated by factors other than the variables linked to corruption or the targeting factors. Whether this is good or bad depends on what those factors are. The second explanation is that the intent might be to target but the Clinton Justice Department is simply not very good at it. Finally, the Clinton administration was particularly slow about replacing Republican appointees and thus its efforts might be muted.

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Corruption Concepts and Federal Campaign Finance Law

Thomas Burke

In *Buckley vs. Valeo*, the Supreme Court put the concept of corruption at the center of American campaign finance law. The Court held that only society's interest in preventing "corruption and the appearance of corruption" outweighed the limits on First Amendment rights created by restrictions on campaign contributions and expenditures. Other goals, such as equalizing the influence of citizens over elections, limiting the influence of money in electoral politics, or creating more competitive elections, were rejected as insufficiently compelling to justify regulating political speech.[1] The Court's focus on corruption has been reiterated in a series of cases following *Buckley* which have decided whether local laws and various provisions of the Federal Election Campaign Act violate the First Amendment.[2] Barring a major shift in this area of law, corruption is the criterion by which the constitutionality of further reforms in American campaign finance regulation will be measured.

The Supreme Court's emphasis on "corruption and the appearance of corruption" has stimulated criticism on several fronts. From the left, the Court is criticized for not giving credence to other interests in campaign finance regulation.[3] From the right comes the criticism that the Court has been inconsistent in its application of the corruption standard.[4] Others find the problem in the term "corruption" itself. Frank Sorauf argues that while the phrase "has a ring that most Americans will like . . . its apparent clarity is deceptive and its origin is at best clouded."[5] Yet whatever its flaws, politicians, activists, judges and even picky academics are constantly drawn to employing the concept of corruption in their claims about the American campaign finance system. I

hope in this chapter to give some sense of both the possibilities and the limits of understanding campaign finance as an issue of corruption.

The first part of the chapter briefly considers the concept of corruption and the ways in which academic commentators have explored it. The second part analyzes how "corruption" has been employed in a series of Supreme Court cases beginning with *Buckley*. Finally the third part defends what I call the "monetary influence" standard of corruption as the most appropriate one to use in controversies over campaign finance. This defense turns out to be a rather complex enterprise; it requires a turn back to the foundations of representative democracy. Any adequate standard of corruption in campaign finance, I argue, must be grounded in a convincing theory of representation.

I. The Concept of Corruption

Even the dictionary definitions of corruption suggest that it is a tricky term. The *Oxford English Dictionary* gives nine basic definitions of corruption, but there is an element common to all: a notion that something pure, or natural, or ordered has decayed or become degraded. Corruption was used in medieval times to denote physical processes such as infection or decomposition.[6] When corruption is proclaimed in political life it presumes some ideal state. Corruption is thus a loaded term: you can't call something corrupt without an implicit reference to some ideal. So for example, at the core of what Arnold Heidenheimer has termed the "public office" approach to corruption is the ideal of disinterested public service, the commonly held view that an officeholder shouldn't trade public good for private gain.[7] Similarly the classical sense of corruption as involving luxuriousness and indolence implies an ideal of asceticism and civic virtue.[8] The Aristotlean conception of corruption as self-interested factionalism depends on an ideal of a polity united in dedication to the common good.[9] The more recent notion of corruption in liberal polities as a loss of vigor presumes an ideal of energetic political competition.[10]

How to decide among these ideals—and their corresponding standards of corruption? James Scott divides attempts into three approaches: legal norms, public opinion and the public interest.[11] A legal norms approach focuses on the laws and formal rules of a given society in determining what is corrupt and what is not.[12] While such an approach may be useful in comparative research, it seems unlikely that it can help us in a discussion of a legal controversy.[13] After all, we can't very well refer to the rules of our society when the issue is what those rules should be.

The public opinion approach is similarly problematic. It may seem sensible to define what is corrupt by finding out what most people in a given society consider corrupt, but on most of the interesting questions public opinion is likely to be ambiguous. As Scott points out, there is no clear, non-

arbitrary way to decide what level of social consensus is necessary before we declare a given act corrupt.[14] Should a mere majority be sufficient, or should unanimity be required? Should the opinions of the more educated, those better informed, or those more interested in politics, be given more weight? Public opinion will always be an unsteady guide except in the easy cases.

Finally there is the public interest approach, which involves defining some ideal against which corrupt conduct can be measured. This approach merely gauges what is corrupt in terms of an even more contested concept, the "public interest." Political scientists, the group that has thought the most about the concept of corruption, have had trouble even agreeing that there is some such thing as the public interest, much less defining what that interest involves.[15] Thus all three approaches have serious problems.

Fortunately, for the purposes of this chapter I need not pretend that there is some unifying, global criterion of corruption, one that can resolve all ethical issues in politics. Rather, my task is to give some sense to the term as it is used in the discussion of campaign finance law. Yet even in this more limited realm it is hard to see where we are to draw our standards from.

II. Corruption and the Campaign Finance Cases

Buckley and its progeny are complex, confusing cases. Thus it is no surprise that commentators and judges have differed in their interpretation of the Court's treatment of "corruption." Lillian BeVier, writing in 1985, concludes that under the Court's rulings the "only activity that may become the target of corruption-preventing legislation is that of securing or attempting to secure 'political quid pro quos from current and potential officeholders.'"[16] By this criterion, only pre-arranged deals—trades of votes for money—qualify legally as corrupt. Paul Edwards further develops the quid pro quo standard of corruption and claims that, in a later campaign finance case, *Austin v. Michigan Chamber of Commerce*, the Court made a "dramatic change" in its approach by veering away from this limited definition of corruption to a much broader one, influenced perhaps by Rawlsian liberalism.[17] Frank Sorauf, by contrast, finds hints even in the earlier cases that the Court's concerns went beyond pure quid pro quos.[18]

In its most recent campaign finance case, *Nixon v. Shrink Missouri Government PAC*, the Supreme Court itself divided on the proper standard of corruption. Shrink Missouri Government, an organization which made campaign contributions to candidates in state elections, challenged limits to those contributions as not falling within the corruption rationale for regulation advanced in *Buckley*. This challenge led the justices to argue with each other over what kinds of conduct had been considered corrupt in *Buckley* and succeeding cases. The majority, led by Justice Souter, insists that in these cases the Court "recognized a concern not confined to bribery of public

officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." Justice Thomas, in his dissent, claims that in *Buckley* "the Court repeatedly used the word 'corruption' in the narrow quid pro quo sense". Thomas contends that the *Nixon* majority "separates 'corruption' from its quid pro quo roots and gives it a new, far-reaching (and speech-suppressing) definition . . . "[19] Thus debate over "corruption" continues to be a central aspect of campaign finance jurisprudence.

Justice Thomas to the contrary, the Court has clearly gone beyond a quid pro quo standard of corruption well before *Nixon*. In the series of cases beginning with *Buckley* and ending with *Nixon*, three distinct standards of corruption are advanced, though at several points the Court blurs them. I label them quid pro quo, monetary influence, and distortion.

The quid pro quo standard is simply that it is corrupt for an officeholder to take money in exchange for some action. The money may be a bribe for personal use or a campaign contribution. The deal is explicit, with both sides acknowledging that a trade is being made.

The monetary influence standard is broader. Here the root idea is that it is corrupt for officeholders to perform their public duties with monetary considerations in mind. The influence of money is corrupting under this standard even if no explicit deal is made.

The third standard of corruption is distortion. The ideal behind this standard is that the decisions of officeholders should closely reflect the views of the public. Campaign contributions are corrupting to the extent that they do not reflect the balance of public opinion and thus distort policymaking through their influence on elections.

The three standards of corruption—quid pro quo, monetary influence and distortion—have been jumbled together in the corpus of campaign finance law.

Quid Pro Quo Versus Monetary Influence

In *Buckley* the Court struck down limitations on the amounts candidates could spend on their campaigns, yet it upheld restrictions on contributions to candidates. Contributions, the Court said, were less speech-like than expenditures and thus deserved lesser protection. But contributions are also more regulatable because they, unlike expenditures, can be a source of corruption. While the Court at first emphasizes the danger of quid pro quos in discussing the problem of corruption,[20] it also notes that the state's interest goes beyond mere bribery: "But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action."[21] This pattern is repeated in succeeding cases. The Court mentions the quid pro quo standard, but also suggests that corruption goes beyond pre-arranged trading of votes for contributions. Here the Court is hinting at the monetary influence standard.

In *National Bank of Boston v. Bellotti*, the Court struck down a Massachusetts law forbidding corporations and banks from spending money in referenda campaigns.[22] The Court followed *Buckley* in reasoning that while the First Amendment interest in such independent expenditures is high, there is no threat of corruption because in referenda elections there is no candidate to corrupt. In a footnote the majority opinion distinguished the Massachusetts law from the longstanding Federal Corrupt Practices Act, which bars corporate spending in candidate elections:

> The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted.[23]

Here again the Court seems to go beyond the concern about quid pro quo vote-trading, this time to characterize corruption as "the creation of political debts." Four years later, in *FEC v. National to Right Work Committee*, the Court again discussed the need to insure that corporate "war chests" not be used to create "political debts."[24]

For the most part in these early cases the Court does little to explain its notion of corruption, and we are left to read between the lines. But in the 1984 case of *FEC v. National Conservative Political Action Committee*, the majority opinion by Justice Rehnquist offers a definition:

> Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors.[25]

Here a much wider standard of corruption appears with a restatement of the familiar quid pro quo as a "hallmark." Rehnquist says that elected officials violate their public trust when they are influenced by the "prospect of financial gain to themselves or infusions of money into their campaigns." If Rehnquist had wanted to limit the corruption interest to quid pro quos, he could simply have said so. Instead he calls quid pro quo vote-trading the "hallmark" of political corruption. Again in this passage the Court seems to be acknowledging the second standard, the monetary influence standard of corruption.

Rehnquist is more clear in another passage, when he relies on *Buckley* in distinguishing the regulation of expenditures from regulations governing contributions. Rehnquist concludes that expenditures made independently by a political action committee to support a particular candidate pose little danger

of corruption. Here he emphasizes that "the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from a candidate."[26] Overall, then, in *NCPAC* the Court seems to be moving towards the more narrow quid pro quo standard.

Distortion

That movement is reversed in the 1986 case *FEC v. Massachusetts Citizens for Life, Inc.*[27] Justice Brennan, writing for the majority, held that a state law restricting independent expenditures for candidate elections was overbroad as applied to the appellee, a non-profit corporation. Brennan argued that advocacy groups such as MCFLI should be distinguished from profit-seeking corporations, who pose a real danger of distorting the political process through their accretion of wealth. Citing several earlier corporate cases, Brennan said the precedents reflected concern "about the potential for unfair deployment of wealth for political purposes." Non-profit corporations "do not pose that danger of corruption."[28] This is the only point in the opinion in where Brennan clarifies, even by implication, just what he means by corruption. Brennan's main argument is that corporate political spending poses a threat to the "political marketplace" because the "resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas."[29] Here Brennan embraces the distortion standard.

Austin v. Michigan Chamber of Commerce, decided in 1990, amplifies this theme and links it more clearly to the concept of corruption. *Austin* concerned an independent expenditure made by the Chamber of Commerce to promote a candidate for the U.S. House. In *Buckley* the Court had concluded that such independent expenditures posed a relatively small risk of corruption since candidates were far less likely to feel a debt to independent spenders than contributors. In upholding a law barring such independent expenditures, the Court could merely have taken issue with this assessment and declared that independent expenditures also create political debts.[30] Instead, Justice Marshall's opinion defines a new concept of corruption, borrowed partly from Brennan's opinion in *MCFLI*:

> Regardless of whether [the] danger of "financial quid pro quo" corruption . . . may be sufficient to justify a restriction on independent expenditures, Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.[31]

Here corruption is no longer tied to the conduct of the officeholder, but instead concerns the power of the corporate spender in the political marketplace. Although some of Marshall's argument was anticipated in *MCFLI*, the *Austin* opinion represents the flowering of the distortion conception of corruption.

In a typically bombastic dissent Justice Scalia castigated the majority's "New Corruption":

> Under this mode of analysis, virtually anything the Court deems politically undesirable can be turned into political corruption—by simply describing its effects as politically "corrosive," which is close enough to "corruptive" to qualify . . . The Court's opinion ultimately rests upon that proposition whose violation constitutes the New Corruption: expenditures must "reflect actual public support for the political ideas espoused." This illiberal free-speech principle of "one man, one minute" was proposed and soundly rejected in *Buckley*.[32]

In *Buckley* the Court had rejected an equalization goal for campaign finance law, concluding that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment".[33] Scalia charged that the majority had simply resurrected the equalization theory in a new guise—the New Corruption.

Scalia's fear that the distortion standard would become a central aspect of campaign finance jurisprudence has not, however, been realized. in its most recent campaign finance decision, *Nixon v. Shrink*, the Court has instead reinvigorated both the "monetary influence" standard of corruption and the "appearance of corruption" prong of *Buckley*. The *Nixon* opinion emphasizes *Buckley*'s concern that large contributors can "influence governmental action," and that the resulting perception that "large donors call the tune" might "jeopardize the willingness of voters to take part in democratic governance."[34] No mention is made of distortion, or indeed of *Austin* itself. *Nixon* seems to limit *Austin* and the distortion standard to cases involving corporate contributions.

Evaluating the Standards

Both *Austin* and *Nixon* illustrate the difficulties in developing standards for corruption. *Austin*'s distortion standard of corruption has broad implications. As noted above, to use the term "corruption" one must have some underlying notion of an ideal state. Marshall's opinion suggests that in his ideal state expenditures are calibrated to actual public support. A deviation from this constitutes corruption and may be regulated. Because just about any private financing scheme is likely to have "distortions"—to not reflect underlying public support—Marshall's principle would justify very strong regulatory measures.[35] Indeed it is difficult to square Marshall's principle with any system of private financing for political campaigns.

Marshall's opinion reflects the broad concerns of many about the connec-

tion between wealth and power, politics and markets, in a capitalist, democratic society. Indeed, many would argue that this is the main problem in campaign finance, far outstripping any concerns we might have about the intentions and actions of individual legislators. This broader concern has not, outside of Marshall's opinion in *Austin*, received much attention from the Court.[36] But even those who might be attracted to Marshall's ideal, or think that corporations can constitutionally be kept from throwing their monetary weight around, may shrink from describing this as a problem of corruption. "Corruption" can be used to describe any movement away from an ideal; this is the sense in which illness is a corruption of the body. But in politics "corruption" has a more specific connotation, that an officeholder has been led by private inducements away from the ideal of disinterested public service. As Justice Scalia charges, the majority opinion in *Austin* takes advantage of this connotation by conflating the relatively uncontroversial ideal of disinterested public service with the far more problematic ideal of "undistorted" campaign finance. The rhetoric of corruption is used to champion an ideal so sweeping that, if taken literally, would condemn any imaginable private campaign finance system—and perhaps even *public* financing systems in which the funding is not carefully calibrated to public support.

But while *Austin*'s standard of corruption is too broad, the quid pro quo standard is too narrow, as the Court has recognized from time to time. Indeed, as Justice Thomas has argued, if only pure vote-trading is considered corrupt, it is difficult to see how the Court could uphold the constitutionality of any limits on contributions.[37]

The quid pro quo conception focuses on pre-arrangement as the truly corrupting aspect of vote-trading. Under this standard, it does not matter whether public officials are influenced in their stands on public policy by contributions so long as there is no formal deal made. But deals—trades of votes for money—were outlawed long before the advent of campaign finance regulation. As Daniel Lowenstein has pointed out, many courts have held that campaign contributions can be bribes, and bribery convictions based on campaign contributions have been upheld in many jurisdictions.[38] Traditionally in First Amendment law, regulations which impair free speech must be judged "narrowly tailored" to achieving a "compelling state interest" to be considered constitutional. If there is a less restrictive way to achieve the same interest, the regulation is struck down. This creates a puzzle: if governments can only regulate quid pro quos, why should they be allowed to go beyond simple bribery laws? Why regulate so much legitimate "speech" in an effort to stop bribery when you can instead simply outlaw bribery? As Justice Thomas has argued, contribution limits are only distantly related to the goal of stopping quid pro quo vote-trading, and certainly would never meet the Court's "narrowly tailored" test.

The truth is that the contribution limits the Court upheld in *Buckley* were aimed at far more than quid pro quo corruption. The *Buckley* Court recognized this when it concluded that "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action."[39] Instead the Court sees the problem as one of "political debts," that officials are "influenced to contrary to their obligations of office by the prospect of . . . infusions of money into their campaign."[40] The problem recognized here is one of generalized financial influence on legislators, not pure vote-trading.

Indeed, it is not clear why a quid pro quo is any more corrupting than a contribution which influences a public official more indirectly. In bribery law it makes sense to require that there be evidence that the official explicitly agreed to trade a vote for a contribution. Otherwise, we will never know for sure if she was influenced by the money; there will always be doubt about whether the gift was taken innocently.[41] But the object of bribery laws is not the deal itself; the deal is just evidence that influence has taken place. The reason we make bribery illegal is that we don't want officials to be affected by monetary considerations, not that we have a particular animus against deal-making. Even in bribery, then, the ultimate interest is not quid pro quo corruption, but the corruptive influence of money. Campaign finance laws can address this problem by creating a contribution system that limits the influence of money. Thus it makes no sense to say that the contribution limits are aimed only at quid pro quo corruption.

In *Nixon* a majority of the Court recognized this. But oftentimes the Court's campaign finance decisions lapse back into quid pro quo language, perhaps because the justices realize the open-endedness of considering general financial influence a problem. If the ideal is a system in which public officials are not influenced by campaign contributions, how broadly should campaign finance laws be allowed to sweep? One can imagine at the least that more extensive campaign regulation could be upheld under this standard. The Court might, for example, uphold a law regulating independent expenditures in candidate elections, or take a deferential view towards a ban on "soft money"—unregulated contributions to parties. (The soft money ban was the centerpiece of the much-publicized McCain-Feingold bill.)

Nonetheless, the Court in its more thoughtful moments has employed the monetary interest standard. When the prospect or the receipt of campaign money influences the behavior of public officials, they are corrupted, whether or not a deal has been made. Although the goal of stopping this kind of corruption must be weighed against First Amendment interests, the Court has upheld contribution limits on this basis.

III. Does Money Corrupt?

I have argued that the Court is on firmest ground when it adopts the "monetary influence" standard of corruption. But what is it about monetary influence—or, for that matter, quid pro quo trading—that is so corrupting? On what basis can we say that public officials who are influenced by contributions are corrupt?[42] Because the Court does not develop its own account of what makes an action corrupt, we must go beyond the campaign finance cases to answer these questions.

Daniel Lowenstein argues that the "payment of money to bias the judgment or sway the loyalty of persons holding positions of public trust is a practice whose condemnation is deeply rooted in our most ancient heritage."[43] Lowenstein believes that there is a strong cultural norm in our society that public officials not be influenced by money, either in the form of gifts or campaign contributions. As evidence, Lowenstein cites the writings of various scholars on the subject and the law of bribery, which in many jurisdictions makes quid pro quo campaign contributions illegal.[44] Thus Lowenstein appeals to the public opinion and legal norms approaches in defining financial influence as corruption. As noted above,[45] these are problematic appeals. Lowenstein has no polling data to show that the vast majority of Americans agree with his norm, but even if he did we might still contend that Americans are simply misguided in believing that financial influence is corrupting. Martin Shapiro argues that Lowenstein, by operating as a "cultural anthropologist," may be able to discover a societal norm, but such a norm cannot be the basis of constitutional law: "There is a cultural norm of racism in our society. Does the existence of such a norm give constitutional legitimacy to racist statutes?"[46] Shapiro maintains that Lowenstein cannot define what is corrupt merely by reference to social norms or legal principles. Even the fact that bribery statutes often cover campaign contributions traded for political favors is not determinative. Only a theoretical argument can answer the question. Everything else is question-begging.

Thus any serious thinking about corruption must move us back to first principles, to fundamental beliefs about government. The debate over the place of corruption in campaign finance ultimately turns on the theoretical foundations of representative democracy. In several recent articles, Dennis Thompson has grounded his approach to legislative ethics in a theory of representation which stresses deliberation. The debate between Thompson and Bruce Cain, another expert on campaign finance, illustrates the deep roots of the controversy over corruption.

Representation and Deliberation

Thompson advances a seemingly simple idea: in a functioning democracy, representatives must deliberate about the public good. Private interests have a legitimate place in a democracy as long as they subject themselves to "the rigors of the democratic process." To get their way, private interests must convincingly articulate public purposes.[47]

Private interests which attempt to bypass this deliberative process are "agents of corruption."[48] They tempt representatives to ignore public purposes and to pay attention to influences "that are clearly irrelevant to any process of deliberation."[49] What influences are clearly irrelevant? Thompson gives as his primary example personal gain. Personal gain tends to take time and attention away from what should be the job of the legislator and can overwhelm the "unsteady inclination to pursue the public good."[50] Thus bribes, for example, corrupt the deliberative process.

Campaign contributions, Thompson says, are different from bribes because they are a necessary part of the political process. Moreover, Thompson says we should admire those who, within limits, pursue political gain, including campaign contributions.[51] But campaign contributions corrupt deliberative democracy when they influence representatives to change their stands or refocus their energies.[52] Thus Thompson accepts what I have called the "monetary influence" standard of corruption. For him, campaign contributions aimed at influencing elections are vital to the democratic process, but those aimed at influencing the representatives' decisions corrupt the process. Thompson shows how a deliberative theory of representation leads to a "monetary influence" standard of corruption.

In his article "Moralism and Realism in Campaign Finance," however, Bruce Cain rejects both deliberative theory and the monetary interest standard. Cain argues that deliberative theory is "excessively restrictive and very naive," and that it is out of step with the philosophical foundations of American government.[53] Further, Cain suggests that Thompson's approach relies on Edmund Burke's trustee concept of representation, which, Cain claims, is not widely accepted.

Instead Cain offers his own "procedural fairness" vision of democracy, drawn from the pluralist tradition in political science. He groups under this label theorists such as Joseph Schumpeter, Anthony Downs, Robert Dahl and James Madison (or at least, Dahl's rendition of Madison). What these otherwise disparate theorists share, according to Cain, is an approach to politics that is nondeliberative. Each treats democracy as a matter of preference aggregation, and each expects representatives to act as delegates in order to be elected. For proceduralists, Cain seems to conclude, the notion of corruption in campaign finance is simply meaningless. If, after all, politics is simply a matter of counting preferences, campaign contributions can be seen as a kind of vote, a way to signal the direction (and intensity) of one's desires. Money is then just another currency in the counting process, one which advantages some groups and disadvantages others. The only real issue in campaign finance, according to Cain, is how to count fairly, and opinions about this will naturally differ depending on which groups one favors.[54]

The conflict between Thompson and Cain is so fundamental that it is difficult to arbitrate. Perhaps the best place to start with Cain's contention that deliberative theory is a "nontraditional conception of American democracy."[55] This is a surprising claim, for as Thompson argues, deliberation was at the center of the Framers' conception of representative government.[56] The *Federalist Papers*, for example, justify many aspects of the Constitution—separation of powers, bicameralism, methods of election, size of legislative bodies—in terms of their effect on the deliberative process. The aim was to replace the excess of passion and "local spirit" that had overtaken state legislators with a concern for "the permanent and aggregate interests of the community," or as the *Federalist Papers* variously puts it, "the good of the whole," "the public weal," "great and national objects," "the great and aggregate interests," the "common interest," the "common good of the society," and the "comprehensive interests of [the] country."[57] Indeed, Madison's famous defense of an extended republic in *Federalist #10* was built on deliberative theory. He argued that such a republic was more likely than other systems of government

> to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be less likely to sacrifice it to temporary or partial considerations.[58]

Madison was, of course, a subtle thinker who understood the complex interplay of interests and deliberation, so one is likely to oversimplify his views by selective quotation. Yet the deliberative aspects of his thought cannot be denied. Over the past three decades, scholars in law, history and political science have demonstrated the profound influence of republican theory, with its emphasis on deliberation about the public good, on the thought of the Framers, particularly Madison. The historian Gordon Wood concludes that Madison and the Federalists believed in a government that rose above factional interests:

> They still clung to the republican ideal of an autonomous public authority that was different from the many private interests of the society. . . Nor did they see public policy or the common interest of the national government emerging naturally from the give-and-take of these clashing private interests. . . Far, then, from the new national government being a mere integrator and harmonizer of the different special interests in the society, it would become a "disinterested and dispassionate umpire in disputes between different passions and interest in the State."[59]

The Framers, in sum, embraced deliberative theory.

The elitism of the Framers, who envisioned rule by a virtuous gentry, soon fell out of favor.[60] But their concern for deliberation has lived on. A long list of studies highlights the continuing importance of deliberation in American democratic theory and practice.[61] This attention to deliberation is hardly

limited to theorists. Political scientists have confirmed the central role of deliberation in American government in their study of legislatures, courts, bureaucracies and the presidency. In his book on deliberative theory and practice Joseph Bessette cites 33 such studies.[62]

A few examples should suffice. Cass Sunstein argues, based on a review of the fundamentals of constitutional jurisprudence, that we live in a "republic of reasons." Courts, he says, will strike down laws based only on "naked preferences," the mere assertion of private power. To act constitutionally, legislators must provide a public-regarding rationale for their policies. It is through the process of deliberation that these rationales are articulated and judged.[63] Martha Derthick and Paul Quirk trace the influence of ideas and deliberation on regulatory reform of the telecommunications, trucking and airline industries in *The Politics of Deregulation*.[64] Richard F. Fenno finds that making "good public policy" through careful study of issues is the dominant goal of representatives who seek a position on the Education and Labor and Foreign Affairs committees.[65] As Joseph Bessette has suggested, when political scientists actually examine the process of policymaking they find plenty of deliberation going on.[66]

Deliberative theory is untraditional only among some political scientists who, beginning with Robert Dahl, have downplayed the republican and deliberative aspects of American government. The tradition from which Cain works starts not with Jefferson, Hamilton, or Madison, but rather Arthur Bentley, David Truman and Dahl.[67] The vision of American democracy as preference aggregation is widespread among political scientists and public choice theorists, but outside of these narrow realms it is hard to say how well it resonates. Whatever popular opinion would hold, though, Cain clearly underestimates the centrality of deliberative theory in American political thought and practice.

Cain's argument that Thompson relies on a trustee theory of representation, however, points to a more troubling issue. In fact Thompson attempts to distinguish his approach from the trustee conception. He points out that the views of the constituency and the views of the representative about what is in the public interest are likely on many issues to coincide. Where they do conflict, however, Thompson says that representatives may voice their constituents' views in order to give them a hearing in the deliberative process. As long as the process itself is deliberative, as long as it focuses on the merits of the issue, it does not matter whether the individual representative is delegate or trustee.[68] And this suggests an important difference between trustee/delegate theories of representation and deliberative theory: where the trustee/delegate dichotomy focuses on the level of the individual representative, the deliberative theory leads us to look at what is happening to the institution as a whole.

Yet this refinement creates another difficulty, one that Thompson does not

address. If in a deliberative democracy representatives can in some circumstances act as delegates for their constituents, why can they not also act as delegates for their contributors?[69] I think the answer is that Thompson allows for only a narrow exception to the basic rule that representatives must deliberate. In giving voice to the views of their constituents, representatives can on some occasions move deliberation forward. But if a significant number of representatives are acting *solely* as delegates, ignoring not only the arguments of others but even their own views, deliberative democracy is imperiled. This corruption of the deliberative process is much more likely when representatives fall under the sway of their contributors. Contributor-influenced representatives are unlikely to be candid about the motivation for their actions; the last thing they want is an open examination of the quality of their reasons and their process of deliberation. Thus where contributor-influenced representatives predominate, legislative deliberation becomes a sham. By contrast, constituent-influenced legislators can acknowledge the pressures on them and, where their own views conflict with those of the constituents, can even deliberate publicly about how the two can be reconciled.[70] Constituent influence can itself become a matter for deliberation in a way that contributor influence never can. Hence contributor influence is much more likely than constituent influence to have a pernicious effect on deliberative democracy.

Deliberative theory, then, provides a grounding for the monetary influence standard of corruption. If politics is nothing more than a market, and politicians nothing more than retailers, than there is no need for deliberation, and no necessary problem with bribery through the campaign finance process. That is the vision behind Cain's procedural theory. But if representation involves deliberation about the public good, then contributions that influence representatives are a corruption of the democratic process.

Deliberative theory is well-grounded in American political philosophy and practice. It is an attractive, approachable ideal. Its appeal explains why, despite criticisms like those voiced by Cain, academic, legal and popular debate about campaign finance continues to revolve around notions of corruption.

IV. Alternative Standards of Corruption

I have argued that the concept of corruption can be applied to one of the major problems in campaign finance, the influence that contributors get over the actions of representatives. The monetary influence standard of corruption has been invoked in several Supreme Court cases, but the Court has drifted in its treatment of corruption.

At some points the Court has characterized the problem as one of distortion of public opinion. At other times the Court has portrayed the issue as a matter of vote trading, of quid pro quos. Both of these characterizations are problematic. *Austin*'s proclamation that the political system is corrupted when

campaign contributions don't mirror public opinion is unpersuasive, because "corruption" is not a synonym for "inequality." Yet when, as in Justice Thomas's recent campaign finance opinions, corruption is reduced to a concern about quid pro quos, it fails to provide a rationale for any campaign finance law beyond prohibitions on bribery.

All standards of corruption rest on some notion of what constitutes an ideal political community. The ideal behind the quid pro quo standard seems to arise out of what Arnold Heidenheimer has called the "public office" approach to corruption. Here the ideal of a healthy political community is one in which representatives do not make deals in which they exchange public policy for some private gain.[71] This ideal seems uncontroversial, but, standing by itself, it is also thin, individualized, and, as I have argued, unconvincing as a rationale for campaign finance regulation. It is unconvincing because absent some broader notion of an ideal political community it is not at all clear why deal-making is corrupt. Even to understand what is wrong with campaign contribution bribery we need a thicker, more institutionally focused ideal.

Deliberative theory provides such an ideal. It turns our attention beyond the behavior of individuals to the functioning of representative institutions, and so provides a richer account of a good political community, in which officeholders come together to deliberate over the public good.

Deliberation is just one among many ideals of political community available to the Court in its campaign finance jurisprudence. In *Nixon*, for example, the Court has at last begun to take seriously the idea that a healthy political community is one in which citizens trust their representatives, and thus has given weight to the "appearance of corruption" prong of *Buckley*, as many commentators have urged. Another ideal, thus far unrecognized by the Court, is that of robust, competitive elections. The Court could approve of campaign finance regulations that move the electoral system closer to this ideal. These approaches to corruption have the virtue of being grounded not in judgments about individual transgressions, but in larger institutional visions. In this they would hearken back to the classical conception of corruption as a "disease of the body politic."[72]

There is, however, a danger in adopting more expansive standards of corruption in the context of campaign finance law. The difficulty is that they can move too far beyond the contemporary connotation of "corruption," which clearly does involve some notion of a private use of public office. This is the point Scalia makes in his dissent from *Austin*, when he argues that the Court has conflated "corruption" with concerns about inequality. Inequality in campaign finance may be troubling to some American citizens, he suggests, but would they really consider this an issue of corruption? Scalia's argument rests on what has been called the "public opinion" approach to corruption, in which what counts as corrupt depends on what public opinion considers

corrupt. Used as an unqualified guide to creating standards of corruption, the public opinion approach is problematic, because on most hard questions public opinion is ambiguous. Nonetheless, as Scalia's dissent suggests, we should be wary of standards of corruption that have little connection to popular understandings.

The Court has, I believe, been most persuasive when it has seen "corruption" in campaign finance as an issue of monetary influence. This is a standard roughly in line with public opinion, and yet it can be grounded in one of America's founding ideals, of vigorous deliberation in representative institutions. Thus the monetary influence standard is compatible with both the "public opinion" and "public interest" approaches to corruption.

Of course, the monetary influence standard does not by itself determine the constitutionality of any particular regulatory scheme. After all, people may balance the goal of preventing corruption and the First Amendment interests at stake differently even though they recognize the legitimacy of both claims. Moreover, there is no easy way to separate contributions whose main effect is to influence legislators and so corrupt democratic deliberation from those which promote deliberation by giving candidates for office the chance to make their views known. Contributions have mixed effects, just as contributors have mixed motives. Still, by thinking more carefully about corruption the Court can build a campaign finance law that is more coherent, more convincing, and more faithful to the highest ideals of American democracy.

Notes

1. Buckley v. Valeo 424 U.S. 1 (1975) at 25–27.
2. *First National Bank of Boston v. Bellotti* 435 U.S. 765 (1978); *Citizens Against Rent Control v. Berkeley* 454 U.S. 290 (1980); *California Medical Association v. Federal Elections Commission* 453 U.S. 182 (1982); *Federal Elections Commission v. National Right to Work Committee* 459 U.S. 197 (1982); *Federal Elections Commission v. National Conservative Political Action Committee* 470 U.S. 480 (1985); *Massachusetts Citizens For Life* 479 U.S. 238 (1986); *Austin v. Michigan Chamber of Commerce* 494 U.S. 652 (1990); *Colorado Republican Campaign Committee v. Federal Elections Commission* 116 S.Ct. 2309 (1996); *Nixon v. Shrink Missouri Government PAC* (120 S.Ct. 897 (2000).
3. Skelley Wright, "Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?" Columbia Law Review 82:609 (1982).
4. See Antonin Scalia's dissent in *Austin*, 479 U.S. 679 (1990).
5. Frank J. Sorauf, "Caught in a Political Thicket: The Supreme Court and Campaign Finance" Constitutional Commentary 3:97 (1986).
6. The Oxford English Dictionary, 2nd ed., v.3 (Oxford: Clarendon Press, 1989), 972–4.
7. "Terms, Concept, and Definitions," in Arnold Heidenheimer, Michael Johnston and Victor T. LeVine, eds., *Political Corruption: A Handbook*, 2nd ed., (New Brunswick, NJ: Transaction, 1990), 8.

8. For a discussion of the many conceptions of corruption in European history, see Carl Friedrich, "Corruption Concepts in Historical Perspective," in *Political Corruption: A Handbook*, 15–24. See also Hannah Arendt's discussion of how the leaders of the American Revolution and the leaders of the French Revolution saw corruption in French society. Arendt, *On Revolution* (New York: Viking, 1963) 61–63, 100–103.
9. J. Peter Euben, "Corruption," in Terence Ball, James Farr and Russell Hanson, eds., *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989), 220–245.
10. Dennis Thompson, "Mediated Corruption: The Case of the Keating Five, American Political Science Review (1993) 87:2:369.
11. See James C. Scott, Comparative Political Corruption (New Jersey: Prentice Hall, 1972) 3–5.
12. This is the approach taken, for example, by Joseph Nye, who defines corruption as "behavior which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence." Although Nye's study was based mainly on the developing world, he used what he called a "Western" standard of corruption. Joseph S. Nye, "Corruption and Political Development: A Cost-Benefit Analysis" in Heidenheimer et. al., *Political Corruption*, 966.
13. This is a point Dan Lowenstein makes in his article "Political Bribery and the Intermediate Theory of Politics," UCLA Law Review (1985) 32:784. Lowenstein discusses the problem of defining corruption at 798–804.
14. James Scott, *Comparative Political Corruption*, 4.
15. Frank Sorauf reviewed this debate in "The Public Interest Reconsidered," Journal of Politics (1957) 19:616–639. Sorauf criticizes the term as "subjective and imprecise" and calls various definitions of it "illogical" (633). Sorauf argues that outcomes of public policymaking cannot be judged by a public interest standard. Nevertheless, Sorauf says there is a public interest in the *process* by which policies are created. Thus Sorauf identifies the public interest with the "process of group accommodation" (638). This leaves some ground for pluralists like Sorauf to use a public interest concept in evaluating campaign finance procedures. Robert Dahl similarly finds the "common good" in "practices, arrangements, institutions, and processes that . . . promote the well-being of ourselves and others . . . " (Dahl, *Democracy and Its Critics* (New Haven, Conn.: Yale University Press, 1989), 307. Like Sorauf, Dahl's discussion of practices that promote the common good suggests that Dahl could employ a public interest concept in evaluating issues of campaign finance.
16. Lillian BeVier, "Money & Politics: A Perspective on the First Amendment and Campaign Finance Reform," California Law Review 73:1045 (1985) at 1082. BeVier is quoting from *Buckley* 424 U.S. at 26.
17. Paul S. Edwards, "Defining Political Corruption: The Supreme Court's Role," The BYU Journal of Public Law 10:1 (1996) at 3.
18. "But while the quid pro quo is the nub of the matter, it is perhaps not the totality of it." Sorauf, "Caught in the Constitutional Thicket," 103.
19. *Nixon v. Shrink*, 120 S.Ct. 897 .
20. "To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined." *Buckley*, 424 U.S. 1 at 27.
21. Ibid., 27.

22. 435 U.S. 765 (1978).
23. 435 U.S. 788 n.26 (1978).
24. FEC v. NRWC 459 U.S. 197 (1982).
25. FEC v. NCPAC 470 U.S. 497 (1984).
26. 470 U.S. 498.
27. 479 U.S. 238.
28. 479 U.S. 259.
29. 479 U.S. 258.
30. This is what Justice Stevens, who wrote a concurring opinion, would do, at least for corporate contributions. See *Austin* 494 U.S. 652 at 678.
31. *Austin* 494 U.S. 659–60.
32. 424 U.S. 48–49.
33. 424 U.S. 48–49.
34. *Nixon v. Shrink* 120 S.Ct , quoting from *Buckley v. Valeo*, 424 U.S. 28.
35. It is important to remember that Marshall limits his principle to "the unique legal and economic characteristics of corporations." See *Austin* 494 U.S. 652 at 660.
36. For an influential analysis from this perspective, see Charles E. Lindbloom, *Politics and Markets: The World's Political-Economic Systems*, (New York: Basic Books, 1970), 170–200.
37. *Colorado Republican Campaign Committee v. FEC* 116 S.Ct. 2317.
38. Such convictions have become far more common recently; see Daniel H. Lowenstein, "When Is a Campaign Contribution a Bribe?" Midwest Political Science Association, Chicago, Illinois, April 1996. This article updates Lowenstein's earlier article on bribery law, Lowenstein, "Political Bribery and the Intermediate Theory of Politics," *UCLA Law Review* 32:784 (1985). For a general review of bribery and campaign finance law, see Lowenstein, *Election Law: Cases and Materials* (Durham, N.C.: Carolina Academic Press), 1996.
39. 424 U.S. 47.
40. Supra notes 18, 19 and 20.
41. Even in bribery law it is not absolutely clear that a public official must agree to a quid pro quo to be convicted. See Lowenstein, "When is a Campaign Contribution a Bribe?"
42. A related question is whether campaign contributions actually do influence representatives. Political scientists have produced a welter a studies on this question but are only beginning to answer it. Most of the research focuses on the effects of contributions on legislators' floor votes, with very little work on other important aspects of the legislator's activities—for example committee activity (including votes), meetings with constituents, and interactions with federal regulatory agencies. Some recent studies include Stephen G. Bronars and John R. Lott, Jr., "Do Campaign Donations Alter How a Politician Votes?" Journal of Law and Economics (1997) 15:317; and Jeffrey Milyo and Timothy Groseclose, "The Electoral Effects of Incumbent Wealth," Journal of Law and Economics, forthcoming. For a listing of further studies, see Thomas F. Burke, "The Concept of Corruption in Campaign Finance Law," Constitutional Commentary (1997) 14:139 fn. 45.
43. Lowenstein, "On Campaign Finance Reform: The Root of All Evil is Deeply Rooted," Hofstra Law Review 18:301 (1989) at 302.
44. Lowenstein, "On Campaign Finance Reform," 301.
45. See pages above.
46. Martin Shapiro, "Corruption, Freedom and Equality," Hofstra Law Review 18:385 (1989) at 386.
47. Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (Washington DC: The Brookings Institution, 1995), 28. The only alternative is logrolling, but recent research suggests that logrolling is both more difficult and more rare than is commonly supposed. Keith Krehbiel, *Information and Legislative Organization* (Ann Arbor, University of Michigan Press, 1991).
48. Thompson, *Ethics in Congress*, 28.
49. Thompson, *Ethics in Congress*, 20. Thompson calls this the independence principle. In his earlier writings Thompson calls it the principle of autonomy; see Thompson, *Political Ethics and Public Office* (Cambridge: Harvard University Press, 1987). The argument is also outlined in Thompson, "Mediated Corruption."
50. Thompson, *Ethics in Congress*, 21.
51. Ibid., 66.
52. Ibid., 117.
53. Bruce Cain, "Moralism and Realism in Campaign Finance Reform," (University of Chicago Legal Forum 1995:111 at 120.
54. Cain argues that "By littering the intellectual landscape with irrelevant issues, moral/idealists obstruct the path to a full, open discussion of the public's views about the proper distribution of power and influence." Cain, 112.
55. Cain, 120.
56. Thompson, *Ethics in Congress*, 19.
57. This point is made by Joseph Bessette in *The Mild Voice of Reason: Deliberative Democracy and American National Government* (Chicago: University of Chicago Press, 1994), quoting from the Federalist Papers, 27.
58. *Federalist Papers #10* (New York: Mentor, 1961), 83. Of course Madison was not so naive as to believe that representatives would always deliberate in the public interest, but he thought this ideal would be more closely approached in an extended republic, where factions would have a difficult time gaining control over the government.
59. Wood, *The Radicalism of the American Revolution* (New York: Vintage Books, 1993), 252, quoting from a letter by Madison to Edmund Randolph, April 8, 1787, in the *Papers of Madison*, IX, 384, 370.
60. Wood documents this process in *The Radicalism of the American Revolution*, 255–305.
61. Selznick, "Defining democracy up," *The Public Interest* (1995) 119:106. There is a huge literature on deliberative democracy in political theory. For some examples see James Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (New Haven: Yale University Press, 1991); Joshua Cohen, "Deliberation and Democratic Legitimacy," in Alan Hamlin and Philip Pettit, eds., *The Good Polity: Normative Analysis of the State* (Oxford: Basil Blackwell, 1989); John W. Kingdon, "Politicians, Self-Interest, and Ideas, in *Reconsidering the Democratic Public*, eds. George E. Marcus and Russell L. Hanson (University Park, Penn.: Pennsylvania State University Press, 1993); Amy Gutmann, "The Disharmony of Democracy," in *Democratic Community: Nomos XXXV*, John W. Chapman and Ian Shapiro, eds. (New York: New York University Press, 1993), 126–160; and David Miller, "Deliberative Democracy and Social Choice," *Political Studies* (1992) 60:54–67.
62. Bessette, *The Mild Voice of Reason*, footnotes on 251–2.
63. See Sunstein, *The Partial Constitution*, 17–39.
64. Martha Derthick and Paul Quirk, *The Politics of Deregulation* (Washington DC: The Brookings Institution, 1985).
65. Fenno, *Congressmen in Committees* (Boston: Little, Brown and Company, 1991). Fenno's classic work on representation in practice is *Home Style: House Members*

in Their Districts (New York: Harper Collins, 1978). For an updating of this book see Jonathan Bernstein, Adrienne Jamieson and Christine Trost, eds., *Campaigning for Congress: Politicians at Home and in Washington* (Berkeley, Cal.: Institute of Governmental Studies Press, 1995)

66. Bessette, *Mild Voice of Reason*, 67–99.
67. The most influential books in this tradition are Robert A. Dahl, *A Preface To Democratic Theory* (Chicago: University of Chicago Press, 1956); David B. Truman, *The Governmental Process*, 2nd ed. (Berkeley: Institute of Governmental Studies Press, reprinted 1993); and Arthur F. Bentley, *The Process of Government* (Chicago: University of Chicago Press, 1908).
68. Thompson is somewhat elusive on this point:
    [T]he ideal legislator in a representative system does not pursue the public interest exclusively (whatever it may be). Such a legislator also has an ethical obligation to constituents that must be weighed against the obligation to a broader public. To find the balance between these obligations, even to decide whether they conflict, the legislator must consider the particular political circumstances at the time . . . Ethical obligations of these kinds are contingent on what is going on in the legislative process as a whole and may differ for different members and vary over time for all members." (*Ethics in Congress*, 70–71)
    Elsewhere Thompson says that the deliberative principle "is consistent with conceptions of representation ranging from delegate to trustee." The principle requires only that representatives defend their views on public policy "in a public forum—and at the risk of political defeat." (*Ethics in Congress*, 114)
    Similarly:
    [R]eelection or party loyalty could also count as principled reasons, when they are consistent with . . . legislative deliberation." (*Political Ethics and Public Office*, 113)
    Thompson does not specify how far this goes. At some point, presumably, the forces of constituency pressure, reelection anxiety, or party loyalty overwhelm the process of deliberation.
    As these passages indicate, Thompson, like many other political theorists, is quite critical of the delegate/trustee dichotomy. See for example Thompson, "Representatives in the Welfare State," in *Democracy and the Welfare State* (Princeton, New Jersey: Princeton University Press, 1995), 132–136.
69. This is the crux of David Strauss's argument against the deliberative approach to the concept of corruption. See Strauss, "What is the Goal of Campaign Finance Reform?" University of Chicago Legal Forum 1995:141–161.
70. This is a point that Lowenstein makes; see "Campaign Contributions and Corruption," 191.
71. Heidenheimer, 8.
72. Friedrich, 21.

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Corruption Control in New York and Its Discontents

Frank Anechiarico and James B. Jacobs

Introduction

What we call the anticorruption project—the development of laws, institutions and regulations to ensure honest government—began as an attempt to rescue government from the venality of machine politics.[1] The irony is that as the project became more powerful it undermined its own foundation. Step-by-step, the image of American public administrators has been transformed from the Progressive ideal of independent expert-professionals, deferred to because of their training and dedication, into low-status functionaries, controlled like probationers.

The role and status of the public service should remain in focus as reformers consider additional anticorruption reforms. The parallel effort to reinvent government using models adapted from corporate practice cannot succeed if it neglects either the problem of corruption itself or the costs of the current scheme of controls.[2] Integrity and control are irreducible elements of administrative design, but they have been implemented by the anticorruption project in both narrow and ineffective ways. Reestablishing integrity, control, and effectiveness in the public service will require reform of the premises and practices of the anticorruption project.

The Anticorruption Project in Action

In the early 1990s, the New York City Comptroller, subsequent to an audit of the Department of Buildings, discovered that a few inspectors would occa-