

# Book Review

## Corruption, Pollution, and Politics

John Copeland Nagle<sup>†</sup>

*The Corruption of American Politics: What Went Wrong and Why.* By Elizabeth Drew. Secaucus, N.J.: Birch Island Press, 1999. Pp. 278. \$21.95.

October 14, 1999, offered the unprecedented spectacle of the Republican members of the United States Senate debating whether or not they were corrupt. The leading advocate for the “yes” proposition was Arizona Senator John McCain—presidential candidate, decorated Vietnam War veteran, member of the infamous Keating Five, and a leading proponent of campaign finance reform. Senator McCain insisted that the existing system for financing political campaigns corrupted the entire Senate.<sup>1</sup> Senator Mitch McConnell—the leading foe of standard campaign finance reform efforts—protested that you cannot have corruption unless somebody is corrupt, and he demanded that McCain name names.<sup>2</sup> McCain refused because he saw the system as the problem, not the individuals within it.<sup>3</sup>

Two subtexts weaved through the October 14 debate. The first involved McCain’s website, which suggested that Congress had been corrupted by the relationship between pork barrel spending and campaign contributions. That allegation angered his colleagues who had supported the named

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<sup>†</sup> Associate Professor, Notre Dame Law School. I am grateful for the comments shared by A.J. Bellia, Nicole Garnett, Rick Garnett, Abner Greene, Ed Hartnett, Roger Lundin, and Steve Smith.

1. 145 CONG. REC. S12,586, S12,587, S12,590, S12,592 (daily ed. Oct. 14, 1999) (statements of Sen. McCain).

2. *Id.* at S12,585, S12,586, S12,590, S12,591 (daily ed. Oct. 14, 1999) (statements of Sen. McConnell).

3. *Id.* at S12,590, S12,592 (daily ed. Oct. 14, 1999) (statements of Sen. McCain).

spending projects, thus prompting one of the Senate's first debates about the meaning of the materials posted on a website.<sup>4</sup> The second subtext centered on a book. Senator McCain quoted Elizabeth Drew's assertion in *The Corruption of American Politics: What Went Wrong and Why* that "[t]he culture of money dominates Washington as never before."<sup>5</sup> McCain added, "Elizabeth Drew has it right. . . . The fact is, there is a pernicious effect of money on the legislative process."<sup>6</sup> McCain's colleagues, however, were not willing simply to accept Drew's judgment. Senator Bennett insisted that Drew's opinions were unrelated to Senator McCain's allegation that the Senate had become corrupt.<sup>7</sup> The Senate debate continued over the course of the next week,<sup>8</sup> but the result was that the Senate once again rejected the kinds of changes to the campaign finance system that Drew, McCain, and others find essential.

Drew has written often and well about the American political system and its follies. Her 1983 book *Politics and Money: The New Road to Corruption*<sup>9</sup> was widely cited by proponents of campaign finance reform, and she addressed these and many related issues in her other books and her years of political writing for various periodicals.<sup>10</sup> In *The Corruption of*

4. *Id.* at S12,587-89 (daily ed. Oct. 14, 1999) (colloquy between Sens. Bennett and McCain) (discussing funding for sewer infrastructure for the 2002 Winter Olympics in Salt Lake City); *id.* at S12,591 (daily ed. Oct. 14, 1999) (colloquy between Sens. Gorton and McConnell) (discussing a statutory exemption from environmental regulations for a Washington mine that was identified on McCain's website as an example of pork barrel spending). The debate concerning the campaign finance implications of those two congressional actions is analyzed *infra* text accompanying notes 96-99.

5. ELIZABETH DREW, *THE CORRUPTION OF AMERICAN POLITICS: WHAT WENT WRONG AND WHY* 61 (1999), *quoted in* 145 CONG. REC. S12,586 (daily ed. Oct. 14, 1999) (statement of Sen. McCain).

6. 145 CONG. REC. S12,586 (daily ed. Oct. 14, 1999) (statement of Sen. McCain). Senator McCain stated, "I believe, as Elizabeth Drew has said, this system is wrong, it needs to be fixed, and the influence of special interests has a pernicious effect on the legislative process." *Id.* Senator McCain also added, "I will repeat again what Elizabeth Drew wrote in her book that this process of money has done great damage to all of us and has had a pernicious and corrupting effect on the process." *Id.* at S12,587 (daily ed. Oct. 14, 1999). Drew noted the October 14 debate in an epilogue contained in the paperback edition of her book published in March 2000, where she ascribed the colloquy about the meaning of corruption to "a smear campaign on the part of some Republican senators who disliked McCain intensely." ELIZABETH DREW, *THE CORRUPTION OF AMERICAN POLITICS: WHAT WENT WRONG AND WHY* 274-75 (The Overlook Press 2000) (1999).

7. 145 CONG. REC. S12,588 (daily ed. Oct. 14, 1999) (statement of Sen. Bennett).

8. *See id.* at S12,660-81 (daily ed. Oct. 15, 1999); *id.* at S12,734-76 (daily ed. Oct. 18, 1999); *id.* at S12,803-31 (daily ed. Oct. 19, 1999).

9. ELIZABETH DREW, *POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION* (1983). The book, which was based on a series of articles that Drew wrote for the *New Yorker*, was featured in much of the ensuing literature advocating campaign finance reform. For academic reviews of the book, see Richard Briffault, *The Federal Election Campaign Act and the 1980 Election*, 84 COLUM. L. REV. 2083 (1984); and Sanford Levinson, *Regulating Campaign Activity: The New Road to Contradiction?*, 83 MICH. L. REV. 939 (1985).

10. Most of Drew's earlier books documented specific periods of recent American political history. *E.g.*, ELIZABETH DREW, *SHOWDOWN: THE STRUGGLE BETWEEN THE GINGRICH CONGRESS AND THE CLINTON WHITE HOUSE* (1996); ELIZABETH DREW, *WASHINGTON*

*American Politics*, she argues that American politics have been corrupted by a number of factors—especially money, but not just money. She presents a variety of anecdotes told by members of Congress, their staffs, lobbyists, reformers, corporate executives, and media personalities, all of which portray a democratic process gone bad.<sup>11</sup> She spends much less time describing solutions to those problems, but she does identify several actions that could eliminate the corruption and restore virtue to Washington.<sup>12</sup> Traditional campaign finance reform measures feature prominently in Drew's list of solutions, but she also emphasizes that the people themselves can achieve many worthwhile results simply by pressuring their elected representatives.<sup>13</sup>

Many politicians, judges, and other observers have reached the same conclusion as Drew. Senator Joseph Lieberman asserted that Drew's evaluation of the role of money in politics "once was nursed by a few public interest groups and then a group of congressional reformers. Now, it constitutes conventional wisdom."<sup>14</sup> At the oral argument in *Nixon v. Shrink Missouri Government PAC*, which occurred days before the October 14 Senate debate, Justice Souter stated, "I think most people assume—I do, certainly—that someone making an extraordinarily large contribution is going to get some kind of an extraordinary return for it."<sup>15</sup> His ensuing opinion for the Court reflects that belief.<sup>16</sup> But the October 14 debate shows how strongly many legislators resist the charge of corruption, while reformers have been frustrated in their efforts to legislate new campaign finance proposals addressing their vision of corruption. The colloquy that occurred in the Senate on October 14 was unique among the many recent

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JOURNAL: THE EVENTS OF 1973-1974 (1975). For examples of her most recent writing, see Elizabeth Drew, *Fortunate Son's Unfortunate Team*, WASH. POST, Apr. 7, 2000, at A31, which encourages George W. Bush to employ advisers to John McCain in his presidential campaign; and Elizabeth Drew, *Let's Destroy These Two Myths. Once and for All*, WASH. POST, Apr. 16, 2000, at B1, which argues that standard campaign finance reform efforts do not violate free speech rights.

11. DREW, *supra* note 5, at 19-85.

12. *Id.* at 268-71.

13. *Id.* at 268 (explaining how fear and embarrassment can cause politicians to change the existing system); *id.* at 271 ("Only if the citizens hold their government to account, demand that their politicians meet a higher standard, and that they fix the most fundamental problem in our political system today, might Americans have a government they can feel better about.").

14. 145 CONG. REC. S12,829 (daily ed. Oct. 19, 1999) (statement of Sen. Lieberman); *see also* Joseph Lieberman, *Campaign Finance*, 49 CATH. U. L. REV. 5, 5 (1999) (repeating the same praise of Drew's book).

15. United States Supreme Court Official Transcript, *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897 (2000) (No. 98-963), 1999 U.S. TRANS LEXIS 76, at \*27. Justice Souter's observation was quoted during the Senate debate two weeks later. 145 CONG. REC. S12,680, S12,772 (daily ed. Oct. 18, 1999) (statements of Sen. Feingold).

16. *Nixon*, 120 S. Ct. at 908 ("[T]here is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters.").

congressional campaign finance debates because it crystallized what divides the Senate: the contested issue of what constitutes corruption.

This Review evaluates Drew's contention that American politics have been corrupted. In Part I of this Review, I examine what Drew says went wrong and why. Drew's account emphasizes the role of campaign money in politics, but she also identifies concerns about incivility and partisanship. These concerns are, however, compromised by her own incivility and partisanship. Part II of this Review evaluates the dispute about the nature of corruption. The disagreement among Drew, the Senate, and the Court suggests that the problem might lie in the standard reliance on the word "corruption." In Part III, I explore another metaphor for the influence of campaign spending on our political system. Nearly twenty years ago, D.C. Circuit Judge J. Skelly Wright suggested that money *pollutes* the system.<sup>17</sup> He did not develop that image, yet it continues to resurface in the debate over campaign finance reform. Part III considers whether the problems associated with campaign finance are an instance of pollution, and what the implications of that metaphor are for efforts to remedy what Drew says has gone wrong with American politics. The pollution metaphor is more helpful than the contested image of corruption in several respects. Pollution targets the harmful influence of money as an outside agent; it better captures the systemic concerns voiced by Drew and McCain alike; and it avoids the connotation of individual blameworthiness to which McConnell and other senators objected. It thus offers a better vehicle for examining the difficult empirical questions regarding the cause and effect of campaign money. Moreover, the way in which pollution can be cleaned up says much about the wisdom of current campaign finance reform proposals.

The pollution metaphor adds these insights to the typical understanding of the campaign finance problem. But while pollution usually connotes contaminated water, dirty air, or other environmental hazards, it possesses additional meanings that are closer to what Drew, Senator McCain, Judge Wright, and others see in the political system. Cultural pollution caused by violent, pornographic, and hateful entertainment media and many other sources has sparked a parallel debate concerning the propriety of government regulation of such pollution. Most of the efforts to regulate Internet decency, hate speech, and the like have failed to survive judicial review employing the strict scrutiny imposed by the First Amendment. From that perspective, the hardest question raised by the pollution metaphor—the constitutionality of governmental efforts to regulate pollution caused by expressive activities—suggests that the standard efforts

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17. J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982).

to reform the campaign finance system are problematic whether they are viewed as eliminating pollution, corruption, or both.

### I. WHAT WENT WRONG AND WHY

Drew characterizes the failure of the campaign finance system established in the aftermath of Watergate as the most serious of the problems with our democracy today. But that is not her only concern. The second chapter of the book—entitled “What’s Happened to Washington?”—offers the most systematic account of the problems that Drew sees. They include the increased selfishness and decreased disinterestedness of politicians, a decline in the quality of politicians, the increased partisanship of politicians, and a decline in civility in the political process. Drew spends little time addressing the causes of those ills, yet she seems to assume that the broken campaign finance system is to blame for them, too.

Drew skillfully combines several chapters recounting recent episodes in the struggle for campaign finance reform and American politics more generally with other chapters containing her normative arguments about the problems ailing American politics. The historical chapters detail the campaign finance hearings headed by Senator Fred Thompson, the 1998 Senate debate on campaign finance legislation, and the saga of President Clinton’s impeachment.<sup>18</sup> The normative analysis examines those stories and countless interviews with Washington figures in an effort to explain how money and other ills have corrupted the political system and what can be done about it.<sup>19</sup> The overall picture, consistent with the book’s subtitle, details “what went wrong” with the American political system, offers a number of explanations for “why” that happened, and generally leaves the appropriate responses for another day.

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18. DREW, *supra* note 5, at 3-18 (describing the formation of Senator Fred Thompson’s committee to investigate campaign fundraising practices in the 1996 elections); *id.* at 86-141 (recounting the work of the Thompson committee); *id.* at 164-210 (describing the unsuccessful congressional efforts to enact campaign finance reform in 1997 and 1998); *id.* at 211-58 (narrating the impeachment and acquittal of President Clinton).

19. *Id.* at 19-42 (analyzing “what went wrong in Washington” apart from campaign finance woes); *id.* at 43-60 (discussing First Amendment objections to campaign finance reform); *id.* at 61-85 (detailing the “money culture” that now pervades Washington); *id.* at 151-63 (criticizing President Clinton for injuring the presidency); *id.* at 259-71 (explaining why there is “reason for hope” that the system can be repaired).

## A. *What Went Wrong*

### 1. *Corrupted Politics*

Money has corrupted Congress. That is the simple lesson from the extended stories that Drew tells about the Senate hearings on campaign finance abuses, the Senate debate on campaign finance reform, and the interviews with members of Congress and private interests reported in the book's chapter on "The Money Culture."<sup>20</sup> Drew asserts that money has influenced the government—especially Congress, but also the presidency—in numerous harmful ways:

Money influences the legislative decisions of members of Congress.

Money influences the outcome of election campaigns.

The need to gather enough money to run an effective campaign distracts members of Congress from their legislative duties.

Money directs the career choices of Washington politicians.<sup>21</sup>

In short, "[s]triving for and obtaining money has become the predominant activity—and not just in electoral politics—and its effects are pernicious."<sup>22</sup>

Drew relies upon numerous anecdotes and personal interviews to support her characterization of the growing and insidious role of money in American politics. She quotes an unnamed former House member who asserts that Texas Representatives Dick Armey and Tom DeLay "have used money to gain power."<sup>23</sup> She notes how contributions for such diverse purposes as university chairs and military museums have become a standard technique for obtaining access to government officials.<sup>24</sup> Drew recounts, for example, how the University of Tennessee established a chair to honor Vice President Gore's late sister and how Gore's former chief political fundraiser raised funds for the chair as well.<sup>25</sup> Drew describes how prodigious fundraising aids members of Congress as they strive to gain

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20. *Id.* at 3-18, 86-141, 164-210 (describing congressional consideration of campaign finance reforms); *id.* at 61-85 (explaining Washington's "money culture").

21. *Id.* at 61-85.

22. *Id.* at 61.

23. *Id.* at 68.

24. *Id.* at 69-73.

25. *Id.* at 73.

leadership positions within the House and the Senate.<sup>26</sup> She cites numerous instances of officials, senators, and representatives who pursued lucrative positions once they left government service.<sup>27</sup> She quotes a White House memorandum explaining that staff briefings of President Clinton “‘may be considerably truncated or eliminated’” in order to accommodate the President’s coffees with individuals who had contributed at least \$50,000.<sup>28</sup> She explains that fundraising is so time-consuming that New Jersey Senator Frank Lautenberg declined to run for reelection in part because he would have to raise \$3000 an hour for nearly two years.<sup>29</sup> And she quotes a Democratic pollster who reported that politicians have “‘utter contempt and distaste for what they have to do day to day to raise money. They hate it. There’s nobody who doesn’t think it’s just a little bit unclean.’”<sup>30</sup>

Drew admits that efforts to use money to sway legislative and administrative decisions are hardly new, but she insists that “‘never before in the modern age has political money played the pervasive role that it does now.’”<sup>31</sup> The book lacks the kind of detailed historical review to support her contention that money plays a role in politics today that it never played before. Drew could be dismissed as crying wolf, given that she made a similar claim sixteen years earlier.<sup>32</sup> And her claim that money pervades everything that happens in Washington today fails to convince other contemporary observers of American politics. Jonathan Rauch’s account of the ills that plague our democratic process contends that “[t]he growing influence of money in politics . . . may be a problem, but there is nothing remotely new in it.”<sup>33</sup>

The absence of any historical support also troubles Drew’s assertion that money plays an increasing role in political campaigns. According to Professor Bradley Smith, candidates paid their own modest election costs until popular campaigning began around 1828.<sup>34</sup> Then government employees whose jobs depended on their party’s remaining in office

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26. *Id.* at 68-69, 72-73.

27. *Id.* at 62-64.

28. *Id.* at 97.

29. *Id.* at 265.

30. *Id.* at 150 (quoting Mark Mellman).

31. *Id.* at 61.

32. DREW, *supra* note 9, at vii (writing in 1983 that “in recent years, it became clear that the distortions of the system and the pressures on the politicians caused by money had grown to the point that they were making a qualitative change in the way the system worked”). Drew’s 1983 book devoted two paragraphs to describing the role of money prior to the 1970s, *id.* at 6-7, in contrast to the solitary sentence about Daniel Webster that appears in the 1999 book, DREW, *supra* note 5, at 61 (noting that Webster “was on retainer from the Bank of the United States and at the same time was one of its greatest defenders in the Congress”).

33. JONATHAN RAUCH, *GOVERNMENT’S END: WHY WASHINGTON STOPPED WORKING* 15 (1999).

34. Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 *YALE L.J.* 1049, 1053-55 (1996).

subsidized most campaigns until the Pendleton Act and state statutes eliminated the vast number of patronage jobs in the 1880s.<sup>35</sup> Corporations and wealthy individuals began funding campaigns only after funds from government employees disappeared and as the effects of government regulation on business interests increased.<sup>36</sup> Many candidates received an enormous proportion of their campaign funds from a small number of moneyed interests. In the 1904 presidential election, for example, corporate contributions accounted for over 73% of Theodore Roosevelt's campaign funds, while a similar percentage of William Jennings Bryan's funds came from two wealthy individuals.<sup>37</sup> By contrast, the leading soft money contributor to the Democratic Party in 1999 accounted for about 3% of the party's total soft money receipts.<sup>38</sup> Similarly, the leading soft money contributor to the Republican Party in 1999 paid just less than \$1,000,000, which was an even smaller fraction of the party's total soft money receipts and of the money raised by George W. Bush's presidential campaign.<sup>39</sup> Or, to judge the historical comparison in another way, the \$450,000 that Thomas Fortune Ryan contributed to William Jennings Bryan's 1904 presidential campaign would be worth \$8,000,000 today, a sum that nearly triples the \$2,939,281 contributed by the Philip Morris Companies, the greatest soft money contributor to a single party in 1999.<sup>40</sup> The point is that, while large contributions raise many questions about their intended purpose and actual effect, Drew overstates her case when she suggests without historical support that the phenomenon is worse today than ever before.

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35. *Id.*

36. *Id.*

37. *See id.* at 1054 (stating that Thomas Fortune Ryan contributed \$450,000 to Bryan and Augustus Belmont contributed \$250,000).

38. *Compare* Common Cause, *Chart VI: Top Overall Soft Money Donors to Democratic Party Committees, January 1, 1999 Through December 31, 1999*, at [http://www.commoncause.org/soft\\_money/study99/chart6.html](http://www.commoncause.org/soft_money/study99/chart6.html) (visited Apr. 30, 2000) (indicating that the American Federation of State, County and Municipal Employees contributed \$1,405,000 in soft money in 1999), *with* Common Cause, *Chart III: Democratic Soft Money Industry Breakdown, Donor Groups of \$10,000 or More, January 1, 1999 Through December 31, 1999*, at [http://www.commoncause.org/soft\\_money/study99/chart3.html](http://www.commoncause.org/soft_money/study99/chart3.html) (visited Apr. 30, 2000) (identifying over \$44,000,000 in soft money contributions to the party in 1999).

39. *Compare* Common Cause, *Chart V: Top Overall Soft Money Donors to Republican Party Committees, January 1, 1999 Through December 31, 1999*, at [http://www.commoncause.org/soft\\_money/study99/chart5.html](http://www.commoncause.org/soft_money/study99/chart5.html) (visited Apr. 30, 2000) (indicating that Philip Morris contributed \$922,067 in soft money in 1999), *with* Common Cause, *Chart II: Republican Soft Money Industry Breakdown, Donor Groups of \$10,000 or More, January 1, 1999 Through December 31, 1999*, at [http://www.commoncause.org/soft\\_money/study99/chart2.html](http://www.commoncause.org/soft_money/study99/chart2.html) (visited Apr. 30, 2000) (identifying over \$49,000,000 in soft money contributions to the party in 1999), *and* Fed. Election Comm'n, *Receipts of 1999-2000 Presidential Campaigns Through February 29, 2000*, at <http://www.fec.gov/finance/precm3.htm> (visited Apr. 30, 2000) (indicating that George W. Bush had received \$72,203,503 in contributions by the end of February 2000).

40. Common Cause, *Top Soft Money Donors: January 1, 1999 Through December 31, 1999*, at [http://www.commoncause.org/laundromat/topdonors99\\_new.htm](http://www.commoncause.org/laundromat/topdonors99_new.htm) (visited Sept. 4, 2000).



## 2. *Dysfunctional Politics*

Drew characterizes the pervasive and insidious effect of money as the most serious of the problems our democracy faces today. But that is not her only concern. The second chapter of the book—entitled “What’s Happened to Washington?”—records a litany of ills that plague American politics today.<sup>41</sup> Most of them can be organized into a downward spiral of members of Congress who are worse than ever before, a legislative and executive process that has become dysfunctional, and a people who no longer esteem their government.

Drew implies that we are now burdened with the worst collection of representatives ever to serve in the U.S. Congress.<sup>42</sup> To be sure, she acknowledges that past Congresses have endured incompetence, corruption, partisanship, and physical beatings.<sup>43</sup> But she insists that things have gotten worse on a variety of fronts, all of which have yielded a Congress filled with men and women who are neither qualified nor interested in serving the public good.<sup>44</sup> Drew rightly criticizes such behavior, sounding a call for increased civility and bipartisanship that has been echoed by others across the political spectrum, but her message suffers from two substantial failings. First, she asserts, but fails to demonstrate, that conditions today are significantly different than earlier periods of our history. More importantly, she is an imperfect messenger for that claim because much of her case suffers from the same flaws that she perceives in many members of Congress.

The book contends that our democracy suffers from a lack of civility even as the book itself is remarkably lacking in civility. Drew rightly echoes the common lament that members of Congress have become less civil in their dealings with each other.<sup>45</sup> She notes instances of name-

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41. DREW, *supra* note 5, at 19–42.

42. *See id.*

43. *Id.* at 26–27.

44. *Id.* at 20–23.

45. *E.g.*, Howard Baker, 1999 *Stephenson Lecture*, 48 U. KAN. L. REV. 391, 393 (2000) (asserting that “[t]here is too little civility in public service in the Congress of the United States and the government of our country, to say nothing of civility among nations”); Kathleen M. McGraw, *Manipulating Public Opinion with Moral Justification*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 129, 138 (1998) (stating that “[m]any observers have noted that the power of the ‘courtesy norm’ in Congress declined markedly in the 1980s and 1990s,” but adding that “[i]t is an open question as to how much the norms of civility in Congress have actually declined”). Note, however, that today’s name-calling pales in comparison to the famous caning of Senator Charles Sumner that Drew mentions and to numerous other violent episodes that she neglects. DREW, *supra* note 5, at 27 (“In 1856, a House member, Preston Brooks of South Carolina, caned Senator Charles Sumner of Massachusetts, beating him insensate, over an abolitionist speech Sumner had given, naming names, including that of Brooks’s uncle, of senators who supported slavery.”); *see also* Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 HARV. L. REV. 1359, 1366 (1992) (noting that Sumner’s speech also suggested that Senator Butler, who was Brooks’s uncle, had been sleeping with his

calling, booing, and other childish behavior that demeans both the institution and its individual members.<sup>46</sup> Yet Drew is guilty of similar childishness. She has a disturbing tendency to ridicule the personal appearance and intellect of those with whom she disagrees. For example, she describes Mitch McConnell as “the owlsh-looking, jowly senator from Kentucky, a man of serious mien, with graying hair, a somewhat nasal voice, and thin lips, giving him a parsonlike appearance.”<sup>47</sup> By contrast, those who enjoy Drew’s approval are described in glowing terms. Thus she writes that “John McCain’s eyes had a certain look, which, along with his gentle voice, drew people to him,” and that he has “an aura of sensitivity that wasn’t common among politicians.”<sup>48</sup> Such reliance on physical and

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slaves). For other historical examples of violence in Congress, see JAMES H. HUTSON, *TO MAKE ALL LAWS: THE CONGRESS OF THE UNITED STATES, 1789-1989*, at 41 (1989), which observes that “[u]ntil the Civil War the floors of Congress were dangerous. Many legislators were armed—during one House debate thirty members pulled guns—and some were prepared to carry their differences to the local dueling grounds.”

46. See DREW, *supra* note 5, at 38-39 (citing examples of booing, ridicule, and shoving matches on the House floor); *id.* (accusing Senator Santorum of bringing “a new low to Senate decorum—and respect for the presidency—in 1996, when he regularly came to the Senate floor with a large poster saying ‘Where’s Bill?’ and referring to the number of days that had passed without Clinton’s offering a budget plan”); *id.* (describing Senator D’Amato as “[t]he other contender for worst decorum” because he brought a drawing of a pig to the Senate floor and sang a version of “Old MacDonald Had a Farm” to protest pork barrel spending). For other instances of incivility besides those committed by the Republican members of Congress mentioned by Drew, see, for example, Peter Baker & Juliet Eilperin, *Clinton Impeached; House Approves Articles Charging Perjury, Obstruction; Mostly Partisan Vote Shifts Drama to Senate*, WASH. POST, Dec. 20, 1998, at A1, which reports that Representative Bob Livingston’s call for President Clinton’s resignation “triggered an angry wave of catcalls on the Democratic side of the chamber, where members began calling out, ‘No! No!’ Rep. Maxine Waters (D-Calif.) banged her open palm on the table in front of her and, along with several others, began shouting, ‘You resign! You resign!’” *Cf.* 145 CONG. REC. S12,737 (daily ed. Oct. 18, 1999) (statement of Sen. Craig) (“[T]his weekend the *New York Times*, in its rather typical fashion, has decided to engage in this debate by simply calling names, suggesting that the Senate is a ‘bordello’ and that Mitch McConnell is its ‘madam.’ Shame on you, *New York Times*.”).

47. DREW, *supra* note 5, at 45. There are many other examples in the book. See, e.g., *id.* at 143 (describing Representative John Doolittle as “appropriately named”); *id.* at 36 (describing Senator Rick Santorum as “[t]oothy” and “[u]nburdened by brilliance”); *id.* at 196 (stating that Representative Tom DeLay was seen “grinning, his dark hair slicked back as usual”); *id.* at 113-14 (describing the members of the Senate committee investigating campaign finance abuses, including Don Nickles, who is “none too bright” and who asks questions “in a yapping manner,” Robert Smith, “a big lump of a man from New Hampshire,” who “was probably the dimmest light on the Republican side,” John Glenn, who “after a while became a whiny bore,” and Daniel Akaka, “often a room-emptier because of the thinness of his thought”).

48. *Id.* at 164. Again, there are many additional examples. See, e.g., *id.* at 112 (describing Senator Susan Collins as having “raven hair, blue eyes, and a porcelain complexion,” and being “a lot lovelier and livelier than she came across on the television screen”); *id.* at 39 (describing Representative David Skaggs as “[a] serious, thoughtful man with dark hair and dark eyes and an almost old-fashioned courtliness”); *id.* at 148 (describing Senator Bob Kerrey as “the blithe spirit . . . whose large, penetrating blue eyes drew attention” and who is “an unconventional political figure” who “didn’t seem to take politics, or himself, with puffed-up seriousness”); *id.* at 184, 196, 199 (describing the two leaders of campaign finance reform efforts in the House: Marty Meehan, “forty-two years old, youthful and apple-cheeked, with straight, salt-and-pepper hair and a broad Massachusetts accent”; and Chris Shays, a “gentleman” with a “gentle demeanor”). Drew further describes Shays as

intellectual characteristics is not the most civil way to advance the needed case for more congressional civility.

The book also provides a partisan condemnation of partisanship. Again, there is abundant support for Drew's contention that Congress has become more partisan in recent years.<sup>49</sup> Even though Drew does not identify with one political party or another,<sup>50</sup> the book is partisan in the broader sense that it exalts supporters of campaign finance reform while vilifying its opponents. Drew questions both the motives and the merits of those who oppose campaign finance reform even as she praises the leaders of that effort in heroic terms. She cannot imagine that opponents of campaign finance legislation regard their fairness, constitutional, or other objections to reform proposals as anything other than a cynical ploy to remain in power. Her complaints against partisanship suffer from her role as a partisan for campaign finance reform.

The incivility, partisanship, and other failings convince Drew that "[p]erhaps the most important change is that the quality of the politicians in Washington has declined during the past twenty-five years, and that the rate of decline has accelerated."<sup>51</sup> Drew sees the diminishing quality of members of Congress evidenced by their lack of experience in government, their indulgence in ideological impulses, their overriding pursuit of their own careers, and their failure to socialize with political opponents in a way that would breed understanding of different points of view.<sup>52</sup> Drew holds special scorn for "[t]he former House members who have entered the Senate in recent years"—citing Trent Lott and Tom Daschle alike—

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an unlikely-looking hero. A serious man with thinning blond hair who wore thick glasses, there was a slight nerdiness in his style—a squeakiness and nervousness in his speech, and often a worried look on his face. The nervousness stemmed in part from the fact that he was in a difficult position as a moderate in a party that had veered sharply right.

*Id.* at 181.

49. *Id.* at 32-38 (describing and criticizing the increased partisanship in Congress). The empirical proof is provided in Richard E. Cohen, *A Congress Divided*, 32 NAT'L J. 382, 382 (2000), which notes that the House and Senate were highly polarized in 1999 and details how "every Democrat had an average [legislative voting] score that was to the left of the most-liberal Republican's."

50. The book blasts President Clinton and Republican members of Congress alike. (Democratic members of Congress escape relatively unscathed.) Congressional Republicans are criticized for their opposition to campaign finance reform and for their overzealous efforts to remove President Clinton from office. The book also belittles President Clinton; perhaps most harshly, Drew remarks that "[t]he boy who wanted to grow up to be President became President but never quite grew up." DREW, *supra* note 5, at 157. Drew devotes an entire chapter to her claim that "Clinton's presidency has been a squandered opportunity." *Id.* at 152. She faults him for failing to lead the effort to secure campaign finance reform, and for "la[y]ing waste to two of the office's most important elements: its mystique and its power to influence the public and the Congress." *Id.* at 151-52. Her case is powerful, but because the lessons of the Clinton presidency have been amply addressed in other forums, I will not pursue it further here.

51. *Id.* at 19.

52. *Id.* at 19-22, 28-36.

because they “are more aggressive, more partisan, less interested in issues, and more tactical, than the average senator used to be.”<sup>53</sup>

Here Drew seems to imagine a golden era that never actually existed. Members of Congress have long suffered from a lack of popular esteem, especially among the elites that Drew represents. Moreover, history may judge some of today’s senators and representatives more highly than Drew does. For example, Warren Rudman, who served as John McCain’s presidential campaign chairman, is now regarded by many as a respected statesman, but Rudman received no such accolades when he was first elected to the Senate in 1980.<sup>54</sup> The passage of time may yield a better judgment on the members of today’s Congress as well. Complaints about the capabilities of members of Congress are hardly new, which makes Drew’s sweeping claims of a declining quality of representatives hard to judge.

Not surprisingly, everyone suffers if those who serve in Congress are as ill-equipped as Drew posits. Public policy loses when members of Congress do not work with each other to seek meaningful compromises that would yield productive legislation. The families of many members of Congress have been strained and even broken by the atmosphere in Washington. Most importantly, people throughout the nation have become discouraged with American politics. Reports of public cynicism toward the government are legion—in Drew’s book, in the congressional debates over campaign finance reform, and elsewhere.

## B. *Why*

Drew’s response to “what happened in Washington” thus contains two discrete conclusions: Money controls what happens, and those who are serving in Washington are not qualified to do the job. Why that has happened—the other part of the subtitle of Drew’s book—is left half-explained. Drew writes much about the role of money in politics, but she spends less time considering possible explanations for her conclusion that the quality of Washington politicians has declined.

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53. *Id.* at 22.

54. *Compare All Things Considered* (National Public Radio broadcast, Mar. 24, 1992), LEXIS, News Library, Transcripts File (statement of Deborah Anderson, New Hampshire gubernatorial candidate) (“Most about what you remember about Warren Rudman is he’s the one who stood up and called it as he saw it when it was really critical not to be a politician but to be a statesman.”), with Michael Knight, *New Hampshire Election To Settle 2 Grudge Fights Between Old Foes*, N.Y. TIMES, Oct. 26, 1980, at 32 (noting that Rudman had been belittled in his Senate race as “Waffling Warren”). Rudman remains less well regarded by many conservative Christians, whom he has harshly criticized. *See* WARREN B. RUDMAN, *COMBAT: TWELVE YEARS IN THE U.S. SENATE* 270 (1996).

Drew blames the broken campaign finance system for the increased influence of money in Washington. She is especially upset with the role of “soft money”—money raised and spent by political parties or private interests, as opposed to the “hard money” given to and spent by the candidate himself or herself.<sup>55</sup> Soft money became more attractive as a result of the Supreme Court’s decision in *Buckley v. Valeo*,<sup>56</sup> which upheld federal campaign contribution limits but struck down federal campaign expenditure limits.<sup>57</sup> Since *Buckley*, federal law has limited hard money contributions to \$1000 per individual and \$5000 per organization,<sup>58</sup> whereas soft money contributions and expenditures have been unregulated. That is why, for example, Microsoft could contribute \$798,163 in soft money in 1999 even as Bill Gates was limited to \$1000 per candidate.<sup>59</sup> Drew thus blames the spiraling efforts to obtain soft money for “virtually all of the Clinton financial scandals in his 1996 election—the large contributions from unsavory or possibly illegal sources, the heavy-handed fund-raising by the President and the Vice President.”<sup>60</sup> Soft money, in turn, results in a proliferation of issue advertisements that Drew regards as a pernicious sham that substitutes the voices of special interests for the voices of the candidates themselves.<sup>61</sup>

All of this has happened, complains Drew, because of the Supreme Court’s invalidation of previous campaign finance reform efforts beginning with *Buckley*.<sup>62</sup> Her constitutional analysis is not the book’s high point. She never really addresses the fundamental claim that money spent on political campaigns implicates the free speech guarantee of the First Amendment. Instead, she devotes most of her chapter entitled “The First Amendment” to telling the story of which groups have taken which positions on the constitutional issue raised by campaign finance legislation.<sup>63</sup> Drew begins by expressing skepticism that the First Amendment argument against campaign finance reform proposals is anything more than a tactical ploy.<sup>64</sup> She characterizes the constitutional concerns as “specious[]” and

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55. DREW, *supra* note 5, at 54-55, 83-84.

56. 424 U.S. 1 (1976).

57. *Id.* at 12-59.

58. 2 U.S.C. § 441a (1994).

59. Common Cause, *Chart IV: Top Overall Soft Money Donors to National Party Committees, January 1, 1999 Through December 31, 1999*, at [http://www.commoncause.org/soft\\_money/study99/chart4.html](http://www.commoncause.org/soft_money/study99/chart4.html) (visited Apr. 30, 2000).

60. DREW, *supra* note 5, at 59.

61. *Id.* at 8-9, 51-52, 266.

62. *Id.* at 49-53.

63. *Id.* at 43-60.

64. *See id.* at 45 (observing that there are “some people . . . who question whether [Senator McConnell] truly believes his First Amendment argument, or simply finds it convenient”); *id.* at 57 (noting a business group’s opposition to campaign finance reform and stating that “[i]f this was done in the name of the First Amendment, the business PACs were happy to go along with the charade”).

“bogus.”<sup>65</sup> Her substantive critique, however, is limited to a few more unkind remarks about *Buckley*, an insistence that equality and saving the time of legislators should suffice to sustain any reforms against constitutional attack, and a one-sided explanation of the constitutionality of regulating soft money and issue advocacy.<sup>66</sup>

Why things besides the pernicious influence of money “went wrong in Washington” remains unexplained. Drew does not contend that campaign money makes members of Congress less civil, more partisan, less skilled, or more selfish. She identifies just a few culprits for those developments, such as the availability of information on computers and around-the-clock news coverage that reduces the ability of legislators to engage in reflective, thoughtful dialogue.<sup>67</sup> Television is also to blame because it requires “that candidates be smooth and telegenic” and thus “has just about rid us of eccentrics, particularly in the Senate.”<sup>68</sup> Apart from those passing suggestions, the unanswered question in the book is why members of Congress have become so nasty, partisan, and incompetent.

Several common explanations escape Drew’s otherwise thorough discussion. Drew recognizes that “there are more women and minorities in politics,”<sup>69</sup> but she neglects the collateral effects of what helped achieve those laudatory events. The increased partisanship in the House is often attributed to redistricting decisions influenced by the Voting Rights Act that have created more reliably liberal or conservative districts that are thereby replacing many moderates with liberals and conservatives who enjoy safe seats.<sup>70</sup> The partisanship and incivility can also be traced to a broader society that has become more divided and less civil.<sup>71</sup> The incivility and selfishness of members of Congress mimic the people whom they represent. These reasons, plus the influence of campaign money, help explain why American politics have descended to the place that Drew regards as corrupt.

Drew targets the campaign finance system and a dysfunctional Congress as two distinct problems that result in the corruption of American politics. Her conclusion is weak in several respects. She does not engage

65. *Id.* at 43 (claiming that First Amendment arguments are raised “speciously”); *id.* at 269 (referring to “the bogus arguments that some of the reforms under consideration . . . would violate the First Amendment’s protection of free speech”); see also 145 CONG. REC. S12,811-12 (daily ed. Oct. 19, 1999) (statement of Sen. Kerry) (contending that the constitutional argument “is fundamentally a sham issue as it is being presented by the other side”).

66. See DREW, *supra* note 5, at 44-59.

67. *Id.* at 28, 31.

68. *Id.* at 27.

69. *Id.* at 26.

70. See, e.g., SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 598-607 (1998) (describing the consequences of redistricting after the 1990 census).

71. Cf. James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1372 (2000) (asserting that “the United States displays a *relative* lack of civility, both in its social practices and in its law,” compared to French and German societies).

the protests about the presumed cause and effect of campaign money that were voiced in the October 1999 Senate debate, and she offers little explanation for why Congress has become uncivil, partisan, and generally lacking in quality. Nor does she attempt to explain whether the broken campaign finance system and the dysfunctional Congress are related or isolated occurrences. Most importantly, Drew does not defend her characterization of each problem as an instance of “corruption.” Perhaps she thought that such a label followed as a matter of course once she described what has happened to the campaign finance system and to Congress, but the October 14 Senate debate revealed that some members of the Senate will not accept accusations of corruption without more proof than Drew offers.

## II. CORRUPTION

Corruption has constitutional consequences. The Supreme Court has indicated that corruption—or the appearance of corruption—is the only constitutionally adequate basis for restrictions on campaign finance that implicate the First Amendment’s freedom of speech guarantee.<sup>72</sup> Yet the October 14 debate confirms that the existence of corruption in the American political system itself remains a point of contention. When Senator McConnell objects that no individual Senators are corrupt, Senator McCain insists that the entire system is corrupt, and Senator Feingold adds that it appears to be corrupt,<sup>73</sup> it is apparent that the notion of corruption is different for a lot of different people. The word expands yet further when Drew implies that the dysfunction of Congress constitutes corruption, too.

This Part examines Drew’s accusation that American politics are “corrupt.” Drew devotes most of her book to the system of financing campaigns, so I focus on that system as well. The October 14 Senate debate and the conflicting opinions in *Shrink Missouri Government PAC* illustrate the contested nature of the concept of corruption. This Part analyzes three distinct meanings of corruption: corruption as quid pro quo agreements;

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72. ISSACHAROFF ET AL., *supra* note 70, at 632-33 (“After *Buckley*, it appeared that the sole legitimate government interest in regulating campaign finance lay in removing the temptation for corruption.”). Nonetheless, Drew is joined by other activists and commentators in pressing other justifications for campaign finance reform. DREW, *supra* note 5, at 50 (contending that “[p]utting the candidates on an even, or a relatively even, playing field” and “spar[ing] candidates from having to spend a large percentage of their time raising money” should also suffice to justify campaign finance regulations); Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1281-84 (1994) (advancing the fundraising time argument); Symposium, *Money, Politics, and Equality*, 77 TEX. L. REV. 1603 (1999) (analyzing the equalization argument).

73. 145 CONG. REC. S12,592 (daily ed. Oct. 14, 1999) (statement of Sen. Feingold); *supra* notes 1-2 and accompanying text.

corruption as monetary influence; and corruption as inconsistency with public opinion. The failure to achieve a consensus about which of these views of corruption is most appropriate in the context of campaign finance reform explains some of the difficulty that Drew and Senator McCain have experienced in articulating their objections to the role of money in politics. That failure also opens the door to my consideration in Part III of pollution as an alternative metaphor for campaign finance concerns.

Drew's book offers the promise of a compelling brief for the case that the campaign finance system is corrupt. The dust jacket trumpets Arianna Huffington's promise that I would find "an incisive analysis of the problem" and the raves of Warren Beatty that Drew "finds stuff nobody else finds and she knows how to put it together." I have elsewhere expressed my genuine uncertainty about whether the system is corrupt,<sup>74</sup> so I eagerly read the book with the expectation that the case for corruption would be spelled out in eloquent detail. I was disappointed. The book nowhere defines "corruption," it neglects any consideration of the numerous empirical studies of corruption,<sup>75</sup> and it is even short on anecdotes about corruption. What one finds instead are countless assertions of corruption.

That is not to say that evidence of corruption does not exist. Rather, those involved in the debate over campaign finance reform embrace fundamentally different ideas of corruption. Senators McCain and McConnell reached a stalemate on October 14 because McCain viewed the entire process as corrupt while McConnell insisted that there was no evidence that any individual Senator was corrupt.<sup>76</sup> Justices Souter and Thomas evidenced a similar disagreement about the nature of corruption in *Shrink Missouri Government PAC*.<sup>77</sup> Or, as Professor Thomas Burke has explained, the rhetoric about corruption in campaign finance debates refers to three distinct kinds of corruption: (1) a *quid pro quo* in which a legislator takes money in exchange for an official action; (2) the monetary influence that campaign money exerts on a legislator's actions; and (3) the distortion

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74. John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 103 (2000).

75. *Infra* text accompanying note 94.

76. *Supra* notes 1-3 and accompanying text.

77. *Compare* *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 905 (2000) (Souter, J.) (noting that *Buckley* "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"), *with id.* at 924 (Thomas, J., dissenting) (complaining that the majority "separates 'corruption' from its *quid pro quo* roots and gives it a new, far-reaching (and speech-suppressing) definition, something like '[t]he perversion of anything from an original state of purity'" (quoting 3 OXFORD ENGLISH DICTIONARY 974 (2d ed. 1989))). *See generally* Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 851 (1985) (describing corruption as "an 'essentially contested concept,' that is, a concept containing a descriptive core on which users of the concept can agree roughly, but so unbounded and so intertwined with controversial normative ideas that general agreement on the features of the concept is impossible").



of policymaking by money that causes a legislator to act inconsistently with public opinion.<sup>78</sup> The assertions of Drew and McCain that the campaign finance system is corrupt presuppose either the monetary influence or the distortion standard, not the quid pro quo standard adopted by McConnell.

#### A. *Corruption as Quid pro Quo Agreements*

Everyone agrees that a quid pro quo agreement in which a campaign contributor funds a candidate in exchange for an agreement to take a legislative action is corrupt. Bribery laws render such conduct a criminal offense. The contested question is whether the label "corruption" may be properly applied in the context of campaign finance to anything besides a quid pro quo agreement. Senator McConnell and Justice Thomas insist that "corruption" necessarily connotes a quid pro quo relationship.<sup>79</sup> Justice Souter, Senator McCain, and Drew see corruption in circumstances beyond quid pro quo agreements.<sup>80</sup> Because even Drew would admit that there are few instances of quid pro quo agreements between campaign contributors and candidates,<sup>81</sup> her characterization of American politics as corrupt necessarily presumes that the narrower vision of corruption is not the only vision of corruption.<sup>82</sup>

#### B. *Corruption as Monetary Influence*

The monetary influence standard finds corruption whenever campaign money influences the official actions of an elected representative. Again, everyone agrees that it is corrupt to allow money contributed to or spent in

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78. Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127, 131 (1997). The literature generally addressing corruption is surprisingly scant. For examples of some of the excellent scholarly work that does exist, see SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* (1999); and John G. Peters & Susan Welch, *Political Corruption in America: A Search for Definitions and a Theory, or If Political Corruption Is in the Mainstream of American Politics Why Is It Not in the Mainstream of American Politics Research?*, 72 AM. POL. SCI. REV. 974 (1978).

79. *Shrink Mo. Gov't PAC*, 120 S. Ct. at 923 (Thomas, J., dissenting) (insisting that only quid pro quo arrangements constitute corruption); 145 CONG. REC. S12,590 (daily ed. Oct. 14, 1999) (statement of Sen. McConnell) (equating corruption with bribery).

80. *Shrink Mo. Gov't PAC*, 120 S. Ct. at 905 (Souter, J.); 145 CONG. REC. S12,586, S12,590 (daily ed. Oct. 14, 1999) (statements of Sen. McCain) (repeating that campaign money corrupts the political system rather than individual legislators); DREW, *supra* note 5, at 76-77 (describing how money can improperly influence members of Congress even if money is not actually exchanged for a vote).

81. See DREW, *supra* note 5, at 137 ("Quid pro quos are usually hard to prove, even if the circumstantial evidence is screaming."); *id.* at vii (explaining that her book addresses "the expanding corruption of money in all its pervasive ways, some of them novel, and including the corruption of the Washington culture").

82. See *id.* at 61 ("The culture of money . . . affects the issues raised and their outcome; it has changed employment patterns in Washington; it has transformed politics; and it has subverted values.").

political campaigns to dictate legislative decisions. That consensus disappears when the effect of campaign money is considered. Drew, Senator McCain, and other reformers view the large amounts of money contributed and spent by particular interests as circumstantial evidence that such money is influencing members of Congress. But most members of Congress heatedly deny that they are influenced by campaign contributions. As Idaho Senator Larry Craig protested, "to anyone who would suggest to any of us that money influences, from the standpoint it is going to change our philosophy, change our attitude or corrupt us, as some Senators have suggested on this floor that it does—out West we call them fighting words."<sup>83</sup> Drew responds that some members of Congress confess to struggling with the implications of granting access, supporting or opposing legislation, or taking other actions affecting their campaign contributors.<sup>84</sup>

The evidence of such corruption is almost always circumstantial. Often corruption is seen in the mere amount of money contributed to and spent on political campaigns by corporations, unions, political action committees (PACs), and wealthy individuals. Senator McCain's website is more general still, seemingly equating soft money contributions, pork barrel spending, and a corrupt political system.<sup>85</sup> Senator McCain went a step further during the October 14 debate when he listed the amounts contributed by various interests and the legislation that—coincidentally or not—benefited those interests.<sup>86</sup> The website of Common Cause, a leading advocate of campaign finance reform, offers a host of additional instances of suggested connections between soft money contributions and congressional activity (or inactivity).<sup>87</sup> Drew's few examples are even more explicit when she traces how money apparently influenced the congressional debates over the expansion of NATO,<sup>88</sup> telecommunications

83. 145 CONG. REC. S12,739 (daily ed. Oct. 18, 1999) (statement of Sen. Craig).

84. One senator admitted:

I had mixed feelings about my donors. Was I giving them the impression they would have more access to me, or that I was now on board for their agenda, whatever it happened to be? It was a moral dilemma all the time.

... If the system isn't corrupt, it's corrupting. It forces you into compromising yourself.

DREW, *supra* note 5, at 24 (quoting Senator Dick Durbin).

85. McCain's website links pork barrel spending and soft money contributions by observing that "[e]ach year there are several appropriations and tax bills that transfer your tax dollars to the special interests who fund politicians [sic] insatiable appetite for soft money." McCain 2000, *Stop the Pork*, at <http://www.itsyourcountry.com/pork.htm> (visited Apr. 30, 2000). Such efforts, McCain explains, are part of a corrupt system even though not all pork barrel spending is triggered by soft money contributions. John McCain, Campaign Finance Reform, Speech at Bedford, New Hampshire (June 30, 1999), at <http://www.itsyourcountry.com/speech6-30-99.htm> (visited Apr. 30, 2000) [hereinafter McCain, Campaign Finance Reform].

86. 145 CONG. REC. S12,589 (daily ed. Oct. 14, 1999) (statement of Sen. McCain).

87. Common Cause, *100% Special-Interest Financing*, at [http://www.commoncause.org/soft\\_money/study99/congress.htm](http://www.commoncause.org/soft_money/study99/congress.htm) (visited May 19, 2000).

88. DREW, *supra* note 5, at 67-68.

deregulation,<sup>89</sup> and banking reform.<sup>90</sup> Drew is also correct in asserting that monetary influence can be seen in the access that contributors gain to government officials, regardless of whether money affects any actual decisions on pending legislation.<sup>91</sup>

But none of those examples proves a causal relationship between campaign contributions and legislative decisions. Drew admits that “[quid pro quos are usually hard to prove, even if the circumstantial evidence is screaming.”<sup>92</sup> The difficulty in proof, though, is not limited to the quid pro quo conception of corruption relied upon by Senator McConnell. To *prove* corruption in the sense of monetary influence, there must be evidence that the money actually influenced the recipient. That is precisely the inference that raised the ire of Senator Craig last October.<sup>93</sup> Moreover, the empirical studies have yielded conflicting results concerning the influence, if any, of campaign contributions on legislators.<sup>94</sup>

It is surprisingly difficult to identify specific campaign contributions that distorted public policy. Consider two of the congressional appropriations listed on Senator McCain’s website that became the center of debate on October 14. As part of the emergency appropriations to fund military operations in Kosovo in May 1999, Congress included \$2.2 million for sewer infrastructure projects associated with 2002 Winter Olympics in Salt Lake City, and it exempted the Crown Jewel Mine in Washington from a new administrative ruling prohibiting the disposal of mining wastes on federal lands surrounding the mine. McCain listed both provisions among dozens of provisions that he characterized as pork barrel spending.<sup>95</sup> Elsewhere on his website, McCain linked pork barrel spending to soft money contributions and corruption, though he also posted a disclaimer that not all listed provisions were necessarily corrupt.<sup>96</sup> During the October 14 Senate debate, Utah’s Senator Robert Bennett and Washington’s Senator Slade Gorton defended the provisions and objected to the insinuation that

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89. *Id.* at 79-81.

90. *Id.* at 81-82.

91. *Id.* at 76-77, 127.

92. *Id.* at 137.

93. *See supra* note 83 and accompanying text.

94. *See Nagle, supra* note 74, at 101 n.101 (citing numerous studies reaching contradictory conclusions regarding the effect of campaign contributions on legislative decisions).

95. McCain 2000, *The Pork List Goes On*, at [http://www.itsyourcountry.com/pork\\_list.htm](http://www.itsyourcountry.com/pork_list.htm) (visited Apr. 30, 2000). McCain leveled the same charge when the Senate agreed to include those provisions in the emergency appropriations bill. 145 CONG. REC. S5647-48 (daily ed. May 20, 1999) (statement of Sen. McCain).

96. McCain, Campaign Finance Reform, *supra* note 85 (admitting that not all pork barrel spending is motivated by special interest campaign contributions); McCain 2000, *The Problem Is Special Interests*, at <http://www.itsyourcountry.com/problem.htm> (visited Apr. 30, 2000) (describing cases of “special interests buying special favor in Washington”).

they were corrupt.<sup>97</sup> Senator McCain responded that he objected to both provisions because of the abbreviated process that produced them, but he did not link either provision to any campaign contributions.<sup>98</sup> The lesson is that the two provisions might have been bad public policy, but it is unlikely that Senators Bennett and Gorton pushed them to pander to campaign contributors.<sup>99</sup>

Yet the public is convinced of the monetary influence resulting from campaign contributions. The best test of the assumption that extraordinarily large contributions influence the actions of the legislators who receive the money would be provided by a proposal that I have articulated elsewhere: to eliminate all restrictions on the amount of money that can be contributed to candidates for the legislature, but to require members of the legislature to recuse themselves from any involvement in any matters affecting a campaign contributor.<sup>100</sup> If contributions dried up once legislators could no longer act on behalf of a contributor, that would suggest that the purpose of contributions was to influence the legislator all along. But if contributions continued apace, then the hypothesis that contributions are designed to influence a legislator would be hard to sustain.

Absent such an empirical test, the debate about the purpose of campaign contributions will persist. Yet the popular assumption about the purpose of campaign contributions cannot be discounted simply because of the lack of definitive proof. Campaign money, like the role of race in reapportionment,<sup>101</sup> is an area where appearances do matter. The

97. 145 CONG. REC. S12,587-89 (daily ed. Oct. 14, 1999) (statement of Sen. Bennett); *id.* at S12,590-91 (daily ed. Oct. 14, 1999) (statement of Sen. Gorton).

98. *Id.* at S12,589 (daily ed. Oct. 14, 1999) (statement of Sen. McCain) (asserting that Senator Bennett “engaged in a continuous practice of violating the rules of the Senate, which require authorization and then appropriation, for several years now”); *id.* at S12,592 (daily ed. Oct. 14, 1999) (statement of Sen. McCain) (insisting that “[n]owhere should it be interpreted that every single one of those pork barrel projects are as a result of soft money”).

99. The two provisions contained in the emergency appropriations for Kosovo are not isolated examples of the difficulty of tying specific campaign money to specific legislative actions. Senator McCain’s October 14 speech linked spending by several industries to certain congressional actions, *see* 145 CONG. REC. S12,589 (daily ed. Oct. 14, 1999) (statement of Sen. McCain), but a subsequent report denied that there was any such connection, *see* Burt Solomon, *Forever Unclean*, 32 NAT’L J. 858, 859 (2000) (“Neutral observers pooh-pooh accusations that campaign donations have proved decisive in congressional action on, among other things, tobacco, bankruptcy law, gambling, financial services deregulation, ethanol subsidies, and a patients’ bill of rights.”). Or consider the example that *Time* magazine chose for its February 7, 2000, cover story on the influence of big money in politics. The *Time* story maintained that campaign contributions from the owner of Chiquita bananas prompted the Clinton Administration to launch a trade war to open European markets for Chiquita. Donald L. Barlett & James B. Steele, *How To Become a Top Banana*, TIME, Feb. 7, 2000, at 42. Another report soon challenged *Time*’s account of the events, suggesting that Time Warner’s own campaign contributions offered a better example of the use of money to affect a policy decision. John Maggs, *Bananas, Nuance, and Time*, 32 NAT’L J. 634, 635 (2000).

100. Nagle, *supra* note 74, at 81-85 (describing the proposal).

101. *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (“[W]e believe that reapportionment is one area in which appearances do matter.”).

circumstantial evidence of monetary influence of campaign money is not as persuasive as the kind of direct evidence that would satisfy Senator McConnell, but circumstantial evidence does suffice to prove most propositions in court. Indeed, public perceptions about the influence of campaign contributions are better described in terms of reflecting a judgment about the persuasiveness of the circumstantial evidence of corruption (as conceived as monetary influence), rather than providing an independent justification for regulation affecting First Amendment interests. The appearance of corruption should not justify government regulation if that appearance is actually a misperception. The response to a misperception of corruption should be to correct that misimpression, not to indulge it. But if the public perception is viewed as the people's judgment about the circumstantial evidence of corruption, and if the legislative judgment is seen as reflecting the popular perception, then deference to that judgment can be appropriate.

The Court has stumbled toward this conclusion, though not in so many words. The majority in *Shrink Missouri Government PAC* disdained any effort to explain the precision with which corruption must be proved in order to support regulation of campaign contributions.<sup>102</sup> The meager evidence of corruption cited by the Court consisted of a handful of local newspaper stories containing unproven allegations of a nexus between specific contributions and legislative acts, and reports of polls showing that the public viewed contributions as influencing their elected representatives in Jefferson City.<sup>103</sup> The Court then dismissed the contrary studies indicating that no monetary influence had occurred as unproven and unlikely to have swayed popular opinion in any event.<sup>104</sup> Perhaps most importantly, the Court was willing to defer to the judgment of the legislature that contributions exerted monetary influence.<sup>105</sup> The implicit message that emerges from the opinion is that if the legislature or the people believes that corruption exists, then that is good enough for the Court.

Of course, such reliance upon the legislature's view of the monetary influence of corruption is a double-edged sword. Legislators will not easily admit that they are corrupted by the campaign contributions that they

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102. *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 907-08 (2000).

103. *Id.*; cf. *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 456-58 (1st Cir. 2000) (relying upon a similar collection of polls, newspaper clippings, and legislative anecdotes to sustain the corruption rationale of Maine's campaign finance statute).

104. *Shrink Mo. Gov't PAC*, 120 S. Ct. at 908.

105. The majority deferred implicitly by declining to impose a specific evidentiary burden and accepting the minimal evidence of corruption proffered by the state (including evidence that was not before the legislature). *Id.* at 906-08. Justice Breyer was more explicit that the Court should defer to the legislature's "political judgment that unlimited spending threatens the integrity of the electoral process," although he was unwilling to defer to the legislature's choice of remedies as well. *Id.* at 913 (Breyer, J., concurring).

receive. Drew responds that contributions make good legislators do bad things.<sup>106</sup> Many members of Congress agree with her, but many other members echo Senator Craig's rejection of that assessment. As the October 14 debate shows, the disagreement centers as much on the implications of the word "corruption" as it does on any empirical or anecdotal evidence of the monetary influence of campaign contributions. Therein lies the most telling shortcoming of viewing corruption according to the monetary influence standard. Any effort to enact new federal regulations of campaign contributions will fail so long as enough members of Congress remain unconvinced that such contributions influence them to such an extent that they may be regarded as corruption.

### C. *Corruption as Inconsistency with Public Opinion*

The distortion standard sees corruption when money affects the policymaking process by causing a legislator to act inconsistently with public opinion. As Professor Burke explains, "[t]he 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."<sup>107</sup> *Austin v. Michigan State Chamber of Commerce*,<sup>108</sup> the decision most often cited in support of this view, refers to corruption as "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."<sup>109</sup> Burke describes *Austin* as indicating that "corruption is no longer tied to the conduct of the officeholder, but instead concerns the power of the corporate spender in the political marketplace."<sup>110</sup>

The distortion standard presupposes a certain model of representation, to wit, that legislators should act in the manner desired by a majority of their constituents. But that is just one position in the longstanding debate about the appropriate role for a legislator in a representative democracy. The contrary view, as quoted by Drew, is reflected by Edmund Burke's classic assertion that a legislator "is in Parliament to support his opinion of the public good and does not form his opinion in order to get into

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106. DREW, *supra* note 5, at 61; *see also* 145 CONG. REC. S12,586 (daily ed. Oct. 14, 1999) (statement of Sen. McCain) ("[T]his system makes good people do bad things.").

107. Burke, *supra* note 78, at 131.

108. 494 U.S. 652 (1990).

109. *Id.* at 660.

110. Burke, *supra* note 78, at 135.

Parliament, or to continue in it.”<sup>111</sup> Drew seems to endorse that model of representation even as she worries that today’s politicians find that view “passé, and even a bit weird,”<sup>112</sup> and she complains that legislators today implicitly reject it when they “reflect[] the momentary mood of the public.”<sup>113</sup> The dilemma this creates for Drew is that the Burkean theory of representation might compel, rather than just tolerate, less regulation of campaign contributions and spending. As Justice Kennedy explained after describing the Burkean ideal in *Shrink Missouri Government PAC*:

Whether our officeholders can discharge their duties in a proper way when they are beholden to certain interests both for reelection and campaign support is, I should think, of constant concern not alone to citizens but to conscientious officeholders themselves. There are no easy answers, but the Constitution relies on one: open, robust, honest, unfettered speech that the voters can examine and assess in an ever-changing and more complex environment.<sup>114</sup>

In any event, Drew’s endorsement of the Burkean tradition precludes her from characterizing any legislative decision contrary to the popular majority as corrupt.

Campaign contributions and expenditures can satisfy any of these three theories of corruption. But few observers believe that there is a quid pro quo relationship involved in most campaign contributions. The extent to which contributions exert a monetary influence is a point of strong contention, and the appropriate model of representation continues to be a source of debate as well. The corruption label that Drew attaches to the existing system of financing political campaigns thus suffers from two

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111. DREW, *supra* note 5, at 29 (quoting Burke). Senator Graham echoed the reference to Burke in his October 1999 speech supporting campaign finance reform. 145 CONG. REC. S12,824 (daily ed. Oct. 19, 1999) (statement of Sen. Graham).

112. DREW, *supra* note 5, at 29.

113. *Id.* More graphically, she observes that “[p]eople tend to think that the politicians in Washington are ‘out of touch’ with their constituents, but if they were any more in touch their ears would never leave the ground.” *Id.* at 29; *see also id.* at 25 (“The level of courage in the face of these challenges to vote with popular sentiment has dropped.”). Drew is especially approving of campaign finance reformers who do the right thing regardless of the political consequences. *Id.* at 181 (applauding Representative Shays for supporting campaign finance reform despite opposition from fellow Republicans). She does not, however, extend the same courtesy to those who oppose campaign finance reform. If the popular support for campaign finance reform is as great as Drew believes, then a member of Congress who opposes such reforms might be viewed as following in the Burkean tradition of heeding personal convictions rather than popular desires. Drew does not even entertain that possibility, instead ascribing selfish political motives to anyone who votes against campaign finance reform. *Id.* at 46 (suggesting that Republicans oppose campaign finance reform because they fear “the power of the ‘liberal media’”). Likewise, when Drew devotes a lengthy chapter to the impeachment of President Clinton, she recognizes that many Republicans supported impeachment in the face of public opposition, but again she is unwilling to believe that their motivation was principled instead of selfish or vengeful. *Id.* at 211-30.

114. *Nixon v. Shrink Mo. Gov’t PAC*, 120 S. Ct. 897, 916 (2000) (Kennedy, J., dissenting).

problems: which theory of corruption is appropriate, and what evidence exists to satisfy that theory. The Supreme Court avoided both of those issues in *Shrink Missouri Government PAC* by its apparent disinterest in both the precise theory of corruption and the actual evidence supporting that theory. But the allegation of corruption must also persuade the legislators—or people—who consider campaign finance reforms in the first instance, and the results have fallen far short of the desires of Drew and other reformers. The October 14 debate confirms that part of the problem is the corruption metaphor itself. It touches a raw nerve, and it has not yielded the kind of reform that Drew, Senator McCain, and others want. So perhaps a new image of the problem would help.

### III. POLLUTION

Pollution provides an alternative metaphor for the campaign finance problems cited by Drew, Senator McCain, and others. The idea that campaign contributions and spending pollute the political system, rather than corrupt it, can be attributed to D.C. Circuit Judge J. Skelly Wright. His 1982 article *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?* offered the possibility of exploring an alternative, potentially more helpful metaphor for the concerns about campaign finance.<sup>115</sup> Judge Wright's article contains a few references to "[t]he corrosive effect of money on the political process,"<sup>116</sup> an image that Drew employs as well.<sup>117</sup> But Wright fails to develop fully the meaning of his suggestion that politics are polluted, not corrupted.

The pollution metaphor has been deployed in the campaign finance debate on a handful of occasions since then. Former Senator Howard Metzenbaum supported campaign finance reform because "[s]pecial interests are polluting our politics like never before."<sup>118</sup> A 1998 New

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115. Wright, *supra* note 17.

116. *Id.* at 609; *see also id.* at 621, 645 (referring to the "corrosive influence of money" on the political process).

117. DREW, *supra* note 5, at 267 (stating that "[r]eform of our campaign finance system to get at the worst, most corrosive problem in our political system isn't a lost cause").

118. Howard M. Metzenbaum, *The Need for Change Is Now Clearer Than Ever*, ROLL CALL, July 26, 1999, 1999 WL 14666093. Others have recently described campaign finance as a pollution problem. *E.g.*, John W. Ashenfelter, Editorial, *Gambling Hurts Families and Pollutes Our Politics*, THE PANTAGRAPH (Bloomington, Ill.), July 17, 1999, at A14 (criticizing the gambling industry's campaign contributions for buying influence in the Illinois government); Editorial, *The Pollution of Politics*, BOSTON GLOBE, Apr. 5, 1999, at A16 (complaining that Congress had failed "to eliminate notoriously corrosive soft money contributions"); Walter Shapiro, *Seeking Substance in Caucus Clamor*, USA TODAY, Jan. 24, 2000, at 4A (referring to "the torrents of unregulated campaign cash that pollute politics"). Other references see pollution in politics apart from campaign finance issues. *E.g.*, William Safire, *For a "Citizen's Privilege,"* N.Y. TIMES, Dec. 28, 1998, at A27 ("Professions of purity pollute our politics."); *Hardball with Chris Matthews* (CNBC television broadcast, Oct. 25, 1999), available at LEXIS, News Library,



Mexico congressional race featured charges by Democratic candidate Phil Maloof that special interest money “pollutes politics,” while his incumbent Republican opponent Heather Wilson insisted that the real problem was the three million dollars of his own money that Maloof spent on the campaign.<sup>119</sup> Al Gore has deplored issue ads that “pollut[e] the public airwaves,”<sup>120</sup> and Hillary Rodham Clinton’s campaign spokesman called on Rudolph Giuliani’s Senate campaign to return a “toxic contribution” from a leading environmental polluter.<sup>121</sup> A proposed “Campaign Pollution Control Act” would prevent negative advertising by candidates receiving public financing in Rhode Island elections.<sup>122</sup>

The state “clean election” laws further pursue this image. The people of Arizona, Maine, and Massachusetts have enacted statutes entitled “clean election” laws through ballot initiatives, the Vermont legislature adopted its own such law, and similar proposals are being considered in many other states.<sup>123</sup> The stated purpose of such statutes is “to create a clean elections system that will improve the integrity of . . . state government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of

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Transcripts File (interview with Rich Bond, former chair of the Republican National Committee, who describes Pat Buchanan as “a superfund site. He pollutes politics”).

119. *Candidates Field Questions on School Violence and Minimum Wage*, ALBUQUERQUE TRIB., June 16, 1998, at A7 (quoting Maloof’s statement in a debate that “I’ve never taken a penny of special-interest PAC money. I think it pollutes politics”); John J. Lumpkin, *Malooof Spends Way into Record Book*, ALBUQUERQUE J., Aug. 2, 1998, at A1 (“The \$3.1 million of his own money that Phil Maloof has poured into a so-far unsuccessful congressional campaign appears to have set a national record for a Democrat seeking a U.S. House seat.”); Barry Massey, *N.M. Race Reflects National Debate over PACs*, ALBUQUERQUE TRIB., June 22, 1998, at A6 (noting that “Malooof describes his personal wealth as a clean source of campaign cash,” while “Wilson portrays Malooof as trying to buy his way into Congress”). Wilson won the election with 45% of the vote, despite being outspent by Malooof, in part because a Green Party candidate who spent less than \$10,000 won 15% of the vote. See MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS 2000*, at 1074-75 (1999).

120. *Gore Lashes Out at ‘Phony’ Critics; Medicare-Plan Foes Pollute TV, He Says*, CHI. TRIB., July 6, 2000, at 18 (reporting that Gore accused the Citizens for Better Medicare of “polluting the public airwaves with special-interest TV ads designed to deceive the American people about a prescription drug benefit”).

121. Lynne Duke, *Hillary Clinton Returns Campaign Donation*, WASH. POST, Apr. 20, 2000, at A4 (quoting Howard Wolfson, Clinton’s campaign spokesman).

122. R.I. 99-S0764 (Jan. Sess. 1999), available at <http://www.rilin.state.ri.us/billtext99/senatetext99/s0764.htm> (visited Apr. 30, 2000); see also Bruce Landis & Jonathan Saltzman, *Lawmakers Ponder Halting Money for “Stupid” Attack Ads; A Proposal To End “Campaign Pollution” Is Among a Flood of Bills Taken Up by Committees in Both Chambers as Deadlines Loom*, PROVIDENCE J.-BULL., Apr. 8, 1999, at 1B (noting that the sponsor of the bill admitted that it was controversial but “a law isn’t unconstitutional until a court rules that it is”).

123. See Citizens Clean Elections Act, ARIZ. REV. STAT. ANN. §§ 16-940 to -961 (West Supp. 1999); Maine Clean Election Act, ME. REV. STAT. ANN. tit. 21-A §§ 1121-1128 (West Supp. 1999); Massachusetts Clean Elections Law, MASS. GEN. LAWS ANN. ch. 55A (West Supp. 2000); Vermont Campaign Finance Option, VT. STAT. ANN. tit. 17, §§ 2851-2856 (Supp. 1999). For a summary of the effort to enact clean elections laws, see Public Campaign, *Clean Money Campaign Reform*, <http://www.publiccampaign.org/cleanmoney.html> (visited Apr. 7, 2000).

speech.”<sup>124</sup> The image of clean elections has become so powerful that the threat of being labeled “unclean” has prompted candidates to object to the government imposing that label.<sup>125</sup> The resonance of that image supports a closer examination of the lessons of the pollution metaphor for campaign finance.

### A. *Pollution Versus Corruption*

The contrast between the colloquial understandings of pollution and corruption is telling. The terms are synonymous insofar as they presuppose a baseline condition that is unpolluted and uncorrupted. They are also similar in their implication that something has gone wrong that has altered that condition for the worse. The terms differ, though, concerning the cause of that harmful change. The dictionary definitions of “pollute” and “pollution” suggest an outside agent that renders something impure.<sup>126</sup> The dictionary definitions of “corrupt” are more general. Sometimes “corrupt” refers to the same concept of the harmful work of an outside agent, but in other uses the term refers to a harm that occurs naturally, while most broadly it includes any “change from good to bad.”<sup>127</sup> Another distinction between the terms involves the unique connotation of pollution as a byproduct that produces unintended (though foreseeable) results. Corruption is also more likely than pollution to connote wrongdoing by specific individuals.

These distinctions support the description of campaign funds as polluting rather than corrupting. The pollution metaphor better captures Drew’s description of the unseen, incremental, yet real impairment that money works on the political and legislative system. The political environment that Drew portrays is as polluted as the air in Bangkok or the water in Nigeria. Those who must live in such a political environment

124. ARIZ. REV. STAT. ANN. § 16-940(A) (West Supp. 1999).

125. See *Daggett v. Comm’n on Governmental Ethics and Election Practices*, 205 F.3d 445, 470 (1st Cir. 2000) (emphasizing that the state agency will not label candidates but that private interests are free to characterize candidates as clean or unclean).

126. See, e.g., BLACK’S LAW DICTIONARY 1159 (6th ed. 1990) (defining “pollution,” in part, as “[c]ontamination of the environment by a variety of sources including but not limited to hazardous substances, organic wastes and toxic chemicals”); 12 THE OXFORD ENGLISH DICTIONARY 42-43 (2d ed. 1989) (defining “pollute,” in part, as “[t]o render ceremonially or morally impure; to impair, violate, or destroy the purity or sanctity of; to profane, desecrate; to sully, corrupt,” and defining “pollution,” in part, as “[t]he presence in the environment, or the introduction into it, of products of human activity which have harmful or objectionable effects”).

127. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 512 (1986) (defining “corrupt”); see also, e.g., BLACK’S LAW DICTIONARY 348 (7th ed. 1999) (defining “corruption” as “[d]epravity, perversion or taint; an impairment of integrity, virtue, or moral principle; esp., the impairment of a public official’s duties by bribery”); 3 THE OXFORD ENGLISH DICTIONARY 973 (2d ed. 1989) (defining “corruption” as “[t]he destruction or spoiling of anything, esp. by disintegration or by decomposition with its attendant unwholesomeness; and loathsomeness; putrefaction”).

suffer the same kinds of slow yet inexorable injuries as those individuals who breathe dirty air and drink contaminated water day after day after day. Likewise, even if campaign contributions and spending are not designed to sway legislative decisions, such money may still be regarded as polluting if it has the unintended harmful byproduct of influencing legislative decisions. The pollution metaphor also avoids the insinuation that certain politicians are corrupt, the charge that Senator McConnell found particularly objectionable during the October 14 debate.<sup>128</sup>

That is not to say that the pollution metaphor captures all of the subtleties of the debate about campaign finance or that the corruption metaphor is altogether misplaced. The description of campaign money as polluting faces the same questions about the motivation and effect of campaign contributions that confront the image of corruption, though perhaps from a slightly more accessible perspective. Conversely, corruption correctly describes those instances when contributors or candidates know that money will yield expected results. The label of corruption may also be used correctly in other contexts involving campaign funding, but not in the eyes of those like Senator Craig who deny the premise and those like Senator McConnell and Justice Thomas who cling to a more precise understanding of corruption. The pollution metaphor may be capable of performing the same work as the metaphor of corruption in the context of campaign finance reform, but without the same baggage. Perhaps most intriguingly, the description of campaign money as polluting presents strikingly different consequences for the elimination of such pollution depending upon what kind of pollution one has in mind.

### B. *Campaign Finance as Environmental Pollution*

Consider how the law addresses environmental pollution. First, it identifies the pollution. The Clean Water Act (CWA), for example, defines “pollutant” by listing fifteen specific materials and three general types of wastes.<sup>129</sup> As Professor William Rodgers observes, “[t]his laundry list of ‘bads’ endorses an understanding of a pollutant as a ‘resource out of place.’”<sup>130</sup> Other statutes define pollution in more general terms that simply

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128. See 145 CONG. REC. S12,586 (daily ed. Oct. 14, 1999) (statement of Sen. McConnell) (“[H]ow can it be corruption if no one is corrupt? That is like saying the gang is corrupt but none of the gangsters are.”).

129. 33 U.S.C. § 1362(6) (1994) (defining “pollutant” as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into the water”).

130. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 300 (2d ed. 1994).

refer to anything that has a harmful effect on the air or the water.<sup>131</sup> Pollution is sometimes defined to exist any time a specified agent is introduced into the air or water, but other statutes define pollution as containing a threshold amount.<sup>132</sup> Next, the law explains what can be polluted. Again, the CWA refers to “waters of the United States.”<sup>133</sup> Other statutes identify what is polluted as the air, the water, the natural environment, or other media.<sup>134</sup> The polluters, in turn, include any individual, corporation, or other party that discharges a pollutant into waters of the United States.<sup>135</sup>

Now transfer that understanding to campaign contributions and expenditures. The threshold difficulty is establishing that there is a pollutant. The typical description of the problems facing the existing campaign finance system suggests that money—especially soft money—is the pollutant that is introduced into the political environment. Drew, for example, argues that “[t]he culture of money dominates Washington as never before,” and she refers to “the pervasive role” played by “political money.”<sup>136</sup> The implication is that money spent on political campaigns permeates the political environment and affects it for the worse. In other words, such money pollutes the system.

This rationale faces a number of objections. Unlike dioxin or PCBs, money is not harmful in all times and in all places. Few observers would characterize the economic marketplace as polluted by money even though money plays a more substantial role in that environment than in the political marketplace. Even within the political marketplace, money appears in a variety of different places—such as lobbying by private interests and appropriations by legislators—that pose problems of their own but which

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131. See, e.g., COLO. REV. STAT. ANN. § 32-4-502(22) (West 1999) (defining “pollution” or “pollute” as “the condition of water resulting from the introduction therein of substances of a kind and in quantities rendering it detrimental or immediately or potentially dangerous to the public health, or unfit for public or commercial use”); KY. REV. STAT. § 224A.011(22) (Michie 1998) (defining “pollution” as “the placing of any noxious or deleterious substances . . . in any waters of the state or affecting the properties of any waters of the state in a manner which renders the waters harmful or inimical to the public health or to animal or aquatic life, or to the use, present or future, of these waters for domestic water supply, industrial or agricultural purposes, or recreational purposes”).

132. See, e.g., CAL. FOOD & AGRIC. CODE § 13142(j) (West 2000) (defining “pollution” as the introduction into groundwaters of pesticides “above a level, with an adequate margin of safety, that does not cause adverse health effects”).

133. 33 U.S.C. § 1362(7) (stating that the “navigable waters” within the scope of the CWA are “the waters of the United States, including the territorial seas”).

134. See, e.g., Clean Air Act § 302(g), 42 U.S.C. § 7602(g) (1994) (defining “air pollutant” as various materials that enter “the ambient air”); N.Y. ENVTL. CONSERV. LAW § 24-0107(8) (Michie, WESTLAW through 1999) (defining “pollution” as “the presence in the environment” of various harmful contaminants).

135. See, e.g., 33 U.S.C. § 1311(a) (regulating “the discharge of any pollutant by any person”).

136. DREW, *supra* note 5, at 61; see also text accompanying notes 118-120 (citing instances of campaign contributions and spending being termed “pollution”).

fall outside the scope of what Drew condemns as corrupt. The consequences of targeting money contributed to or spent on political campaigns as pollution become more troubling when it is remembered that such money is spent on speech.

Even if campaign money can be characterized as pollution, that does not mean that all such money constitutes pollution. Drew does not believe that *all* campaign contributions or spending are problematic, suggesting instead that money below a certain amount does not present any problem.<sup>137</sup> This refusal to target all campaign money fits nicely within those environmental statutes that indicate that pollution does not exist until a threshold amount of the contaminant is introduced into the water or the air.<sup>138</sup> In both instances the label “pollution” is applied only if the agent of concern is capable of causing harm at a particular level.

The challenge, then, is to identify how much and what kind of campaign money the political environment can tolerate without suffering harm. So viewed, the problem is not money itself, but the influence that money has on political campaigns and the legislative process.<sup>139</sup> And whether or not campaign contributions or campaign spending have such an influence echoes the questions raised by the monetary influence theory of corruption.<sup>140</sup> The investigation into the effect that campaign money has on legislators and the legislative process will also guide the inquiry into whether such money is a pollutant or not.

But the pollution metaphor adds several nuances to the inquiry into the effect of campaign money. First, the need to ascertain the baseline condition of the natural environment in order to know when it becomes polluted suggests the need for an agreement about a properly functioning campaign and legislative process prior to any determination that money has adversely affected that process. Second, campaign money cannot be regarded as a pollutant if the same effects—for example, the same legislative decisions or the same electoral results—would have occurred anyway. Third, the concept of pollution leads toward consideration of the effect of campaign money on the political environment as a whole instead of its effect on specific legislators and their decisions. Fourth, the regulation of environmental pollution often favors prophylactic measures, as opposed to individualized determinations of harm. For example, sand appears on the CWA’s list of materials described as pollutants when it is discharged into the water even though a body of water is not always harmed when sand is

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137. *Id.* at 269 (encouraging campaign finance reformers to “overcome their resistance to raising the limit on individual contributions”).

138. *See supra* note 131 and accompanying text.

139. *See* Nagle, *supra* note 74, at 71 (arguing that campaign finance reform should take into account the influence of campaign money, rather than the mere existence of such money).

140. *See supra* text accompanying notes 83-106.

dumped into it.<sup>141</sup> Finally, viewing campaign finance through the lens of pollution encourages consideration of whether campaign money is pollution because it is in the wrong place, because there is too much of it, or both. Each of these distinctions raises new questions that should be addressed when evaluating campaign finance reforms.

The next aspect of the analogy between environmental pollution and campaign money considers what is being polluted. The political, electoral, and legislative environments can all be seen as polluted by campaign money. The legislative process is polluted when campaign contributions and spending affect the policy decisions made by members of Congress. Political campaigns are polluted when money distorts the electoral process. The title of Drew's book contends that what has been "corrupted" is "American politics," and other descriptions of the campaign finance problem agree that the harm is suffered by the political system.<sup>142</sup>

The last view—that the political system is the injured party—responds to the difficulty that Senator McCain had last October when Senator McConnell asked which senators were corrupted. Individuals are often characterized as corrupt; they are rarely described as polluted. The things that are described as polluted—the air, the water—are more general. Another use of the term "pollution" is even more helpful. The House report accompanying the Civil Rights Act Amendments of 1991 refers to workplaces polluted by discrimination.<sup>143</sup> Note that it is the workplace that is polluted, not individual employees. Or to offer one more illustration, it is more common to describe a forest as polluted than the trees.

To say that the political system is polluted avoids the implication that particular representatives are polluted. It also avoids the connotation of corruption that suggests that no corruption can be tolerated. By contrast, the law tolerates some environmental pollution. The law intervenes to regulate or prohibit pollution only when the amount of a particular type of pollutant has harmful effects. Under this view, campaign contributions and spending would be permissible up to the point where they begin to produce harmful effects, including but not limited to corruption. Indeed, the pollution metaphor permits consideration of other justifications for campaign finance regulation, such as encouraging all interests to have an equal voice in the

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141. See 33 U.S.C. § 1362(6) (1994) (including "sand" within the definition of "pollutant").

142. See 145 CONG. REC. S12,600 (daily ed. Oct. 14, 1999) (statement of Sen. McCain) (stating that "[u]nlimited amounts of money given to political campaigns have impaired our integrity as political parties and as a legislative institution"); 144 CONG. REC. H6944 (daily ed. Aug. 3, 1998) (statement of Rep. Roukema) (noting that "unions, corporations, and wealthy individuals pumped over \$260 million of soft money into the political environment" during the previous election cycle).

143. H.R. REP. NO. 102-40, pt. 1, at 47 (1991) (quoting a statement by the former counsel of the U.S. Department of Housing and Urban Development that "[i]t is in the interest of American society as a whole to assure that equality of opportunity in the workplace is not polluted by unlawful discrimination").

political process. Environmental pollution exists when there is too much of one substance relative to the amount of another substance. For example, a certain amount of chlorine is not harmful when it is contained in a large body of water, but it is harmful when it is contained in a small cup of water. Likewise, a \$10,000 contribution may not be harmful in the context of a presidential campaign when thousands of other individuals and organizations make similar contributions, but its effect would be much more dramatic in a municipal election where the typical amount spent in the entire campaign is less than that.

Also, the *appearance* of pollution often justifies legal regulation. To be sure, unsubstantiated fears of pollution fail to support even a private nuisance action against an alleged polluter.<sup>144</sup> But several environmental regulations target pollution simply because it is unsightly, even if no health or other harms exist. The Clean Air Act, for example, forbids the introduction of pollution into areas like the Grand Canyon where the air is crystal clear.<sup>145</sup> Likewise, the CWA prohibits the degradation of bodies of water even if they could tolerate pollution and still satisfy the health standards.<sup>146</sup> Local efforts to apply zoning laws to protect aesthetic interests have also become acceptable to the courts in most jurisdictions.<sup>147</sup> These legal rules support the Court's treatment of the appearance of improper influence of campaign money as a distinct basis for the regulation of campaign contributions.

The pollution of campaign contributions differs from environmental pollution in one important respect. Environmental pollution occurs either as a byproduct (such as emissions from a factory) or from an accident (such as an oil spill), or from knowing wrongdoing (such as a midnight dumper). The polluting effect of campaign contributions—if it exists—is intentional but not knowingly wrongful.<sup>148</sup> That depends, of course, on the contested question of the purpose of such contributions: to influence future legislative decisions or to reward legislators and candidates for decisions already made. If the purpose is to influence decisions, then the result is both intended and understandably characterized as pollution. If contributions are

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144. See, e.g., *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715 (Mich. 1992).

145. See 42 U.S.C. §§ 7491-7492 (1994); Assessment of Visibility Impairment at the Grand Canyon National Park: Advance Notice of Proposed Rulemaking, 64 Fed. Reg. 32,458 (1999) (describing the EPA's plans for complying with the Clean Air Act's duty to protect the visibility of areas like the Grand Canyon).

146. See 33 U.S.C. § 1313(d)(4)(B); *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 705 (1994) (describing the CWA's antidegradation provision).

147. See JOHN P. DWYER & PETER S. MENELL, *PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE* 919-21 (1998) (explaining the willingness of the state courts to allow zoning for aesthetic purposes).

148. See *The Pollution of Politics*, *supra* note 118 (distinguishing environmental pollution from the pollution of politics because "[w]ith money in politics . . . it is the intended effect that is polluting").

reactive instead, then the result is neither intended nor characterized as pollution. In other words, if campaign contributions are fairly regarded as pollution, then their intentional nature distinguishes them from environmental pollution.

If money is the pollutant and the political or legislative system is what is polluted, then the polluters are those who contribute to political campaigns. Just as environmental statutes do not distinguish among factories or mines or individuals that pollute the air or the water, the image of pollution in the campaign context includes corporations, PACs, unions, nonprofit organizations, and individuals alike. Remember, though, that the choice of the appropriate definition of "pollutant" will determine whether all campaign contributors are regarded as polluters, or only those who contribute more than a certain amount of money.

### C. Remedies for Environmental Pollution and Campaign Finance

Once the pollution and the polluters are identified, the question becomes how to reduce or eliminate the pollution. Removing the pollution of campaign contributions and spending can be accomplished in a similar manner as the removal of other kinds of environmental pollution. One common remedy for environmental pollution suggests that the regulation of campaign finance is unnecessary. As Judge Deanell Reece Tacha recently observed in the course of invalidating an FEC limit on political party spending, "the old rule of sanitary engineers applies here: the solution to pollution is dilution."<sup>149</sup> The idea, as described above, is that the harmful effect of a substance disappears if the substance is mixed into a sufficiently large environment. This would appear to be the case with campaign finance: The effect of a \$1000 contribution diminishes when it is simply one of thousands received by a candidate, and larger contributions to political parties are likewise diluted by many similar contributions. The dilution analogy, however, cannot be pressed too far. According to Professor Rodgers, "[p]ollution dilution is a control strategy held in low esteem" in contemporary environmental law, which favors the removal of pollution instead.<sup>150</sup> But much of the demand to remove environmental

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149. *FEC v. Colo. Republican Fed. Campaign Comm.*, 213 F.3d 1221, 1231 (10th Cir. 2000) (citing Brief of Amicus Curiae Committee for Party Renewal, *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (No. 95-489)); see Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 647 (2000).

150. 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER 16 (1986). Rodgers acknowledges, however, that dilution might satisfy the CWA's water quality standards. *Id.* (citing *Ford Motor Co. v. EPA*, 567 F.2d 661 (6th Cir. 1977)). *Contra* Mark C. Van Putten & Bradley D. Jackson, *The Dilution of the Clean Water Act*, 19 U. MICH. J.L. REF. 863, 888 (1986) (arguing that Congress intended "to eliminate dilution in national waters as an acceptable pollution control solution").



pollution comes from a moral objection to the very existence of pollution in the air or the water, whereas it is more difficult to sustain an objection against the presence of any money in political campaigns. Instead, it is a more limited objection to dilution as a remedy for environmental pollution that is most relevant here. Dilution does not remedy environmental pollution—especially water pollution—if the substance is especially toxic or if the substance concentrates in certain places rather than spreading out.<sup>151</sup> Campaign money is not especially toxic, but the concentration of such money in the hands of certain legislators, candidates, and parties is precisely the problem that much campaign finance legislation is designed to address.

The preferred techniques for regulating environmental pollution could be extended to respond to the concerns about the polluting effect of money in political campaigns as well. Federal environmental statutes like the CWA and the Clean Air Act rely upon a complicated regulatory scheme that employs technological, prohibitory, and other devices. The CWA, for example, forbids anyone without a permit from introducing any pollution from a point source into a water of the United States.<sup>152</sup> The principal statutory system for determining when a permit will be issued begins with an understanding of how much of each pollutant can be tolerated until an injury occurs, then mandates a specified type of technology that each industry must employ to avoid such pollution.<sup>153</sup> Variances are extended to those polluters who can show that their circumstances were not contemplated by the process of establishing the general limits.<sup>154</sup> That system is supplemented by provisions authorizing the imposition of

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151. See Zygmunt J.B. Plater, *Facing a Time of Counter-Revolution—The Kepone Incident and a Review of First Principles*, 29 U. RICH. L. REV. 657, 662 n.11 (1995) (agreeing that “[w]idespread diffusion can indeed lessen environmental effects,” but explaining that “many pollutants do not thin out evenly through the environment, but rather collect in nodes . . . where their effects are reconcentrated rather than dispersed”).

152. 33 U.S.C. § 1311(a) (1994) (providing that “the discharge of any pollutant by any person shall be unlawful” except when in compliance with a permit or other statutory exception). By contrast, pollution that reaches the water from farms, roads, and other nonpoint sources is largely exempt from federal regulation, and addressed instead through state programs that feature voluntary incentives. See, e.g., Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, 23 ECOLOGY L.Q. 201, 283 (1996). Campaign finance could be viewed as an instance of nonpoint source pollution because there are so many scattered individuals and organizations who contribute or spend money on political campaigns. Such money, though, is difficult to characterize as polluting unless one adheres to an absolutist view that the political environment cannot tolerate *any* money. The better view is that if campaign finance involves pollution, then it presents an instance of pollution from point sources that can be defined, and if desirable, controlled.

153. See generally RODGERS, *supra* note 130, at 361-74 (describing the permit system established by the CWA’s National Pollutant Discharge Elimination System).

154. See *Chem. Mfrs. Ass’n v. NRDC*, 470 U.S. 116 (1985) (upholding the EPA’s issuance of variances to polluters that demonstrate that they are fundamentally different from other polluters subject to the general CWA regulation).

additional permit restrictions to assure a certain level of water quality when the technological restrictions prove inadequate.<sup>155</sup>

The CWA analogy suggests that the pollution caused by “excessive” campaign contributions and expenditures can be remedied by determining how much money the system can tolerate and then prohibiting any additional money absent a permit based both on what can be accomplished and the quality of the system. That description is not too far removed from the federal election law or the standard proposals for campaign finance reform. Contributions of less than certain amounts are permitted because of an assumption that they are not harmful. Those amounts are currently set at \$1000 for individuals and \$5000 for corporations and other organizations, though whether those amounts are too high or too low is constantly debated, just as the similar standards in environmental laws are debated. The law prohibits contributions beyond those limits. But unlike in the environmental context, there is no mechanism for obtaining a variance or a permit to contribute more money upon a showing that such money would not be harmful. Perhaps as a result, contributors have developed many strategies for avoiding the limits while satisfying the letter of the law.

The image of pollution has further implications for the kind of response that is appropriate. The disclosure of contribution and spending information is desirable for the same reasons that prompt environmental right-to-know laws. Likewise, when Drew would rely more on shame to pressure politicians to do the right thing,<sup>156</sup> she echoes the calls of environmental groups for corporations to stop polluting the air or the water and for individuals to boycott those firms that offer no hint that they are ashamed of what they do.

Finally, the pollution metaphor offers a vehicle for bridging Drew’s distinct concerns about the campaign finance system and the incivility, partisanship, and other ills that plague American politics. The Washington political environment has been described as “polluted” by politicians and observers alike.<sup>157</sup> This description should encourage consideration of what outside agents are producing the pollution, a task that is necessary given Drew’s inability to explain why American politics have become

155. 33 U.S.C. § 1313(d); see RODGERS, *supra* note 130, at 342-55 (describing the application of the CWA’s water quality standards).

156. See DREW, *supra* note 5, at 268 (“One of the strongest motivations for politicians is embarrassment. The more attention paid to their corrupt or even questionable transactions—the more exposure that there is of them—the more pressed they are likely to feel to change the rules.”).

157. See, e.g., *Bush Promises To ‘Change the Tone’ of Washington as President*, at [http://www.georgewbush.com/news/2000/april/pr042600\\_tone.asp](http://www.georgewbush.com/news/2000/april/pr042600_tone.asp) (last modified Apr. 26, 2000) (asserting that “it’s time to clean up the toxic environment in Washington, D.C.”); Burt Solomon & W. John Moore, *Hometown Boy*, 31 NAT’L J. 1872, 1878 (1999) (reporting the statement of political consultant James Carville asserting that the issue is not whether Al Gore is a Washington insider, but “whether he’s been polluted” by his time in Washington).

dysfunctional.<sup>158</sup> Moreover, just as a natural environment can be injured by a number of distinct environmental pollutants, so can American politics be seen as suffering from a number of unrelated causes. Identifying those pollutants and their effects can be just as difficult as isolating the role of specific environmental pollutants in the water or the air. The pollution metaphor thus explains how Drew can perceive the distinct harms to American politics even as it confirms the difficulty in showing how those harms have occurred.

#### D. *The Cultural Pollution Analogy to Campaign Finance*

Thus far, the implications of the pollution metaphor have been limited to environmental pollution. But environmental pollution is not the only kind of pollution, either in the colloquial understanding of “pollution” or in the eyes of the law. Noise and light pollution are subject to increasing federal, state, and local regulation. The word “pollution” has also been used to characterize a variety of objectionable effects, including suburban sprawl, billboards, smells from hog farms, and tourists. The most significant analogy for campaign finance reform, though, is to cultural pollution.

The term “cultural pollution” refers to the ways in which the introduction of certain messages harms the cultural environment in which we live. The most common offender is the entertainment industry. Movies, television programs, video games, and music that are violent, sexually suggestive, racist, or materialist have all been singled out as instances of cultural pollution.<sup>159</sup> The complaints became most frequent in the aftermath of the Columbine High School tragedy in which twelve students and one teacher were killed by two classmates who allegedly were inspired by numerous violent images. Senator Joseph Lieberman and William Bennett joined to award several corporations “Silver Sewer Awards” that are designed “to identify the nation’s worst cultural polluters.”<sup>160</sup> Presidential candidates of all stripes railed against cultural pollution, Congress

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158. *Supra* text accompanying notes 67-71.

159. *E.g.*, *Federal Trade Commission Report on Marketing Violent Entertainment to Children: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 106th Cong. (2000) (testimony of Sen. Hatch), <http://www.senate.gov/~commerce/hearings/0913hat.pdf> (“In Utah, we reclaim abandoned coal mines. Why can’t we even acknowledge that there has been a mental and moral waste dump created from our over infatuation with television, movies, and music?”); 145 CONG. REC. S4421 (daily ed. Apr. 29, 1999) (statement of Sen. Brownback) (describing violent video games as “cultural pollution”); 142 CONG. REC. 12,627 (1996) (statement of Rep. Hoke) (“The price we pay as a community [for cable television pornography] is the pollution of our culture and trashing of Judeo-Christian values . . . .”); Morton M. Kondracke, *Bush, Gore Silent as Popular Culture Gets Ever Coarser*, ROLL CALL, Apr. 3, 2000, 2000 WL 8734054 (“[T]wo new reports confirm that the entertainment industry is spewing out cultural pollution at an accelerating rate . . . .”).

160. Press Release, Joe Lieberman, Silver Sewer Award: Bennett, Lieberman Dishonor Fox Television with Latest (Sept. 14, 1999), LEXIS, News Library, News Group File.

considered legislation to control such pollution, and even entertainment executives acknowledged the validity of the analogy.<sup>161</sup> In the words of Rob Reiner, “these violent movies that are made poison the soul. They pollute the culture.”<sup>162</sup> The notion is that people can be injured when the culture in which they live is filled with harmful images and speech, just as people can be injured when they breathe dirty air or contaminated water.

Yet cultural pollution generally escapes legal regulation. Whereas the legal response to environmental pollution supports more stringent regulation of campaign contributions, the cultural pollution analogy points in the opposite direction. The contested nature of what constitutes cultural pollution provides another common justification for the refusal to regulate sources of such pollution. But the polluting effect of money is contested, too. The empirical studies of the influence of campaign funding on the political and legislative process have yielded far more mixed results than the studies of the effect of violent television programs on children.<sup>163</sup> The evidence in support of such injuries is far more convincing than the evidence of the monetary influence or distortion of the legislative process caused by campaign contributions. The indignation that movie producers and video game manufacturers express when charged with producing cultural pollution simply echoes the outrage that Senator Craig voiced at the suggestion that his legislative decisions were influenced by campaign contributors.

The First Amendment offers the principal reason why efforts to regulate violent movies, pornography, hate speech, and indecency on the Internet have failed. Current First Amendment doctrine permits the regulation of such speech only if it satisfies the exceedingly demanding test for “fighting words” or obscenity that is beyond the protection of the First Amendment.<sup>164</sup> Any government effort to block a violent, hateful, or pornographic movie or television program before it is aired will fail as an unconstitutional prior restraint.<sup>165</sup> Any effort to impose liability on, for

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161. *E.g.*, The Beltway Boys (Fox News Network Television broadcast, July 3, 1999), LEXIS, News Folder, Transcripts File (interview with Gary Bauer); *Remarks as Prepared for Delivery by Al Gore*, University of New Hampshire, Durham, [http://www.gore2000.org/speeches/speeches\\_unh\\_052399.html](http://www.gore2000.org/speeches/speeches_unh_052399.html) (last modified May 22, 1999) (advocating giving “parents the tools to allow their children to watch the good programming without being polluted by the bad”).

162. *CNN Crossfire* (CNN television broadcast, May 10, 1999).

163. *See, e.g.*, JAMES T. HAMILTON, CHANNELING VIOLENCE, at xvii (1998) (detailing the studies demonstrating the relationship between television and violence in children and asserting “that television violence is fundamentally a problem of pollution”).

164. *E.g.*, *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (reversing a conviction for burning an American flag because the act could not be viewed “as a direct personal insult or an invitation to exchange fisticuffs”); *Miller v. California*, 413 U.S. 15 (1973) (holding that obscenity is not protected speech within the meaning of the First Amendment).

165. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976) (stating that “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights”).

example, a producer whose movie inspired violent acts is unlikely to succeed. The egregiousness of the most recent exception to the general rule against the imposition of liability on those characterized as cultural polluters—*Rice v. Paladin Enterprises*, in which the Fourth Circuit held a publisher liable for a murder committed by someone who followed the step-by-step instructions in the *Hit Man* manual<sup>166</sup>—shows how unlikely it is that any effort to regulate cultural pollution will survive the First Amendment. Moreover, the notion of the *appearance* of cultural pollution has gained no traction in the law. The perception that violent, sexually explicit, or hateful entertainment media are harmful is widespread, but the perception itself has not been credited as a justification for any regulation that raises First Amendment concerns.

Regulation of the “pollution” of campaign money has been more fortunate. According to *Shrink Missouri Government PAC*, the level of scrutiny for campaign finance regulations is uncertain, but it assuredly is not the strict scrutiny that applies to any effort to regulate violent movies, hate speech, and other speech.<sup>167</sup> Why the Court hesitates to invoke strict scrutiny—as the *Shrink Missouri Government PAC* dissenters demand—is unstated. Why Justice Breyer does not do so is better known. He refuses to invoke strict scrutiny because of the seriousness of the harms that such regulation is designed to address.<sup>168</sup> Indeed, he offers the scary suggestion that the appropriate constitutional test should be measured by the ability of desirable campaign finance reforms to satisfy it.<sup>169</sup> There is no similar suggestion of a test fashioned to permit the regulation of cultural pollution.

The differential treatment of cultural pollution and campaign finance pollution is hard to justify. Both types of pollution involve real harms, contested causal relationships, and disagreements about whether they can be fairly characterized as pollution at all. Yet they are subject to dramatically different constitutional tests. Imagine, for example, that

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166. 128 F.3d 233 (4th Cir. 1997). Note that many publishers and other groups strenuously opposed liability under even these facts. *Id.* at 265. The court remarked:

That the national media organizations would feel obliged to vigorously defend Paladin’s assertion of a constitutional right to intentionally and knowingly assist murderers with technical information which Paladin admits it intended and knew would be used immediately in the commission of murder and other crimes against society is, to say the least, breathtaking.

*Id.* (emphasis omitted).

167. *Nixon v. Shrink Mo. Gov’t PAC*, 120 S. Ct. 897, 903, 907 (2000) (acknowledging that “[p]recision about the relative rigor of the standard to review contribution limits was not a pretense of the *Buckley per curiam* opinion,” but declining to specify an exact standard).

168. *Id.* at 911 (Breyer, J., concurring) (resisting strict scrutiny because “this is a case where constitutionally protected interests lie on both sides of the legal equation”).

169. *Id.* at 913-14 (suggesting that “the Constitution would require us to reconsider *Buckley*” if that decision “denies the political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance”). I term this suggestion scary because I know of no other instance in which a Justice has suggested that a particular desired policy result should determine the appropriate interpretation of the Constitution.

Congress sought to impose a \$1000 per person limit on investments in movie productions. It is inconceivable that such a statute would survive First Amendment scrutiny, yet that is an exact analogue to the FECA restriction on individual campaign contributions. And the difficulty exists whether the problem is viewed as pollution or as corruption. Violent, pornographic, or hateful movies and television shows are often described as corrupting our culture instead of polluting it, yet nothing in First Amendment jurisprudence suggests that the government can restrict speech or spending on speech in order to prevent cultural corruption. The question, then, becomes which constitutional test is appropriate: subjecting campaign contributions to the strict scrutiny imposed on the regulation of violent movies, pornography, and hate speech; or extending the more relaxed test suggested in *Shrink Missouri Government PAC* to those forms of cultural pollution.

#### IV. CONCLUSION

Elizabeth Drew brings thirty years of experience in Washington to her conclusion that American politics—and especially our system of financing campaigns—has become corrupt. Perhaps she is right. It is sobering to consider how many people agree with her or simply assume that she must be right. There are still many unbelievers, though, and there are still many days like last October 14 when the focus is on the word “corruption” instead of the broader questions that Drew’s critique raises. The ongoing debate also questions the efficacy of the proposals to regulate political campaigns further that have been offered by Senator McCain and endorsed by Drew.

The pollution metaphor offers a means of ending that stalemate. Seeing campaign money as analogous to environmental pollution would encourage lawmakers to focus on the amount of money that the system can tolerate and the best way to eliminate the harm that too much money can cause. Seeing campaign money as cultural pollution reminds lawmakers that the First Amendment concerns raised by limiting contributions and spending are even more serious than the Court indicated in *Shrink Missouri Government PAC*. I have elsewhere articulated a proposal to eliminate the influence of campaign money on the legislative process, and the pollution metaphor shows how that proposal achieves Drew’s goals while honoring the First Amendment.

That is not to say that seeing the problem as an instance of pollution will serve as a panacea for the debate about campaign finance reform. “Pollution” is often no easier to define than “corruption,” as the ongoing debates about cultural pollution demonstrate. Members of Congress and their contributors are unlikely to be more pleased about contributing to

pollution than to corruption. And the metaphor will be useful only if it persuades lawmakers—including people voting on state initiative measures—that pollution exists and that there are effective and permissible means of controlling it.

There is evidence that the pollution metaphor can be persuasive. It responds to the popular belief that money somehow renders the system unclean. That image is similar to the theory of corruption as monetary influence, but it focuses on the idea that the problem is created by the introduction of money into a system that is otherwise “pure.” That focus, in turn, encourages further study of exactly what constitutes such a pure political system and when money alters it for the worse. Such a fresh perspective is the best way to begin to address the problems that have long troubled Elizabeth Drew and that divided the Senate on October 14, 1999.

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