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Conventional and Unconventional Corruption

M. Patrick Yingling

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Conventional and Unconventional Corruption

*M. Patrick Yingling**

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* Law Clerk to the Honorable D. Michael Fisher, U.S. Court of Appeals for the Third Circuit, 2012-2013; Associate, Reed Smith LLP, 2012; Visiting Lecturer, Moi University School of Law, Kenya, 2011; Juris Doctor, University of Pittsburgh School of Law; Bachelor of Science, Bucknell University. Thanks to Ronald Brand, Vincent Mutai, and Maurice Oduor for their helpful advice. Thanks also to the Moi University School of Law Faculty and the many people associated with the Indiana University House in Eldoret, Kenya. This article was presented at the Creighton University Public International Law and Foreign Affairs Conference, Omaha, Nebraska, March 30, 2012; the American Society of Comparative Law, Younger Comparativists Committee, New Perspectives in Comparative Law Conference, George Washington University Law School, Washington, D.C., April 20, 2012; and the International Public Management Network Innovations in Public Management for Combating Corruption Conference, Honolulu, Hawaii, June 28, 2012. The views expressed in this article are to be attributed only to the author.

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A Prince who wishes to remain in power is often forced to be other than good. When the group whose support he deems vital to his survival is corrupt – be it the common people, the soldiers, or the nobility – he must follow their inclinations in order to satisfy them. In such a case, good deeds become his enemies.

– Niccolo Machiavelli, *The Prince*

The history of government corruption is as old as the history of government itself. Corruption in the public sector, however, is not an unvarying phenomenon; it exists in different forms around the world. This article is concerned with two such forms: “conventional corruption” and “unconventional corruption.”

Conventional corruption occurs when government officials illegally abuse public office for private gain. Illegal *quid pro quo* transactions, including acts of bribery, are examples of conventional corruption. In contrast, unconventional corruption occurs when elected officials make decisions without regard for the public interest, but in lieu of an illegal *quid pro quo* transaction, in order to achieve re-election to public office. This form of corruption often involves decision-making that is undertaken with the purpose of inducing private parties to make contributions and independent expenditures for the benefit of a re-election campaign. Thus, unconventional corruption involves decision-making that is undertaken with the purpose of serving a relatively small group of political *funders* and *spenders*, rather than decision-making that is done with the purpose of serving the *people*.

There is no blanket solution for dealing with both conventional and unconventional corruption. These different forms of corruption require different solutions. Specifically, in regard to conventional corruption, a separation of powers, complete with a system of checks and balances, must exist in government so that laws may be appropriately enacted by the legislature, effectively enforced by the executive, and impartially interpreted by the judi-

ary. When protections against conventional corruption are properly implemented, private parties who have become accustomed to offering bribes (or otherwise inducing conventional corruption) must seek alternative means of achieving their objectives. Such alternative means often take the form of campaign contributions and independent expenditures.

Elected officials in transition countries that have recently implemented protections against conventional corruption are especially susceptible to the influence of campaign contributions and independent expenditures because they can no longer illegally abuse their office to divert public funds for campaign purposes. Elected officials in such countries are thus likely to develop an improper dependency on campaign cash, which leads to an incentive to engage in unconventional corruption. Therefore, once a country effectively reduces conventional corruption, it must then set its sights on combating unconventional corruption. In order to curtail unconventional corruption, the people and their elected representatives must gather the political will to end improper dependencies on large campaign contributions and independent expenditures.

This article will analyze corruption in the United States and Kenya, two countries at different stages in their development, with the purpose of providing solutions based on the specific forms of corruption that have thrived, and continue to exist, within each country. Part I describes the two forms of corruption that are the focus of this article: conventional corruption and unconventional corruption. Part II provides the different solutions for conventional and unconventional corruption. Part III highlights the history of conventional and unconventional corruption in a developed country, the United States, and provides solutions for the United States to effectively combat the unconventional form of corruption that currently flourishes within its borders. Part IV highlights the history of conventional corruption in a developing country, Kenya, and provides solutions for Kenya to effectively combat an inevitable rise in unconventional corruption.

I. DIFFERENT FORMS OF CORRUPTION

A. *Conventional Corruption*

Conventional corruption occurs when government officials illegally abuse public office for private gain. Illegal *quid pro quo*¹ transactions, including acts of bribery, are examples of conventional corruption. Modern institutions and academic scholars typically associate these kinds of activities with the concept of corruption.² This is primarily because conventional corruption, as opposed to unconventional corruption, is illegal by definition.

Conventional corruption can be further broken down into two basic kinds: grand corruption and petty corruption. Grand corruption involves theft or misuse of vast amounts of public resources by government officials.³ This kind of corruption most often originates with high-level officials who recognize and exploit opportunities that are presented through government work.⁴ Because grand corruption involves high-level officials, it is often the subject of popular scandals.⁵ Grand corruption can be perfected in many different ways. For example, government officials might

1. In its definition of "quid," Webster's Third New International Dictionary (1992) references "quid pro quo" and defines it as "something given or received for something else." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1865 (2002).

2. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010) (finding a compelling government interest in combating only "*quid pro quo* corruption"); see also ROBIN THEOBALD, *CORRUPTION, DEVELOPMENT AND UNDERDEVELOPMENT* 15 (Palgrave Macmillan et al. eds., 1989) ("[Corruption is] the illegal use of public office for private gain."); Jakob Svensson, *Eight Questions about Corruption*, J. ECON. PERSP., Summer 2005, at 19, 20 ("A common definition of public corruption is the misuse of public office for private gain. Misuse, of course, typically involves applying a legal standard."). But see RALPH KETCHAM, *FRAMED FOR POSTERITY: THE ENDURING PHILOSOPHY OF THE CONSTITUTION* 58 (Wilson C. McWilliams & Lance Banning eds., 1993) (stating that the universally understood meaning of "corruption" is "the opposite of the public good").

3. Anwar Shah, *Tailoring the Fight Against Corruption to Country Circumstances*, in PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION 231 (2007); Mark Jorgensen Farrales, *What is Corruption?: A History of Corruption Studies and the Great Definitions Debate* 28 (University of California, San Diego Division of Social Sciences, 2005), available at <http://ssrn.com/abstract=1739962>.

4. See James Thuo Gathii, *Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of Law as an Anti-Corruption Strategy in Kenya*, 14 CONN. J. INT'L L. 407, 412 (1999); Kimberly Ann Elliott, *Corruption as an International Policy Problem: Overview and Recommendations*, in CORRUPTION AND THE GLOBAL ECONOMY 175, 178 (Kimberly Ann Elliott ed., 1997), available at http://www.piie.com/publications/chapters_preview/12/10ie2334.pdf.

5. See Monica Davey, *Blagojevich Sentenced to 14 Years in Prison*, N.Y. TIMES (Dec. 7, 2011), <http://www.nytimes.com/2011/12/08/us/blagojevich-expresses-remorse-in-courtroom-speech.html>; David Pallister, *Scandals cast shadow over Kenya's government*, THE GUARDIAN (July 5, 2004), www.guardian.co.uk/world/2004/jul/06/kenya.davidpallister.

issue public contracts to private businesses for excessive prices with an arranged kickback scheme so that both the government officials and the private businesses benefit. Also, government officials might form companies to perform public works projects, put such companies in the names of their friends and family members to avoid detection, win a public contract with an artificially low bid, and then inflate prices to ensure maximum returns.⁶ In addition, it is all too common for government officials to engage in grand corruption by leveraging political banks in order to defraud the unsuspecting public.⁷

In contrast to grand corruption, petty corruption involves isolated transactions by lower-level administrative bureaucrats who abuse their office by demanding bribes, diverting public funds, or awarding favors in return for personal considerations.⁸ The individual transactions that constitute petty corruption may involve very little money, but in the aggregate, can involve a substantial amount of public resources.⁹ Examples of petty corruption include bureaucrats establishing red tape to induce private parties to offer bribes, civil servants withdrawing licenses in an arbitrary manner to create a crisis where bribes can be easily solicited, and court officers jailing people for small, routine offenses so that money can be extorted in return for freedom.¹⁰

B. *Unconventional Corruption*

Unconventional corruption, which is unique to democratic forms of government, occurs when elected officials make decisions without regard for the public interest, but in lieu of an illegal *quid pro quo* transaction, in order to achieve re-election to public office. Thus, unconventional corruption is not necessarily illegal. The fundamental problem with this form of corruption, however, is not its legality; to the contrary, the problem is the incentive that elected officials have to engage in this form of corruption—an incentive that often goes unaddressed.

The label “unconventional” does not imply that this form of corruption occurs less frequently than conventional corruption; in-

6. See PAUL COLLIER, *THE BOTTOM BILLION, WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 138 (2007).

7. PETER N. ANASSI, *CORRUPTION IN AFRICA: THE KENYAN EXPERIENCE* 17 (2004).

8. See Gathii, *supra* note 4, at 412; Elliott, *supra* note 4, at 178, 189.

9. Shah, *supra* note 3, at 231; Farrales, *supra* note 3, at 28.

10. ANASSI, *supra* note 7, at 86, 188.

stead, the label “unconventional” reflects the fact that because acts of unconventional corruption are not necessarily illegal, courts and academics often assume that government power can only be corrupted through traditionally illegal activities, such as *quid pro quo* transactions.¹¹ Corruption, however, does not require such a transaction in order to impose significant costs on society. As will be shown, perhaps the most powerful form of corruption today is the unconventional form, which does not depend on the existence of a *quid pro quo*.¹²

To be clear, the unconventional corrupt act is not the contributing or spending of money by private individuals and entities or the intermediary actions of lobbyists; rather, it is the elected official’s decision to act without regard for the public interest in order to induce private individuals and entities to make contributions and independent expenditures for the benefit of a re-election campaign. Unconventional corruption is not a problem associated with gratitude; it is problem associated with incentives—the wrong incentives. Instead of decisions made with the incentive of serving the public interest, decisions are made with the incentive of receiving future campaign contributions and independent expenditures. The underlying problem is not so much what happens in regard to candidates pre-election but what incentives are offered to officials post-election.¹³ Unconventional corruption, therefore, does not represent an *ex-post* effect whereby elected officials take a position on a particular issue because of past contributions and independent expenditures; to the contrary, it represents an *ex-ante* effect whereby elected officials take a position on a particular issue in anticipation of future contributions and independent expenditures. As Daniel Lowenstein explains, “Legislators know of past contributions *and the possibility of future ones*.”¹⁴ In the same vein, former United States Congressman Eric Fingerhut

11. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010) (finding a compelling government interest in combating only “*quid pro quo* corruption”); THEOBALD, *supra* note 2, at 15 (“[Corruption is] the illegal use of public office for private gain.”); Svensson, *supra* note 2, at 19, 20 (“A common definition of public corruption is the misuse of public office for private gain. Misuse, of course, typically involves applying a legal standard.”). But see KETCHAM, *supra* note 2, at 58 (stating that the universally understood meaning of “corruption” is “the opposite of the public good”).

12. LAWRENCE LESSIG, *REPUBLIC, LOST* 107 (2011).

13. Samuel Issacharoff, *On Political Corruption*, in *MONEY, POLITICS, AND THE CONSTITUTION: BEYOND CITIZENS UNITED* 119, 124 (Monica Youn ed., 2011).

14. LESSIG, *supra* note 12, at 121 (citing Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 *HOFSTRA L. REV.* 301, 325 (1989)) (emphasis added).

acknowledged that “people consciously or subconsciously tailor their views to where they know the sources of campaign funding to be.”¹⁵

Unconventional corruption is not necessarily done by evil souls. Instead, this form of corruption is often practiced by good souls who have intentions of serving a democracy with honor. In order to stay in office and make decisions that benefit the public interest, well-meaning elected officials often believe that it is necessary, in the short-term, to induce private parties to make large contributions and independent expenditures for campaign finance purposes. The unfortunate truth is that these officials lack the nerve to stand up and reform their democratic institutions. In this regard, it must be acknowledged that great societal harm does not always stem from evil intentions; sometimes it comes from timid, or even pathetic, souls.¹⁶

Unconventional corruption, as described, has been classified as a subset of *political corruption*, whereby the decisions of elected officials are affected by legal and illegal campaign contributions.¹⁷ Unconventional corruption is also similar to, but not the same as, *negative corruption*, whereby government officials make biased decisions in order to avoid incurring the wrath of a powerful actor, such as a politician or a private businessperson with connections sufficient to have the official transferred, reprimanded, or even charged with a crime.¹⁸ Lawrence Lessig, in *Republic, Lost*, describes this form of non-*quid pro quo* corruption as *dependence corruption*, due to elected officials’ dependence on campaign contributions and independent expenditures in order to be re-elected.¹⁹ As Lessig insightfully observes, elected officials in a democracy should be dependent upon *the people alone*, but they can sometimes be distracted by a competing dependency on money

15. *Id.* at 149 (citing MARTIN SCHRAM, *SPEAKING FREELY: FORMER MEMBERS OF CONGRESS TALK ABOUT MONEY IN POLITICS* 48-49 (1995)).

16. *Id.* at 7.

17. Shang-Jin Wei, *Corruption in Economic Development: Beneficial Grease, Minor Annoyance, or Major Obstacle?* 4 (World Bank Policy Research), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=604923 (describing political corruption, as opposed to corruption involving bribery, as vote buying in an election or decisions that are affected by legal and illegal campaign contributions by the wealthy and other special interest groups to influence laws and regulations).

18. Rob Jenkins, *The Roles of Political Institutions in Promoting Accountability*, in *PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION* 135, 142 (2007).

19. LESSIG, *supra* note 12, at 17 (citing Richard L. McCormick, *The Discovery That Business Corruptions Politics: A Reappraisal of the Origins of Progressivism*, 86 AM. HIST. REV. 247, 265 (1981)).

for re-election purposes, which is an improper dependency.²⁰ Elected officials can only feed this improper dependency if they can provide something of value to their suppliers, who are often large private entities or lobbyists.²¹

Unconventional corruption is associated with lobbying efforts, but lobbying and unconventional corruption are not identical concepts. There are two basic reasons for this: first, unconventional corruption is limited to acts of elected officials, while lobbying encompasses the acts of private individuals and entities outside of government; second, lobbying is not merely the private counterpart to unconventional corruption; it is a broader concept that can involve things other than making campaign contributions and independent expenditures. For example, lobbying can also involve the offering of expertise to government officials.²² More than ever before, many lobbyists are just highly-compensated policy wonks who are extremely knowledgeable in a particular field.²³

Still, lobbying is relevant to unconventional corruption. Lobbyists can provide campaign contributions to elected officials directly. In addition, lobbyists can arrange for elected officials to receive campaign contributions indirectly, acting as intermediaries between the officials and their clients. Admittedly, there is a coherent and sensible argument to be made that money from lobbyists does not literally buy an election; it merely buys speech that helps persuade voters to side with one candidate over another.²⁴ The problem with unconventional corruption, however, is not what the money does; rather, it is what has to be done in order to obtain the money. The money does not necessarily contradict democratic principles. What must be done to secure the money, however, corrupts a democracy to its core.²⁵

Unconventional corruption is most often associated with developed countries. Developing countries usually have more fundamental problems associated with conventional corruption. However, when protections against conventional corruption are properly implemented, and countries begin to develop economically and politically, private parties who have become accustomed to offer-

20. *Id.* at 19-20.

21. *Id.* at 104.

22. Nauro F. Campos & Francesco Giovannoni, *Lobbying, Corruption and Political Influence*, 131 PUB. CHOICE 1, 1 (2007).

23. LESSIG, *supra* note 12, at 103.

24. *Id.* at 161.

25. *Id.* at 161-62.

ing bribes (or otherwise inducing conventional corruption) must seek alternative means of achieving their objectives. These alternative means often include campaign contributions and independent expenditures, which can be important alternative instruments of influence to conventional corruption in transition countries.²⁶ Elected officials in such countries are especially susceptible to the influence of campaign contributions and independent expenditures because they can no longer illegally abuse their offices with the purpose of diverting public funds for campaign purposes. Therefore, as is argued below in the case of Kenya, once a country effectively reduces conventional corruption, it must then set its sights on combating unconventional corruption.

II. SOLUTIONS FOR CONVENTIONAL AND UNCONVENTIONAL CORRUPTION

A. *Solutions for Conventional Corruption*

In order to curb conventional corruption, the people must impose upon their government a separation of powers, complete with a system of checks and balances. When powers are separated and limited, the government can effectively enact laws prohibiting public officials from abusing office, enforce such laws, and impartially determine when the laws have been violated. In such a system, each branch of government has an independent, but restricted, role to play.²⁷

The first step in combating conventional corruption is to separate powers within government. This principle, where the legislative, executive, and judicial functions of government are divided among separate and independent bodies, has long been a cornerstone of governance in democratic nations.²⁸ In fact, arguments

26. See Campos, & Giovannoni, *supra* note 22, at 2-3; Bård Harstad & Jakob Svensson, *Bribes, Lobbying and Development* 27 (Centre for Economics Policy Research Discussion Paper, 2006) (“[F]irms prefer bribing to lobbying early in the development process but at later states . . . they are more likely to lobby the government.”) (published as Bård Harstad & Jakob Svensson, *Bribes, Lobbying and Development*, 105 AM. POL. SCI. REV. 46 (2011)).

27. Victoria Nourse, *Toward a “Due Foundation” for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447, 451 (1996) (citing THE FEDERALIST NO. 51, at 322-23 (James Madison) (Clinton Rossiter ed., 1961)) (“[T]he most important requirement for a system of separated institutions is a set of independent persons exercising incomplete power.”).

28. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L. J. 1725, 1732 (1996); James E. Alt & David Dreyer Lassen, *Political and Judicial Checks on Corruption: Evidence from American State Governments* 1 (EPRU, Working Paper No. 2005-12, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=816045.

that a separation of powers can curtail corruption date back to Locke, Montesquieu, and the framers of the United States Constitution.²⁹

Conventional corruption is a problem that is most often associated with the executive branch of government. Executive branch officials who carry out the laws are in a unique position to engage private parties in *quid pro quo* transactions whereby public funds become diverted from their intended use. A distribution of power between the executive and the legislature prevents corruption by enabling the legislature to challenge the actions of executive branch officials.³⁰ As Montesquieu wrote in *The Spirit of Laws* in the 18th century, “When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.”³¹

A separation of powers between the executive and the judiciary is also imperative to combat conventional corruption. If the judiciary is subject to the whims of the executive, then corrupt executive branch officials are not likely to be held accountable.³² A judiciary is ineffective if it is not independent.³³ Without independence, the judge is simply an impotent actor who enables the executive to exercise oppressive and corrupt power. In recognition of this, Montesquieu wrote that “[i]f [the judiciary] were joined to executive power, the judge could have the force of an oppressor.”³⁴

In itself, however, a system of separation of powers does not prevent the misuse of power. Procedures that enable actors to stop or block the actions of other actors are required to prevent the misuse of power.³⁵ Such procedures, known as checks and balances, empower the separate actors of government to contest each

29. Omar Azfar & William Robert Nelson Jr., *Transparency, Wages, and the Separation of Powers: An Experimental Analysis of Corruption*, 130 PUB. CHOICE 471, 486 (2007).

30. Migai Akech, *Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?*, 18 IND. J. GLOBAL LEGAL STUD. 341, 349 (2011) (citing N.W. Barber, *Prelude to the Separation of Powers*, 60 CAMBRIDGE L. J. 59, 61 (2001)).

31. MONTESQUIEU, *THE SPIRIT OF LAWS* 157 (Anne M. Cohler, Basia C. Miller & Harold S. Stone eds. and trans., Cambridge University Press 1989) (1748).

32. See generally Akech, *supra* note 30.

33. Sahr J. Kpundeh, *Political Will in Fighting Corruption*, in CORRUPTION AND INTEGRITY IMPROVEMENT INITIATIVES IN DEVELOPING COUNTRIES 91, 102 (2007), available at <http://mirror.undp.org/magnet/Docs/efa/corruption/Chapter06.pdf>; Elliott, *supra* note 4, at 210-11.

34. MONTESQUIEU, *supra* note 31, at 157.

35. COLLIER, *supra* note 6, at 147; KETCHAM, *supra* note 2, at 108.

other's corrupt actions. Checks are exercised, for example, through vetoes, judicial review, or regulatory oversight, with the aim of preventing misuse of power.³⁶ These procedures limit the ability of any one political faction to dominate the government for its own benefit.³⁷ For example, when the legislature is given oversight over the executive, friction is created between the branches, thereby enabling the executive to be held accountable.³⁸ In addition, checks and balances ensure that no single institution can thwart an investigation into illegal activity.³⁹ On checks and balances, Montesquieu wrote, "So that one cannot abuse power, power must check power by the arrangement of things."⁴⁰ Also, James Madison, who drew upon the writings of Montesquieu, stated that formal checks and balances "oblige the government to control itself."⁴¹

The primary focus of efforts to fight conventional corruption in the past has been the promotion of democratic elections.⁴² The idea has been that if an elected official engages in corrupt conduct, the public can simply express its dissatisfaction by voting the official out of power, thereby giving incentives against corruption. The mere existence of democracy, however, is neither an absolute cure nor an impermeable barrier to corruption.⁴³ In order to control conventional corruption, a democracy must also have a separation of powers with checks and balances that limit the power of a government once elected. Paul Collier writes, "Some of the rules of democracy do indeed determine how power is *achieved*, and that's where elections come in. But other rules of democracy limit how power is *used*. These rules are concerned with checks and balances on government abuse of power."⁴⁴ Once power is *achieved*, the winner of an election cannot be given an opportunity

36. Alt & Lassen, *supra* note 28, at 1.

37. Kpundeh, *supra* note 33.

38. Akech, *supra* note 30 (citing Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L. J. 2314 (2006)).

39. Kpundeh, *supra* note 33, at 105.

40. MONTESQUIEU, *supra* note 31, at 155; Flaherty, *supra* note 28, at 1766 ("Montesquieu, the authority used by the critics, had not advocated a separation of powers pure and simple.").

41. KETCHAM, *supra* note 2, at 31 (quoting THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961)).

42. See COLLIER, *supra* note 6, at 146.

43. *Id.* at 146; Kpundeh, *supra* note 33, at 92.

44. COLLIER, *supra* note 6, at 44.

to use power in a corrupt manner to crush the defeated.⁴⁵ If there are no limits on the power of the victor, the election becomes a matter of life and death in which the contestants are driven to extremes.⁴⁶

The public does not often adore a political leader who engages in corrupt practices. Therefore, without checks and balances, a political leader who engages in corrupt practices while in office will likely engage in further corrupt practices leading up to an election, such as miscounting votes, in order to stay in power.⁴⁷ The recent history of Kenya, a country without effective checks and balances until very recently, provides an illustrative example of this phenomenon.⁴⁸ In the lead up to the election of 2007, there was an expectation of victory for Kenya's political opposition, and as the regional constituency results came in, the opposition appeared destined to win the presidency.⁴⁹ However, by the time the votes of these constituencies were added to the national total by the electoral commission, the incumbent president had won by a narrow margin.⁵⁰ In one district, the vote for the president had first been announced as 50,145 before being entered as 75,261 in the final tally.⁵¹ In another district, turnout was first shown at 115%, but was later changed to 85%.⁵² This example from Kenya shows that democracy, like other systems of governance, is simply a set of rules guiding the appointment of power and conduct of transitions.⁵³ The benefits can only be realized with an adequate system of checks and balances.

45. See, e.g., DANIEL BRANCH, *KENYA: BETWEEN HOPE AND DESPAIR, 1963-2011* 228-29 (2011) (describing Kenya's lack of restraints on the power of the executive during the Moi regime, and stating that "[o]nce the [1997] election results became known and ethnic voting patterns widely circulated, various individuals and communities set out to settle scores and punish groups seen to have been treacherous").

46. PAUL COLLIER, *WARS, GUNS, & VOTES, DEMOCRACY IN DANGEROUS PLACES* 15 (2009).

47. See *id.* at 35-36.

48. See James T. Gathii, *Kenya's Long Anti-Corruption Agenda - 1952-2010: Prospects and Challenges of the Ethics and Anti-Corruption Commission Under the 2010 Constitution*, 64 (Albany Law Sch. Legal Studies Research Paper Series, Working Paper No. 35, 2010), available at <http://ssrn.com/abstract=1718620> ("The President and his incumbent ministers may have even resorted to corruption to retain their hold on Kenyan politics in the 2007 Presidential elections.").

49. BRANCH, *supra* note 45, at 266-77; COLLIER, *supra* note 46, at 36.

50. BRANCH, *supra* note 45, at 270; COLLIER, *supra* note 46, at 36;

51. COLLIER, *supra* note 46, at 36.

52. TED DAGNE, CONG. RESEARCH SERV., RL34378, *KENYA: CURRENT CONDITIONS AND THE CHALLENGES AHEAD* 8 (2011), available at www.fas.org/sgp/crs/row/RL34378.pdf.

53. Kpundeh, *supra* note 33, at 93.

B. *Solutions for Unconventional Corruption*

While long-term solutions in regard to conventional corruption can be derived from a separation of powers with checks and balances, such solutions are not sufficient to combat unconventional corruption. This form of corruption does not involve a violation of law; rather, it involves a violation of virtue. As Montesquieu wrote, "It is not only crimes that destroy virtue, but also . . . the seeds of corruption, that which does not run counter to the laws but eludes them, that which does not destroy them but weakens them: all these should be corrected by censors."⁵⁴ In our modern society, lobbyists and campaign cash are the "seeds of corruption," and they require censors.

The first step towards combating unconventional corruption is to establish rules that require elected officials to disclose the source of their campaign contributions.⁵⁵ Effective disclosure rules require that candidates report their contributions to the public in a timely manner.⁵⁶ With such rules, the voting public gains necessary access to information that may be indicative of an elected official's tendencies to act against the public interest.⁵⁷

Disclosure rules, however, although necessary, are not sufficient for eliminating unconventional corruption. As has been described by Marcos Chamon and Ethan Kaplan, the influence of campaign contributions may be independent of any actual amounts contributed because the influence could also depend on the credible threat of contributions to benefit the elected official's opponent.⁵⁸ For example, imagine that a corporation announced that it intended to contribute and spend millions of dollars to defeat any elected official who supported an increase in the capital gains tax.

54. MONTESQUIEU, *supra* note 31, at 71.

55. See COLLIER, *supra* note 6, at 149 ("Probably parliaments should also set some ceilings on contributions, and require some transparency in party finances. This is not a very ambitious agenda, but it would at least get the issue of campaign finance started.")

56. USAID OFFICE OF DEMOCRACY AND GOVERNANCE, MONEY IN POLITICS HANDBOOK: A GUIDE TO INCREASING TRANSPARENCY IN EMERGING DEMOCRACIES 15 (2003), available at http://transition.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacr223.pdf.

57. See *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) ("[Disclosure] allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predications of future performance in office.")

58. LESSIG, *supra* note 12, at 258 (citing Marcos Chamon & Ethan Kaplan, *The Iceberg Theory of Campaign Contributions* 2-5 (Apr. 2007) (on file with the University of Stockholm), available at http://people.su.se/~ekapl/jmp_final.pdf).

If an official learned of the corporation's intent and decided to change his or her position in regard to the capital gains tax, there would be little doubt that such change was the result of the corporation's threat. Disclosure rules, however, would not be able to quantify the corporation's influence or the official's unconventional corruption.

In order to effectively combat this corrupting influence, contributions must be limited in their amounts. As recognized by Samuel Issacharoff, problems arise "when there are only a few large donors, not when there are many donors who may be substantial but not critical."⁵⁹ This is not to say that campaign contributions must be prohibited. In fact, it is critical that contributions not be totally prohibited, otherwise candidates for public office, who are not independently wealthy, would lack the ability to communicate their message to their constituencies. To the extent that this remains a concern when campaign contributions are merely limited in their amounts, a public financing system of elections provides an effective remedy. Under such a system, candidates who collect a set number of signatures and small contributions become eligible to receive substantial amounts of public funding for their campaigns as long as they agree not to accept private contributions over a specified amount. A public financing system, in order to be successful, must provide candidates with enough money to control the agenda of their campaigns.⁶⁰

Although public financing of elections, as described, addresses problems of unconventional corruption associated with contributions, it does not necessarily solve the problems associated with independent expenditures. In order to effectively combat unconventional corruption, both contributions and independent expenditures must be limited. Unfortunately, in countries with strong protections for free speech, restrictions on independent campaign expenditures sometimes receive pushback from the courts.⁶¹ A common argument is that money spent on campaign activities is the equivalent of political speech, which, in order to maintain a proper democracy, should only be limited in the most rare of circumstances.⁶² Prevention of corruption and preservation of de-

59. Issacharoff, *supra* note 13, at 133.

60. *Id.*

61. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

62. *See, e.g., id.* at 898 ("Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"); *Buckley*, 424 U.S. at 14 ("The

mocracy are deserving circumstances. Courts, however, do not always agree with this conclusion. If and when this roadblock occurs, reformers concerned with the effects of unconventional corruption must gather the political will to amend and clarify the principles of their democracy.⁶³

III. CORRUPTION IN THE UNITED STATES

A. *Conventional Corruption in the United States*

In regard to conventional corruption, the United States is a success. From the beginning, Americans have shared a suspicion of government power.⁶⁴ The people have cooperated to build and sustain a government that is not easily undermined by conventional corruption. This is not to say that the United States has not experienced conventional corruption. Even well-established safeguards can give way to abuses.⁶⁵ Congressmen associated with lobbyist Jack Abramoff, who pled guilty to corrupting public officials, were certainly involved with conventional corruption.⁶⁶ More recently, Rod Blagojevich, the former Governor of Illinois, was sentenced to fourteen years in prison on eighteen counts of corruption, which included trying to sell or trade the Senate seat that became vacant when Barack Obama was elected president.⁶⁷ But in this basic form, such crimes are rare in the United States. Bribery at the federal level has nearly vanished. There are, undoubtedly, a handful of public officials exchanging government

Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on qualifications of candidates are integral to the operation of the system of government established by our Constitution.").

63. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 34 (1998) ("Had not Machiavelli and Sidney both written that 'all human Constitutions are subject to Corruption and must perish, unless they are *timely renewed* by reducing them to their first Principles?").

64. COLLIER, *supra* note 46, at 199.

65. CENTRE FOR LAW AND RESEARCH INTERNATIONAL, *THE ANATOMY OF CORRUPTION IN KENYA: LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES* 38 (Kivutha Kibwana et al. eds., Clairpress 1996) (quoting Sadir Rasheed, *Conclusion: Towards an Agenda for Action in Enhancing Ethics and Accountability in African Public Services*, in *ETHICS AND ACCOUNTABILITY IN AFRICAN PUBLIC SERVICES* 301 (Sadig Rasheed & Dele Olowu eds., 1993)).

66. See *60 Minutes: Jack Abramoff: The Lobbyist's Playbook* (CBS television broadcast Nov. 6, 2011), available at <http://www.cbsnews.com/video/watch/?id=7387331n> (transcript of interview available at http://www.cbsnews.com/8301-18560_162-57319075/jack-abramoff-the-lobbyists-playbook/?tag=currentVideoInfo;videoMetaInfo).

67. Davey, *supra* note 5.

favors for private kickbacks, but these individuals are few and far between.⁶⁸

Conventional corruption has been kept at a minimum due to the structure of government that is provided by the Constitution. As Zephyr Teachout has written, the Framers of the Constitution had an obsession with corruption.⁶⁹ More than anything else, the Framers envisioned the Constitution as providing a structure to fight corruption.⁷⁰ According to Teachout, corruption was discussed “more often in the Constitution Convention than factions, violence, or instability.”⁷¹ As the Constitutional Convention commenced, George Mason proclaimed, “If we do not provide against corruption, our government will soon be at an end.”⁷² Mason’s concern was echoed by many voices throughout the summer of 1787. There was near unanimous agreement that corruption had a degenerative effect on democracy.⁷³ In fact, according to James Madison’s notes, fifteen delegates at the Constitutional Convention used the term “corruption” no less than 54 times.⁷⁴

To the Framers, a key component of a government without corruption was the separation of powers.⁷⁵ The Framers understood that one branch could become dependent upon another and that private citizens might be tempted to create dependent and corrupt public officials. Therefore, powers were divided in order to create a structural maze in the Senate, House, Judiciary, and Presidency so that private citizens looking to own public officials would find it

68. LESSIG, *supra* note 12, at 8.

69. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 347 (2009). *But see* Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout’s Anti-Corruption Principle*, 107 NW. U. L. REV. 399, 404-10 (2012) (arguing that the Framers were not obsessed with corruption).

70. Zephyr Teachout, *The Unenforceable Corrupt Contract: Corruption and Nineteenth Century Contract Law*, in *BEYOND CITIZENS UNITED*, *supra* note 13, at 135, 148-49.

71. Teachout, *supra* note 69, at 352.

72. Notes of Robert Yates (June 23, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 391, 392 (Max Farrand ed., 1911) [hereinafter *FARRAND’S RECORDS*], available at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php?title=1785&Itemid=99999999.

73. James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. POL. 174, 181 (1994).

74. *Id.* at 177; *see also* John M. Murrin, *Escaping Perfidious Albion: Federalism, Fear of Aristocracy, and the Democratization of Corruption in Postrevolutionary America*, in *VIRTUE, CORRUPTION, AND SELF-INTEREST: POLITICAL VALUES IN THE EIGHTEENTH CENTURY* 103, 104 (Richard K. Matthews ed. 1994) (stating that at the Founding, concern over corruption was “the common grammar of politics”).

75. Nourse, *supra* note 27, at 459.

too onerous to buy off enough of them.⁷⁶ Thus, the separation of powers comported with Alexander Hamilton's view that "[n]othing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption."⁷⁷

The Framers' views on the separation of powers were primarily sourced from the writings of Montesquieu, whose name appears more frequently than any other authority in all of the literature on the Constitution.⁷⁸ Montesquieu was cited often by the delegates to the Constitutional Convention and his philosophy permeated their debates.⁷⁹ Corruption plays the lead antagonist to a flourishing polity in Montesquieu's writings.⁸⁰ For example, Book 8 of *The Spirit of Laws* is devoted solely to corruption within government. In Chapter I of Book 8, Montesquieu clearly states that "[t]he corruption of each government almost always begins with that of its principles."⁸¹

The Framers' concern for corruption can be seen not only in regard to having a separation of powers between and within the branches; it can be seen throughout the Constitution. A concern for corruption played a notable role in the drafting of Article I of the Constitution with regard to the legislature. The Framers were especially concerned about the prevalence of corruption in a small legislative body. According to Akhil Reed Amar, the Framers "feared that members of an overly select House would become targets for bribery and corruption"⁸² James Wilson specifically warned that "it is a lesson we ought not to disregard, that the smallest bodies are notoriously the most corrupt."⁸³ Notably, George Washington's only contribution to the Constitutional Convention arose in the context of the size of the House of Representa-

76. Teachout, *supra* note 69, at 381.

77. THE FEDERALIST No. 68, at 411 (Alexander Hamilton) (Clinton Rossiter ed, 2003).

78. Flaherty, *supra* note 28, at 1764; Teachout, *supra* note 69, at 351; Duane Smith, *An Introduction to the Political Philosophy of the Constitution*, CENTER FOR CIVIC EDUCATION, <http://www.civiced.org/papers/political.html> (last visited Jan. 23, 2013) (stating that "[t]he modern reader must be struck, for instance, by the frequency with which the authors of the numerous pamphlets and newspaper articles published during the ratification controversy, appealed to the authority of the man they called 'the celebrated Montesquieu'").

79. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 7 (1986).

80. Teachout, *supra* note 69, at 347.

81. MONTESQUIEU, *supra* note 31, at 112.

82. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 78 (2005).

83. Notes of James Madison (June 16, 1787), in 1 FARRAND'S RECORDS, *supra* note 72, at 249, 254.

tives. Washington “dramatically intervened”⁸⁴ and argued that the House should be larger, to ensure accountability to the people.⁸⁵ The Framers thus decided to make the House larger to protect against corruption.⁸⁶

In addition, some of the Convention’s most heated discussions involved Article I’s Ineligibility Clause. There was a concern that the executive’s power to appoint legislators to civil service positions would cause an improper legislative dependency on the executive.⁸⁷ As recognized by Forrest McDonald, corruption was the primary focus of the Convention’s debates surrounding the ineligibility of Congressmen to hold other offices.⁸⁸ Pierce Butler, arguing against the executive’s ability to appoint legislators to civil service positions, stated, “Executive may be as corrupt as Legislature – It would place too pervading an Influence in him.”⁸⁹

In order to address such concerns of corruption, Article I, Section 6, Clause 2 of the United States Constitution provides that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”⁹⁰ At the Convention, the delegates explained that this provision would “preserv[e] the Legislature as pure as possible, by shutting the door against appointments of its own members to offices, which was one source of its corruption.”⁹¹ Specifically, James McHenry

84. AMAR, *supra* note 82, at 80 (“[Washington] urged the delegates to reconsider the issue of House size. ‘It was,’ he said, ‘much to be desired that the objections to the plan recommended might be as few as possible – The smallness of the proportion of Representatives had been considered by many members of the Convention, and insufficient security for the rights & interests of the people.’”).

85. Teachout, *supra* note 69, at 356 (citing Savage, *supra* note 73).

86. *Id.* at 356; AMAR, *supra* note 82, at 80 (“The parchment, which had already been prepared for the signing ceremony, was hastily revised by substituting a maximum of one representative for every ‘thirty’ thousand constituents instead of ‘forty’ as had initially been proposed. (The parchment smudge remains visible today.)”). Corruption, in addition to being a reason for increasing the size of the House, was also a focal point in regard to the duration of a legislator’s term in office. In arguing (unsuccessfully) against a limit for a senator’s term in office, Alexander Hamilton stated that “[i]n Republics trifling Characters obtrude – they are easily corrupted – the most Important Individuals ought to be drawn forth for Government – this can only be effected by establishing upper House for good Behaviour.” Notes of John Lansing (June 18, 1787), in SUPPLEMENT TO MAX FARRAND’S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 82, 84 (James H. Hutson ed., 1987) [hereinafter FARRAND’S RECORDS SUPP.].

87. LESSIG, *supra* note 12, at 129.

88. McDONALD, *supra* note 79, at 199.

89. Notes of John Lansing (June 23, 1787), in FARRAND’S RECORDS SUPP., *supra* note 86, at 109.

90. U.S. CONST. art. I, § 6, cl. 2.

91. Notes of James Madison (June 23, 1787), in 1 FARRAND’S RECORDS, *supra* note 72, at 385, 386.

explained that the purpose of the provision was “to avoid as much as possible every motive for Corruption”⁹²

The Framers’ concern for corruption can also be seen in Article II of the Constitution, which details the powers of the executive branch. The executive’s power to appoint judicial officers was seen as a potential avenue for corruption. The initial draft of the Constitution had no requirement for the approval of appointments.⁹³ In light of this, James Madison suggested that the Senate approve judicial appointments in order to forestall “any incautious or corrupt nomination by the Executive.”⁹⁴ As a result, Article II, Section 2 of the Constitution requires that the Senate approve judicial appointments.⁹⁵

The impeachment process was also intended to guard against corruption in the executive branch.⁹⁶ In fact, in early drafts of the Constitution, a president could be impeached for “Treason[,] bribery[,] or Corruption.”⁹⁷ Although the provisions of Article II regarding presidential selection were aimed at preventing a corrupt or easily corruptible leader from reaching the pinnacle of power,⁹⁸ the Framers recognized that even the best of selection systems might occasionally fail.⁹⁹ If a President could not be removed from office until the next election, a President’s “loss of capacity or corruption . . . might be fatal to the Republic.”¹⁰⁰

The Framers’ concern for corruption also extended to the judiciary. An independent judiciary was seen as critical to a thriving republic. The determination that judges could hold their offices only during good behavior meant that corruption would not be viewed with a blind eye.¹⁰¹ Juries were another means of curtailing corruption. Elbridge Gerry “urged the necessity of Juries to

92. James McHenry’s Speech to Maryland State House of Delegates (Nov. 29, 1787), in 3 FARRAND’S RECORDS, *supra* note 72, at 144, 148.

93. Teachout, *supra* note 69, at 365.

94. Notes of James Madison (July 18, 1787), in 2 FARRAND’S RECORDS, *supra* note 72, at 40, 42-43.

95. U.S. CONST. art. II, § 2.

96. Teachout, *supra* note 69, at 367.

97. See, e.g., The Pinckney Plan, in 3 FARRAND’S RECORDS, *supra* note 72, at 595, 600; Edmund Randolph: Draft Sketch of Constitution (July 26, 1787), in FARRAND’S RECORDS SUPP., *supra* note 86, at 183, 189-90; AMAR, *supra* note 82, at 200 (“Early drafts in Philadelphia had provided for impeachment in noncriminal cases of ‘mal-practice or neglect of duty’ and more general ‘corruption.’”).

98. AMAR, *supra* note 82, at 154, 198.

99. *Id.* at 198.

100. Notes of James Madison (July 20, 1787), in 2 FARRAND’S RECORDS, *supra* note 72, at 63, 66.

101. Teachout, *supra* note 69, at 369.

guard [against] corrupt Judges.”¹⁰² Unlike individual judges, who could be easily compromised, juries were larger, and therefore more difficult to corrupt.¹⁰³ Juries also did not depend upon their role for their livelihood, which created fewer temptations.¹⁰⁴ As a result of the Framers’ obsession, the United States gained a structure of government that has protected the people against a great deal of conventional corruption.

B. *Unconventional Corruption in the United States*

1. *The Framers’ Definition of Corruption*

If conventional corruption were the only possible form of corruption, then the United States is a success – it does not have a corrupt government. Unfortunately, corruption has an “unconventional” form, and in the United States, it is rampant. The United States government, in this regard, is very corrupt, in spite of the fact that the Framers were obsessed with fighting corruption.¹⁰⁵ This is unfortunate because the Framers’ obsession was not solely focused on “conventional corruption”; rather, it also encompassed what has been termed “unconventional corruption.”¹⁰⁶

Ultimately, the Framers intended to ensure the integrity and virtue of public officials.¹⁰⁷ The term “corruption,” according to the Framers, represented the use of government power in “the displacement of the public good by private interest.”¹⁰⁸ Thus, corruption meant much more than illegal theft, which was covered by the term “peculation.”¹⁰⁹ Gouverneur Morris explicitly stated that the corruption concern encompassed lawful abuses of power, not mere-

102. Notes of James Madison (September 12, 1787), in 2 FARRAND’S RECORDS, *supra* note 72, at 585, 587.

103. AMAR, *supra* note 82, at 413.

104. Teachout, *supra* note 69, at 369.

105. *Id.* at 345.

106. See Lawrence Lessig, *Democracy After Citizens United*, BOSTON REV. (Sept/Oct. 2010), <http://bostonreview.net/BR35.5/lessig.php> (referring to the Framers’ concern for protecting public officials from becoming dependent upon anything other than the people alone).

107. See MCDONALD, *supra* note 79, at 71-72.

108. KETCHAM, *supra* note 2, at 58; see also Issacharoff, *supra* note 13, at 126 (“The Framers appear to have conceptualized corruption as a derogation of the public trust more than as the narrow opportunity for surreptitious gain.”).

109. Teachout, *supra* note 69, at 375 (quoting Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 KAN. L. REV. 1, 48 (2003)).

ly unlawful abuses or “usurpations.”¹¹⁰ At the core of the Framers’ emphasis on integrity and virtue was the idea that public officials should be dependent upon the *people* alone,¹¹¹ rather than political *funders* and *spenders*. Federalist Tench Coxe, in defense of the Constitution, emphasized that “[t]he people will remain . . . the fountain of power and public honour. The president, the Senate, and the House of Representatives . . . will be the channels through which the stream will flow – *but it will flow from the people, and from them only.*”¹¹²

Of course, the Framers’ beliefs should not always be determinative when analyzing modern issues.¹¹³ Many of the Framers had beliefs that do not comport with contemporary notions of freedom and justice.¹¹⁴ It is helpful, however, to use the Framers’ ideas as the standard against which to judge current practices.¹¹⁵ If the standard appears to be just or sensible, then Americans should ask whether any deviation from that standard is something to praise or condemn.¹¹⁶ If current laws allow for the integrity of elected officials to be continually compromised to the point where the interests of a relatively small group of political *funders* and *spenders* are elevated over the interests of the *people*, then Americans must ask whether such laws are inhibiting the kind of democracy that the Framers envisioned.

110. Notes of James Madison (July 19, 1787), in 2 FARRAND’S RECORDS, *supra* note 72, at 51, 52.

111. See THE FEDERALIST NO. 52 (James Madison) (emphasis added).

112. Flaherty, *supra* note 28, at 1804 (quoting Tench Coxe, *An Examination of the Constitution for the United States of America*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 131, 147 (Paul L. Ford ed., Da Capo Press 1968) (1888)) (emphasis added).

113. See Tillman, *supra* note 69, at 410 (criticizing the original intent approach to constitutional interpretation in regard to corruption and stating, “The democratically enacted public text of the Constitution recedes, only to be replaced by amorphous normative principles whose contours are ‘discovered’ in documents that were not widely – or even publicly – available during the ratification process. If those normative principles have deep support in the present day, they might have some strong claim on the modern interpreter. But a generalized fear that the other is corrupt or disloyal seems an odd and, perhaps, a dangerous place to begin our long march back to the lost world of 1787.”).

114. LESSIG, *supra* note 12, at 131 (“Of course, just because the Framers believed in something does not make it right. They (or many of them) believed in slavery. Most believed in bloodletting. They thought it absurd to imagine a woman as president.”).

115. Flaherty, *supra* note 28, at 1745 (“Nearly every theory of constitutional interpretation . . . agrees that history merits some consideration.”).

116. LESSIG, *supra* note 12, at 131.

2. *The Effect of Money and Lobbying in Modern Campaigns*

The problem of unconventional corruption in the United States is related to the staggering amount of money involved in modern campaigns. In 2008, the average amount required to run for re-election in the House of Representatives was \$1.3 million, 23 times the average amount in 1974.¹¹⁷ Why such an increase? One of the primary reasons is the advance in campaign technology (and the costs of such technology). Modern campaigns that are dependent on pollsters, consultants, and television commercials are many times more expensive than the simpler campaigns of the past. As technologies have advanced, incumbents have required more money than ever before to run for re-election.¹¹⁸ Consequently, many of these elected officials have developed a dependency upon contributions and independent expenditures—a dependency that the Framers would have deemed improper.

In addition to problems of integrity, this development has also produced problems in the realm of public policy. As fundraising has become more important, elected officials have shifted to the political extremes. It is now obvious that a strong message to the party base is more likely to induce a financial response than a sensible, moderate message to the middle. In other words, extremism pays—literally.¹¹⁹ As Bertram Johnson's study concludes, "An incumbent's ideological extremism improves his chances of raising a greater proportion of funds from individual donors"¹²⁰ So long as there is a constant demand for campaign cash, elected officials will communicate the message that stimulates the most money, even if that message does not truly represent the elected official's view of what is best for the people.¹²¹

Lobbying has played a key role in the rise of unconventional corruption in the United States. Lobbying, although not new to the United States, has undergone a transformation in recent

117. *Id.* at 91 (citing ARIANNA HUFFINGTON, *THIRD WORLD AMERICA* 130 (2010)).

118. *Id.* at 95 (citing ROBERT KAISER, *SO DAMN MUCH MONEY* 201 (2009)); Mark C. Alexander, *Citizens United and Equality Forgotten*, in *BEYOND CITIZENS UNITED*, *supra* note 13, at 153, 160 ("Candidates are locked in an escalating cycle of fund-raising for campaigns that consumes their time. They spend more money each election, therefore they must start fund-raising earlier and do so more often in order to raise more for the next election.").

119. LESSIG, *supra* note 12, at 97.

120. *Id.* (quoting Bertram Johnson, *Individual Contributions: A Fundraising Advantage for the Ideologically Extreme?*, 38 AM. POL. RES. 890, 906 (2010)).

121. *Id.* at 99.

times.¹²² As Robert Kaiser described the situation, in at least the last thirty years, the campaign cash demand has turned the lobbyist into an essential supplier for elected officials.¹²³ The lobbyist is not necessarily a direct supplier; rather, the lobbyist is more often an indirect supplier of campaign cash to the elected official from private entities that hire lobbyists to produce policy results for their benefit.¹²⁴ Statistics show that private entities are likely to receive great benefits when they hire lobbyists to produce policy results. According to a recent Sunlight Foundation study of the 200 largest U.S. companies, those that spent the most on lobbying were most successful in reducing their reported tax rates between 2007 and 2010.¹²⁵ While the average tax rate reduction for the largest 200 U.S. companies between 2007 and 2010 was 0.6 percent, six of the eight largest spenders on lobbying enjoyed a decrease of at least seven percent.¹²⁶

In order to maintain the prospect of beneficial campaign contributions and independent expenditures, elected officials are likely to make decisions that benefit the private parties and lobbyists who have provided campaign cash in the past, and are likely to provide campaign cash in the future, regardless of whether such decisions benefit the public interest. In spite of this, the current Supreme Court tolerates the effects of lobbying, and a number of academics even celebrate lobbying as an integral part of the legislative process.¹²⁷ However, one does not have to go back to the country's founding to see that this has not always been the prevailing view. Notably, in 1874, the Court stated:

If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to produce the passage of a general law with a view to the promotion of their private interests, the moral sense of every

122. *Id.* at 100-07.

123. *Id.* at 103 (citing KAISER, *supra* note 118, at 291).

124. *Id.*

125. Lee Drutman, *Lobby More, Pay Less in Taxes*, SUNLIGHT FOUNDATION (Apr. 16, 2012), <http://sunlightfoundation.com/blog/2012/04/16/lobby-more-pay-less-in-taxes/>.

126. *Id.*; see also Brian Kelleher Richter, Krislert Samphantharak, & Jeffrey F. Timmons, *Lobbying and Taxes*, 53 AM. J. POL. SCI. 893, 907 (2009) (indicating that, in 2009, the average firm received a return between \$6 and \$20 for every \$1 spent on lobbying for targeted tax benefits).

127. Teachout, *supra* note 70, at 144 (citing Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL'Y REV. 105, 107 (2008) and Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J.L. & PUB. POL'Y 1, 9 (2006)).

right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.¹²⁸

3. *The Effects of Unconventional Corruption: Troubles Unresolved*

The clue that something is currently very wrong is the endless list of troubles that are never resolved:¹²⁹ a financial system composed of improper incentives;¹³⁰ nutrition standards that promote obesity,¹³¹ environmental policies that exempt producers of the greatest environmental harms;¹³² and unnecessary regulations that exist purely so that elected officials can leverage private parties in order to receive campaign contributions.¹³³ A notable example of the negative effects of unconventional corruption can be seen in regard to the recent financial crisis in the United States. Government regulations, or lack of regulations, allowed banks, and even incentivized them, to engage in risky behavior. The banks correctly recognized that they would not have to bear the losses of their risky behavior because they knew that their failure

128. *Trist v. Child*, 88 U.S. 441, 451 (1874).

129. LESSIG, *supra* note 12, at 1.

130. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No 111-203, 124 Stat 1376 (2010); Michael Beckel, *Campaign Cash from Wall Street Favored Representatives Who Opposed Finance Reform Bill*, CENTER FOR RESPONSIVE POLITICS (Dec. 12, 2009, 5:30 PM), <http://www.opensecrets.org/news/2009/12/campaign-cash-from-wall-street.html> (“And a Center for Responsive Politics analysis shows that these industries, which aggressively fought to water down Democrats’ plans for new regulations and oversight, have long lined the pockets of lawmakers who voted against the bill.”); William Grieder, *Still No End to ‘Too Big to Fail,’* THE NATION (Feb. 15, 2012, 1:42 PM), <http://www.thenation.com/blog/166277/still-no-end-too-big-fail>; LESSIG, *supra* note 14, at 186-89.

131. See David W. Freeman, *Congress Pushes Back on Healthier School Lunches*, ASSOCIATED PRESS (Nov. 15, 2011), http://www.cbsnews.com/8301-504763_162-57325333-10391704/congress-pushes-back-on-healthier-school-lunches/; Ron Nixon, *School Lunch Proposals Set Off a Dispute*, N.Y. TIMES (Nov. 1, 2011), <http://www.nytimes.com/2011/11/02/us/school-lunch-proposals-set-of-a-dispute.html?sq=pizzaisavevegetable&st=cse>.

132. See, e.g., 42 U.S.C. § 9601(14) (2006); Regulatory Determination for Oil and Gas and Geothermal Exploration, Development and Production Wastes, 53 Fed. Reg. 25,447, 25,447 (Jul. 6, 1988); Amendments to the National Pollutant Discharge Elimination System (NPDES) Regulations for Storm Water Discharges Associated With Oil and Gas Exploration, Production, Processing, or Treatment Operations or Transmission Facilities, 71 Fed. Reg. 33,628-01, 33,631-32 (June 12, 2006); Renee Lewis Kosnik, THE OIL AND GAS INDUSTRY’S EXCLUSIONS AND EXEMPTIONS TO MAJOR ENVIRONMENTAL STATUTES (2007), *available at* <http://www.earthworksaction.org/files/publications/PetroleumExemptions1c.pdf>.

133. LESSIG, *supra* note 12, at 196-99.

would be a failure for the United States economy, and thus, the government would be forced to bail them out.¹³⁴ This was the problem of banks being “too big to fail.”

In 2010, the federal government passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) in order to address financial sector problems.¹³⁵ Dodd-Frank was intended “to end ‘too big to fail.’”¹³⁶ One simple way to provide incentives against risky behavior, and end “too big to fail,” would have been to put a hard cap on the size of banks so that their collapse would not trigger destruction of the national economy to the point where the government would be obligated to bail them out.¹³⁷ Unfortunately, Congress was not able to effectively accomplish such reform. While Dodd-Frank mandates that regulators label any bank with over \$50 billion in assets as “systemically important” financial institutions,¹³⁸ and includes measures to ensure that these institutions do not receive a bailout, such measures are based on the regulators’ discretion,¹³⁹ and thus, are not guaranteed to be effective.¹⁴⁰ As a result, the banks have only become larger since the enactment of Dodd-Frank,¹⁴¹ and the government’s “promise” not to bail out the banks has become illusory. If any of the six largest banks today were to face bankruptcy, there would be huge costs for the country’s economy. Government intervention to save a collapsing bank would not only be justified, it

134. *Id.* at 80.

135. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No 111-203, 124 Stat 1376 (2010) (hereinafter “Dodd-Frank”).

136. *Id.*

137. LESSIG, *supra* note 12, at 188.

138. Dodd-Frank, §§ 112(a)(2)(J), 116.

139. *Id.* §§ 201-217.

140. See “Does The Dodd-Frank Act End ‘Too Big To Fail?’,” Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services, 112th Cong. 97 (2011) (Statement of Christy Romero, Acting Special Inspector General), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrhg67932/pdf/CHRG-112hhrhg67932.pdf> (“It is too early to tell whether Dodd-Frank will ultimately be successful in ending ‘too big to fail’ In order to end ‘too big to fail,’ the regulators must take effective action using the tools that have been given them under the Dodd-Frank Act.”).

141. *Id.* at 1 (Statement of Congresswoman Shelley Moore Capito, Chairwoman of the Subcommittee on Financial Institutions and Consumer Credit) (“The financial regulatory reform debate of 2009 and 2010 provided a forum for this change, but I believe it had a missed opportunity for Congress, the large institutions continue to grow, and I feel that we have done nothing but further embed the idea of an institution being ‘too big to fail.’”); Shahien Nasiripour, *A Year After Dodd-Frank, Too Big To Fail Remains Bigger Problem Than Ever*, THE HUFFINGTON POST (September 19, 2011), http://www.huffingtonpost.com/2011/07/20/dodd-frank-too-big-to-fail_n_903969.html.

would be necessary. In the face of such a disaster, it would be irrational for the government not to offer a bailout.¹⁴²

The failure of the federal government to end “too big to fail” was a victory for the banks, accomplished with the influence of their lobbyists. In 2010, lobbying by interests opposed to reform exceeded \$205 million, which dwarfed the \$5 million of lobbying for groups that supported reform.¹⁴³ Members of Congress recognized that if they did not vote in line with the interests of their financial suppliers, they would not likely receive the benefit of contributions and independent expenditures in the future, and thus, would not likely be re-elected. Therefore, the interests of the *funders* and *spenders* were protected, while the interests of the *people* were ignored due to the influence of money in campaigns, as is the case with unconventional corruption.

A more recent example of the negative effects of unconventional corruption can be seen in regard to the federal government’s nutritional standards for school lunches. According to members of the nutritionist community, childhood obesity is a significant problem in the United States.¹⁴⁴ In fact, the U.S. Department of Health & Human Services found that childhood obesity has tripled in the past three decades.¹⁴⁵ One would think that public officials would address this problem by promoting healthier school lunches. However, in November 2011, Congress passed a spending bill that rejected the U.S. Department of Agriculture’s proposal to require a half-cup of tomato paste for any food item to be classified as a vegetable.¹⁴⁶ The Department of Agriculture’s proposal was based on recommendations from the Institute of Medicine, the health arm of the National Academy of Sciences.¹⁴⁷

Instead of following the recommendations of the Institute of Medicine, Congress voted to allow just two tablespoons of tomato paste to count as a serving of vegetables, which has the effect of classifying a slice of pizza as a vegetable.¹⁴⁸ Why would Congress do this when childhood obesity is such a pressing problem? The answer is apparent when one recognizes that corporate lobbyists,

142. LESSIG, *supra* note 12, at 188.

143. *Id.* at 189.

144. Freeman, *supra* note 131; Nixon, *supra* note 131.

145. *Childhood Obesity*, U.S. DEPARTMENT OF HEALTH & HUM. SERVICES, spe.hhs.gov/health/reports/child_obesity/ (last visited Jan. 25, 2013).

146. Freeman, *supra* note 131.

147. *Id.*

148. *Id.*

including many from the frozen food industry, spent \$5.6 million influencing members of Congress to relax school lunch standards.¹⁴⁹ This is a clear example of elected officials acting against the public interest, not because they were doing what they thought was right, but because they wanted to continue receiving financial support for campaign purposes. Again, the interests of the *funders* and *spenders* were protected, while the interests of the *people* were ignored.

The previous examples might imply that unconventional corruption is something that only frustrates the interests of those who desire increased government regulation. Unconventional corruption, however, frustrates the interests of those who push for less government regulation as well. Reforms targeted at reducing unnecessary government regulations are difficult to achieve. There is a simple reason for this: when government regulation is decreased, there is a corresponding decrease in the number of individuals and entities that have an incentive to make contributions or independent expenditures to benefit a public official's reelection campaign.¹⁵⁰ As long as elected officials have a dependency on campaign cash, small government activists are not likely to achieve their objectives.¹⁵¹

Unconventional corruption also frustrates the interests of those who support tax breaks to kindle the economy. In order to test new ideas for generating revenue and stimulating growth, legislators often enact targeted tax breaks that are limited in their duration, i.e. temporary tax provisions. In the late 1990s, there were typically fewer than a dozen tax provisions that had a limited lease on life, but by the end of 2010, there were 141.¹⁵² This increase resulted from legislators' recognition that temporary provisions can be used to constantly generate campaign contributions and independent expenditures from private individuals and entities that have an interest in renewing or not renewing a particular provision.¹⁵³ Even when politicians and economists from both

149. Nixon, *supra* note 131.

150. LESSIG, *supra* note 12, at 196-99.

151. *Id.* at 198.

152. John D. McKinnon, Gary Fields & Laura Saunders, 'Temporary' Tax Code Puts Nation in Lasting Bind, WALL ST. J. (Dec. 14, 2010), <http://online.wsj.com/article/SB10001424052748703963704576005960558986604.html>.

153. *But see* Frank Fagan & Michael Faure, Response, *The Role of Lawmakers, Lobbyists, and Scholars in the Normative Evaluation of Timing Rules*, 160 U. PA. L. REV. PENNUMBRA 61, 66 (2011) (noting one possible alternative explanation for more temporary legislation in recent times: temporary legislation is easier to pass than permanent legisla-

sides of the aisle agree that a temporary tax provision is a success, such provision remains temporary because elected officials rely on temporary tax provisions to further their stints in office.

The members of each side of the political divide assume that their policies are not being achieved because there are too many liberals or too many conservatives in government. In reality, the current system prevents both sides from getting their way. Change for those who desire increased government protection is thwarted by powerful private interests that benefit from the unregulated status quo, while change for those who desire a decrease in unnecessary government regulation is thwarted by powerful public interests that depend on fundraising through regulation.¹⁵⁴ The existing system will always block the changes championed by each side. Both sides should thus have the same interest in reforming the system and curtailing unconventional corruption.¹⁵⁵

4. *The Supreme Court on Corruption and Campaign Finance*

The Supreme Court, unfortunately, has held, in essence, that there is little that the people can do through Congress to address problems of unconventional corruption without offending the Constitution. Although the Supreme Court has recognized government interests in preventing corruption, the Court has limited its recognition to anti-corruption measures targeted at illegal *quid pro quo* transactions. Thus, the Court has failed to acknowledge the improper dependencies of public officials associated with unconventional corruption.

Since the Tillman Act of 1907, corporations have been prohibited from making campaign contributions in U.S. elections.¹⁵⁶ In 1974, the Federal Election Campaign Act of 1971 ("FECA") was amended in order to, among other things, limit campaign contributions and expenditures in regard to all third-party individuals and entities.¹⁵⁷ At the time, the 1974 amendments to FECA were described as "by far the most comprehensive legislation (ever) passed by Congress concerning election of the President, Vice-

tion, and as a result, has become a favorite tool of younger, less connected legislators who are seeking to build a legislative resume).

154. LESSIG, *supra* note 12, at 211.

155. *Id.* at 212.

156. Tillman Act, ch. 420, 34 Stat. 864 (1907).

157. 2 U.S.C. § 431 (1974).

President, and members of Congress.”¹⁵⁸ One of the Court’s most prominent campaign finance decisions, *Buckley v. Valeo*,¹⁵⁹ came in response to this legislation. In addition to upholding disclosure requirements and a system of public financing for presidential elections, *Buckley*, which is often seen as the fountainhead of modern campaign finance jurisprudence,¹⁶⁰ addressed the constitutionality of limits on campaign contributions and independent expenditures. The Court’s guiding principle was that money used for campaign purposes could be equated with political speech, and thus afforded broad protection under the First Amendment.¹⁶¹ With this principle in mind, the Court struck down the limits on campaign expenditures,¹⁶² while upholding the limits on contributions.¹⁶³

FECA’s limits on contributions were upheld because the Court concluded that they served the government interests of limiting “corruption” and “the appearance of corruption.”¹⁶⁴ The limits on independent expenditures, on the other hand, were struck down because the Court concluded that the anti-corruption interests advanced by limiting independent expenditures did not outweigh the damage done to First Amendment freedoms.¹⁶⁵ In justifying this conclusion, the Court introduced the notion of *quid pro quo* corruption as being the core harm against which anti-corruption measures are intended to fight, stating, “The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”¹⁶⁶

158. *Buckley v. Valeo*, 424 U.S. 1, 7 (1976).

159. *Id.*

160. Alexander, *supra* note 118, at 157 (“*Buckley* is the seminal modern-era campaign reform decision.”); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 585 (2011).

161. *Buckley*, 424 U.S. at 14 (“The Act’s contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression . . .”).

162. *Id.* at 28-29.

163. *Id.* at 58.

164. *Id.* at 25.

165. *Id.* at 45-48.

166. *Id.* at 47 (emphasis added).

Although *Buckley* may be seen as the fountainhead of campaign finance jurisprudence, *Citizens United v. FEC*,¹⁶⁷ decided in 2010, is currently the most discussed and debated decision in the realm of campaign finance. In *Citizens United*, a nonprofit corporation brought an action against the Federal Election Commission ("FEC"), asserting that it feared it could be subject to civil and criminal penalties if it made a feature-length documentary available for free download by cable subscribers "on demand" within 30 days of primary elections.¹⁶⁸ The documentary, *Hillary: The Movie*, contained no express advocacy, but did contain a number of negative statements about Hillary Clinton, who was at the time a candidate for president.¹⁶⁹ The FEC argued that the documentary was the equivalent of express advocacy, and therefore not eligible to be paid for with corporate treasury funds under the FEC regulations to Bipartisan Campaign Reform Act of 2002.¹⁷⁰

When *Citizens United* reached the Supreme Court, rather than addressing the narrow issue of whether the FEC regulations should be construed to apply to video-on-demand cable broadcasts, the Court asked for supplemental briefing on whether it should overrule prior cases upholding the validity of legislation restricting campaign expenditures.¹⁷¹ Independent expenditure limits were held not to survive constitutional scrutiny because expenditures "including those made by corporations, do not give rise to corruption or the appearance of corruption."¹⁷² In distinguishing *FEC v. National Right to Work Committee*,¹⁷³ which held that a nonprofit corporation could be limited in terms of who it could solicit for contributions to its political action committee, the Court

167. 130 S. Ct. 876.

168. *Id.* at 888.

169. *Id.*

170. Hasen, *supra* note 160, at 594 (citing Brief for Appellee, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) No. 08-205). The Court had previously concluded that the only corporate funded advertisements that could be constitutionally barred were those that were the "functional equivalent of express advocacy." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 455-82 (2007).

171. Hasen, *supra* note 160, at 592-93 (citing *Citizens United*, 130 S. Ct. at 893 ("For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b?")).

172. *Citizens United*, 130 S. Ct. at 909. This holding was re-affirmed by the Court in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011) ("We have also held that 'independent expenditures . . . do not give rise to corruption or the appearance of corruption.'")

173. 459 U.S. 197 (1982).

stated that *National Right to Work Committee* had “little relevance,” because it “involved contribution limits, which, unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption.”¹⁷⁴

The Court’s decision in *Citizens United* has been criticized for many reasons.¹⁷⁵ One of the most questionable aspects of the Court’s decision was its failure to account for the Framers’ vision and concern with regard to corruption.¹⁷⁶ Instead of turning to the Framers, the Court turned to *Buckley*, which was treated as if it were itself its own beginning.¹⁷⁷ The result is a modern framework for analyzing corruption that lacks fidelity to the Framers and previous case law. Starting as it does from *Buckley*, the *Citizens United* majority can be said to make a logical argument that leads to a logical conclusion. However, if you start from a flawed premise, then you finish with a flawed result.¹⁷⁸

Buckley is a flawed premise because it does not ground the concept of corruption in constitutional history.¹⁷⁹ *Buckley* discussed the Framers extensively in some contexts. For example, in regard to whether the FEC was a legitimate institution, the Court stated, “Our inquiry of necessity touches upon the fundamental principles of the Government established by the Framers of the Constitution”¹⁸⁰ Yet the Court failed to consider the Framers’ views in the context of understanding corruption.¹⁸¹ Attempting to understand the Framers’ views on political integrity simply by reading *Buck-*

174. *Citizens United*, 130 S. Ct. at 909.

175. See, e.g., Hasen, *supra* note 160, at 584-85 (arguing that the Supreme Court’s decision in *Citizens United* is likely to lead to incoherence and inconsistency in campaign finance jurisprudence); Zephyr Teachout, *Facts in Exile: Corruption and Abstraction in Citizens United v. Federal Election Commission*, 42 LOY. U. CHI. L. J. 295, 301 (2011) (arguing that the Supreme Court’s decision to hear *Citizens United* without a developed factual record demonstrates a disdain for facts, evidence, and narrative).

176. Again, the Framers’ beliefs should not be the sole determinative factor on any issue before the Court. However, if the Framers’ beliefs appear to be just or sensible, then such beliefs should be relevant, and when referenced, such beliefs should be referenced consistently and coherently.

177. See Teachout, *supra* note 69, at 384 (arguing that *Buckley* is often treated as if it were itself its own beginning). Even the *Citizens United* dissent only looks back as far as the twentieth century. The Stevens dissent concluded by alluding to the troubled U.S. economy in 2010 driven by corporate excess, declaring that it was “a strange time to repudiate” the “common sense” of the American people dating back to Theodore Roosevelt’s efforts to fight “against the distinctive corrupting potential of corporate electioneering.” *Citizens United*, 130 S. Ct. at 979.

178. Alexander, *supra* note 118, at 159.

179. Teachout, *supra* note 69, at 385.

180. 424 U.S. 1, 120 (1976).

181. Teachout, *supra* note 69, at 398.

ley would likely lead the reader to believe that the Framers did not spend much time discussing corruption, which, of course, would be a false conclusion. Constitutional history, if referenced and relied upon, should be used consistently and coherently.¹⁸²

In addition, *Buckley* introduced the notion of *quid pro quo* corruption as being the core harm against which anti-corruption measures are designed to fight, thus providing an opportunity for future courts to hold that corruption and *quid pro quo* transactions can be interchangeable notions.¹⁸³ Even after the founding era, in cases involving corruption, *quid pro quo* corruption was merely hinted at; it was not seen as the core harm against which anti-corruption measures were designed to fight.¹⁸⁴ In the nineteenth century, courts frequently refused to enforce contracts involving corruption, not because they involved illegal *quid pro quo* transactions, but because they undermined the integrity of the political process.¹⁸⁵ For example, in the 1874 case of *Trist v. Child*,¹⁸⁶ the Supreme Court refused to enforce a contract between a client and his lawyer because the lawyer was hired to petition the government on behalf of the client, which was considered to be a lobbying action associated with corruption.¹⁸⁷ The Court held that the entire contract was against public policy and that the letters written to Congressmen by the lawyer were "if not corrupt, . . . illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy."¹⁸⁸ By limiting the government's interest in reducing corruption to an interest in reducing *quid pro quo* transactions, the Court has failed to acknowledge the realities of unconventional corruption in the United States.

5. *Solutions for Unconventional Corruption in the United States*

Unconventional corruption is rampant in the United States, and the courts have not helped the efforts of the American people to find solutions. Unless and until the problem of unconventional

182. *Id.* at 400.

183. *Id.* at 385-86.

184. *See id.* at 386 (citing *Ex Parte Yarbrough*, 110 U.S. 651 (1884); *Trist v. Child*, 88 U.S. 441 (1874); *Bartle v. Nutt*, 29 U.S. 184 (1830); *Fletcher v. Peck*, 10 U.S. 87 (1810)).

185. Teachout, *supra* note 70, at 135-52.

186. 88 U.S. 441 (1874).

187. *Id.*; Teachout, *supra* note 70, at 142.

188. *Trist*, 88 U.S. at 451.

corruption is addressed, the endless list of problems facing the United States will remain unresolved. As Montesquieu wrote, "When a republic has been corrupted, none of the ills that arise can be remedied except by removing the corruption and recalling the principles; every other correction is either useless or a new ill."¹⁸⁹ In reference to the Latin derivation of *radix*, meaning "root, base, foundation," reformers in the United States need to be "radical."¹⁹⁰ To be radical is to get at the root of the matter.¹⁹¹

The root of the matter is unconventional corruption and the improper dependency on campaign cash within government. Public officials must ask whether that dependency too severely weakens the independence of the government institutions in which they serve. If they do not ask that question, then they betray such institutions.¹⁹² Unfortunately, the improper dependency is not easily curable. Due to the Court's decisions striking down campaign finance legislation, Americans must be creative and look to other means of dealing with the corrupting influence of money on elected officials.¹⁹³

To begin with, the corrupting effect of campaign contributions must be limited. Since *Buckley*, it has been clear that Congress may limit campaign contributions. However, according to the Court's case law, Congress is not permitted to enact significant limits on contributions that would, in the Court's eyes, contravene First Amendment freedoms.¹⁹⁴ Thus, individuals in the United States are still able to contribute large amounts of money directly to campaigns. In 2012, individuals were able to contribute \$5,000 to a candidate: \$2,500 for the primary, and \$2,500 for the general election.¹⁹⁵

Attempts to limit the corrupting effect of contributions in the past have focused on disclosure rules. Federal law requires all political contributions greater than \$200 to be recorded and disclosed.¹⁹⁶ The enactment of disclosure rules, which survived the

189. MONTESQUIEU, *supra* note 31, at 121.

190. MCDONALD, *supra* note 79, at 261.

191. *Id.*

192. LESSIG, *supra* note 12, at 17.

193. Teachout, *supra* note 70, at 138.

194. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) ("Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.")

195. 2 U.S.C. § 441(a)(1)(A), (c) (2012).

196. *Id.* § 434(b)(3)(A) (2012).

scrutiny of *Buckley*,¹⁹⁷ was a necessary first step toward ending unconventional corruption in the United States. Without such rules, champions of reform would not have statistics and figures to support their arguments.

However, disclosure rules, while necessary, are not sufficient for eliminating unconventional corruption. The influence of campaign contributions may be independent of any actual amounts spent because the influence could also depend on the credible threat of contributions to benefit the elected official's opponent.¹⁹⁸ For example, imagine that a wealthy business owner announced that he or she intended to contribute and spend millions of dollars to defeat any elected official who supported workers' rights legislation. If an official learned of the business owner's intent, and decided to change his or her position in regard to workers' rights, there would be little doubt that such change was the result of the business owner's threat. Yet disclosure rules would not be able to quantify the business owner's influence or the elected official's unconventionally corrupt act.

The challenge in crafting solutions for unconventional corruption in the context of campaign finance reform is straightforward. Solutions must be devised in order to accommodate the need for funding sufficient to enable candidates to mount competitive races without rendering them unduly dependent on massive pools of private money.¹⁹⁹ One way of meeting this challenge is through a voluntary public financing system of elections. Such a system is premised on the notion that candidates should be rewarded with public funds for their campaigns to the extent that they expand the network of citizens who participate in the political process through small contributions.²⁰⁰ With the exception of public financing systems that provide for "trigger funds" that are released to a candidate in response to an opponent's spending or hostile

197. *Buckley*, 424 U.S. at 66-68 ("The strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. But we have acknowledged that there are government interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude.")

198. LESSIG, *supra* note 12, at 258 n.4 (citing Chamon & Kaplan, *supra* note 58, at 2-5).

199. Issacharoff, *supra* note 13, at 131 (citing Richard Briffault, *Reforming Campaign Finance Reform: A Review of Voting With Dollars*, 91 CAL. L. REV. 643, 645 (2003)).

200. *Id.* at 132.

independent expenditures,²⁰¹ such systems have been upheld as constitutional by the Court.²⁰² Justice Elena Kagan, dissenting from the Court's invalidation of Arizona's "trigger fund" provision in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, stated, "We recognized in *Buckley* that . . . public financing of elections 'facilitate[s] and enlarge[s] public discussion' in support of First Amendment values."²⁰³

Although the realities of modern presidential campaigns have caused candidates to opt out of public financing for presidential elections, an option for public financing exists in presidential campaigns thanks to the Presidential Election Campaign Fund Act and the 1974 Amendments to FECA.²⁰⁴ However, there is currently no comprehensive public financing system for members of Congress. The reason for this is not that certain members of Congress have not tried to pass public financing legislation; instead, the reason is that they have not been successful. Proposed legislation, known as the Fair Elections Now Act,²⁰⁵ would amend FECA and allow candidates to run for public office without relying on large contributions. In order to qualify for public funding under the Fair Elections Now Act, a candidate for the U.S. House of Representatives would have to collect 1,500 contributions of \$100 or less from the people in their state and raise a total of \$50,000.²⁰⁶ The qualified candidate would then receive public funding equal to 80% of the national average spent by winning candidates over the previous two election cycles that would be split 40% for the primary and 60% for the general election.²⁰⁷

Under the proposed Fair Elections Now Act, a qualified candidate would also be eligible to receive additional matching public funds if he or she continued to raise small donations.²⁰⁸ In turn, the candidate would be prohibited from accepting large outside contributions.²⁰⁹ This proposed Act, and its matching funds provision, stands on strong constitutional footing because, in place of

201. *Bennett*, 131 S. Ct. at 2813 (holding that "Arizona's matching funds scheme substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment.").

202. See *Buckley v. Valeo*, 424 U.S. 1, 85-109 (1976).

203. *Bennett*, 131 S. Ct. at 2833 (Kagan, J., dissenting) (quoting *Buckley*, 424 U.S. at 92-93).

204. 26 U.S.C. §§ 9001-9013 (2012).

205. Fair Elections Now Act, H.R. 1404, 112th Cong. § 501 (2011).

206. *Id.* § 512.

207. *Id.* § 502.

208. *Id.* § 503.

209. *Id.* § 521.

funding provisions triggered by an opponent's spending or hostile independent expenditures, such as those struck down by the Court in *Bennett*, the Act conditions additional public funding on the candidate's own ability to raise funds in small amounts, thus empowering candidates to respond to a high-spending opponent or hostile independent expenditures at any point by simply raising more small donations from constituents.²¹⁰

Robert Brooks, in 1910, stated, "It is highly improbable that the question of campaign funds would ever have been raised in American politics if party contributions were habitually made by a large number of persons each giving a relatively small amount."²¹¹ Congress, therefore, could take a big step towards curing its improper dependency by passing a simple statute providing for public financing of elections.²¹² Unfortunately, reform such as the Fair Elections Now Act faces an immense obstacle: every incumbent has been successful under the current system, and no incumbent can be certain that he or she will be able to maintain such success under a radically different system. It is unlikely that a majority of incumbents are going to voluntarily reform the system.²¹³ For this reason, neither the House of Representatives nor the Senate has been able to pass the Fair Elections Now Act.²¹⁴

But there is hope. The medical profession has dealt with similar issues, and physicians have reformed their institutions from within, despite the incentives for maintaining the status quo. Physicians have the option of choosing amongst numerous pharmaceuticals to prescribe. In turn, pharmaceutical companies attempt to influence the decisions of physicians by offering well-paid speaking opportunities, free pharmaceutical samples, large gifts

210. See BRENNAN CENTER FOR JUSTICE, FAIR ELECTIONS: A CONSTITUTIONAL SAFE HARBOR (2010), available at http://brennan.3cdn.net/6c782abbca1aa1b762_z7m6bnu53.pdf.

211. LESSIG, *supra* note 12, at 120-21 n.97 (quoting ROBERT C. BROOKS, CORRUPTION IN AMERICAN POLITICS AND LIFE 228 (1910)).

212. *Id.* at 273.

213. *Id.* at 274; USAID, *supra* note 56, at 50 ("Parties that are not in power are usually in the best position to benefit from reform, and may supply the largest number of reform-minded politicians with whom to work.").

214. An updated version of the Fair Elections Now Act was introduced in Congress on January 15, 2013. H.R. 269, 113th Cong. (2013). Also introduced on January 15, 2013 were the Grassroots Democracy Act, H.R. 268, 113th Cong. (2013), and the Empowering Citizens Act, H.R. 270, 113th Cong. (2013). Because few incumbents are willing to reform a system in which they have had electoral success, these thoughtful proposals are likely to face the same uphill battle that the Fair Elections Now Act has faced.

such as vacations, and small gifts like pens and notepads.²¹⁵ The physician begins to depend upon such gifts. And while there is no *quid pro quo* agreement that the physician will recommend the pharmaceutical company's treatment over others, the physician is more likely to have a positive attitude in regard to the pharmaceutical company and its representatives.²¹⁶ Social science data confirms what many pharmaceutical representatives already know: physicians are, in fact, quite susceptible to being influenced by gifts.²¹⁷

The decision-making of physicians is very similar to the unconventional corruption that takes place with elected officials. The physician is supposed to make judgments objectively, dependent upon the best available science about the benefits and costs of various treatments. Instead, the physician becomes dependent upon a pharmaceutical company. This is an improper dependency.²¹⁸ Like the elected official, the physician is not an evil person. If the physician has committed an irresponsible act, it is at least an irresponsible act that can be understood. The problem is not the intention of the physician; the problem is the system, the institution as a whole.²¹⁹

In the medical profession, however, those responsible for the effectiveness of the profession have acknowledged medical professionals' corrupted dependency on pharmaceutical companies, and have made reforms, despite the fact that many medical professionals had success under the gift-giving system. For example, in 2008, the University of Pittsburgh Medical Center, a \$9 billion integrated global nonprofit health enterprise that has 54,000 employees, 20 hospitals, and 3,000 physicians, implemented a conflicts-of-interest policy aimed at making physicians' decisions free from influence created by gifts or improper relationships with the pharmaceutical and medical device industries.²²⁰ The new policy

215. Andrew Lee Younkings, *The Physician Payments Sunshine Act and the Problem of Pharmaceutical Companies' Influence Over Prescribing Physicians* 7-12 (Fall 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1331022>.

216. LESSIG, *supra* note 12, at 15; Younkings, *supra* note 215, at 9-10 (citing Troyen Brennan & David J. Rothman et al., *Health Industry Practices That Create Conflicts of Interest: A Policy Proposal for Academic Medical Centers*, 295 JAMA 429, 431 (2006)).

217. Younkings, *supra* note 215, at 9 (citing Jason Dana & George Lowenstein, *A Social Science Perspective on Gifts to Physicians From Industry*, 290 JAMA 252, 254 (2003)).

218. LESSIG, *supra* note 12, at 16.

219. *Id.* at 15.

220. UPMC Facts and Stats, UPMC, <http://www.upmc.com/aboutupmc/fast-facts/Pages/default.aspx> (last visited Jan. 26, 2013); Joe Fahy, *Implications of UPMC's*

bans “gifts such as pens, note pads, and food provided by industry representatives.”²²¹ It also includes restrictions on consulting relationships with industry, attendance at off-campus industry-sponsored meetings, and industry support for scholarships and fellowships.²²²

Revamped policies in the medical profession provide an example of freedom-restricting rules being self-imposed because of the realization that such restrictions are in the long-term interests of the institution.²²³ The medical profession recognized that in order to preserve the public’s trust, it had to thwart the corrupting effect of money in the wrong place. If properly insulated, money within an institution can be fine. However, when money is in a place where it causes even the most dependable compass to deviate, there exists cause for concern.²²⁴ Like the improper dependencies that exist in the medical profession, there are improper dependencies for elected officials in the United States. Elected officials are responsible for effectiveness of their institutions. If they do not gather the political will to address this improper dependency, then they betray the institutions that they serve.²²⁵

Still, a simple statute that attempts to limit the corrupting effects of campaign contributions from large donors by establishing a publicly funded election system would not totally cure unconventional corruption in the United States because it would not combat the unconventional corruption that occurs due to independent expenditures. Because the Supreme Court has held that independent expenditures, “including those made by corporations, do not give rise to corruption or the appearance of corruption,” limits on third-party independent expenditures can now only be achieved through a change in the Constitution.²²⁶ Sometimes a constitu-

Ethics Policy Far-Reaching, PITTSBURGH POST-GAZETTE (Feb. 10, 2008), <http://www.post-gazette.com/pg/08041/856084-28.stm>.

221. Fahy, *supra* note 220.

222. *Id.*; see also *Wisconsin Medical Society Bans Gifts From Pharma Companies*, HCPRO (Oct. 22, 2008), <http://www.hcpro.com/LFS-221943-356/Wisconsin-medical-society-bans-gifts-from-pharma-companies.html> (implementing a policy of no gifts from pharmaceutical companies).

224. Self-imposed restrictions have raised awareness and provided the impetus for state and federal laws targeted at reducing undue influence in the medical profession. See Ann E. Lewis & David I. Sclar, *Complying with Federal and State “Sunshine Laws”: How Manufacturers Can Avoid Getting Burned*, ABA HEALTH ESOURCE (Aug. 19, 2010), http://www.americanbar.org/newsletter/publications/aba_health_esource_home/lewis.html.

224. LESSIG, *supra* note 12, at 36.

225. *Id.* at 17.

226. *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010).

tional change is warranted and necessary. As Gordon Wood wrote in *The Creation of the American Republic, 1776-1787*, “Had not Machiavelli and Sidney both written that ‘all human Constitutions are subject to Corruption and must perish, unless they are *timely renewed* by reducing them to their first Principles?’”²²⁷

According to Article V of the Constitution, there are two methods for proposing amendments to the Constitution. The first involves a path through Congress – “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution.”²²⁸ This has been the exclusive path for each of the amendments to the Constitution, and it was the path used in 2011 in an attempt to amend the Constitution for purposes of eliminating the corruption associated with campaign contributions and independent expenditures. The resolution, proposed by Senator Tom Udall of New Mexico, would simply have given Congress the power to set limits for campaign contributions and expenditures.²²⁹ This proposed resolution did not earn the support of two thirds of both Houses. It did not earn such Congressional support for many of the same reasons that the Fair Elections Now Act did not earn Congressional support. No incumbent can be certain that he or she will be able to maintain success under a radically different system.²³⁰

Fortunately, there is a second method for proposing amendments to the Constitution. This method involves a path through the states—“[O]n the Application of the Legislatures of two thirds of the several States, [the states] shall call a Convention for proposing Amendments”²³¹ The Framers created this second method of amending the Constitution in order to address situations in which reform through Congress is not possible, such as when Congress clogs the paths for necessary reforms or when the subject of reform is Congress itself.²³² During the Constitutional Convention of 1787, many believed that Congress should have a

227. WOOD, *supra* note 63, at 34.

228. U.S. CONST. art. V.

229. S.J. Res. 29, 112th Cong. (2011). More recently, on January 22, 2013, Congressman Jim McGovern proposed two resolutions to amend the Constitution. The first, H.J. Res. 20, 113th Cong. (2013), would empower Congress and the states to regulate political spending. The second, H.J. Res. 21, 113th Cong. (2013), would overturn *Citizens United*.

230. LESSIG, *supra* note 12, at 274.

231. U.S. CONST. art. V.

232. AMAR, *supra* note 82, at 16.

very limited role in passing amendments, since it was possible that Congress “would be the very occasion for moving to amend.”²³³

While the first method for amending the Constitution through Congress would focus solely on the proposed resolution, a call for a convention could involve broader interests. As noted by Lawrence Lessig, “[D]ifferent souls with different objectives could agree on the need for a convention without agreeing on the particular proposals that a convention should recommend.”²³⁴ Some people, for example, may desire an amendment allowing the states to prohibit flag burning or abortion. Others may want a balanced budget amendment. These interests would contribute to the call for a convention. And while a number of issues could be discussed at a convention, only the causes with great public support would be proposed for ratification. An amendment giving Congress the ability to limit independent campaign expenditures is one such cause. According to a 2010/2011 survey conducted by Hart Research Associates, 79% of Americans support the passage of an amendment to overturn *Citizens United*.²³⁵ Once public opinion manifests itself in a proposal for an amendment, Congress’s desire to maintain the status quo will be inadequate to thwart the movement for change. In order to reform American institutions and combat unconventional corruption, it must be recognized that those at the heart of power are not likely to change how things are done. If the Constitution is to be renewed to reflect its first principles, a movement originating outside of Congress is needed.

233. LESSIG, *supra* note 12, at 294-95 (citing William W. Van Alstyne, *The Limited Constitutional Convention: The Recurring Answer*, 1979 DUKE L.J. 4, 985, 987).

234. *Id.* at 293.

235. *Impressions Of The Citizens United Decision And A Proposed Constitutional Amendment To Overturn It*, HART RESEARCH ASSOCIATES, http://freespeechforpeople.org/sites/default/files/me10129b_public.pdf. (last visited Feb. 1, 2013). “From December 27, 2010, to January 3, 2011, Hart Research Associates conducted a survey among 500 registered voters on behalf of Free Speech For People with support from the Nathan Cummings Foundation. The interviews were conducted online among a nationally representative sample of voters.” *Id.* As a caveat, the survey focused on Congress’s authority to limit the amount of money corporations can spend on election, rather than Congress’s authority to limit contributions and expenditures in general.

IV. CORRUPTION IN KENYA

A. *Conventional Corruption in Kenya*1. *Kenya's Special Status*

Kenya is one nation in Africa that has always been monitored by outsiders for indications as to which course the entire continent is taking. Long before Barack Obama's ancestry intrigued Western societies, Kenya was fantasized through Ernest Hemingway's tales of adventure and stories of man-eating lions.²³⁶ Also, Kenya's dysfunctional neighbors have always made it look good in comparison.²³⁷ Kenya has never exhibited the chaos of Uganda, the failed socialism of Tanzania, or the genocide of Rwanda and Sudan.²³⁸ In place of Somalia's feuding warlords and Ethiopia's feeding stations, Kenya offered safari parks and extravagant coastal hotels.²³⁹

With independence in 1963, Kenya became the West's most stalwart pupil in Africa,²⁴⁰ a model developing country in a continent where civil wars perpetuated and authoritarian governments reigned.²⁴¹ Seen as too important to fail, Kenya became the first sub-Saharan country to receive structural adjustment funding from the International Monetary Fund in the 1980s.²⁴² Between 1970 and 2006, Kenya received \$17.26 billion in foreign aid, approximately one and a quarter times what the United States spent on the Marshall Plan.²⁴³ By the early 1990s, contributions from

236. MICHAELA WRONG, *IT'S OUR TURN TO EAT, THE STORY OF A KENYAN WHISTLE-BLOWER* 8 (2010).

237. Speaking in the aftermath of the 2007-2008 post-election violence in Kenya, Kofi Annan told journalist Roger Cohen, "What was in my head was that we can't let this happen to Kenya! . . . We'd seen a lot of destruction in the region – Rwanda, Somalia, Sudan, Darfur – and Kenya had been the safe haven for refugees. And suddenly Kenya itself was going!" See BRANCH, *supra* note 45, at 19 (citing Roger Cohen, *How Kofi Annan Rescued Kenya*, N. Y. REV. OF BOOKS (Aug. 14, 2008), www.nybooks.com/articles/archives/2008/aug/14/how-kofi-annan-rescued-kenya/?pagination=false).

238. COLLIER, *supra* note 6, at 55, 57; BARACK OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* 312 (2004); WRONG, *supra* note 236, at 8-9.

239. WRONG, *supra* note 236, at 9.

240. OBAMA, *supra* note 238, at 312.

241. DAGNE, *supra* note 52, at 2; see Pia Anthony-muttu, *Democracy in Practice – Campaigns, Elections and Voters, Policy Perspectives: Kenya*, 13 GEO. PUB. POL'Y REV. 125, 125-26 (2007-08); Gathii, *supra* note 4, at 411.

242. WRONG, *supra* note 236, at 184.

243. *Id.*

multinational lending institutions and donor nations accounted for 45 percent of Kenya's budget.²⁴⁴

By the end of the 20th century, however, Kenya was beginning to look dreadfully unimpressive; the stalwart pupil had become a surly delinquent.²⁴⁵ Once ranked a middle-income country, Kenya began to straggle behind, occupying a spot at the bottom of the international tables, with its potential unfulfilled.²⁴⁶ An editorial in the *Financial Times* from 2002 stated, "Kenya is now one of the most disappointing performers in sub-Saharan Africa. . . . There is barely an economic or social indicator that does not testify to the country's decline."²⁴⁷ The country was, as one Australian newspaper put it, an "African Paradise Lost."²⁴⁸ Given that Kenya had never been invaded, never experienced a civil war, and had started out with so much in its favor, the source of the problem was obvious – the government was overflowing with corruption.²⁴⁹

2. *Empty Promises of Reform*

In the wake of the historic 2002 election in Kenya, the newly sworn president, Mwai Kibaki, made statements that reflected the country's recognition of a growing corruption problem. President Kibaki stated, "The era of 'anything goes' is gone forever. Government will no longer be run on the whims of individuals. Corruption will now cease to be a way of life in Kenya."²⁵⁰ However, such words were not new; they had been uttered in the past: in 1994, then President Daniel T. arap Moi, who was infamous for corrupt activity,²⁵¹ had stated, "On corruption, my government is committed to fighting it at all levels. Kenyans must stop the habit

244. *Id.*

245. See DAGNE, *supra* note 52, at 2.

246. WRONG, *supra* note 236, at 10.

247. *Id.* at 11 (internal quotation omitted).

248. BRANCH, *supra* note 45, at 186 (referencing John Shaw, *African Paradise Lost*, SYDNEY MORNING HERALD, Aug. 26, 1989, at 71).

249. WRONG, *supra* note 236, at 11.

250. *Id.* at 5; see also Francis Openda, "I'll be the first to declare wealth," says Kibaki, E. AFR. STANDARD, July 24, 2003 (President Kibaki stated, "Corruption starts from the top, let's not make any mistake about it.").

251. See Gathii, *supra* note 4, at 444 (stating that President Daniel T. arap Moi's "anti-corruption efforts" were largely seen as "big shows" that were performed purely to win the donor community's approval); see also BRANCH, *supra* note 45, at 211 (referencing Wangari Maathai's letter to President Moi after the 1992 election in which she stated that "the Electoral Commission, the State mass media and the Civil Service" were all used "to rig Your Excellency back to power").

of inducing public officials with money and other items for services that should be rendered free of charge.²⁵²

Yet Kenyans were optimistic that a change in leadership would bring accountability in government.²⁵³ When Gallup conducted a poll shortly after Kibaki's election, it found that Kenyans were the most optimistic people in the world, with 77 percent saying they had high hopes for the future.²⁵⁴ In fact, after Kibaki's election, there were reports of citizens storming an upcountry police station to demand refunds for bribes paid over the years.²⁵⁵ Even academics were optimistic. In 2004, Peter Anassi, an advocate for social justice in Kenya, described a "genesis of the war against corruption"²⁵⁶ in which the new government has a mandate to fight corruption and "has shown the willingness and the capacity to deal with the vice."²⁵⁷ Unfortunately, the new found hope was short lived, as Kibaki was not able to deliver on his promises of ending corruption.²⁵⁸

Perhaps the most notorious example of Kibaki's failure to end corruption is the Anglo-Leasing scandal.²⁵⁹ This scandal involved 18 government contracts that were described as "sensitive" due to their military or security-related nature.²⁶⁰ As calculated by the Auditor General, the 18 contracts were worth a total of 56.3 billion Kenyan shillings (751 million U.S. dollars).²⁶¹ In fact, the value of the contracts amounted to 5 percent of Kenya's GDP, and over 16 percent of the government's gross expenditure over the two-year period in which the contracts were signed. This was enough mon-

252. CENTRE FOR LAW AND RESEARCH INTERNATIONAL, *supra* note 65, at 2 (citing President Daniel T. arap Moi's Jamhuri Day Speech (Dec. 12, 1994)).

253. Gathii, *supra* note 48, at 33-34 ("To many, [Kibaki's] election in 2002 signaled a time of hope in which government reform would bring about a new way of life in Kenya."); see also BRANCH, *supra* note 45, at 251 (stating that foreign institutions as well, including the European Union, were impressed by Kibaki during the early months of his presidency).

254. WRONG, *supra* note 236, at 7.

255. *Id.* at 6; COLLIER, *supra* note 6, at 181.

256. ANASSI, *supra* note 7, at 98.

257. *Id.* at 14.

258. See BRANCH, *supra* note 45, at 252 ("The government soon gave other Kenyans good reason to doubt its competence and honesty. In Parselelo Kantai's acclaimed short story based on this moment in recent Kenyan political history, the metaphor of pungent fish is a recurring trope. By the end, 'the stench of rotting fish is everywhere now.' The metaphor was apposite.")

259. *Id.* at 253.

260. WRONG, *supra* note 236, at 168.

261. *Id.* at 165; see also Gathii, *supra* note 48, at 51.

ey to provide anti-retrovirals to every HIV-positive Kenyan for ten years.²⁶²

Anglo-Leasing was a classic government procurement scam. A crucial component was the military nature of the contracts. In every other sector, contracts had to be put to open tender. Contracts within the military sector, however, were secretive and able to escape scrutiny.²⁶³ These contracts were a rudimentary device for extracting large amounts of money from the Kenyan treasury. As an example of the greed involved, Kenya was paying 9 million U.S. dollars for MI 17 helicopters, while the same helicopters were simultaneously selling in Asia for only 3.9 million U.S. dollars.²⁶⁴ Where the extra funds ultimately settled is a mystery, but it is safe to presume that they were split between those in government who authorized the deals and the entrepreneurs who provided the essential smokescreen of legitimate sounding shell companies that acted as "looting pipes."²⁶⁵

As described by Michaela Wrong in *It's Our Turn to Eat*, when the Permanent Secretary for Governance and Ethics, John Githongo, briefed President Kibaki on the corruption surrounding Anglo-Leasing, the president exuded a look that could only be described as sheepish, like a boy "caught with his hand in a biscuit tin."²⁶⁶ Kibaki urged the anti-corruption czar to slow down, and by all means, not to hand over his information to the Attorney General.²⁶⁷ Once it was clear that Kibaki realized the full extent of the scandal, but was unconcerned, Githongo resigned and spent the next three years living in the United Kingdom, fearing retaliation from the Kenyan government.²⁶⁸ In October 2006, as a result of Kibaki's orders, Attorney General Amos Wako refused to prosecute those suspected of corruption in the Anglo-Leasing scandal.²⁶⁹

The unwillingness of the Kibaki administration to deal with corruption did not go unnoticed. A report from Transparency Inter-

262. WRONG, *supra* note 236, at 166.

263. *Id.* at 168; *see also* Gathii, *supra* note 48, at 52.

264. WRONG, *supra* note 236, at 169.

265. *Id.* at 171.

266. *Id.* at 174.

267. *Id.* at 174; *see also* Gathii, *supra* note 48, at 51-52; Pallister, *supra* note 5 ("John Githongo, the government anti-corruption chief, has warned in the Kenyan press that the corrupt networks that held the stage hostage under the former regime have started attempting to regroup.").

268. BRANCH, *supra* note 45, at 254.

269. DAGNE, *supra* note 52, at 13-14; *see* Gathii, *supra* note 48, at 50 ("The Attorney General's office has long dragged its feet and been unwilling to prosecute corruption cases recommended to it by the anti-corruption bodies it supposedly worked in concert with.").

national described Anglo-Leasing as “the albatross around the Kibaki government’s neck.”²⁷⁰ Also, in a 2004 speech, British High Commissioner to Kenya Edward Clay famously stated: “We never expected corruption to be vanquished overnight. We all implicitly recognized that some would be carried over to the new era. We hoped it would not be rammed in our faces. But it has.”²⁷¹ Those in government were now eating “like gluttons,” he proclaimed.²⁷² “They may expect we shall not see, or notice, or will forgive them a bit of gluttony, but they can hardly expect us not to care when their gluttony causes them to vomit all over our shoes.”²⁷³ Clay’s statement, while colorful, was not terribly exaggerated—Transparency International, in its 2010 Corruption Perceptions Index, ranked Kenya as one of the most corrupt countries in the world, occupying a rank of 154 out of 178 countries.²⁷⁴ In reference to President Kibaki’s political party, the National Rainbow Coalition (“NARC”), Timothy Njoya aptly remarked: “We now know what ‘NARC’ means, ‘Nothing-Actually-Really-Changed!’”²⁷⁵

3. *Issues of Tribalism*

It could be argued that tribal favoritism, rather than corruption, is the true cause of social and economic problems in Kenya. There are about 42 distinct tribes in Kenya.²⁷⁶ The largest tribes by population in Kenya include the Kikuyu (22%), Luhya (14%), Luo (13%), Kalenjin (12%), Kamba (11%), Kisii (6%), and Meru (6%),

270. Mwalimu Mati, *It’s Time to Tell the Kenyan People the Truth About the Anglo-Leasing Corruption Scandal*, TRANSPARENCY INT’L (Jan. 22, 2006), http://archive.transparency.org/news_room/latest_news/press_releases_nc/2006/2006_01_23_kenya_githongo.

271. WRONG, *supra* note 236, at 201.

272. *Id.* at 201-02.

273. *Id.* at 202 (quoting Edward Clay, British High Commissioner, Address at the British Business Association of Kenya (July 2004)); *see also* BRANCH, *supra* note 45, at 253; COLLIER, *supra* note 6, at 181.

274. *Corruption Perceptions Index 2010*, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results (last visited Jan. 27, 2013).

275. BRANCH, *supra* note 45, at 258 (citing Thomas Wolf, *Immunity or Accountability? Daniel Toroitich arap Moi: Kenya’s First Retired President*, in LEGACIES OF POWER: LEADERSHIP CHANGE AND FORMER PRESIDENTS IN AFRICAN POLITICS 197, 219 (Roger Southall & Henning Melber eds., 2006)).

276. *The Kenya People*, KENYA INFORMATION GUIDE, <http://www.kenya-information-guide.com/kenya-people.html> (last visited Jan. 27, 2013); *see also* Kristin MacDougall, *Tribal Rights in Kenya and Zimbabwe: To Promote or Not to Promote, That is the Question*, 27 CONN. J. INT’L L. 167, 185 (2011).

among others.²⁷⁷ The history of these tribes is the history of Kenya; they have cultivated the country's unique identity. Tribal identities, however, have also been the cause of much division in Kenya.

The tribes of pre-colonial Kenya surely recognized their different ethnic languages and customs.²⁷⁸ When friction occurred between the tribes, it was primarily caused by economic necessity.²⁷⁹ In *Facing Mt. Kenya*, Kenya's first president, Jomo Kenyatta, described instances where the threat of starvation forced the Masai to raid the cattle stock of the Kikuyu when cattle disease invaded Masai country.²⁸⁰ However, such raids were rare, with long intervals in between.²⁸¹ While tribes such as the Kikuyu and Masai sometimes fought each other, they also traded with one another, intermarried, and utilized the same lands.²⁸²

Colonialism had a definite effect on the tribes of Kenya. Although colonialism did not create Kenya's tribal distinctions, colonialism definitely ensured that ethnic affiliation became the key factor determining a citizen's life chances.²⁸³ The tribes began to feel the effects of colonialism as early as 1885 when Kenya was established under the British "sphere of influence" at the Berlin Conference.²⁸⁴ By 1938, the British had divided Kenya into 24 congested native reserves, leaving for the fertile "White Highlands" for exclusive European use. Kenyans from outside of a particular reserve were considered as foreigners who posed threats to the economic sustainability of the community.²⁸⁵

The tribal stereotypes of modern-day Kenya faithfully reflect the roles that were once imposed on the tribes by the colonial government. Growing up on a white-owned farm in the Rift Valley in the 1940s, the future Nobel Peace Prize-winner Wangari Maathai observed how the colonial experience reinforced the tribal distinctions.²⁸⁶ In her autobiography, she records that "Kikuyus worked

277. *The World Factbook: Kenya*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html> (last updated Oct. 4, 2012); see also DAGNE, *supra* note 52, at 12.

278. WRONG, *supra* note 236, at 48.

279. JOMO KENYATTA, *FACING MT. KENYA, THE TRIBAL LIFE OF THE KIKUYU* 200 (1965).

280. *Id.*

281. *Id.* at 201.

282. WRONG, *supra* note 236, at 48.

283. *Id.* at 44.

284. CENTRE FOR LAW AND RESEARCH INTERNATIONAL, *supra* note 65, at 12; MacDougall, *supra* note 276, at 170.

285. WRONG, *supra* note 236, at 48-49.

286. *Id.*

in the fields, Luos laboured around the homestead as domestic servants, and Kipsigis took care of the livestock and milking Most of us on the farm rarely met people from other communities, spoke their languages or participated in their cultural practices.”²⁸⁷ These tribal divisions did not automatically disappear with independence.²⁸⁸ United States President Barack Obama, in *Dreams from My Father*, notes that his Kenyan Luo father had political ambitions, “[b]ut by 1966 or 1967, the divisions in Kenya had become more serious. President Kenyatta was from the largest tribe, the Kikuyus. The Luos, the second largest tribe, began to complain that Kikuyus were getting all the best jobs.”²⁸⁹

It could be argued that such tribal tension, and not government corruption, was the root cause of the Kenyan post-election violence that occurred in 2007 and 2008 and eventually led to the International Criminal Court prosecution of six people, including three government officers, for crimes against humanity.²⁹⁰ The violence occurred following the December 27, 2007 election, when supporters of the challenger, Raila Odinga, alleged electoral manipulation by the incumbent government. In fact, it was widely confirmed that both sides perpetrated electoral manipulation during the election.²⁹¹ Targeted ethnic violence escalated initially against the

287. *Id.* at 49-50 (quoting WANGARI MUTA MAATHAI, UNBOWED: ONE WOMAN'S STORY (2004)); see also Jeffrey Gettleman, *Kenyans Approve New Constitution*, N.Y. TIMES (Aug. 5, 2010), <http://www.nytimes.com/2010/08/06/world/africa/06kenya.html> (noting that “Kenya has a long legacy of ethnic rivalries. It has more than 40 different ethnic groups and the British colonizers shamelessly typecast them: the Maasai were the guards; the Kikuyu the farmhands; the Luo the teachers; the Kamba the bureaucrats; etc.”).

288. See generally MacDougall, *supra* note 276.

289. OBAMA, *supra* note 238, at 214. Barack Obama, Sr. was a recognized contemporary of Kenya's early political leaders. Daniel Branch, discussing the assassination of Tom Mboya, writes: “Walking the short distance from his parked car to the shop front, [Mboya] paused to speak to a passing friend, Barack Obama, father of the current US president. After a brief chat, Mboya said goodbye to Obama and entered the pharmacy. . . . As he left, shots were fired and he was hit twice in the chest.” BRANCH, *supra* note 45, at 79.

290. See DAGNE, *supra* note 52, at 1; Press Release, International Criminal Court, Kenya's Post-Election Violence: ICC Prosecutor Presents Cases Against Six Individuals for Crimes Against Humanity (Dec. 15, 2012), available at <http://www.icc-cpi.int/NR/exeres/BA2041D8-3F30-4531-8850-431B5B2F4416.htm>; Press Release, International Criminal Court, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Mar. 3, 2011), available at <http://www.icc-cpi.int/NR/exeres/BFAD2A42-55B5-4791-9AFA-28C0CAF26E5E.htm>; Prosecutor v. Ruto, Kosgey & Sang, Case No. ICC-01/09-01/11, Decision on the Prosecutor's Application for Summonses to Appear (Mar. 8, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1037044.pdf>.

291. BRANCH, *supra* note 45, at 271; DAGNE, *supra* note 52, at 11; KENYA NATIONAL COMMISSION ON HUMAN RIGHTS, ON THE BRINK OF THE PRECIPICE: A HUMAN RIGHTS ACCOUNT OF KENYA'S POST-2007 ELECTION VIOLENCE, FINAL REPORT 3 (2008), available at <http://www.knchr.org/dmdocuments/KNCHR%20doc.pdf>.

Kikuyu people, the community of which President Kibaki was a member.²⁹² The different ethnic groups all joined into pro-Kikuyu and anti-Kikuyu coalitions.²⁹³ The violence peaked with the killing of over thirty civilians in a church near Eldoret on New Year's Day.²⁹⁴ Some Kikuyu coalitions also engaged in retaliatory violence against groups supportive of Odinga, primarily Luos and Kalenjin, in the towns of Nakuru and Naivasha.²⁹⁵

If tribal self-awareness and tension is at the heart of the societal problems in Kenya, then corruption can be explained as a mere by-product of public officials' instinct for tribal patronage. That is, public officials have an incentive to extort monies against the public interest only because they are expected to provide for their kinsman over the interests of other Kenyans, or Kenyans as a whole. With this perspective, it would follow that any big picture solution for Kenya must initially target a reduction in tribal identities and self-awareness.

However, in addition to the negative aspects, there are positive aspects of the tribal identities in Kenya.²⁹⁶ As recognized by Jomo Kenyatta, the key to this culture is the tribal system.²⁹⁷ Within the tribal system are family groups and age-grades, which shape the character of every member of the society. In this system, nobody is an isolated individual.²⁹⁸ The people of Kenya collectively recognized the importance of their tribal history as recently as 2010, when they established a new constitution. The Preamble to

292. DAGNE, *supra* note 52, at 1; Samir Elhawary, *Crisis in Kenya: Land, Displacement and the Search for 'Durable Solutions,'* 31 HPG POL'Y BRIEF 1 (Apr. 2008), available at <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2263.pdf>.

293. COLLIER, *supra* note 46, at 57.

294. See *Prosecutor v. Ruto, Kosgey & Sang*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Case No., ¶¶ 234-235 (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf>; BRANCH, *supra* note 45, at 273-74.

295. BRANCH, *supra* note 45, at 275-76; see Press Release, International Criminal Court, Summary of Decision in the Two Kenya cases (Jan. 23, 2012), available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/background%20information/Pages/summary%20of%20decision%20in%20the%20two%20kenya%20cases.aspx (determining that the Prosecutor of the International Criminal Court had provided enough evidence of crimes against humanity for trial in regard to for four Kenyan suspects - William Ruto, Joshua Arap Sang, Francis Muthaura, and Uhuru Kenyatta - collectively referred to after the prosecutor, Luis Moreno Ocampo, as the "Ocampo four").

296. BRANCH, *supra* note 45, at 293.

297. KENYATTA, *supra* note 279, at 305 (stating that "a culture has no meaning apart from the social organisation of life on which it is built").

298. *Id.* at 298 ("The Gikuyu does not think of his tribe as a group of individuals organised collectively, for he does not think of himself as a social unit. It is rather the widening-out of the family by a natural process of growth and division.").

the Constitution of Kenya now reads, “We, the people of Kenya . . . proud of our ethnic, cultural and religious diversity . . . adopt, enact and give this Constitution to ourselves and to our future generations.”²⁹⁹

In light of this, solutions focused on erasing tribal identities are neither ideal nor practical. However, a big picture solution that initially targets the detection and enforcement of corrupt acts will reduce the amount of tribal patronage that occurs in government and, in turn, reduce the feelings of hostility that may occasionally exist between the tribes. On this point, it is important to recognize that government favoritism based on tribal associations is an *effect* of corruption, not a *cause*.³⁰⁰ It is possible to preserve tribal heritage while decreasing the kind of conduct that ultimately leads to hostilities.

There is a need for the people to be informed about corrupt practices in government.³⁰¹ A free press is essential for fighting corruption³⁰² and can play a key role in the detection of corruption.³⁰³ The press in Kenya has been detecting corruption in government for years.³⁰⁴ As noted in James Forole Jarso’s account of the Kenyan media’s relationship to anti-corruption efforts, “In Kenya, hardly a day passes without the media highlighting corruption in the government.”³⁰⁵ Nearly all of the Kenyan newspapers have featured a litany of articles citing occurrences of corruption that are eating into the very fabric of Kenyan society, yet corruption continues.³⁰⁶ Thus, detection is not sufficient to effectively combat corruption. Solutions for corruption must be preemptive. A sepa-

299. CONSTITUTION, pmbl. (2010) (Kenya) (emphasis added).

300. BRANCH, *supra* note 45, at 21-22 (“Rather than using their control of institutions like parliament, the presidency or the judiciary to protect Kenyans and their livelihoods, elites in power have tended to use their power to seize resources, of which the most important has been land. The *symptoms* of this crisis, including ethnic division and political violence, are all too often confused with its *cause*.”); CENTRE FOR LAW AND RESEARCH INTERNATIONAL, *supra* note 65, at 110.

301. COLLIER, *supra* note 6, at xii.

302. *Id.* at 48.

303. USAID, *supra* note 56, at 43.

304. CENTRE FOR LAW AND RESEARCH INTERNATIONAL, *supra* note 65, at 168. *But see* BRANCH, *supra* note 45, at 20-21, 119 (2011) (noting that while Kenya generally has a free press, there have been limits to this freedom, evidenced by a culture of self-censorship that took hold of the newsrooms of the main daily papers in the 1970s in response to Kenyatta’s efforts to quash all opposition).

305. James Forole Jarso, *The Media and the Anti-Corruption Crusade in Kenya: Weighing the Achievements, Challenges, and Prospects*, 26 AM. U. INT’L L. REV. 33, 35 (2010).

306. CENTRE FOR LAW AND RESEARCH INTERNATIONAL, *supra* note 65, at 123; *see also* BRANCH, *supra* note 45, at 20-21 (noting the existence of a fairly open press and the ability of elites to commit corrupt acts remaining unchecked).

ration of powers, complete with checks and balances, must be established in order to prevent corruption from occurring in the first place. This was the goal of the framers, and the hope of the citizens, when they wrote and voted into law the Kenya Constitution of 2010.³⁰⁷

4. *A New Constitution to Combat Conventional Corruption*

An entrenched culture of conventional corruption is extremely difficult to transform.³⁰⁸ Reducing this form of corruption requires reform of political institutions that are often resistant to change.³⁰⁹ Public officials often resist change because the status quo serves their interests.³¹⁰ Although some institutions change over time, constitutional features, such as executive relations with the legislative and judicial branches, are often difficult to replace.³¹¹ Thus, it is not impossible to understand how countries with corrupt governments can become caught in a downward spiral of hopelessness.³¹² In spite of this, Kenya has made real efforts to free itself from such a downward spiral by enacting a new constitution that alters the relations between the executive and the other branches of government. After extensive vetting sessions, the new constitution was presented to the public for approval, which it obtained by an overwhelming majority, on August 4, 2010.³¹³ These constitutional changes were implemented in an effort to control corruption

307. BRANCH, *supra* note 45, at 21 ("What the culture of impunity meant in practice was that the government's control over the police, judiciary and electoral system ensured that there was no possibility of punishment for major crimes, even if they attracted considerable attention and censure in the press. The constitution ratified in 2010 is meant to address these matters"); Zareen Iqbal, *Kenya's New Constitution: Erasing the Imperial Presidency*, INT'L INST. FOR JUST. AND DEV. (Sept. 22, 2010), <http://www.ijid.org/index.php/news/entry/kenyas-new-constitution-erasing-the-imperial-presidency>; Gettleman, *supra* note 287.

308. Mark A. Glaser, *Networks and Collaborative Solutions for Performance Measurement and Improvements in Sub-Saharan Africa*, in PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION 89, 124 (Anwar Shah ed., 2007). See generally COLLIER, *supra* note 6.

309. David S. Brown, Michael Touchton, & Andrew B. Whitford, *Political Polarization as a Constraint on Government: Evidence from Corruption* 23 (Working Paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=782845.

310. Matthew Andrews & Anwar Shah, *Citizen-Centered Governance: A New Approach to Public Sector Reform*, in BRINGING CIVILITY IN GOVERNANCE 153 (Anwar Shah ed., 2005).

311. Brown, Touchton, & Whitford, *supra* note 309, at 23.

312. Glaser, *supra* note 308, at 124.

313. DAGNE, *supra* note 52, at 1; Gettleman, *supra* note 287.

and maintain an appropriate balance of power within the government.³¹⁴

In the time leading up to the Kenya Constitution of 2010, the negative effects of corruption were evident to every Kenyan, including those in power. For example, the Kenyan Court of Appeals, in a 2006 decision concerning an alleged corrupt act of a public official, declared:

Corruption is equally a cancer which robs the society in general but more particularly the poor when resources of a country whether public or privately controlled are siphoned into local or foreign accounts for the benefit of a few individuals or groups thereof. . . . It is a form of terrorism and tyranny to the poor, the majority of our population.³¹⁵

The Kenya Constitution of 2010 provides for greater separation of powers within the government. Specifically, the legislature is now more independent of the executive. Previously, there were few incentives for legislators to enforce checks on the executive due to a lack of separation between the branches that allowed the executive to appoint legislators to be government ministers. To remedy this situation, the new constitution provides that “cabinet secretaries shall not be legislators.”³¹⁶ In addition, cabinet secretaries can now be removed without approval by the president if a majority of the members of the National Assembly adopt a resolution based on recommendations of a select committee.³¹⁷ This provision seals a loophole that allowed ministers to stay in office even when the legislature had lost confidence in them.³¹⁸ Also, cabinet secretaries must now appear before committees of the legislature whenever they are summoned and provide the legislature with “full and regular” reports concerning matters under their control.³¹⁹

314. Iqbal, *supra* note 307; Gettleman, *supra* note 287; see CONSTITUTION, art. 10(2)(c) (2010) (Kenya) (“The national values and principles of governance include . . . good governance, integrity, transparency and accountability.”).

315. Christopher Ndarathi Murungaru v. Kenya Anti-Corruption Commission & Another (2006), eKLR 1, 46-47 (Kenya), available at [http://www.marshgroupkenya.org/Reports/Website/JudicialDecisions/feb_07/Dr._Christopher_Murungaru_v_KACC_\(2006\).pdf](http://www.marshgroupkenya.org/Reports/Website/JudicialDecisions/feb_07/Dr._Christopher_Murungaru_v_KACC_(2006).pdf).

316. CONSTITUTION, art. 152(3) (2010) (Kenya).

317. *Id.* art. 152(5)(c), (6)-(10); Akech, *supra* note 30, at 384.

318. Akech, *supra* note 30, at 384.

319. CONSTITUTION, art. 153(3), (4)(b) (2010) (Kenya); Akech, *supra* note 30, at 385; Iqbal, *supra* note 307.

The new constitution also changes the relations between the executive and the judiciary. Previously, undue influence on the judiciary from the executive was a significant catalyst for conventional corruption. The new constitution gives the judiciary autonomy from the executive by providing that the president will now appoint the chief justice and the judges of the superior courts subject to the recommendation of the Judicial Service Commission ("JSC") and the approval of the National Assembly.³²⁰ This new procedure was recently challenged when President Kibaki attempted to appoint the chief justice without consulting the JSC. However, after a public outcry, the new constitution was enforced to prevent such action.³²¹

In addition, the new constitution circumscribes the power to dismiss judges. Unlike before, the process of removal of the chief justice and judges will now be initiated by the JSC. Acting on its own motion, or on the petition of "any person," the JSC is required to hold a hearing regarding the judge in question and to send the petition to the president only when there are legitimate grounds for removal.³²² Upon receiving the petition, the president is then required to establish a tribunal to inquire into the matter.³²³ Thus, the new constitution introduces due process in the dismissal of judges and is therefore likely to enhance the independence of judges.³²⁴

The Public Service, and its relation to the executive, is also affected by the new constitution, which establishes a new Public Service Commission, consisting of a chairperson, vice chairperson, and seven other members appointed by the president with the approval of the National Assembly.³²⁵ Unlike before, members of the commission can only be removed from office pursuant to the recommendation of a tribunal established by the president with the approval of the National Assembly.³²⁶ Also, in an effort to protect public officers from intimidation, the new constitution provides

320. CONSTITUTION, art. 166(1)(a) (2010) (Kenya); Akech, *supra* note 30, at 390; Iqbal, *supra* note 307.

321. DAGNE, *supra* note 52, at 2; Anthony Kariuki, *Kenya: Kibaki Withdraws List of Nominees*, DAILY NATION ON THE WEB (Feb. 22, 2011), <http://allafrica.com/stories/201102230005.html>.

322. CONSTITUTION, art. 168(2), (4) (2010) (Kenya); Akech, *supra* note 30, at 390.

323. CONSTITUTION, art. 168(5) (2010) (Kenya); Akech, *supra* note 30, at 390.

324. Akech, *supra* note 30, at 390.

325. CONSTITUTION, art. 233(1)-(2) (2010) (Kenya); Akech, *supra* note 30, at 385; *see also* Gathii, *supra* note 48, at 70.

326. CONSTITUTION, art. 251(2)-(6) (2010) (Kenya); Akech, *supra* note 30, at 385.

that public officers will not be “dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”³²⁷ Therefore, public officers will no longer hold office “during the pleasure of the president,” as the previous constitution proclaimed.³²⁸ In addition, the new constitution provides that the decisions of the cabinet and the president must be in writing.³²⁹ Accordingly, the new constitution fills a significant loophole in the framework governing the Public Service, namely that public officers were not empowered to resist the illegal instructions of their superiors, which often resulted in such officers becoming caught up in schemes of grand corruption.³³⁰

So while an entrenched culture of conventional corruption is exceedingly difficult to transform, and no reform can completely eradicate such corruption, Kenya’s recent efforts are to be commended. The passing of a new constitution in Kenya has brought about renewed faith in the political process.³³¹ A system of government strengthened with a greater separation of powers that is complete with checks and balances cannot but reduce the occurrence of conventional corruption within the country.

B. Unconventional Corruption in Kenya

The Kenya Constitution of 2010 provides beneficial reforms that have the potential to lead to reductions in conventional corruption. However, if Kenya is successful in this regard, unconventional corruption, which is not necessarily cured by a separation of powers and a system of checks and balances, will likely become a greater problem. When protections against conventional corruption are properly implemented, private parties who have become accustomed to inducing conventional corruption must seek alternative means of achieving their objectives. These alternative means often include campaign contributions and independent expenditures, which can be important alternative instruments of

327. CONSTITUTION, art. 236 (2010) (Kenya); Akech, *supra* note 30, at 385-86.

328. CONSTITUTION, art. 25(1) (1963) (Kenya); Akech, *supra* note 30, at 386.

329. CONSTITUTION, arts. 135, 153 (2010) (Kenya); Akech, *supra* note 30, at 386.

330. Akech, *supra* note 30, at 386.

331. BRANCH, *supra* note 45, at 288 (“In the days following the referendum and ratification of the new constitution, it was common to hear Kenyans refer to these events as a ‘new start.’”); Iqbal, *supra* note 307.

influence to conventional corruption in transition countries.³³² Elected officials in such countries are especially susceptible to the influence campaign contributions and independent expenditures because they can no longer illegally abuse their office to divert public funds for campaign purposes.

Kenya is currently very susceptible to an epidemic of unconventional corruption. There are multiple reasons for this. First, Kenya has implemented measures to combat conventional corruption. As noted, when such measures are implemented, private parties accustomed to inducing conventional corruption will be forced to seek alternative means of achieving their objectives, such as campaign contributions and expenditures, which are likely to induce unconventional corruption within government. Second, public officials in Kenya are currently more dependent on campaign cash than at any other time in the country's history due to the escalating costs of elections.³³³ According to a Coalition for Accountable Political Funding ("CAPF") monitoring report from the general election of 2007, interviews of 32 retired politicians and former legislators revealed a rise in campaign contributions and expenditures from KSH 4,000 in 1963 to KSH 8,000,000 in 2007 – a rise of 200,000 percent since independence.³³⁴ Third, public officials in Kenya are currently very susceptible to the influence of potential campaign contributions and expenditures because they are less likely to be able to illegally abuse their office to divert public funds for campaign purposes. According to the CAPF report from the general election of 2007, which took place before Kenya's new constitution came into force, each of Kenya's 71 constituencies indicated that the misuse of state resources was dominant among incumbent politicians.³³⁵ And finally, Kenya currently lacks a comprehensive institutional framework for governing campaign finances.³³⁶ In regard to individual candidates, Kenya has no limits

332. See Campos & Giovannoni, *supra* note 22, at 2-3; Harstad & Svensson, *supra* note 26, at 46 ("[F]irms prefer bribing to lobbying early in the development process but at later stages . . . they are more likely to lobby the government.").

333. COALITION FOR ACCOUNTABLE POLITICAL FINANCING (CAPF), CAMPAIGN FINANCE AND CORRUPTION: A MONITORING REPORT ON CAMPAIGN FINANCE IN THE 2007 GENERAL ELECTION (KENYA) 53 (2007) (hereinafter "CAPF"), available at <http://www.capf.or.ke/publications/asp?DocumentTypeID=3&formpost=1>.

334. *Id.* at 54.

335. *Id.* at 35.

336. *Id.* at 6, 9.

on contributions,³³⁷ limits on independent expenditures,³³⁸ or even any disclosure requirements.³³⁹

The lack of disclosure requirements is most troubling. Disclosure rules are a necessary first step towards effectively combating unconventional corruption. Effective disclosure rules require accurate public reporting of the amounts, sources, and destinations of money.³⁴⁰ Campaign finance disclosure reports are to politics what financial statements are to business – without them, there is simply no way to follow the money.³⁴¹ However, a campaign finance system that requires disclosure without limiting contributions and independent expenditures is not sufficient for eliminating unconventional corruption. The influence of potential campaign contributions and expenditures may be independent of any actual amounts spent because the influence could also depend on the credible threat of contributions and expenditures to benefit the public official's opponent.³⁴² Still, disclosure rules are necessary to effectively fight unconventional corruption. Without such rules, the links between campaign finance and politics in Kenya will be obscure, and voters will have no way of gauging the influence of campaign finance on the politicians they elect.³⁴³

In recognition of the absence of effective laws and regulations in this regard, many leaders in Kenya have supported the enactment of new legislation, the Election Campaign Financing Bill of 2012 (“Campaign Financing Bill”), which is Kenya’s most ambitious attempt to regulate campaign finance and unconventional corruption to date.³⁴⁴ The Campaign Financing Bill, if enacted, would establish disclosure rules for candidates and even provide for certain contribution and expenditure limits.³⁴⁵ Unfortunately, even this proposed legislation does not go far enough.

337. *Id.* at 26.

338. *Id.* at 22.

339. *Id.* at 21.

340. *Id.* at 61.

341. *Id.*

342. LESSIG, *supra* note 12, at 258 (citing Chamon & Kaplan, *supra* note 58, at 2-5)

343. CAPF, *supra* note 333, at 61; USAID, *supra* note 56.

344. Election Campaign Financing Bill, 2012 (Kenya), available at <http://www.cickenya.org/index.php/legislation/item/180-election-campaign-financing-bill-2012> (hereinafter “Campaign Financing Bill”); CENTRE FOR MULTIPARTY DEMOCRACY – KENYA, RESPONSE TO CAMPAIGN FINANCE BILL 2011 1 (2011), available at www.cmdkenya.org/files/Campaign_Finance_Bill_Analysis.pdf (“The Campaign Financing Bill . . . sets out major reforms for funding of election campaigns, use of campaign funds in the nomination process, election campaign and elections.”) (analyzing an earlier version of the Campaign Financing Bill).

345. Campaign Financing Bill, §§ 12, 14.

The Campaign Financing Bill specifically provides that a “candidate, political party and a referendum committee shall disclose the amount and source of contributions received.”³⁴⁶ However, the Bill would not require that disclosures be made to the public: “The disclosure of funds shall be confidential and shall not be divulged except where such information is the subject of a complaint or an investigation or is the subject of proceedings in a court of law.”³⁴⁷ In recognition of this shortcoming in an earlier version the Bill, the Centre for Multiparty Democracy in Kenya recommended that “consideration should be made to allow public access to records in accordance with the Constitutional rights to access information.”³⁴⁸ Additionally, the Article 19 Law Programme, in its 2012 legal analysis of the Bill, observed that “the obligation to maintain the confidentiality of these records is contrary to international standards on freedom of information, and runs counter to the objectives of the law to inculcate accountability in the financing of election and nomination campaigns.”³⁴⁹

In regard to limits on campaign contributions and expenditures, the Bill makes a considered effort to combat unconventional corruption: “The Commission shall . . . set out the spending limits prescribing the – total amount that a candidate or a political party contesting for an elective post may spend during an election campaign period [and the total amount] of contributions that a candidate, a political party or a referendum committee may receive from a single source.”³⁵⁰ In addition, the Bill would require organizations wishing to support a particular candidate to register with the Commission and be subject to spending limits.³⁵¹

Although these provisions certainly represent a step in the right direction, they are not ideal, for a couple of reasons. First, although required to consider factors such as the population³⁵² and the communication infrastructure of the electoral area,³⁵³ the Commission is given a great deal of discretion in determining the contribution and expenditure limits, and thus, effective limits are not guaranteed to be implemented. Second, regulation of what a

346. *Id.* at § 12.

347. *Id.* at § 12(5).

348. CENTRE FOR MULTIPARTY DEMOCRACY, *supra* note 344, at 4.

349. ARTICLE 19, KENYA: DRAFT CAMPAIGN FINANCING BILL, 2011 17 (2012), *available at* <http://www.article19.org/data/files/medialibrary/3077/12-05-01-LA-kenya.pdf>.

350. Campaign Financing Bill, § 14(1).

351. *Id.* at § 19.

352. *Id.* at § 14(4)(c).

353. *Id.* at § 14(4)(e).

candidate may ultimately spend, in addition to what independent third parties may spend, could present problems in regard the candidate's ability to communicate his or her message, depending upon the limits set by the Commission.³⁵⁴

As Kenya begins to effectively combat conventional corruption, issues of unconventional corruption are sure to emerge, and if Kenya is to limit such corruption, it would do well to look to the root causes of unconventional corruption in the United States and do what the United States has not yet been unable to do – implement comprehensive measures that are free of loopholes – to ensure that its democracy does not persist with improper dependencies. Just as Kenya has attempted to free itself from an improper dependence on foreign nations for its economic prosperity,³⁵⁵ Kenya must attempt free itself from an improper dependence on campaign funds for its democratic prosperity.

One lesson to be learned from the United States' experience is that fighting unconventional corruption is a process of reform, evasion, identifying loopholes, and then more reform. Like most anti-corruption efforts, the fight against unconventional corruption requires constant vigilance and is not for the easily discouraged.³⁵⁶ That said, periods of transition that accompany a new constitution are intervals when political will is strong and there is a real chance to combat corruption in all forms.³⁵⁷ Statutes in the mold of the Campaign Financing Bill are helpful, but unconventional corruption is extremely difficult to combat – it requires comprehensive reform that targets the root causes of corruption.

V. CONCLUSION

An entrenched culture of conventional corruption is exceedingly difficult to transform. However, as can be seen in the case of Kenya, it is possible for developing countries to fundamentally change their institutions in an effort to control conventional corruption

354. See ARTICLE 19, *supra* note 349, at 13 (noting that while “a restriction on campaign expenditure may be justified to the extent that the restriction is provided by law, pursues a legitimate aim, and is necessary and proportionate[,]” a restriction of the amount of money a candidate has to spend necessarily restricts candidates' freedom to communicate their message).

355. BRANCH, *supra* note 45, at 122 (noting Francois Bayart's conclusion that the relationships between African states and those in the wider world are defined most of all by economic dependence).

356. USAID, *supra* note 56, at 37; see also Jarso, *supra* note 305, at 82.

357. Kpundeh, *supra* note 33, at 94.

and maintain an appropriate balance of power within government. When protections against conventional corruption are properly implemented, private parties who have become accustomed to inducing conventional corruption must seek alternative means of achieving their objectives. These alternative means often include campaign contributions and independent campaign expenditures.

If private parties have the ability to make large campaign contributions and expenditures, then elected officials are likely to engage in unconventional corruption. Elected officials in transition countries are especially susceptible to the influence of potential campaign contributions and independent expenditures because they can no longer illegally abuse their office to divert public funds for campaign purposes.

Too often, unconventional corruption goes unsolved because courts do not recognize the threat to democracy posed by an improper dependency on campaign cash, and public officials refuse to reform a system in which they have had electoral success. However, where there is an improper dependency within government, public officials have a duty to correct such a dependency. If they do not, then they betray the institutions that they serve. It must be recognized that when a government has been corrupted, no troubles that arise can be appropriately remedied until corruption, in all forms, is effectively curtailed.