The Price of Corruption

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According to the Supreme Court, politicians can't be bought for less than $5200, the maximum campaign contribution an individual can give a single legislator. Consequently the Court struck down aggregate contribution limits on the theory that confining individual donations to that base limit provides an adequate safeguard against corruption.

But the Court was wrong. Coupling data from actual campaign contributions from the last election cycle with social science research, this Article demonstrates that corruption likely occurs below the base limit threshold. In one case, a CEO made a first-time $1000 donation to a member of Congress. The next day that representative introduced a securities bill tailored to the interests of that CEO's firm. The fact that the price of corruption is lower than commonly understood has fundamental repercussions for the Court's current protection of money as speech.

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INTRODUCTION

In *McCutcheon v. Federal Election Commission*, Chief Justice Roberts made a crucial assumption: a $5200 contribution is not enough to create a "cognizable risk" of corruption.[1] Drawing upon a combination of social science research, evidence from the world of lobbying, and a look at particular contributions from the most recent election cycle, this Article will demonstrate that donations under $5200 could in fact qualify as corrupt. Even a paltry $1000 may suffice.[2]

Federal election law puts a "base limit" on the amount of money a donor can contribute to a single candidate to $2600 ($5200 in total combining the primary and general election) and, pre-*McCutcheon*, also imposed an "aggregate limit" of $48,600 on the amount a donor could contribute in a single election cycle.[3] The *McCutcheon* plurality emphasized that the aggregate limits, in combination with the base limits, layered prophylaxis upon prophylaxis in a manner that unnecessarily burdened donors' efforts to use money to voice their preferences for particular candidates.[4] In the eyes of the plurality, this problem was particularly acute because "few if any contributions to candidates will involve *quid pro quo* arrangements" in the first place.[5] Using this reasoning, it struck down the aggregate limits as an unconstitutional restraint on donors' free-speech interests in contributing money to the candidates of their choice.

Thus, the effectiveness of the base limits as protection against corruption is central to the balance Justice Roberts strikes between money-as-speech and the prevention of corruption. He presumes that no "cognizable risk of corruption" exists below the base limits.[6] Yet in a political environment where even a $1000 donation appears to prompt legislation, aggregate limits are meaningful because they limit the number of instances an individual donor can engage in *quid pro quo* corruption. Far from being belt and suspenders, the aggregate limits become a tool to mitigate corrupting influences that may persist within the base limits. Rightly understood, then, the base limits are a rough compromise struck precisely because it is so hard to identify what constitutes corruption. Yet leading election law scholar

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[1] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1439 (2014).

[2] *See infra* p. 6.

[3] *McCutcheon*, 134 S. Ct. at 1442.

[4] *Id.* at 1458.

[5] *Id.* at 1458 (quoting Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 357 (2010) (internal quotation marks omitted)).

[6] *See id.* at 1439.

Richard Hasen has suggested that the base limits themselves are vulnerable to constitutional attack.[7]

Original research implicates SecondMarket, a new trading platform that provided a market for the secondary trading of the shares of privately held corporations.[8] The law SecondMarket acutely focused on was Section 12(g) of the Securities and Exchange Act of 1934, which prior to the 2012 Jumpstart Our Business Startups Act (the "JOBS Act") required firms with over 499 shareholders to make public disclosures to the Securities and Exchange Commission (the "500-shareholder rule"), thus effectively coercing them to go public.[9] Part I of this Article recounts in detail the problems that Section 12(g) posed for SecondMarket, but the critical point is that it was vital to the firm's business model that the law be changed.[10]

SecondMarket sought that change. Two episodes in this reform effort stand out. First, on May 24, 2011, Representative Jim Himes (D-CT), a member of the Subcommittee on Capital Markets and Government Sponsored Enterprises, introduced H.R. 1965, requesting a study of appropriate shareholder registration thresholds.[11] Within two weeks, two SecondMarket employees—its CEO and its head of public affairs—each donated $1000 to Representative Himes.[12]

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[7] *See* Richard L. Hasen, *Die Another Day: The Supreme Court Takes a Big Step Closer to Gutting the Last Bits of Campaign Finances Reform*, SLATE (Apr. 2, 2014, 1:13 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/the_subtle_awfulness_of_the_mccutcheon_v_fec_campaign_finance_decision_the.html ("While Roberts goes out of his way to say that those base limits were not challenged today, he does not do anything to affirm that those limits are safe. In fact, he expressly says those limits don't prevent corruption, but are "prophylaxis"—and that itself could provide a basis for striking them down.").

[8] *See* SECONDMARKET, https://www.secondmarket.com/?t=edlogo (last visited Mar. 14, 2014); *see also* Richard Teitelbaum, *Facebook Drives SecondMarket Broking $1Billion Private Shares*, BLOOMBERG (Apr. 27, 2011, 12:01 AM), http://www.bloomberg.com/news/2011-04-27/facebook-drives-secondmarket-broking-1-billion-private-shares.html (recounting the history of SecondMarket).

[9] To be precise, firms with assets over $10 million and a class of equity security held by five hundred or more persons had to register under the Securities Exchange Act of 1934 ("Exchange Act"). Securities Exchange Act of 1934, 15 U.S.C. § 78 (1964) (amended 2012). Section 12(g)(1) of the Exchange Act in reality specifies a $1 million cutoff, but Rule 12g-1 of the Exchange Act exempts firms with $10 million or less in total assets. *See* 17 C.F.R. § 240.12g-1 (2013). Registering under the Exchange Act means filing a Form 10 with the SEC, describing its business in detail. Once registered, a firm must make periodic filings and comply with proxy regulations. *See* William K. Sjostrom, Jr., *Questioning the 500 Equity Holders Trigger*, 1 HARV. BUS. L. REV. ONLINE 43, 43–44 (2011).

[10] The impatient reader can see infra notes 28–29 and accompanying text.

[11] H.R. 1965, 112th Cong. § 2 (2011).

[12] *See Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket") (listing two SecondMarket employees as contributing $1000 each to Rep. Himes, one on June 6, 2011, and the other on June 7, 2011).

Why? One possibility is that SecondMarket is based in New York,[13] reasonably close to Himes's home state of Connecticut,[14] and that these employees may reside in Connecticut or have a close relation to the state and regularly engage in its political life. Yet the Federal Election Commission ("FEC") database does not include any record of either of these individuals having made any political campaign contributions—except one donation to a local New York Congresswoman—prior to Himes' introduction of H.R. 1965.[15]

The second confluence of legislative and donative activity occurred only weeks later. On June 13, SecondMarket's CEO donated $1000 to David Schweikert (R-AZ).[16] The very next day, Schweikert introduced H.R. 2167, the Private Company Flexibility and Growth Act, which proposed raising the threshold to 1000 shareholders and excluding even from that heightened threshold most of SecondMarket's buyers and sellers.[17] Again, SecondMarket's CEO had no obvious connection with Arizona and, save for his earlier donation to Congressman Himes, had not, according to the government's database, made any prior out-of-state campaign contributions to anyone ever before.[18]

While some readers may be shocked by these events, others will shrug. Everyone knows money matters in Washington. But two things *are* unique about the SecondMarket story: the narrowness of the issue and the targeted nature of the contributions.

This Article argues that the short time interval between the introduction of the Himes bill and the SecondMarket employees' donation and the virtual simultaneity of the introduction of the Schweikert bill and the second donation raise enough of a red flag of corruption to bring into play the state's

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[13] *Contact Us*, SECONDMARKET, https://www.secondmarket.com/about/contact (last visited Feb. 18, 2015).

[14] *About Jim*, HIMES.HOUSE.GOV, http://himes.house.gov/about-jim/biography (last visited Feb. 18, 2015).

[15] Additionally, SecondMarket was founded in 2004 by its CEO, so Himes had been associated with the firm for 7 years at the time of the donation. *About Us*, SECONDMARKET, https://www.secondmarket.com/about (last visited Feb. 18, 2015).

[16] *See Individual Contributions Arranged by Type, Giver, then Recipient*, *supra* note 12 (listing Rep. Schweikert as receiving a June 13, 2011, donation of $1000 from a SecondMarket employee); *Legislative Proposals to Facilitate Small Bus. Capital Formation and Job Creation: Hearing Before the H. Subcomm. on Capital Markets & Gov't Sponsored Entities of the H. Comm. on Fin. Servs.*, 112th Cong. (2011) (listing Rep. Schweikert as a subcommittee member), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg72604/html/CHRG-112hhrg72604.htm.

[17] Private Company Flexibility and Growth Act, H.R. 2167, 112th Cong. (2011). Only accredited investors could buy shares on SecondMarket, and most of its sellers were employee shareholders. H.R. 2167 exempted both groups. *Id.*

[18] *See* Appendix.

interest in limiting campaign contributions. These individuals never made an out-of-state contribution before this election cycle, and their brief foray into out-of-state politics subsided as soon as the legislation they sought was secured.

The obvious counterargument is that such reasoning is nothing more than the familiar *post hoc, ergo propter hoc* fallacy: just because Schweitzer introduced legislation the day after receiving a $1000 donation from a CEO who had never made an out-of-state political donation before does not mean that the donation *caused* the action in question.

This Article offers three arguments in response. First, I draw on the law of contract, within which the *quid pro quo* phrase originated, to argue that a finding of corruption does not require that a contribution be the "but for" cause of political action. When assessing the presence of a bargain, contract law is more concerned with external manifestations than with internal mental states. Thus, inherent in the concept of *quid pro quo* is the notion that appearances matter.

Second, *McCutcheon* follows a line of campaign finance cases that specifies that the government may regulate to prevent not only corruption, but also the *appearance* of corruption. Even without going so far as to suggest that an actual *quid pro quo* exchange between donor and legislator existed, the close timing surely gives the appearance of such an arrangement.

Third, for those skeptical that a paltry $1000 could matter to a legislator, social science research that reaches back decades shows that receipt of even small dollar-value items can trigger feelings of obligation in the receiver. This "reciprocity principle," regularly observed in behavioral science labs, also explains real-world practices such as a server leaving a candy with a patron's bill or nonprofits sending pre-printed, individualized address labels with their donation solicitations. In each case, the receipt of a gift—even a trivial one—prompts the recipient to want to reciprocate.

Thus, the pattern of SecondMarket employees' giving suggests that there might indeed be a cognizable risk of corruption or its appearance—again, even stringently defined as *quid pro quo* corruption—when contributions fall below the base limit amount. And after *McCutcheon*, every CEO is free to donate up to $5200 to each and every senator and representative in Congress.

The key point is that the base limits do not—as both the *McCutcheon* plurality and dissent presume—provide an effective bulwark against corruption. The SecondMarket example provides evidence that the base limits' preventative measures are imperfect. And if that is so, then Chief

Justice Roberts' opinion, by its own logic, has over-privileged money-as-speech.

Part I of this Article tells the story of the amendment of Section 12(g), punctuated with an account of the campaign contributions of SecondMarket's employees. Part II argues that these contributions may qualify as corrupt under *McCutcheon*. Part III emphasizes the importance of the base limits in the post-*McCutcheon* world. In particular, it highlights that the risk of corruption may be inversely proportionate to the salience of the issue. While on issues of major national concern the media and public pressure may discipline corruption, on narrow and mundane issues, special interests may be no less active and no less effective at using money to achieve their aims.[19] Indeed, this very lack of attention may be what allows their efforts to succeed. Part IV offers further lessons.

I. THE STORY OF SECTION 12(G)

Section 12(g) of the Exchange Act long imposed certain disclosure requirements on private firms with over 499 shareholders, including the duty to provide the Securities and Exchange Commission ("SEC") with an annual report and periodic quarterly filings.[20] The imposition of these duties imposed burdens over and above the simple cost of filing; they exposed these firms to litigation risks and to the disadvantage of disclosing otherwise hidden information to eager-eyed competitors. Most firms approaching 500 shareholders, conventional wisdom went, therefore elected simply to go public—that is, to sell shares on the open market in order to expand business capital in a context where they were going to have to make public-firm-type disclosures in any event. Commentators have asserted that the old 500-shareholder threshold triggered the initial public offerings ("IPOs") of such prominent businesses as Apple, Google, and Facebook.[21]

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[19] For a similar account in the realm of lobbying, see Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 220 (2012) ("At other times, the issue of interest to the lobbyist (and her client) is one about which the legislator has no firm position, or even knowledge, and one about which the public is not paying any attention. In such circumstances the legislator is often willing to help a friendly lobbyist achieve her client's interests . . . .").

[20] *See* Sjostrom, Jr., *supra* note 9, at 43–44 (summarizing the old provision and advocating for exceptions to the rule).

[21] *See, e.g.*, Nicholas Carlson, *Why The SEC Will Force Facebook To Go Public*, BUSINESS INSIDER (Jan. 4, 2011), http://www.businessinsider.com/why-the-sec-will-force-facebook-to-go-public-2011-1 (explaining the special circumstances underlying SEC investigation); Danny Sullivan, *Facebook to IPO in 2008 (It'll Have To)*, SEARCH ENGINE LAND (Oct. 26, 2007), http://searchengineland.com/facebook-to-ipo-in-2008-itll-have-to-12547 (quoting reports that Exchange Act requirements forced Google's offering).

Even so, the impact of Section 12(g) was never clear; in other words, the question of the prevalence of the "unwilling public firm" was an open one. In a separate work, this Author made use of an original dataset to ascertain just how many firms, prior to the JOBS Act's passage, felt the bite of the 500-shareholder rule.[22] Using publicly available data, the article examines the number of shareholders of firms that went public from between 2000 and 2012. Of 1192 firms, only 35 (2.94%) went public with over 400 shareholders; only 27 (2.27%) with over 450 shareholders.[23] Even these numbers may be somewhat overstated. Because firms with an expanding number of shareholders may be older firms with more individuals clamoring for liquidity, the data do not show the number of corporations near 500 shareholders that actually went public *because of* Section 12(g). Instead, the evidence suggests that the number of firms that went public with over 400 shareholders captures most of the firms that *may* have gone public because of Section 12(g)—and that number is small, indeed.

This research thus reveals that the 500-shareholder rule mattered only to a small subset of extremely interested firms: those few that approached this threshold and were threatened with being "forced" public, and those whose business model depended on the firm staying private. This Section will focus on the extraordinary efforts of two such firms to support an increase in the 500-shareholder threshold in 2011—efforts that, combined with other reform proposals, would crystallize in the JOBS Act of 2012.

The two firms were SecondMarket, Inc., and Wawa, Inc., a Pennsylvania-based convenience store operator.[24] Each had a special interest in raising the threshold. Wawa was rapidly approaching the 499 shareholder ceiling.[25] If the law remained unchanged, it would need to reduce its shareholder count by way of a reverse stock split that would cost it $40 million.[26] SecondMarket's reason for opposing the 500-shareholder rule resulted from the nature of its business. The firm provided a marketplace for the secondary trading of the shares of still-private companies.[27] Notably, certain wealthy

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[22] Usha Rodrigues, *Private Firms and Public Disclosures: The Curious Case of Section 12(g)*, 2015 ILL. L. REV (forthcoming 2015).

[23] *Id.*

[24] Phil Mattingly & Robert Schmidt, *Startup Act Shows Silicon Valley Clout Growing in DC*, BLOOMBERG (May 31, 2012, 12:01 AM), http://www.bloomberg.com/news/2012-05-31/startup-act-shows-silicon-valley-clout-growing-in-dc.html.

[25] *Id.*

[26] *Id.*

[27] *See Spurring Job Growth Through Capital Formation While Protecting Investors—Part I: Hearing Before the Comm. on Banking, Hous., & Urban Affairs*, 112th Cong. 29 (2011) (statement of Christopher T. Gheysens, Exec. V.P. and Chief Fin. & Admin. Officer, Wawa Inc.). at 34; *see also* Jen

investors—called accredited investors—were able to use SecondMarket's exchange to purchase shares of Facebook before its IPO.[28] Most SecondMarket sellers sold only a portion of their shares;[29] thus, most sales *added* to a firm's shareholder rolls, rather than substituting one shareholder for another. As a result, Section 12(g)'s 500-shareholder limit threatened SecondMarket's business model in two ways. First, as firms approached the 500-shareholder limit, they might go public, forsaking SecondMarket's exchange for public exchanges like the New York Stock Exchange or Nasdaq. Second, the *in terrorem* effect of the 500-shareholder rule might encourage firms to avoid the SecondMarket exchange altogether, for fear of running afoul of Section 12(g). Thus, the 500-shareholder rule fundamentally endangered SecondMarket's business.

Both Wawa and SecondMarket employed a variety of techniques in pursuit of the goal of revising the 500-shareholder rule. They spent a great deal of money on lobbying efforts. Their employees testified before Congress. And—most important for present purposes—some of their employees made timely campaign contributions.

A. On the Hill

The most vocal and sustained argument for reform came from SecondMarket.[30] Its CEO, Barry Silbert, testified before both the House and the Senate.[31] On both occasions he echoed the concerns about Section 12(g)'s deleterious effects on firms' ability to attract investors and hire employees using stock options. Indeed, Silbert was the only individual quoted in the House report. As that Report stated:

Wieczner, *Investing in private startups is a hot trend. But sorry, you're not invited*, FORTUNE (Aug. 14, 2014, 7:36 AM), http://fortune.com/tag/secondmarket/ (describing SecondMarket's operations).

[28] Barry Silbert, *Not All Markets Are Created Equal*, TECHCRUNCH (Mar. 28, 2012), http://techcrunch.com/2012/03/28/secondmarket-sec/ ("Only "accredited" investors are eligible to buy private company stock on SecondMarket, and we have established a process to ensure that only accredited investors buy stock."); 17 C.F.R. § 230.501 (2013) (defining accredited investor as, among other categories, individuals with over $200,000 in income or $1 million in assets).

[29] *See* Usha Rodrigues, *Securities Law's Dirty Little Secret*, 81 FORDHAM L. REV. 3389, 3411 (2013) (describing that the second market allows employees to liquidate a portion of their assets), *available at* http://fordhamlawreview.org/assets/pdfs/Vol_81/Rodrigues_May.pdf.

[30] *See* Garett Sloane, *Tech Companies New Lobbying Force in DC*, NEW YORK POST (Apr. 1, 2012, 4:00 AM), http://www.nypost.com/p/news/business/flexing_muscles_tezyRbXX ee4BuGpqV9StUK.

[31] *Legislative Proposals to Facilitate Small Business Capital Formation and Job Creation: Hearing Before the Subcomm. on Capital Markets and Government Sponsored Enterprises of the H. Comm. of Financial Services*, 112th Cong. 35-36 (2011); *Examining Investor Risks in Capital Raising: Hearing Before the Subcomm. on Securities, Insurance, Investment of the S. Comm. on Banking, Housing and Urban Affairs*, 112th Cong. 8-9 (2011).

> Barry Silbert, Chief Executive Officer of SecondMarket, Inc., explained that the 500 shareholder threshold "has created a disincentive for private companies to hire new employees, or acquire other businesses for stock, as these private companies are fearful of taking on too many shareholders." Mr. Silbert also testified that the current threshold "discourages companies from providing stock option-based compensation to employees, removing one of the great economic incentives attracting the country's best and brightest employees to startups."[32]

Neither Silbert nor his interlocutors ever acknowledged that the 500-shareholder rule represented a serious problem for the business model of Silbert's own firm, and that he might therefore have self-interested reasons for wanting it changed.

Wawa started out as a seller of dairy products and nonalcoholic drinks in 1905,[33] and opened its first convenience store in 1964.[34] In 2011, Wawa faced an urgent problem. Wawa's Christopher Gheysens, Executive VP and Chief Financial and Administrative Officer, testified before the Senate that "[w]e are at an inflection point" because the firm was approaching the 500-shareholder threshold.[35] Because of Section 12(g), Gheysens testified, Wawa and companies like it would be "limited in their ability to grow because remaining private means dollar for dollar we would have to take capital dollars for new store growth and job creation away to be able to restrict and reduce the number of shareholders we have just to remain private under that outdated rule."[36] In particular, Wawa planned to back away from the 500-shareholder threshold by squeezing out owners of small lots of its shares by effectuating a reverse stock split. According to Gheysens, however, this plan was bad for both Wawa and the social good. As he put the point, Wawa faced a "one-time probably $40 million . . . reverse stock split that would be dollar for dollar away from new store growth."[37]

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[32] H.R. REP. NO. 112-327, at 2 (2011).

[33] *Ice Cream, Milk, or Swimwear?*, 18 NO. 10 WESTLAW J. INTELL. PROP. 11 (2011).

[34] *About Us*, WAWA, https://wawa.com/About.aspx (last visited Feb. 16, 2015, 5:58 PM).

[35] *Spurring Job Growth Through Capital Formation While Protecting Investors—Part I: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 112th Cong. 29 (2011) (statement of Christopher T. Gheysens, Executive Vice President and Chief Financial & Administrative Officer for Wawa, Inc.).

[36] *Id.* at 34.

[37] *Id.* Reverse stock splits involve the corporation issuing new shares that are worth much more than the original shares. For example, in a 100-for-1 reverse stock split, a shareholder with 500 old shares

Senator Toomey of Pennsylvania clearly appreciated the concerns of his local corporate constituent,[38] and he quickly assumed the role of advocate for Wawa, beginning with the notion that the company was open to reform regardless of how it came. To develop the idea, Toomey directed a question to Wawa's Gheysens: "Does it make any difference to you guys whether the ceiling on the number of permissible shareholders is lifted by regulation, presumably by the SEC, or through legislation of Congress?"[39] Gheysens responded: "It does not. Either Congress or by rule of the SEC, the process to us, we are indifferent. The importance for us really is the timeline. We are at an inflection point."[40]

Senator Toomey then turned his attention to Meredith B. Cross of the SEC's Division of Corporation Finance, asking her to provide "any sense for a timeframe" for when the agency would reach a decision on raising the 500-shareholder limit.[41] Cross responded:

> [W]hen the limit was originally put in, it followed a robust study to understand the costs and the benefits and the economic consequences of a change in the rule. So we are doing that now. That takes time, I am afraid. So I expect that we would get the work done on the study during 2012, and then the Commission, if they decide they want to change the rule, would need to put out a rule proposal. So it is at least . . . more than a year away.[42]

Senator Toomey was not happy with this answer, noting in response: "I just have to say that is disappointing."[43]

The SEC's "disappointing" response to Toomey's question left Wawa with no option except to seek relief in Congress. If Wawa tried to lobby the SEC for relief, it would confront an extended delay, as well as the inevitable uncertainty attendant to agency action. Any proposed rule would have to

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would receive 5 new ones. In the course of the reverse split, corporations often cash out the holders of fractional shares. Thus, in the example, a holder of 50 shares would wind up with a half-share, which the corporation could force the fractional holder to sell back to the firm at market price. Thus reverse stock splits are a way for corporations to eliminate small stockholders. *See* Jesse M. Fried, Symposium, *Firms Gone Dark,* 76 U. CHI. L. REV. 135, 141–42 (2009). Wawa did not elaborate on the $40 million number, but presumably the cost of cashing out (and thus eliminating) small holders comprised most of the figure.

[38] *Spurring Job Growth*, *supra* note 36, at 29–30.

[39] *Id.* at 29.

[40] *Id.* at 34 (2011).

[41] *Id.* at 30.

[42] *Id.*

[43] *Id.*

survive the rigors of a notice-and-comment process and potential follow-up revision.[44] Even if Wawa obtained a favorable final rule, that rule could face exacting judicial scrutiny. And so, the far better course was for the affected firms simply to lobby for a change directly from Congress, obtaining a fast result that was all-but-immunized from judicial second-guessing.

B. Lobbying and Campaign Contributions

The effect of the 500-shareholder rule on SecondMarket's business model was profound. Thus it may not be surprising that SecondMarket lobbied for reform, or that its employees made campaign contributions to members of Congress involved in the reform effort.[45] But two pieces of this story are particularly instructive. The first involves the sequencing of these contributions. The second involves the relatively low dollar volume of the contributions the SecondMarket employees made, especially in comparison to the firm's lobbying budget. The culmination of the tale is that multiple bills that came together to produce H.R. 3606, the bill that became the JOBS Act—all to the advantage of both Wawa and SecondMarket.[46]

SecondMarket lobbied hard for a change to Section 12(g),[47] spending $210,000 in 2011[48] and $170,000 in 2012.[49] Wawa also agitated for change,[50] lobbying Democratic senators in Delaware and Pennsylvania to take up the cause.[51] It spent nearly $40,000 on lobbyists to push forward its

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[44] *Id.*

[45] Federal law requires that the treasurer of a political committee use "best efforts" to obtain, maintain, and submit information on donors' employer. 52 U.S.C. § 30102(i) (2015). FEC regulations specify that "best efforts" require that "[a]ll written solicitations for contributions include a clear request for the contributor's full name, mailing address, occupation and name of employer." 11 C.F.R. § 104.7(b)(1)(i) (2014). If the contributor does not provide employer information, then within 30 days after receipt of the contribution the treasurer must make "at least one effort after the receipt of the contribution to obtain the missing information," and if the effort is in writing, must include a pre-addressed return postcard or envelope. 11 C.F.R. § 104.7(b)(2) (2014). If there is a pattern of missing employer information, the FEC might investigate or a competing candidate may lodge a complaint. *See* 11 C.F.R. § 111.3(a) (2014) (outlining the procedures for complaints and investigations).

[46] For a full timeline of the history of Section 12(g)'s amendment, readers should see the Appendix, *infra* at p. 68.

[47] *See* Sloane, *supra* note 31.

[48] *SecondMarket Holdings 2011*, OPEN SECRETS.ORG, http://www.opensecrets.org/lobby/clientsum.php?id=F12960&year=2011 (last visited April 12, 2015).

[49] *Second Market Holdings 2012*, OPEN SECRETS.ORG, http://www.opensecrets.org/lobby/clientsum.php?id=F12960&year=2012 (last visited April 12, 2015).

[50] Andrew Ramonas, *Nixon Peabody Hired by Texas Grocery Chain for JOBS Act Lobbying Effort*, THE BLT: THE BLOG OF LEGALTIMES (Apr. 18, 2012, 3:23 PM), http://legaltimes.typepad.com/blt/2012/04/nixon-peabody-hired-by-texas-grocery-chain-for-jobs-act-lobbying-effort.html.

[51] *Id.*

position—$40,000 more than it had ever spent in lobbying Congress on any issue before.[52]

As will be seen, the money these corporations spent on lobbying dwarfed the amount of their employees' campaign contributions. And there is no doubt that these lobbying expenditures played a significant role in the overall effort for reform. Even so, this Article focuses on campaign contributions, rather than lobbying efforts, for two reasons.

First, the lobbying data are problematic because of the law governing their disclosure. Under the Lobby Disclosure Act of 1995,[53] lobbyists must register with the Secretary of the Senate and the Clerk of the House of Representatives and make quarterly disclosures of their lobbying activities.[54] Because reports are made only every three months, the data do not permit the kind of granular temporal analysis possible with campaign contribution data, which specify a particular date for each contribution.[55]

Second, whether lobbying actually drove the legislation increasing Section 12(g)'s shareholder threshold is, for present purposes, largely beside the point. Lobbying is something of a "black box."[56] Critics see lobbyists as corruptors of the ideal legislative process, who use bribes, favors, and gifts to change the position of politicians.[57] Defenders see them as zealous advocates of their clients' position, providing needed context to distracted legislators as to the effect of government policy in the real-world.[58] Both

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[52] *See Wawa Inc.*, OPENSECRETS.ORG, http://www.opensecrets.org/orgs/summary.php?id=D000029767&cycle=2012 (last visited Mar. 15, 2014) (noting $30,000 in lobbying expenditures by Wawa Inc. in 2012, all to Nixon Peabody, LLP); *Wawa Inc.*, OPENSECRETS.ORG, http://www.opensecrets.org/orgs/lobby.php?id=D000029767 (last visited Mar. 9, 2014) (noting $10,000 in lobbying expenditures by Wawa Inc. in 2011, all to Nixon Peabody, LLP); *Nixon Peabody LLP*, OPENSECRETS.ORG, http://www.opensecrets.org/lobby/firmbills.php ?id=D000022157&year=2012 (last visited Mar. 9, 2014) (listing Wawa Inc. as a Nixon Peabody, LLP client only on bills pertaining to the JOBS Act for 2012); *Nixon Peabody LLP*, OPENSECRETS.ORG, http://www.opensecrets.org/lobby/firmlbs.php?id=D000022157&year=2011 (last visited Mar. 9, 2014) (listing Wawa Inc. as a Nixon Peabody, LLP client only on bills pertaining to the JOBS Act for 2011).

[53] Pub. L. No. 104-65, 109 Stat. 691 (codified as amended at 2 U.S.C. §§ 1601-1614 (2006 & Supp. I 2007)).

[54] 2 U.S.C. § 1603 (2014).

[55] Another flaw of the data is that they do not specify the particular amounts expended on each bill for which the organization lobbied. Thus, the U.S. Chamber of Commerce might disclose that it spent $50 million in a quarter lobbying for twenty-five different bills. *See id.* This lack of specificity is not a problem for the Section 12(g) lobbying, however, because the interests of both SecondMarket and Wawa were so narrowly focused on raising its threshold.

[56] *See* Hasen, *supra* note 19, at 216.

[57] *See id.* at 217.

[58] *See, e.g.*, Nicholas W. Allard, *Lobbying is an Honorable Profession: The Right to Petition and the Competition to Be Right*, 19 STAN. L. & POL'Y REV. 23, 35–36 (2008) ("[P]ublic policy advocacy is inextricably woven into the fabric of our constitutional system because it plays a vital role in promoting effective representative government.").

positions are plausible, and it may well be that the lobbying expenditures of Wawa and SecondMarket were far more influential than the campaign contributions detailed here.

But the focus of this Article does not have to do with lobbying; it has to do with whether, even applying the crabbed *McCutcheon* definition of corruption as *quid pro quo* corruption, contributions below the base limits might qualify as corruption or create the appearance of corruption. My account provides both new empirical evidence and social science data that suggest that even relatively low-dollar contributions can be corrupting. As a result, it is of only peripheral significance whether the "real work" of spending was done on the lobbying front rather than by way of campaign contributions. It suffices that the campaign contributions influenced, or appeared to influence, legislators in a corrupting way.

This Article will return to the question of lobbying at the end. For now, the focus turns to employee campaign contributions. Corporations are forbidden from making direct campaign contributions.[59] Their employees are not.[60]

With regard to timing, as mentioned earlier, two SecondMarket employee contributions were of particular significance. CEO Barry Silbert and SecondMarket's head of public affairs, Mark Murphy, each donated $1000 to Representative Himes in June of 2011, two weeks after Himes introduced a bill requesting a study of shareholder registration thresholds.[61]

The next month, Silbert donated another $1000 to Representative Schweikert, and this action took place the day before he introduced H.R. 2167, the Private Company Flexibility and Growth Act (the "PCFG Act"), proposing to raise the threshold to 1000 shareholders.[62] Schweikert's bill not only sought to raise the Section 12(g) threshold from 500 to 1000, but also moved to exclude from the definition of holders of record both accredited investors and persons who had acquired shares by way of employee compensation plans.[63] This exclusion was highly consequential to SecondMarket because only accredited investors could buy shares on its exchange, and most of the sellers it dealt with were employee or ex-

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[59] 52 U.S.C.S. § 30118 (Lexis 2014).

[60] *Id.* § 30116.

[61] Transaction Query by Individual Contributor, Federal Election Comm., http://fec.gov/finance/disclosure/norindsea.shtml (search for individual contributor by name).

[62] Private Company Flexibility and Growth Act, H.R. 2167, 112th Cong. (2011).

[63] *See id.* §§ 2–3. Accredited investors are individuals with a net annual income of over $200,000 or a total net worth of over one million dollars may invest in securities that are not registered, provided that those securities meet the general disclosure requirements of Rule 502. *Id.* § 230.501(a)(5)–(6).

employee shareholders.[64] H.R. 2167 thus not only doubled the threshold, but also excluded entirely from the count the lion's share of individuals who traded on SecondMarket—by definition all of its buyers, and most of its sellers. [65]

These early donations made by Silbert and Murphy were not the end of the story. SecondMarket's employees continued to make active campaign contributions throughout 2011-2012, as proto-JOBS Act bills wended their way through Congress. In July and August, SecondMarket employees donated $5000 to Schweikert.[66]

On October 17 and 20, two SecondMarket employees donated $1000 to Senator Mark Warner (D-VA),[67] less than three weeks before Warner joined Senator Toomey in introducing the S. 1824 Private Company Flexibility and Growth Act ("PCFGA").[68] This bill proposed raising the shareholder threshold to 2000 and not including employees with vested stock options in the count.[69]

On November 14, five SecondMarket employees collectively gave $13,000 to Sen. Schumer (D-NY).[70] Schumer was an attractive donation target for two reasons. First, on December 1, Schumer introduced S. 1933, Reopening American Capital Markets to Emerging Growth Companies Act

[64] Rodrigues, *Securities Law's Dirty Little Secret*, 81 FORDHAM L. REV 3389, 3404 (2013).

[65] *See* Silbert, *supra* note 29 and accompanying text.

[66] *See Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket") (listing five SecondMarket donations of $1000 each to Rep. Schweikert in July and August). On September 21, Barry Silbert, SecondMarket's CEO, testified before the House's Committee on Financial Services. *Legislative Proposals to Facilitate Small Business Capital Formation and Job Creation: Hearing Before the H. Subcomm. on Capital Markets & Gov't Sponsored Entities of the H. Comm. on Fin. Servs.*, 112th Cong. 35 (2011) (statement of Barry Silbert, Founder & Chief. Exec. Officer, SecondMarket, Inc.), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg72604/html/CHRG-112hhrg72604.htm.

[67] *See Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket") (listing two SecondMarket employees' donations of $1000 each to Sen. Warner in October).

[68] Private Company Flexibility and Growth Act, S. 1824, 112th Cong. (2011) (listing Sen. Warner as a co-sponsor).

[69] The bill went to the Committee on Banking, Housing, and Urban Affairs, and ultimately died there. *See Spurring Job Growth Through Capital Formation While Protecting Investors—Part I: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 112th Cong. (2011) (debating S. 1824); *S. 1824 (112th): Private Company Flexibility and Growth Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/112/s1824 (last visited Mar. 10, 2014) (noting S. 1824 died in committee).

[70] *See Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket") (listing five SecondMarket employees' donations on Nov. 14, 2011, to Impact, totaling $13,000); *Impact*, OPENSECRETS.ORG, http://www.opensecrets.org/pacs/lookup2. php?strID=C00348607 (last visited Mar. 11, 2014) (affiliating Impact with Sen. Schumer); *Spurring Job Growth Through Capital Formation While Protecting Investors—Part I: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 112th Cong. ii (2011) (listing committee members).

of 2011.[71] Although Schumer's S. 1933 proposed no changes to the shareholder threshold under Section 12(g), it embodied other pro-business provisions ultimately incorporated in the JOBS Act.[72] Second, on November 14, Warner and Toomey's PCFGA bill languished in the Senate Committee on Banking, Housing, and Urban Affairs.[73] Notably, Senator Schumer also was on that selfsame committee, as was Senator Richard Shelby (R-AL).[74] On December 30, 2011, a SecondMarket employee gave $1000 to Defend America PAC, Shelby's political action committee.[75]

On December 8, Representative Mark Fincher introduced H.R. 3606: the Reopening American Capital Markets to Emerging Growth Companies Act of 2011, which would later acquire the moniker "Jumpstarting Our Business Startups."[76] On February 15, this bill, which did not propose any change to the shareholder threshold, was reported by the House Financial Services Committee.[77] On March 8, Jack Miller of North Carolina introduced an amendment on the House floor to alter the shareholder threshold to 2000 persons or 500 persons who are not accredited, and to exclude shares acquired from stock options from the count.[78] The move built on Representative Schweikert's earlier proposal to raise the threshold to 1000

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[71] Reopening American Capital Markets to Emerging Growth Companies Act of 2011, S. 1933, 112th Cong. (2011) (listing Sen. Warner as a co-sponsor).

[72] *See id.* (outlining various exemptions for "emerging growth companies").

[73] *See Private Company Flexibility and Growth Act*, *supra* note 82 (documenting the demise of S. 1824).

[74] Members of the Committee on Banking, Housing, and Urban Affairs, 2011-2012 (112th Congress), BALLOTPEDIA.ORG, http://ballotpedia.org/United_States_Senate_Committee_on_Banking,_Housing,_and_Urban_Affairs#2011-2012_.28112th_Congress.29 (last visited July 9, 2015).

[75] *Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket") (showing a SecondMarket employee contributed $1000 to Defend America PAC on Dec. 30, 2011); *Defend America PAC*, OPENSECRETS.ORG, https://www.opensecrets.org/pacs/lookup2.php?strID=C00325993&cycle=2014 (last visited Mar. 15, 2014) (showing Sen. Shelby's affiliation with Defend America PAC).

[76] Reopening American Capital Markets to Emerging Growth Companies Act of 2011, H.R. 3606, 112th Cong. (2011). When H.B. 3606 was reported on in the House on March 1, 2012, it was still titled Reopening American Capital Markets to Emerging Growth Companies Act of 2011. *See* H.R. REP. NO. 112-406, at 1 (2012). By the time the bill was passed by both the House and the Senate on March 28, 2012, Reopening American Capital Markets to Emerging Growth Companies became the heading of Title I and the entire bill was renamed the Jumpstart Our Business Startups Act. *See Text of Jumpstart Our Business Startups*, GOVTRACK.US, https://www.govtrack.us/congress/bills/112/hr3606/text (last visited Mar. 16, 2014) (showing the title of the bill after it passed both the House and the Senate on March 28, 2012).

[77] Jumpstart Our Business Startups Act, H.R. 3606, 112th Cong. §§ 2–3 (2012).

[78] 158 CONG. REC. H1278-79 (daily ed. Mar. 8, 2012) (text of amendment submitted by Rep. Miller (D-NC)).

and exclude from the count both shares acquired through stock options and those held by accredited investors, and effectively gutted Section 12(g).[79]

SecondMarket employees remained active campaign contributors as H.R. 3606 made its way through Congress. On March 9, the day after H.R. 3606—now including the Schweikert-Miller amendment—cleared the House and moved to the Senate, an employee gave $1000 to Sen. Toomey,[80] and on March 15 another employee gave Senator Toomey an additional $1000.[81] Recall that Senator Toomey was a sympathetic advocate for Wawa in committee; Senator Toomey was a sympathetic advocate for Wawa in committee; he was also a member of the Committee on Banking, Housing, and Urban Affairs.[82] On March 20, four employees gave a total of $4500 to Senator Tim Johnson (D-SD), the chair of that same committee.[83] On March 22, the bill passed the Senate with some amendments not pertaining to Section 12(g),[84] and on March 27 the amended version passed the full House.[85] That same day Mark Murphy, SecondMarket's head of public

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[79] S*ee* Usha Rodrigues, *The Once and Future Irrelevancy of Section 12(g)*, 2015 ILL. L. REV. (forthcoming). By Schweikert's account, the amendment to H.R. 3606 was the product of a "back and forth" between his staff and Miller's staff that resulted in a compromise. *See* 158 CONG. REC. H1278-79 (daily ed. Mar. 8, 2012) (statement of Rep. Schweikert (R-AZ)) ("We've [Rep. Schweikert and Rep. Miller] gone back and forth in discussion over the last year, you know, what should the number be. We all came to a collective agreement that 500 was far too small for capital formation. Was 2,000 appropriate? Well, should it be 2,000 accredited? Well, what should be the unaccredited portion for that? I think this is what we'll call an appropriate compromise, and I thank Mr. Miller for bringing this to us and helping us get there."). In another work the Author of the present Article has provided data that show that firms rarely approached the 500 figure even when counting employee shares. Rodrigues, *supra*, at __.

[80] *Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket") (listing one SecondMarket employee as contributing $1000 to Sen. Toomey on Mar. 9, 2012).

[81] *Id.* (search "Employer/Occupation" field for "SecondMarket") (listing one SecondMarket employee as contributing $1000 to Sen. Toomey on Mar. 15, 2012).

[82] Members of the Committee on Banking, Housing, and Urban Affairs, 2011-2012 (112th Congress), BALLOTPEDIA.ORG, http://ballotpedia.org/United_States_Senate_Committee_on_Banking,_Housing,_and_Urban_Affairs#2011-2012_.28112th_Congress.29 (last visited July 9, 2015).

[83] *Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket") (listing two SecondMarket employees as contributing $1000 each and one employee contributing $2500 to Sen. Johnson on Mar. 20, 2012).

[84] *See H.R. 3606 (112th): Jumpstart Our Business Startups*, GOVTRACK.US, https://www.govtrack.us/congress/bills/112/s1824 (last visited Mar. 11, 2014) (noting that H.R. 3606 passed through the Senate with changes on Mar. 22, 2012); Jumpstart Our Business Startups Act, H.R. 3606 Amend., 112th Cong. (2012) (amending H.R. 3606 with regard to crowdfunding).

[85] *See H.R. 3606 (112th): Jumpstart Our Business Startups*, GOVTRACK.US, https://www.govtrack.us/congress/bills/112/s1824 (last visited Mar. 11, 2014) (noting the House accepted the Senate's changes to H.R. 3606 on Mar. 27, 2012).

affairs, gave $500 to Himes' campaign.[86] Also on March 27, the date H.R. 3606 passed the House,[87] SecondMarket employees gave $5000 to Representative Shelley Berkley (D-NV),[88] who was then in a heated and ultimately unsuccessful bid for a Senate seat.[89]

Wawa employees were not as politically engaged as SecondMarket's employees, but six of them made a total of $11,000 in donations to the Friends of Pat Toomey political action campaign on June 27, 2012,[90] two months after the passage of the JOBS Act. Wawa is based in Pennsylvania, so the mere fact that employees donated to the campaign of a Senator from that state is unsurprising. However, these donations were the only campaign contributions listed for these individuals in the FEC database going back more than ten years.[91]

So what does this story disclose about the intersection of campaign contributions and legislative action? The most notable correlation occurs at the outset, when the sponsors of two bills dealing with the shareholder threshold issue received donations within weeks or, in the case of Representative Schweikert, within a day of the key proposal from employees

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[86] *Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket") (listing one SecondMarket employee as contributing $500 to Rep. Himes on Mar. 27, 2012).

[87] *See H.R. 3606 (112th): Jumpstart Our Business Startups*, GOVTRACK.US, https://www.govtrack.us/congress/bills/112/s1824 (last visited July 9, 2015) (noting the House suspended the rules and on a 380 – 41 vote, accepted the Senate's changes to H.R. 3606, on Mar. 27, 2012).

[88] *Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket") (listing two SecondMarket employees as contributing $1250 each and one employee contributing $2500 to Rep. Berkley on Mar. 27, 2012).

[89] *See* Michelle Merlin, *Hot Race for Nevada Senate Seat: Dean Heller vs. Shelley Berkley*, OPENSECRETS.ORG, (Nov. 2, 2012, 2:07 PM), http://www.opensecrets.org/news/2012/11/hot-race-for-nevada-senate-seat-dea.html (describing the tight race); *Shelley Berkley Election Results: Democrat Loses to Dean Heller in Nevada Senate Race*, HUFFPOST POLITICS (Nov. 7, 2012, 9:20 AM), http://www.huffingtonpost.com/2012/11/07/shelley-berkley-election-result s-2012_n_2049717.html (stating that Berkley ultimately lost the tight race).

[90] *Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "Wawa") (showing five Wawa employees contributed $1000 to Friends of Pat Toomey on June 27, 2012, and one Wawa employee made two $2500 contributions on June 27, 2012).

[91] *Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Individual Name" field "Compitello, William") (showing a single donation to Friends of Pat Toomey); *id.* (search "Individual Name" field "Eckhardt, Michael") (showing a single donation to Friends of Pat Toomey); *id.* (search "Individual Name" field "Gheysens, Chris") (showing the June 27, 2012 contribution and one other to Wawa Political Action Committee); *id.* (search "Individual Name" field "Pulos, Catherine") (showing the June 27, 2012 contribution and one other to Wawa Political Action Committee); *id.* (search "Individual Name" field "Schroeder, Nathaniel"); *id.* (search "Individual Name" field "Stoeckel, Howard") (showing no other campaign contributions).

who had never given to any out-of-state federal candidate before.[92] Later contributions focused on the members of the Senate, as S. 1824 sought to make its way out of committee. Committee members Warner, Schumer, Toomey, Johnson and Shelby received $2000, $13,000, $2000, $4500, and $1000 respectively from SecondMarket employees.

These events shine a light on *McCutcheon*'s articulation of campaign finance law. We turn in the next Part to the lessons they offer about emerging constitutional limits in this field.

II. DO THE SECONDMARKET EMPLOYEE DONATIONS QUALIFY AS CORRUPT UNDER *MCCUTCHEON*?

McCutcheon, after reiterating the bedrock principle that Congress may regulate campaign contributions only to protect against corruption or the appearance of corruption, clarified that corruption in the campaign finance context means *quid pro quo* corruption, with direct contributions to a candidate's own campaign coffers posing the greatest danger in that regard.[93] It assumed that, under this definition, contributions beneath the base limit that a citizen can donate to a single candidate—currently $5200 under federal law—"do not create a cognizable risk of corruption."[94]

This Part suggests that, under *McCutcheon*'s narrow definition, the SecondMarket employee contributions may qualify as corrupt. First, it elaborates on *McCutcheon*'s new definition of corruption as *quid pro quo* corruption, highlighting the special dangers posed by direct campaign contributions (rather than contributions to political action committees). The contributions of SecondMarket's employees are precisely these types of contributions.

Next, this Part makes clear that contributions need not rise to the level of bribery in order to be considered corrupt. Criminal bribery presents a separate and distinct issue—one with a higher burden of proof—and one, because of the Speech and Debate clause, uniquely hard to prove in the halls of Congress.

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[92] *See supra* notes 16–17 and accompanying text.
[93] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014).
[94] *Id.* at 1439.

A. Corruption Means Quid Pro Quo *Corruption, and Direct Campaign Contributions are Especially Dangerous*

The *McCutcheon* plurality makes four points of interest here. First, it equates corruption with *quid pro quo* corruption, observing, "[t]hat Latin phrase captures the notion of a direct exchange of an official act for money."[95] For the plurality, at least, "[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors."[96] Moreover, the *McCutcheon* plurality emphasizes that direct campaign contributions pose a greater risk of *quid pro quo* corruption than expenditures made on behalf of a candidate because money flows directly to a candidate, rather than passing through an intermediary: "there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly."[97]

The *McCutcheon* plurality emphasizes this point repeatedly. The core problem is with large contributions made directly to a candidate.

> In analyzing the base limits, *Buckley* made clear that the risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself….*Buckley*'s analysis of the aggregate limit under [the Federal Employees Compensation Act ("FECA")] was similarly confined. The Court noted that the aggregate limit guarded against an individual's funneling—through circumvention—"massive amounts of money to *a particular candidate*." (emphasis added). . . . We have reiterated that understanding several times. See, e.g., National Conservative Political Action Comm., 470 U.S., at 497, 105 S.Ct. 1459 (*quid pro quo* corruption occurs when "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to *themselves* or infusions of money into *their* campaigns" (emphasis added)); Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 297, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981) (*Buckley*'s holding that contribution limits are permissible "relates to the perception

[95] *See id.* at 1441 (citing McCormick v. United States, 500 U.S. 257, 266 (1991)).
[96] *McCutcheon*, 134 S. Ct. at 1441 (citing Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985)).
[97] *McCutcheon*, 134 S. Ct. at 1452.

> of undue influence of large contributors to a *candidate*”); McConnell, 540 U.S., at 296, 124 S.Ct. 619 (opinion of KENNEDY, J.) (*quid pro quo* corruption in Buckley involved “contributions that flowed to *a particular candidate’s* benefit” (emphasis added)).[98]

In the above quotation, it was the *McCutcheon* plurality that supplied the emphasis, making it clear that direct campaign contributions present the critical problem.

The question whether the plurality fairly reads prior precedent on this point is a fair one. Zephyr Teachout describes the rebirth of *quid-pro-quo*-only corruption like a kind of Athena, springing from Zeus’ head but claiming eternal existence: “For twenty-two years, the Court clearly explained (in majority opinions) that *quid pro quo* was but one type of corruption—in *Wisconsin Right to Life, quid pro quo* reappears as the heart of corruption.”[99] The dissent in *McCutcheon* vociferously protests the reduction of corruption’s meaning to *quid pro quo* alone.[100] The *McCutcheon* plurality itself admits, “we have not always spoken about corruption in a clear or consistent voice.”[101] For present purposes, however, this Article takes at face value the plurality’s assertion that only *quid pro quo* corruption counts as corruption in campaign finance, with direct contributions posing the greatest danger of corruption.

Taking the two most obvious SecondMarket donations, we have two examples of contributions close in time to representatives introducing favorable legislation. The question is, do these contributions relate to the political process in such a way that they constitute the kind of *quid pro quo* corruption the government may legislate to thwart? To answer that question we must first differentiate corruption from bribery.

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[98] *Id.* at 1460–61.

[99] Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 391 (2009).

[100] The dissent pointed out that in prior cases the Court had resisted efforts to restrict the meaning of corruption to quid pro quo: “We specifically rejected efforts to define ‘corruption’ in ways similar to those the plurality today accepts. We added: ‘Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.’” *McCutcheon*, 134 S. Ct. at 1470 (Breyer, J., dissenting) (citing McConnell v. Fed. Election Comm’n, 540 U.S. 93, 153 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010)).

[101] *McCutcheon*, 134 S. Ct. at 1451.

B. Bribery Distinguished

In an early dissent, Justice Thomas directed attention to a key point: any discussion of campaign finance law must deal with the distinction, if there is one, between bribery and corruption.[102] Justice Thomas's view is that there is no need for specialized campaign finance regulation at all because longstanding criminal bribery laws are enough: "Federal bribery laws are designed to punish and deter the corrupt conduct the Government seeks to prevent under FECA, and disclosure laws work to make donors and donees accountable to the public for any questionable financial dealings in which they may engage."[103] What counts as bribery and whether there is another category of activity that qualifies as more general "corruption" are thus important questions.

A proper starting point for distinguishing bribery from corruption is with a paradigm case. The "archetypal corruption" occurs when a political actor accepts money as direct payment for political action.[104] Such action is coextensive with bribery, and it is a crime. One reason why campaign contributions are not classic bribes is because the transferred money does not go directly into the politician's pocket. Campaign contributions are in effect a special kind of currency, exchangeable only for one specific purpose. As Professor David Strauss explains:

> They can be spent only in order to gather votes, directly or indirectly. They do not go into the legislator's pocket. . . . That means that these bribes have only a certain kind of value to the recipient. In a sense they are like vouchers, redeemable only for a certain purpose.[105]

Put another way, the legislator is "[using] the power of her office, not for personal enrichment, but in order to remain in office longer."[106] Strauss posits that "[i]n a democracy that is not necessarily a bad thing for an official to do."[107] After all, the money a candidate receives, as she spends money in

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[102] Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 641 (1996) (Thomas, J., dissenting) (discussing Buckley v. Valeo, 424 U.S. 1 (1976)).

[103] Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 643 (1996) (Thomas, J., dissenting).

[104] *See* Teachout, *supra* note 102, at 388.

[105] David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1372 (1994).

[106] *Id.* at 1373.

[107] *Id.*

an effort to stay in office, allows her to explain more broadly her policies and beliefs to the electorate as a whole.[108]

The story of Section 12(g) does not involve a classic case of bribery. But it does raise the question of whether the ideas behind bribery laws should carry over to the campaign finance context. Professor Lowenstein identifies the elements of bribery as: (1) that the case involve a public official, (2) that the defendant have a corrupt intent, (3) that the official receive some type of benefit—"anything of value," (4) that there be a relationship between the thing of value and an official act, and (5) that "[t]he relationship must involve an intent to influence the public official (or to be influenced if the defendant is the official) in the carrying out of the official act."[109] *Buckley v. Valeo* established that campaign contributions count as a "thing of value"[110] for the candidate. Indeed, even Justice Thomas tacitly agreed that campaign contributions can count as bribes when he relied on bribery laws to police the field.[111] Moreover, courts do not require "an actual, bilateral agreement"[112] for bribery to occur. The "intent to influence" element is a controversial one,[113] but "[a] bribe can occur even if it is intended only by the briber or only by the recipient."[114]

Professor Lowenstein would likely find that the SecondMarket employee campaign contributions satisfy the elements of bribery. Indeed, according to his seminal article *Political Bribery and the Intermediate Theory of Politics*, "Under most bribery statutes as they have been interpreted by most courts, most special interest campaign contributions are bribes."[115] One example Professor Lowenstein provides involves contributions "given to members of legislative committees important to the contributor without regard either to ideology or to electoral need."[116] In his view, such payments can only be explained as "intended to influence the official actions of recipients,"[117] and thus they qualify as bribes.

This example of bribery by Professor Lowenstein maps neatly onto the SecondMarket employee donations. First, the SecondMarket employees

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[108] *Id.* at 1375.
[109] Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 796 (1985).
[110] *Id.* at 809.
[111] *See, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 428 (Thomas, J., dissenting).
[112] Lowenstein, *supra* note 112, at 820.
[113] *Id.* at 821.
[114] *Id.* at 820.
[115] *Id.* at 828.
[116] *Id.* at 826.
[117] *Id.*

contributed to Democrats (Representative Himes, Senator Warner, Senator Schumer, Senator Tim Johnson) and Republicans (Representative Schweikert, Senator Toomey, Senator Shelby) alike.[118] Second, in each case they were made to sitting members of Congress when the donor had made no out-of-state political contribution prior to the 2011-2012 election cycle.[119] Third, all of the recipients either introduced or co-sponsored promising bills, or served on influential committees.[120] Certainly there is no doubt that in the two most prominent examples, a SecondMarket employee gave a $1000 contribution to a public official—a legislator—with an intent to influence that legislator in the carrying out of an official act of introducing legislation.

The fly in the ointment involves the question of whether these individuals had the requisite "*corrupt* intent" needed to establish bribery. This question brings us back to defining corruption. Here there was no proof of any explicit agreement between legislator and donor of a *quid pro quo* nature. (Indeed, one is in good company in suspecting such agreements rarely exist).[121] Professor Lowenstein might well respond, however, that no actual agreement is needed to establish bribery.

The Speech and Debate Clause[122] complicates matters even more, because it makes it far more difficult to prove criminal bribery by a member of Congress. In particular, in *United States v. Helstoski* the Court interpreted this clause as prohibiting the introduction of legislative actions as evidence in bribery cases, even while acknowledging that it would make prosecuting such cases more difficult.[123] In reaching this result the Court emphasized that "the Speech or Debate Clause was designed to preclude prosecution of Members for legislative acts."[124]

To be clear, this Article is not arguing that the SecondMarket employee donations qualify as bribes. There are two more fundamental points in the picture. First, given the Speech and Debate Clause, criminal bribery is

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[118] *See* Appendix.

[119] *Id.*

[120] *Id.*

[121] *See* Lowenstein, *supra* note 112, at 826 ("It is widely believed, at least among "sophisticated" observers of American politics, that explicit quid pro quo arrangements involving specific, identified official actions, such as legislative votes, given in exchange for campaign contributions, are rare. While this view may be too optimistic, it is unquestionably true that such arrangements are regarded as bad form, and it is difficult to discover or assemble direct proof of their existence when they do occur.").

[122] U.S. CONST. art. I, § 6, cl. 1 (specifying that elected representatives "shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their Respective Houses, and in going to and from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place").

[123] 442 U.S. 477, 488–89 (1979).

[124] *Id.* at 488.

exceptionally hard to prove in Congress, and thus offers cold comfort as a policing mechanism on Capitol Hill. Second, current campaign finance law, as articulated by the *McCutcheon* plurality, does not endorse Justice Thomas' "regulate bribery and no more" position anyway. Instead, campaign finance regulation has a function separate and apart from criminal bribery. Corruption's yardstick must perforce be less exacting than that of criminal bribery. Something less must suffice.

C. Corruption Requires Neither a Bad Policy Outcome nor Causation

Campaign finance laws regulate campaign contributions on anti-corruption grounds, yet the Court has not defined *corruption* itself, beyond limiting it to *quid pro quo* corruption. The closest it gets to a definition is when it describes that the "Latin phrase captures the notion of a direct exchange of an official act for money."[125] Moreover, as discussed above, the plurality recognizes the special danger that direct campaign contributions—as opposed to expenditures—pose.[126] The plurality states that "*Buckley* made clear that the risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself."[127] It adds that *quid pro quo* corruption occurs when "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to *themselves* or infusions of money into *their* campaigns" and that *Buckley*'s concerns "relate[ ] to the perception of undue influence of large contributors to a *candidate*."[128] As the *McCutcheon* dissenters point out, such occasions are a "subversion of the political process."[129]

So, even if not bribery, is the story of the SecondMarket employee campaign contributions enough to suggest *quid pro quo* corruption? To make that case this Article must first attempt to define *quid pro quo* corruption itself. As Professor Teachout observes, *quid pro quo* has no definite meaning, either in the context of constitutional or criminal law.[130] Its origins as a legal term lie in the law of contracts.[131] This Article argues that in the context of campaign finance, *quid pro quo* corruption requires

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[125] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1441 (2014).

[126] *Id.* at 1452.

[127] *Id.* at 1460.

[128] *Id.* at 1461.

[129] *Id.* at 1468 (Breyer, J. dissenting) (citing Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985)).

[130] *See* Zephyr Teachout, *McCutcheon and the Meaning of Corruption: Not All Quid Pro Quos are Made of the Same Stuff*, Fordham Law Legal Studies Research Paper No. 2387041 at 12 (Jan. 20, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2387 041.

[131] *Id.*

that a campaign contribution or promise of one shortly thereafter precipitates legislative action of some kind.

Two problems present themselves. First, the two early SecondMarket employee donations are not the large contributions that most of the Court's language warns about. This Article will defer discussion until Part III below as to whether making donations in small dollar amounts should be enough to cleanse the taint of corruption. The second problem is that it is not clear that the legislators' actions are "contrary to the obligations of their offices" or "not on the merits."[132]

There are two distinct but related versions of this argument: corruption only occurs if (1) the action is against the public interest, or (2) the legislators in question were not already inclined toward introducing this legislation; in other words, corruption only takes place when, but for the donation, legislators would have acted in a contrary manner. This Article rejects both arguments for reasons that bear elaboration.

The first argument boils down to the point that raising Section 12(g)'s registration threshold to 2000 accredited investors was good policy—or at the very least, not demonstrably bad policy. Who knows what number of shareholders merits forcing public disclosure upon a private corporation? Five hundred, 2000, or 5000 may well be the best choice. Yet in *McConnell* the Court found "[j]ust as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder."[133]

But how do we decide whether legislators have acted "not on the merits?" After all, the electorate place disparate expectations on legislators. What is more, reasonable people can and do—to say the least—have genuine disagreements on the merits of most political issues. Thus, such urges to "pure" decision-making on the merits are Platonic ideals, better suited for philosophy than politics, because one cannot speak of "deciding on the merits" without a clear idea of what the merits are.

But if we cannot evaluate the quality of the legislative end-product, we might still be able to evaluate the purity of means. As Professor Lowenstein points out, "even if the policy outcomes are good ones, corruption impairs

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[132] *McCutcheon* at 1460-61 (quoting Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985)); *see also* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 153, (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, (2010).

[133] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 153 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

the benefits that citizens obtain from participation in politics."[134] A pure end cannot justify a corrupt means, nor can it cleanse it from corruption. "Bought sex is not the same;"[135] neither is bought legislative decision-making, even if the ultimate decisions make for good policy.

But determining what constitutes "bought legislative decision-making" poses serious problems of its own, as the case of Section 12(g) reveals. In particular, Representative Schweikert is a Republican. Thus, one can expect him to be pro-business and anti-regulation. He may well have introduced H.R. 2167 regardless of the $1000 contribution from SecondMarket's CEO that came his way the day before. Indeed, he might not even have known of this very recent donation.

This second argument amounts to requiring that the contribution be a "but for" cause of political action: but for the campaign contribution, the action would not have occurred. Just because one event followed another closely in time, does not mean that the first event caused the second—or as the *post hoc, ergo propter hoc* fallacy more succinctly puts it, "after this, therefore because this." Yet there is no but-for causation requirement in *quid pro quo* corruption that the politician change position or act counter to how his or her "true" beliefs would otherwise counsel. Such a requirement has never existed. It would exclude all but the most overt cases of corruption, since most donors, in seeking potential targets to sway with money, will turn to those already ideologically sympathetic to their cause. Moreover, it would be impossible to implement in practice, since it would require a reliable way to discern what a legislator "truly" believed. The phrase "*quid pro quo* corruption" does not require one to act against one's belief—it merely requires the reasonable appearance of a bargained-for exchange.[136]

Because the *quid pro quo* concept has its roots in contract,[137] it seems fitting to turn to that doctrine for enlightenment. The Restatement (2d) of Contracts tells us that a binding contract requires a bargained-for exchange.[138] The comments explain that in the "typical bargain" each side of the exchange induces the other.[139] The use of the word *induces* might seem to suggest that the donation must be the cause of the legislator's action

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[134] Lowenstein, *supra* note 112, at 805.

[135] *Id.*

[136] Even the most stringent of quid pro quo corruption definitions in state statutes requires only that a specific act needs to be alleged to have been obtained or sought. *See* Teachout, *supra* note 133, at 13–14. It does not require a change of heart.

[137] *Id.* at 12.

[138] RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

[139] *Id.* at cmt. b.

to count as *quid pro quo*. Yet the comment goes on to clarify that "the law is concerned with the external manifestation rather than the undisclosed mental state."[140] Moreover, Section 81 of the Restatement provides that what is bargained for need not "of itself" induce the making of a promise or a performance.[141] In short, contract doctrine does not require that consideration be the "true" or even inducing reason for the exchange; instead it looks to external manifestations that show an intent to induce another to act.[142]

With this notion of the meaning of *quid pro quo* in mind, debating whether Schweikert would have introduced H.R. 2167 without the SecondMarket employee contributions becomes unnecessary. The relevant point is that appearances matter. The near simultaneity of the donation and legislative action—particularly given that it was the very first contribution Silbert had ever made to Schweikert and only the second donation he had ever made to anyone (except one local New York politician)[143]—creates the appearance of money inducing legislative action.

The appearance of corruption does considerable work in a world where corruption must be *quid pro quo*; what makes a qualifying exchange can be hard to pin down, particularly when motives are usually opaque. Thus the next topic, the appearance of corruption, is a vital one.

D. The "Appearance of Corruption" is Enough

The plurality in *McCutcheon* recited without elaborating the standard formulation that campaign finance regulation may target not only corruption but also the appearance of corruption. Indeed, it endorsed this idea in various phrasings no less than eight times.[144] The dissent, too, invoked the

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[140] RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (1981).

[141] *Id.* § 81 (1981).

[142] Another bedrock contracts principle is that courts do not inquire into the adequacy of consideration. *See* 3 Williston on Contracts § 7.21 (4th ed. 2014) ("It is an elementary and oft quoted principle that the law will not inquire into the adequacy of consideration as long as the consideration is otherwise valid or sufficient to support a promise."). To do so would be to attempt to value the benefit of the legislative action to the donor, a fool's errand. One could attempt to place a value on raising the shareholder threshold to the CEO of SecondMarket, attempting to quantify the current law's effect on its business, and the amount of Silbert's interest in the company, discounting by the probability that such legislation would actually pass, and the probability that Schweikert would have introduced the bill anyway, and then compare that number to $1000. That way madness surely lies.

[143] *Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Individual Name" field for "Silbert, Barry").

[144] *See* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1441 (2014) ("Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption.); *id.* at 1445 ("Congress was justified in concluding that the interest in safeguarding against

"appearance of corruption" concept. Such appearance, Justice Breyer reasoned, "can lead the public to believe that its efforts to communicate with its representatives or to help sway public opinion have little purpose."[145] And a cynical public can lose interest in political participation altogether. Democracy, the Court has often said, cannot work unless "the people have faith in those who govern."[146] Appearances matter, to everyone on the Court.

But in what ways can campaign finance laws address appearances of corruption? In a related context, Professor Levin has dismissed the objective of removing the appearance of corruption as "vague and subjective, and … also a copout."[147] He also worries that taking cognizance of this interest opens the barn door to permitting the most far-reaching legislative investigations: "In our scandal-oriented political environment, accusations of wrongdoing can be, and are, leveled at virtually every political candidate in sight. What fundraising effort is *not* accused of being unsavory and making the candidate too beholden to special interests?"[148] Indeed, legislating on the basis of the appearance of corruption creates the risk of a self-fulfilling prophecy. As he observes: "[T]he appearances rationale invites circular reasoning. In effect, it means that the most zealous and aggressive advocates of restriction can make accusations, whether well founded in fact or not, and then use the very fact that some people believe the charges as a reason to justify regulation."[149]

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the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated."); *id.* at 1450 ("This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption."); *id.* ("In addition to 'actual *quid pro quo* arrangements,' Congress may permissibly limit 'the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions' to particular candidates.") (quoting Buckley v. Valeo, 424 U.S. 1, 26 (1976)); *id.* ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption."); *id.* at 1451 ("And because the Government's interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption, the Government may not seek to limit the appearance of mere influence or access."); *id.* ("The Court in that case upheld base contribution limits because they targeted 'the danger of actual *quid pro quo* arrangements' and 'the impact of the appearance of corruption stemming from public awareness' of such a system of unchecked direct contributions.") (quoting *Buckley*, 424 U.S. at 27); *id.* at 1459 ("[Disclosure requirements] may also 'deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.'") (quoting *Buckley*, 424 U.S. at 67).

[145] *McCutcheon*, 134 S. Ct. at 1467.

[146] *Id.* at 1468 (Breyer, J., dissenting) (citing United States v. Mississippi Valley Generating Co., 364 U.S. 520, 562 (1961)).

[147] Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 WASH. U. J.L. & POL'Y 171, 174 (2001).

[148] *Id.* at 177.

[149] *Id.* at 178.

Yet today's Court clearly thinks that appearances matter and are an appropriate target of regulation:

> Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.[150]

The danger of the appearance of corruption in this reasoning is that it will force people to lose faith in the entire democratic system.[151]

But what constitutes corruption is difficult to articulate or pin down. Levin argues:

> At a time when many people casually speak of the entire Congress as corrupt, a guideline that looks to maintaining public confidence in Congress can scarcely be applied at face value. Nor would such a straightforward application be desirable, because popular attitudes toward Congress often suffer from misinformation, unrealistic expectations, and failure to appreciate the tradeoffs that legislators must make among their constituents' many incompatible demands.[152]

Levin's point is well-taken: attempts to apply the "appearance of corruption" standard in practice seem perilous because corruption is in the eye of the beholder.

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[150] Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000) (citing United States v. Miss. Valley Generating Co., 364 U.S. 520, 562 (1961)).

[151] Zephyr Teachout characterizes this as the idea that the appearance of corruption has a "dispiriting impact" on the public. Teachout, *supra* note 114, at 394–95. She identifies two forms of this argument: "In the strong form of this view--which few Justices take--the real problem with corruption is that voters will stop voting, people will stop running for office, and citizens will stop making serious efforts to read the news and understand the public issues of their day, because they will believe that such efforts are futile. In the weak form, public perceptions are a secondary concern. However, the weak form has a hydraulic power of its own, mostly because evidentiary issues seem much easier when 'appearance of corruption' instead of corruption itself needs to be measured, and so this concern allows for Justices to insert their own intuitions about actual corruption into the appearance framework." *Id.* at 395..

[152] Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1, 100 (1996).

Even so, the language must mean *something*, especially when it has made the point over and over again. In short, there must be some circumstances where the appearance of corruption is enough to turn the judicial analysis; otherwise, the words of the Court are mere superfluity or platitudes.[153]

This Article has made the case that SecondMarket employee contributions raise the appearance of *quid pro quo* corruption. If anything is to qualify as the appearance of *quid pro quo* corruption by the logic of *McCutcheon*, these payments—separated from a favorable outcome for the donor by mere weeks and, in one case, one day—must qualify. The timing is too tight.

One might object that the circumstances of the June 13 donation —which was made one day before Rep. Schweikert introduced H.R. 2167—do not suggest corruption. The bill as introduced contained only 346 words;[154] it does not appear to be a "rush job." It addresses three separate provisions of the Exchange Act and contains a detailed revised definition.[155] In sum, it is a well thought-out, if targeted, piece of legislation. Such proposals are not born overnight.

But this fact is precisely what suggests that untoward coordination may have occurred. SecondMarket might well have consulted with Representative Schweikert's staff for some time on the wording of this piece of legislation. Indeed, Representative Schweikert may not even have known about SecondMarket's timely donation. But the fact that the donation

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[153] *But see* Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does-Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 143 (2002) ("[T]he model implies that lower courts should treat Supreme Court rulings in the securities area with a grain of salt."); Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771, 798 (1990) ("Other courts, however, have shown a hesitancy to interpret the Supreme Court's words literally."); Wing H. Liang, *Honeywell: The Straw That May Just Break the Inventor's Back*, 26 CARDOZO L. REV. 2655, 2695 (2005) ("One commentator, Werner H. Stemer, argues that the Supreme Court's words should not be read so literally so as to extend presumptive prosecution history estoppel to all situations where a new element was added by amendment because both Justice Thomas in *Werner-Jenkinson* and Justice Kennedy in *Festo II* used the terms "new element" and "new limitation" relatively loosely."); Margaret Meriwether Cordray & Richard Cordray, *The Calendar of the Justices: How the Supreme Court's Timing Affects Its Decisionmaking*, 36 ARIZ. ST. L.J. 183, 215–16 (2004) ("Judge Richard Posner, for example, has documented how the length of Supreme Court opinions has expanded since the 1960s, and he opines that '[m]odern federal judicial opinions bristle with superfluities.'"); Martin A. Schwartz, Lawrence v. Texas*: The Decision and Its Implications for the Future*, 20 TOURO L. REV. 221, 247 (2004) ("The Supreme Court's decision in *Turner v. Safley* is filled with all kinds of platitudes about marriage . . . . "); Mark Wankum, *Standing in the Way of Clarity:* Hein v. Freedom from Religion Foundation, Inc., 30 U. ARK. LITTLE ROCK L. REV. 515 (2008) ("In the waning days of the 2006 Term, the Supreme Court published a series of fractured and controversial decisions, filled with fiery constitutional platitudes and passionate dissents.").

[154] Private Company Flexibility and Growth Act, H.R. 2167, 112th Cong. (2011), *available at* https://www.govtrack.us/congress/bills/112/hr2167/text/ih..

[155] *Id.*

occurred the day before the bill's introduction creates the appearance, at least, that even if it was not a but-for cause, the donation played some role.

To sum up, the SecondMarket employee donations are among the most obvious imaginable examples of the form of campaign contribution that could *appear* corrupt. Yet some might remain skeptical that such small amounts of money—despite being the coin of the campaign finance realm—could influence legislation. Empirical research from the social sciences suggests that even small-dollar gifts can inspire feelings of obligation in the recipient.[156]

E. The Reciprocity Principle and the Power of Small Gifts

Through behavioral experiments and by observing real-life sales tactics, the social science literature has elucidated the reciprocity principle: receipt of a gift triggers in the recipient a perceived obligation to reciprocate.[157] Research in a variety of disciplines suggests that small gifts raise large conflicts of interest.

Psychologist Robert Cialdini describes an early and oft-cited experiment involving a subject and a research assistant (posing as a fellow subject, shorthanded as "Joe") rating paintings for what was ostensibly an art appreciation study.[158] In some cases, Joe offered the subject an unsolicited favor: he left the room and returned, saying "I asked [the experimenter] if I could get myself a Coke, and he said it was OK, so I bought one for you, too."[159] In the other cases, he left the room and returned empty-handed.[160] At the end of the session, Joe asked the subject to buy raffle tickets at 25 cents apiece, for a $50 prize: "Any would help, the more the better."[161] The subjects who received the soda bought twice as many tickets as those who did not.[162]

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[156] A.W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*. 25 AM. SOCIOLOGICAL REV., 161, 171 (1960).

[157] *Id*.

[158] *See* ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 22 (2001) (discussing the original study, R.T. Regan, *Effects of a Favor and Liking on Compliance*, 7 J. Experimental Soc. Psychol. 627, 627–39 (1971)). For other references, *see, e.g.*, Hasen, *supra* note 19, at 221, n.183 (citing same); Thomas M. Susman, *Private Ethics, Public Conduct: An Essay on Ethical Lobbying, Campaign Contributions, Reciprocity, and the Public Good*, 19 STAN. L. & POL'Y REV. 10, 16 (2008); Thomas M. Susman, *Lobbying in the 21st Century—Reciprocity and the Need for Reform*, 58 ADMIN. L. REV. 737, 748 (2006).

[159] R.T. Regan, *Effects of a Favor and Liking on Compliance*, 7 J. EXPERIMENTAL SOC. PSYCHOL. 627, 631 (1971)).

[160] *Id.*

[161] *Id.* at 632.

[162] CIALDINI, *supra* note 180, at 22.

A similar study showed that providing diners with a "fancy, foil wrapped piece of chocolate" (to differentiate from the cheap mints that restaurants more customarily provide) increased the amount of tips servers received.[163] To counter the self-evident objection that chocolate makes people feel better, and thus more generous, in one variation the server gave each customer a chance to select a piece of candy and then, seemingly spontaneously, stopped to allow each diner to select a second one.[164] Percentage tips increased with the chocolate, but more with the "spontaneous" gift.[165]

Cialdini describes this "rule of reciprocation" as possessing "awesome strength,"[166] observing that "[b]ecause there is a general distaste for those who take and make no effort to give in return, we will often go to great lengths to avoid being considered a moocher, ingrate, or [freeloader]."[167] He attributes to the reciprocity principle the success of Hare Krishnas in soliciting money from strangers after first pressing upon them a flower,[168] the inclusion of an unsolicited gift of pre-printed individualized address labels,[169] and the use of free samples in supermarkets.[170]

There are suggestions that the reciprocity principle, so strong in the lab and in daily life, also affects Washington politics. Cialdini attributes Lyndon Johnson's success in getting programs through Congress to the many favors he had provided to legislators while in the House and Senate—and the problems Jimmy Carter suffered to his "Washington outsider" status.[171] He had no favors on which to cash in.

Capitol Punishment, the memoir of disgraced lobbyist Jack Abramoff, likewise details a world where reciprocity—by way of campaign contributions and favors—is the order of the day. He recounts a scene in which then-Majority Whip Tom DeLay explained to Microsoft the importance of campaign contributions:

> One of the Microsoft executives firmly brushed off his solicitation, prompting DeLay to deliver a stern message. When he was a freshman in Congress, he told them he

[163] David B. Strohmetz et al., *Sweetening the Till: The Use of Candy to Increase Restaurant Tipping*, 32 J. APPLIED SOC. PSYCHOL. 300, 302–03 (2002).
[164] *Id.* at 303.
[165] *Id.* at 305–06.
[166] CIALDINI, *supra* note 161, at 22.
[167] *Id.* at 21.
[168] *See id.* at 24–25.
[169] *See id.* at 29.
[170] *See id.* at 26–27.
[171] *See id.* at 25–26.

> approached Walmart for a campaign contribution. The government affairs director of Walmart told him that Walmart didn't like to "sully their hands" with political involvement. Staring intently at the Microsoft executives, DeLay continued: "A year later, that government affairs rep was in my office asking me to intervene to get an exit built from the federal highway adjacent to a new Walmart store. I told him I didn't want to sully my hands with such a task. You know what? They didn't get their ramp. You know what else? They will never get that ramp."[172]

According to Abramoff, Microsoft soon delivered the Republican Congressional Committee a $100,000 check.[173] Of course, $100,000 is not $5200—but it was the product of individual donations of made to the Microsoft PAC.[174] Moreover, Abramoff, an individual unique in being positioned to have seen the inner workings of Capitol Hill and—by dint of his criminal convictions—having nothing to lose by being candid, reflected that such payments, while legal, negatively affected the legislative process.[175] He extols the power of "baubles and trinkets," including sports and concert tickets to generate favorable treatment by legislators. Abramoff's baubles thus provide an example of the power of the reciprocity principle at work on Capitol Hill.[176]

Interestingly, Abramoff ends his memoir by calling on an outright ban on lobbyists' contributing "so much as one dollar" to elected officials, and on gift-giving entirely: "[n]o finger food, no snacks, no hot dogs. Nothing."[177]

III. THE BASE LIMITS ARE A COMPROMISE, NOT A SAFE HARBOR

The *McCutcheon* plurality conceives of the base limits as a safe harbor; in effect, it posits that contributions are unproblematic so long as they do not exceed $5200.[178] But in the same breath it takes a position that almost guarantees that corruption will occur within the base limits: *Citizens*

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[172] JACK ABRAMOFF, CAPITOL PUNISHMENT 65 (2011).

[173] *Id.*

[174] *Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "Microsoft").

[175] *See* ABRAMOFF, *supra* note 175, at 90.

[176] *See id.* at 162–63.

[177] *Id.* at 273.

[178] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1441 (2014).

United's proposition that the stark creation of access and gratitude does not equal corruption or even the appearance of corruption.[179] In this I explore and debunk this idea first, demonstrating the ultimate futility of parsing the difference between gratitude, access, and corruption. Armed with this insight, I then criticize in greater detail *McCutcheon*'s unrealistic view of the base limits as an effective safeguard against corruption.

A. *If "Gratitude and Access" Are Not Corruption, Then the Base Limits Demarcate What Will Always be a Fuzzy Line*

The *McCutcheon* plurality was at pains to make clear that gratitude and access do not count as corruption, citing crucial language from *Citizens United*: "[G]overnment regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford."[180] Instead, "[t]hey embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns."[181]

The plurality goes so far as to assert that responsiveness lies at the very heart of democracy:

> For the past 40 years, our campaign finance jurisprudence has focused on the need to preserve authority for the Government to combat corruption, without at the same time compromising the political responsiveness at the heart of the democratic process, or allowing the Government to favor some participants in that process over others.[182]

It cites Edmund Burke for the proposition that "a representative owes constituents the exercise of his 'mature judgment,' but that this judgment should be informed by 'the strictest union, the closest correspondence, and the most unreserved communication with his constituents.'"[183]

While constituents may not (to use the dissent's language) deploy money to "call the tune"[184] for representatives, politicians nevertheless "can be expected to be cognizant of and responsive to [contributors'] concerns. Such

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[179] *Id*. at 360 (citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 360 (2010)).
[180] *McCutcheon*, 134 S. Ct. at 1441.
[181] *Id.*
[182] *Id.* at 1461.
[183] *Id*. (citing THE SPEECHES OF THE RIGHT HON. EDMUND BURKE 129–130 (J. Burke ed. 1867).
[184] *Id.* at 1468 (quoting majority in Nixon v. Shrink Mo. Gov't PAC, 528 U.S 377 (2000).

responsiveness is key to the very concept of self-governance through elected officials."[185] Thus, the justices of the plurality believe that one can in practice distinguish between corruption—defined as *quid pro quo* corruption—and those unobjectionable payments that merely secure access to a legislator or convey gratitude for a position taken.

When the *McCutcheon* plurality intoned that "government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford,"[186] it invoked an idea previously recognized by the Court. The *Citizens United* Court declared that "[i]ngratiation and access . . . are not corruption."[187] What is more, this idea has a long lineage. Professor Lowenstein observed in 1985 that "[e]ven defenders of special interest contributions do not generally deny that such contributions are intended to influence official actions. The most common assertion is that a contributor to a legislator seeks nothing more for the contribution than assured access to a legislator when important issues arise."[188] (Lowenstein also wryly noted that "[n]o evidence is cited to support this assertion of universal self-restraint on the part of special interest campaign contributors.")[189]

Threading the line between permissible influence and impermissible corruption is a difficult one for a simple reason: the defenders of such contributions cannot deny that donors' payments are getting them *something*. Special interest groups of all stripes make donations all the time, and presumably they are not all eleemosynarians. But self-serving motives are fine according to the *McCutcheon* plurality as long as the donor is not trying to "control the exercise of an officeholder's official duties . . . . [M]ere influence or access" is acceptable, as are their appearance.[190]

Finally, the plurality makes clear that, even if the line between verboten corruption and non-verboten influence is difficult to draw, when it comes to the First Amendment rights of the donor versus the possibility of corruption, any tie goes to the donor: "The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights."[191] Thus,

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[185] *McCutcheon*, 134 S. Ct. at 1462.
[186] *Id.*, 134 S. Ct. at 1441.
[187] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 360 (2010).
[188] Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 827 (1985).
[189] *Id.*
[190] *McCutcheon*, 134 S. Ct. at 1450–51.
[191] *Id.* at 1451.

"[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it."[192]

In the *McCutcheon* plurality's view, a heightened responsiveness to donors is a good thing.[193] But the unstated cost of access is its flipside: the diminished voice of non-donors. As Professor Vincent Blasi observes, campaign finance restrictions have created a world that pressures candidates' time in a manner that leaves little room for general constituent service.[194] Candidates spend massive blocks of time "dialing for donors"—if not for themselves, then for other party members.[195]

So, how to analyze the most problematic payments made by SecondMarket and Wawa employees, in light of *McCutcheon*'s teachings on ingratiation and access? The $11,000 donations of Wawa employees to Senator Toomey, which occurred months after the JOBS Act's passage,[196] can readily be categorized as gratitude payments. But in the Court's language, gratitude is for the candidate; donors seek ingratiation and access. After-the-fact donor payments don't readily fit within the established framework.

Perhaps if candidates can permissibly express gratitude, then so too can donors. But does this way of thinking about things solve the corruption problem, or merely sweep it under the rug? How can an outside observer differentiate "gratitude" from a relationship-strengthening tit-for-tat corrupt payment? Put crudely, is donor gratitude simply corruption's deferred payment plan?

Consider the most notable SecondMarket employee contributions. The first involved Representative Himes' introduction of a bill requesting a study of appropriate shareholder registration thresholds.[197] Within two weeks, SecondMarket's CEO and head of public affairs each donated $1000 to Himes, neither having donated to another out-of-state politician before. This behavior might look like just the sort of *quid pro quo* style corruption—or at least its appearance—as to trigger concern. Yet could the Court dismiss

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[192] *Id.* at 1451 (quoting Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 457 (2007)).

[193] *McCutcheon*, 134 S. Ct. at 1441.

[194] Vincent Blasi, *Free Speech and the Widening Gyre of Fund - Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1282–83 (1994).

[195] Ezra Klein, *The Most Depressing Graphic for Members of Congress*, Washington Post (Jan. 13, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/14/the-most-depressing-graphic-for-members-of-congress/.

[196] *Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "Wawa") (showing five Wawa employees contributed $1000 to Friends of Pat Toomey on June 27, 2012 and one Wawa employee made two $2500 contributions on June 27, 2012).

[197] H.R. 1965, 112th Cong., 1st Sess. (2011).

these payments as mere manifestations of gratitude? Where is the evidence of any attempt to influence action—especially when that action has already occurred? And even assuming there is an attempt to influence a representative, why not conclude the only goal is to secure access to the Representative as the bill winds its way through Congress? The line here seems "vague" to the point of dissolving into mystery. The donation could fairly be characterized as either having the appearance of a *quid pro quo* or constituting only a bid for influence and access.

The second payment occurred when SecondMarket's CEO Barry Silbert donated $1000 to Representative Schweikert and the next day, Schweikert introduced a bill proposing to raise the shareholder threshold.[198] This Article presumes that "access" in the context of campaign finance means the opportunity to make one's policy case to an elected official, perhaps repeatedly over time. If this donation merely granted Silbert "access" to Schweikert, it was clearly money well spent, since the access it procured translated overnight into legislative action.[199] "Access" might be viewed a different way—that is, as access to the bill's sponsor as the bill moved through Congress, including in both the short and the long term. Or we might characterize the $1000 as an expression of gratitude for what Schweikert was then about to do. Such characterizations, however, work the trick of rendering all contributions mere expressions of gratitude or quests for access in a way that makes issues of apparent or actual corruption a *de facto* empty set.

As stated in the prior section, if anything is going to count as the appearance of corruption—defined as *quid pro quo*—then it must be these payments. Yet the permissible securing of access and gratitude are malleable enough concepts to apply even in extreme cases like these. The plurality's distinctions collapse in practice. The plurality calls the line separating *quid pro quo* corruption from permissible influence "vague."[200] But there is reason to wonder whether there is any line at all.

B. McCutcheon's Impoverished View of the Base Limits

The *McCutcheon* plurality's view is that the base limits represent a safe harbor from the tempest of corruption.[201] "Base limits" refers to the maximum a giver can donate to a single candidate.[202] Originally $1000 in

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198 H.R. 2167, 112th Cong., 1st Sess. (2011).
199 *Id.*
200 McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1451 (2014).
201 *Id.* at 1442
202 *Id.* at 1443.

the FECA,[203] they have been adjusted for inflation. At the time of the JOBS Act's passage they were $2500[204] and are currently $2600 ($5200 for combined primary and general elections).[205]

Buckley approved the constitutionality of base limits. It alo approved (albeit in only "one paragraph" as the *McCutcheon* plurality points out) FECA's limitation on how much a donor could give in the aggregate to all candidates during a single election cycle.[206] *McCutcheon*'s holding overturned the aggregate limits, and in doing so both affirmed the constitutionality of the base limits[207] and repeatedly discounted the corrupting potential of relatively small dollar values.[208]

The plurality knows how much money matters to Congress: $5000, even $26,000, is not enough.[209] For example, the plurality scoffed about the hypothetical contortions the dissent employed to justify the aggregate limits, noting "on a more basic level, it is hard to believe that a rational actor would engage in such machinations. In the example described, a dedicated donor spent $500,000—donating the full $5,000 to 100 different PACs—to add *just $26,000* to Smith's campaign coffers."[210] Later it pooh-poohs $5000: "It might be that such guilty knowledge could not be shown because the donors were not guilty—a possibility that the dissent does not entertain. In any event, the donors described in those eight cases were typically alleged to have exceeded the base limits *by $5,000 or less*."[211] The plurality implies that sums this small will not drive a senator or representative to act. And if that is so, donations under the $5200 legal cap should pose no cause for concern at all.

As the *Buckley* Court analyzed the constitutionality of limiting direct contributions to candidates, it repeatedly emphasized the evidence Congress

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203 Anthony Johnstone, *Recalibrating Campaign Finance Law*, 32 YALE L. & POL'Y REV. 217, 232 (2013).

204 *Id.*

205 McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1442 (2014).

206 *See id.* at 1437 (2014) ("After doing so, the Court devoted only one paragraph of its 139–page opinion to the aggregate limit then in place under FECA, noting that the provision "ha[d] not been separately addressed at length by the parties.").

207 *See id.* at 1458 ("It is worth keeping in mind that the *base limits* themselves are a prophylactic measure. As we have explained, 'restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements.' The aggregate limits are then layered on top, ostensibly to prevent circumvention of the base limits.") (internal citations omitted).

208 *Id.* at 1446.

209 *Id.* at 1457.

210 *Id.* at 1454 (emphasis added).

211 *Id.* at 1456 (emphasis added).

had assembled of problematically large donations. It cited to the Court of Appeals opinion, which detailed:

> Congress and the public had become informed of the various aspects of the 1972 campaign. Revelations of huge contributions from the dairy industry, a number of corporations (illegally) and ambassadors and potential ambassadors, made the 1972 election a watershed for public confidence in the electoral system.…After extensive investigation, Congress concluded that such corrupt and pernicious practices are more likely to occur when there are no effective limits on amount of campaign expenditure. In short, big-spending campaigns pull like a magnetic field.[212]

Building on this idea, the Court in *Buckley* concluded that "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined."[213]

It might be said that this quotation indicates that *Buckley* sought to restrict only "large contributions." But following *Buckley*, the Court did not hesitate to endorse limits on small contributions—even those under than the base limits.[214] For example, in *Nixon v. Shrink Missouri Government PAC* the Court upheld state limits even lower than $1000, and citing *Buckley* as rejecting the idea that any amount was "a constitutional minimum below which legislatures could not regulate."[215] The question instead was:

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[212] Buckley v. Valeo, 519 F.2d 821, 839–40 (D.C. Cir. 1975) (en banc) (per curiam). The findings are quite suggestive of *quid pro quo* corruption. *See id.* at 839 n.36 ("Looming large in the perception of the public and Congressmen was the revelation concerning the extensive contributions by dairy organizations to Nixon fund raisers, in order to gain a meeting with White House officials on price supports. The industry pledged $2,000,000 to the 1972 campaign, a pledge known to various White House officials, with President Nixon informed directly by Charles Colson in September 1970, as acknowledged by the 1974 White House paper. . . . On March 23, 1971, after a meeting with dairy organization representatives, President Nixon decided to overrule the decision of the Secretary of Agriculture and to increase price supports. In the meetings and calls that immediately followed the internal White House discussion and preceded the public announcement two days later, culminating in a meeting held by Herbert Kalmbach at the direction of John Ehrlichman, the dairymen were informed of the likelihood of an imminent increase and of the desire that they reaffirm their $2 million pledge." (internal quotation marks omitted)).

[213] Buckley v. Valeo, 424 U.S. 1, 26–27 (1976) (per curiam).

[214] Nixon v. Shrink Mo. Gov't PAC, 528 U.S 377 (2000).

[215] *Id.*at 397.

> [W]hether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless. Such being the test, the issue in later cases cannot be truncated to a narrow question about the power of the dollar, but must go to the power to mount a campaign with all the dollars likely to be forthcoming.[216]

Thus, *Nixon* signals that the amount of base limits may be low—even far lower than the federal base limits—as long as the candidates still have an effective voice.

Professor Teachout observes, "[t]he more politics looks like a store, where actions can be bought, the more corrupt it is."[217] In effect, the FECA slashed the prices in the congressional store. The story is a classic one of supply and demand, as Professors Issacharoff and Karlan have observed:

> As in all markets in which demand runs high but supply is limited, the value of the good rises. In campaigns, the result is an unceasing preoccupation with fundraising. The effect is much like giving a starving man unlimited trips to the buffet table but only a thimble-sized spoon with which to eat: chances are great that the constricted means to satisfy his appetite will create a singular obsession with consumption. If candidates are unable to rely on large contributions, the rather predictable outcome is that they will spend all their time having to chase smaller contributions to fill their giant-sized appetites . . . .[218]

And if the currency by which donors can seek gratitude and access is confined by the base limits, then presumably donations under those limits can amount to impermissible *quid pro quo* corruption. As Teachout points out, federal criminal law prohibits giving something of value in exchange for official action.[219] The Foreign Corrupt Practices Act defines corruption as "an offer, payment, promise to pay, or authorization of the payment of

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[216] *Id.*
[217] Teachout, *supra* note 102, at 388.
[218] Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1710–11 (1999).
[219] *See* Teachout, *supra* note 150, at 29.

any money, or offer, gift, promise to give, or authorization of the giving of *anything of value.*"[220] There is no safe harbor for payments under $5200.

The plurality in *McCutcheon* asserts that a safe harbor *does* exist—that there is no risk of corruption or its appearance under the base limits. Consider this passage:

> Of course a candidate would be pleased with a donor who contributed not only to the candidate himself, but also to other candidates from the same party, to party committees, and to PACs supporting the party. But there is a clear, administrable line between money beyond the base limits funneled in an identifiable way to a candidate—*for which the candidate feels obligated*—and money within the base limits given widely to a candidate's party—for which the candidate, like all other members of the party, feels grateful.[221]

In the plurality's view, a candidate would feel obligation for money beyond the base limits—but presumably not for money within those limits. It is unclear why this should be the case, particularly given that the law makes those smaller contributions quite valuable—precisely because the larger ones are illegal.[222]

C. In Reality, the Base Limits Are no Safe Harbor—Especially in Areas of Low Salience

The argument thus far leads to one conclusion: contrary to the *McCutcheon* plurality's assertion, *quid pro quo* corruption—or at least a "cognizable risk of corruption—does sometimes exist below the base limits. The campaign contributions of SecondMarket employees were all perfectly legal—indeed, well below the base limits for individual candidates. Yet the timing and pattern of donation—in the first instance, to representatives within days of introducing favorable legislation—create at least the appearance of corruption. Corruption requires less than bribery, and even *McCutcheon*'s *quid pro quo* corruption does not require but-for causation. In short, the contribution of SecondMarket's CEO need not have caused

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[220] 15 U.S.C. § 78dd-2(a) (2014) (emphasis added).

[221] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1461 (2014) (emphasis added).

[222] Indeed, they may *increase* the likelihood of corruption. *See* Philip M. Nichols, *The Perverse Effect of Campaign Contribution Limits: Reducing the Allowable Amounts Increases the Likelihood of Corruption in the Federal Legislature*, 48 AM. BUS. L.J. 77, 109–10 (2011).

Representative Schweikert to introduce legislation; the appearance of corruption is enough to justify the ban.

Moreover, other data support the idea that even comparatively low-dollar contributions can create a predisposition to reciprocate on the part of the recipient.[223] Psychologists have noted this reciprocity principle in a number of settings, and it explains a variety of fundraising and sales tactics.[224] No one likes to be a "moocher," and anecdotal evidence from lobbyist Abramoff's memoir reflects the common understanding of the importance of favors on Capitol Hill.[225]

The story of Section 12(g)'s campaign contributions could mean several things for base limits themselves. If the donations detailed here qualify as *quid pro quo* corruption or its appearance, then Congress may have set its number too high. Indeed, it may be that the very idea of base limits is doomed to failure because, by virtue of limiting the amount of any individual contribution, smaller dollar contributions take on greater campaign value.

The story of Section 12(g) may also support a more nuanced view of base limits. Professor Hasen, for example, has made the following observations with regard to lobbying:

> Lobbyists rarely can sway resistant legislators on high-salience issues about which the public appears to be paying a great deal of attention. Birnbaum and Murray, for example, describe in painstaking detail how even the most highly paid professional lobbyists were unable to derail a large corporate tax increase which became part of the politically popular Tax Reform Act of 1986, a major tax bill passed during the Reagan Administration with bipartisan support . . . . Rather than working primarily to change legislative minds on issues of high public salience, lobbyists, like mushrooms, thrive in areas of low light. As Birnbaum and Murray show, once it became apparent that the 1986 tax bill was going to pass, lobbyists were much more successful in working to get favorable treatment for

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[223] ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 26–27 (2001) (discussing the original study, Singer, Van Holwyk & Maher, *Experiments with Incentives in Telephone Surveys*, 64 PUB. OP. Q, 177–81 (2000); and James & Bolstein, *Effect of Monetary Incentives and Follow-up Mailings on the Response Rate and Response Quality in Mail Surveys. 54* PUB. OP. Q, 442–53 (1992)).

[224] *Id*.

[225] ABRAMOFF, *supra* note 175, at 65.

> their clients in the details of the bill and its implementation.[226]

We can tell a similar story with regard to campaign contributions. If a politician is campaigning on gun rights and has considerable NRA support, a mere $5200 donation is not going to tempt her to deviate from that position. But on laws regarding issues to which most politicians, their constituents and the general public are relatively indifferent—like securities regulation, particularly in a time where no scandal has rendered the issue salient—the price of legislator mind-changing is likely to be much lower. And if legislators have no clear prior preference on the question of the 500-shareholder threshold—and it's hard to imagine that they would—then $5200 could go a long way indeed.

D. The Wobbly-Fulcrum Problem

The *McCutcheon* plurality, like the majority in *Citizens United*, purports to strike a reasoned balance between the speech interests of political donors and the legitimate government interest in protecting against corruption or its appearance. It privileges the rights of the individual to "participate in the public debate through political expression and political association"—making clear in the next sentence that "[w]hen an individual contributes money to a candidate, he exercises both of those rights: The contribution 'serves as a general expression of support for the candidate and his views' and 'serves to affiliate a person with a candidate.'"[227]

Chief Justice Roberts' opinion expands on the importance of the money-as-speech interest:

> Those First Amendment rights are important regardless whether the individual is, on the one hand, a "lone pamphleteer[ ] or street corner orator[ ] in the Tom Paine mold," or is, on the other, someone who spends "substantial amounts of money in order to communicate [his] political ideas through sophisticated" means. Either way, he is participating in an electoral debate that we have recognized

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[226] Hasen, *supra* note 19, at 220–21.

[227] *McCutcheon*, 134 S. Ct. at 1448 (quoting Buckley v. Valeo, 424 U.S. 1, 21–22 (1976) (per curiam)).

> is "integral to the operation of the system of government established by our Constitution.[228]

If money-as-speech interests are as paradigmatic as Thomas Paine's in the context of free speech, and the base limits are "adequate to protect against corruption," then it logically follows that aggregate limits impose an undue, and thus unconstitutional, constraint on speech interests.[229]

Not surprisingly,Chief Justice Roberts reached exactly this conclusion:

> [The aggregate] limits deny the individual all ability to exercise his expressive and associational rights by contributing to someone who will advocate for his policy preferences. A donor must limit the number of candidates he supports, and may have to choose which of several policy concerns he will advance—clear First Amendment harms that the dissent never acknowledges.
>
> It is no answer to say that the individual can simply contribute less money to more people. To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process. And as we have recently admonished, the Government may not penalize an individual for "robustly exercis[ing]" his First Amendment rights.[230]

Given the vibrant notion of speech via campaign contributions that Chief Justice Roberts endorses, the aggregate limits seem ludicrously excessive. Yet the fulcrum on which this balance is struck is the critical assumption that the base limits effectively prevent corruption. If this premise is faulty, then so too is the Chief Justice's rationale and resulting conclusion. In other words, if base limits are not, in fact, "adequate to protect against corruption," then aggregate limits are more properly seen as an important fail-safe than as a useless redundancy. In that case, *McCutcheon* has favored money-as-speech to the detriment of valid anti-corruption interests.

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[228] *McCutcheon*, 134 S. Ct. at 1448 (quoting Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 493 (1985)).

[229] *McCutcheon*, 134 S. Ct. at 1448.

[230] *Id.* at 1448–49 (quoting Davis v. Fed. Election Comm'n, 554 U.S. 724, 739 (2009)).

IV. FURTHER LESSONS

In this Article I have focused on demonstrating that, contrary to *McCutcheon*'s presumption, the base limits provide no guarantee against corruption, its risk and its appearance. The plurality's point that "few if any contributions to candidates will involve *quid pro quo* arrangements" may be true; base limits may be over-inclusive. But in other situations, particularly in areas of low-salience, they may well be under-inclusive as well. This Part offers a few further points for reflection.

A. A Missed Argument for Aggregate Limits

Everyone involved in *McCutcheon*—the government, the plurality, and the dissent—accepted one premise: campaign contributions within the base limits do not present a "cognizable risk of corruption." The crux of the dissent's argument was that the aggregate limits prevented circumvention of the base limits.

The SecondMarket employee contributions suggest that aggregate limits guard against another danger that is no less salient—the cognizable risk of corruption within the base limits. Donations of $1000, if occurring in near conjunction with legislative action, can suggest the existence of a *quid pro quo* exchange. If donations smaller than $5200 pose a real threat of corruption, then the aggregate limits play a significant role: they stand as a second-line bulwark against corruption. In the pre-*McCutcheon* world, if a single donor sought to influence legislation in a corrupt manner, she would have to choose among ten legislators upon which to bestow her largess.[231] Now the field is wide open. Each donor—each employee—can contribute up to $5200 to each and every member of Congress.

This argument against the aggregate limits is more powerful than the dissent's failed anti-circumvention rationale. The SecondMarket employee contributions show that the aggregate limits, far from being prophylaxis-upon-prophylaxis, function instead as a mitigating principle. If corruption can occur within the base limits, then limiting the extent of that corruption becomes a separate and crucial function.

This second line of defense is sorely needed because there is reason to doubt that any legislative reform will prevent this type of corruption. To the contrary, as soon as this kind of timing problem is exposed, it will disappear. If the problem is one of too short an interval of time between contribution

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231 2 U.S.C. § 441a(a)(3) (2014), (which set aggregate contribution limits at $57,500).

and legislative action, then candidates and donors will make sure to observe a decorous delay between contribution and action.

What this decorous delay accomplishes is a nuanced question. If the objection to the SecondMarket employee contributions was merely the unseemliness of the timing, then future donors and donees can solve the problem simply by waiting. Democracy is no longer undermined because the corrupt appearances are gone. On the other hand, if the Section 12(g) story is disquieting because it is an unusually blatant example of troubling behavior that exists all the time, then a decorous delay just drives underground *quid pro quo* corruption that remains objectionable (although now hidden).

B. The Importance of the Base Limits

Post-*McCutcheon*, all that remain are the base limits, and these may now be vulnerable to attack. A prominent election scholar, Richard Hasen, has suggested that the plurality's cramped definition of corruption could mean that "many more campaign laws could fall in the near future, including those base $2,600 limits."[232] James L. Buckley, the named plaintiff in *Buckley v. Valeo*, recently calculated the prospects of the Roberts Court overturning the base limits at "50/50."[233]

Some might respond by saying that since the base limits do not prevent corruption, their elimination would be no great loss. That response would be a mistake. As Part III of this Article showed, in a world where corruption means *quid pro quo* corruption and ingratiation and access are permissible, corruption is nigh onto impossible to prove. And it was for precisely this good reason that *Buckley v. Valeo* upheld base limit restrictions in the first place. It observed that it was "difficult to isolate suspect contributions."[234] Even more importantly, it added, the "opportunity for abuse inherent in the process of raising large monetary contributions" was a legitimate governmental interest.[235]

Section 12(g) teaches that the base limits are a vital, if imperfect, safeguard against corruption. Instead of presenting the government with the

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[232] Richard L. Hasen, *Die Another Day: The Supreme Court Takes a Big Step Closer to Gutting the Last Bits of Campaign Finance Reform*, SLATE.COM, (Apr. 2, 2014 1:13 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/the_subtle_awfulness_of_the_mccutcheon_v_fec_campaign_finance_decision_the.html.

[233] James Taranto, *Nine Decades at the Barricades*, WALL ST. J. (Aug. 1, 2014 6:18 PM), http://online.wsj.com/articles/the-weekend-interview-nine-decades-at-the-barricades-1406931516.

[234] Buckley v. Valeo, 424 U.S. 1, 30 (1976) (per curiam).

[235] *Id.*

intractable problem of untangling corruption from access from gratitude, they allow it to cut the Gordian knot with a simple and readily administrable prophylactic rule. Without the base limits, the floodgates open.

C. Limits on Corporate Donations

This Article has been at pains to make clear that the donations at issue in this piece came from individuals who worked for certain corporations—not from the corporations themselves. Since 1907, federal law has barred corporations from contributing directly to candidates for federal office.[236] As *Beaumont* stated: "Any attack on the federal prohibition of direct corporate political contributions goes against the current of a century of congressional efforts to curb corporations' potentially 'deleterious influences on federal elections,' which we have canvassed a number of times before."[237]

In 2010 Professor Issacharoff remarked that a logical extension of *Citizens United* might be to allow corporations to donate directly to candidates.[238] He wrote that:

> In endowing corporations with all the prerogatives of natural persons in terms of independent expenditures, the logic of the Court's holding could even signal a willingness to open the door to allowing corporations to donate directly to candidates and parties. As shocking as such a step would be to century-old settled practice, it is unclear how big a difference it would make. Would the world look all that much different if corporations could contribute $2400 (the current federal contribution limit on individual donations) to a candidate? Perhaps, but likely not all that much.[239]

To the contrary, the story of Section 12(g) may well teach that base limit donations are the coin of the campaign finance realm. In particular, allowing corporations to donate up to the base limit to candidates sympathetic to their cause could have a significant impact on overall donations and on the appearance of *quid pro quo* corruption. SecondMarket employees donated

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[236] *See* Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 149 (2003) ("Since 1907, federal law has barred such direct contributions to candidates.").

[237] *Id.* at 152.

[238] Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 133 (2010).

[239] *Id.*

in total $34,500 to candidates around late 2011-early 2012.[240] Consider the comparatively vast amount of money, $380,000, SecondMarket itself spent on lobbying for Section 12(g)'s amendment.[241] The corporation clearly had both the interest in advocating on its own behalf and far greater financial resources than its individual employees.

Opening corporate coffers to direct campaign contributions thus could have a significant effect on politics—and all the more so in the absence of aggregate limits. Moreover, as Professor Jill Fisch has pointed out, the ban on corporate contributions channels corporate money into "high information contact activities such as lobbying, testimony, and other direct contacts."[242] Such information is particularly valuable given that legislators often have less information on the policy impact of legislation than the affected firms.[243] In other words, allowing direct corporate contributions may well re-channel resources into a use that invites large-scale influence while generating no helpful information for a Congress that needs it.

D. An Alternative to the "Clientelist" Corruption Model

Professor Issacharoff was one of the first legal observers to use the term "clientelist model" to describe the relationship between politicians and their donors. As he describes it, clientelism is "a patron-client relationship in which political support (votes, attendance at rallies, money) is exchanged for privileged access to public goods."[244] According to Issacharoff, "the focus of clientelism is not the enrichment of an individual politician but that individual's continued officeholding on the condition that 'party politicians distribute public jobs or special favors in exchange for electoral support.'"[245]

Clientelism, then, is more or less when politicians are "on retainer"—indebted to special interests for officeholding and expected to deliver political largess in return. The Section 12(g) story suggests that special interests may make especially effective use of well-timed and highly targeted donations. If firms have only occasional legislative concerns, they

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[240] *Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket", and limit dates to 2011 – 2012)

[241] *SecondMarket Holdings Bills Lobbied*, OPENSECRETS.ORG, https://www.opensecrets.org/lobby/clientbills.php?id=F12960&year=2011, and https://www.opensecrets.org/lobby/clientbills.php?id=F12960&year=2012.

[242] Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495, 1566 (2005).

[243] *Id.* at 1565.

[244] Issacharoff, *supra* note 241 at 127.

[245] *Id.* at 128.

make discrete interventions into politics in order to further their limited causes, and then subside into relative silence. The clientelist model, in other words, might only crudely describe the relationship of politics and money on the ground, failing to take into account discrete and time-bound relationships.

E. Thoughts on Representativeness and Empirics

Professor Bradley Smith has lamented the dearth of empirical support for claims of corruption in campaign finance.[246] He disdains the arguments of proponents of campaign finance restrictions who "suggest that the influence of money is shown long before matters are brought to vote: in setting of the legislative agenda, in deciding which speeches are made, and in the early drafting stages of legislation."[247] As to these assertions, he responds that "[t]he government interest is not supported by empirical evidence . . . . Whatever the particulars of reform proposals, it is increasingly clear that reformers have overstated the government interest in the anticorruption rationale. Money's alleged corrupting effects are far from proven."[248] The saga of Section 12(g) supplies evidence that cuts against both the larger and smaller points made by Professor Smith. For some observers, the Section 12(g) story is one that will bespeak corruption on the face of things. And if so, they will note that Professor Smith's observations are in tension with the facts; after all, legislative interventions on Section 12(g) that seemed to connect up with campaign contributions came at the early drafting stages, through the introduction of legislation, and the movement of bills out of committee.

Yet perhaps Section 12(g) presents an extraordinary case. A narrow special interest was able to get its preferences made into law. While perhaps troubling, such stories are the exception, rather than the rule. But perhaps not.

Here is a different perspective. Much of constitutional law—and campaign finance literature—focuses on hot-button social issues or front-page controversies in the law. The majority of law, however, is conceived and crafted behind the scenes. And it is precisely in these instances, when lawmakers confront issues that not many people care about at all, that

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[246] *See* Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 58 (1997) ("Although the alleged corruption is supported by bits and pieces of anecdotal evidence and a certain amount of common sense, it has not been supported by systematic studies of voting records.").

[247] *Id.* at 58–59.

[248] *Id.* at 63.

opportunities for *quid-pro-quo* like behavior are most probable. No robust studies exist, or perhaps can exist, on this point. But that does not mean that the story of Section 12(g) is unrepresentative of the legislative process.

F. Disclosure's Limits

The *McCutcheon* plurality took great comfort in the rules of disclosure. In particular, it noted that at the time of *Buckley* "Congress could regard disclosure of contributors as "only a partial measure," because "information about campaign contributions was filed at FEC offices and was therefore virtually inaccessible to the average member of the public."[249] In contrast to the Dark Ages of the 1970s, the development of new technology has meant that "disclosure now offers a particularly effective means of arming the voting public with information."[250] The plurality went on to observe that "[r]eports and databases are available on the FEC's Web site almost immediately after they are filed, supplemented by private entities such as OpenSecrets.org and FollowTheMoney.org."[251]

The plurality has a valid point; indeed, this Article could not easily have been written without consultation of the very websites to which it refers. Yet even in a world of proliferating information, there are limits to the power of disclosure. As Richard Briffault observes, "[t]he extensive disclosure currently required produces mountains of political finance information that must be exhaustively mined and analyzed to reveal significant patterns of giving and spending."[252] Private citizens will not sift through these information mountains on their own, and intermediaries such as the press offer "very limited" coverage of campaign finance topics.[253]

To this Author's knowledge, no investigative journalist or blogger has reflected on the story of the Section-12(g)-related campaign contributions. A securities and corporate law scholar by trade, I happened upon it only by chance while conducting empirical research on another topic. Disclosure rules may shed useful light on the moneyed interests that seek high-profile legislation. But there is reason to doubt that these rules will work the same way for the less exciting, bread-and-butter legislation that lends itself to corrupting influences, far from the headlines—where no one is looking.

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[249] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1460 (2014).
[250] *Id.* at 1439.
[251] *Id.* at 1460.
[252] Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 288 (2010).
[253] *Id.*

APPENDIX

(Lobbying expenditures are reported for the quarter after which they occur.)

On May 24, 2011: Representative Jim Himes (D-CT), a member of the Subcommittee on Capital Markets and Government Sponsored Enterprises, introduced H.R. 1965, requesting a study to improve shareholder registration thresholds.[254]

June 6: SecondMarket employee donates $1000 to Himes.[255]

June 7: SecondMarket employee donates $1000 to Himes.[256]

June 13: SecondMarket employee donates $1000 to Schweikert[257] (R-AZ), member of the Subcommittee on Capital Markets and Government Sponsored Enterprises.[258]

June 14: Schweikert introduces H.R. 2167, the Private Company Flexibility and Growth Act, which proposes raising the threshold to 1,000 shareholders and excluding accredited investors and employee shares.[259]

July 20: $20,000 SecondMarket lobbying expenditure.[260]

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[254] H.R. 1965, 112th Cong. § 2 (2011).

[255] *See Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket") (listing two SecondMarket employees as contributing $1000 each to Rep. Himes, one on June 6, 2011, and the other on June 7, 2011).

[256] *Id.*

[257] *Id.* (listing Rep. Schweikert as receiving a June 13, 2011, donation of $1000 from a SecondMarket employee).

[258] *Legislative Proposals to Facilitate Small Business Capital Formation and Job Creation: Hearing Before the H. Subcomm. on Gov't Sponsored Entities of the H. Comm. on Fin. Servs.*, 112th Cong. II (2011) (listing Rep. Schweikert as a subcommittee member).

[259] Private Company Flexibility and Growth Act, H.R. 2167, 112th Cong. (2011) (introduced June 14, 2011).

[260] *SecondMarket Holdings*, OPENSECRETS.ORG, http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=3698EEAE-8C4C-4C3F-A51E-AE20F549DDE9&filingTypeID=60 (last visited Mar. 15, 2014) (linking to a July 20, 2011 lobbying report in amount of $20,000 related to the JOBS Act).

July 26: Three SecondMarket employees each donate $1000 to Schweikert.[261]

July 27: SecondMarket employee donates $1000 to Schweikert.[262]

August 29: SecondMarket employee donates $1000 to Schweikert.[263]

September 21: Barry Silbert testifies to Committee on Financial Services.[264]

October 17: SecondMarket employee donates $1000 to Mark Warner (D-VA).[265]

October 20: SecondMarket employee donates $1000 to Mark Warner.[266]

October: $60,000 SecondMarket lobbying expenditure.[267]

October 24: SecondMarket employee donates $500 to Gregory Meeks.[268]

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[261] *See Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket") (listing Rep. Schweikert as receiving two $1000 donations from two SecondMarket employees on July 26, 2011).

[262] *Id.* (listing Rep. Schweikert as receiving a $1000 donation from a SecondMarket employee on July 27, 2011).

[263] *Id.* (listing Rep. Schweikert as receiving a $1000 donation from a SecondMarket employee on Aug. 29, 2011).

[264] *Legislative Proposals to Facilitate Small Business Capital Formation and Job Creation: Hearing Before the H. Subcomm. on Gov't Sponsored Entities of the H. Comm. on Fin. Servs.*, 112th Cong. 35, 48 (2011) (statement of Barry Silbert, Founder & Chief. Executive Officer, SecondMarket, Inc.).

[265] *See Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket") (listing a SecondMarket employee's donation of $1000 each to Sen. Warner on Oct. 17, 2011).

[266] *Id.* (listing a SecondMarket employee's donation of $1000 each to Sen. Warner on Oct. 20, 2011).

[267] *SecondMarketHoldings*, OPENSECRETS.ORG, http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=CCF1D71C-F3BF-485A-8696-0EB2C58B5877&filingTypeID=69 (last visited Mar. 15, 2014) (linking to an Oct. 20, 2011 lobbying report in amount of $60,000 related to the JOBS Act).

[268] *See Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket") (listing Rep. Meeks as receiving a $500 donation from a SecondMarket employee on Oct. 24, 2011).

October 25: Schweikert joins as co-sponsor of H.R. 1965.[269]

October 26: H.R. 1965 reported by committee.[270]
H.R. 2167 reported by committee.[271]

November 2: H.R. 1965 passes the House (never passed by Senate).[272]

November 8: Sen. Pat Toomey (R-PA) introduces the S. 1824 Private Company Flexibility and Growth Act.[273] Mark Warner is a co-sponsor.[274] The bill proposes raising the shareholder threshold to 2,000 persons and not counting employees who receive the stock as stock options. Goes to Committee on Banking, Housing, and Urban Affairs. Dies in committee.[275] Tim Johnson (D-SD) chair, Schumer on committee.[276]

November 14: Five SecondMarket employees donate a total of $13,000 to Sen. Schumer (D-NY).[277]

Dec. 1: Sen. Schumer introduces S. 1933 Reopening American Capital Markets to Emerging Growth Companies Act of 2011. [278]

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[269] *Bill Summary & Status Congress (2011-2012) H.R. 1965 Cosponsors*, THE LIBRARY OF CONGRESS THOMAS, http://hdl.loc.gov/loc.uscongress/legislation.112hr1965 (last visited Mar. 16, 2014) (showing Rep. Schweikert joining as a cosponsor on Oct. 25, 2011).

[270] *Id.* (showing a report to the House on Oct. 26, 2011).

[271] H.R. REP. NO. 112-327, at 3 (2011).

[272] *Bill Summary & Status Congress (2011-2012) H.R. 1965 Cosponsors*, THE LIBRARY OF CONGRESS THOMAS, http://hdl.loc.gov/loc.uscongress/legislation.112hr1965 (last visited Mar. 16, 2014) (showing the passage of 1965 in the House).

[273] Private Company Flexibility and Growth Act, S. 1824, 112th Cong. (2011).

[274] *Id.* (showing Sen. Warner as a cosponsor).

[275] *See Spurring Job Growth Through Capital Formation While Protecting Investors—Part I: Hearing Before the Comm. on Banking, Hous., & Urban Affairs*, 112th Cong. (2011) (debating S. 1824); *S. 1824 (112th): Private Company Flexibility and Growth Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/112/s1824 (last visited Mar. 10, 2014) (noting S. 1824 died in Congress).

[276] *Spurring Job Growth Through Capital Formation While Protecting Investors—Part I: Hearing Before the Comm. on Banking, Hous., & Urban Affairs*, 112th Cong. II (2011) (listing committee members).

[277] *See Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket") (listing five SecondMarket employees' donations on Nov. 14, 2011, to Impact, totaling $13,000); *Impact*, OPENSECRETS.ORG, http://www.opensecrets.org/pacs/lookup2.php?strID=C00348607 (last visited Mar. 11, 2014) (affiliating Impact with Sen. Schumer).

[278] Reopening American Capital Markets to Emerging Growth Companies Act of 2011, S. 1933, 112th Cong. (2011).

Senate hearing: Wawa's Christopher Gheysens testifies; Toomey questions Cross.[279]

December 5: Kay Bailey Hutchinson introduces S. 1941. The threshold is left at 500 if not a bank or bank holding company.[280]

December 8: Rep. Mark Fincher introduces H.R. 3606: Jumpstart our Business Startups.[281] No mention of 2000 or 500.[282]

December 30: SecondMarket employee donates $1000 to Senator Shelby via Defend America PAC.[283]

January 20, 2012: $10,000 Wawa lobbying expenditure;[284] $60,000 SecondMarket lobbying expenditure.[285]

February 15: H.R. 3606 reported by committee.[286]

March 1: H.R. 3606 has no mention of 2000.[287]

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[279] *Spurring Job Growth Through Capital Formation While Protecting Investors—Part I: Hearing Before the Comm. on Banking, Hous., & Urban Affairs*, 112th Cong. 29 (2011) (statement of Christopher T. Gheysens, Executive Vice President and Chief Financial & Administrative Officer, Wawa Inc.).

[280] *See Bill Summary & Status 112th Congress (2011-2012) S.1941 All Information*, THE LIBRARY OF CONGRESS THOMAS, http://hdl.loc.gov/loc.uscongress/legislation.112s1941 (last visited Mar. 16, 2014) (summarizing the bill).

[281] Reopening American Capital Markets to Emerging Growth Companies Act of 2011, H.R. 3606 112th Cong. (2012).

[282] *See generally* H.R. Rep. No. 112-406 (2012) (containing no mention of a 2000 shareholder threshold).

[283] *Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket") (showing a SecondMarket employee contributed $1000 to Defend America PAC on Dec. 30, 2011); *Defend America PAC*, OPENSECRETS.ORG, http://www.opensecrets.org/pacs/lookup2.php?strID=C00325993&cycle=2014 (last visited Mar. 15, 2014) (showing Sen. Shelby's affiliation with Defend America PAC).

[284] *Wawa, Inc.*, OPENSECRETS.ORG, http://www.opensecrets.org/lobby/client_reports.php?id=D000029767&year=2011 (last visited Mar. 15, 2014) (linking to a Jan. 20, 2012 lobbying report in the amount of $10,000).

[285] *SecondMarket Holdings*, OPENSECRETS.ORG, http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=F6798A91-EAED-4848-AD38-80525F238466&filingTypeID=51 (last visited Mar. 15, 2014) (linking to an Apr.. 20, 2012 lobbying report in amount of $60,000 related to the JOBS Act).

[286] H.R. REP. NO. 112-409 (2012).

[287] *See generally* H.R. REP. NO. 112-406 (2012) (containing no mention of a 2000 shareholder threshold).

March 8: Miller of NC amendment to add 2000 persons or 500 persons who are not accredited.

March 8: Passed House with 2000.[288]

March 9: SecondMarket employee donates $1000 to Sen. Toomey.[289]

March 13: Placed on Senate calendar.[290]

March 15: SecondMarket employee donates $1000 to Sen. Toomey.[291]

March 20: Three SecondMarket employees donate a total of $4500 to Sen. Tim Johnson,[292] chair of the Committee on Banking, Housing and Urban Affairs.[293]

March 22: Passed Senate with changes.[294]

March 27: House agreed to changes.[295]

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[288] *Bill Summary & Status 112th Congress (2011-2012) H.R. 3606 All Information*, THE LIBRARY OF CONGRESS THOMAS, http://hdl.loc.gov/loc.uscongress/legislation.112hr3606 (last visited Mar. 16, 2014) (showing the bill's passage in the House on Mar. 8, 2012).

[289] *Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket") (listing one SecondMarket employee as contributing $1000 to Sen. Toomey on Mar. 9, 2012).

[290] *Bill Summary & Status 112th Congress (2011-2012) H.R. 3606 All Information*, THE LIBRARY OF CONGRESS THOMAS, http://hdl.loc.gov/loc.uscongress/legislation.112hr3606 (last visited Mar. 16, 2014) (showing the bill was placed on the Senate calendar).

[291] *Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket") (listing one SecondMarket employee as contributing $1000 to Sen. Toomey on Mar. 15, 2012).

[292] *Id.* (listing three SecondMarket employees as contributing $1000, $1000, and $2500 to Sen. Johnson on Mar.20, 2012).

[293] *Spurring Job Growth Through Capital Formation While Protecting Investors—Part I: Hearing Before the Comm. on Banking, Hous., & Urban Affairs*, 112th Cong. II (2011) (listing Sen. Johnson among the committee members).

[294] *Bill Summary & Status 112th Congress (2011-2012) H.R. 3606 All Information*, THE LIBRARY OF CONGRESS THOMAS, http://hdl.loc.gov/loc.uscongress/legislation.112hr3606 (last visited Mar. 16, 2014) (showing the bill passed the Senate with Amendments on Mar. 22, 2012).

[295] *Id.*

March 27: Three SecondMarket employees donate a total of $5000 to Shelley Berkley.[296]

March 27: SecondMarket employee donates $500 to Rep. Himes.[297]

April 5: President Obama signs the JOBS Act.[298]

April 20: $60,000 SecondMarket lobbying expenditure;[299] $30,000 Wawa lobbying expenditure.[300]

June 27: Six Wawa employees donate a total of $10,000 to Friends of Pat Toomey.[301]

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[296] *Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "SecondMarket") (listing two SecondMarket employees as contributing $1250 each and one employee contributing $2500 to Sen. Berkley on Mar. 27, 2012).

[297] *Id.* (listing a SecondMarket employee as contributing $500 to Rep. Himes).

[298] *Bill Summary & Status 112th Congress (2011-2012) H.R. 3606 All Information*, THE LIBRARY OF CONGRESS THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR03606: @@@L&summ2=m& (last visited Mar. 16, 2014) (showing the President signed the bill on Apr. 5, 2012).

[299] *SecondMarketHoldings*, OPENSECRETS.ORG, http://soprweb.senate.gov/index.cfm?event= getFilingDetails&filingID=F6798A91-EAED-4848-AD38-80525F238466&filingTypeID=51 (last visited Mar. 15, 2014) (linking to an Apr. 20, 2012 lobbying report in amount of $60,000 related to the JOBS Act).

[300] *Wawa, Inc.*, OPENSECRETS.ORG (last visited Mar. 15, 2014), http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=CD5AFB27-5357-4C49-ABBB-C98B8FD621AF&filingTypeID=51 (last visited Mar. 15, 2014) (linking to an Apr. 20, 2012 lobbying report in the amount of $30,000).

[301] *Individual Contributions Arranged by Type, Giver, then Recipient*, FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Employer/Occupation" field for "Wawa") (showing five Wawa employees contributed $1000 to Friends of Pat Toomey on June 27, 2012 and one Wawa employee made two $2500 contributions on June 27, 2012).

[301] *Id.* (search "Individual Name" field "Compitello, William")(showing a single donation to Friends of Pat Toomey); *Id.* (search "Individual Name" field "Eckhardt, Michael") (showing a single donation to Friends of Pat Toomey); *Id.* (search "Individual Name" field "Gheysens, Chris") (showing the June 27, 2012 contribution and one other to Wawa Political Action Committee); *Id.* (search "Individual Name" field "Pulos, Catherine") (showing the June 27, 2012 contribution and one other to Wawa Political Action Committee); *Id.* (search "Individual Name" field "Schroeder, Nathaniel"); *Id.* (search "Individual Name" field "Stoeckel, Howard") (showing no other campaign contributions).