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Campaign Contributions and Corruption: Comments on Strauss and Cain

Daniel Hays Lowenstein†

A decade ago, I concluded an article on political bribery with the thought that corruption is an “essentially contested concept,” that is, a concept containing a descriptive core on which users of the concept can agree roughly, but so unbounded and so intertwined with controversial normative ideas that general agreement on the features of the concept is impossible.” I went on:

I do not believe, however, that we should provide our political scientists and theorists with such a convenient escape hatch just yet. Even if the problem of political bribery will not be solved in the end, there is value in the attempt. We need to think more about the concrete situations in which actors in our political system characteristically find themselves, and what we reasonably can ask of them in order to have the kind of system and the kind of results we would like. Intermediate political theory will no more solve our problems than other varieties of political theory, but it may help us disagree more intelligently. 

In the present Symposium, Professors David A. Strauss and Bruce E. Cain—both scholars of the first rank—take up the challenge, by theorizing about whether it is corrupt for elected officials and pressure groups to exchange favorable official actions, such as legislative votes, for campaign contributions. The fact

† Professor of Law, University of California, Los Angeles. This Article is based on a panel discussion at the University of Chicago Legal Forum Symposium, Nov. 4-5, 1994 entitled, “Voting Rights and Elections.”


2 Lowenstein, 32 UCLA L Rev at 851 (cited in note 1).

3 David A. Strauss, What is the Goal of Campaign Finance Reform?, 1995 U Chi Legal F 141; Bruce E. Cain, Moralism and Realism in Campaign Finance Reform, 1995 U
that they employ very different theoretical methods does not prevent them from reaching impressively convergent results: the purchase of favorable official action with campaign contributions is not a corrupt practice, as long as the "contributions" do not benefit candidates in their personal lives and as long as the "purchases" are voluntary and thus not "extorted" by the public officials.

The Strauss and Cain papers confirm several of the speculations contained in the conclusion to my 1985 article. First, they show that corruption, if anything, is a more essentially contested concept than I had supposed, because Strauss and Cain deny the corruptness of a practice that most people would regard as lying close to the core of the concept. Second, as no one who reads their stimulating and thought-provoking papers needs to be told, they demonstrate that there is "value in the attempt" to find a theoretically based definition of corruption. Third, but of course more controversially, I believe their failure to sustain their conclusions supports the proposition that concepts such as corruption cannot be applied satisfactorily to political life by deduction from general theoretical propositions.

Strauss provides an analytic account of the problems posed by campaign finance practices, in the precise sense of "separating something into component parts or constituent elements." Strauss acknowledges that the purchase of favorable official action with campaign contributions is cause for concern. However, he contends that when the real grounds for concern are identified—primarily, that inequality of wealth and structural collective-action problems lead to skewed results when campaign contributions are influential—no negative quality remains that can be described as corruption. Strauss has no objection in principle to campaign finance regulation intended to ameliorate inequality and the other problems he identifies, though he suggests a number of practical reasons for skepticism about regulation. I shall not discuss his practical objections, many of which are well

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4 Merriam-Webster's Collegiate Dictionary 42 (Merriam-Webster, 10th ed 1993).
6 See generally, id at 143-44, 149-52.
7 See id at 158-60.
taken. Instead, I challenge Strauss's central claim: that the belief that campaign contributions may be corrupt is mistaken and that regulations based on that belief are unfounded even in principle.\(^8\)

If Strauss's approach is analytic, Cain's is categorical. He argues that there are two categories of democratic theories: the moralist/idealist variety, which assumes that political institutions should be evaluated according to some specified moral or substantive goals; and the proceduralist variety, which seeks fairness in the ground rules regulating the aggregation and translation of citizens' preferences into public policy, but which remains neutral regarding what the citizens' preferences are and what public policies emerge. Cain gives various reasons for favoring proceduralist theories. Like Strauss, Cain admits that inequalities of wealth provide a legitimate basis for concern about the effects of campaign contributions.\(^9\) He also joins Strauss in suggesting that countervailing considerations may make it futile or inadvisable to attempt to minimize the inegalitarian consequences of the system of private campaign finance.\(^10\) In any event, Cain argues, whatever inequity the campaign-finance system may cause, contributions made in exchange for favorable policy decisions are not corrupt.\(^11\) To characterize such contributions as corrupt would require the application of moralist/idealist standards of "disinterestedness or public spiritedness," whereas in a proceduralist conception, "electoral selfishness is a fundamental premise in a democracy."\(^12\) I shall argue that Cain's dichotomization of democratic theory is overdrawn and that even if it is accepted, it does not support his denial that campaign contributions can be corrupt.

I

Professor David Strauss argues that when reformers call for measures intended to prevent or reduce the corrupting effects of campaign contributions, they are confusing a perceived problem of corruption with a real problem of inequality.\(^13\) The question,

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\(^8\) Id at 141-42, 149.
\(^10\) Id at 135-37.
\(^11\) Id at 116-17.
\(^12\) Id at 117.
\(^13\) David A. Strauss, What is the Goal of Campaign Finance Reform?, 1995 U Chi Legal F 141, 143-44 (cited in note 3).
he writes, "is whether, apart from inequality, the potentially 'corrupting' effect of campaign contributions is a problem." He proposes, as a means of answering this question, a thought experiment consisting of the assumption that "everyone has an equal opportunity to 'bribe' the official or candidate of his or her choice by making campaign contributions." Strauss argues that if a voucher or other wealth-equalization scheme existed, so that equality "were somehow secured (or [ ] we decided it was not an issue)," then officials might properly be pressured by contributions and even make policy decisions explicitly in exchange for campaign contributions. Such behavior, he argues, should trouble us no more than when elected officials adopt policies calculated to appeal to voters. In the absence of inequality, contributions would become very much like another form of voting. Indeed, contributions might be preferable to voting as a means of exercising political influence, because they register intensity of preferences better and are deployed more easily in favor of particular preferences.

Readers must judge for themselves, but I find it difficult to form a clear intuition based on Strauss's thought experiment. For one thing, Strauss asks us to assume that in the world of the thought experiment, officials exchange legislative votes for campaign contributions in accord with the "anti-corruption nightmare scenario." But this assumption does not seem plausible. In the 1991-92 election cycle, approximately $3.2 billion was spent on all political campaigns in the United States. In Strauss's hypothetical world, if the amount of spending corresponds roughly to real-world levels, the voucher or wealth-equalization scheme apparently would leave the average adult with, say, $50 or so to spend on all local, state, and federal campaigns. How could I
expect to influence, much less purchase, a legislator's vote for $50, even assuming I chose to allocate my whole political budget to one legislative race? How can we form clear intuitions in Strauss's thought experiment in the face of such a contradiction?22

A second problem with Strauss's thought experiment is that he gives no account of how we arrived in the wealth-equalized world and what tangible and intangible societal changes occurred in the process. I do not argue that there never could be a society in which campaign contributions legitimately and properly could be exchanged for legislative votes. Public ethics include a large element of convention, so it is difficult to rule out such a possibility. However, I am not persuaded that the only thing necessary to transform the United States into such a society is the “solution” of the inequality problem. Attitudes toward campaign contributions would still depend on a host of additional factors.23

A third problem with Strauss's thought experiment, which he acknowledges,24 is that no agreement exists on what it would mean to “solve” the problem of inequality. Equality is a more notoriously contested concept than corruption.

For all these reasons, Strauss's thought experiment yields intuitions that are uncertain and of doubtful relevance to the society in which we live. Conceptions of equality are so divergent and the causes and consequences of inequality are so complex and pervasive, that simply imagining away inequality for the purpose of a thought experiment leaves us in too abstract a setting to draw any conclusions. Rather than trying to imagine inequality away, a far more workable strategy for a thought

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22 Later, Strauss indicates that wealth-equalized contributions could be channeled through intermediary organizations, which could thereby aggregate large amounts of money that plausibly could be used to buy votes. But Strauss does not ask us to contemplate this possibility in the section in which he asks us to intuit that purchasing legislative votes with contributions in a wealth-equalized world is like voting and unlike bribery. To the contrary, he later provides excellent reasons for regarding contributions channeled through intermediary groups as very much unlike voting. Strauss, 1995 U Chi Legal F at 149-52 (cited in note 3).

23 For some examples of the subtle factors that can affect societal judgments of what is corrupt, see notes 81-98 and accompanying text.

24 Strauss, 94 Colum L Rev at 1371 (cited in note 18).
experiment is to hold inequality constant. As I shall now attempt to demonstrate, doing so leads to the opposite conclusion from the one put forward by Strauss.

Let us suppose that in a California legislative district, the Democratic incumbent, Demetrios, runs against Rebecca, a Republican. There is a 70 percent probability that Demetrios will be reelected. A potential contributor, Barbara Bigbucks, is a lifelong Republican whose primary interest in this race is a complex and obscure tax revision that will come before the legislature next session. If enacted, the measure will save her millions of dollars per year. Rebecca already has announced that she supports the tax revision and will vote for it if she wins the election. Most Democrats oppose the tax revision, and Demetrios privately has informed Bigbucks that he will vote against it.

To simplify the exposition, we shall assume that the vote of the legislator elected from this district will determine whether the tax revision passes. Therefore,

$$P = v_D e_D + v_R (1 - e_D),$$

where \( P \) represents the probability that the tax revision passes, \( v_D \) represents the probability that Demetrios will vote for the tax revision if he is elected, \( v_R \) represents the probability that Rebecca will vote for the tax revision if she is elected, and \( e_D \) represents the probability that Demetrios will be elected. As things stand,

$$P = (0)(.7) + (1)(.3) = .3$$

Now, Bigbucks has another conversation with Demetrios in which she asks if he will agree to vote for the tax revision if she contributes $100,000 to his campaign. After giving the proposal some thought, Demetrios agrees. However, Bigbucks has had some prior experience with Demetrios, and she believes that if he receives enough pressure, he may vote against the tax revision despite her contribution and his agreement. Such pressure might come from Democratic party leaders or from the press. All in all, Bigbucks calculates that the contribution and agreement will

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25 I chose California because I am familiar with its election laws, and for this thought experiment I need a jurisdiction without contribution limits.
increase the probability of Demetrios supporting the tax revision to 50 percent. The $100,000 contribution to Demetrios would increase his chances of being reelected from 70 to 80 percent. Thus, if Bigbucks contributes to Demetrios,

\[ P = (0.5)(0.8) + (1)(0.2) = 0.6 \]

The contribution doubles the chances of the tax revision passing, from 30 to 60 percent. But Bigbucks has another possible strategy. She could make a $100,000 contribution to Rebecca instead of Demetrios. Such a contribution would increase Rebecca's chances of winning from 30 to 60 percent.\(^{26}\) If Bigbucks contributes to Rebecca,

\[ P = (0)(0.4) + (1)(0.6) = 0.6 \]

Under these assumptions, Bigbucks can make either of two contributions, each of $100,000, with the same effect of increasing the probability of attaining her legislative objective from 30 to 60 percent. From a societal standpoint, each possibility might be regretted on egalitarian grounds because Bigbucks's wealth gives her an advantage not available to other citizens in the pursuit of her political objectives. Similarly, each possibility might be regretted as an example of the "dangers of excessive interest-group power."\(^{27}\) As a single individual, Bigbucks avoids the collective-action problems that may prevent other citizens of California—who will suffer higher taxes or reduced government spending to make up for the millions Bigbucks saves—from organizing to defeat the tax revision.

Egalitarian or interest-group concerns could explain any general negative reaction we may have to Bigbucks achieving her policy goals by making a large campaign contribution. However, neither concern can explain any different reactions we may have to the two contribution strategies that are open to her. Either way, she is taking precisely the same advantage of her wealth

\(^{26}\) There is robust statistical evidence that, on average, the electoral prospects of challengers improve more from a given amount of enhanced spending than is the case for incumbents. See, for example, Stephen Ansolabehere and Alan Gerber, _The Mismeasure of Campaign Spending: Evidence from the 1990 U.S. House Elections_, 56 _J Pol_ 1106 (1994).

\(^{27}\) Strauss, 1995 _U Chi Legal F_ at 149 (cited in note 3).
and achieving precisely the same benefit. And either way, she has exactly the same collective-action advantage of being an individual with an intense preference opposed to a large, diffuse, and unorganized group.

Yet, as I believe almost everyone will agree, a contribution to Demetrios under these circumstances is corrupt, but a contribution to Rebecca is not. Viewed from the perspective of the candidates, Rebecca receives a contribution intended to help get her elected from a person who supports her policy views. That is the civics-book conception of campaign contributions. Demetrios, on the other hand, obtains a contribution from an individual who otherwise would oppose his candidacy by agreeing to act contrary to how his conception of representation (whatever that conception may be) would have led him to vote in the absence of the contribution. That is the fearful conception of campaign contributions that, according to Frank Sorauf, "pervades Americans' views of their campaign finance."

Suppose that Bigbucks makes the contribution to Demetrios, who wins reelection and keeps his bargain, so that the tax revision passes the legislature by a margin of one vote. Four legislators, Alice, Bill, Carol, and Demetrios, are asked to explain their votes in news conferences later that day. Here are excerpts from these hypothetical news conferences:

Q: Why did you vote against this bill in the face of voluminous mail and public-opinion polls indicating that the bill was strongly supported by people in your district?

Alice: I paid careful attention to public opinion in my district and discussed the issue with many of my constituents. I concluded that despite their views, this tax break is unfair and comes at a time when we can ill afford it. I owe my constituents, not my industry only, but my judgment; and I betray, instead of serving them, if I sacrifice it to their opinion.

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28 Frank J. Sorauf, Money in American Elections 307 (Scott, Foresman and Co., 1988). Sorauf, who surely qualifies as a distinguished contributor to Cain's "proceduralist" tradition, has expressed skepticism about the empirical claim that campaign contributions have a distorting effect on public policy-making, but he has not denied the normative premise that legislative votes in exchange for campaign contributions are corrupt.

29 Admittedly, the assumption of such media interest contradicts my former assumption that the bill is an obscure one. Nothing turns on this point, however, because I could have used a different hypothetical for this part of the argument.

30 See Edmund Burke, Speech to the Electors of Bristol, in Daniel Hays Lowenstein,
Q: Doesn’t your vote today in favor of this bill contradict your strong stand in recent years in favor of tax simplification and against tax loopholes?

Bill: I admit that I have some real doubts about the wisdom and fairness of the bill we passed today. But public opinion in my district has been strongly in support of this tax revision. My constituents have listened to my arguments against the bill, but I have not persuaded them. In the end, I am in the legislature to represent them, not my own views. Today I voted my district.

Q: You’ve been on a crusade against tax loopholes for years, and every indication is that people in your district agree with you. Yet you voted for the bill today. Why?

Carol: You’re right that I don’t like this tax revision personally, and neither do most of my constituents. But I’ve always tried to be a loyal Republican. Our leaders regarded this as an important partisan issue. Most of the time my constituents and I strongly favor Republican issues. I think it is important to set an example of party loyalty, so that we can get other issues passed even if other individual Republican legislators disagree. The voters can judge each party by the totality of our actions.

Q: Why did you vote with the Republicans on a bill that seems to go against your position on tax policy and that has little support in your district?

Demetrios: It’s true that my judgment of good public policy, the views of most of my constituents, and the demands of party loyalty all pointed toward voting against the bill. But these considerations, even in combination, were outweighed by my desire to raise funds

to help me get reelected. Therefore, I agreed to vote for this bill in exchange for a large contribution from Barbara Bigbucks.

Now, I do not contend that any of these answers is exactly realistic. American politicians typically do not make public statements that schematically follow the lines of major theories of democratic representation. Instead, they fudge, and usually will find a way to claim that what they do reflects both their firm convictions and the views of their constituents. With this qualification, Alice's and Bill's answers are certainly within the pale of American political discourse. Carol's answer is surprising because party discipline tends to be unpopular in the United States, certainly in comparison with following public opinion and doing what one judges to be in the public interest. Nonetheless, her answer is not scandalous.

Demetrios's answer is scandalous. Indeed, it is almost unimaginable. Professors Strauss and Cain may believe it is perfectly proper for Demetrios to accept a large contribution from Bigbucks in exchange for agreeing to vote in her favor on a tax bill, but they would be as astonished as anyone else to hear Demetrios admit in public that he had done so. As my previous analysis shows, the unequivocal disapproval of this transaction in the American political culture cannot be explained by concerns about equality or structural problems of collective action. Americans disapprove of this transaction because they recognize it as corrupt.

Not only Demetrios's public-relations adviser, but his lawyer as well, ought to have advised Demetrios against giving the answer quoted above, for he has a good chance of being led away from his news conference in handcuffs. Aside from possible state-law bribery violations, Demetrios is probably guilty of the federal crime of extortion under the Hobbs Act. The Hobbs Act defines "extortion" as the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." In McCormick v United States, the Supreme Court took what many regard as a narrow view of the Hobbs Act's applicability to campaign con-

31 18 USC § 1951 (1988). For a violation to be established, certain elements not relevant to the present discussion would have to be present. For example, the transaction must affect interstate commerce.

32 18 USC § 1951(b)(2).

tributions when it stated that a contribution could violate the Act only if there was a *quid pro quo*. The presence or absence of a *quid pro quo* is of no particular importance to Strauss and Cain, who maintain that there is nothing corrupt about even the outright bartering of campaign contributions for legislative votes.

In contrast to Strauss's and Cain's view, the Supreme Court wrote:

The receipt of [campaign] contributions is [ ] vulnerable under the [Hobbs] Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking. This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.

The law, the simplest and most unmistakable elements of our political culture, and, for most of us, our sense of what is right and wrong in politics all tell us that acceptance of a campaign contribution in exchange for official decisions favorable to the contributor is a corrupt practice. At best, Strauss shows that

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25 Campaign contributions are "things of value" within the meaning of bribery laws. See Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L Rev 784, 809 (1985)(cited in note 1). It is anyone's guess whether the Supreme Court will read the *quid pro quo* requirement for campaign contributions into the federal bribery statute, 18 USC § 201(b) (1988). Like the federal statute, state bribery laws usually require an "intent to influence" the recipient of a bribe, rather than a *quid pro quo*. In general, a *quid pro quo* does not seem to be required under the state statutes. See, for example, *State v Agan*, 259 Ga 541, 384 SE2d 863 (1989). But there are very few cases, probably a reflection of the reluctance of prosecutors to bring bribery charges based on campaign contributions unless the facts are flagrant. On the issues raised in this note, see, generally, Lowenstein, *Election Law* at 434-68 (cited in note 30).


if the ability to make contributions were so widely and evenly distributed that no one person's contribution could make a nonnegligible difference, we might regard contributions as so much like votes that their use in exchange for official behavior would not be regarded as corrupt. Strauss does not deny that in the real world such behavior poses a social problem that may warrant reform. The example of Demetrios, Rebecca, and Barbara Bigbucks shows that at least part of the reason such behavior is a social problem is that it is corrupt.

II

Invoking the shade of Hans Morgenthau, Professor Bruce Cain proposes a "realist" approach to the campaign-finance reform debate. The only definition that Cain provides for this term appears in his summary of Morgenthau's approach to foreign policy. Cain states that realism was the view that "United States foreign policy-making was characterized by excessive moral idealism and the neglect of well-defined, objective national interests." The overriding "realist" goal for campaign finance, according to Cain, is "to confer widespread legitimacy on government actions," and the purpose of campaign reform should be the pursuit of equity.

Cain's emphasis on legitimacy and equity surely negates his claim that he is a realist of Morgenthau's stripe. These terms smack of moral idealism, and they certainly are not well-defined. Cain criticizes "moral idealists," meaning campaign finance reformers, because they either downplay or disregard issues of equity. Even if this characterization of reformers were accurate—which it is not—Cain's claim to be holding the ban-

37 Bruce E. Cain, Moralism and Realism in Campaign Finance Reform, 1995 U Chi Legal F 111, 111-12 (cited in note 3).
38 Id at 111.
39 Id at 122.
40 Id at 111-12.
41 See, for example, David W. Adamany and George E. Agree, Political Money 8 (Johns Hopkins University Press, 1975)("The first problem of reform is to enable a nation with a private property economy and, consequently, a massive inequality of individual and institutional means to preserve opportunities for all its citizens to participate equally or nearly equally in financing politics."); California Commission on Campaign Financing, The New Gold Rush 89 (Center for Responsive Government, 1985)("The massing effect of interest groups against a particular measure (e.g., tax reform or environmental protection) overwhelms less powerful or poorly organized opponents, even if those opponents enjoy broad popular support."); Daniel Hays Lowenstein, On Campaign Finance Reform: The Root of All Evil is Deeply Rooted, 18 Hofstra L Rev 301, 340-41 (1989)."In [one re-
ner of "realism" in his quarrel with reformers would be unjustified.

Cain asserts that there are two forms of democratic theory: the "moralist/idealist" and the "proceduralist." Although Cain unambiguously favors the latter and disdains the former, little else is clear about his approach. He exaggerates the contrast between these types of theory without ever adequately specifying their characteristics or the precise features that differentiate them from each other. He also fails to substantiate his claim that promoting equity is more "procedural"—much less more "realistic"—as a goal for campaign-finance regulation than the goal he rejects, the control of corruption and conflict of interest.

It is plausible to speak of outcome-based versus process-based support for democracy. Some people may value governments according to their tendency to accomplish certain objectives. Examples include "that government is best which governs least," or the maximization of peace and/or prosperity. Such people may support democracy because they believe it is the form of government most likely to achieve the goal in question. For them, democracy is a means to an end. Others may regard self-government as right or valuable for its own sake, regardless of the consequences. For them, democracy is an end in itself. Few people, especially if they have any sense, would favor one side of this dichotomy to the entire exclusion of the other.

Rather than arguing for a procedural conception of democracy over a substantive conception, Cain draws a confusing distinction between moral idealism and proceduralism. For example, he argues that democratic thought should focus on "procedural fairness, rather than ethical outcomes." But what is an "ethical outcome?" It must be either an outcome that is ethical in itself or

form] vision, the right to political participation may be infringed not only by government suppression, but also by structural inequalities in access to the resources that are necessary for effective participation. In this vision, government intervention to offset such inequalities is permissible if not obligatory, because an individual's or group's good fortune in the economic sector does not create a right to a corresponding advantage in the political sector." (footnote omitted)).

42 Cain, 1995 U Chi Legal F at 111-12 (cited in note 3).

43 In a discussion with Professor Cain after he had read this commentary, he expressed surprise at my apparent rejection of a general recognition that American political thought tends to divide into these two categories. Certainly, some such dichotomization is commonly made, but it is just as certain that it means different things to different writers. I believe Cain must work out his version more carefully. My criticism of Cain's essay is not intended to discredit his enterprise, but rather to encourage him to build on his first, relatively brief, run-through.

44 Cain, 1995 U Chi Legal F at 122 (cited in note 3).
an outcome that was brought about by ethical means. An outcome that is ethical in itself might be one that accords with some ethical system such as utilitarianism or, more likely in the American context, it might refer to an outcome that is regarded as just by substantive standards. But the campaign-finance debate is not ordinarily conducted along such lines. Reformers do not argue that campaign contributions are corrupt when and only when they bring about certain objectionable outcomes. The wrongfulness lies in the means of influencing the outcome, not in the outcome itself. Therefore, Cain probably means "ethical outcomes" to refer to outcomes achieved by ethical means. But in that case, "ethical outcome" might roughly serve as a synonym for "procedural fairness," which Cain favors, rather than as an opposing conception of democracy.

Conceptions of ethics cut across substantive and procedural issues in politics. One may hold substantive policy views for reasons that many would regard as "ethical," for general policy reasons that do not seem distinctively ethical, or for self-interested reasons. For example, one might oppose offshore oil drilling because of a belief that incurring the risk of a spill would violate the obligations that humans have to marine life, because of a belief that it is imprudent to deplete a limited resource under present conditions, or because one has just invested in beachfront real estate whose value will decline if unsightly oil wells are constructed. The same types of reasons may underlie views on procedural issues. For example, one might support a nonpartisan commission to design legislative districts because of a belief that incumbents act unethically when they design districts favorable to themselves, because one believes that districts designed by a commission will result in a more responsive legislature, or because one anticipates that a nonpartisan commission will create a district well-suited to one's own political ambitions.

Thus, one problem with Cain's approach is that its framework is faulty. Cain bases his analysis on a supposed contrast between "proceduralist" conceptions of democracy on the one hand and conceptions that are "moralist/idealist" and outcome oriented on the other. This contrast is faulty because "moralist/idealist" conceptions cut across the proceduralist and outcome-oriented conceptions. Ethical considerations can play either a major or a minor part in both proceduralist and outcome-oriented discussions.

Cain claims to write in a "proceduralist" tradition, but if "proceduralism" means a disregard for ethical conduct and some
conception of the public interest, no such tradition exists in America. Certainly James Madison, whom Cain places at the fountainhead of this so-called tradition, had no such disregard. One of the advantages of a republic over a democracy, according to Madison, is:

[T]o refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.

Robert Dahl, another contributor to Cain’s proceduralist tradition, regarded the character of the individual as at least as important as procedural mechanisms:

A contemporary social scientist would be inclined to assume that the prevailing type of family relationship . . . would be at least as important a determinant of political behavior as the constitutionally prescribed system of governmental controls. Family structure, belief systems, myths, heroes, legitimate types of behavior in primary groups, prevailing or modal personality types, these and other similar factors would be crucial in determining the probable responses of leaders and non-leaders and hence the probability of tyranny or non-tyranny.

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46 See id.

Of this much we can be certain: the system of checks and balances in the Madisonian constitution did not prevent one of the bloodiest civil wars in the history of Western man. None of the numerous constitutional devices suggested
Anthony Downs, another example cited by Cain, did not believe in pure proceduralism. Rather, he described a concept he called the "minimal consensus," without which a democracy could not survive. That minimal consensus includes not only the basic rules of personal conduct and democratic decision making, but broad agreement on the goals that government should pursue. Although in Downs's conception the minimal consensus is likely to be too general to resolve many concrete controversies, it "embodies part of the basic value structure of a democratic society." Consequently, no policy that contradicts the minimal consensus is in the public interest for that society.

It is certainly true that Madison, in particular, did not assume that representatives would always act ethically. But this does not mean that he regarded the ethics or motives of representatives as irrelevant or unimportant. It simply means that institutions must be designed to provide incentives for representatives to act rightly and to minimize the damage when they act badly.

This leads to the second problem with Cain's approach. In his zeal to condemn "moralism/idealism," he overlooks this basic Madisonian distinction. Often, attempts to require ethical conduct—or any form of desirable conduct, for that matter—by direct mandate will prove futile or unwise. However, the object may be

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at the time proved acceptable, and even in retrospect it is impossible to discover any purely constitutional solution for what was a profoundly rooted social conflict.

Id.

See Cain, 1995 U Chi Legal F at 122 (cited in note 3).

Anthony Downs, The Public Interest: Its Meaning in a Democracy, 29 Soc Res 1, 8 (1962). Other writers not cited by Cain, but comfortably fitting within the proceduralist tradition, included similar concepts within their views of politics. David Truman, for example, regarded the "rules of the game" as majority interests within the pluralist system, "the serious disturbance of which will result in organized interaction and the assertion of fairly explicit claims for conformity." David B. Truman, The Governmental Process 512 (Alfred A. Knopf, 2d ed 1971). See also Daniel H. Lowenstein, Political Bribery and the Intermediate Theory of Politics, 32 UCLA L Rev 784, 837-43 (1985)(cited in note 1). Another example is Cain himself, who observes that there are "shared notions of fairness, consisting of other-regarding considerations, that underlie any formal system of democratic procedures." Cain, 1995 U Chi Legal F at 131 (cited in note 3).

Thus, immediately following the passage quoted in the text accompanying note 46, Madison wrote:

On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people.

obtained indirectly by manipulation of the incentives and environment within which the actors in question will operate. The indirect procedure is the characteristically Madisonian procedure. It is also the procedure typically favored by campaign finance reformers, who do not believe that direct regulation of corruption by means such as bribery laws is sufficient. The reformers therefore favor indirect means such as public financing and contribution limits. The wisdom of all such proposals can and should receive scrutiny, but there is nothing un-Madisonian about them.

Given the conceptual problems with Cain’s approach, the third problem is predictable. His approach does not point clearly to the conclusion for which he argues, namely that issues of corruption and conflict of interest are irrelevant to “proceduralist” consideration of campaign finance. Cain’s failure to define his terms precludes evaluation of Cain’s assertion by means of deductive logic. However, the richness of Cain’s discussion permits using inductive reasoning to discern the boundaries of his conception of “proceduralism.” Let us therefore list some of the principles and proposals that Cain does regard as appropriate for debate within proceduralism.52

- The assignment of “basic rights . . . to individuals either by tradition or by the Constitution.”54
- “[S]hared notions of fairness, consisting of other-regarding considerations . . . .”55
- A proposal to prohibit or limit some out-of-district contributions to candidates in order to enhance the “perceived legitimacy of the political system.”56

52 Cain, 1995 U Chi Legal F at 122 (cited in note 3).
53 Cain does not himself espouse all of the items on the following list, but he treats them as plausible “proceduralist” positions, in contrast to any proposal intended to control corruption or conflict of interest deriving from campaign contributions.
54 Cain, 1995 U Chi Legal F at 122 (cited in note 3). As Cain argues, some basic rights, such as some degree of freedom of speech, are necessary for any regime of popular sovereignty and therefore can be accommodated comfortably within a proceduralist approach. But other basic rights that are recognized in the American tradition and the American Constitution are more outcome based than proceduralist. The right to freedom of religion, rights of criminal defendants, the right to compensation for government takings of property, and some applications of freedom of speech are examples. Cain must either take the position that only the process-based rights are “basic” and deserving of constitutional protection or he must live with a gaping hole in his “proceduralist” construct.
55 Id at 131.
56 Id at 133.
A proposal to prohibit or limit contributions and expenditures by groups on the basis of a view of the “logic of representation.”

A proposal to limit contributions and expenditures in order to promote equality of influence.

How can a conception of proceduralism that admits each of the above as proper for consideration be closed to a contention that the bartering of legislative votes for campaign contributions is corrupt and ought to be discouraged to the extent feasible? It hardly would exceed the bounds of contemporary discourse to assert a “right” to government decisions not determined by such means, though I would not make the claim myself. But I would very readily make the claim that “shared notions of fairness” condemn such decision making. Bartering of contributions for favorable official action diminishes the “perceived legitimacy of the political system” and contradicts almost any “logic of representation” I can imagine. The specific proposals to minimize such bartering likely would include some of the proposals that Cain regards as properly “proceduralist,” if put forth for slightly different purposes. Indeed, although the distinction between procedural and substantive policy is not hard and fast, I think most people, if forced to choose, would regard campaign-finance regulation as procedural.

Given the generally inclusive nature of Cain’s proceduralist tent, on what basis can he exclude issues of corruption and conflict of interest that arise within the campaign-finance system? Apparently, the reformers’ crucial error is their concern with motivation. Though moralists “may prefer disinterestedness or public spiritedness, [ ] electoral selfishness is a fundamental premise in a democracy.” Regulating the motives of representatives is “impractical and ultimately futile.”

For several reasons, Cain’s attempt to proscribe motive-based regulation will not suffice to rule campaign-finance regulation targeted at corruption and conflict of interest out of his proceduralist conception. First, Cain allows rights into his sys-

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57 Id at 134.
59 For example, the “logic of representation” put forth by Alice, Bill, and Carol in my example above would in each case condemn such bartering.
60 Cain, 1995 U Chi Legal F at 117 (cited in note 3).
61 Id at 111.
but the definition of rights often depends on motive. If the government wants to take a tree from my land to use in the White House Christmas celebration, I will have a right to compensation. If the government takes my tree to prevent the spread of disease to my neighbors' trees, I have no such right.

Second, equity, which Cain apparently equates with fairness, is not only admissible within his proceduralist system but plays a "central role" in political regulation. But the fairness of a decision often depends on its motivation. Last night I attended a Giants-Dodgers game. The umpires made a series of outrageous decisions, all favoring the Dodgers. If the umpires were impartial, then their decisions were mistaken but not unfair to the Giants, at least not in a procedural sense. But if before the game they bet a large sum of money on the Dodgers, then their decisions were unfair. The unfairness turns not on the decisions themselves, but on the motivation for the decisions. So, if I fail to obtain my legislative objective because I fail to persuade enough legislators on the merits or because public opinion is against me, I have not been denied procedural fairness. But if my bill was on the verge of passing until my policy opponents made contributions in exchange for which a decisive group of legislators agreed to change their votes, I have been treated unfairly.

Third, it is possible, admittedly, to consider bribery and corruption as bad primarily on ethical grounds. However, one may also oppose bribery and corruption on consequentialist grounds, in the belief that, in the long run, society will reach better decisions and operate more efficiently without these practices. Although evaluation of any particular incident to deter-

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62 See id at 122 (cited in note 3).
63 See Miller v Schoene, 276 US 272 (1928).
64 See Cain, 1995 U Chi Legal F at 122 (cited in note 3).
65 Id at 112.
66 At least, the tickets I purchased give me the right to so believe.
67 It is not even necessary for present purposes to conclude that I have been treated unfairly. A weaker assertion, that my claim to have been treated unfairly is admissible within a "proceduralist" debate on campaign finance, will suffice.

I occasionally have made small contributions to a college classmate who is a United States Senator from Connecticut. According to Cain, a proposal to prohibit such contributions on the ground that I am not a resident of Connecticut is a properly "proceduralist" response to a threat to the "perceived legitimacy of the political system." Cain, 1995 U Chi Legal F at 133 (cited in note 3). Is that viewpoint admissible and not the one described in the text?

69 See, generally, Lowenstein, 32 UCLA L Rev at 802-05 (cited in note 1).
mine if it is corrupt still will require consideration of motivation, the underlying purpose is not necessarily the policing of motivation.

Fourth, Cain may respond that he does not wish to rule out all concern with motivation, but only the reformers’ “highly idealized notions about the appropriate motives for democratic public policy-making.” It would indeed be unrealistic to insist that representatives act most of the time upon “highly idealized” motives. However, asking them not to barter legislative votes for campaign contributions seems to me only “slightly idealized.” Or, it would be only slightly idealized if the system of campaign finance as a whole did not place inordinate pressure upon candidates to raise money from interested sources. That is why, pace Cain, it does not “flow naturally” from the reform position to favor “more vigorous prosecution of legislatively oriented contributions as crimes.” The primary goal of reform is not to punish sinners. Rather, it is to reduce the pressure on candidates to seek contributions from interested sources.

Finally, Cain’s attempt to proscribe motive-based regulation is inconsistent with his position on “extortion.” As the next part shows, Cain’s position on extortion imports motivation into the proceduralist discussion of campaign-finance reform in precisely the manner that he prohibits to reformers.

According to Cain, campaign finance reformers take a “‘good government’ position [that] often appears to be self-righteous, unrealistic, and ultimately counterproductive.” Supposedly, this position is in contrast to the “realism” of Cain and his fellow “proceduralists.” But the foregoing analysis suggests that Cain’s dichotomy between “moralist/idealist” and “proceduralist” conceptions of democracy is a jerry-built structure based on unspecified, cross-cutting categories that fail to support Cain’s conclusions. Indeed, the whole structure seems to have little purpose except to serve as a device for name-calling directed against the reformers.

III

Curiously, Professors Strauss and Cain both concede that one situation exists in which the bartering of legislative votes for

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70 Cain, 1995 U Chi Legal F at 113 (cited in note 3).
71 Id at 114.
72 Id at 131.
campaign contributions is corrupt—when the contribution is "extorted" from the contributor. According to Strauss, for example, extortion:

[I]s the opposite of the concern with corruption (understood as a form of bribery): the problem is not the power that contributors have over officials, but the power that officials have over potential contributors.

Strauss and Cain incorrectly assert that "extortion" has received "little attention" from reformers and that reformers "tend not to take this complaint very seriously." However, it probably is true that reformers tend not to give extortion a great amount of separate attention, for the good reason that extortion by contribution is not a greater problem than bribery by contribution. To the contrary, for most practical purposes it is not a different problem at all.

How can an extortionate demand for contributions be differentiated from a corrupt acceptance of a contribution? Suppose

74 Strauss, 1995 U Chi Legal F at 152 (cited in note 3). See also Cain, 1995 U Chi Legal F at 124 ("While the conventional story about special interest group contributions is that they potentially alter legislator behavior, interest group lobbyists sometimes argue the opposite—that legislators force groups to give money in order to maintain access to the legislator, or to keep the legislator from taking threatened action . . . .") (cited in note 3).
75 Strauss, 1995 U Chi Legal F at 182 (cited in note 3).
76 Cain, 1995 U Chi Legal F at 124 (cited in note 3). See, for example, David W. Adamany and George E. Agree, Political Money 11 (Johns Hopkins University Press, 1975)("Politicians may invoke the powers of government in demanding financial support. . . . Extortion, or practices that differ only in being more genteel, are the Janus face of undue influence by contributors.") (cited in note 41); California Commission on Campaign Financing, The New Gold Rush 140 (Center for Responsive Government, 1985)("Contributors use words like 'extortion' and 'shakedown' to describe the strong-arm tactics used by legislators to solicit money. . . . The appearance of a quid pro quo is thus generated both by contributors who press money into candidates' hands and by candidates who coerce money from unwilling contributors.") (cited in note 41); Daniel Hays Lowenstein, On Campaign Finance Reform: The Root of All Evil is Deeply Rooted, 18 Hofstra L Rev 301, 320 (1989)("Lobbyists frequently complain that they are the victims of extortion in the campaign finance system.") (cited in note 41).
77 As James Lindgren has shown, the crime of extortion, when committed by a public official "under color of office," historically has not required any particular threats or coercion on the part of the official. James Lindgren, The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act, 35 UCLA L Rev 815 (1988). The threat has been implicit in the holding of the power of office, and extortion by a public official resembles the modern crime of bribery. Id at 822-29. The Supreme Court accepted the conclusions of Lindgren's research in Evans v United States, 504 US 255, 260 n 5.
a potential contributing group wants to maximize a quantity (an appropriation of funds, say) and that our old friend Demetrios has the deciding vote in the legislature. If the group does not contribute to him, Demetrios will vote for $x$, but if the group makes a contribution, he will support $x + y$. Is Demetrios trying to extort a contribution from the group, or is the group contemplating bribing Demetrios? From these facts, there is no way to tell.

The only way to specify a precise distinction between extortion and bribery is to determine what position Demetrios would take if the group could not make a contribution. Call that his "vacuum position." If Demetrios's vacuum position is $x$, then we have a case of bribery, but if his vacuum position is $x + y$, he is attempting to extort a contribution. In the former case, the contribution, if made, will induce a favorable vote. In the latter case, Demetrios's vote for $x$ if the group declines to contribute can only be explained as a punishment of the group, intended either as retribution or as an incentive for this group and others to respond to threats in the future. If Demetrios's vacuum position is greater than $x$ but less than $x + y$, then we have a mixed case of extortion and bribery.

Positing a vacuum position gives conceptual precision to the distinction made by both Strauss and Cain, but the distinction has little practical value. Demetrios's vacuum position will be hidden from the contributing group and from everyone else. Indeed, since the vacuum position is purely hypothetical, even Demetrios may not know it.

Of course, as I argued in part II, regulation can aim at disfavored motivations indirectly by rearranging incentives, without any need for inquiry into anyone's motivation in a particular


Although I believe that the historical and still-current meaning of "extortion" in law is informative, I recognize that Cain and Strauss are not making legal arguments, and I do not press the point further.

78 The vacuum position can be no less than $x$, because there would be no reason for Demetrios to treat the group more harshly when it is disabled from making a contribution than when it could contribute but chooses not to. Similarly, the vacuum position can be no greater than $x + y$, because there would be no reason to treat the group more favorably when it is disabled from contributing than when it can and does contribute.

79 See Lowenstein, 18 Hofstra L Rev at 325 ("[T]he influence of campaign contributions is present from the start, and it interacts in the human mind with other influences in an unfathomable but complex dynamic. It affects the 'chemistry' or the 'mix' of the legislator's deliberations. It may or may not affect the legislator's ultimate actions, but setting aside the most flagrant cases, no one can be sure, perhaps not even the legislator in question.") (cited in note 41).
case. However, there is no apparent reason why any package of campaign-finance regulations would affect differently the incentives to engage in "extortion" or "bribery." A given regulation is likely to be equally effective (or ineffective) against both extortion and bribery. Furthermore, whether regulation is direct or indirect, the concept of a "vacuum position," which is necessary to give the extortion/bribery distinction any precise meaning, is precisely the sort of motive-based concept that Cain rules out of "proceduralist" deliberations.

Alternatively, Strauss and Cain might give up conceptual precision in favor of a more qualitative approach that would look to the factual circumstances, such as which party initiated the transaction. This approach would work well in extreme cases, where either the contributor or the recipient proposes the bargain in the first place and persists until the other party finally gives in.80 But campaign-finance reformers aim at the system of influence deriving from campaign contributions, and it is the nature of such a system that in the routine case there is no difference between "bribery" and "extortion." Interest groups know that legislators need contributions and legislators know that contributors have interests in legislation. It is a pressure system. The truly "realistic" approach is to deal with it as such and not get caught up in a futile attempt to identify villains and victims.

IV

In the preceding parts, I was walking on very firm ground, or so it seemed to me. But now I am approaching a lake whose waters run very deep. I intend to do no more than dip a toe into the water.

Professors Strauss and Cain agree that payments made to legislators for their personal use in exchange for legislative votes are corrupt and a proper object of regulation.81 Therefore, they must distinguish "personal-use" payments from campaign contributions. Each gives essentially the same ground for the distinction: that the candidate can use campaign contributions only to attempt to gain votes. Thus, Strauss writes:

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80 State v Agan, 259 Ga 541, 384 SE2d 863 (1989), is an example of a case that could easily be categorized as bribery and not extortion based on the facts as the court describes them.

To obtain a bribe, a legislator might deliberately cast a vote that she knew would ruin her chances of reelection. But it would be irrational for a legislator to cast such a vote in return for a campaign contribution—since the most the contribution can do is to improve her chances for reelection.... The conventional form of corruption occurs when elected officials take advantage of their position to enrich themselves. In effect they convert their public office into private wealth. But when the quid pro quo for an official action is not a bribe but a campaign contribution, the official has used the power of her office, not for personal enrichment, but in order to remain in office longer. In a democracy that is not necessarily a bad thing for an official to do.82

Cain similarly states:

Bribes [ ] deal in a currency of self-interest other than votes. If campaign contributions can only be used to persuade others to vote a certain way, then voters still have sovereignty—their votes are what matter in the end, and they can ignore or discount the messages they receive if they choose.83

That campaign contributions, unlike personal payments, can be used only to attempt to win votes is true by tautology; it has been built into the stipulation that differentiates contributions from personal payments. The question is: what is the normative significance, if any, of that difference?

Strauss and Cain argue that however important the campaign contributions may be to the legislator, their importance derives solely from their usefulness in winning votes. In Cain's words, "voters still have sovereignty ... and they can ignore or discount the messages they receive if they choose."84 However, voters also retain sovereignty when the candidate receives personal payments. Assuming that campaign contributions and personal payments are both fully disclosed, voters are free to attach whatever significance they wish to the transactions. True,

83 Cain, 1995 U Chi Legal F at 117 (cited in note 3).
84 Id.
as Strauss argues, the legislator might value a personal payment more highly than a contribution and therefore might accept a personal payment that jeopardizes his or her chances of reelection. In this case, voter sovereignty would be impaired in a way that is not possible in the case of campaign contributions. However, this possibility is irrelevant if, as usually seems to be the case, the legislator values reelection more than personal payments.85

What undermines Strauss's and Cain's argument is that no connection is likely to exist between the exchange of a contribution for a legislative vote on the one hand, and the campaign communications that the contribution will purchase on the other. Their argument would have some force if, in our previous example, there were some assurance that Demetrios would use Bigbucks's $100,000 contribution to defend his vote in favor of the tax revision that prompted her to make the contribution. But, of course, it will not be used for that purpose.86 In a world in which incumbents value reelection highly, the limitation on the use of campaign contributions to winning votes has no normative significance.

But now I come to the deep waters. Defensively, Strauss and Cain recognize their need to distinguish campaign contributions from personal payments. I have argued that their attempted distinction fails. But they also have an offensive point, namely, that those of us who believe campaign contributions bartered for legislative votes are corrupt need to distinguish campaign contributions from other political benefits that may be bartered for votes. As Cain writes:

The critical questions raised by [the reformers'] conception of corruption are whether all forms of personal gain are inappropriate for representatives and, if not, which ones are appropriate and why? For instance, when a representative adopts a position on an issue to help himself or herself get reelected, this choice is seemingly based on the personal gain of holding office. . . . Is this

85 One reason that legislators value reelection more than theoretically limitless personal enrichment is that although there may be no limit to personal greed, there are very real limits on how much a legislator can accept in personal payments without serious risk of detection.
86 It probably will pay for mail either attacking Rebecca because she once sat on a bus next to a person who once employed an illegal immigrant, or taking credit for the bill Demetrios authored increasing the penalty for certain felonies from seven consecutive life sentences to nine.
form of personal gain acceptable, and, if so, why? Or, to take another example, when a party leader tells a representative to follow the party whip if the representative wishes to advance up the leadership ladder, receive a bigger office, or hire more staff, the whip's inducement is based on the representative's personal gain. If all considerations of personal gain were eliminated, many of the common mechanisms for electoral and party accountability would be rendered ineffective. Assuming that few if any commentators would favor eliminating all considerations of personal gain from politics, the question becomes why the personal gain attached to receiving a campaign contribution is different from the gain of reelection or career advancement.

This is a fair challenge. The expected response, in an academic setting, is a statement of a more general principle from which the conclusion can be derived that contributions alone among all political benefits create corruption and conflict of interest or, alternatively, that contributions and other specified political benefits alone create such a danger.

I shall not offer such a general principle. Some readers may take this statement as an evasion or concession. However, I believe that deductive reasoning from general principles is but one method, and not the dominant method, of the moral and political reasoning that we do and should employ. In the past several decades, research in linguistics, philosophy, psychology, and other disciplines has found that human thought generally relies much less on hierarchical, logically defined categories than is usually supposed. Groupings depend on metaphor, metonymy, reference points, and a variety of other mental processes as much as they do on logic. Furthermore, even either/or categories can be a matter of degree.

I see no reason to doubt that researchers' discoveries regarding human thought about the tangible world apply equally to

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87 Cain, 1995 U Chi Legal F at 115-16 (cited in note 3).
89 Id.
90 For example, robins and chickens are birds, but there is a recognizable sense in which robins are more "bird-like" than chickens. If a large number of people are asked to name a type of bird, they probably will name robins more often than chickens, despite the fact that chickens play more of a part in most people's daily lives than do robins.
normative thought. No doubt many people will find this position unsatisfactory. It seems to preclude definitive answers to specific questions such as whether it is wrong to exchange campaign contributions for legislative votes. One response is that the imagined certainty that comes from deductive moral reasoning is illusory, as anyone who spends any time reading moral philosophy will soon discover. Furthermore, it seems intuitively correct—to me, at least—that difficult normative problems should be matters of judgment rather than of abstract reasoning.

How shall we proceed, then? The prevailing social norm with respect to campaign contributions bartered for legislative votes provides an excellent starting point. As I have argued, here and elsewhere, prevailing social norms unambiguously condemn the practice. In my view, that puts a fairly heavy burden of persuasion on those who wish to argue that the practice is proper.

Martin Shapiro has raised two familiar objections to placing such reliance on social norms:

There is a cultural norm of racism in our society. Does the existence of such a norm give constitutional legitimacy to racist statutes? Such an argument would not appear terribly attractive or constitutional. Moreover, there is that old bromide of cultural anthropology. Is the best evidence of a norm profession or behavior? If there is an anti-corruption norm in American society, surely there is also a pro-corruption norm in the widespread proclivity of Americans to seek to influence the behavior of legislators by any means short of assassination.

I shall sidestep the very difficult issues raised by Shapiro's first objection by conceding that prevailing norms are not always "right." But I am not arguing that prevailing norms always must be accepted. We have come to believe that some of the norms of our forebears were profoundly wrong. Our successors probably

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91 Please recall at this point my earlier statement that I will do no more than dip my toe into these deep waters.
93 I do not agree with this claim, but that disagreement does not affect the general argument.
will have the same belief about some of our norms. But recogni-
tion of the evolution of norms does not provide a reason to as-
sume that we start with a normative tabula rasa. To use a famil-
 iar metaphor, we can make repairs and improvements to our ship
as we float, but we cannot take the ship apart and rebuild it from
scratch.

Shapiro's second point seems to me mistaken. Certainly,
some norms are, in Shakespeare's phrase, "honored in the
breach." Perhaps the norm that elected officials should adhere to
party platforms is an example. But the case of campaign contribu-
tions exchanged for legislative votes does not fall into this
category. To be sure, the norm is sometimes violated. It is regu-
larly violated if the norm is extended beyond outright exchanges
to campaign contributions that influence official behavior.\footnote{I believe that the norm is and should be so extended, but this issue is not present-
ed by the Strauss and Cain papers.} The
mere fact that a norm is violated, however, does not mean that
the norm is illusory. Even strongly held norms often will be vi-
olated when the pressure to do so becomes great enough. From a
reformer's standpoint, the trouble with the campaign finance
system is that it places too much pressure on candidates, elected
officials, and interest groups to violate the norms of our society.

Are there good reasons for disapproving and seeking to
change the existent norm that regards the bartering of campaign
contributions for legislative votes as corrupt? I think not. I shall
give a few reasons, without attempting to be exhaustive or to
provide much elaboration.

First, the practice closely resembles other practices that
Cain, Strauss, and most other people condemn: acceptance of
bribes consisting of personal payments and "extortion" of contribu-
tions.

Second, as I have argued in opposition to Strauss, the contribu-
tion-corruption norm does not coincide with egalitarian norms
or with concerns about collective-action problems. Nevertheless,
the general effect of the contribution-corruption norm probably is
beneficial from the standpoint of egalitarian and collective-action
concerns. On the whole, campaign finance reforms aimed at cor-
rup tion and conflict of interest probably will have beneficial dis-
tributive and efficiency consequences. Thus, functional consider-
ations tend to reinforce rather than undermine the contribution-
corruption norm.
Finally, however much political theorists like to debate competing theories of representation, in practice the theories tend to work in harmony. This was the key insight of Hanna Pitkin in her commentary on the "Burkean debate." Usually, individuals who are elected by particular constituencies will have the same viewpoint as their constituents. When they do not, reflection on the reasons for the disagreement may provide insight as to how the conflict should be resolved. Similarly, the election of a Democrat or Republican typically will reflect both the constituents' and the representative's general agreement with the positions of the Democratic or Republican party. In contrast, there is no reason to assume that legislative votes given in exchange for contributions will coincide with what we would hope for under recognized conceptions of representation. To the contrary, the contribution may be made precisely to induce the representative to violate the recognized conceptions of representation.

Cain's challenge, set forth above, assumes that condemnation of the exchange of legislative votes for campaign contributions must be based on a more general principle: that any legislative behavior motivated by self-interest, including political self-interest, must be corrupt. As Cain shows, any such general principle would be much too broad. I have tried to show that the prevailing norm on campaign contributions is neither derived from nor dependent on a general condemnation of the pursuit of political self-interest.

Just as the free-market economy and governmental interventions into that economy aim to create incentives that will guide self-interest toward serving the public interest, political institutions should be similarly designed to the extent feasible. Where possible, self-interest should be channeled and tamed, but not condemned.

From an ethical standpoint, matters of degree are of vital importance. The legislators Cain refers to who support the party leadership in order to advance within the legislature may well deserve admiration, depending on the circumstances. In some circumstances, the legislator's pursuit of self-interest does not deserve approval, but still falls well short of being corrupt. We likely would refer to that legislator's "petty" self-interest. The delineation of corrupt conduct entails much more than the mere

pursuit of self-interest, though what that "more" is depends a great deal on context, history, and a host of other considerations.

But enough! My toe is wet. Having begun this commentary by quoting the conclusion of my earlier article on bribery, I shall close it by quoting from the introduction to that article:

American politics consists largely of pressures and deals. Certain of these pressures and deals are prohibited under the name of bribery, a particularly heinous offense. This Article asks [as do Strauss, Cain, and I in the present Symposium]: which ones, and why.\(^8\)

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