

2000

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Recommended Citation

John C. Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 Harv. J. on Legis. 69 (2000).

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ARTICLE

THE RECUSAL ALTERNATIVE TO CAMPAIGN FINANCE LEGISLATION

JOHN COPELAND NAGLE*

Typical campaign finance proposals focus on limiting the amount of money that can be contributed to candidates and the amount of money candidates can spend. This Article suggests an alternative proposal that places no restrictions on contributions or spending, but rather targets the corrupting influence of contributions. Under the proposal, legislators would be required to recuse themselves from voting on issues directly affecting contributors. The author contends that this proposal would prevent corruption and the appearance of corruption while remedying the First Amendment objections to the regulation of money in campaigns.

Campaign finance legislation is necessary, we are told, because of the corruption and apparent corruption that accompanies the money given to political candidates. Millions of dollars are spent on contributions to candidates for elected office. Why? Many believe that contributors—especially big contributors—hope to receive some reward for their generosity, such as a vote against a troublesome bill, a promise to push for a tax break, or a night in the Lincoln bedroom. Even if the contributor and the candidate both enjoy the most altruistic motives, many in the public believe that they have cut an illicit deal.

The typical response to this corruption or appearance of corruption is to propose restrictions on the amount of money that may be contributed to a candidate and the amount of money that the candidate may spend in a campaign. The Federal Election Campaign Act (FECA), expanded by Congress in the aftermath of the campaign finance scandals of the Watergate era, featured both contribution and expenditure limits.¹ Today Congress is considering numerous proposed statutes to close the perceived loopholes that have allowed lots of money to flow from contributors to candidates notwithstanding the existing legal restric-

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¹ See 2 U.S.C. §§ 431–455 (1971).

tions.² States are even more aggressive in their efforts to control the amount of money involved in political campaigns.³

But spending and contribution limits suffer from numerous flaws as tools for combating corruption. The experience of the past quarter century with FECA shows that often the law has simply prompted contributors and candidates to become more ingenious in their efforts to give and spend money in campaigns. Campaign contributions flow like water: whenever one obstacle appears, the stream is simply diverted until it finds another way to proceed.⁴ Moreover, laws prohibiting the contribution and spending of money for political campaigns strike at the heart of First Amendment values. *Buckley v. Valeo* was only the first of numerous decisions invalidating the efforts of Congress, the Federal Election Commission (FEC), and the states to regulate campaign contributions and expenditures.⁵ Furthermore, the laws still allow legislators to act on any matter that affects parties who have given them money.

These standard objections to campaign finance reform legislation are forceful,⁶ but they overlook the fundamental manner in which such laws are misdirected. Restrictions on the amount of money that may be contributed or spent in a political campaign

² See, e.g., *infra* note 12.

³ See, e.g., *infra* note 37.

⁴ This metaphor has occurred to others. See Samuel Issacharoff and Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) (noting that “political money, like water, has to go somewhere”); Daniel R. Ortiz, *Water, Water Everywhere*, 77 TEX. L. REV. 1739, 1742 (1999) (referring to “Issacharoff and Karlan’s evocative hydraulic metaphor” and observing that “[i]f we constrict one path, it will take another”).

⁵ See *Buckley v. Valeo*, 424 U.S. 1 (1976) (invalidating parts of the 1974 amendments to FECA, including the expenditure limits); see also, e.g., *Colorado Republican Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (invalidating the application of FECA’s party contribution provision to money that a political party spends independently without coordination with any candidate); *FEC v. National Conservative PAC*, 470 U.S. 480 (1985) (invalidating a prohibition on PAC’s spending more than \$1,000 to support any presidential or vice presidential candidate who receives public funds); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) (striking down state limits on campaign contributions made by non-economic political action committees and by nonprofit corporations); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999) (holding that the distribution of voter’s guides does not constitute prohibited express advocacy of a candidate).

⁶ See, e.g., Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311; Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45 (1997); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996); Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045 (1985); see also Issacharoff & Karlan, *supra* note 4, at 1734 (“part[ing] company with the most prominent reformers of campaign finance regulations” and offering “far more modest” proposals).

address a symptom, not a cause. The premise underlying the use of campaign finance legislation to combat corruption is that money is the root of all evil.⁷ Another proverb is more apt. It states that it is the *influence* of money—not money itself—that is the root of all evil.⁸ The influence or perceived influence of money accounts for most of the support for campaign finance reform legislation. The remedy, therefore, is to eliminate that influence and the perception that there is any such influence.

I propose the following alternative: allow contributors to give whatever they want to political candidates, but require successful candidates to recuse themselves from voting on or participating in any legislation or other matters that directly affect those contributors. Recusal provides the most direct response to the apparent corrupting influence of campaign contributions. The mechanics of how to establish a recusal requirement based on campaign contributions present some difficult choices,⁹ though the system of campaign spending regulation that a recusal requirement would replace is hardly a model of effortless enforcement itself. By contrast, the virtues of a recusal requirement are straightforward. Corruption and its appearance are avoided, the First Amendment is protected, and contributors and candidates are free to decide what to do.

Of course, it remains questionable whether campaign contributions are actually corrupting. If they are not corrupting, then both a recusal requirement and contribution limits are unnecessary. Even if they are corrupting, the typical reform proposals are misguided. Influence and money are not identical, and one can be regulated without imperiling the other. That is my solution to the campaign finance problem.

⁷ See Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of all Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 302 (1989) (defending campaign finance reform as responsive to “that strain in our culture that perceives money as the root of all evil”); see also ALAN ROSENTHAL, *DRAWING THE LINE: LEGISLATIVE ETHICS IN THE STATES* 139 (1996) (analyzing campaign finance issues with the understanding that “[f]or the press and the public, money is the root of evil—not all evil, perhaps, but much of it”).

⁸ See 1 Tim. 6:10 (advising that “the love of money is a root of all evil”).

⁹ See *infra* text accompanying notes 50–95 (explaining how a recusal requirement could operate).

I. THE CAMPAIGN FINANCE PROBLEM AND ITS STANDARD SOLUTIONS

Charges that the existing campaign finance system is “corrupt” dominate the editorial pages of the *New York Times*.¹⁰ The system is corrupt because “it elevates the voice of the wealthy special interests over that of the average voter.”¹¹ Existing campaign finance laws “have all been circumvented by the deviously conceived fiction that the parties can raise so-called ‘soft money’ outside Federal regulation.”¹² The problem extends to “President

¹⁰ See, e.g., *Senator Hegel's Deceptive Bill*, N.Y. TIMES, Nov. 18, 1999, at A24 (decrying “the corrupt status quo”); *Campaign Finance Tactics*, N.Y. TIMES, September 15, 1999, at A28 (referring to “the long, grinding effort to drive corrupt money out of the process”); *The \$2 Billion Election*, N.Y. TIMES, Aug. 11, 1999, at A18 (describing a proposed tax cut as “[a] fairly good example of the corruption of campaign money”); *A Dubious Campaign Ruling*, N.Y. TIMES, Aug. 4, 1999, at A18 (decrying “the corrupting power of money in elections”); *A New Speaker Errs on Reform*, N.Y. TIMES, Mar. 8, 1999, at A16 (referring to “a corrupt system” of campaign finance); *A New Year for Campaign Reform*, N.Y. TIMES, Dec. 27, 1998, § 4, at 8 (noting that “Americans will have a new opportunity to rescue their political culture from the grip of corruption and cynicism”); *A Pivotal Vote on Campaign Reform*, N.Y. TIMES, Oct. 23, 1997, at A26 (referring to “the nation’s corrupt campaign finance system”); *Next Round for Campaign Reform*, N.Y. TIMES, Sept. 3, 1997, at A22 (describing “[t]he challenge of cleaning up the nation’s corrupt campaign finance system”); *Clash Over Congressional Cash*, N.Y. TIMES, Mar. 8, 1993, at A16 (characterizing the campaign finance status quo as “corrupt, outdated and harmful”); *Priorities, Priorities*, N.Y. TIMES, Nov. 11, 1992, at A24 (describing the political process as “awash in corrupting campaign contributions”); *Republican Snipers in the House*, N.Y. TIMES, Apr. 12, 1992, § 4, at 20 (denouncing “the present corrupt incumbent-protection campaign finance system”); *Another Campaign Finance Fight*, N.Y. TIMES, Oct. 19, 1999, at A22 (observing that Senator McConnell (R-Ky.) had complained that the *Times* had editorialized on campaign finance reform 114 times since the beginning of 1997).

¹¹ *Where Did Campaign Finance Go?*, N.Y. TIMES, June 20, 1996, at A20. See also, e.g., *John McCain's Message*, N.Y. TIMES, Nov. 7, 1999, § 4, at 14 (praising Senator McCain (R-Ariz.) for illustrating “the crucial connection between campaign donations and bad laws” benefitting special interests); *A Republican Full House*, N.Y. TIMES, Dec. 2, 1999, at A34 (referring to “the corrupt campaign finance system that has kept [special interests] so powerful”); *The \$2 Billion Election*, *supra* note 10, at A18 (writing that “[m]ore scandals and evidence of favors in return for donations are bound to corrupt the system as fund-raising accelerates in coming months”); *A New Year for Campaign Reform*, *supra* note 10, at 8 (explaining that “the nation’s two biggest political parties have completed their transformation from representing popular constituencies to serving as fund-raising machines that cater to special interests,” and concluding that “the legislative and executive branches of Government will be more and more beholden to the forces that give the money” after the 1998 elections); *A Moment for Reform*, N.Y. TIMES, Mar. 9, 1997, § 4, at 14 (noting that “the current system of selling access for corporate and to a lesser extent labor union money is a bipartisan invention”); *Meeting for Dollars*, N.Y. TIMES, Dec. 31, 1996, at A12 (writing that “party fund-raisers were bartering meetings with President Clinton for contributions during the election campaign this year”); *Where Did Campaign Finance Go?*, *supra*, at A20 (worrying that “this Congress may outdo its predecessor in mortgaging the legislative process to powerful donors”).

¹² *A New Year for Campaign Reform*, *supra* note 10, at 8. See also *Senator Hegel's Deceptive Bill*, *supra* note 10 (criticizing proposed legislation to limit but not eliminate

Clinton's shameful legacy" during "one of the most corrupt election campaigns in modern history" in 1996,¹³ and to congressional campaigns as well.¹⁴ Thus the *Times* frequently calls for new federal legislation, it opposes potential FEC nominees who do not share its vision,¹⁵ and it endorses public financing as the ultimate solution to the corruption that plagues the system.¹⁶

The *New York Times* is not alone. Hundreds of other newspapers have editorialized in favor of campaign finance reform.¹⁷ Organizations like Common Cause and New York University's Brennan Center report on campaign finance scandals and press for new reform legislation.¹⁸ Fred Wertheimer has made the case for campaign finance reform in a dizzying host of forums, both during his time as the president of Common Cause and in his

soft money because it "would not end the corrupt soft-money system so much as legitimize it"); *Campaign Reform Gains an Ally*, N.Y. TIMES, July 24, 1999, at A14 (complaining that "unregulated donations to political parties are poisoning the political process by allowing wealthy individuals, corporations and unions to use the 'party-building' dodge to evade the Federal limitations on direct contributions to candidates"); *A New Speaker Errs on Reform*, *supra* note 10, at A16 (stating that "[o]nce the Presidential campaign heats up, hundreds of millions of dollars in soft money from special interests will pollute the system"); *Plotting Against Reform*, N.Y. TIMES, Mar. 14, 1998, at A16 (objecting to "the soft-money contributions that have made a mockery of the nation's present fund-raising limits").

¹³ *Janet Reno May Finally Get It*, N.Y. TIMES, Sept. 4, 1998, at A22; *accord Illegal Use of Soft Money*, N.Y. TIMES, Dec. 2, 1998, at A26 (describing the 1996 election campaign as "one of the most corrupt in modern history"). See also *A Moment for Reform*, *supra* note 11, at 14 (objecting to the campaign fundraising tactics of President Clinton and Vice President Gore in 1996).

¹⁴ See *A Moment for Reform*, *supra* note 6, at 14 ("Yes, of course, Congressional fund-raising is corrupt at the core, too.").

¹⁵ See *Mischief in the Senate*, N.Y. TIMES, July 13, 1999, at A16 (insisting that President Clinton is right to resist naming Professor Bradley Smith to the FEC); *An Insult to Campaign Reform*, N.Y. TIMES, June 4, 1999, at A28 (opposing the selection of Professor Smith to the FEC). For examples of Professor Smith's writings on campaign finance reform, see Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. LEGIS. 179 (1998); Smith, *Money Talks*, *supra* note 6; Smith, *Faulty Assumptions*, *supra* note 6.

¹⁶ See *Clash Over Congressional Cash*, *supra* note 10, at A16 (advising that "[a]bsent a decent infusion of public financing, it will be impossible to stop Congressional dependence on special-interest money"); *President Bush and the Sewer*, N.Y. TIMES, May 12, 1992, at A22 (concluding that "[t]he only way to reduce the influence of corrupting private money and to help challengers is to supply public money").

¹⁷ See 144 CONG. REC. S10156 (daily ed. Sept. 10, 1998) (reprinting a list of 196 newspapers that had published more than 400 campaign finance reform editorials in the preceding six months).

¹⁸ The activities of both groups are detailed in their web sites. See *Common Cause: Holding Power Accountable* (visited July 21, 1999) <<http://www.commoncause.org>>; *Brennan Center*, (visited July 21, 1999) <<http://www.brennancenter.org/index.html>>. For lists of numerous other groups seeking to reform the campaign finance laws, see *Center for Responsive Politics: Links/Resources* (visited July 21, 1999) <<http://www.opensecrets.org/resources.htm>> (providing links to the web sites of other advocacy groups).

current position as head of Democracy 21.¹⁹ Scholars have urged the reform of the existing system of financing electoral campaigns.²⁰ Supportive members of Congress have delivered impassioned speeches urging their colleagues to change the current system for financing elections.²¹

The primary basis for their concern is the amount of money that is raised for and spent on political campaigns. Candidates raised \$781.3 million and spent \$740.4 million for the 1998 congressional elections.²² Sixteen months before the 2000 elections, prospective presidential candidates had raised over \$100 million—including \$37 million raised by Texas Governor George W. Bush—and they had already spent nearly \$50 million.²³ Fundraising estimates for one particularly interesting 2000 Senate race run as high as \$50 million.²⁴

¹⁹ See, e.g., *Campaign Advertising: Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 50 (1991) (statement of Fred Wertheimer); Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of our Democracy*, 94 COLUM. L. REV. 1126 (1994); Fred Wertheimer, *The PAC Phenomenon in American Politics*, 22 ARIZ. L. REV. 603 (1980); Fred Wertheimer, *Candidate Carte Blanche*, N.Y. TIMES, Nov. 30, 1998, at A23.

²⁰ See, e.g., DAVID B. MAGLEBY & CANDICE J. NELSON, *THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 195–213* (1990) (offering a comprehensive campaign finance reform proposal); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994) (arguing that “[t]he Constitution of the United States should contain a principle . . . that would guarantee to each eligible voter equal financial resources for purposes of supporting or opposing any candidate or initiative on the ballot in any election held within the United States”); Lowenstein, *supra* note 7, at 335, 348–66 (concluding that “[t]he campaign finance system is corrupt” and outlining a reform proposal).

²¹ See, e.g., 144 CONG. REC. S10147 (daily ed. Sept. 10, 1998) (statement of Sen. Feingold (D-Wis.)) (asserting that “[t]he biggest threat to our democracy still comes from this out-of-control campaign finance system”); *id.* at S10150 (statement of Sen. Snowe (R-Me.)) (remarking that “[h]ow we choose our elected officials goes to the heart of who we are as a nation”); *id.* at S10161 (statement of Sen. Thompson (R-Tenn.)) (describing the current campaign finance system as “an open invitation to corruption”); *id.* at S10166 (statement of Sen. Glenn (D-Ohio)) (contending that campaign finance law loopholes are “inviting corruption of the electoral process” and thus “they threaten our democracy”); *id.* at S10166 (statement of Sen. Kennedy (D-Mass.)) (stating that “[t]he vast sums of special interest money pouring into campaigns are a cancer on our democracy”); *id.* at S10170 (statement of Sen. Bumpers (D-Ark.)) (opining that “the method of financing campaigns in this country [is] rotten to the core”).

²² See *FEC Reports on Congressional Fundraising for 1997-98* (visited July 21, 1999) <<http://www.fec.gov/press/canye98.htm>>. Those figures represented a decrease of \$9.2 million in receipts and \$24.9 million in expenditures from the 1996 congressional elections. See *id.*

²³ See *Financial Activity of 1999-2000 Presidential Campaigns Through June 30, 1999* (visited July 21, 1999) <<http://www.fec.gov/finance/prsq299.htm>>.

²⁴ See Adam Nagourney, *Backers Set Record Goal for First Lady*, N.Y. TIMES, July 16, 1999, at B1 (indicating that Hillary Rodham Clinton hopes to raise \$25 million to run for the Senate from New York, and that Rudolph Giuliani promised to match Clinton’s fundraising in “what is shaping up as the costliest Congressional contest in

Large amounts of money contributed to and spent on political campaigns is not necessarily bad. One would hope that people would be interested enough in their governance to support those who will represent their views. Moreover, the amount of money is tiny compared to spending on Big Macs and other items that are presumably less important to the health of a democratic society.²⁵ Still, it is not the money itself that is of concern, but rather the influence that it has. If elected officials are making decisions based on who gave them the most money for their campaigns, then we have a problem.

The evidence suggests that we do have a problem. Certain individuals and organizations contribute far more to electoral causes than other individuals and organizations. Corporations, unions, wealthy individuals, trade associations, and trial attorneys contribute millions of dollars to political campaigns annually. So do the political action committees (PACs) established by such interests. By contrast, as Senator Dole once observed, “[t]here aren’t any Poor PACs, or Food Stamp PACs or Nutrition PACs or Medicare PACs.”²⁶ Moreover, the interests of those contributing such large sums often coincide with the votes of the elected officials who receive them. There are many examples of such apparent influence. Common Cause proclaimed in 1998 that alcohol, oil, transportation, and gambling interests all provided substantial campaign contributions to members of Congress and were rewarded with favorable legislative action.²⁷ Other observers, including members of Congress themselves,

the nation’s history”).

²⁵ See 144 CONG. REC. S10174 (daily ed. Sept. 10, 1998) (statement of Sen. Grams (R-Minn.)) (noting that the \$3.50 per person per year that is spent on elections in the United States is less than the money spent on supporting the United Nations and “less money than we spend on a Value Meal at McDonald’s”). It is possible that Senator Grams is more familiar with what lunch costs in Washington than what it costs in his home state of Minnesota. See Telephone Interview with Professor Michael Stokes Paulsen, Minnesota Law School (July 27, 1999) (reporting that a Value Meal costs about \$2.99 in the Minneapolis area).

²⁶ 134 CONG. REC. S1188 (daily ed. Feb. 23, 1988) (statement of Sen. Murkowski (R-Ark.)) (quoting Elizabeth Drew, who quoted Senator Dole (R-Kan.)). *But see id.* (statement of Sen. Murkowski) (responding that “there is a food stamp program, a Medicare program, and a substantial array of welfare programs. They were enacted because they were thought to be good ideas and, even if recently trimmed, they survive because people still believe them to be good ideas and because they have substantial constituencies.”).

²⁷ The Common Cause reports are detailed in their web site. See *Common Cause* (visited July 20, 1999) <<http://commoncause.org/publications/booze1.htm>> (alcohol), <<http://commoncause.org/publications/drilling.htm>> (oil), <<http://commoncause.org/publications/concrete.htm>> (transportation), <http://commoncause.org/publications/062697_sdytoc.htm> (gambling).

make similar claims.²⁸ This leads many congressional supporters of campaign finance reform to conclude that “[t]he paramount goal of any true effort to reform the system of financing elections for federal office must be to reduce the influence of special interest money on elected officials.”²⁹

But spending and contribution limits are blunt instruments for rooting out corruption. They are overinclusive to the extent that they prohibit contributions and expenditures that are truly independent of any obligation between the donor and the candidate. They are underinclusive to the extent that they allow smaller contributions or other activities that really do instill an obligation between the candidate and the donor. They rely on the contested assumption that contributors give money in order to persuade an elected official how to vote, rather than assuming that contributors give money because they like the way an elected official has already voted or promises to vote. Moreover, laws

²⁸ See, e.g., 144 CONG. REC. S10157 (daily ed. Sept. 10, 1998) (statement of Sen. McCain) (describing a 1996 Democratic National Committee document outlining the privileges that would be extended to large contributors); *id.* at S10159 (reprinting two documents indicating the benefits offered to Republican campaign contributors); *id.* at S10166 (statement of Sen. Kennedy (D-Mass.)) (arguing that campaign contributions directed the way in which Republicans voted on bankruptcy, tobacco, and managed care legislation). The empirical studies examining the actual influence of campaign contributions are discussed *infra* note 101.

²⁹ 144 CONG. REC. S10164 (daily ed. Sept. 10, 1998) (statement of Sen. Chafee (R-R.I.)). *Accord* 145 CONG. REC. H1305 (daily ed. Mar. 16, 1999) (statement of Rep. Udall (D-N.M.)) (observing that people “view the system as one that is controlled by special interests, and they do not believe that their voices are being heard”); *id.* at H1306 (statement of Rep. Moore (D-Kan.)) (noting that “[p]eople in this country believe that both political parties receive so much corrupt money from interest groups, from lobbyists, from other sources, that the whole system is corrupt”); 144 CONG. REC. S10157 (daily ed. Sept. 10, 1998) (statement of Sen. McCain (R-Ariz.)) (asserting that “there is undue influence on the part of special interests”); *id.* at S10158 (statement of Sen. Reed (D-R.I.)) (encouraging Congress to pass campaign finance reform legislation to “make elections about ideas and policies, and not auctions to the highest bidder”); *id.* at S10160 (statement of Sen. Collins (R-Me.)) (asserting that “political equality is the essence of democracy, and an electoral system fueled by money is one lacking in political equality”); *id.* at S10163 (statement of Sen. Mikulski (D-Md.)) (arguing that “[b]y limiting the influence of those with big dollars, and increasing the influence of those with big hearts, we can bring government back to where it belongs—with the people”); *id.* at S10166 (statement of Sen. Kennedy (D-Mass.)) (remarking that “[t]he voice of the average citizen today is scarcely heard over the din of lobbyists and big corporations contributing millions of dollars to political campaigns and buying hundreds of TV ads to promote the causes of their special interests”); *id.* at S10167 (statement of Sen. Murray (D-Wash.)) (arguing that “[t]he campaign system is so clogged with money, there is hardly room left for the average voter”); *id.* at S10170 (statement of Sen. Bumpers (D-Ark.)) (stating that “[a]nybody who believes that a democracy can survive when the people you elect and the laws you pass depend on how much money is given for the cause are daydreaming”).

I consider the other reasons why campaign finance legislation might be desirable *infra* text accompanying notes 103–104.

candidate Bill Bradley advocates the same ideas plus public financing and free television broadcast time for candidates.³⁶ States have enacted a variety of sweeping campaign reform measures that incorporate similar provisions.³⁷ But Congress has not enacted any of these proposals or anything like them.

Furthermore, the Supreme Court has shown little willingness to reconsider its conclusion that campaign spending is protected by the First Amendment. *Buckley* held that the federal contribution limitations satisfied constitutional strict scrutiny because they served the government's compelling interest in combating corruption and its appearance, but the Court struck down the federal expenditure limits because they did not achieve those ends.³⁸ The invalidation of the spending limits has made *Buckley* the target of scholars supporting campaign finance legislation.³⁹ But rather than heeding those calls, the Court is perhaps more likely to revisit its conclusion that campaign contributions may be limited consistent with the First Amendment. Justice Thomas said as much in the Supreme Court's most recent FECA decision,⁴⁰ and soon the Court will decide a case that challenges the constitutionality of the types of contribution expenditures that were upheld in *Buckley*.⁴¹ The upshot, in the colorful words of Kathleen Sullivan, is that *Buckley* "has become the great white whale of constitutional law: the more elusive its demise be-

³⁶ See *Campaign Finance Reform Fact Sheet* (visited Oct. 25, 1999) <<http://www.billbradley.com/bin/article.pl?path=220799/2>>. An earlier version of the McCain-Feingold bill would have encouraged voluntary compliance with spending restrictions by providing public campaign financing and discounted television advertising. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 662-63 (1998) (describing the 1997 version of the McCain-Feingold bill).

³⁷ See, e.g., Maine Clean Election Act, ME. REV. STAT. ANN. tit. 21-A, §§ 1121-1128 (West. Supp. 1997) (adopting voluntary public financing conditioned upon a candidate's acceptance of expenditure limitations, contribution limits of as low as \$250 per election, and restrictions on independent expenditures); *Daggett v. Webster*, 1999 U.S. Dist. LEXIS 17830 (D. Me. Nov. 5, 1999) (sustaining most of the Maine Act against a constitutional challenge).

³⁸ See *Buckley*, 519 F.2d at 821.

³⁹ See, e.g., E. JOSHUA ROSENKRANZ, *BUCKLEY STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM* (1998) (report by legal scholars comprising the Twentieth Century Fund Working Group on Campaign Finance Litigation that describes how to persuade the Court to overrule *Buckley*).

⁴⁰ See *Colorado Republican Campaign Comm. v. FEC*, 116 S. Ct. 2309, 2325-29 (1996) (Thomas, J., concurring in the judgment and dissenting in part) (suggesting that *Buckley* should be reconsidered to the extent that the decision permits the regulation of campaign contributions). Note, however, that no other Justice joined that part of Justice Thomas' opinion.

⁴¹ *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998), cert. granted, 119 S. Ct. 901 (1999).

prohibiting the contributing and spending of money for political campaigns conflict with First Amendment values.³⁰

Proponents of campaign finance reform believe that the public is on their side,³¹ though some admit that the extent of the public's enthusiasm is questionable.³² Campaign finance reform ranked seventeenth and last in public concern according to a poll released in July 1999.³³ In any event, the anguish has produced little actual federal legislation. The leading bill, sponsored by Senators McCain (R-Ariz.) and Feingold (D-Wis.), would ban soft money contributions to political parties, regulate campaign advertisements funded by corporations and unions, and promote increased disclosure and enforcement efforts.³⁴ The leading House bill, sponsored by Representatives Shays (R-Conn.) and Meehan (D-Mass.), contains similar provisions.³⁵ Presidential

³⁰ There is an extensive literature on the constitutionality of campaign finance legislation. Most writers acknowledge the First Amendment implications of spending and contribution restrictions, including both those who oppose such restrictions, *see, e.g.,* Smith, *Money Talks*, *supra* note 6, at 48–52, and those who favor them. *See* DANIEL HAYS LOWENSTEIN, *ELECTION LAW: CASES AND MATERIALS* 535 (1995) (noting that “most defenders of reform have accepted the Court’s conclusion that spending limits need to be treated as speech limitations”). A notable exception is Judge J. Skelly Wright, who wrote the lower court opinion upholding the FECA restrictions at issue in *Buckley*, *see* *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975), *aff’d in part and rev’d in part*, 424 U.S. 1 (1976), and who later expressed his disagreement with the proposition that such restrictions may violate the First Amendment. *See* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 *YALE L.J.* 1001, 1012 (1976).

³¹ *See* 145 CONG. REC. H1306 (daily ed. Mar. 16, 1999) (statement of Rep. Udall (D-Colo.)) (citing a *New York Times* survey showing that “9 out of 10 Americans think that we ought to have significant campaign finance reform”); 144 CONG. REC. S10155 (daily ed. Sept. 10, 1998) (statement of Sen. Levin (D-Mich.)) (asserting that “[s]eventy-five percent of the American people want campaign finance reform”); *A New Speaker Errs on Reform*, *supra* note 10, at A16 (insisting that “voters are demanding an overhaul of a corrupt system”).

³² *See* 145 CONG. REC. H1305 (daily ed. Mar. 16, 1999) (statement of Rep. Udall (D-N.M.)) (indicating that he has heard the comment that there is no popular support for campaign finance reform “over and over again”); *id.* at H1307 (statement of Rep. Baird (D-Wash.)) (admitting that campaign finance is “an issue which, if we ask pollsters, they will tell us it does not poll high”); 144 CONG. REC. S10148 (daily ed. Sept. 10, 1998) (statement of Sen. Snowe (R-Me.)) (acknowledging that “some have said that the American people actually aren’t very concerned about this issue”).

³³ *See Public Opinion Online*, July 29, 1999, available in LEXIS, News Library, Wires File (providing responses to the question “what one issue would you most like to hear presidential candidates talk about next year”).

³⁴ *See* S. 26, 106th Cong., 1st Sess. (1999); *see also Summary of the McCain-Feingold Campaign Finance Reform Bill* (visited Aug. 11, 1999) <<http://www.senate.gov/~feingold/cfrsumm.html>> (providing Senator Feingold’s summary of the provisions of the bill).

³⁵ *See* H.R. 417, 106th Cong., 1st Sess. (1999); *see also Shays-Meehan Bipartisan Campaign Finance Reform Act Short Summary* (visited Aug. 11, 1999) <<http://www.house.gov/shays/reform/cfr3526-sum.htm>> (providing Representative Shays’ summary of the provisions of the bill).

comes, the greater the intellectual exertion expended in its pursuit."⁴²

Once these objections are combined, the outlook for campaign finance reform is none too promising. The proposed campaign finance legislation may well be misguided, it is doubtful whether it will be enacted, and it will probably continue to be held unconstitutional in any event.

II. MONEY AND OFFICIALS IN THE EXECUTIVE AND JUDICIAL BRANCHES

Meanwhile, officials in other parts of the government perform their duties without similar controversy. Federal judges may own stock in any corporation they wish. The Secretary of Energy can own stock in Exxon. An attorney in the Department of Justice may enjoy a lunch paid for by a friend who is a partner with a leading Washington law firm. But these officials cannot then work on any matters involving the corporation or individuals with whom they have that kind of connection.

Federal statutes prohibit government officials from participating in any matters in which they have a financial interest. Executive branch employees are prohibited from participating in any matter in which they or their family have a financial interest.⁴³ An official who transgresses that statute faces the possibility of spending up to five years in prison.⁴⁴ The federal conflict of interest statutes, however, do not prohibit the financial interests as such. Judges, prosecutors and bureaucrats can hold whatever stock or other financial interests they please; they just cannot work on any official matters that relate to those interests.

Legislators must abide by similar constraints. House and Senate rules require a member to recuse from any legislative business in which the member has a personal financial interest.⁴⁵

⁴² Sullivan, *supra* note 6, at 311. For other images of the failed efforts at campaign finance reform, see Robert Post, *Regulating Election Speech Under the First Amendment*, 77 TEX. L. REV. 1837 (1999) (remarking that "[c]ampaign finance reform has become the Vietnam of First Amendment theory and doctrine," or more accurately, "it has become the Kosovo, since the beneficence of our intentions in the latter case is so much more apparent"); Isscharoff & Karlan, *supra* note 4, at 1705 (stating that "[e]lectorate reform is a graveyard of well-intentioned plans gone awry").

⁴³ See 18 U.S.C. § 208 (1994).

⁴⁴ See 18 U.S.C. § 216(a)(2) (1994).

⁴⁵ See H.R. R. III(1) (providing that "[e]very Member shall be present within the Hall of the House during its sittings, unless excused or necessarily prevented, and shall vote

Senate Majority Leader Trent Lott recused (R-Miss.) in part from involvement in the tobacco legislation considered by Congress in 1998 because his brother-in-law was a lead attorney for the plaintiffs in the consolidated state litigation being reviewed by Congress.⁴⁶ Pending litigation, business ownerships, and the work of a senator's wife on a matter have prompted other members of Congress to recuse from involvement in particular legislation.⁴⁷ State legislators are subject to similar rules requiring recusal whenever they have a special financial or personal interest in a matter before the legislature.⁴⁸

Such examples, though, are not precisely analogous to the issues raised by campaign contributions. The conflict of interest problems described above involve the permissibility of actions taken by a current government official. Campaign contributions,

on each question put, unless he has a direct personal or pecuniary interest in the event of such question"); S. R. XII (describing the procedure by which a Senator may be excused from voting on a question and permitting a Senator to decline to vote "on any matter when he believes that his voting on such a matter would be a conflict of interest").

⁴⁶ See 144 CONG. REC. S6434 (daily ed. June 17, 1998) (statement of Sen. Ashcroft (R-Mo.)) (noting that Senator Nickles (R-Okla.) was managing the proposed tobacco legislation because Senator Lott "has recused himself in large measure from this consideration"). Senator Lott was criticized for not completely withdrawing from any participation on tobacco related matters. See Alison Mitchell, *Lott, On Sidelines, Remains Key Player on Tobacco Bill*, N.Y. TIMES, June 11, 1998, at A26. President Clinton did not recuse himself from involvement in the tobacco legislation even though his own brother-in-law had an interest similar to that of Senator Lott's brother-in-law. See Ed Henry, *Majority Leader Recused Himself from Tobacco Deal, But What Does it Mean?*, ROLL CALL, Sept. 22, 1997.

⁴⁷ See, e.g., 143 CONG. REC. E1248 (daily ed. June 18, 1997) (statement of Rep. Campbell (R-Cal.)) (stating that he will recuse from "debating, commenting upon and voting on USIA funding for my wife's specific program" to open a business school in Russia); 141 CONG. REC. S17982 (daily ed. Dec. 5, 1995) (statement of Sen. Bond (R-Mo.)) (indicating that he will recuse from proceedings on securities litigation reform legislation because he is "engaged in securities litigation of the kind this legislation seeks to reform"); 102 CONG. REC. S7303 (daily ed. June 2, 1992) (statement of Sen. Kohl (D-Wis.)) (noting that he recused himself from participating in the debate on a sports gambling bill because of his ownership of the Milwaukee Bucks basketball team); Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1, 13 n.36 (1996) (noting that Senator Bingaman (D-N.M.) recused himself from the Ethics Committee's proceedings in the Keating Five case because his wife had worked for associates of Senator Cranston (D-Cal.), one of the targets of the investigation).

⁴⁸ See George F. Carpinello, *Should Practicing Lawyers Be Legislators?*, 41 HASTINGS L.J. 87, 92-93 (1989) (stating that "[w]hen a legislator directly benefits in a unique way from a particular piece of legislation . . . the legislator generally is expected to announce his or her involvement and to recuse from any further involvement with the legislation"); see also *id.* at 113-14 n.92 (quoting state statutes and rules requiring legislatures to recuse from involvement in legislation in which they have a conflict of interest). For a discussion and occasional criticism of the rules requiring recusal, see ROSENTHAL, *supra* note 7, at 84-93.

by contrast, are intended to help decide who will serve in the government in the first place. The best analogy, then, considers efforts to influence who will be chosen to serve as a federal judge, the Secretary of Energy, or an attorney in the Justice Department. For example, suppose that Exxon believes that its pet offshore oil project would receive a more favorable hearing if the Administrator of the Environmental Protection Agency names Attorney Oil to serve as her assistant administrator for water. To encourage that choice, Exxon gives \$10,000,000 to the Administrator. This is a bribe within the meaning of the federal criminal law.⁴⁹ In other words, the law forces executive branch officials and employees to choose between money and their work. Legislators, however, are allowed to choose both.

III. A RECUSAL REQUIREMENT FOR THE RECIPIENTS OF CAMPAIGN CONTRIBUTIONS

The conflict of interest rules applicable to the work of government officials suggest a route around the obstacles to campaign finance reform. *Allow contributors to give whatever they want to political candidates, but require any successful candidates to recuse themselves from voting on or participating in any legislation or other matters that affects those contributors.* For example, Exxon can contribute whatever it wants to Senator Oil, but if he accepts the company's money, Senator Oil cannot have any involvement in any legislation or other congressional business that would affect Exxon.

Such a prohibition would have either of two results. On the one hand, if Exxon realizes that it will not be able to count on

⁴⁹ See 18 U.S.C. § 201(c)(1)(A) (making it illegal to give anything of value to a public official for an official act to be performed by that official); see also *infra* at text accompanying notes 50–53 (discussing the bribery statute). The hardest case under the federal statutes would occur if Exxon instead gives the money to Attorney Oil, who then uses the money to wage a “campaign” to be named to the assistant administrator post. Exxon’s provision of the money to Attorney Oil would not be illegal because Attorney Oil is neither a public official nor one “selected to be a public official.” But Attorney Oil would violate the statute if in the course of his “campaign” he used some of Exxon’s money to give, offer or promise anything of value to the EPA Administrator (or any other government official), and arguably Exxon would be liable, too, if the company knew that is what Attorney Oil planned to do. If Attorney Oil spent the money in other ways, e.g., buying TV ads promoting his appointment, he would not violate the statute, but it is doubtful that such spending offers a useful way to secure a federal appointment. *But cf.* Michael Stokes Paulsen, *Straightening Out The Confirmation Mess*, 105 YALE L.J. 549, 577–78 (1995) (advocating organized campaigns for and against federal judicial nominees).

Senator Oil's support when the Clean Gasoline Act is debated in Congress, then Exxon may be less inclined to contribute to Senator Oil in the first place. Indeed, Exxon may lose a vote it would have otherwise had if Senator Oil was predisposed to support Exxon's position. On the other hand, if Exxon decides that it wants to contribute the money to Senator Oil anyway, and the Senator accepts it, then Exxon must be doing so for reasons besides an allegedly corrupt effort to sway the Senator to act in a certain fashion.

Likewise, the recusal requirement would impact candidates for elected office in one of two ways. If Senator Oil accepts Exxon's money, then Senator Oil will not be able to participate in matters involving the Clean Gasoline Act. If Exxon contributes to the campaigns of enough senators, and if enough Senators make that choice, then we are faced with the not entirely appealing spectacle of the fate of the Clean Gasoline Act being decided by a 5-4 vote of the senators who have not recused. And if Senator Oil accepts enough contributions from enough different contributors, then Senator Oil will not be too busy with legislative work in Washington, and he will presumably have to explain his idleness to many skeptical constituents who thought they were voting for someone to represent them in the legislative deliberations in the Senate. On the other hand, if Senator Oil does not accept Exxon's money, then he will be free to vote on the Clean Gasoline Act and anything else, but he will then be faced with the need to collect sufficient money to fund his campaign to be elected Senator in the first instance. If Senator Oil refuses all contributions in order to avoid the recusal prohibition, then the financial picture for his campaign becomes very bleak indeed.

The recusal requirement may seem drastic at first, but campaign contributions can already have more ominous consequences than mandated recusal. The federal bribery statute may be applied to a member of Congress who participates in a matter affecting a campaign contributor. The standard components of bribery statutes are: (1) a public official is involved; (2) the defendant has a corrupt intent; (3) the public official must gain anything of value; (4) there is a relationship between the thing of value and an official act; and (5) the relationship involves an intent to influence the public official regarding the official act.⁵⁰

⁵⁰ See 18 U.S.C. § 201 (1994) (federal statute prohibiting bribery); Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784,

Numerous cases have held or assumed that campaign contributions can fit within such federal or state statutory definitions of bribery.⁵¹ Indeed, Daniel Lowenstein has concluded that “[u]nder most bribery statutes as they have been interpreted by most courts, most special interest campaign contributions are bribes.”⁵² Simply claiming that something is a campaign contribution instead of a bribe does not make it so; the reported cases contain numerous examples of bribery defendants who protested that the contested money was a permissible campaign contribution rather than an impermissible bribe.⁵³

Recusal even seems modest in comparison to the other sanctions that could be imposed on a member of Congress whose votes seem dictated by the campaign contributions that he or she receives. The penalty for violating the federal bribery statute can be as high as fifteen years in prison.⁵⁴ At least one judge has had to defend against a federal civil rights action filed by a litigant who claimed that the judge violated her due process rights by failing to recuse from a case involving a campaign contributor.⁵⁵ And prison or civil liability might not be the worst fate that could befall a legislator who is judged to be corrupt.⁵⁶

796–97 (1985) (listing the components of typical bribery statutes). *See generally* JOHN T. NOONAN, JR., *BRIBES* (1984) (comprehensive study of the concept of bribery). Other statutes define the lesser included offense of giving or receiving an illegal gratuity. *See* Lowenstein, *supra*, at 796–97 (comparing illegal gratuity provisions with bribery provisions).

⁵¹ *See, e.g.*, *United States v. Derrick*, 163 F.3d 799, 815–17 (4th Cir. 1998); *Jackson*, 72 F.3d at 1373; *United States v. Tomblin*, 46 F.3d 1369, 1379 (5th Cir. 1995); *United States v. Allen*, 10 F.3d 405, 410–11 (7th Cir. 1993); *United States v. Bailey*, 990 F.2d 119, 124 (4th Cir. 1993); *see also* Lowenstein, *supra* note 50, at 808 & nn.86–88 (1985 article citing numerous cases holding or assuming that a campaign contribution can qualify as a bribe).

⁵² Lowenstein, *supra* note 50, at 828; *accord* Note, *Campaign Contributions and Federal Bribery Law*, 92 HARV. L. REV. 451, 452 (1978) (acknowledging that campaign contributions are problematic “under a literal reading of the federal bribery statute”). Even one Senator admitted that “[t]he distinction between a campaign contribution and a bribe is almost a hairline’s difference.” 120 CONG. REC. 10351 (1974) (remarks of Sen. Inouye quoting Sen. Long). *See generally* NOONAN, *supra* note 50, at 621–651 (chapter entitled “the donations of democracy”).

⁵³ *See, e.g.*, *Derrick*, 163 F.3d at 815–17; *Tomblin*, 46 F.3d at 1379; *United States v. Mokol*, 957 F.2d 1410 (7th Cir. 1992).

⁵⁴ 18 U.S.C. § 201(b) (Supp. V 1999). The penalty for bribery can also include a fine of up to three times the amount of the bribe and disqualification from any future federal office. *See id.*

⁵⁵ *See Sheperdson v. Nigro*, 5 F. Supp. 2d 305 (E.D. Pa. 1998) (rejecting the due process claim and admonishing the plaintiff pursuant to Fed. R. Civ. P. 11 for ignoring the judge’s immunity from suit).

⁵⁶ *Cf. United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 119 S. Ct. 1402, 1404 (1999) (Scalia, J.) (observing that “Talmudic sages believed that judges who accepted bribes would be punished by eventually losing all knowledge of the divine

My proposed recusal requirement prevents both corruption and the appearance of corruption. Rather than seeking to do so indirectly by controlling the flow of money, it responds directly by eliminating any opportunity for campaign contributions to influence a senator or representative's votes or other activities involving any business before Congress. Campaign contributions cannot corrupt if the recipient is no more able to influence the contributor's legislative agenda than anyone else in the public at large. Nor would the appearance of corruption remain once the disqualifying effect of a contribution becomes known.

This proposal also avoids the First Amendment problems posed by restrictions on campaign contributions and expenditures. Anyone can contribute any amount to any candidate. What they cannot do, though, is make such a contribution in the hope of encouraging the candidate to support their legislative agenda once in Congress. The constitutional objection to such a recusal requirement is hard to construct. There is no First Amendment right to bribery. Speech may be used to try to persuade an elected official to support a cause; money may not.⁵⁷ Nor has the First Amendment been read to limit the application of bribery laws to campaign contributions. Several convicted campaign contributors and lobbyists have asserted that the First Amendment imposes a quid pro quo requirement on bribery statutes, but the courts have refused to impose such a constitutional limit on what qualifies as bribery.⁵⁸

To require a member of Congress to recuse from any matters affecting a campaign contributor is both a direct response to charges of apparent corruption and a straightforward extension of existing recusal practices and bribery law. Nonetheless, it may

law").

⁵⁷ See, e.g., *State v. Agan*, 384 S.E.2d 863, 867 (Ga. 1989) (explaining that citizens "have every right to try to influence their public officers—through petition and protest, promises of political support and threats of political reprisal. They do *not* have, nor have they every had, the 'right' to buy the official act of a public officer"), quoted in *Agan v. Vaughn*, 119 F.3d 1538, 1544 (11th Cir. 1997), *cert. denied*, 523 U.S. 1023 (1998).

⁵⁸ See *United States v. Jackson*, 72 F.3d 1370, 1375–76 (9th Cir. 1995), *cert. denied*, 517 U.S. 1157 (1996); *United States v. Cleveland*, No. 96-207, 1997 U.S. Dist. LEXIS 5060, at *20–*27 (E.D. La. 1997); see also *Agan*, 119 F.3d at 1542–45 (rejecting another First Amendment objection to the bribery conviction of a campaign contributor); *United States v. Allen*, 10 F.3d 405, 410–12 (7th Cir. 1993) (discussing the question but finding it unnecessary to answer it). Of course, it is *permissible* for a bribery statute to impose a quid pro quo requirement, see, e.g., *McCormick v. United States*, 500 U.S. 257 (1991), but no case decided since *McCormick* holds that a bribery statute *must* contain such an element.

have occurred to you by now that my modest little proposal presents a few difficulties. Let me try to address several of them in turn.

A. *The Validity of Legislation Supported by a Legislator Who Should have Recused*

In the judicial context, the standard remedy for a judge's wrongful failure to recuse from a case is to repeat the affected proceedings: hold a new trial, resentence a defendant before a different judge, or rehear the appeal.⁵⁹ The transposition of that approach into the legislative context would mandate a new vote on a bill whenever a senator or representative fails to recuse despite the interests of a campaign contributor. The invalidation of legislation because of the subsequent disqualification of one of its supporters is not unprecedented,⁶⁰ but such a rule would pres-

⁵⁹ See, e.g., *United States v. Greenspan*, 26 F.3d 1001, 1007 (10th Cir. 1994) (ordering the resentencing of a defendant after a judge failed to recuse himself from sentencing despite receiving a death threat); *Cool Light Co., Inc. v. GTE Prods. Corp.*, 832 F. Supp. 449, 460 (D. Mass. 1993) (describing a new trial before another judge as "the classic remedy" for a trial judge's improper failure to recuse); *Regional Sales Agency, Inc. v. Reichert*, 830 P.2d 252, 253-58 (Utah 1992) (vacating a court of appeals decision and ordering a rehearing because one of the appellate judges was related by marriage to two members of the plaintiff's law firm). In other instances, though, the judge's decisions may stand even though the judge should have recused. See generally *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 862-70 (1988) (describing the factors to be considered when deciding the remedy for a federal judge's improper failure to disqualify from a case); *United States v. Cerceda*, 172 F.3d 806 (11th Cir. 1999) (en banc) (applying *Liljeberg* and holding that a trial judge's improper failure to recuse himself from several cases did not necessitate vacating the judgments and sentences in those cases).

⁶⁰ There are a few cases in which a city council's zoning decision was invalidated because one of the council members possessed a conflict of interest. See *Lagrange City Council v. Hall Bros. Co. of Oldham County, Inc.*, No. 1998-CA-000181-MR, 1999 Ky. App. LEXIS 83 (Ky. Ct. App. July 23, 1999); *Fleming v. City of Tacoma*, 502 P.2d 327 (Wash. 1972); see also *Griswold v. City of Homer*, 925 P.2d 1015 (Alaska 1996) (remanding for a determination of whether a zoning ordinance should be invalidated because of the improper participation of a city council member who had a conflict of interest). The majority rule in zoning cases does not require recusal in such instances, let alone invalidation of the resulting action. See JOHN P. DWYER & PETER S. MENELL, *PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE* 1021 (1998) (explaining that "[o]nly a few courts, however, require recusal of legislative officials who may have a conflict of interest, absent a statute prohibiting conflicts of interest for such officials). Zoning is viewed as combining features of legislative, administrative and judicial decisionmaking, so even those cases supporting the invalidation of a zoning decision have emphasized that a similar rule need not follow for all legislative determinations. See *Fleming*, 502 P.2d at 330-31 (stating that "zoning amendments or zoning reclassifications are sufficiently distinguishable from other legislative functions that an exception to the general rule [against inquiring into the motives of legislative officials] is desirable").

ent substantial practical challenges. Instead, the recusal rule should be enforced prospectively in conjunction with contribution disclosure requirements. The burden for seeking recusal should be placed on anyone who believes that a legislative matter affects a contributor to a particular senator or representative. Federal law already requires that campaign contributions be disclosed.⁶¹ Armed with this information, a careful analysis of proposed legislation can usually reveal which contributors stand to benefit or suffer from it, and anyone who contends that the recusal of a particular senator or representative is necessary could inform the House or Senate ethics committee. Those committees could then decide whether to order the recusal of the legislator. Failure to seek recusal before the legislative action takes place would waive any claim for recusal, just as belated motions for recusal are rejected in the judicial context.⁶²

But a retroactive remedy is necessary to deter legislators who manage to escape a forced recusal even though they know that their campaign contributors will benefit from particular legislation. The identification of which contributors stand to benefit from a proposed bill is not always easy, especially if the scope of the bill is changed at the last minute. Timely recusal motions become virtually impossible when Congress legislates on the floor of the House or Senate. The appropriate response in such circumstances is directed not at the validity of the legislation, but instead at the conduct of the legislator. A member of Congress who knowingly participates in a matter that affects a campaign contributor should be required to repay the amount of the contribution received. The money should go to the federal treasury—or even to the national committee of the opposing political party—rather than being returned to the contributor. The sanc-

⁶¹ See 2 U.S.C. § 434 (Supp. III 1997); see generally *Campaign Finance Reports and Data* (visited Aug. 12, 1999) <<http://www.fec.gov/1996/sdrindex.htm>> (FEC web site containing campaign finance reports); Leslie Wayne, *Following the Money, Through the Web*, N.Y. TIMES, Aug. 26, 1999, at G1 (finding that “[t]he Internet is making it easy for journalists, competing candidates and ordinary citizens to connect the dots between politicians and their sources of money”).

⁶² See, e.g., *Polizzi v. United States*, 926 F.2d 1311, 1321 (2d Cir. 1991); *Parker v. State*, 486 S.E.2d 687, 691 (Ga. Ct. App. 1997); *State v. Bordelon*, 75 So. 429, 431 (La. 1917); *MacCormick v. MacCormick*, 513 A.2d 266, 267 (Me. 1986); *State v. Keene*, 693 N.E.2d 246, 263 (Ohio 1998); *State v. Hoeft*, 594 N.W.2d 323, 326 (S.D. 1999); *Pena v. Pena*, 986 S.W.2d 696, 700–01 (Tex. App. 1998); see generally Richard C. Tinney, Annotation, *Waiver or Loss of Right to Disqualify Judge by Participation in Proceedings—Modern State Civil Cases*, 24 A.L.R. 4th 870, 877–79 (1983) (summarizing the rules concerning waiver of an objection to a judge’s failure to recuse from a case).

tion for repeat violators who knowingly participate in legislation for which they should have recused because of a campaign contribution should be consideration for expulsion from Congress.⁶³

B. *Elected Judges Do Not Have to Recuse from Cases Involving Campaign Contributors*

Many state court judges are elected, and like aspiring members of Congress, they rely upon campaign contributions to fund activities designed to persuade the electorate to vote for them. Once elected, judges occasionally find themselves hearing a case in which one of their campaign contributors is representing one of the parties, or even where the party himself or herself was a contributor. Not surprisingly, the opposing party often moves to recuse the judge in such circumstances. Surprisingly, such motions hardly ever succeed.⁶⁴

⁶³ See U.S. CONST. art. I, § 5, cl. 2 (providing that “[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member”); see also *United States v. Brewster*, 408 U.S. 501, 519 n.13 (1972) (“The right to expel extends to all cases where the offence is such as in the judgment of the Senate is inconsistent with the trust and duty of a member.”) (quoting *In re Chapman*, 166 U.S. 661, 669–70 (1897)). *Powell v. McCormack* is no obstacle to expulsion because the Court there considered only the exclusion of Adam Clayton Powell from the House, explicitly expressing no view on any potential constitutional questions regarding expulsion. See 395 U.S. 486, 507 n.27 (1969).

⁶⁴ See *Shepherdson v. Nigro*, 5 F. Supp. 2d 305 (E.D. Pa. 1998) (holding that recusal was not required when the law firm representing the defendant had contributed to the judge’s campaign); *Ex parte The Kenneth D. McLeod, Sr. Family Ltd. Partnership XV*, 725 So. 2d 271 (Ala. 1998) (holding that recusal was not required when the defendant had contributed \$200 to the trial judge’s campaign for the appellate court); *Velarde v. Osborn*, No. 37789-2-I, 1997 Wash. App. LEXIS 1404 (Wash. Ct. App. Aug. 25, 1997) (holding that a judge need not recuse despite receiving a \$100 campaign contribution from the defendant); *Aguilar v. Anderson*, 855 S.W.2d 799 (Tex. App. 1993) (holding that recusal was not required when the judge solicited a \$300 campaign contribution from the plaintiff’s law firm); *Keane v. Andrews*, 555 So. 2d 940 (Fla. Dist. Ct. App. 1990) (holding that a trial judge need not recuse from a case despite receiving \$500 campaign contributions from several members of an attorney’s firm); *J-IV Investments v. David Lynn Machine, Inc.*, 784 S.W.2d 106 (Tex. App. 1990) (holding that recusal was not required when a judge accepted a \$500 campaign contribution from the defendant’s attorney); *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 844–45 (Tex. App. 1987) (refusing to order the recusal of a trial judge who received a \$10,000 campaign contribution from Pennzoil’s lead counsel two days after the company filed its answer), *cert. dismissed*, 485 U.S. 994 (1988); *River Road Neighborhood Ass’n v. South Texas Sports, Inc.*, 673 S.W.2d 952 (Tex. App. 1983) (holding that the recusal of two justices was not required when the attorneys representing the appellant accounted for about 20% of each justice’s campaign contributions); *Rocha v. Ahmad*, 662 S.W.2d 77 (Tex. App. 1983) (holding that the recusal of two judges was not required when the attorney representing the appellees had contributed several thousand dollars to both judges’ campaigns and had held election victory celebrations for them at his offices); *Raybon v. Burnette*, 135 So.2d 228 (Fla. Dist. Ct. App. 1961) (concluding that a trial judge need

The courts offer several reasons for why a judge need not recuse from a case in which a campaign contributor serves as counsel for one of the parties. They deny that a reasonable observer would view a judge as biased when deciding a case involving a campaign contributor.⁶⁵ They see it as an inevitable consequence of judicial elections.⁶⁶ It would be impractical, they say, for a judge to have to choose between running an underfinanced campaign and having to recuse from lots of cases involving attorneys who contributed to the campaign.⁶⁷

These decisions are not especially popular among the writers who have considered them. Indeed, the scholarly opinion is just as unanimous that a campaign contribution should require a judge to recuse as the courts are agreed that recusal is unnecessary.⁶⁸ The academic writings and the occasional dissenting

not recuse from a case where the defendant's attorney contributed to the judge's campaign and the plaintiff's attorney contributed to the judge's opponent); *Coker v. Harris*, 281 S.W.2d 100 (Tex. App. 1955) (affirming the denial of motion to recuse a judge who had received campaign contributions from the attorneys representing both sides in the case). Recusal is not even required when a judge contributes to the political campaign of an attorney appearing before him. *See Frade v. Costa*, 171 N.E.2d 863 (Mass. 1961).

⁶⁵ *See Aguilar*, 855 S.W.2d at 802 (opinion of Larsen, J.) (noting that "Texas courts have repeatedly rejected the notion that a judge's acceptance of campaign contributions from lawyers creates bias necessitating recusal, or even an appearance of impropriety"); *id.* at 805 (Osborn, C.J., concurring) (stating that "I do not believe the 'reasonable person on the street' would conclude that receipt of a \$100 contribution or even a \$500 contribution, with today's standards and cost of campaigns, would result in a trial judge being biased or prejudiced"); *Breakstone v. MacKenzie*, 561 So. 2d 1164, 1174 (Fla. Dist. Ct. App. 1989) (Nesbitt, J., dissenting) (concluding that "a contribution of \$1,000 or less made by a litigant or his counsel to the political campaign of a trial judge or the judge's spouse does not create a legally sufficient basis for a reasonable person to fear a bias by the trial judge in favor of the contributing side"), *vacated in part*, 571 So. 2d 32 (Fla. 1990); *but see infra* note 71.

⁶⁶ *See Breakstone*, 561 So. 2d at 1176 (Nesbitt, J., dissenting) (insisting that "[b]ecause it is the people's desire that trial judges submit to contested elections, I do not find that the people have a reasonable expectation that they can be free of all of the necessary evils that attend such an election").

⁶⁷ *See Aguilar*, 855 S.W.2d at 814 (Barajas, J., dissenting) (contending that "if the trial judge tries to preserve his or her integrity and maintain an appearance of impartiality by refusing to raise funds, the election is destined to be lost"); *Breakstone*, 561 So. 2d at 1179 n.4 (Schwartz, C.J., dissenting) (describing the "chilling effect" of mandatory recusal on judicial campaign contributions from lawyers); *Rocha*, 662 S.W.2d at 78 (opining that "[a] candidate for the bench who relies solely on contributions from non-lawyers must reconcile himself to staging a campaign on something less than a shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts.").

⁶⁸ *See Bradley A. Siciliano*, Note, *Attorney Contributions in Judicial Campaigns: Creating the Appearance of Impropriety*, 20 HOFSTRA L. REV. 217 (1991); *Stuart Banner*, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449 (1988); *Mark Andrew Grannis*, Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L.

judges dispute the practical effects of requiring recusal.⁶⁹ More importantly, the critics of these decisions emphasize that the integrity of the system—the avoidance of the appearance of corruption, if you will—overrides any of those other concerns. As one court put it, “[t]he overriding priority . . . is to assure that our courts are impartial, and that they have the appearance of impartiality.”⁷⁰ Many writers—and some judges—submit that campaign contributions provide the *appearance* that a judge is not impartial, regardless of whether or not such bias actually exists.⁷¹

These critics have the better argument. The practical arguments regarding the implementation of a recusal requirement are not without force, but accepting them consigns a poor litigant to the disturbing spectacle of having her case decided by a judge who holds office in part because of the financial generosity of the attorney for the opposing party.⁷² One could reasonably conclude that an attorney’s \$10,000 campaign contribution to the

REV. 382 (1987); see also *Breakstone*, 561 So. 2d at 1168 n.6 (listing numerous bar journal and other articles criticizing the decisions allowing judges to decide cases involving campaign contributors).

⁶⁹ See *Breakstone*, 561 So. 2d at 1172 (responding that “[t]o suggest that a candidate’s friends and supporters will fail to assist at a substantial level through fear of possible disqualification of the judge on motion in future cases (thus running the risk that the opposition will instead be elected) defies both logic and experience”); *id.* at 1174 (Ferguson, J., concurring) (claiming that “[i]n all likelihood today’s decision [requiring recusal] will no more trouble the present system than a teardrop in Biscayne Bay”).

⁷⁰ *Id.* at 1172.

⁷¹ See *Ex parte Bryant*, 675 So. 2d 552, 556 (Ala. Crim. App. 1996) (Cobb, J., dissenting) (suggesting that a person of ordinary prudence could question the judge’s impartiality even if it is the contributing attorney who seeks the judge’s recusal); *Aguilar*, 855 S.W. 2d at 814–16 (Barajas, J., dissenting) (asserting that receipt of campaign contributions can sometimes eliminate the appearance that a judge is impartial); Norman Krivosha, *Acquiring Judges by the Merit Selection Method: The Case for Adopting Such a Method*, 40 Sw. L.J. 15, 19 (1986) (statement by Nebraska’s Chief Justice that “[o]ne may be the most ethical individual in the world and, yet, if one must seek funds as the other two branches of government do when running for office, one inevitably creates the appearance of impropriety”); Siciliano, *supra* note 68, at 227 (questioning the motives of campaign contributors in light of the substantial contributions that are made to judicial candidates who are running unopposed, or who are sure to win, or who have already won their election).

⁷² See *Aguilar*, 855 S.W. 2d at 815 (Barajas, J., dissenting) (noting that the realities of judicial elections are “not comforting to the single mother of five, unable to afford counsel of her choice for the purpose of enforcing child-support obligations, who discovers that opposing counsel attorney made a financial contribution to the judge’s reelection campaign”); *Breakstone v. MacKenzie*, 561 So. 2d 1164, 1168 (Fla. Dist. Ct. App. 1989) (asserting that “[c]ertainly the ordinary litigant does not make, or have the financial capacity to make, a \$500 contribution” and concluding that such a contribution could cause a reasonable person to fear that the judge would not be impartial), *vacated in part*, *Breakstone*, 565 So. 2d at 1332. The decisions refusing to mandate recusal include a disturbing number of instances where the disadvantaged party was in particularly dire straits.

judge who is handling his case creates a fair question about the ability of the judge to decide a case according to the law, not the money.⁷³ That the courts say otherwise suggests that they perceive corruption differently than most others do. If the popular perception of the corrupting influence of campaign contributions is correct, then the appropriate response is to extend the recusal requirement to the judicial context, rather than imitating the contrary judicial decisions in the legislative context.

C. *The Type and Scope of Interests Subject to the Recusal Requirement*

Note that my description of the rule requires recusal whenever a contributor has any interest in the matter before Congress, not just when the contributor has a *financial* interest in the matter. Many ethics statutes only apply to conflicts of interest arising out of financial holdings.⁷⁴ Such a limitation could be added here, too, so that recusal is necessary only if a contributor stands to benefit financially from how the legislator votes. The existing standards for identifying when a member of Congress has a financial interest could be employed to determine when a campaign contributor has a financial interest.⁷⁵

But the concern about the influence of money on those who receive it applies equally to funds given by people or organizations who make campaign contributions for non-economic reasons. Suppose that Senator Oil accepted a million-dollar campaign contribution from the Sierra Club, which reminds him of its generosity on the day that the Clean Gasoline Act is before the Senate. Senator Oil would seem to face the same dilemma—vote in accordance with the desires of a contributor lest future contributions be extinguished—that he would face if the con-

⁷³ *But see* *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 842–45 (Tex. App. 1987) (holding that a \$10,000 campaign contribution to the judge who is hearing a party's case does not create an appearance of impropriety).

⁷⁴ *See* 18 U.S.C. § 201(b)(1) (1994) (prohibiting corrupt gifts of “anything of value” to a public official).

⁷⁵ *See* S. R. XXXVII(4) (stating that “[n]o Member, officer, or employee shall knowingly use his official position to introduce or aid the progress or passage of legislation, a principal purpose of which is to further only his pecuniary interest, only the pecuniary interest of his immediate family, or only the pecuniary interest of a limited class of persons or enterprises, when he, or his immediate family, or enterprises controlled by them, are members of the affected class.”); H.R. R. III(1) (requiring members to vote on all questions unless the member has “a direct personal or pecuniary interest in the event of such question”).

tributor had been Exxon instead. The desire to please a contributor and encourage future contributions exists regardless of what the contributor wants.

This approach, however, carries its own baggage. Once all interests are relevant for purposes of determining whether recusal is necessary, there must be some means of identifying the interests of a contributor. Other ethics rules require disqualification based on non-financial interests, so the task is not unique.⁷⁶ In fact, there are a number of ways to ascertain an organization's interests. An organization can be presumed to have an interest in any legislation about which it has lobbied Congress or otherwise taken a public position. More generally, an organization's stated purposes can be consulted to determine whether proposed legislation will affect the organization. For example, the Sierra Club's web site contains sixty-seven stated policies on particular issues.⁷⁷ An examination of these policies confirms that the Sierra Club would be interested in the Clean Gasoline Act while leaving no basis for concluding that the organization is concerned about funding for refugees in Kosovo. Accordingly, a member of Congress who receives a campaign contribution from the Sierra Club would have to recuse from the Clean Gasoline Act but not from a bill to aid Kosovo refugees. To be sure, an organization could try to prevent the application of the recusal requirement by declining to lobby or post stated policies or otherwise explain its views, but such measures would also make it difficult to support the inference that the campaign contribution was given to influence the member of Congress on particular legislation.

The scope of the recusal requirement can be tempered by limiting its application to interests that are sufficiently substantial to be viewed as likely to influence a legislator. The rules governing

⁷⁶ See, e.g., 28 U.S.C. § 455(a) (1994) (requiring a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned"); OKLA. STAT. art. V, § 24 (1981) (requiring a legislator who has a "personal or private interest" in a matter to recuse); CODE OF JUDICIAL CONDUCT, canon 3E(1)(c) (1999) (requiring disqualification when a judge or a member of the judge's immediate family holds "any other more than de minimis interest that could be substantially affected by the proceeding" of a matter before the judge); Carpinello, *supra* note 48, at 113-14 n.92 (listing state rules requiring legislators to recuse from matters in which they have certain interests); see also JEFFREY M. SHAMAN, STEVEN LUBET & JAMES J. ALFINI, JUDICIAL CONDUCT AND ETHICS § 4.24 (2d ed. 1995) (noting the difficulties in applying Code of Judicial Conduct test); John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 331-43 (1998) (arguing that Catholic judges should recuse themselves in certain capital punishment proceedings but not others).

⁷⁷ See *Sierra Club Conservation Policies* (visited Aug. 23, 1999) <<http://www.sierraclub.org/policy/conservation/index.html>>.

financial interests are subject to tests of directness and proximity. Many state conflict of interest laws do not apply to interests that are shared by a group, class or profession.⁷⁸ Other rules include an exemption for de minimis interests.⁷⁹ The recusal requirement should contain similar exemptions so that a contribution from the Sierra Club, for example, would not mandate recusal from defense spending appropriations even though the Sierra Club believes that “[i]nvestments in environmental security should begin to replace new military expenditures.”⁸⁰

The hardest case arises when an individual makes a contribution for a non-economic reason. Suppose that Bill Gates contributes \$1,000,000 to each Senate candidate who promises to support pro-choice policies, or that Nancy DeMoss contributes \$1,000,000 to each Senate candidate who promises to support pro-life policies.⁸¹ Should the senators who received such contributions have to recuse from any matters involving abortion? Such contributions pose the same threats of corruption or apparent corruption. A candidate is just as likely to be influenced by a campaign contribution from an individual motivated by a non-economic interest as by a contribution from a multinational corporation. But it is more difficult to apply the recusal rule to indi-

⁷⁸ See Carpinello, *supra* note 48, at 92 n.16 (citing state statutes and rules); see also ROSENTHAL, *supra* note 7, at 94 (observing that “New Mexico lawmakers, like lawmakers elsewhere, are allowed to introduce legislation that benefits the class of citizens to which they belong . . . even though it may also benefit themselves”). The congressional ethics rules contain a similar limitation, though its scope has been controversial. See Elizabeth A. Palmer, *Campbell Ethics Complaint Dismissed*, 57 Cong. Q. 2772 (1999) (reporting that the Senate Ethics Committee concluded that Senator Campbell (R-Colo.) had engaged in an apparent conflict of interest—but no violation of the ethics rules—when he introduced legislation that would benefit 1,100 landowners including himself).

⁷⁹ See CODE OF JUDICIAL CONDUCT, canon 3E(1)(c) (1999); see also *In re Virginia Elec. & Power Co.*, 539 F.2d 357, 368–69 (4th Cir. 1976) (holding that a judge’s \$100 interest in a utility rate reduction was de minimis).

⁸⁰ *Environmental Security Policy* (visited Aug. 23, 1999) <<http://www.sierraclub.org/policy/conservation/envsecurity.html>>. The policy statement contains the qualification that such spending changes should be “consistent with existing Club policies and whenever feasible through arms control negotiations or other international agreements.” *Id.*

⁸¹ Cf. David Van Biema, *Who Are Those Guys?*, TIME, Aug. 9, 1999, at 52 (noting that Nancy DeMoss is the CEO of the Arthur S. DeMoss Foundation, which funds advertisements opposing abortion); Jennifer Kabbany, *Gates, Tycoons’ Largess Aims to Curb World’s Birthrate*, WASH. TIMES, Mar. 24, 1999, at A2 (reporting that “The William H. Gates Foundation, which recently received \$2.2 billion in Microsoft stock from Mr. Gates, plans to give the majority to Planned Parenthood and other population control agencies”). Note that these examples are different from my hypothetical to the extent that they involve contributions by organizations rather than individuals, and they do not involve political campaign contributions.

vidual contributions. The interests of an individual can be much more difficult to ascertain than the interests of a corporation or other organization.⁸² Even when an individual's contribution is motivated by a specific policy concern, it can be difficult to prove the identity of that interest. Gates or DeMoss or any other individual could avoid triggering the recusal requirement by contributing money to a candidate without explaining why. But the practical difficulties in determining when an individual's campaign contribution should be the basis for the recusal of its recipient are not substantial where the contribution can be fairly characterized as corrupting because of its influence on the recipient. The stated purpose of the contribution and other evidence of its purpose can be consulted to determine the contributor's interests, and thus, the scope of the recusal requirement. If the reason for the contribution remains unknown, then there is little reason to fear that any corruption will result from it.

D. Money Will Be Diverted to Other Means of Influencing the Political and Legislative Process

Another worry about a recusal requirement is that it would encourage contributions to political parties or PACs instead of political candidates. The Supreme Court would probably not be too concerned about contributions to parties because of the Court's support for the role of political parties in the electoral process.⁸³ But the large sums of money that have been contributed to political parties and PACs in recent years—so-called "soft money"

⁸² See, e.g., Mike Flaherty, *Road Builders' Influence Criticized*, Wis. St. J., June 5, 1999, at 3B (reporting that campaign finance reform group characterized a family's \$32,263 campaign contributions as supportive of highway construction because the family owns a cement business, while others attributed the contribution to the family's support of an anti-abortion candidates).

⁸³ See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997) (holding that states have "a strong interest in the stability of their political systems," an interest that "permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system"); *Colorado Republican Campaign Comm. v. FEC*, 518 U.S. 604, 615–16 (1996) (plurality opinion of Breyer, J.) (stating that "[a] political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure"); *id.* at 629–30 (Kennedy, J., concurring in the judgment and dissenting in part) (extolling the role of political parties); see generally ISSACHAROFF, KARLAN & PILDES, *supra* note 36, at 244–63 (discussing the entrenchment of the two-party system).

because it is outside the FECA's restrictions on "hard" money given directly to specific candidates—have been the focus of many of the current campaign finance reform proposals. Alternatively, the organizations and individuals who now spend millions of dollars on campaign contributions will just shift their spending to lobbying if such campaign contributions become impossible or counterproductive because of the recusal requirement. Any effort to block the flow of money into lobbying would confront constitutional constraints that are at least as demanding as those applicable to campaign spending.⁸⁴

There is no doubt that a recusal requirement will divert the flow of money from candidates so that it reaches PACs, political parties, lobbyists, or others instead. The applicability of the recusal requirement depends upon what those entities do with the money that they receive. If they make contributions of their own to political candidates, then it would be easy to apply the recusal requirement. For example, a legislator could be required to recuse from any legislative business that affects the interests of a PAC that has contributed to his or her campaign. This makes sense in the context of PACs, whose interests can be identified in the same manner as the interests of other organizations.

Besides making contributions, PACs also spend money to further their own political objectives. Such spending is the object of much of the wrath of campaign reformers, but it may not be regulated if it is independent of a candidate's own campaign. "Independent," moreover, has been broadly understood by the courts as including any spending except that which is explicitly coordinated with a candidate's campaign or which explicitly supports or opposes a specific candidate.⁸⁵ But corruption, not independence, determines whether or not recusal is necessary. If campaign spending by PACs influences or appears to influence how legislators vote in Congress because of the desire to benefit

⁸⁴ See, e.g., WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 316–18 (2d ed. 1995) (discussing the constitutional constraints on the regulation of lobbying); Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 77–90 (1996) (explaining how the Court has narrowly construed lobbying regulations because of constitutional concerns).

⁸⁵ See, e.g., *Colorado Republican Campaign Comm.*, 518 U.S. at 619–23 (holding that a political party's spending is independent from, rather than coordinated with, the party's candidate); *FEC v. The Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999) (holding that the distribution of voter's guides does not constitute prohibited express advocacy of a candidate).

from such spending in future campaigns, then the same reasons for applying the recusal requirement to other campaign money would justify its application to PAC spending.

It is more difficult to extend the recusal rule to money contributed to candidates by political parties, or to spending by parties in support of candidates. Money given to political parties is not as corrupting as money given directly to candidates. Votes on laws in the United States Congress are cast by senators and representatives, not by the Republican or Democratic Party. The Republican Party can be influenced by a campaign contribution from Exxon, and a Republican congressional candidate can be financially dependent on the party, but the threat of corruption is reduced by the existence of the party as an intermediary between the contributor and the candidate. Both of the major political parties include members of Congress who oppose the agendas of the party's primary contributors, yet the contributors continue to support the parties. The increased amount of money contributed to political parties at a time when members of Congress show increased independence from their parties suggests that more money for political parties would not necessarily result in any particular legislative outcomes. And even if a contribution is seen as somehow corrupting the party, it is more difficult to characterize the party's financial support for its own candidates as corrupt. The Court's unwillingness to permit the regulation of a political party's independent spending on its candidates shows as much.⁸⁶

A similar result occurs if funds are diverted to lobbyists instead of candidates. Lobbying does not present the same danger

⁸⁶ See *Colorado Republican Campaign Comm.*, 518 U.S. 604 (holding that the first amendment prohibits the application of FECA's expenditure limits to money spent by a political party without coordination with a candidate). The opinions in *Colorado Republican Campaign Committee* reveal the Court's skepticism about the possibility that a political party's spending could corrupt its candidates. See *id.* at 616 (plurality opinion of Breyer, J.) (observing that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees"); *id.* at 623 (suggesting that if a party and its candidate are thought of as being identical then "one might argue that the absolute identity of views and interests eliminates any potential for corruption"); *id.* at 630 (Kennedy, J., concurring in the judgment and dissenting in part) (stating that "[t]he greater difficulty posed by the statute is its stifling effect on the ability of the party to do what it exists to do"); *id.* at 646 (Thomas, J., concurring in the judgment and dissenting in part) (suggesting that "if the Democratic Party spends large sums of money in support of a candidate who wins, takes office, and then implements the Party's platform, that is not corruption; that is successful advocacy of ideas in the political marketplace and representative government in a party system.").

of a corrupting quid pro quo relationship between a contributor and a legislator. A legislator who ignores the pleas of a lobbyist may face the ire of a company or group, but the consequences of that ire are diminished dramatically by the recusal rule. The lobbyist may want to support the legislator's opponent in the next election, but any campaign contributions would render the opponent ineligible from supporting the contributor's interests in Congress because of the recusal requirement. Without the tool of campaign contributions as a threat, a legislator faces relatively limited sanctions from a disappointed lobbyist. Conversely, lobbying is desirable because it is the means by which the people express their views about particular legislation in a representative democracy.⁸⁷ Of course, lobbying can be abused, and it can slip dangerously close to corruption in its own right. But other statutes are available to control those excesses. Lobbying thus offers a combination of lesser dangers and greater advantages compared to the fears of corruption and apparent corruption accompanying campaign spending.

So where will the money that is now spent on campaign contributions end up if the recusal rule is adopted? Much of it will probably go to political parties and to lobbyists, and while their spending presents problems of its own, it is less susceptible to the charge of corruption that is so often leveled at campaign contributions. Other funds might go to general educational efforts to teach the public about the erstwhile contributor's point of view. The studies of spending on ballot initiatives suggest that the amount of money spent on such efforts increases the likelihood that the public will be persuaded,⁸⁸ but again, the charge of corruption is harder to level because it views a particular outcome as evidence that the people were corrupted themselves. Finally, it is possible that money that was once spent on campaign contributions will now be spent on different matters altogether. Whatever those matters are, they will be preferable to campaign contributions from the perspective of avoiding corruption or its appearance.⁸⁹

⁸⁷ See U.S. CONST. amend. I (prohibiting federal laws abridging the right "to petition the Government for a redress of grievances").

⁸⁸ See, e.g., Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 22 (1997) (noting that "[a] handful of studies suggests that the amount of money spent in a campaign is crucial in determining the outcome of the vote").

⁸⁹ For additional speculation about the course that money would take if traditional campaign finance proposals are adopted, see Issacharoff & Karlan, *supra* note 4, at

E. *The People Will Lose Their Representatives*

A fifth concern about the recusal requirement assumes that candidates will choose to accept contributions despite the prospect of recusal. The practical effect of mandating recusal is to deny the successful candidate's constituents representation in Congress whenever the interests of the campaign contributors are at issue.⁹⁰ Recusal would become the norm rather than the exception if enough candidates accepted contributions from enough different sources. The recusal requirement could even be used strategically by those opposed to a candidate who would contribute to the candidate in order to force recusal, though the success of that ploy could be defeated by the diligence of the candidate.

Nevertheless, it is hard to imagine wholesale recusals. Contributors are likely to vanish if forced recusal is the consequence of a contribution. Even if contributors persist, the people themselves can ensure that their representative is not a frequent recuser by not voting for a candidate who will be required to recuse on issues of importance to the voters. This self-help remedy will encourage candidates to avoid recusal by declining contributions that would require it.

F. *Campaigns Cannot Be Financed*

The only remaining problem is how a candidate can collect the funds needed to run a campaign once the recusal requirement causes many of the existing sources of campaign contributions to disappear. Campaigns are expensive, and there is little likelihood that they will suddenly become cheap just because candidates can no longer collect contributions. Without spending from political candidates, television stations will air advertisements for other products, and pollsters and consultants will find other businesses that are interested in their services. To avoid this result, candidates will turn to other means of funding campaigns.

1713–16 (worrying that money would be spent without the “mediating influence” of political parties or candidates); Sullivan, *supra* note 6, at 321–22 (suggesting that money will go to issue advocacy).

⁹⁰ See ROSENTHAL, *supra* note 7, at 97 (objecting to a legislator's recusal from matters in which he or she might be accused of having a conflict of interest because “the recused legislator's constituents are denied representation”).

Those candidates who possess substantial personal wealth will still be able to run expensive campaigns. Then pressure for public financing of campaigns may grow in response to the inability of those who lack personal wealth to run for elected office.

The likely alternative means of financing campaigns present the most serious objection to imposing a recusal requirement. I am unaware of anyone who contends that the nation is well served by limiting our choice of political candidates to those who are sufficiently wealthy to pay for their own campaigns. Nor is public financing especially appealing, for reasons that others have already articulated.⁹¹ Nevertheless candidates still need money to campaign for election.

The best solution would be to modify the recusal rule so that it is not triggered by contributions below a certain amount. For example, a candidate could be permitted to accept any contributions below \$100 or \$1,000 and still participate in legislative matters affecting the contributor. The premise of the exception would be that contributions below the stated amount neither corrupt nor provide the appearance of corrupting the candidate who receives them. In other words, a candidate who receives a host of \$1,000 contributions is unlikely to vote a certain way just because some of his or her contributors desire such a vote. Such a threshold finds precedent in suggested solutions to the apparent corruption attending campaign contributions in state judicial elections.⁹² Furthermore, a substantial amount of campaign funds can be collected from individuals or organizations who contribute no more than \$1,000 each. For example, about half of the contributions received by 1998 Senate candidates came from individuals who gave no more than \$1,000 each, with the New York Senate race alone yielding nearly \$25 million in individual contributions.⁹³ The smaller donations encouraged by the

⁹¹ See, e.g., Sullivan, *supra* note 6, at 327–29; Smith, *Faulty Assumptions*, *supra* note 6, at 1084–86; David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 156–57. The case for public financing is made in Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160 (1994). For an overview of the debate, see LOWENSTEIN, *supra* note 30, at 733–82.

⁹² See Banner, *supra* note 68, at 478–83 (proposing that judges should be required to recuse themselves from any case involving an attorney who contributed more than \$1,000 to the judge's campaign); see also *Breakstone v. MacKenzie*, 561 So.2d 1163, 1170–71 (Fla. Dist. Ct. App. 1988) (declining to adopt that proposal because recusal decisions involving campaign contributions must be made on a case-by-case basis).

⁹³ See *1997-98 Top 50 Senate—Contributions from Individuals* (visited Aug. 10, 1999) <<http://www.fec.gov/press/seind98.htm>>.

modified recusal rule may not fully fund increasingly expensive election activities, but neither will they render elections the exclusive province of the independently wealthy.

This would seem to solve the problem of providing a reasonable source of money for election campaigns, except for one tiny problem: it returns us full circle to the status quo. Federal law already limits individual campaign contributions to \$1,000.⁹⁴ That limit, however, has not deterred charges that the existing system of campaign finance is corrupt. Perhaps a lower limit would eliminate the corruption and apparent corruption on the theory that a \$100 contribution is not corrupting even if a \$1,000 contribution is. However, the \$1,000 individual contribution limit set by Congress in 1974 equals less than half of that amount today because of inflation,⁹⁵ which undercuts the force of the argument. Also, a lower limit would exacerbate the difficulties in trying to raise campaign funds when the recusal requirement is in effect.

The scope of the recusal requirement is thus inversely related to the availability of campaign contributions. My proposal here—to require recusal from legislative matters affecting a more than de minimis or general interest of a corporation, PAC, other organization or individual who contributed more than \$1,000—reflects only one way of balancing the need for private campaign contributions with the concern about corruption. A broader application of the rule to all contributions made by all entities would eliminate all corruption, but it would do so at the cost of leaving any viable sources of campaign funds other than personal wealth or public financing. A narrower application of the rule that excludes some contributors or those contributors with only non-economic interests would free up more money for campaigns, but would simultaneously reopen the door to charges of corruption. In other words, the recusal requirement always avoids the First Amendment pitfalls of traditional campaign finance reform proposals, but it must then strike an uneasy bal-

⁹⁴ See 2 U.S.C. § 441a(a)(1)(A) (1994).

⁹⁵ See *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519, 523 n.4 (8th Cir. 1998), cert. granted sub nom. *Nixon v. Shrink Missouri Government PAC*, 119 S. Ct. 901 (1999) (noting that a state contribution limit of \$1,075 established in 1976 was equal to \$378 in 1998 dollars when adjusted by the consumer price index). The failure to periodically adjust a contribution limit for inflation gives rise to its own constitutional claim. *Id.* at 522–23 (judging the constitutionality of the 1976 state contribution limits by their meaning “[i]n today’s dollars”).

ance between avoiding corruption and allowing for the actual funding of campaigns.

IV. THE RECUSAL REQUIREMENT AND THE NATURE OF CORRUPTION

I know that the recusal requirement proposed here would work a dramatic change in the manner in which political candidates and legislatures operate. Recusal of an elected official from a particular matter draws attention already, even when the recusal is because of financial or personal interests. Senator Lott's decision to recuse from the tobacco legislation that was deliberated by Congress in 1997 and 1998 was characterized as "apparently unprecedented."⁹⁶ To require a legislator to recuse himself from participating in legislative business whenever the interests of a campaign contributor would be affected would have the seemingly drastic consequences of either disqualifying countless legislators from voting on certain bills or cutting the flow of campaign money to a trickle. To extend the recusal requirement to the President would be even more drastic.⁹⁷

But drastic measures may be necessary if the existing campaign finance system really is corrupt. Many believe that it is.⁹⁸ That view, however, is not universally held. Indeed, the measure of the existing system of campaign finance depends upon one's definition of "corrupt." The stigma of corruption has been applied to a host of activities, with little agreement about when the label is appropriate.⁹⁹ Thomas Burke offers perhaps the most helpful analysis of the idea of corruption in the context of campaign finance. He distinguishes three types of corruption: (1) a *quid pro quo* in which a legislator takes money in exchange for an official action, (2) a legislator's actions affected by *monetary influence*, and (3) the *distortion* of policymaking by money that causes a legislator to act inconsistently with public opinion.¹⁰⁰

⁹⁶ Henry, *supra* note 46, at 22.

⁹⁷ *Cf. id.* (noting that "it is rare for a President to recuse himself on anything because he has such a wide-ranging impact on policy").

⁹⁸ See *supra* text accompanying notes 10–29.

⁹⁹ See Strauss, *supra* note 91, at 142 (observing that "[t]he claim that the current system of campaign finance is corrupt can mean many things"); Lowenstein, *supra* note 50, at 798–806 (recounting various possible understandings of corruption).

¹⁰⁰ See Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMM. 127, 131 (1997).

The rhetoric about the corruption of the campaign finance system presupposes either the monetary influence or the distortion standard. To the extent that the objectionable corruption is monetary influence, the question becomes whether campaign contributions do in fact influence legislative decision-making. Many simply assume that they do, but the empirical evidence is more highly contested.¹⁰¹ To the extent that the objectionable corruption is the distortion of legislative policymaking, the question then becomes what does an undistorted legislative process look like? Or, more broadly, an understanding of corruption as distortion implicates fundamental theories of representation.¹⁰²

¹⁰¹ The most extraordinary demonstration of the disagreement about the corruption of the existing system occurred during a colloquy between Senator McCain and his Republican colleagues in the Senate who resented the characterization of their activities as corrupt. See 145 Cong. Rec. S12575–S12668 (daily ed. Oct. 14, 1999). For other examples of the contested assumptions and evidence about the corruption of the current campaign finance system, compare Elizabeth Drew, *The Corruption of American Politics: What Went Wrong and Why* (1999), and Justice Souter on *Campaign Cash*, N.Y. TIMES, Oct. 6, 1999, at A22 (reporting that Justice Souter stated during an oral argument in a campaign finance case that “[m]ost people assume, and I do, certainly, that someone making an extraordinarily large contribution gets something extraordinary in return”), and Lowenstein, *supra* note 7, at 306–35 (analyzing the evidence and concluding that “[t]he campaign finance system is corrupt”), and Lowenstein, *supra* note 50, at 826–27 (insisting that “almost no one denies that special interest campaign contributions usually are intended to influence the official acts of recipients” and that “[t]here is also ample anecdotal evidence and some quantitative evidence that contributions do in fact influence official actions”) (footnotes omitted), and J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 618 (1982) (contending that “[w]hatever the cause and effect relationship, studies of issue after issue demonstrate that a much higher percentage of legislators who voted with a PAC’s position received money from that PAC in the previous campaign than those who voted the other way”), with FRANK J. SORAUF, MONEY IN AMERICAN ELECTIONS 307–17 (1988) (examining the evidence and concluding that “there simply are no data in the systematic studies that would support the popular assertions about the ‘buying’ of the Congress or about any other massive influence of money on the legislative process.”), and Smith, *Money Talks*, *supra* note 6, at 58 (indicating that “systematic studies of voting records . . . have found little or no connection between campaign contributions and legislative voting records.”), and Smith, *Faulty Assumptions*, *supra* note 6, at 1071 (concluding that “[t]he available evidence simply does not show a meaningful, causal relationship between campaign contributions and legislative voting patterns.”); see generally ROSENTHAL, *supra* note 7, at 150–51 (suggesting that the results of the empirical studies are inconclusive, but that nearly everyone believes that campaign contributions buy influence); Burke, *supra* note 100, at 139 n.45 (suggesting that “contributions do influence representatives, but less than many suppose. Political scientists have produced a wealth of studies on this question but are only beginning to answer it.”); Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 114 & n.14 (citing empirical studies which show that the influence of campaign contributions “is a lively topic of dispute in political science.”).

¹⁰² For helpful discussions of the relationship between theories of representation and appropriate models of campaign finance, see Burke, *supra* note 100, at 140–48; Lowenstein, *supra* note 50, at 831–43.

The recusal requirement responds to either the monetary influence or the distortion theory of corruption. If the idea of corruption is best limited to the quid pro quo understanding, then the recusal requirement is misguided. Recusal makes sense only if campaign contributions do influence legislative decisions or distort the legislative process in a way that can properly be characterized as corrupt. The wisdom of the recusal requirement thus turns on the resolution of those empirical and theoretical disputes. But the contested meaning of corruption affects more than just the recusal requirement. Proponents of contribution and expenditure limits and other typical features of campaign finance reform claim that their remedies are necessary to eliminate corruption, thereby presuming either the monetary influence or distortion theories of corruption. Even if they are right, the recusal requirement demands that the defenders of more traditional campaign finance reform proposals explain why such measures are better suited to combat corruption than recusal.

The fact that the recusal requirement is designed to combat corruption has one more consequence for the debate over campaign finance reform. Even if the current system is not corrupt, there may be other reasons to promote campaign finance reform. Defenders of campaign finance reform point to the need to free legislators from the distraction of having to raise vast sums of money and the need to equalize the electoral playing field as independent reasons for imposing more stringent contribution and expenditure restrictions.¹⁰³ These arguments are not without force, but they suffer from two possibly fatal shortcomings. First, the Supreme Court views them as inadequate to justify campaign finance regulation.¹⁰⁴ Of course, the Court may be

¹⁰³ See, e.g., 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 (1994) (advancing the distraction argument); Symposium, *Money, Politics, and Equality*, 77 TEX. L. REV. 1603 (1999) (collection of articles analyzing the equalization argument); Foley, *supra* note 20 (advancing the equalization argument). David Strauss has argued that concerns about corruption are really concerns about equality of the democratic process, but that simply returns us to the contested understanding of corruption. See David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1371–75 (1994).

¹⁰⁴ See ISSACHAROFF, KARLAN & PILDES, *supra* note 36, at 645 (noting that “[a]fter *Buckley*, it appeared that the sole legitimate government interest in regulating campaign finance lay in removing the temptation for corruption”); Burke, *supra* note 100, at 127 (agreeing that *Buckley* rejected campaign finance goals “such as equalizing the influence of citizens over elections, limiting the influence of money in electoral politics, or creating more competitive elections”). The Court has shown some—but not too much—flexibility in that position since *Buckley*. See LOWENSTEIN, *supra* note 30, at

wrong, but until it changes its mind, any effort to ground campaign finance reform in the distraction or equalization argument is probably doomed. Second, those arguments do not appear to be as persuasive as the corruption argument. Most accounts of the need for campaign finance reform begin by stating concerns about the corrupting influence of campaign contributions and spending, and turn to the other arguments only once the corruption theme is exhausted. In other words, in the brief that campaign finance reform defenders submit to the public, corruption is the lead argument, and the other arguments are visibly secondary. Whatever momentum campaign finance reform enjoys is primarily attributable to the corruption argument, not to a passionate public desire to relieve legislators of the burdens of raising campaign funds or to assure every political candidate an equal source of campaign funds.

What this means for the recusal requirement is that the dominance of the corruption argument matters. So are campaign contributions corrupting? I am not sure. The rhetoric suggesting that they are masks the other reasons why legislators act as they do and why contributors give money in political campaigns. There are, however, many troubling anecdotal suggestions of the influence of campaign contributions on legislative decisions, though the empirical studies have yielded mixed results. Either way, the recusal requirement renders obsolete traditional campaign finance reform proposals to restrict contributions and expenditures. If the existing system is not corrupt, then the recusal requirement becomes unnecessary, but so do other campaign finance proposals because the alternative justifications for such reform are both rhetorically and constitutionally inadequate. If the existing system is corrupt, then the recusal requirement offers a drastic but understandable remedy that avoids the First Amendment objections to regulating money that is spent to speak. It addresses the influence of money, rather than money itself. It would change the way that contributors, candidates and the legislature do business, but that is precisely the point. Thus if we are concerned that the existing system of financing campaigns is corrupt or that it appears to be corrupt, it is worthwhile to begin considering measures that directly respond to that concern.

541 (observing that "later campaign finance decisions have seemed to show fluctuating attitudes on the Court toward equalizing regulations").

