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Access si, Payoffs no

F.H. Buckley[[1]](#footnote-1)

On December 15, 2015 the first group of 25,000 Syrian refugees arrived in Canada. Mostly families with small children, they were greeted at the Toronto airport by the Prime Minister and the Premier of Ontario, and the following day another group landed in Montreal where they were welcomed by the Premier of Québec and the Mayor of Montreal. “You are home,” the Prime Minister told them. “You are safe at home now.” Days later one saw refugee families welcomed at churches and mosques across the country. It was difficult to watch any of this without emotion.

The program is hugely popular in Canada. In addition to government-sponsored refugees, another 25,000 privately sponsored Syrian refugees are expected to arrive in Canada. The sponsors are ordinary Canadians, and we saw one of them take a bewildered new arrival out on a canoe. Sponsorship duties cannot be assumed lightly, for sponsors must agree to provide the refugee with care, lodging, and settlement assistance for a year, and this assumes a financial commitment of $25,000. Many of the sponsored refugees are from Christian or Kurdish families. Canada (like the U.S.) defines a refugee as a person who has a well-founded fear of persecution because of race, religion, or membership in a particular social group; and if the sponsors discriminate, so too does ISIS.

The contrast with the American reaction to the Syrian refugee crisis could not be greater. The American response was puny, compared to Canada’s welcome. Ten times Canada’s size, the U.S. would have to admit 500,000 refugees to match Canada’s commitment. Instead it will admit only 10,000 refugees. Moreover, the United States bears a moral responsibility for the crisis, since its 2003 invasion of Iraq and the precipitous pullout of American forces in 2011 were the conditions that led to the creation of ISIS. Like a child, America walked away from a toy it had broken. Third, the refugees the U.S. has admitted thus far are nearly all Moslems. Of the 2,290 Syrian refugees admitted since 2011, only 62 or 2.7 percent were Christians.[[2]](#footnote-2) Apologists for the administration argue that it’s impossible to admit more of the threatened Christian refugees, but somehow Canadian sponsors found a way of doing so.

***The Dismal Dialectic***

The final difference between the two countries is the way in which the refugee program became a divisive political issue in the United States but not in Canada. North of the border all political parties supported the government, with only a few quibbles here and there. South of the border, the issue sparked a bitter debate. Republicans don’t believe that the administration is capable of screening the terrorists who might manage to slip in, or that it will fail to do so because of political sensitivities or preferences. The sense that the government can’t be trusted became acute when it became clear that, with greater screening, the San Bernadino murderers might have been identified before the shooting. Attorney-General Loretta Lynch did nothing to address conservative suspicions when she expressed her uncertainty about whether this was a terrorist attack, and told a group of Muslim activists the next day that her greatest fear was the “incredibly disturbing rise of anti-Muslim rhetoric.”[[3]](#footnote-3) In the inevitable and unedifying pathology of American politics, Republicans urged a complete halt in the Syrian refugee program, while Democrats called Republicans heartless bigots.

If American politics are so nasty, we shouldn’t be surprised. This is a low trust country, compared to most of the First World. A 2008 survey reported that only 49 percent of Americans felt a high level of trust in other people, far less than the Nordic countries (with Denmark at the top at 89 percent), and noticeably less than the OECD average of 59 percent.[[4]](#footnote-4) Other reports suggest even lower levels of trust in America. In *Bowling Alone*, Robert Putnam reported that the percent of people who thought that “most people can be trusted” fell from 55 in 1960 to 34 in 1998.[[5]](#footnote-5) Similarly, the University of Chicago’s General Social Survey found that between 1976 to 2006 there was a 10 percent decline in the number of Americans who believe other people can generally be trusted. The decline is sharpest amongst the 18-33 year-old Millennials, according to a recent Pew Research poll. When asked, “would you say that most people can be trusted,” only 19 percent of Millennials agreed, compared to 40 percent of Boomers and 31 percent of Generation X’ers.[[6]](#footnote-6) Unless the Millennials develop a hitherto unnoticed trust gene as they age, one can expect Americans to be less trusting in the future.

The general decline is especially dramatic when it comes to trust in the government. When asked in 2015 “how much of the time do you trust the government in Washington,” only 19 percent of respondents said “just about always” or “most of the time” That is one of the lowest levels in the last 50 years,[[7]](#footnote-7) and it’s a report card on how voters feel about the federal government’s competence and integrity.

Across the board, the decline in trust harms us all. In high trust countries, cooperation is repaid with cooperation, gift against return gift. In low trust countries, on the other hand, defection is met with reciprocal defection. In both cases, a law of what historian René Girard called mimetic rivalry is at work, calling forth an identical payback, whether for good or ill.[[8]](#footnote-8) In low trust countries, deals don’t get done. Bad laws are never reversed, and opportunities for workable compromises pass by unnoticed. We might hope for a synthesis, between extreme positions, in which both sides let down their guard and search for what is just and right, and common to all. But that cannot happen when the level of distrust is so high, and we’re left with a dismal dialectic that privileges people at the extreme corners of a debate.

***The Crimes of Democracy in America***

The dismal dialectic is starkly apparent in the campaign finance reform movement. Take Dinesh D’Souza, for example. He’s the author of a series of best-selling books that portray Obama as the leader of a criminal gang,[[9]](#footnote-9) and if you’re a Democrat he makes a big fat target. There’s an enormous anti-Obama literature, but no one is so prolific or as biting as D’Souza. He is also the writer and producer of the second most grossing documentary film, again a searing indictment of Obama. And he’s a felon.

By law, campaign donors are limited to a $5,000 contribution to a political campaign. When a friend was running as a Republican for a Senate seat, D’Souza doubled this to $10,000 by adding a contribution from his wife. That wasn’t the problem. What he did next was what made him a criminal. When the friend asked for more support, D’Souza made a further $10,000 contribution, through the conduit of two other friends, after promising to reimburse them the moneys. Because this was a sham transaction, he was prosecuted for violating the monetary limits of American campaign finance law.

D’Souza had displayed an appalling lack of judgment, on more than one level. Had he wanted to contribute more than $5,000 to his friend’s campaign, there were other, legal ways of doing so. He might have given the money to the local Republican committee or to an independent expenditure (“Super PAC”) committee. But he didn’t do so, and what was worse was the people he chose to use as conduits: his wife, his mistress, and his mistress’ husband. In his most recent book D’Souza speculates that a vengeful Obama ordered his minions to find evidence of a crime, but searching through financial disclosure records wouldn’t have revealed a fictitious transaction. Someone had to come forth and disclose the sham, and with a personal life as messy as D’Souza’s it doesn’t take a Sherlock Holmes to narrow down who might have ratted him out.

So D’Souza was charged with an election law offence. What was shocking, however, was the sentence: eight months in a hallway house confinement center, five years probation, a $30,000 fine and an order to submit to psychiatric evaluation. All this for a first offence, and for a matter that is usually the subject of an administrative fine. Very few people are prosecuted criminally for exceeding the donation limits, and then only for much larger amounts and where there is evidence of quid pro quo corruption.

D’Souza served his time in lock-up, but there’s a penalty to pay even if you’re not convicted of a crime. That’s what happened to the members of the Wisconsin Club for Growth, a conservative organization created under §501(c)4 of the Tax Code, which by law wasn’t permitted to coordinate with the candidates it supported. Still, it’s by no means unusual for politicians to speak at meetings of sympathetic 501(c)4’s, or to suggest that donors support them, and senior aides to Wisconsin governor Scott Walker did just that for the Club for Growth. But this time Democratic prosecutors charged the Club and its members (the “Unnamed Movants” in the subsequent litigation) had unlawfully coordinated with Walker. Police wearing flak vests conducted paramilitary pre-dawn raids on club members, turning floodlights onto their homes and seizing their computers and phones as well as those of their families. They were not allowed to call their attorneys, and prosecutors subsequently demanded the club’s confidential donor list. The breadth of the search was “amazing,” said the Wisconsin Supreme Court.

Millions of documents, both in digital and paper copy, were subpoenaed and/or seized. Deputies seized business papers, computer equipment, phones, and other devices, while their targets were restrained under police supervision and denied the ability to contact their attorneys. The special prosecutor obtained virtually every document possessed by the Unnamed Movants relating to every aspect of their lives, both personal and professional, over a five-year span … Such documents were subpoenaed and/or seized without regard to content or relevance to the alleged violations ... As part of this dragnet, the special prosecutor also had seized wholly irrelevant information, such as retirement income statements, personal financial account information, personal letters, and family photos. [[10]](#footnote-10)

We wouldn’t know much about all this, but for the fact that the Club’s director, Eric O’Keefe, revealed it, thus breaching a state gag law and opening himself up to criminal prosecution. O’Keefe has now been vindicated by the Wisconsin Supreme Court, which held that the Club’s activities were constitutionally protected speech. It was a bittersweet victory, however, for it came only after extensive and expensive legal proceedings in five Wisconsin counties and numerous interlocutory motions, in three levels of Wisconsin courts and two levels of federal courts. During all this time, the Club’s donor support dried up and the prosecution very effectively shut down its issue advocacy during Wisconsin’s 2014 gubernatorial election. When you’re charged with a breach of campaign finance laws, says O’Keefe, “the process is the punishment.”

If we could agree on anything, it would be that people shouldn’t be singled out for their political beliefs, as D’Souza apparently was; or subjected to pre-dawn SWAT raids, as happened to Wisconsin Club for Growth members. That would be nice—but for that to happen we’d have to be another, more trusting country. D’Souza’s travails are a subject for mirth on the Left, and the *New York Times* administered a wrap on the knuckles to the Wisconsin Supreme Court and to Governor Walker for killing the law that permitted the proceedings against the Club for Growth.[[11]](#footnote-11)

Because of cases such as these, most libertarians reflexively oppose all efforts at campaign finance reform. In America’s dismal dialectic, they recognize that campaign finance laws can result in more, not less, corruption, if administered in a partisan manner. Most of the countries that rank higher than the U.S. on measures of economic freedom have strict campaign finance laws, and they’re also reported to be less corrupt. But then politically unfree countries also restrict campaign contributions. Try to fund an opposition party in Russia, for example. Restrictions on campaign spending in America might therefore go either way. They might open up the political process, as reformers assert; but they might also limit freedom by protecting incumbent politicians from political challengers, as libertarians counter. They can also result in more corruption if they are employed primarily against one party, and immunize a less than honest dominant party from criticism.

Think of it as an upside-down U-curve, with freedom from corruption represented on the vertical axis and the stringency of campaign finance laws on the horizontal. On the extreme left of the curve there is no law of any kind and a great deal of corruption. More law would mean less corruption here. But as one moves up the curve one comes at last to an apex, beyond which more law would mean more corruption, where truly innocent people put in jail and political differences are criminalized. That’s where Russia is, on the extreme right hand side of the curve; and where America is too, says the libertarian.

Election laws are highly technical, and the political party that enacts them can be expected to impose a disproportionate burden on the other party. There are different kinds of donors, and different kinds of finance regulations, and it’s not beyond the skill of the draftsman to produce one-sided rules. In particular, the politician who demands restrictions on campaign contributions, and tells us he does so to defund his political opponents, is the very last person to be trusted to come up with a set of fair and evenhanded standards.[[12]](#footnote-12) Less trustworthy still are the breathless and often dishonest accounts of the dangers of money in politics, in which left-wing donors are either ignored or get a pat on the head.[[13]](#footnote-13) Even ostensibly neutral rules that give the regulator a degree of discretion can be employed in a partisan manner. That was the story of Lois Lerner’s IRS and its targeting of conservative and libertarian Tea Party groups, after all.

Cases such as these illustrate how four features of American campaign finance laws might invite more corruption than they cure. First, prosecutors are often highly political animals, elected by the voters, and not a few of them have a taste for the kind of publicity that a high profile case might generate. Second, many are elected at the local level, and that increases the likelihood of finding a partisan prosecutor. Third, the sanctions for prosecutorial misbehavior are extremely weak, and the partisan prosecutor can expect to be celebrated by his political allies and by elite establishment outlets such as the *New York Times*. Bad faith prosecutions can be a good career move. Finally, the legal standards are often extremely vague, giving the prosecutor the discretion to discriminate between political friends and foes.

In America, therefore, it’s a nice question whether stiffer campaign finance laws would give us less rather than more political corruption. Those who argue that we’d see less corruption seem to assume that campaign finance laws would never be abused, that corruptible politicians will do the bidding of their donors but will be models of integrity when it comes to enforcing election laws against their political opponents. Nothing could be more naïve, and while flint-eyed reformers burn with honest zeal they might have picked the wrong country. They seem to be thinking they’re living in Nirvana—or New Zealand. Campaign finance laws might work well in less corrupt countries, but in America, First Amendment guarantees of free speech and free assembly are very possibly the best we can do. Or so the libertarian thinks.

The reformer who puts his faith in the one, perfect set of reforms repeats Madison’s error, in supposing a theory more powerful than a culture. Madison’s mistake was to think that the idea of separation of powers, borrowed from the “celebrated Montesquieu,” might provide the basis for a constitution he is (wrongly) taken to have fathered. What Madison forgot is that, more than a theorist, Montesquieu was a sociologist who knew that, for each culture, there is a different form of laws and government. Before it is anything else, American law, including its campaign finance laws, must be American and suitable for a country with less than sterling levels of trust and public integrity.

***The Cost of Corruption***

So just how corrupt is America? What we’re interested in is public corruption, where public officials misbehave, and not the private chiseling where one private individual cheats another. We’re also looking for something more than the number of criminal indictments for bribery. That might not tell you very much, since the indictments might be without foundation and themselves a corrupt method of silencing political opponents.[[14]](#footnote-14) That’s how they do things in Russia—and also at times in the U.S. Even apart from that, the number of indictments doesn’t speak to the subtler and vastly more costly forms of pay-for-play, in which political favors are traded away in exchange for campaign contributions.

What is needed, then, is a more subjective measure of a country’s corruption, of the kind provided by a highly respected German NGO, Transparency International, in its Corruption Perceptions Index (CPI). On a score of 1 to 100, the CPI ranks countries, based on reports from respected observers, including businessmen and experts from the country in question.[[15]](#footnote-15) People are asked questions such as:

* Are misbehaving public officeholders prosecuted or penalized?
* Are there effective public auditors?
* Is corruption a problem in the court system? The tax bureau? Inspection bodies?
* Is the executive accountable to oversight institutions?
* Has the government been captured by special interests?

The CPI has been criticized for its lack of objectivity,[[16]](#footnote-16) but any similar ranking system must inevitably rely on judgment calls, and the CPI is the most widely followed measure of public corruption. On its ranking, the U.S. comes in at an unimpressive no. 17, behind many of its First World competitors.

***Figure I Less Corruption, More Wealth***



Source: GDP per Capita, PPP International Monetary Fund World Economic Outlook (April 2015); Transparency International Corruption Perceptions Index 2014. twoway (scatter GDP2015 Corruption2014, msymbol (smcircle) mlabel(Country)) (lfit GDP2015 Corruption2014), ytitle(---------->GDP2015) xtitle> (---------->Less Corruption)

It’s possible to put a number on the cost of corruption. Figure 1 matches a country’s 2014 CPI ranking against its wealth, as measured by its 2015 per capita Gross Domestic Product in terms of Purchasing Power Parity (which takes into account the relative cost of local goods and services). The Figure’s straight line estimates how, for 107 countries, less public corruption results in a significantly wealthier country, from corrupt and poor Afghanistan to honest and rich Luxembourg and Singapore, and accounts for nearly 70 percent of the relationship between the two variables. Corrupt countries above the line, such as Venezuela and Russia, are playing above their weight, with a higher than expected per capita GDP that reflects natural assets such as oil. Some honest countries below the line, such as Estonia, are playing catch-up from communism and have yet to reap the full financial benefits of adherence to the rule of law. The U.S. is above the line, richer and less corrupt than Third World countries, but more corrupt than many of its First World competitors.

The cross-country differences can be expressed in dollars. At a ranking of 74 on the Corruption Perceptions Index, the model tells us that, were America’s ranking to rise to Canada’s 81, its per capita GDP would increase from $54,629 to $59,914. But why stop there? Francis Fukuyama has said that “getting to Denmark” is the goal of public policy,[[17]](#footnote-17) and were America’s ranking to rise to Denmark’s 92 its per capita GDP would rise to $68,219. For America as a whole, that would come to an 18 percent or $3.2 trillion increase in the country’s wealth. Think of it as the tax that corrupt politicians, regulators, and judges impose on all Americans.

These numbers are suggestive at best, and obviously don’t prove the cost of corruption to the hilt. In addition, getting to Denmark might seem an impossible dream, given that country’s ethnic homogeneity. Societies that are ethnically alike are more trusting[[18]](#footnote-18) and less corrupt.[[19]](#footnote-19) As for America, we’re not especially homogenous and we can’t turn ourselves into Denmark. As a self-styled “nation of immigrants,” America prides itself on its diversity, and we’re not about to change that, and wouldn’t want to do so even if we could. On the other hand, other countries are far more welcoming to immigrants. Fourteen percent of American residents (legal and undocumented) are foreign born, as compared to 20 percent in Canada and 26 percent in Australia—the true nation of immigrants. Nevertheless, both countries rank ahead of the U.S. on the CPI, Australia at 80 and Canada at 78. Evidently, ethnic diversity isn’t an excuse to throw up one’s hands at corruption.

Figure 1’s simple model elides over other factors such as the social and political culture, ethnic diversity, income inequality, and constitutional design that might affect the level of corruption. In addition, the CPI is merely an estimate, taken from surveys of locals, and it’s by no means certain that respondents in one country employ the same standards as those in other countries. As between the United States and Canada, for example, American respondents might employ more exacting standards than the more forgiving Canadians. At 74, then, one might argue that the American ranking is too low. On the other hand, Americans are generally apt to think their country the greatest in the world, and aren’t known for their modesty. If 74 isn’t the right number, then, it’s at least as plausible to think that it should be lower still, not higher.

There are other reasons to think that Transparency International has America’s number, for the World Justice Project (WJP) has no better view of it. The WJP was co-founded by a former head of the American Bar Association and collects data from the general public and legal professionals to rank countries according to their adherence to the rule of law.[[20]](#footnote-20) That includes a look not only at public corruption but also at fundamental civil rights, order and security, and constraints on government powers. By that measure, Russia came in at 75th from the bottom in 2015, just a little ahead of the Côte d’Ivoire and Ecuador, and way behind former communist countries that invested more heavily in the rule of law: Estonia (15), the Czech Republic (20), and Poland (21). And what about America? It’s not Russia, not by a long shot, but it still doesn’t rank all that highly on the Rule of Law Index, coming in number 19 out of 102 countries and thirteenth amongst 24 First World nations. Broken down on the subcategory for corruption, the United States is a mediocre number 20, and twelfth out of 24 First World nations.

Until fairly recently, the rule of law wasn’t on our radar screen. Most economists explained why some countries were wealthy and some not by reference to natural endowments, such as valuable minerals or oil. Others pointed to the country’s infrastructure, or to human capital investments such those provided by a country’s public educational system. Still others looked to differences in culture or religion. Over the last 40 years, however, economists have increasingly focused upon the role of institutions, such as a legal regime that protects property rights and enforces contracts. That’s the difference between North and South Korea, one country desperately poor and the other rich, both alike in all respects except for their political and legal institutions.[[21]](#footnote-21) It’s also the difference between corrupt and non-corrupt societies.

Corrupt countries may be rich in natural assets such as farmland, oil, and minerals, and in capital assets such as plant and machinery, but these aren’t the most important sources of wealth. The World Bank estimates that natural and capital assets amount to only 23 percent of a country’s riches. The rest is intangible assets, the difference in institutions, of which the most important element is adherence to the rule of law: equality before the law, an efficient and honest judicial system, and the absence of corruption. Remarkably, that accounts for 44 percent of a country’s total wealth according to the World Bank.[[22]](#footnote-22)

We might be one of the richest countries in the world, but that’s not to say that we don’t pay a price for corruption. Beethoven composed his Fifth Symphony when he was deaf, but that was in spite of his handicap and not because of it. If we might somehow make the country more honest, then, we’d want to do so, and if the cost of corruption was as great as it appears we’d make it one of our chief goals, more than any changes we could make to the Tax Code, to the administrative law regime, to the healthcare system. And we’d be bound to look seriously at campaign finance reform if it might make a difference—so long as the reforms wouldn’t make us more corrupt still.

***The Limits of Virtue***

If America is corrupt, it’s not because our anti-bribery laws are too weak. Under the federal bribery statute, no one’s been bribed unless there has been an *official act* favoring the donor, and this is broadly defined as “any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.”[[23]](#footnote-23) But while that might seem an expansive test, former Virginia governor Bob McDonnell argues that what he did was less than an official act, in appealing his conviction to the Supreme Court.

McDonnell had been indefatigable in urging his subordinates to assist a donor who had put money in his family’s pockets. If the subordinates didn’t respond, that was seemingly because they knew the governor was dirty. At the Governor’s mansion, Mrs. McDonnell was widely disliked, and staffers realized she was infatuated with the donor. When McDonnell’s aides balked, he did not take the further step of ordering them to help the donor, and this he argued meant that he could not be guilty of bribery. All he had done, he said, had been to give the donor the routine courtesies that all politicians provide for their constituents, and that hadn’t amounted to an official act.

The Fourth Circuit Court of Appeals disagreed, and ruled that by urging state employees to help the donor McDonnell had taken official action.[[24]](#footnote-24) An act may be “official” under the bribery statute, it held, even if the recipient plays only an indirect or advisory role and the final decision rests with other people. Moreover, even if McDonnell had merely promised the donor that he would help him, that would amount to bribery. The federal bribery statute makes it a crime to corruptly seek or demand anything of value in return for “being influenced in the performance of any official act,” and the Court ruled that the crime is complete when the official accepts a bribe in return for a promise to help the donor, even if the official does nothing thereafter. Crucially, the donor believed that he had a deal, that the governor would see that he got what he wanted. That was enough for the Fourth Circuit, but the question is sufficiently murky that it will likely remain an open one even after the Supreme Court rules on it. Tellingly, a large number of elected officials wrote letters praising McDonnell or signed on to amicus briefs in his support, recognizing how they too had favored donors in similar circumstances.

The second reason why bribery laws aren’t going to solve America’s crony capitalism problem is because they have never been employed to sanction an elected official who accepts the gift as a campaign contribution that he can’t pocket directly. Nor should campaign contributions constitute bribery. And yet the concern that the contribution might bias the official’s decisions is the same. After retiring from Congress an elected official is ordinarily assured of a large stream of income from the contacts he has made. Under “revolving door” laws, Congressmen are barred from lobbying their former colleagues for a year or two, but they can immediately lobby the executive branch and provide behind the scenes advice to business clients. As such, the legislator has an incentive to pay the closest attention to the network of donors and lobbyists who might employ him after he leaves office. Compared to what his future earnings might be, the gifts to McDonnell were chump change.

From a series of campaign contributions, settled patterns of cooperation easily develop and morph into a form of *crony capitalism* in which the favored firm secures protection against business rivals. In the eyes of historian J.G.A. Pocock, the lobbyists of Washington’s K Street, the associations of Alexandria VA, and the campaign donors who aren’t looking to the next world for their reward form “the greatest empire of patronage and influence the world has known.” American politics is “dedicated to the principle that politics cannot work unless politicians do things for their friends and their friends know where to find them.”[[25]](#footnote-25) If America has a corruption problem, crony capitalism is plausibly the reason, and voter disgust at it bids to transform American politics.

It’s conventional to rank politicians along a Right-Left ideological axis, but for many voters in our new Machiavellian Moment,[[26]](#footnote-26) this is increasingly supplanted by a corruption-virtue axis, and this accounts for the defeat of Eric Cantor and the manner in which John Boehner was edged out of his Speakership. The same corruption-virtue axis explains the improbable rise of Bernie Sanders and of Donald Trump. Though not the poster child of republican virtue himself, Trump’s supporters nevertheless see him as the candidate best able to take on what they regard as a corrupt Republican establishment. He is not a true conservative, we are told, but somehow that doesn’t seem to matter to the country’s most truly conservative voters, who are dismayed by corruption in government and by crony capitalism, and who seem poised to determine the outcome of the 2016 presidential election.

If one wanted to see restrictions on campaign spending, the obstacle isn’t the voters, then. Rather, it’s the manner in which the Supreme Court has interpreted First Amendment rights, from *Buckley v. Valeo*[[27]](#footnote-27)to *Citizens United*.[[28]](#footnote-28) That’s not to say that those decisions were wrongly taken, however. Rather, the challenge is to come up with a set of campaign finance reforms that would pass constitutional muster, that would not offend on libertarian norms, and that would not result in even more corruption.

Though often criticized, the distinction introduced by *Buckley* between contribution and spending limits is entirely sensible, even if puzzling at first glance. Contributions and expenditures are linked, like a faucet and a garden hose. Contributions are the faucet, expenditures the nozzle. Turn off the faucet and nothing comes out of the nozzle. The *Buckley* Court recognized that contributions are linked to expenditures, but found that the impugned contribution limits had not reduced spending. The faucet—campaign contributions—had not been turned off to shut down the flow of expenditures. Just the opposite, given the complaints about excessive money in politics.

Why the distinction, then? First, limiting expenditures more directly affects free speech rights than contribution limits. With spending limits, a popular opposition voice, funded like Bernie Sanders by small dollar donors, might be entirely silenced. Second, contribution limits more clearly focus on the possibility of corruption, which the Court thought was the only justification for regulating campaigns. Unlike campaign spending, contributions create the crucial nexus between donor and elected official from which pay-for-play favors may follow.[[29]](#footnote-29) The greater problem, however, is the difficulty of fixing an optimal level of campaign giving. We’re putting much more money into politics now than we did 40 years ago, but who’s to say that that was the right level back then and that it’s today’s figure which is out of whack? We spend three times more on video games than we do on campaign spending, and no one is trying to pry our video game remotes away from us. How much more foolish would it be to try to limit the information voters receive about their government. Nor is there clear evidence that the aggregate total campaign spending signals corrupt bargains between donors and elected officials. One study of the spending increase from 1978 to 2000 (when spending was half that of 2012) reported that campaign spending tracks personal income and the degree to which electoral races are competitive, and not increased government spending.[[30]](#footnote-30) The study concluded that what fueled the increase was simply the greater willingness of voters to participate in the political process. If so, that seems more a sign of virtue than of corruption.

***Table 2016 Contribution Limits***

|  |  |  |
| --- | --- | --- |
|  | *An Individual May Give* | *Corporations May Give* |
| To himself, as a candidate | No limit | -- |
| To each candidate | $2,700 per election | 0 |
| To a separate-segregated fund corporate-connected or an unconnected PAC | $5,400 per year | Administrative expenses for corporate-connected PACs |
| To the national party committee | $33,400 per year | 0 |
| To each state, district or local party committee | $10,000 per year | 0 |
| Total permissible giving to presidential candidates, national and state parties | $366,100 per year | 0 |
| Total permissible giving to Independent Expenditure groups (Super PACs) | No limit | No Limit |
| Total permissible giving for issue ads | No limit | No limit |

While spending limits did not survive First Amendment scrutiny, the Supreme Court did uphold contribution limits, as these were not so low as to seriously affect campaign spending, and as the donor-official nexus gave rise to a concern about possible corruption. Since *Buckley* was decided, however, contribution limits have been effectively abolished. First, donors found a way to amass large amounts of moneys by bundling contributions from groups of friends, with each individual donor adhering to a $5,000 limit. More recently, a semi truck had been driven through the limits that had been imposed on presidential campaign contributions. An individual is now permitted to contribute up to $366,100 per year to a presidential candidate, which comes to just under $1.5 million for a couple over a two-year period.[[31]](#footnote-31)

Second, donors can now contribute unlimited amounts of money to Super PACs that call for the election or defeat of a particular candidate but do not coordinate with a political party. As such groups are independent, the possibility of pay-for-play corruption is much weaker than in the case where the donor deals directly with the candidate.[[32]](#footnote-32) Extending this, *Citizens United* held that corporations might contribute to independent expenditure groups, and the case has been roundly condemned for this. Permitting corporate contributions wasn’t the principal consequence of the decision, however. Instead, the case’s importance stems from the stamp of approval it gave to independent expenditure groups generally. The decision was followed in *SpeechNOW v. FEC*, in which the District of Columbia Court of Appeals held that, as a matter of law, Congress could *never* limit contributions to independent expenditure groups.[[33]](#footnote-33) Subsequently, the Federal Election Commission clarified the law by permitting Super PACs to accept unlimited contributions from individuals, for-profit corporations, and unions, and to spend unlimited amounts on political campaigns.

Since then we’ve seen an explosive growth in Super PAC spending. In the 2012 election they were still relatively novel, and were outraised ten to one by the official party campaigns. By 2014, however, Super PAC fundraising had increased threefold to $700 million, nearly half of what the two parties spent, according to the Center for Responsive Politics’ Open Secrets blog. For 2016, Super PAC spending is on track to exceed official party spending. That hasn’t resulted in a corporate takeover of American elections, however. Super PACS must disclose who their donors are and what they gave, and corporate donations are dwarfed by donations from wealthy individuals.

The rise of Super PACs has transformed American politics, though not in a way anyone expected, by opening up a cleavage not between but within the parties. The divide today is not so much between Left and Right as it is between a party that claims the mantle of virtue and a party seen to be corrupt. What has happened is what in the business world is called disintermediation, where the middleman is cut out. Instead of dealing with a travel agent, for example, one can now book flights or hotel rooms through web sites such as Kayak. Similarly, instead of relying on a political party to pick candidates or finance campaigns, one might donate through a Super PAC more reliably aligned with one’s political preferences. As this happens, the parties becomes weaker, their supporters stronger. That is why both parties agreed in August 2015 to increase the maximum an individual could give to a party from $30,800 to $366,000 a year,[[34]](#footnote-34) in order to meet the challenge from insurgent Super PACs.

***Payoffs Are the Real Problem***

Senate hearings can be an unintended source of humor when campaign bundlers are nominated as ambassadors. That doesn’t happen in other countries, but it’s commonplace in the American foreign service. While individuals have until recently been limited in what they can give to a candidate, they can nevertheless dun their rich friends and bundle all their contributions for the candidate. That’s how our ambassador to Hungary, Colleen Bell, got her job. She is a soap opera producer who was one of Obama’s top campaign bundlers, raising more than $1 million for him along with her husband. The problem, however, is that Hungary isn’t exactly Ruritania. It’s a NATO ally that is trending away from the West in the direction of Russia, and the nominee’s want of foreign policy chops at her nomination hearings led to this embarrassing exchange with Senator John McCain (R-AZ).

SEN. MCCAIN: So what would you be doing differently from your predecessor, who obviously had very rocky relations with the present government?

MS. BELL: If confirmed, I look forward to working with the broad range of society … [Pause]

SEN. MCCAIN: My question was, what would you do differently?

MS. BELL: Senator, in terms of what I would do differently from my predecessor, Kounalakis … [Pause]

SEN. MCCAIN: That's the question.

MS. BELL: Well, what I would like to do when - if confirmed, I would like to work towards engaging civil society in a deeper … in a deeper …

[Pause]

SEN. MCCAIN: Obviously, you don't want to answer my question.

McCain was so unfair! Had he watched Ambassador Bell’s *The Bold and the Beautiful*, he’d have realized that those are perfectly good answers.

Then there’s our ambassador to Argentina, Noah Mamet, a political consultant who raised $3.2 million for Obama in 2012. When he took some flack for admitting he had never visited that country, comedian Jon Stewart saw a virtue in his inexperience. Perhaps we should have a rule against nominees visiting a country before being appointed ambassador. Otherwise we’d “ruin the surprise.”

In truth, Obama didn’t begin the practice of repaying political favors by appointing incompetent cronies to represent our country abroad. It’s been a long, bipartisan tradition, but it’s a slap in the face for career U.S. foreign service officers. In other countries a distinguished civil servant might aspire to represent his country as its ambassador in one of the world’s glittering capitals. A British diplomat, for example, might hope for a posting in Paris and a K.C.M.G (“Kindly Call Me God”) knighthood. In America, however, we appoint bundlers to serve as ambassadors to Britain, France and Italy. As for our career diplomats, let them go to Libya.

Political cronyism of this kind is an insult to the countries to which we send the bundlers. Hungary’s ambassador to the U.S. is an economist who worked for the International Monetary Fund for 27 years, but we’ve sent it a message that they’re less important to us than someone who can raise a spot of cash for a political campaign. No wonder they don’t seem to like us. Ambassador Bell took up her appointment on January 21, 2015, and a month later Hungary signed an economic cooperation agreement with Russia. Mind you, at that point Ambassador Bell had only begun her work in engaging civil society.

More generally, we advertise our tolerance for political corruption to the world through our ambassadorial appointments. They’re the official face of America to other countries, and when they get the nod the host country’s media will tell its citizens just how they got their job. For people in most First World countries, it’s an education on how they order things differently in America.

As we can’t trust America’s politicians to abstain from corruption of this kind, the question arises whether statutory barriers would survive a constitutional challenge. We can expect large donors to have a preferred access to their candidates, but there is nothing per se wrong with that. In the words of Justice Kennedy, “ingratiation and access … are not corruption.”[[35]](#footnote-35) But then getting a personal payoff is something more than ingratiation and access.

The distinction is one that the Framers would have recognized, at their 1787 Philadelphia Convention. However much they admired the British constitution, they meant to create something better, and what they wanted was a constitution free of the corruption they saw in British politics. In Parliament no one saw anything wrong with offering lucrative offices—*places*—to political allies, and that indeed was how governments were formed. “Men … no more dreamt of a seat in the House in order to benefit humanity,” observed Sir Lewis Namier, “than a child dreams of a birthday cake that others may eat it.”[[36]](#footnote-36)

Of the Framers, no one had seen the House of Commons more closely than Benjamin Franklin, and in Philadelphia he urged that presidents should serve without pay in order to lessen corruption. “The struggles for [places] are the true sources of all those factions which are perpetually dividing the [British] Nation, distracting its councils, hurrying sometimes into fruitless & mischievous wars, and often compelling a submission to dishonorable terms of peace.”[[37]](#footnote-37) The proposal went nowhere. Perhaps the delegates recalled just how effectively Franklin had sought profitable places himself and his family, and might have felt as if they had just heard a lecture on temperance from the town drunk. Nevertheless, it was the fear of corruption that gave us the Framers’ complicated machinery for the election of presidents, and so much else of the Constitution that it might fairly be regarded as an anti-corruption covenant.[[38]](#footnote-38)

Might it be possible, then, to construct a statute that would ban the grossest forms of pay-for-play and yet pass constitutional muster? That question, happily, has already been answered by the District of Columbia Court of Appeals, in two decisions upholding bans on political contributions from donors who might expect to receive favors from the government. In the more recent case, decided after *Citizens United*, a unanimous en banc court in *Wagner v. FEC* upheld a ban on contributions by government contractors to elected federal officials or parties.[[39]](#footnote-39) The ban extends from the time contractual negotiations begin to the time when performance ends.

The prohibition was incorporated into the Federal Election Campaign Act in 1976,[[40]](#footnote-40) but was initially adopted as an amendment to the 1939 Hatch Act.[[41]](#footnote-41) That Act limits the political activities of federal officers and employees, in part to ensure that the government can hire the best-qualified people, and it has been upheld by the Supreme Court.[[42]](#footnote-42) Because government contractors resemble federal employees, and because the concerns about cronyism are the same, the ban was extended to contractors in 1940. Since then, there has been an enormous increase in the number of government contractors who are hired to do jobs formerly performed by federal employees.

As the ban was a limit on contributions, not expenditures, the *Wagner* Court held that strict scrutiny standards did not apply. Even though the statute prohibited all donations, rather than simply placing a ceiling on campaign contributions, the government had not unnecessarily restricted First Amendment freedoms and had demonstrated a sufficiently important interest in curbing the pay-for-play corruption of crony capitalism.

The chief concern was the possibility of *rent-seeking*, first described by my former colleague Gordon Tullock.[[43]](#footnote-43) People rent seek when they try to obtain economic benefits through political leverage. Rent-seeking does not create new wealth but instead redistributes it from those who lack to those who have access to the rule-maker, and this is especially to be feared when government contractors are permitted to make political contributions. Unlike campaign donations by a member of the general public who does not seek a personal payoff, there is a very specific quo for which the contribution may serve as the quid. “A contribution made while negotiating or performing a contract looks like a quid pro quo, whether or not it truly is.”[[44]](#footnote-44)

The Court also noted that, absent the ban, elected officials might engage in *rent extraction.* A donor rent seeks when he solicits a government favor in return for a contribution; an official extracts rent when he conditions the favor on the donor’s willingness to contribute.[[45]](#footnote-45) That might easily happen to government contractors, who are particularly susceptible to a shakedown because they lack the job protection afforded by the civil service regime.

In the highly lucrative municipal bond market, the possibility of rent extraction prompted another restriction on campaign contributions, and this had been upheld in an earlier decision of the District of Columbia Court of Appeals in *Blount v. SEC*.[[46]](#footnote-46) Municipal bond market brokers and dealers had complained that the state and local officials from whom they sought business had shaken them down for political contributions. Fed up with being dunned for money, they proposed a rule change to prevent contributions to city and state officials, and the Securities and Exchange Commission subsequently adopted this as Rule G-37. On appeal, the Rule was upheld in an opinion written by Judge Stephen Williams.[[47]](#footnote-47)

The question, then, is whether such cases might reasonably be extended. In *Blount*, the Court itself had recognized how unbounded the scope of prophylactic rules might be, “in the full-blown modern interest-group state” it found itself.

The class of people with “business relations to government entities” is plentiful, if we include all government employees; all government contractors; all who benefit in their business from government activity creating a market for their goods or services (from lawyers specializing in SEC work to suppliers of environmental control technology); all whose businesses benefit from the imposition of regulatory, tax, or tariff restrictions on competitors or potential competitors; all whose income enjoys any kind of tax advantage; and all who are employed by or otherwise economically dependent on firms fitting the description above. The principle could also embrace anyone who (directly or through some group) is seeking to receive any such benefits and anyone seeking to stave off either the cancellation of existing benefits or the imposition of new burdens.[[48]](#footnote-48)

The Court held that Rule G-37 survived the exacting strict scrutiny standard, since it was closely drawn, and applied only to the municipal bond market which all the players knew each other. That doesn’t suggest a reason why the anti-corruption rationale should not be apply more broadly, however. Just the opposite, for if there’s an argument for banning pay-for-play in one small corner of the economy, how much stronger is the case for doing so more generally. The Court also noted that Rule G-37 did not restrict the brokers and dealers from engaging in the vast majority of political activities, and there are so many more ways of doing so today, through issue ads and Super PACs, that a restriction on contributions to candidates or parties scarcely infringes on rights of free speech and association.

There are other reasons to think that such cases might serve to justify expanded barriers to pay-for-play corruption. In *Blount* the Court adopted a strict scrutiny standard, while in the more recent *Wagner* decision, the en banc Court applied a less rigorous test. The less demanding standard would likely be applied were the principles of the Hatch Act and Rule G-37 extended in other domains. Following *McCutcheon v. FEC*,[[49]](#footnote-49) such a law would not seek to reduce the amount of money in politics, or level the playing field, given the other avenues for support. The *Wagner* Court also held that the Hatch Act deserved judicial deference because it had stood on the books for 75 years. That might be a reason to limit the application of the decision were crony capitalism less of a concern today than it was in 1940. No one would think so, however, and the argument for prophylactic barriers to corruption are stronger today than ever they were. In addition, the *Wagner* Court found that the need for a merit-based public administration provided a justification for the Hatch Act. There is, however, no reason to limit the desirability of merit-based principles to government employees or contractors, if the economic costs of meritless crony capitalism are exponentially greater.

***The Promise of Prophylactic Rules***

Confronted with cases such as *Blount* and *Wagner*, the libertarian has a dilemma. He must either argue that those cases were wrongly decided, and array himself against Judge Stephen Williams in the first case and the unanimous en banc District of Columbia Court of Appeals in the second, or he must ask himself whether those decisions might reasonably be extended to other cases where pay-for-play can be anticipated. In either case, those who elsewhere complain of pay-for-play corruption are bound to examine carefully any reasonable attempt to rein it in.

If campaign finance laws are to be strengthened, Franklin’s placemen would be a good place to start. America’s practice of rewarding bundlers with an ambassadorship is a scandal, and the recent increase in contribution limits for presidential candidates only increases the possibility of pay-for-play. A useful corrective would limit the ability of bundlers and major donors to solicit or accept a position in the federal government for a two-year period.[[50]](#footnote-50)

Such a law would be seriously over-inclusive if it banned all contributions by bundlers. It would not do so, however, for it would leave open the possibility of gifts of unlimited moneys to Super PACs that disclose their donors, as well as to groups organized under section 503(c)4 of the Tax Code that do not have to disclose their donors. That should be enough to satisfy concerns that the law might trench on First Amendment associational rights “to petition the government for a redress of grievances.” What instead the law would do is sever benign contributions from those tainted by pay-for-play, and that has always been the Supreme Court’s goal in its campaign finance reform jurisprudence. The Court has even held that “preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”[[51]](#footnote-51) Those who seek a government office might therefore contribute to a Super PAC but not to a candidate committee, while those who have no such ambitions could contribute to both, within the prescribed limits for direct support.

Nor would such a reform be under-inclusive, to the extent that it permitted donor support to flow hydraulically through a Super PAC. That option has been blessed by the Supreme Court, and it’s not about to be taken away from donors. Moreover, those who complain about coordination between candidate and Super PAC, as the *New York Times* has done in editorializing about the Wisconsin Club for Growth, fail to understand the nature of modern politics. They imagine that Super PACs are shams organized by a sophisticated political party to evade contribution limits. The reality, however, is that Super PACs don’t take direction from political parties but instead employ their own advisers to determine how moneys should best be spent.

The best-known group of Super PACs, organized around Charles and David Koch as well as the donor base they have assembled, bids to eclipse the Republican Party itself. Americans for Prosperity and related Koch Super PACs employ 1,200 full-time staffers, more than 3½ times more than the Republican National Committee, and plan to spend $889 million in the 2016 election run-up, more than twice what the RNC spent in 2012.[[52]](#footnote-52) They carry out their own searches for like-minded political candidates, do opposition research, plan legislative agendas, and conduct micro-data analyses of likely voters, all at a more sophistical level than the Party. They don’t need the Republican National Committee to tell them what to do, and reasonably think themselves more sophisticated than regular party strategists. As such, concerns about coordination between candidate and Super PAC are for the most part meritless.

The proposed new law would also restrict the fund-raising activities of lobbyists, as first proposed by an American Bar Association committee chaired by Harvard law professor Charles Fried.[[53]](#footnote-53) Lobbyists very usefully serve to inform officials about the unintended consequences of proposed legislation and keep them abreast of new initiatives, studies and legislation. Under the proposed law they would continue to play this valuable role. Like all Americans, lobbyists have the right under the First Amendment to petition the government, and the proposed law would not trench on this. What it would do, however, is bar lobbyists from fundraising for public officials from whom the lobbyist can be expected subsequently to seek favors.

The proposed rule would also ban contributions by lobbyists to federal candidates for office. In *Preston v. Leake*,[[54]](#footnote-54) the Fourth Circuit Court of Appeals held that a North Carolina law that banned lobbyist contributions to state officials survived a strict scrutiny analysis under the First Amendment. The ban simply channeled lobbying support into other avenues, “cutting off the avenue of association and expression that is most likely to lead to corruption but allowing numerous other avenues of association and expression.”[[55]](#footnote-55) Like other donors, lobbyists now have increased avenues for political support, through Super PACs, and that should suffice.[[56]](#footnote-56)

*Citizens United*, and the legitimacy it conferred on Super PACs, has been much criticized, but one of the benign consequences of the ruling has escaped our attention. By widening the gate for donors who contribute to independent organizations, the decision justifies a narrowing of the gate for donations that are tainted by the possibility of pay-for-play. It becomes easier to argue for a ban on placemen and on lobbyist contributions to candidates and parties, if they can simply channel their support into more innocent avenues.[[57]](#footnote-57)

***Conclusion***

For both parties, the leading candidates for the presidency favor campaign finance reform, and before he opposes all such efforts the libertarian should recall how much we are weakened by crony capitalism. And doing so, he should embrace reforms that apply a surgeon’s knife to pay-for-play while leaving untouched broader avenues for more honest forms of campaign contributions. However much some might decry *Citizens United*, that case invites one to take a close look at more suspect avenues of corporate contributions. For a start, the libertarian should recall how strong courts have upheld restrictions on corporate giving by government contractors and broker-dealers in the municipal bond industry, and then ask how such barriers might reasonably be extended to other donors.

This article has suggested two such reforms. First, bundlers should be barred from taking a position with the federal government for a period of time, in order to address the obvious pay-for-play problem of unqualified ambassadors and other “placemen.” Second, restrictions on lobbyist contributions, as suggested by the ABA report prepared under the chairmanship of Charles Fried, would serve to limit their undue influence while preserving the useful informational purposes they offer. Both proposals are incorporated in the draft legislation prepared by James Wooton and appended to this paper.

The final question is whether, in America’s comparatively politicized system of criminal justice, these reforms would lead to more rather than less corruption. And so they might, were they directed at naïfs such as Dinesh D’Souza. But since the proposed reforms are targeted at major donors, lobbyists, and corporations, the possibility that they might become a trap for the unwary is slight. If, moreover, the reform proposals might find allies on the Left, and help bridge the partisan divides of American politics, that would stand as a point in its favor, rather than count against it.

**H.R.**

**IN THE UNITED STATES HOUSE OF REPRESENTATIVES:** Mr.\_\_\_\_\_\_ (for ·himself) introduced the following bill; which was read twice and referred to the Committees on Ethics and the Judiciary.

**A BILL**

To prohibit lobbyists and political fundraisers from lobbying federal government officials to whom they make or facilitate political contributions or gifts and give citizens greater control over their political contributions.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**PUBLIC INTEGRITY ACT OF 2016**

**SECTION 1. SHORT TITLE, TABLE OF CONTENTS.**

1. SHORT TITLE. --This act may be cited as the “Public Integrity Act of 2016”
2. TABLE OF CONTENTS. --The table of contents is as follows:

Section 1. Short Title and Table of Contents.

Section 2. Purpose.

Section 3. Citizen Control.

Section 4. Prohibitions.

Section 5. Definitions.

**SECTION 2. PURPOSE.**

1. Toassure that the integrity of elected federal officials is maintained and to prevent undue influence or the appearance of undue influence.
2. To separate policymaking and political fundraising.
3. To promote access to elected public officials for all citizens, particularly those who are constituents of the elected official.
4. To put an end to the expectation that political favors will be forthcoming in recognition of gifts or political contributions facilitated by lobbyists and fundraisers.

**SECTION 3. CITIZEN CONTROL.**

1. All direct contributions, whether given to a candidate’s campaign or through a political committee, must be designated by the contributor for a particular candidate and election and returned to the contributor if not used for that purpose.
2. Direct contributions, up to the applicable limits for that candidate and election,may be allocated by the contributor between the candidate’s campaign and the political committees of the contributor’s employer, labor union or political party.
3. Any such committee must pass through the entire contribution to the designated candidate, minus any administrative expense of which the committee has given advanced written notice to the contributor.
4. A **“**constituent contribution” must be designated by the contributor for a candidate for whom the contributor is registered and eligible to vote in the designated election.
5. The limits for “constituent contributions” shall be triple those for non-constituent contributions.

**SECTION 4. PROHIBITIONS.**

1. “Compensated lobbyists” may not make or facilitate “political contributions” to elected federal officials or candidates whom they or their associates lobby or intend to lobby if the candidate is elected.
2. An elected federal official may not perform an “official act” at the request of a “compensated lobbyist” or “political fundraiser” or their associates unless that person or associates has not made or facilitated a “political contribution” to benefit that official during the prior two years.
3. For a period of two years after a requested “official act” has occurred, that public official may not accept a “political contribution” which is being given or facilitated by a “compensated lobbyist” or “political fundraiser” or their associates who directly or indirectly benefitted from that “official act.”
4. A “ compensated lobbyist” or “political fundraiser” or their associates may not request or accept an official act, including appointment to a government position, from any public official (or the official’s subordinates) who has benefited from a “political contribution” which was given or facilitated by that person or associates in the prior two years.
5. For a period of two years after a requested “official act” has occurred, that public official may not accept a “political contribution” which is being given or facilitated by a “compensated lobbyist” or “political fundraiser” or their associates who directly or indirectly benefitted from that “official act.”
6. All incumbent federal officials and candidates for federal office are required to disclose the identity of all “ political fundraisers,” including any individual who is authorized by or known to the official or candidate to collect and transmit contributions to their campaign committee or leadership PAC, regardless of whether or not the individual is compensated.
7. No contributor or the contributor’s agents may solicit an ”official act” by a federal official or his or her subordinates after that contributor makes any contribution or other gift in excess of federal campaign finance or gift limits applicable to that official which benefitted, directly or indirectly, that official, the official’s family or the official’s associates.
8. After an “official act” has occurred which has benefitted an individual or entity, that individual or entity may not make any contribution or other gift in excess of federal campaign finance or gift limits, including employment, applicable to that official when the “official act” occurred which benefitted, directly or indirectly, that official, the official’s family or the official’s associates, even if that official in no longer in office.
9. A federal official may not perform an “official act” which would benefit the contributor after that contributor makes any contribution or other gift in excess of federal campaign finance or gift limits applicable to the official which benefitted, directly or indirectly that official, the official’s family or the official’s associates.
10. No person or entity shall, directly or indirectly, through or by any other person or means, do any act which, if done by other means, would be a violation of the prohibitions of this Act.

**SECTION 5. DEFINITIONS.**

1. To “lobby” is to request an “official act” whether or not the requester is being compensated for making the request.
2. “Compensated lobbyist” means any person or his or her associate(s) who is being paid, directly or indirectly, for requesting “official acts” or supporting such requests.
3. “Official act” means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought, before any public official, in his or her official capacity, including votes for legislation, appointment to an official position or the arranging of a meeting for the purpose of requesting an “official act.”
4. “Political fundraiser” means any person, whether compensated or not, who solicits or facilitates ”political contributions” to candidates, political committees or parties.
5. "Political contribution" means the making or facilitating of any gift, subscription, loan, advance, or deposit of money or anything else of value to be used for:
   1. general political purposes;
   2. the purpose of influencing any election for federal office;
   3. payment of debt incurred in connection with any such election;
   4. transition or inaugural expenses incurred by the successful candidate for federal office; or
   5. the benefit of an elected official, the official’s family or associates.

EXCEPTIONS: For the purpose of this Act, a “political contribution” shall not include:

A contribution to be used to fund “independent expenditures” by groups, including Super PACs, labor unions and trade associations, which advocate the election or defeat of candidates and which, by law, may not coordinate their expenditures with a candidate, a candidate’s political committee or party; or

A contribution to be used for campaign related expenditures by groups, including non-profit corporations organized pursuant to IRC Sections 501(c)(4) and 501(c)(6), which do not advocate the election or defeat of a candidate and which, by law, may not be coordinated with a candidate, a candidate’s political committee or party.

1. “Elected federal official” means the President, Vice-President and members of the House and Senate of the United States and their subordinates who are employees of the United States.

**Summary of Public Integrity Act of 2016**

**Free Speech**—PIA preserves the right of groups which do not coordinate with candidates or parties to raise and spend unlimited amounts of money to support or oppose candidates for federal office.

**No Fundraising by Lobbyists**—PIA prohibits lobbyists from lobbying public officials who benefit, directly or indirectly, from lobbyists’ raising of both hard and soft contributions. Lobbyists can’t fundraise and fundraisers can’t lobby.

**No Favors for Those Who Exceed Campaign Finance and/or Gift Limits**—Anybody who gives gifts or contributions in excess of applicable limits which benefit the official or the official’s family or associates, cannot request, nor the official perform, an official act which would benefit that contributor.

**Citizens Control Their Campaign Contributions—**Campaign contributors must designate the candidates they want to support and get their money back if their contributions are not used for that purpose. Constituents may give three times the existing federal campaign finance limits to candidates for whom they are entitled to vote.

1. Foundation Professor, George Mason School of Law, [fbuckley@gmu.edu](mailto:fbuckley@gmu.edu), fhbuckley.com. I should not have been able to prepare this but for the advice and friendship of James Wooton, the former president of the U.S. Chamber of Commerce Institute of Legal Reform, who led me to understand just how pervasive the problem of corruption is and whose reform proposal is appended. [↑](#footnote-ref-1)
2. Facts about the Syrian Refugees, at Factcheck.org, Nov. 23, 2015. [↑](#footnote-ref-2)
3. “Loose talk about free speech,” *Washington Times*, Dec. 6, 2015. [↑](#footnote-ref-3)
4. *Society at a Glance 2011: OECD Social Indicators* 91 at Table A (OECD Publishing, 2011). The United States also ranked poorly on the World Values Survey when people were asked whether most people can be trusted. Thirty-five percent of Americans said yes, compared to 66 percent of Dutch and 51 percent of Australian respondents. *World Values Survey 2010-2014* 42 at Table V24 Study # 906-WVS2010 (April 18, 2015). [↑](#footnote-ref-4)
5. Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* 140(New York: Simon and Schuster, 2000). See also Pamela Paxton, “Is Social Capital Declining in the United States? A Multiple Indicator Assessment,” 105 *American J. Sociology* 88 (1999). [↑](#footnote-ref-5)
6. “Millennials in Adulthood,” Pew Research Social and Demographic Trends, March 7, 2014. [↑](#footnote-ref-6)
7. “Beyond Distrust: How Americans View Their Government,” Pew Research Center, Nov. 23, 2015. [↑](#footnote-ref-7)
8. René Girard, *Celui par qui le scandale arrive* (Paris: Desclée De Brouwer, 2001). [↑](#footnote-ref-8)
9. Dinesh D’Souza, *Stealing America* (New York: Broadside, 2015) (discussing his prosecution for campaign finance violations); *Obama’s America: Unmaking the American Dream* (New York: Threshold, 2014); *The Roots of Obama’s Rage* (Washington: Regnery, 2011). [↑](#footnote-ref-9)
10. Wisconsin v. Peterson, \_\_\_ Wisc.2d \_\_\_ (July 16, 2015). Since then the Federal Election Commission has abandoned any effort to rein in coordination between candidates and donors. Matea Gold, “Less is More for super PACS,” *Washington Post*, Dec. 25, 2015. [↑](#footnote-ref-10)
11. Editorial, “Elusive Justice in Wisconsin,” *New York Times*, March 10, 2015; Editorial, “The Revenge of Scott Walker,” *New York Times*, Oct. 27, 2015. [↑](#footnote-ref-11)
12. Ramsey Cox, “In First Speech Back, Reid Blasts Koch Brothers,” *The Hill*, Sept. 8, 2014. For an argument that campaign finance reform might advantage conservatives, see Richard W. Painter, *Taxation Only with Representation: The Conservative Conscience and Campaign Finance Reform* (Auburn, AL: Take Back our Republic, 2016). In an era of Donald Trump and Bernie Sanders, one might be careful what one wishes for. [↑](#footnote-ref-12)
13. See Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* (New York: Doubleday, 2016). [↑](#footnote-ref-13)
14. Within the United States, a way around this is provided by studies that employ federal Justice Department statistics as a proxy for state-by-state corruption. For a finding of a significant negative relation between corruption and economic growth within the U.S., see Noel D. Johnson, Courtney L. LaFountain and Steven Yamarik, “Corruption is bad for Growth (even in the United States),” 147 *Public Choice* 377 (2011). See also Edward Glaeser and Raven Saks, “Corruption in the United States of America,” in Transparency International, *Global Corruption Report 2006: Corruption and Health* (London: Pluto Press, 2006) (states with higher income levels are significantly less corrupt). But see Edward L. Glaeser and Raven E. Saks, “Corruption in America,” 90 *J. Pub. Econ.* 1053 (2006) (finding only a modest relationship between corruption and growth). [↑](#footnote-ref-14)
15. Transparency International Corruption Perceptions Index 2010 Long Methodological Brief. [↑](#footnote-ref-15)
16. See John G. Peters and Susan Welch, “Gradients of Corruption in Perceptions of American Public Life,” in Arnold J. Heidenheimer and Michael Johnston, *Political Corruption: Concepts & Contexts* 155 (New Brunswick: Transaction, 2002); Michael Johnston, “Measuring the New Corruption Rankings: Implications for Analysis and Reform,” id. at 865. [↑](#footnote-ref-16)
17. Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (New York: Farrar, Straus and Giroux, 2014). [↑](#footnote-ref-17)
18. Edward Glaezer, David Laibson, José A. Scheinkman and Christine L. Soutter, “Measuring Trust,” 115 *Q.J. Econ.* 811 (2000); Alberto Alesina and Eliana La Ferrara, “Who Trusts Others,” 85 *J. Public Econ.* 207 (2002). [↑](#footnote-ref-18)
19. See, e.g., Alberto Alesina and Eliana La Ferrara, “Ethnic Diversity and Economic Performance,” 43 *J. Econ. Lit.* 762 (2005). [↑](#footnote-ref-19)
20. On the WJP methodology, see Juan Carlos Botero and Alejandro Ponce, Measuring the Rule of Law, SSRN-1966257 (Nov. 31, 2011). [↑](#footnote-ref-20)
21. See Daron Acemoglu, *Introduction to Modern Economic Growth* 123-40 (Princeton U.P., 2009) (“the evidence … suggests that institutions are a major—perhaps the most significant—fundamental cause of economic growth.” Credit for the insight about the importance of institutions goes to Nobel laureate Douglass North. On the positive relation between economic growth and the rule of law, see Robert J. Barro and Xavier Sala-i-Martin, *Economic Growth* 526-29 (MIT Press, 2d ed. 2004). [↑](#footnote-ref-21)
22. *Where Is the Wealth of Nations? Measuring Capital for the 21st Century*, World Bank 2006 (Washington, DC). [↑](#footnote-ref-22)
23. 18 U.S.C. §§ 201(b)(2), 201(a)(3). Several other federal criminal offences piggyback on the bribery prohibition. The Supreme Court has held that the honest services wire fraud statute, 18 U.S.C. §§ 1343, 1346.16, which requires the Government to prove that the defendant sought to carry out a fraudulent scheme to defraud a person of his intangible right to honest services, prohibits acts of bribery. Skilling v. U.S., 130 S. Ct. 2896, 2933 (2010). A second statute, the Hobbs Act, makes it criminal to commit extortion by obtaining property “under color of official right,” 18 U.S.C. § 1951(b)(2), which again the Supreme Court has found comes down to taking a bribe. *Evans v. U.S.,* 504 U.S. 255, 260, 268 (1992). Third, the federal gratuity statute, 18 U.S.C. § 201(c), criminalizes gifts given to a public official “for or because of any official act.” 18 U.S.C. § 201(c)(1)(A). Finally, federal regulations ban employees from accepting gifts from people whose interests might be substantially affected by the employee’s official duties. 5 U.S.C.S. § 7353. [↑](#footnote-ref-23)
24. ## U.S. v. McDonnell, 792. F.3d 478 (2015), *aff’g* 64 F. Supp. 3d 783 (E.D., Va., 2014).

    [↑](#footnote-ref-24)
25. J.G.A. Pocock, *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* 87-88 (Cambridge U.P., 1985). [↑](#footnote-ref-25)
26. For earlier episodes, see J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton U.P., 2003). [↑](#footnote-ref-26)
27. 424 U.S. 1 (1976). [↑](#footnote-ref-27)
28. Citizens United v. FEC, 558 U.S. 310, 340-41 (2010). [↑](#footnote-ref-28)
29. Buckley, at 26-27. [↑](#footnote-ref-29)
30. Stephen Ansolabehere John de Figueiredo James M. Snyder, Jr., “Why Is There So Little Money in U.S. Politics?,” 17 *J. Econ. Persp*. 105 (2003). [↑](#footnote-ref-30)
31. Mattea Gold and Tom Hamburger, “Political Parties Go after Million Dollar Donors in Wake of Looser Rules,” *Washington Post*, Sept. 19, 2015. [↑](#footnote-ref-31)
32. Buckley, at 53. [↑](#footnote-ref-32)
33. SpeechNow v. FEC, 599 F.3d 686 (2010). [↑](#footnote-ref-33)
34. Gold and Hamburger, supra note X. [↑](#footnote-ref-34)
35. Id. at 360. [↑](#footnote-ref-35)
36. Sir Lewis Namier, *The Structure of Politics at the Accession of George III* 2 (London: Macmillan, 2d. ed., 1957). For David Hume, the King’s patronage powers served to preserve the balanced British constitution. In his essay “Of the Independency of Parliament” (1742), Hume argued that practically all political power had devolved upon the House of Commons. Formally, the king retained the power to veto legislation, but in practice this had fallen into disuse and could not be revived. Yet the king was not powerless either, for his ability to rally the King’s Friends through the promise of patronage permitted him to shape ministries to his liking. [↑](#footnote-ref-36)
37. I The Records of the Federal Convention of 1787 82 (June 2) (Max Farrand, ed.) (New Haven: Yale U.P., rev. ed. 1937). [↑](#footnote-ref-37)
38. See Zephyr Teachout, *Corruption in America: From Benjamin Franklin’s Snuff Box to Citizens United* ch. 1 (Harvard U.P., 2014). [↑](#footnote-ref-38)
39. 52 U.S.C. § 30119(a)(1).See Wagner v. FEC, 793 F.3d 1, *cert. den. sub nom. Miller v. FEC*, \_\_ U.S. \_\_ (Jan. 19, 2016). The statute does not extend to contributions by state government contractors to state officials or parties, but similar state and city law bans were upheld in Green Party of Conn. v. Garfie*ld*, 616 F.3d 213, 218-19 (2d Cir. 2010); and Ognibene v. Parkes, 671 F.3d 174 (2d Cir. 2011). [↑](#footnote-ref-39)
40. Pub. L. No. 94-283, sec. 112(2), § 322, 90 Stat. 475, 492-93. [↑](#footnote-ref-40)
41. 5 U.S.C. §§ 7321-7326. [↑](#footnote-ref-41)
42. United States Civil Service Commission v. National Association of Letter Carriers, [413 U.S. 548](https://en.wikipedia.org/wiki/Case_citation) (1973). [↑](#footnote-ref-42)
43. Gordon Tullock, “The Welfare Costs of Tariffs, Monopolies and Theft,” 5 *Western Econ. J.* 224 (1967). See also Gordon Tullock, *Rent Seeking (*Brookfield, Vt.: Edward Elgar, 1993). [↑](#footnote-ref-43)
44. Wagner, at 22. [↑](#footnote-ref-44)
45. See Fred S. McChesney, *Money for Nothing: Politicians, Rent Extraction, and Political Extortion* (Harvard U.P., 1997); Peter Schweizer, *Extortion: How Politicians Extract Your Money, Buy Votes, and Line their own Pockets* (Boston: Houghton, Mifflin, Harcourt, 2013). [↑](#footnote-ref-45)
46. 61 F.3d 938 (D.C. Cir. 1995). [↑](#footnote-ref-46)
47. Proposed amendments to Rule G-37 by the Municipal Securities Ruling Board would extend the ban to mutual fund advisors. Securities and Exchange Commission Release No. 34-76763 (Dec. 23, 2015). For objections to the alleged overbreath of the proposed rule, see Center for Competitive Politics, letter of Allen Dickerson (Oct. 1, 2014). [↑](#footnote-ref-47)
48. Id. at 943. [↑](#footnote-ref-48)
49. 134 S. Ct. 1434 (2014); *see* Arizona Free Enterprise Club, v. Bennett, 564 U.S. \_\_\_ (2011). [↑](#footnote-ref-49)
50. The rule would incorporate the FEC’s definition of bundlers along with the exemptions provided in the regulations. 11 CFR 110.6, implementing 52 USC 30116. Ways of strengthening the definition of bundlers are suggested by Public Citizen in *Bundling for Favors: Open the Books on Bundled Campaign Contributions What Is bundling and Who Is a Bundler?*, August 10, 2012. [↑](#footnote-ref-50)
51. FEC v. Nat’l Conservative PAC, 470 U.S. 448. 496-97 (1985); *see* Davis v. FEC, 554 U.S. 724, 741-42 (2008). [↑](#footnote-ref-51)
52. Kenneth P. Vogel, “How the Koch Network Rivals the GOP,” *Politico*, Dec. 30, 2015. [↑](#footnote-ref-52)
53. Lobbying Law in the Spotlight: Challenges and Proposed Improvements -- Report of the Task Force on Federal Lobbying Laws, American Bar Association Sec. of Admin. L. & Reg. Prac., Jan. 3, 2011; see also Joseph E. Sandler, “Lobbyists and Election Law: The New Challenge,”in *The Lobbying Manual* 751, 756-57 (ABA, 4th ed., 2009). The ABA Report suggested safe harbors for isolated or casual acts of soliciting contributions, and for solicitations by non-lobbyist colleagues, which should be incorporated in any reform proposal. However, the Report also recommended broadening the definition of lobbyists by deleting the reference to activities that constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period in U.S.C. 1602(10). [↑](#footnote-ref-53)
54. 660 F.3d 726 (2011). [↑](#footnote-ref-54)
55. Id. at 734. [↑](#footnote-ref-55)
56. Does that mean that Super PACs must escape any form of contribution limits? Not necessarily, for a case for barriers to Super PAC support is suggested by a paper by my George Mason colleagues, Thomas Stratmann and J.W. Verret. Thomas Stratmann and J.W. Verret, “How Does Corporate Political Activity Allowed by *Citizens United v. Federal Election Commission* Affect Shareholder Wealth,” 58 *J. Law & Econ.* 545 (2015). The two authors did an event study of the unexpected removal of the ban on corporate contributions in *Citizens United*, and reported a significant share price increase for firms in heavily regulated industries. The positive stock price increase was good for the firm’s shareholders, but presumptively bad for consumers in the regulated industries. Such firms resemble government contractors, since their businesses are closely dependent on the favorable decisions of politically appointed regulators. As such, the concern for pay-for-play corruption is the same in both cases, and one might wonder whether government contractors might similarly be limited. While restrictions on Super PAC contributions might seem to fly in the face of *Citizens United*, they would be entirely consistent with the Court’s broader goal of addressing the problem of corruption. [↑](#footnote-ref-56)
57. The proposed rules with respect to bundlers and lobbyists would to some extent overlap with those suggested in the American Anti-Corruption Act (the “AACA”), drafted by Trevor Potter and Lawrence Lessig amongst others. See anticorruptionact.org/full-text/. In other respects the AACA goes much too far. A blanket restriction on contributions to Super PACs would severely restrict free speech rights and would be struck down under Citizens United, while the AACA’s proposed prohibition of confidential donations (“dark money”) under section 501(c)4 of the Tax Code would increase concerns about pay-for-play by revealing the identity of donors. [↑](#footnote-ref-57)