

## THE MOTHER'S MILK OF POLITICS IS CORRUPTING ABSOLUTELY

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There is today a “clear and present danger”<sup>1</sup> that political contribution corruption threatens the integrity of our political system. The time for action has arrived. This Essay explores the extent of pay-to-play corruption and its implications for campaign finance law.

### I. THE PAY-TO-PLAY CORRUPTION EPIDEMIC

Let us start with Illinois, where I served as governor. Chicago and Illinois have long been known for scandals, both private and public. According to a recent *Chicago Tribune* editorial, Chicago is the most corrupt city in the nation and Illinois one of its most corrupt states.<sup>2</sup> For many decades, Chicago was known for Al Capone and machine guns.

Now, Illinois is known for something entirely new: attempting to auction a seat in the U.S. Senate to the highest bidder. Recently impeached Governor Rod Blagojevich's taped, expletive-filled telephone conversations involve blatant, large-money deals between him and various candidates for the Senate seat vacated by President Barack Obama. Said the governor in a recorded conversation: “I've got this thing and it's [bleeping] golden and . . . I'm not just giving it up for [bleeping] nothing.”<sup>3</sup>

The *Chicago Tribune* tracked 235 contributions of \$25,000 or more to Blagojevich and found that most of the donors had received something from his administration, ranging from high-paying jobs to “lucrative state contracts” to “favorable policy” decisions.<sup>4</sup>

Those pernicious practices are called “pay-to-play.” Another Illinois governor, George Ryan, was convicted on a variety of counts describing numerous money deals establishing malfeasance in office.<sup>5</sup> In Chicago

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<sup>1</sup> Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.) (link).

<sup>2</sup> John Kass, *Much More Than This, He Did It Chicago Way*, CHI. TRIB., Oct. 5, 2008, at C2, available at <http://archives.chicagotribune.com/2008/oct/05/opinion/chi-kass-0510> (link).

<sup>3</sup> Jeff Coen et al., *Feds Arrest Gov. Blagojevich To Stop . . . A Political Crime Spree*, CHI. TRIB., Dec. 10, 2008, at C1, available at <http://www.chicagotribune.com/news/politics/obama/chi-bлагоjevich-1210,0,7494354.story> (link).

<sup>4</sup> Jeffrey Meitrodt et al., *The Governor's \$25,000 Club*, CHI. TRIB., Apr. 27, 2008, at C1, available at [http://newsblogs.chicagotribune.com/clout\\_st/2008/04/tribune-investi.html](http://newsblogs.chicagotribune.com/clout_st/2008/04/tribune-investi.html) (link).

<sup>5</sup> Matt O'Connor & Rudolph Bush, *Ryan Guilty*, CHI. TRIB., Apr. 18, 2006, at C1, available at <http://www.chicagotribune.com/news/custom/newsroom/chi-060417ryantrial,0,4525779.story> (link).

alone there have been in the last few years more than 130 felony indictments based on mail fraud and wire fraud.<sup>6</sup> In our nation's capital, it is said that there is a "culture of corruption" in the Congress, where scandals have involved both people in lofty leadership positions and newly arrived congresspersons.<sup>7</sup>

In other states, there are many more scandals involving governors, state legislators, mayors, and other public office holders. Many have been indicted and sent to jail. It is no exaggeration to conclude that pay-to-play has woven a national tapestry of endemic corruption. Money, sometimes called "the mother's milk of politics,"<sup>8</sup> has definitely gone sour.

As usual, these scandals involve money, because more money than ever before is involved. In 2008, money raised and spent for political campaigns set new records. Although the exact total is not yet known, it is well into the billions. The presidential election alone set a new record of \$1.75 billion raised and spent.<sup>9</sup> The median cost for a successful congressional campaign exceeded \$1 million.<sup>10</sup> In just one senate campaign, the contributions totaled more than \$45 million.<sup>11</sup>

Unfortunately, the sophisticated deals cut in today's complicated political and governmental world are often not as direct and uncomplicated as a simple *quid pro quo*, such as exchanging money for a job or a contract. Instead, today's corruption is much more sophisticated. For instance, corrupting influence today comes in the form of gifts to family members, weekend stays at resorts, games of golf at expensive clubs, insider information regarding stocks, and flights on corporate jets. The list goes on because the ways and means of corruption are endless.

## II. CAMPAIGN FINANCE REGULATION AND EVASION

The average citizen sees a direct connection between all the contributions and the government that results, and cynically concludes that "money talks, and you get what you pay for." Whoever coined the expression "money talks" undoubtedly did not know that it involved constitutional law.

<sup>6</sup> Federal Bureau of Investigations—Chicago Division—Press Releases 2008, <http://chicago.fbi.gov/2008prsrsls.htm> (last visited Mar. 9, 2009) (link).

<sup>7</sup> Kimberly A. Strassel, *Democrats Are the New Ethics Story*, WALL ST. J., Dec. 19, 2008, at A15, available at <http://online.wsj.com/article/SB122964897338520479.html> (link).

<sup>8</sup> See, e.g., Thomas Stratmann, *The Effectiveness of Money in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 1041, 1042 (2005) (quoting *Now Is the Time for All Good Men . . .*, TIME, Jan. 5, 1968, at 44 (quoting Jesse Unruh)) (link).

<sup>9</sup> OpenSecrets.org Center for Responsive Politics, *Stats at a Glance*, <http://www.opensecrets.org/overview/index.php> (last visited Feb. 23, 2009) (link).

<sup>10</sup> The Campaign Finance Institute, *A First Look At Money In The House And Senate Elections*, <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=215> (last visited Feb. 23, 2009) (link).

<sup>11</sup> OpenSecrets.org Center for Responsive Politics, *Most Expensive Races*, <http://www.opensecrets.org/overview/topraces.php> (last visited Feb. 23, 2009) (tabulating the money raised for the 2008 Minnesota senate race) (link).

The U.S. Supreme Court has ruled repeatedly that money is speech; every dollar donated to candidates and every dollar spent on their behalf is protected by the strictures of the First Amendment. The purpose of this Essay is to ask whether that protection has gone too far.

The two key Supreme Court cases dealing with political contributions as speech are *Buckley v. Valeo*<sup>12</sup> and *McConnell v. FEC*.<sup>13</sup> In these cases, campaign finance regulatory laws passed by Congress were challenged and partially upheld. In many cases, the Court has killed far more regulatory provisions than it has upheld, repeatedly emphasizing that campaign finance regulation requires a finding of either actual “corruption” or “its appearance.”<sup>14</sup>

For any regulation of campaign contributions to survive, it must surmount very high hurdles. As stated by the Court in *McConnell*, “[w]hen the government burdens the right to contribute, we apply heightened scrutiny.”<sup>15</sup> Regulation can be approved only when, after subjecting the regulation to “strict” and “exacting scrutiny,”<sup>16</sup> the conduct to be regulated is found to be “sufficiently threatening” to the general welfare of the public.<sup>17</sup>

That exacting, strictest, or heightened scrutiny, says the Court, involves weighing two important public interests: individual free speech and the integrity of the electoral system.<sup>18</sup> In doing that weighing, the Court in *Buckley* experienced little difficulty in permitting limits on the size of individual contributions, recognizing that the evil of large contributions provided the requisite “appearance of corruption.”<sup>19</sup>

However, the Congressional ban on large contributions has been easily avoided by the practice called “bundling.” The person desirous of wielding “clout” simply obtains and ties together a number of smaller individual contributions and delivers the large total to the grateful candidate. The bundler’s ability to deliver bulk campaign contributions to the candidate quickly and efficiently provides a “calling card” that opens doors and provides access to the politically powerful.

Here is an example: Suppose a corporate CEO tells all his subordinates to consider making the allowed contribution limit of \$4,600 to his favored candidate.<sup>20</sup> When many comply with the “suggestion,” the CEO

<sup>12</sup> 424 U.S. 1 (1976) (per curiam) (link).

<sup>13</sup> 540 U.S. 93 (2003) (link).

<sup>14</sup> See, e.g., *Randall v. Sorrell*, 126 S. Ct. 2479, 2488–90 (2006) (reaffirming *Buckley* and listing other court precedents that have adhered to *Buckley*’s constraints) (link).

<sup>15</sup> 540 U.S. at 231.

<sup>16</sup> *Buckley*, 424 U.S. at 44–45, 75.

<sup>17</sup> *Id.* at 260 (White, J., concurring).

<sup>18</sup> *McConnell*, 540 U.S. at 136–37.

<sup>19</sup> *Buckley*, 424 U.S. at 26 (opinion of the Court).

<sup>20</sup> Individuals are allowed to contribute to a candidate’s campaign for both the primary and general election, with the current limit being \$2,300 for each election. Price Index Increases for Expenditure and Contribution Limitations, 72 Fed. Reg. 5294, 5295 (Feb. 5, 2007) (link).

gives the bundle to the candidate and receives a very nice “thank you” letter. At the least, he has that very valuable “door opener.”

When the Court encountered the much heralded and extensive Federal Election Campaign Act Amendments of 1974<sup>21</sup> in *Buckley*, its examination resulted in one of the most complicated set of opinions in the Court’s history. In addition to the opinion of the Court, there are almost as many separate opinions as there were justices. When the numerous regulations imposed by the Federal Elections Commission are added to the confusing morass of the Court’s opinions, the result is a legal labyrinth that only experts can penetrate.

It is beyond dispute that the current contribution regulations are not providing the result promised. Constantly, one hears the cry that the mother’s milk of politics is feeding a ravenous monster. The Court has held that the mere appearance of corruption arising from large campaign contributions is sufficiently threatening to prohibit them.<sup>22</sup> Doesn’t today’s nationwide pay-to-play corruption warrant the same result?

The Court should recall that campaign finance corruption can amount to a “constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government.”<sup>23</sup> That evil is no longer just growing; it has become a full-grown monster. Congress has considered but failed to pass very tough regulation measures for fear of Court disapproval.

If the Court is unwilling to reevaluate its overly tough constitutional tests based on the insistence that “money is speech” in the light of the reality of modern day pay-to-play politics, Congress should at the least direct the Federal Election Commission to undertake a national study verifying the extent of corruption that exists and make specific remedial recommendations to the Congress. If the “appearance of corruption” is the only interest the Court deems legitimate, then Congress needs to take action and explore the corruption surrounding pay-to-play scandals.

#### CONCLUSION

This conclusion is inescapable. Too great a flow of First Amendment-protected political speech cannot ruin our political system, but an insufficiently regulated flow of money and things of value to politicians surely can. It is past time to make sure that it does not.

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<sup>21</sup> Pub. L. No. 93-443, 88 Stat. 1263 (codified in part as amended in 2 U.S.C. §§ 431–455 (2006)).

<sup>22</sup> See *Buckley*, 424 U.S. at 26.

<sup>23</sup> *United States v. Auto. Workers*, 352 U.S. 567, 571 (1957) (quoting *Hearing Before the H. Comm. on Elections*, 59th Cong. 1st Sess. 12 (1894) (statement of Elihu Root)) (link).