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A Negative Incentive Based Proposal for Campaign Finance Reform: Lessons from Nottingham

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A Negative Incentive Based Proposal for Campaign Finance Reform: *Lessons From Nottingham*

herefore, upon such as come hereabouts, I levy a certain toll, which I use for a better purpose, I hope, than to make candlesticks withal. Therefore, sweet chuck, I would have thee deliver to me thy purse, that I may look into it, and judge, to the best of my poor powers, whether thou hast more wealth about thee than our law allows. [1]

I. INTRODUCTION

Like the advent of taxes, summer re-runs, and visits from in-laws, 1992[2] is here and another election year is upon us.[3] Elections, one of the enduring wonders of American democracy,[4] provide each citizen a chance to participate in government.[5] Elections are also a time when candidates are pounding the pavement searching for campaign dollars. After all, this is America, and "land of the free" doesn't mean

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1. HOWARD PYLE, THE MERRY ADVENTURES OF ROBIN HOOD 101 (1952) (words of Robin Hood to Will Gamwell).

2. I have never understood why we have elections in the "even" years—it seems to me that the "odd" years would make more sense. While I am on the subject, I have never understood why elections fall on the first Tuesday after the first Monday of November. Why not hold elections on a date with real meaning like July 4th, or better yet, April 1st?

3. You can always recognize an election year because it's the only time your Representative in Congress writes to you.

4. It's a wonder that democracy can endure election year chaos.

5. Yes, ours is a government "by the people and for the people," which has a nice ring to it until you have witnessed the spectacle of American politics.

candidates can get elected without some real financial backing. Today, serious candidates[6] must raise staggering amounts of money to get elected.[7] During the 1988 campaign, amounts spent by political candidates in federal elections totaled $718 million.[8] When expenditures by all political candidates and all who attempted to influence the political process at the federal, state, and local levels are summed together, the total cost of the 1988 election cycle swells to $2.7 billion.[9] So where does all this money go? My guess is that the money is spent on a barrage of thirty second commercials, special breakfasts, and luncheons aimed at convincing the voting public that the candidates need more money. This Comment takes the position that campaign costs threaten to spiral out of control unless each candidate can be lead to raise and spend less money. This Comment further proposes a campaign receipts tax that would encourage individual candidates to voluntarily control their campaign spending sprees.

II. A GLANCE AT THE CURRENT SYSTEM

The biggest problem with our current campaign finance system[10] is not that candidates need a lot of money to get

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6. "Serious candidate" is something of an oxymoron, not because candidates are not serious people, but because the public finds it difficult to take what they say seriously.

7. Was that a government *"by* the people" or *"buy* the people?"

8. DAVID B. MAGLEBY & CANDICE J. NELSON, THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 28-33 (1990). It is interesting to note that in 1988, winning House candidates spent an average of $388,000 and successful Senate candidates spent an average of $3,745,000. *Id.* at 36. Extravagant campaigning is not new to American politics. In 1757, George Washington was criticized for spending too much money in his campaign for the Virginia House of Burgesses. According to his critics, Washington passed out twenty-eight gallons of rum, fifty gallons of rum punch, thirty-four gallons of wine, forty-six gallons of beer and two gallons of cider royal. Considering that only 391 voters resided in the district, this amounted to over a quart-and-a half of liquor per voter. Alan Skelly, Note, *Political Action Committees and the Supreme Court*, 12 W. ST. U.L. REV. 281, 281 (1984) (citing J. HARRIGAN, POLITICS AND THE AMERICAN FUTURE 213 (1984)).

9. HERBERT E. ALEXANDER & MONICA BAUER, FINANCING THE 1988 ELECTION 1 (1991). At this point it is both interesting and customary to consider how many miles 2.7 billion dollar bills placed end to end would extend. Considering that a dollar bill is 6 inches in length, simple mathematics reveal that 2.7 billion dollars multiplied by 6 inches per dollar divided by 12 inches times the reciprocal of 5,280 feet per mile yields 255,682 miles. This mileage could span the entire distance from the earth to the moon or could be wrapped around the earth's equator ten times. Oddly, however, the mileage only accounts for one-half of one percent of John Sununu's frequent flyer miles.

10. Of course, if American "'[f]inance [is] the art of passing currency from hand

elected[11] but that each year they need more and more money to get elected.[12] From 1972 to 1988, for example, Senate campaign spending increased over 600 percent while House campaign spending increased over 456 percent.[13] As a result, this rate of spending increase has some candidates worried—especially those who aren't very good at raising money. The natural question to ask at this point is, "Who cares if some candidates can't keep up with current spending levels?" It's a "natural" question because in nature the weak are doomed to die for the good of the group. Fortunately for the weaker candidates, only people like economists and biologists with very little political clout, and even less charisma, take such arguments seriously.

There may be some real reasons for concern about the rising costs of campaigns. Some argue that fund-raising has become a full-time job that distracts incumbent candidates from their official duties.[14] Others argue that the candidates' insatiable appetite for cash makes them dangerously dependent upon political action committees (PACs) and other big contributors.[15] Of course, most politicians don't want to buddy up to PACs just for their money—but they don't know how else to get it.[16]

Many, however, are quick to defend current spending levels.[17] Some contend that campaign spending promotes

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to hand until it finally disappears,'" *Thoughts on the Business of Life*, FORBES, Apr. 1, 1991, at 154 (quoting Robert W. Sarnoff), then maybe the system is working just fine and you should quit reading.

11.   Besides, it's not easy creating an image of electability, particularly if the candidate is lacking in substantive qualifications.

12.   It seems that political campaigns involve more and more image building and less and less substance. *See supra* note 11.

13.   MAGLEBY & NELSON, *supra* note 8, at 28.

14.   *See* MAGLEBY & NELSON, *supra* note 8, at 44-46. I personally don't see any cause for concern. There may be good reasons to distract our elected officials from their duties. The more they are distracted by spending their own money, the less time they will have to spend ours.

15.   *Id.* at 75-80.

16.   Consider the words of presidential candidate Tom Harkin when asked about PAC money: "I take P.A.C. money, you bet I do, . . . I don't want to fight with one hand tied behind my back. In George Bush, we are up against the mother of all money machines." Elizabeth Kolbert, *Harkin Seeks to Recall Democrats' History, Though Some Fear It*, N.Y. TIMES, Dec. 26, 1991, at D11.

17.   *See generally* MAGLEBY & NELSON, *supra* note 8, at 40-43. These tend to be candidates who can, by the way, raise vast sums of money with relative ease. Such candidates don't mind the Darwinian approach to campaign spending—it always

participation in the political process by increasing voter awareness of critical issues.[18] Others actually have the audacity to suggest that we really don't spend *that* much on political campaigns. I think Senator Packwood made the point very nicely:

> We don't come near spending what we do in this country on toothpaste or lipstick or beer or pet food or even advertising for pet food. So, in terms of priorities and importance, let us not get things out of scale. I would like to think that the value of an election for Congress or the Senate is worth as much as a can of cat food or dog food[!][19]

Actually, the candidates' desperation for cash really isn't their fault. We have given them every incentive to behave irrationally,[20] i.e., spend more on campaigns than they should. A simple example of how one might go about auctioning a single U.S. dollar for more than it is worth will help illustrate the quandary in which candidates find themselves.[21] In the dollar auction, two participants bid for a dollar with the restriction that both the winner and loser must pay their bids. The structure of the auction creates a trap for both players when the bidding reaches ninety-nine cents. By bidding one cent more, the next bidder would just break even while the second bidder would lose ninety-nine cents unless she stays in the game. By bidding $1.01, the second bidder can cut her losses from ninety-nine cents to one cent. The bidding continues in this fashion as each bidder bids more and more in an effort to minimize losses. Theoretically, the auction ends when one player runs out of money. Campaign dynamics bear a strong resemblance to the dollar auction in that all candidates,

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helps to be at the top of the food chain.

18.   *Id.* at 41-42 (citing 133 CONG. REC. S11872 (daily ed. Sept. 9, 1987) (Statement of Sen. Dole)). I wonder, however, if spending increases voter participation as much as it increases voter annoyance.

19.   133 CONG. REC. S7548 (daily ed. June 3, 1987) (Statement of Sen. Packwood). *Cf.* Old Proverb, "Putting your best foot forward at least keeps it out of your mouth."

20.   Astute observation suggests that they needed no coaxing in the first place.

21.   *See* Martin Shubik, *The Dollar Auction Game: A Paradox in Noncooperative Behavior and Escalation*, 15 J. CONFLICT RESOL. 109-11 (1971). It is a novel idea, but one that is not well received among economists. For decades, economists have been trying to convince us that markets behave rationally, and then Shubik comes along and gives us good reasons to doubt rational market theories.

win or lose, are required to pay their "bids" (campaign expenses). Accordingly, we should show a little compassion for candidates who find themselves in the middle of an uncontrollable spending frenzy.

III.   ASSESSING VARIOUS CAMPAIGN REFORM PROPOSALS: FROM BRAINSTORM TO THE ABSURD

Given these problems with our campaign finance system, should we throw up our hands,[22] convinced that nothing can be done? Or can we "refine"[23] our elections and avoid the expense of all this campaigning? One might first be tempted to try a military coup. A military dictatorship would certainly eliminate unnecessary campaign expenses, but would have the rather extreme effect of eliminating campaigns all together. "Not a bad idea," you might say, until you remember that the people at the Pentagon also have a lousy track record of spending.[24]

With hopes dashed for a quick military solution, we are left to consider other alternatives. Why not try "democracy by chance"? For example, each state could hold its own "Seat in Congress Lotto." Think about it: each candidate would pay $1.00 to play the regular Lotto and could then throw away an extra $1.00 on power play. The beauty of the system is that it limits spending to $2.00 per candidate and it's fair because each candidate has the same one-zillionth chance of winning.[25] "Who would run for office in this way?" you query. Certainly a lot of people would play the campaign lotto once they realized they could win an all-expenses-paid shopping spree in the nation's capital for a term of two or six years.

If you think the two preceding ideas sound silly, consider two proposals that have been kicked around Washington lately. First, some[26] have argued that we should "publicly finance"[27]

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22.   Or, just plain "throw up."
23.   Using the word loosely.
24.   *Remember, e.g.,* $435 hammers, $640 toilet seats, etc.; *see also* Eric Schmitt, *No $435 Hammers, But Questions,* N.Y. TIMES, Oct. 23, 1990, at A16.
25.   There would be no need to impose term limitations. What are the odds of the same candidate winning two campaign lottos in a row?
26.   Remember the candidates at the bottom of the food chain? You guessed it. These are the "some" behind this proposal.
27.   This is congressional code language for "spend tax dollars."

all federal campaigns.[28] This means that each candidate would receive a campaign stipend from the government each election year. Sounds great until you consider that Uncle Sam is in debt up to the stripes on his hat and really can't spare the change. "No! No!" exclaim the proponents of public funding, the money can be raised from an "income tax check off"[29] that would allow individuals to contribute a dollar or two[30] to the campaign kitty.[31] The biggest problem with this idea is that it would give our elected officials too much free time to think of new ways to spend "public funds."[32]

The second reform proposal includes a system of spending limitations.[33] Spending limits offer the most direct solution to the dollar auction quandary.[34] But consider the hardship that spending limits would impose upon the candidates. Once a candidate reached his spending quota, he would have to waste a lot of extra time and energy trying to figure out alternative ways to "spend more" without "spending more money."[35] I'm not suggesting that candidates would do anything illegal,[36] but I am suggesting that politicians are creative people and that we shouldn't discount their resourcefulness. Consider the effectiveness of "soft money"[37] in whittling away individual contribution limitations. Though the law limits the amount that individuals may contribute to any single *candidate*, these same individuals may make unlimited contributions of "soft money" to the candidate's *party* for activities that indirectly benefit the candidate.[38]

Spending limits also suffer another minor defect—they're

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28. *See generally* MAGLEBY & NELSON, *supra* note 8, at 153-62.
29. This is like making a contribution with a gun to your head. What they are saying is, "Since I already have your wallet in hand, how do you feel about making a donation?"
30. Why don't they ask us to send in our old aluminum cans and cereal-box tops while we are at it?
31. *See generally* MAGLEBY & NELSON, *supra* note 8, at 158-60.
32. *See supra* note 14 and accompanying text.
33. *See generally* MAGLEBY & NELSON, *supra* note 8, at 162-75.
34. *See supra* note 21 and accompanying text.
35. Of course, this might create a nice distraction tying up several hundred hours of a politician's time in any given year. *See supra* note 14 and accompanying text.
36. Far be it from me to suggest such an outrageous idea.
37. "Soft money" is money that has been slobbered on by the dog "under the table."
38. *See generally* MAGLEBY & NELSON, *supra* note 8, at 19 & 166.

unconstitutional! In *Buckley v. Valeo*,[39] the Supreme Court held that campaign spending is a form of speech protected by the First Amendment and cannot be involuntarily limited.[40] Now you know why "talk is cheap" unless politicians are the people doing it.

IV.   BUILDING AN IDEAL CAMPAIGN FINANCE SYSTEM: A LESSON FROM NOTTINGHAM

Actually, public financiers and spending limitators [sic][41] each make some valid points in favor of their respective proposals. But both groups have been unable to convince enough people that their ideas hold water.[42] What we really need is a political hero who can come to the rescue and propose a compromise, a win—win solution. Since people like Madison and Washington are no longer with us,[43] who could do a better job than our childhood hero, Robin Hood?[44] After all, Robin Hood stands for everything we hold sacred today in American politics—you know—"Take from the rich and give to the poor!"

Let's take a closer look at what this compromise might entail. Our dollar auction example aptly demonstrated that we shouldn't expect candidates to voluntarily limit their own spending impulses. They need some external help.[45] Outright spending limitations also have some minor drawbacks and are probably not the best way to go about controlling campaign spending. The answer may lie in a system of negative

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39.   424 U.S. 1 (1976).

40.   *Buckley*, 424 U.S. at 58-59.

41.   This is a short-hand way of saying, "I meant to do that."

42.   A similar drawback is that these ideas really don't hold water.

43.   This is not to say that we shouldn't look for modern day Madisons and Washingtons. However, as Stanley Cloud suggests, we may not want to waste our time wandering the halls of Congress: "[O]nly a fool would expect 535 individual politicians to coalesce into a body capable of national leadership. That is, after all, what Presidents are for." Stanley W. Cloud, *Bums of the Year*, TIME, Jan. 6, 1992, at 48.

44.   I bring Robin Hood into this Comment ignoring the fact that nobody can agree upon whether he was real or fiction and further ignoring the fact that if he was real, he would have been a foreigner. But hey, if the Framers could look admiringly to foreigners like Locke, Montesquieu, and Hobbes, why shouldn't we at least give a guy like Robin Hood a few paragraphs in a student comment included in a *Humor & the Law* symposium?

45.   After all, these are the same people responsible for thousands of broken campaign promises.

incentives that induce candidates to voluntarily limit their campaign spending sprees. The next few paragraphs get a little confusing, but, if you have ever successfully completed your own Form 1040 before the April 15 deadline, you really shouldn't have any difficulty.[46]

Figure 1 is a drawing of a typical candidate[47] in graphic form.[48] The graph represents the candidate's budget constraint[49] that plots campaign receipts on the vertical axis and time on the horizontal axis.
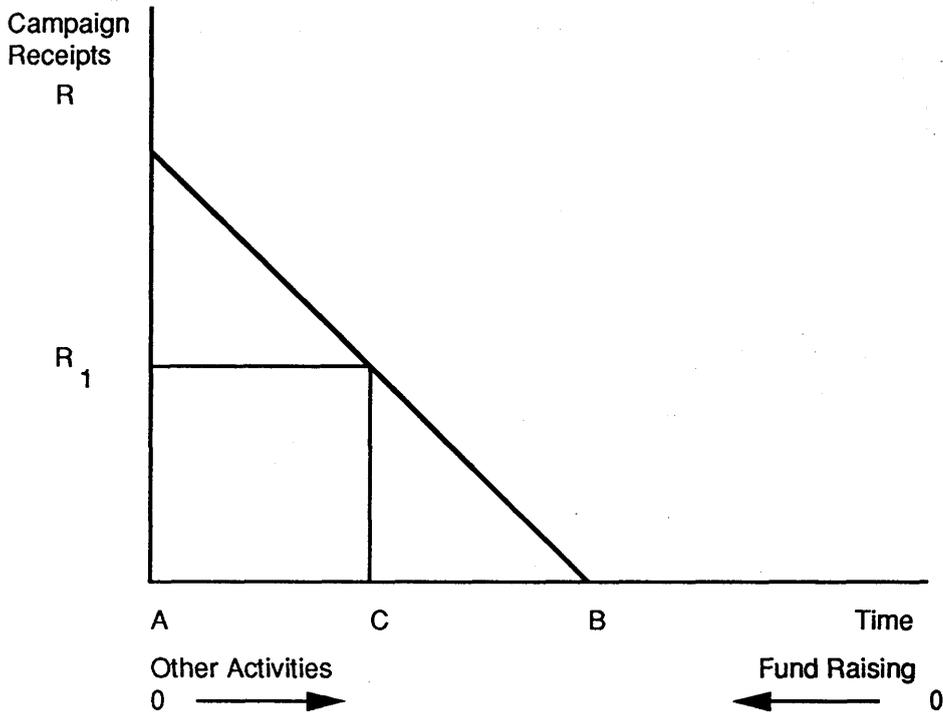
Figure 1. The Candidate's Budget Constraint.

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46. Some of you might be saying, "I don't do my own taxes. I have my accountant do them for me." If so, you should have your accountant read the next few paragraphs.
47. Notice the resemblance?
48. Whatever you do, don't be impressed with graphs. Graphs are merely evidence of the slow evolution of economic literature. They are the functional equivalent of Neanderthal pictographs drawn on cave walls.
49. Despite the fact that once these people get elected they spend "public funds" as if there were no such thing as budget constraints, garden variety candidates really are like you and me in that they have a tough time spending more than their budget allows.

Time is considered a fixed resource; therefore, line segment AB represents the total amount of time available to the candidate for all activities. Figure 1 assumes that candidates trade time for campaign receipts.[50] Thus, at point B, the candidate has spent no time fund-raising and her campaign receipts equal zero. At point C, the candidate has spent time in the amount of CB fund-raising, leaving time in the amount of AC for all other activities.[51] At point C, the candidate has campaign receipts in the amount of R_1. Now, how can we tell exactly how much time the candidate will spend fund-raising? The answer to that question depends on the candidate's own set of preferences.
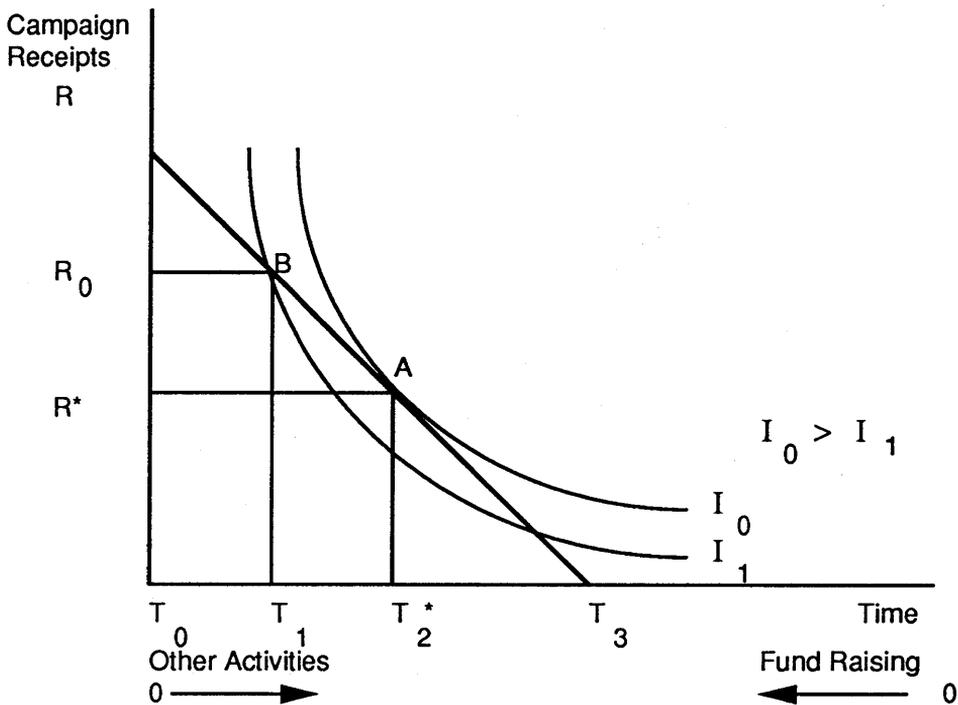
Campaign Receipts
R

R_0

R^*

$I_0 > I_1$

I_0

I_1

T_0 T_1 T_2^* T_3 Time

Other Activities   Fund Raising

0 ⟶   ⟵ 0

Figure 2. The Candidate's Indifference Curves.

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50.   Never mind the fact that, in the past, some candidates have actually been willing to trade political favors for campaign contributions. This is an economic argument, and I am, therefore, allowed to ignore reality to make my point.

51.   This graph is a bit tricky to read. The difficulty lies in the fact that to determine how much time the candidate devotes to fund raising, you must read the horizontal axis from right to left. To determine how much time the candidate devotes to all activities excluding fund raising, you must read the horizontal axis from left to right. If this explanation hasn't helped, try reading the graph while relaxing in a soothing bubble bath. That way, if you never do catch on to the graph, you'll at least have one thing to thank me for.

Figure 2 represents the candidate's trade-off between campaign receipts and other activities. The curved lines labeled I_0 and I_1 are called "indifference curves."[52] The curves represent constant levels of satisfaction. In other words, as far as the candidate is concerned, any point on a given curve is just as desirable as another point along that same curve. The levels of satisfaction increase in a "north easterly" direction on the graph.

In Figure 2, the candidate maximizes her fund-raising satisfaction[53] at point A where I_0 is tangent to her budget constraint. At point A, the candidate spends time fund-raising in an amount represented by the distance from T_2^* to T_3, and receives campaign contributions in the amount of R^*. At any other level of fund-raising, the candidate would fall on a lower indifference curve—a less desirable result. For example, at point B, the candidate receives greater contributions, R_0, but has less time to devote to other activities like recovering from the lead-weight pancakes she consumed at early morning fund-raising breakfasts.

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52.   There is really nothing sacred about the name "indifference curve." The name probably owes its origin to the fact that economists are people who generally lack a great deal of personality and creativity and who in a fit of rational boredom settled upon the name "indifference."

53.   This is not to say that she maximizes her fund-raising income. "Income" and "satisfaction from income" are really two different things. Congress' recent salary increase is a good example of how little satisfaction politicians derive from any income less than $125,000.
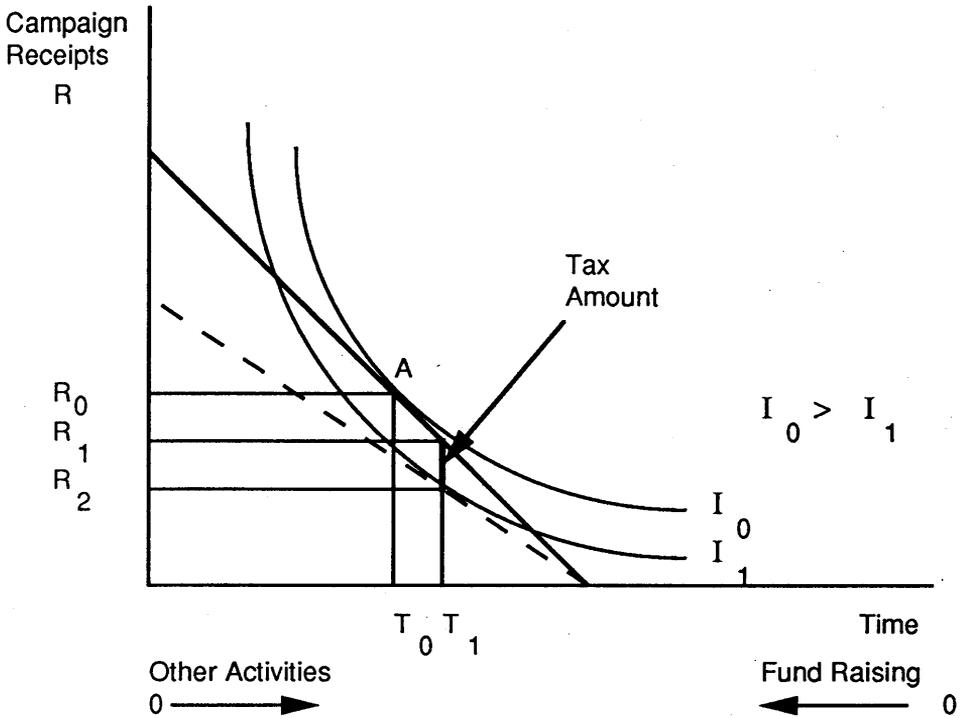
Figure 3. The Effect of a Negative Incentive Tax.

Figure 3 depicts what happens to our candidate's fund-raising activities when she is subjected to a negative incentive—a tax on gross campaign receipts. The tax creates a new budget constraint represented by the dotted line lying just below the solid budget constraint. The shift in the budget constraint compels the candidate to operate on a lower indifference curve. Notice that campaign receipts fall from R_0 to R_2 and fund-raising time decreases from T_0 to T_1. The advantage of the negative incentive tax is that it is not an absolute ceiling on spending and does not require a political determination of how much total spending is too much.[54] Instead, campaign fund-raising activities and spending are

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54.   This prevents pitting more perfectly evolved candidates at the top of the food chain directly against weaker candidates at the bottom of the chain when trying to decide exactly where a given spending limit should be drawn.

voluntarily curtailed when subjected to the negative incentive.[55]

"Well enough," say the spending limitators, "the idea at least partially satisfies our desire to cap spending." But now we hear the public financiers ask, "What's in the proposal for us?" Actually there is something in the proposal that might help the public financiers get a little extra sleep at night. Look at Figure 3 again.[56] Remarkably, the negative incentive tax has extracted a net revenue from our beleaguered candidate of R_1 - R_2. If you are a public financier, you are now probably starting to wake up from the slumber induced by the preceding paragraphs. Reaching for your calculator, you start to wonder,[57] "What if that $718 million spent by individual candidates in the 1988 federal campaign had been subject to a 15 percent tax?" Happily, you discover that the 1988 campaign would have generated revenues in excess of $107 million. Remembering that generating revenues is only half the fun, we ask, "What should we do with all that money?" Returning to the gospel of modern American politics and drawing upon the lessons from Nottingham, we realize that the $107 million was taken from none other than "rich candidates." So why not take that pot of gold and give it to "poor candidates?"[58] "Hooray!"

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55. On a more serious note, the negative incentive could be enhanced by a graduated rate of taxation that would result in greater campaign receipts being subject to increasing rates of taxation. In such an environment, large contributors would probably alter their own donation strategies. If a contributor knew that its target candidate was nearing a greater tax bracket, it would realize that a substantial portion of its donation would not end up in the candidate's pocket. To avoid diluting its contribution, the contributor could be expected to spread its wealth among several candidates who have not yet reached top level tax brackets.

56. "Agony!" you cry out when you finally realize that I am asking you to look at Figure 3 "again." I apologize. I realize that one look at a graph is about all any self-respecting non-economist can stomach, but if you will bear with me, I promise that there will only be one more graph to look at after this.

57. Don't bother reaching for your calculator, I'll do the math for you. Rest assured. You can trust my calculations. After all, I am a product of public education.

58. Of course, somebody will still need to decide who the "poor candidates" are. The decision could be avoided, however, by one of two means. First, treat everybody the same. You heard me. This is America and we at least have to give lip service to equality. Thus, the revenues would be divided equally among all nominees; part of the amount paid to the big fund raisers will return in the form of the negative incentive tax. Second, if you are still clinging to the law of the jungle argument made earlier in this Comment, don't give the money to anybody and let the little candidates fall by the wayside. Instead, use the money for some silly thing like paying off the national debt.

exclaim the public financiers as they realize that they will now be entitled to a substantial election year windfall.
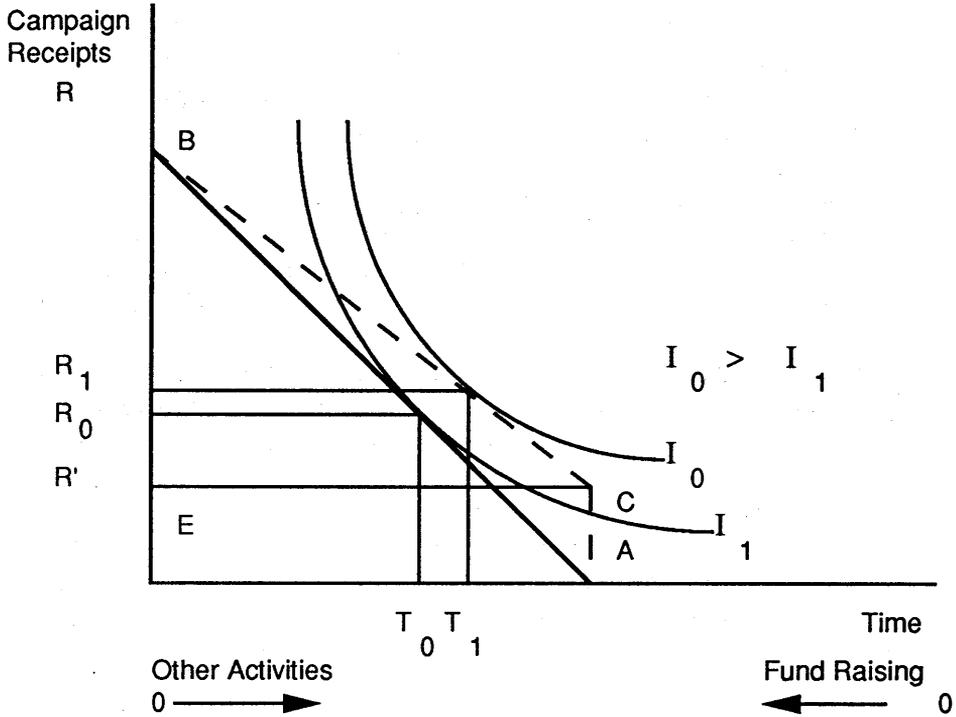

Figure 4. Effect of an Assistance Payment to the Candidate.

Figure 4 demonstrates the effect of a common fund assistance payment to a single needy candidate. The amount of the assistance payment is represented by the horizontal line EC and insures the candidate a minimum budget in the amount of R'. The candidate's original budget constraint AB is now modified by the lump sum payment and is represented by the line ACB. Before the lump sum payment, the candidate spent T_0 time fund-raising and received contributions in the amount of R_0. After the payment, the candidate spends time in the amount of T_1 devoted to fund-raising but now has total contributions R_1 at her disposal to compete with more perfectly evolved candidates up the food chain.

V.   CONCLUSION

Well, perhaps this Comment hasn't discussed all of the

intricacies of campaign finance.[59] But, at least it has attempted to present a workable compromise between the public financiers and the spending limitators. The negative incentive based campaign finance proposal tries to satisfy the spending limitator's impulse to curb run away-campaign costs and correct the dollar auction problem of the current system. The proposal also attempts to give the public financiers a little working capital with which to work their social justice and help out feeble candidates.

If you are a spending limitator and happen to share an office with a public financier, this Comment will hopefully give you both some common ground upon which to build a somewhat civil relationship. But before you both go in together on that houseboat time-share, don't forget about the more perfectly evolved candidates on the other end of the food chain. They are likely to impede your budding relationship because they neither need nor want real reform. Be patient. Their time will come. For, as our hero Robin Hood said, " 'He who is fat from overliving must needs lose blood.' "[60]

<div align="right">York Moody Faulkner</div>

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59.   To do so would require an entire book. Besides, the publishing companies I know of aren't likely to give a third year law student a cash advance to write a voluminous exposition on a bunch of theoretical hogwash. That's what professors are for.

60.   PYLE, *supra* note 1, at 101 (Robin Hood quoting Gaffer Swanthold).