

**UNSUCCESSFUL CAMPAIGN FINANCE REFORM:
THE FAILURE OF NEW JERSEY'S 2004–2005 PAY-TO-PLAY
REFORMS TO CURB CORRUPTION AND THE
APPEARANCE OF CORRUPTION**

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Money, like water, will always find an outlet.¹

I. INTRODUCTION

On November 15, 2004, New Jersey Senate President Richard Codey assumed the office of Governor of New Jersey,² following the resignation of Governor James E. McGreevey.³ Among his pledges upon assuming office⁴ was to end the practice in New Jersey known as “pay-to-play.”⁵ “‘Pay-to-play’ is the political practice of rewarding campaign contributors with no-bid government contracts.”⁶ Critics

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¹ *McCConnell v. Fed. Election Comm'n*, 540 U.S. 93, 224 (2003). This quotation from Justice O'Connor is based on the understanding that as government keeps regulating political contributions and advocacy, the money finds new outlets. *See also* Kathleen Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 312 (1998) (“[T]he restriction on formal campaign contributions has had predictable substitution effects. Barred from giving to candidates or limited in the amount that they can give, corporations, labor unions, [Political Action Committees], and wealthy individuals have shifted resources into other forms of political advocacy and association.”).

² *See* N.J. CONST. art. V, § 1, ¶ 6.

³ Laura Mansnerus, *A Governor Resigns: Overview*, N.Y. TIMES, Aug. 13, 2004, at A1.

⁴ Richard J. Codey, Acting New Jersey Governor, State of the State Address (Jan. 11, 2005) (transcript available at <http://www.stateline.org/live/details/speech?contentId=16583>).

⁵ *Id.* (“Governor McGreevey’s Executive Order on pay to play . . . must become a permanent law. And I am 100% committed to getting that done in the very near future.”).

⁶ Paula A. Franzese & Daniel J. O’Hern, Sr., *Restoring the Public Trust: An Agenda for Ethics Reform of State Government and a Proposed Model for New Jersey*, 57 RUTGERS L. REV. 1175, 1222 (2005).

describe pay-to-play as a hidden tax, as it increases the cost of government.⁷

Shortly before leaving office, Governor McGreevey signed an Executive Order to ban this practice,⁸ and upon taking office, Governor Codey promised to push the legislature to codify the Executive Order in legislation.⁹ Among Governor Codey's promises and proposals to reform the broken system were the creation of an independent state ethics commission, a new plain-language ethics guide for state employees, a new business ethics guide, stiffer penalties for ethical transgressions, and greater public disclosure.¹⁰ Arguably, the most important and most public of his proposals was the proposed statute banning pay-to-play.

In response to New Jersey's perceived culture of corruption and "[s]candals [that] have shaken the public's trust," there was a public outcry to reform the state's campaign finance system.¹¹ Accusations of pay-to-play were common, touching both Republicans¹² and Democrats¹³ in recent years. However, as insidious and corrupting as this confluence of money and politics appeared to be, it was nevertheless perfectly legal in New Jersey, so long as there was no "quid pro quo."¹⁴ Under New Jersey law, specifically the Local Public Contracts Law and the Criminal Code, a campaign contribution donated in exchange for a government contract is, in fact, illegal, but "the problem is proving the connection between the contributions and the contract."¹⁵ Thus, as proving the illegal quid pro quo is often largely futile, New Jersey's elected officials took the next logical step: attempting to tighten the restrictions on campaign contributions from businesses holding and seeking public contracts.

⁷ James Prado Roberts & Paul D'Ambrosio, *Ante Up, if You Want to Get in the Game*, ASBURY PARK PRESS, June 6, 2004.

⁸ Exec. Order No. 134, 36 N.J. REG. 4562(b) (Sept. 22, 2004), available at <http://www.state.nj.us/infobank/circular/eom134.htm>.

⁹ Codey, *supra* note 4.

¹⁰ Franzese & O'Hern, *supra* note 6, at 1177.

¹¹ *Id.* at 1176; see also NJ.com, Corruption, <http://www.nj.com/corruption> (last visited Feb. 15, 2008) (collecting investigative reports on New Jersey corruption).

¹² David Kocieniewski, *Errors Emerge as Exhaust Test Is Introduced in New Jersey*, N.Y. TIMES, Jan. 7, 2000, at B1 (recounting accusations of pay-to-play in Republican Governor Christine Whitman's administration).

¹³ Laura Mansnerus, *Who Are the Lawyers Packing All the Clout?*, N.Y. TIMES, Dec. 11, 2005, § 14, at 1 (showing that law firms donating to the Democrats received favorable public contracts).

¹⁴ See N.J. STAT. ANN. §19:44A-20 (West 1999 & Supp. 2007) (noting that prohibited donations include anything that "seek[s] to influence the content, introduction, passage or defeat of legislation").

¹⁵ Franzese & O'Hern, *supra* note 6, at 1222.

This Comment discusses the recent history of New Jersey's campaign finance reform, specifically the 2004–2005 pay-to-play reforms, and argues that the current statutory framework fails to curb actual corruption, as well as the appearance of corruption, in New Jersey politics. Part II of this Comment defines political corruption, and traces the history of political corruption in New Jersey. Part III examines the current statutory framework of New Jersey's campaign finance system, discusses the current law on restricting political contributions, and examines the first challenge to the pay-to-play statute. Part IV examines the failures of New Jersey's campaign finance scheme, including the loopholes that businesses, contributors, and politicians use to exploit the system. Part V discusses proposed measures to fix the system, including proposed bills in the New Jersey Legislature and an examination of campaign finance laws in other states. Part VI concludes by describing what measures should be taken to fix the current problem and detailing which provisions of the current system should be left unchanged.

II. DEFINING CORRUPTION AND TRACING THE EVOLUTION OF CORRUPTION IN NEW JERSEY

A. *Corruption of Officials, Corruption of the Voter*

New Jersey has a sordid history of political corruption¹⁶ dating back to the days of “Boss” Frank Hague,¹⁷ the mayor of Jersey City from 1917 to 1947, who oversaw a machine of patronage and kick-backs.¹⁸ However, an elected official can still be “corrupted” without receiving an outright bribe:

[o]nce we get beyond classical corruption, political spending is useful to a politician to the extent, and only to the extent, that it enables him to attain or retain office. For money to “corrupt,” then, an elected official must be able to shade his conduct away from what a constituent-serving or public-regarding representative would do¹⁹

¹⁶ See NJ.com, Corruption, <http://www.nj.com/corruption> (last visited Feb. 20, 2008) (collecting investigative reports on New Jersey political corruption).

¹⁷ Staff Report, *Who's the Boss?*, ASBURY PARK PRESS (Asbury Park, N.J.), Oct. 24, 2004, at A7.

¹⁸ Joseph Sullivan, *The Trial of Hudson Corruption Cases*, N.Y. TIMES, Feb. 27, 1983, § 4, at 6 (noting that Frank Hague was “a figure who dominated state politics for four decades and who laughed at investigations aimed at uncovering how he became a millionaire on a mayor's salary”).

¹⁹ Samuel Issacharoff & Pamela Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1720 (1999).

That is, an official is “corrupted” if a campaign donation changed his vote or executive decision from what he otherwise would have done. In *Colorado Republican II*,²⁰ Justice Souter defined “corruption [as] being understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder’s judgment, and the appearance of such influence.”²¹ Thus, campaign donations, arguably, have the ability to corrupt an official as much as an outright bribe. While some commentators argue that campaign finance reform has largely been a failure in practice, as the money of advocates always finds an outlet (i.e., politicians continue to be actually corrupted despite increased regulation),²² it must be remembered that the purpose of campaign finance reform is not only to stop actual corruption, but the *appearance* of corruption as well.²³ Beginning with the Supreme Court’s landmark decision in *Buckley v. Valeo*,²⁴ the Court noted that “the primary interest served by [campaign finance regulations] . . . is the prevention of corruption and the *appearance of corruption* spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office.”²⁵

While outright bribery certainly still exists, at times, in New Jersey,²⁶ a more subtle form of corruption has largely replaced the explicit pay-off. Today, favoritism in the awarding of public contracts and access to decision-makers is insidiously traded for large campaign donations, fundamentally replacing the direct kickback of years past. In recent years, as the cost of campaigns in the media age has increased exponentially, politicians have aggressively increased their fundraising operations.²⁷ As there is “near-universal agreement that

²⁰ 533 U.S. 431 (2001).

²¹ *Id.* at 441 (citing *Nixon v. Shrink Missouri Gov’t Political Action Comm.*, 528 U.S. 377, 388–89 (2000)).

²² *See, e.g.*, Sullivan, *supra* note 1, at 311.

²³ Dennis Thompson, *Law and Democracy: A Symposium on the Law Governing Our Democratic Process: Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1036 (2005) (“Why should campaigns be regulated? To prevent corruption or the appearance of corruption is the answer the Supreme Court gives in *McConnell v. Fed. Election Comm’n* . . .”).

²⁴ 424 U.S. 1 (1976).

²⁵ *Id.* at 25 (emphasis added).

²⁶ Ronald Smothers, *11 Officials in New Jersey Snared After 4-Year Operation by F.B.I.*, N.Y. TIMES, Feb. 23, 2005, at A1.

²⁷ Rachel Leon, *Cash and Carry Democracy*, N.Y. TIMES, Mar. 19, 2006, § 14, at 13 (Op-Ed). Leon, the executive director of Common Cause New York, notes that “when adjusted for inflation, the cost of a winning campaign has more than doubled since 1986, and has increased sixfold since 1990.” *Id.* Though Leon uses data for New York state candidates, as most New Jersey state candidates advertise in the New York media market, the results would likely be similar.

the functional relationship between political spending and political success is essentially positive,²⁸ there is no reason to believe that politicians will not spend as much as they can possibly raise in the foreseeable future.²⁹ This recent trend of hyper-elevated spending on campaigns has been called “corruption of the voter.”³⁰ As candidates and elected officials continue to accept donations to buy media and advertising to influence voters, it becomes the voter who is corrupted, essentially bought-off with slickly produced advertisements, their attention diverted from more civic-minded questions when casting their votes.³¹

A difficult question arises when attempting to discern the difference between permissible levels of influence and illegal corruption. The vital difference, it has been argued, is the link between the money and the official action. “Only when the connection between the contribution and some favor is especially close should there be any reason to worry about corruption [T]he connection between the contribution and the favor must be close in two senses: proximate in time and explicit in word or deed.”³² Some would argue that “[c]ampaign finance reform protects the integrity of the American political-governmental process.”³³ While this may be true as a general proposition, politicians in New Jersey recently have seemed more concerned with only curbing the appearance of corruption, rather than attempting to curb the actual corruptive influence of money on the system.³⁴ A somewhat cynical view would be that New Jersey politicians passed a faux reform, rife with loopholes and the benefit of which was marginal at best, in an effort to appear vigilant on corruption while preserving the status quo.

²⁸ Issacharoff & Karlan, *supra* note 19, at 1708–09.

²⁹ Joe Donahue, *Lawmakers Break the Bank on Races*, TRENTON TIMES, Dec. 4, 2007, at A1 (noting that spending on New Jersey’s legislative campaigns ballooned from \$57 million in 2003 to \$69 million in 2007).

³⁰ Issacharoff & Karlan, *supra* note 19, at 1708 (“[F]or all the rhetorical focus on money’s role in corrupting candidates and elected officials, the critical problem turns out to be that political money corrupts voters.”) (emphasis added).

³¹ See Thompson, *supra* note 23, at 1037 (referring to the diversion of the electorate from civic minded questions as “electoral corruption”).

³² *Id.* at 1044.

³³ Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 WASH. & LEE L. REV. 767, 768 (2003).

³⁴ Jason Method, *Codey: Existing Reforms Largely Sufficient*, ASBURY PARK PRESS, Sept. 30, 2007, available at <http://www.app.com/apps/pbcs.dll/article?AID=/20070930/NEWS/70930003/0/SPECIAL10> (quoting Senate President Codey as saying, “[w]e can pass all the laws to try and stop corruption, but someone who is determined to be corrupt is not going to be stopped by any laws”).

B. Corruption and the Appearance of Corruption in New Jersey

One of the most prolific sources of campaign cash in New Jersey has been those firms and companies seeking lucrative government contracts. In New Jersey, the state's contract procurement laws say that the contract does not need to go to the lowest bidder.³⁵ The State can accept whichever bid it feels will "be most advantageous to the State, price and other factors considered."³⁶ Thus, state officials have tremendous latitude when doling out contracts, with little to stop an official from steering a contract to whomever he or she chooses, including a campaign supporter.³⁷

Between 1994 and 2001, the administration of Republican Governor Christine Whitman received some negative press attention when the state awarded a \$463 million contract for auto emissions testing to the Parsons Infrastructure and Technology Company.³⁸ Campaign finance reports reveal that Parsons made \$62,000 in campaign contributions to Republican committees.³⁹ While there were never any allegations that campaign dollars were traded quid pro quo for preferential treatment, the appearance of impropriety existed to many observers, and the State Senate conducted hearings on the matter.⁴⁰

The subsequent administration of Democratic Governor James McGreevey was no different, and the practice of pay-to-play continued. In fact, after leaving office, McGreevey admitted that nobody "benefited from 'pay-to-play' more than [he] did."⁴¹ Upon taking office in 2001, several supporters of Governor McGreevey's past campaigns received lucrative contracts.⁴² The years of the Whitman administration were lean for some firms and corporations with strong Democratic Party ties, and the incoming administration was a chance to reclaim some of these extremely lucrative public contracts.⁴³

³⁵ N.J. STAT. ANN. § 52:34-12 (West 2001 & Supp. 2007).

³⁶ *Id.* § 52:34-12(g).

³⁷ See *Commercial Cleaning Corp. v. Sullivan*, 47 N.J. 539, 548 (1966) (holding that the Executive branch has broad discretion under N.J. STAT. ANN. § 52:34-12 to "determine who is the 'responsible bidder,' [and] which bid will be most advantageous to the State, 'price and other factors considered'").

³⁸ Kocieniewski, *supra* note 12, at B1.

³⁹ *Id.*

⁴⁰ Iver Peterson, *Public's Chance to Inspect Emissions-Test Contracting*, N.Y. TIMES, July 10, 2001, at B5.

⁴¹ JAMES E. MCGREEVEY WITH DAVID FRANCE, *THE CONFESSION* 337 (2006).

⁴² Mansnerus, *supra* note 13, at § 14, 1.

⁴³ *Id.* "One firm closely identified with the McGreevey administration was Wilentz, Goldman & Spitzer of Woodbridge, where Mr. McGreevey was mayor. When he took office, Mr. McGreevey rewarded Wilentz with a new client, the enor-

Rewarding your supporters and hurting your enemies is business as usual in New Jersey,⁴⁴ and is not limited to the state level. Outright corruption, as well as pay-to-play, is practiced at the local level as well. Straightforward bribery exists in both upper-class suburbia⁴⁵ and poorer inner-cities⁴⁶ in New Jersey as does legal pay-to-play, where municipal and county officials grant contracts and receive corporate campaign contributions.⁴⁷

III. REFORMING NEW JERSEY'S CAMPAIGN FINANCE SYSTEM AND THE CURRENT LAW

A. *An Attempt at Reforming Pay-to-Play*

On August 12, 2004, Governor McGreevey announced that he would resign, effective November 15, 2004.⁴⁸ As a "lame duck" and saying he felt liberated⁴⁹ from the corruptive influence of the political bosses who wield incredible influence in New Jersey through the pay-to-play process,⁵⁰ Governor McGreevey issued Executive Order No. 134 on September 22, 2004.⁵¹ McGreevey later called this an "atom bomb in the world of New Jersey politics."⁵² The governor's intention was to "insulate the negotiation and award of State contracts from political contributions that pose the risk of improper influence, pur-

mous Turnpike Authority; he took it away from the Republican favorite Riker, Danzig, Scherer, Hyland & Peretti." *Id.* Wilentz, Goldman & Spitzer made extensive contributions to Governor McGreevey's campaign. *Id.*

⁴⁴ Richard Lezin Jones, *State Senator Who Combines Donations, Law Practice, and Influence*, N.Y. TIMES, Jan. 9, 2006, at B1. State Senator Raymond Lesniak spoke regarding the connection between his financial support to candidates and subsequent contracts for his firm. *Id.* "People say, 'You raise money for people who get elected and then they hire your law firm.' I go, 'Shocking, isn't it?' Are you supposed to hire people who donated to your opponent?" *Id.*

⁴⁵ Smothers, *supra* note 26, at A1.

⁴⁶ David Halbfinger, *Hudson County Leader Quits Amid Signs of Federal Inquiry*, N.Y. TIMES, Sept. 7, 2001, at B2.

⁴⁷ See, e.g., Jones, *supra* note 44, at B1; Staff Report, *supra* note 17, at A7. Controlling these local fiefdoms that grant contracts totaling billions of dollars each year is arguably as important as influencing the award of contracts at the state level. *Id.*

⁴⁸ Laura Mansnerus, *McGreevey Steps Down After Disclosing a Gay Affair*, N.Y. TIMES, Aug. 13, 2004, at A1.

⁴⁹ MCGREEVEY WITH FRANCE, *supra* note 41, at 336-40.

⁵⁰ Exec. Order No. 134, 36 N.J. REG. 4562(b) (2004), available at <http://www.state.nj.us/infobank/circular/eom134.htm> (describing the power of county bosses in the preamble).

⁵¹ *Id.*

⁵² MCGREEVEY WITH FRANCE, *supra* note 41, at 336-40.

chase of access, or the appearance thereof.”⁵³ The Executive Order directed that the state

shall not enter into an agreement or otherwise contract to procure from any business entity services or any material, supplies or equipment, or to acquire, sell, or lease any land or building, where the value of the transaction exceeds \$17,500, if that business entity has solicited or made any contribution of money, or pledge of contribution, including in-kind contributions to a candidate committee and/or election fund of any candidate or holder of the public office of Governor, or to any State or county political party committee⁵⁴

There was some initial veiled displeasure with Governor McGreevey’s Executive Order. One prominent Democrat, Assembly Majority Leader Joseph Roberts, asked the non-partisan Office of Legislative Services for an opinion as to whether the Governor had the power to issue such a law via an executive order, bypassing the legislature.⁵⁵ The opinion letter from the Office of Legislative Services agreed that the Executive Order “infringes upon the lawmaking power of the legislature and does not ‘comport with the constitutional principle of separation of powers.’”⁵⁶

The questionable legality of the Executive Order was problematic for the incoming Governor Codey, who in his State of the State address soon after assuming office pledged a reformist and ethical course for New Jersey.⁵⁷ Governor Codey would soon deliver on his pledge to codify McGreevey’s Executive Order into legislation. On March 22, 2005, Governor Codey signed bill A1500/S2052,⁵⁸ which his press release trumpeted as “one of the nation’s strongest statewide pay-to-play bans.”⁵⁹

⁵³ See Exec. Order No. 134, 36 N.J. REG. 4562(b) (2004), available at <http://www.state.nj.us/infobank/circular/eom134.htm>.

⁵⁴ *Id.*

⁵⁵ Letter from Albert Porroni, Legislative Counsel, Office of Legislative Services, to Hon. Joseph Roberts, Assemblyman (Oct. 15, 2004) (on file with author).

⁵⁶ *Id.* (quoting *Comm’ns Workers v. Florio*, 130 N.J. 439, 450–51 (1992)).

⁵⁷ Codey, *supra* note 4 (“I assumed this office at a time of political upheaval Our faith in government had been shaken. But this moment in history has given us the opportunity to chart a new course. Together, we have begun to restore faith, integrity, and hope to our government.”).

⁵⁸ N.J. STAT. ANN. § 19:44A-20.13 (West 1999 & Supp. 2007).

⁵⁹ Press Release, Acting Governor Richard Codey, Codey Signs Pay-to-Play Ban into Law (Mar. 22, 2005), available at http://www.state.nj.us/cgi-bin/governor/njnewsline/view_article.pl?id=2427.

The language of this bill was virtually identical to Governor McGreevey's Executive Order, other than a new section⁶⁰ that said that this new law "shall not . . . apply in circumstances when it is determined by the federal government or a court of competent jurisdiction that its application would violate federal law or regulation."⁶¹ The legislature added this passage as a significant problem emerged. According to the Federal Highway Administration, New Jersey's pay-to-play ban violated federal law.⁶² The federal government demanded that New Jersey abandon its new pay-to-play law, or else it would freeze "hundreds of millions of dollars in federal road funds" headed for New Jersey, as the federal government claimed it was a violation of federal competitive-bidding laws.⁶³ Acting Governor Codey challenged the Federal Highway Administration's position in court⁶⁴ but was unsuccessful.⁶⁵ The added language of section 20.25 would apparently allow the ban on pay-to-play to remain but kept a loophole for projects that received federal highway dollars.⁶⁶

This was not the only problem that arose with the new legislation. In his Executive Order, McGreevey acknowledged the fluid nature of money in New Jersey politics, that is, that improper donations did not necessarily need to flow directly to the public official they were meant to influence.⁶⁷ In New Jersey, it is often the political bosses⁶⁸ of New Jersey's twenty-one counties who "through their powers of endorsement, fundraising, ballot slogan or party line designation, and other means, exert significant influence over" candidates for public office.⁶⁹ Thus, pay-to-play is arguably more pervasive at the

⁶⁰ N.J. STAT. ANN. § 19:44A-20.25 (West 1999 & Supp. 2007).

⁶¹ *Id.*

⁶² See Certification of Assistant U.S. Attorney Daniel J. Gibbons at 22, *New Jersey v. Mineta*, No. 05-228 (D.N.J. 2005). Exhibit 10 is the final legal opinion from the Federal Highway Administration to the New Jersey Department of Transportation, where the federal government argued that the pay-to-play ban violated 23 U.S.C. § 112 (2006). *Id.*

⁶³ *Id.*

⁶⁴ Brief of Plaintiff, *New Jersey v. Norman Y. Mineta*, No. 05-228 (D.N.J. 2005).

⁶⁵ Editorial, *'Pay to Play' in New Jersey*, N.Y. TIMES, Feb. 3, 2005, at A26. State campaign finance laws are preempted by federal law. See 2 U.S.C. § 453 (2000).

⁶⁶ N.J. STAT. ANN. § 19:44A-20.25 (West 1999 & Supp. 2007).

⁶⁷ Exec. Order No. 134, 36 N.J. REG. 4562(b) (2004), available at <http://www.state.nj.us/infobank/circular/eom134.htm>. Note the preamble about power of county bosses and their influence on the political process. *Id.*

⁶⁸ See Paul D'Ambrosio, *Like Puppeteers, Bosses Pull the Strings*, ASBURY PARK PRESS (Asbury Park, N.J.), Oct. 24, 2004, at A1.

⁶⁹ Exec. Order No. 134, 36 N.J. REG. 4562(b) (2004), available at <http://www.state.nj.us/infobank/circular/eom134.htm>.

local and county level, an area often unseen by the public, as it is less scrutinized by the media.

However, what Executive Order No. 134 and the subsequent legislation did not do was ban pay-to-play on the local and county level.⁷⁰ Moreover, there was concern and speculation that the new state law preempted local governments from enacting more stringent campaign finance restrictions and bans on pay-to-play in their own jurisdictions.⁷¹ Under state law

the local governmental units of this State may neither enact nor enforce any ordinance or other local law or regulation conflicting with, or preempted by, any provision of this code or with any policy of this State expressed by this code, whether that policy be expressed by inclusion of a provision in the code or by exclusion of that subject from the code.⁷²

Seemingly, this statutory language would preempt a municipality from enacting a law banning pay-to-play, as campaign finance was an area reserved for regulation at the state level.⁷³

Governor Codey and the pro-reformists in the legislature began to take steps to pass the so-called enabling legislation which would allow local governments to pass ordinances banning pay-to-play in their jurisdictions. Under this new law

[a] county, municipality, independent authority, board of education, or fire district is hereby authorized to establish by ordinance, resolution or regulation, as may be appropriate, measures limiting the awarding of public contracts therefrom to business entities that have made a contribution... and limiting the contributions that the holders of a contract can make during the term of a contract, notwithstanding the provisions and parameters of [the State's pay-to-play ban].⁷⁴

This new law allowed local governments to enact their own, more stringent, reform packages. As of June 2007, by one newspaper's count, eighty-one of New Jersey's 566 municipalities had enacted some form of their own pay-to-play reform.⁷⁵ This was a major victory

⁷⁰ *Id.* The Executive Order explicitly states that it applies to the state and governor candidates. *Id.*

⁷¹ See N.J. STAT. ANN. § 2C:1-5(d) (West 2005) (local ordinances are preempted by state statutes in some areas).

⁷² *Id.*

⁷³ N.J. CONST. art. IV, § VII, ¶ 11.

⁷⁴ N.J. STAT. ANN. § 40A:11-51 (West 1993 & Supp. 2007).

⁷⁵ Editorial, *Pay-to-Play Stays; Status Quid Pro Quo Rules Too Many Towns*, BERGEN RECORD (Bergen County, N.J.), June 19, 2007, at L6.

for reform-minded legislators and groups such as Common Cause, whose New Jersey chapter made it one of their signature issues.⁷⁶

B. The Current Law on the Restriction of Campaign Contributions

The seemingly insidious direct corporate campaign contributions under review in New Jersey have been completely outlawed for federal candidates for some time.⁷⁷ The Tillman Act of 1907 was the first attempt by Congress to enact a ban on direct corporate contributions.⁷⁸ However, the effectiveness of the Tillman Act was short-lived. “In time, of course, corporations would find other ways to translate their treasury funds into political influence, such as increased reliance on lobbying, company-funded political advertisements, covert reimbursement of executive or employee contributions, and soft money gifts to political parties.”⁷⁹

By 1971, “corporate leaders pushed Congress to add provisions to the Federal Election Campaigns Act (FECA) clearly codifying their ability to form voluntarily funded political committees.”⁸⁰ “Formed by corporations to collect voluntary contributions from their members, [Political Action Committees] may lawfully contribute to electoral candidates.”⁸¹ Over time, Political Action Committee (PAC) donations to individual federal candidates were seemingly not a powerful enough vehicle for business corporations seeking to influence the electoral process. Business corporations began circumventing the system by making large contributions to the national political parties, which in turn could work on voter turnout, registration, and issue advertisements.⁸² In 2002, Congress again sought to curtail the influ-

⁷⁶ See Common Cause, <http://www.commoncause.org/newjersey> (last visited Feb. 20, 2008).

⁷⁷ 2 U.S.C. § 441b(a) (2000) (Supp. II 2003) (“It is unlawful for any . . . corporation . . . to make a contribution or expenditure in connection with any election to any political office . . .”); see also *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146, 152–53 (2003) (upholding a ban on corporate contributions as a valid rationale for preventing corruption).

⁷⁸ Publicity of Political Contributions Act, ch. 420, 34 Stat. 864 (1907), amended by Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–456 (2006)).

⁷⁹ Adam Winkler, “*Other People’s Money*”: *Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871, 926 (2004).

⁸⁰ *Id.* at 933.

⁸¹ *Id.* at 928 (citing 2 U.S.C. § 441b (Supp. II 2003)).

⁸² Winkler, *supra* note 79 at 935–36 (“In coordination with their candidates, the parties used soft money to pay for expensive advertisements during election campaigns. Soft money became a mechanism for corporations and unions to skirt the contribution ban and donate general treasury funds for what was ultimately campaign spending.”).

ence of corporate money in federal elections, and passed the Bipartisan Campaign Reform Act (BCRA).⁸³ The BCRA banned the donations of so-called “soft money,”⁸⁴ in essence ending the practice of unlimited direct corporate contributions to the national parties.⁸⁵ BCRA’s limitation on corporate soft money contributions was upheld by the Supreme Court of the United States in *McConnell v. Federal Election Commission*.⁸⁶ The Court’s decision in *McConnell* reflected the continuing rationale evolving from *Buckley v. Valeo*⁸⁷ and its progeny: that limitations on contributions, while subject to strict scrutiny, were likely to be found constitutional, while limitations on campaign expenditures were unlikely to pass strict scrutiny.⁸⁸

Of course, congressional actions and Supreme Court decisions had no effect on candidates for state and local office in New Jersey, who continued to solicit and receive direct contributions to their election campaigns from corporate entities.⁸⁹ New Jersey is by no means an anomaly. In fact, roughly half of the states still allow some direct corporate campaign contributions.⁹⁰ Only following a series of political scandals and public outcry against perceived corruption did New Jersey begin to pass laws that began to further limit corporate

⁸³ Bipartisan Campaign Reform Act of 2002, 107 Pub. L. No. 107-155, 116 Stat. 81 (codified as amended at 2 U.S.C. § 431–56 (2006)).

⁸⁴ 2 U.S.C. § 431 (2006) (providing the Federal Election Commission’s definition of a legal campaign contribution).

⁸⁵ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 133 (2003). See also Winkler, *supra* note 79, at 936 (“The BCRA simply barred corporations and unions from using general treasury funds to make contributions to political parties. Once again, corporations and unions can still undertake the regulated activity—giving to parties—but they must do so through the agency costs-reducing device of PACs.”).

⁸⁶ *Id.* at 134.

⁸⁷ 424 U.S. 1 (1976).

⁸⁸ *Id.* at 14. “[C]ontribution and expenditure limitations operate in an area of the most fundamental First Amendment activities.” *Id.* “A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.” *Id.* at 19. “By contrast with a limitation upon expenditures . . . a limitation upon . . . [contributions] entails only a marginal restriction upon the contributor’s ability to engage in free communication.” *Id.* at 20.

⁸⁹ See New Jersey Election Law Enforcement Commission (ELEC), <http://www.elec.state.nj.us> (last visited Feb. 20, 2008). Campaign disclosure reports for state candidates confirm that state level candidates in New Jersey continued to accept corporate donations that would be illegal for federal candidates. *Id.* See also Joe Donahue, *Kean Accepted Contributions From Firms He Sought to Ban*, STAR LEDGER (Newark, N.J.), Oct. 7, 2006, at 1.

⁹⁰ Public Affairs Council, *States That Prohibit Corporate Contributions*, <http://www.pac.org/page/ethics/StatesThatProhibitCorporateContributions.shtml> (last visited Feb. 20, 2008).

contributions, albeit only for those businesses holding or seeking government contracts.⁹¹

The constitutional legitimacy of subjecting businesses to stringent contribution regulations has been repeatedly upheld. In *FEC v. National Right to Work Committee*,⁹² the Court upheld a federal law restricting the ability of corporations to raise funds for candidates from non-members of the corporation. The Court unanimously found that the government's compelling interest in regulating corporate donations outweighed the free association rights of the contributors, holding "that substantial aggregations of [corporate] wealth" should "not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions."⁹³

However, just several years later in *FEC v. Massachusetts Citizens for Life, Inc.*, the Court held, by a 5-4 margin, that the segregated funds requirement was unconstitutional as applied to an anti-abortion advocacy group formed as a nonprofit corporation.⁹⁴ As the group's stated purpose was to influence policy and engage in issue advocacy, and not to make profits, there was not the same level of danger of corruption as there was with for-profit businesses.⁹⁵

But nonprofits may generally still be subjected to campaign finance regulation, as was held in *FEC v. Beaumont*,⁹⁶ where the Court reiterated that it will not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."⁹⁷ In *FEC v. Beaumont*, the Court distinguished *FEC v. Massachusetts Citizens for Life, Inc.* by noting that although the Court will "assume advocacy corporations are generally different from traditional business corporations in the improbability that contributions they might make would end up supporting causes that some of their members would not approve" there still exists a legitimate concern that nonprofits can corrupt the electoral process.⁹⁸ Nonprofits, like

⁹¹ See Richard J. Codey, Acting New Jersey Governor, State of the State Address (Jan. 11, 2005) (transcript available at <http://www.stateline.org/live/details/speech?contentId=16583>).

⁹² 459 U.S. 197 (1982).

⁹³ *Id.* at 207.

⁹⁴ Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986).

⁹⁵ *Id.* at 259-60.

⁹⁶ 539 U.S. 146, 152-53 (2003).

⁹⁷ *Id.* at 157 (quoting Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197, 210 (1982)).

⁹⁸ *Id.* at 159.

“their for-profit counterparts, benefit from significant state-created advantages, and may well be able to amass substantial political war chests”; thus, the need for regulating their contributions remains.⁹⁹

Thus, the Supreme Court has continuously reaffirmed its jurisprudence that corporate political speech may be subjected to stringent limitations, as corporations possess a unique ability to amass great amounts of wealth, which could easily corrupt the electoral process.¹⁰⁰ It is important to note, however, that while the federal government treats a business’s PAC as an independent and distinct entity from the corporation, New Jersey does not for the purposes of its pay-to-play ban.¹⁰¹ New Jersey’s definition of a “business entity” includes “any subsidiaries directly or indirectly controlled by the business entity” and “any political organization organized under [S]ection 527 of the Internal Revenue Code that is directly or indirectly controlled by the business entity”¹⁰² Thus, as New Jersey’s version of a PAC, known as a Continuing Political Committee (CPC), is incorporated under Section 527 of the Internal Revenue Code, a business’s direct contributions and its contributions from a CPC under its control would both count towards the contribution limit for such a business.¹⁰³

New Jersey would likely be within constitutional bounds to completely ban all corporate contributions to state candidates, as Congress has already done so for federal candidates, a decision that has been repeatedly upheld by the courts.¹⁰⁴ While a federal constitutional challenge to New Jersey’s recent legislation is possible in the

⁹⁹ *Id.* at 160 (internal quotations omitted). The Court held that applying the prohibition on corporate donations to non-profit corporations was consistent with the First Amendment, but that non-profit corporations, like all corporations, could create a PAC that “may be wholly controlled by the sponsoring corporation, whose employees and stockholders or members generally may be solicited for contributions.” *Id.* at 149.

¹⁰⁰ James Weinstein, *Contributions: Campaign Finance Reform and The First Amendment: An Introduction*, 34 ARIZ. ST. L.J. 1057, 1062–65 (2002).

¹⁰¹ New Jersey’s version of a PAC is known as a Continuing Political Committee (CPC). See N.J. STAT. ANN. § 19:44A-3n (West 1999 & Supp. 2007).

¹⁰² Exec. Order No. 134, 36 N.J. REG. 4562(b) (Sept. 22, 2004) (emphasis added), available at <http://www.state.nj.us/infobank/circular/eom134.htm>.

¹⁰³ Steven Sholk, *A Guide to New Jersey Corporate Political Action Committees After the 2004 Campaign Finance Legislation and Executive Order*, 29 SETON HALL LEGIS. J. 11, 36 (2004). “[I]f the corporation or an interest holder contributes to the corporation’s CPC, and the CPC then contributes to a candidate or committee, ELEC [Election Law Enforcement Commission] may take the position that as a matter of economic substance, the corporation or interest holder made the contribution to the candidate or committee.” *Id.* at 31.

¹⁰⁴ See e.g., *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146 (2003).

near future,¹⁰⁵ such a challenge is likely to fail, based on the courts repeated determinations that it will not second guess legislative determinations that a prophylactic remedy is necessary to deter corruption.¹⁰⁶ Should it be shown that limiting contributions from CPCs was narrowly tailored to the State's interest in stopping corruption and the appearance of corruption in the contract procurement process, New Jersey's law would survive a federal constitutional challenge. Federal courts have previously granted the legislature the discretion to determine how to uphold the integrity of its political process,¹⁰⁷ and if the New Jersey Legislature should determine that it is necessary to limit CPC contributions to protect the integrity of New Jersey's political process, then such a limitation would likely be upheld by a federal court.

Moreover, New Jersey, with its history of corruption and the ongoing appearance of corruption, would likely be within constitutional bounds if it chose to drastically limit *all* campaign contributions. In *Nixon v. Shrink Missouri Government PAC*,¹⁰⁸ the Court reviewed a Missouri legislative scheme that imposed contribution limits ranging from \$250 to \$1000 depending on the office and size of the constituency.¹⁰⁹ The *Nixon* court defined what evidentiary obligation was needed to be proven by the government for the regulations to pass this level of scrutiny. In *Montana Right to Life Association v. Eddleman*,¹¹⁰ the United States Court of Appeals for the Ninth Circuit succinctly interpreted the required evidentiary standard of *Nixon* as thus:

state campaign contribution limits will be upheld if (1) there is adequate evidence that the limitation furthers a sufficiently important state interest, and (2) if the limits are "closely drawn"—i.e., if they (a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign.¹¹¹

In *Nixon*, the Supreme Court found Missouri's contribution limits were allowable because the government had met its evidentiary obligation, and there was no showing from the challengers that the contribution limits would dramatically affect the funding of political

¹⁰⁵ Charles Stile, *Ferriero Support of Pay-to-Play Stuns Democrats*, BERGEN RECORD, Aug. 30, 2007, at A1.

¹⁰⁶ *Beaumont*, 539 U.S. at 157.

¹⁰⁷ See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 137 (2003).

¹⁰⁸ 528 U.S. 377 (2000).

¹⁰⁹ *Id.* at 382.

¹¹⁰ 345 F.3d 1085 (9th Cir. 2003).

¹¹¹ *Id.* at 1092.

campaigns or otherwise prevent the running of effective campaigns.¹¹²

In the recent decision of *Randall v. Sorrell*,¹¹³ however, the Supreme Court found Vermont's contribution limits were severely low, and, therefore, were not narrowly tailored.¹¹⁴ Vermont's scheme had mandated contribution limits as low as \$400 for governor and other statewide offices.¹¹⁵ The Court found these limits would hamper the ability to carry out effective campaigns,¹¹⁶ and thus laid out a more exacting standard of how to narrowly tailor contribution limits.¹¹⁷ Importantly, one such rationale was for "special justification."¹¹⁸ In Vermont, there was no problem with corruption.¹¹⁹ However, in New Jersey, where candidates for office have accepted bribes as low as \$500,¹²⁰ a court may be more willing to allow more stringent campaign finance limits, should such "special justification" evidence be put forward regarding New Jersey's historical and ongoing problem of corruption.

C. *The First Challenge to the Pay-to-Play Law: State Constitutional Grounds*

In 2008 the new pay-to-play law was challenged in state court on First Amendment grounds.¹²¹ A New Jersey appellate court upheld the law over a challenge from a public contractor excluded from obtaining future contracts by the New Jersey Department of Transportation because of their political donations.¹²² Analyzing the New Jersey law under the State Constitution's free speech clause, in a way no more restrictive than the Federal Constitution,¹²³ the court did not employ a level of strict scrutiny equaling a presumption against constitutionality.¹²⁴ As the court noted, the correct level of scrutiny, un-

¹¹² 528 U.S. at 397.

¹¹³ 548 U.S. 230 (2006).

¹¹⁴ *Id.* at 253.

¹¹⁵ *Id.* at 237.

¹¹⁶ *Id.* at 253.

¹¹⁷ *Id.* at 247-48.

¹¹⁸ *Id.* at 261.

¹¹⁹ *Randall*, 528 U.S. at 261.

¹²⁰ Smothers, *supra* note 26, at A1.

¹²¹ *In re Earle Asphalt Company*, 950 A.2d 918 (App. Div. June 30, 2008).

¹²² *Id.* at 921.

¹²³ *Id.* at 922, n.1 (citing *Hamilton Amusement Ctr. v. Verniero*, 156 N.J. 254, 264 (1998)).

¹²⁴ *Id.* at 923 (citing *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 137 (2003)).

der both the Federal and New Jersey Constitutions, is that “a statute limiting political contributions will be sustained ‘if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.’”¹²⁵

While the United States Supreme Court has never ruled on the constitutionality of legislation that “imposes targeted limitations upon political contributions by a class of contributors considered to pose a particularly serious threat” to preventing corruption and the appearance of corruption, a New Jersey court has addressed such a statute.¹²⁶ In 1989, a New Jersey appellate court in the case of *In re Petition of Soto*, upheld a portion of the Casino Control Act prohibiting political donations by officers and employees of casinos. The court found a high risk of vulnerability to corruption in this tightly regulated industry, justifying a compelling government interest in maintaining integrity.¹²⁷ Thus, in response to the challenge to the pay-to-play law, the court in *In re Earle Asphalt* found a similar “strong governmental interest in limiting political contributions by businesses that contract with the State”¹²⁸ The remaining question was whether the limitations were “closely drawn to avoid unnecessary abridgment of associational freedoms.”¹²⁹ Again referring back to *Buckley*, the court found that the limitations of the new law were closely drawn, given that the State’s “interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.”¹³⁰

IV. CORRUPTION AND THE APPEARANCE OF CORRUPTION CONTINUE UNDER THE NEW STATUTE

There are several problems and loopholes in the current statutory scheme, once called among the strongest in the nation.¹³¹ As Justice O’Connor noted, “[m]oney, like water, will always find an outlet.”¹³² This section will examine some of these outlets and explore

¹²⁵ *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

¹²⁶ *In re Earle Asphalt*, 953 A.2d at 923 (citing *In re Petition of Soto*, 236 N.J. Super. 303 (App. Div. 1989)).

¹²⁷ *In re Petition of Soto*, 236 N.J. Super. 303, 321 (App. Div. 1989).

¹²⁸ *In re Earle Asphalt*, 953 A.2d at 923.

¹²⁹ *Id.* at 925 (quoting *Buckley*, 424 U.S. at 25).

¹³⁰ *Id.* (quoting *Buckley*, 424 U.S. at 30).

¹³¹ Press Release, Acting Governor Richard Codey, Codey Signs Pay-to-Play Ban Into Law (Mar. 22, 2005), available at http://www.state.nj.us/cgi-bin/governor/njnewsline/view_article.pl?id=2427.

¹³² *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 224 (2003).

how money from state and local contractors continues to flow to public officials and political candidates.

A. *The Fair-and-Open Contract Standard*

Perhaps the most glaring shortcoming is that the same campaign contributors that the legislation sought to preclude from obtaining no-bid contracts can still contribute and then obtain government contracts that go through a “fair and open” bidding process.¹³³ Furthermore, once a contract has gone through such a “fair and open” bidding process, the public entity is under no obligation to grant it to the lowest bidder—the entity can choose whichever bidder it desires.¹³⁴ Per state law, a “fair and open” bidding process means

at a minimum, that the contract is (1) advertised in newspapers or on the public entity’s website to give sufficient prior notice of the contract; (2) awarded pursuant to public solicitation of proposals or qualifications under criteria disclosed in writing prior to the solicitation; and (3) the proposals or qualifications are publicly opened and announced when the contract is awarded. The public entity’s decision as to what is a fair and open process is final. There is no requirement to award the contract to the lowest responsible bidder.¹³⁵

The above requirements that transform an illegal no-bid contract into a legal contract are not particularly stringent. Thus, elected officials can advertise a public contract, receive several bids, and continue to award the contract to the friendly company that has showered them with campaign contributions, even though another company’s bid was higher. Under the state rules, this would be perfectly legal and allowable.¹³⁶

¹³³ Sholk, *supra* note 103, at 21–22.

¹³⁴ N.J. STAT. ANN. § 52:34-12(g) (West 2001 & Supp. 2007).

¹³⁵ Sholk, *supra* note 103, at 21–22.

¹³⁶ *Id.* at 22 n.62. Assemblyman Michael Patrick Carroll, criticized the exception for contracts awarded pursuant to a fair and open process, saying “[t]he bill also effectively allows a public entity to exempt itself from pay-to-play reform by declaring itself to have a ‘fair and open’ process for the awarding of contracts, and that declaration is considered final under the terms of the bill.” *Id.* However, “the entity’s contracting process need not require the selection of the lowest bidding responsible bidder in order to be declared ‘fair and open.’ The bill also fails to address the potential influence of a political contribution on decisions regarding contracts already awarded . . . which can have lucrative implications for contractors.” *Id.* (quoting Minority Statement to Assembly Bill A2, Assemblyman Michael Patrick Carroll, Assembly State Government Committee, 2004).

B. The Continuing Problem of Pay-to-Play at the Local and County Level

Another gap in the statutory scheme is that the current legislation applies only to the state, and not to local and county level governments. This loophole is (somewhat ironically) discussed on the website of the State Division of Local Government Services.¹³⁷ Designed to help local government officials navigate the complex and unfamiliar framework of the pay-to-play legislation, one “Frequently Asked Question” posited the following:

A contractor said that he made a contribution to a political action committee (PAC) within our county, but they have not made any direct contributions to the local officials in office. The county PAC supports a political party that is represented within our governing body. Is that contractor eligible for a non-fair and open contract?

Yes. If the contractor has made contributions to a county PAC they are not precluded from doing non-fair and open business with a municipality in that county.¹³⁸

This acknowledges that a contractor could donate large sums of money to the county political party, which could in turn support the local candidates, and the donator could still receive a no-bid contract from the municipality, thereby finding a new outlet for its contributions (and circumventing the campaign finance laws, as may be the case). As was directly mentioned in the preamble of McGreevey’s Executive Order, it is often the “county political party committees . . . [who] exert significant influence over the . . . election process.”¹³⁹ These county-level leaders have the private influence and political power to steer municipal contracts to friendly businesses.¹⁴⁰ Moreover, public contracts at the local and county level can be just as lucrative as state level contracts:

Public contracts can be extremely lucrative. According to the Gannett newspapers, about one third of all State contracts issued

¹³⁷ See New Jersey Division of Local Services, Frequently Asked Questions, <http://www.nj.gov/dca/lgs/p2p/refs/p2pfaq.pdf> at Question 10 (last visited Feb. 15, 2008).

¹³⁸ *Id.*

¹³⁹ Exec. Order No. 134, 36 N.J. REG. 4562(b) (2004), available at <http://www.state.nj.us/infobank/circular/eom134.htm>.

¹⁴⁰ Eileen Smith & Eric Schwartz, *Norcross, Bank Enjoy Marriage of Convenience*, ASBURY PARK PRESS (Asbury Park, N.J.), Oct. 27, 2004, at A1. Camden County Democratic leader and Commerce Bank executive George Norcross wields influence on the municipal level as well, and “approximately 15 percent to 20 percent of [Commerce Bank’s Insurance] business is from negotiated, or no-bid, contracts with municipalities.” *Id.*

in 2003 were unadvertised, worth a staggering total of \$414 million. That sum does not include the millions more awarded at the county and municipal levels. In that same year, the combined sum of \$91 million was raised in contributions to political committees for legislative and county elections and contributions to municipal elections.¹⁴¹

Though there are no definitive numbers available, given the size of the budgets of New Jersey's 566 municipalities and twenty-one county governments¹⁴² (not to mention school districts, fire districts, etc.), it is a reasonable inference that no-bid pay-to-play contracts at the county and municipal level represent a greater portion of the total pay-to-play system than do contracts at the state level, where regulation is more stringent.¹⁴³

C. Contributions from Employees and Partners

Another loophole is that while the new pay-to-play statutes ban businesses from making donations and receiving contracts, employees of the business can make personal donations.¹⁴⁴ For many smaller companies this is not applicable,¹⁴⁵ but for certain entities, most notably law firms, it can be a large loophole. The legislation defines a "business entity" to include "all principals who own or control more than 10 percent of the profits or assets of a business entity or 10 percent of the stock in the case of a business entity that is a corporation for profit."¹⁴⁶ This definition allows, for example, the partners of a law firm (should they own less than ten percent) to make donations

¹⁴¹ Franzese & O'Hern, *supra* note 6, at 1222.

¹⁴² New Jersey Department of Community Affairs, Division of Local Government Services, <http://www.state.nj.us/dca/lgs> (last visited Feb. 15, 2008) (providing budget data for New Jersey's counties and municipalities).

¹⁴³ Joe Donahue & Dunstan McNichol, *Reports Tracking Pay-to-Play Online: ELEC Data Show Firms That Donated Over \$11.6M Won \$5.2B in Fees*, STAR-LEDGER, Oct. 11, 2007, at 13 (noting that several firms with large state government contracts, while not donating to state political parties, gave substantial amounts to local and county political parties).

¹⁴⁴ See N.J. STAT. ANN. § 19:44A-20.15 (West 1999 & Supp. 2007). As long as an employee does not own more than ten percent of a business, an employee can make personal donations and not jeopardize the company's eligibility for a public contract. *Id.* § 19:44A-20.17.

¹⁴⁵ See *id.* § 19:44A-20.17. The statute defines business entity and would include contributions from a sole-proprietorship as applicable to the person, rather than the business entity. *Id.* Arguably, this is unfair to larger businesses, as sole proprietorships would not be barred from receiving public contracts because their donation was not attributable to the business.

¹⁴⁶ *Id.* § 19:44A-20.17(i).

to a candidate,¹⁴⁷ and their firm can still receive no-bid public contracts.¹⁴⁸ It should also be noted that in many counties, the county party directly funded the campaigns of the county-wide officials.¹⁴⁹ However, since the new laws went into effect, some elected county officials (who in past campaigns never created personal candidate accounts or raised money on their own) began raising money for individual candidate accounts.¹⁵⁰ By each candidate creating a separate and distinct account, each candidate could individually raise the maximum amount,¹⁵¹ and a firm seeking to influence a slate of elected officials could contribute a greater aggregate amount than would be allowable if it donated just to the county committee, as it had done in the pre-legislation years.

D. Donations to the State Party's Federal Account are Exempt

According to news reports, shortly after Governor Codey signed the new pay-to-play legislation into law, Democratic Party officials began planning how to circumvent the new contribution limits.¹⁵²

¹⁴⁷ Diane C. Walsh, *Contractor Funds Circle Back to Democrats*, STAR-LEDGER, Sept. 17, 2006, at 45. For instance, since the new law went into effect:

[A] Woodbridge-based law firm that has been among the biggest contributors to the [Democratic] party, stopped donating. Between 1998 and 2004, the firm and its employees donated \$390,000 to the [Middlesex] county Democrats. But in 2005, the firm did not make a single donation, although its employees gave nearly \$59,000 to the party and an additional \$30,000 to the individual accounts of county officials. . . . [T]he managing partner . . . said individual lawyers can and have continued to donate without violating the pay-to-play ordinance because no one owns 10 percent of the firm.

Id.

¹⁴⁸ See New Jersey Election Law Enforcement Commission (ELEC), <http://www.elec.state.nj.us/PublicInformation/viewreports.htm> (last visited Feb. 15, 2008). An extremely rudimentary search can be done via the state's election website by putting in the name of the law firm in the "Employer Name" field. The results return the names of individual lawyers at these firms and the various (and numerous) donations that they have made.

¹⁴⁹ See e.g., D'Ambrosio, *supra* note 68, at A1.

¹⁵⁰ Walsh, *supra* note 147, at 45.

¹⁵¹ Compare N.J. STAT. ANN. §19:44A-11.3 (West 1999 & Supp. 2007) (contribution limits for individual candidates), with N.J. STAT. ANN. §19:44A-11.4 (West 1999 & Supp. 2007) (contribution limits for various committees). See also New Jersey Election Law Enforcement Commission (ELEC), http://www.elec.state.nj.us/forcandidates/elect_limits.htm (last visited Apr. 17, 2008) (a user-friendly chart providing the current contribution limits for each type of source).

¹⁵² Josh Margolin & Jeff Whelan, *'Pay-Play' Ban Offers Democrats a Loophole—Party Lawyer Outlines a New Route for Cash*, STAR-LEDGER, Mar. 24, 2005, at 1; see also Sandy McClure, *Memo to Donors Has GOP Riled Up Critics: It Dodges Pay-to-Play Ban*, ASBURY PARK PRESS (Asbury Park, N.J.), Mar. 25, 2005, at A1 (explaining the purpose of the memo).

These news reports detailed that party lawyers drafted a memo to party fund-raisers detailing how a state contractor could continue to contribute without triggering the new pay-to-play limits.¹⁵³ The document was distributed “just hours after Codey signed the pay-to-play law.”¹⁵⁴ The memo advised contributors that they could “contribute up to \$10,000 per year to the Democratic State Committee’s federal campaign committee” without violating the statute.¹⁵⁵

The memo explained that the state party maintains a federal campaign account for aiding presidential and congressional campaigns in New Jersey.¹⁵⁶ This account, and donations to it, are regulated under federal election laws and policed by the Federal Election Commission (FEC).¹⁵⁷ Thus, the New Jersey’s Election Law Enforcement Commission (ELEC), and the new pay-to-play statute have no authority over this account and cannot bar donations to it to by state contractors.¹⁵⁸

The Republican state party chairman disagreed with the interpretation offered by the Democratic lawyers, saying that the Republican party would not accept donations from state contractors to their federal account, and that a Democratic attempt to do so “wouldn’t be a loophole, it would be a glaring, giant, gaping, intentional violation of the spirit of the law.”¹⁵⁹ Several days after news of this memo leaked to media outlets, the Democrats retreated from their position and pledged not to make use of the federal account for purposes of evading the pay-to-play laws,¹⁶⁰ but it remains an open question as to how enforcement agencies such as the FEC and ELEC (and the courts, for that matter) would have treated this type of contribution.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as 2 U.S.C. § 431-56 (2000)). The Federal Election Commission has authority over candidates for federal office (House of Representatives, U.S. Senate, and President). *Id.*

¹⁵⁸ 2 U.S.C. § 453 (2000). State campaign laws regarding election to a federal office are preempted by the federal campaign laws. *See Id.*

¹⁵⁹ Margolin & Whelan, *supra* note 152, at 1.

¹⁶⁰ Tom Moran, *Democrats Back Out of a Loophole for Donors*, STAR-LEDGER, Mar. 30, 2005, at 13.

E. Legislators Can Solicit Contributions from State Contractors

It is critical to remember that some of the most costly and closely contested races in New Jersey are for the legislature.¹⁶¹ However, the state pay-to-play ban covers only the election accounts of the governor and the state parties.¹⁶² Individual legislators have their own campaign accounts and can still accept donations from businesses with state contracts.¹⁶³ Many of these legislators are very powerful, both in their home districts and in Trenton.¹⁶⁴ Thus, a contractor wishing to exert some political influence on those granting the contract could donate substantial sums to influential legislators, who may in turn lobby and push the state government to send the contract to their favored contributor.¹⁶⁵

This is not to suggest that a quid pro quo exists in such a situation, as legislators do not control which bidder receives a contract; a true quid pro quo is legislatively impossible.¹⁶⁶ However, legislators have a unique ability to exert influence on state agencies and authorities through their budgetary oversight, votes on nominations, and routine hearings into their activities. Therefore, it is reasonable to suggest that a contractor seeking to procure state business would make a powerful ally by donating substantial sums to legislators.

F. The Problem of Wheeling

Some state laws have been proposed to ban the practice known as “wheeling,” where campaign dollars are swapped among county political parties, legislative leadership committees, and state committees to candidates for local office, purportedly to evade current con-

¹⁶¹ Donahue, *supra* note 29, at A1 (noting that spending for the 2007 legislative races reached a record \$69 million).

¹⁶² N.J. STAT. ANN. § 19:44A-20.13 (West 1999 & Supp. 2007).

¹⁶³ *Id.* § 19:44A-20.14. The pay-to-play ban only covers contributions to “any candidate or holder of the public office of Governor, or to any State or county political party committee . . .” *Id.*

¹⁶⁴ See, e.g., Jones, *supra* note 44, at B1.

¹⁶⁵ See Jones, *supra* note 44, at B1. Some legislators exert significant influence in county organizations and municipalities around the state, including State Senator Raymond Lesniak (D-Elizabeth) who controls the Union County Democrats. *Id.* Also note that several members of the Legislature are Mayors of municipalities or Freeholders in county governments and control contracts granted by those respective governments. See New Jersey Legislative Roster, <http://www.njleg.state.nj.us/members/roster.asp> (last visited Apr. 17, 2008).

¹⁶⁶ The Executive branch, specifically the Division of Purchase and Property in the Department of the Treasury, is the State’s central procurement agency. N.J. STAT. ANN. § 52:18A-3 (year). See also State of New Jersey, the Department of the Treasury, Division of Purchase and Property, <http://www.state.nj.us/treasury/purchase/> (last visited Apr. 17, 2008).

tribution limits.¹⁶⁷ It is often the county political leaders who exert tremendous amounts of influence,¹⁶⁸ and donations to the county party continue the practice of pay-to-play with little to stop them.

This process is often a thinly veiled effort to skirt the contribution limits by using a different campaign committee as a middle-man. There is a modest anti-wheeling provision, enacted by Governor McGreevey,¹⁶⁹ explained on the ELEC website, “[f]rom January 1st through June 30th of each year, a county political party committee is prohibited from making a contribution to another county political party committee and a county political party committee is prohibited from accepting a contribution from another county political party committee.”¹⁷⁰

This is an extremely weak provision because it allows the transfer of funds between county committees up to \$37,000 in the crucial time right before the election, after June 30 but before November.¹⁷¹ The transfer of cash in itself is not illegal, and, according to the ELEC, some sort of deal or agreement must be proven.¹⁷² In a back-room political culture where many of the so-called bosses have personal and professional ties,¹⁷³ there often appears to be an understanding that campaign dollars will flow to the crucial races in a timely fashion.¹⁷⁴

There are many ways a business entity seeking to curry favor with elected officials can make donations, beyond the purview of the legis-

¹⁶⁷ Franzese & O’Hern, *supra* note 6, at 1223.

¹⁶⁸ See Exec. Order No. 134, 36 N.J. REG. 4562(b) (2004), available at <http://www.state.nj.us/infobank/circular/eom134.htm> (discussing the influence of county political powers).

¹⁶⁹ N.J. STAT. ANN. § 19:44A-11.3a (West 1999 & Supp. 2007); see also New Jersey Election Law Enforcement Commission, http://www.elec.state.nj.us/forcandidates/elect_limits.htm (last visited Apr. 17, 2008) (noting the limitations on county parties’ donations to each other from January 1 through June 30 of each year).

¹⁷⁰ New Jersey Election Law Enforcement Commission, *supra* note 169.

¹⁷¹ *Id.*

¹⁷² Lilo H. Stainton, ‘Wheeling’ Decried in ‘04 Ocean Campaign Hudson Donation Matched Same Day, ASBURY PARK PRESS (Asbury Park, N.J.), Apr. 3, 2005, at A17 (quoting Frederick Hermann, executive director of the Election Law Enforcement Commission, saying, “[g]enerally speaking, you have to prove that there was some sort of deal or agreement that this was going to happen. Just the fact that somebody made a contribution on one day and they gave it to someone else the same day doesn’t make it illegal. It’s a question of: Can you prove it?”).

¹⁷³ Smith & Schwartz, *supra* note 140 (noting that Camden County Democratic leader and Commerce Bank executive George Norcross wields considerable influence throughout New Jersey, and Middlesex County Democratic leader John Lynch formerly sat on the Board of Commerce Bank with Norcross).

¹⁷⁴ James W. Prado Roberts, *Flow of Cash Creates Power*, ASBURY PARK PRESS (Asbury Park, N.J.), Oct. 26, 2004, at A1.

lation, which would then be wheeled to the intended recipient. Perhaps most importantly, on the state level there are, by statutory creation,¹⁷⁵ entities known as legislative leadership committees:

The President of the Senate, the Minority Leader of the Senate, the Speaker of the General Assembly and the Minority Leader of the General Assembly may each establish, authorize the establishment of, or designate one legislative leadership committee for the purpose of receiving contributions and making expenditures to aid or promote the candidacy of any individual, or the candidacy of individuals, for elective office in any election or the passage or defeat of a public question or public questions in any election.¹⁷⁶

These committees can receive up to \$25,000 in a year from a business entity.¹⁷⁷ In turn, these so-called legislative leadership committees can donate or wheel *unlimited* sums to state, county, municipal, and individual campaign accounts.¹⁷⁸ Therefore, legislative leadership committees make a perfect host for transferring such money.¹⁷⁹

H. *Redevelopment Pay-to-Play*

There is also a new and emerging problem in the field of pay-to-play, noted by the New Jersey chapter of Common Cause to be one of the most important issues currently facing the quality of life and public trust in New Jersey.¹⁸⁰ New Jersey is currently undergoing major real estate development in urban areas.¹⁸¹ In many such areas the city

¹⁷⁵ N.J. STAT. ANN. § 19:44A-10.1 (West 1999 & Supp. 2007).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* § 19:44A-11.4 (West 1999 & Supp. 2007).

¹⁷⁸ *Id.*; see also New Jersey Election Law Enforcement Commission, *supra* note 148 (showing all the contribution limits and noting the special nature of the legislative leadership committees); N.J. ADMIN. CODE § 19:25-11.2 (2008) (showing no limits on contributions received by Legislative Leadership Committees). While the state committees can also transfer unlimited amounts of cash amongst each other, business entities cannot donate to state committees without triggering the pay-to-play laws. N.J. STAT. ANN. § 19:44A-20.14 (West 1999 & Supp. 2007).

¹⁷⁹ See Cynthia Burton, *Big Money Coming from Party Bigwigs*, PHILADELPHIA INQUIRER, Nov. 1, 2007, at B1.

¹⁸⁰ See Common Cause New Jersey, www.commoncause.org/newjersey (follow “Redevelopment Pay-to-Play Reform” hyperlink under “Our Issues”). “Redevelopment decisions have profound impacts on the quality of life of our citizens and it is critical that they be made based on the public interest, not as a reward to big contributors and politically connected players.” *Id.*

¹⁸¹ See, e.g., Antoinette Martin, *Can a Face Lift Offer a New Identity?*, N.Y. TIMES, Oct. 29, 2006, Real Estate, at 11, (noting that, for instance, there is promising ongoing redevelopment in Rahway, New Jersey, where eminent domain, condemnation by the

has created redevelopment zones and controls the development rights to abandoned or dilapidated properties.¹⁸² Developers compete heavily for the redevelopment rights to these areas, which are controlled and granted by the municipality or county, along with generous “loans, grants, tax breaks or the use of public condemnation powers.”¹⁸³

These redevelopment agreements would not fall under the pay-to-play provisions, which cover only “services or furnishing of any material, supplies or equipment or for the acquisition, sale, or lease of any land or building.”¹⁸⁴ In these new redevelopment situations, the builder is not purchasing land from the state. Therefore, they are not barred from making donations. As has been discussed, this statute applies only to the state and its many authorities, and not to counties and municipalities.¹⁸⁵ Furthermore, it is often engineering firms, consultants, and attorneys, working on behalf of (or in collusion with) developers, who make donations to those who control the development rights.¹⁸⁶

V. PROPOSED MODELS FOR REFORM

A. *Proposed Bills in New Jersey*

In response to criticisms that New Jersey’s initial reforms of the campaign finance system did not go far enough, there have been several bills proposed in the legislature to reform the system. From the previous section discussing the shortcomings of the current state system, it is clear that reform is needed.

The most obvious reform would be a total ban on direct corporate donations and donations from their Continuing Political Committees.¹⁸⁷ There does not seem to be much public impetus for such

redevelopment agency, and private development are transforming the economy of a city).

¹⁸² *Id.*

¹⁸³ Joe Donohue, *Pay-to-Play Limitations Take Shape in Trenton*, STAR-LEDGER, Oct. 24, 2006, at 16.

¹⁸⁴ N.J. STAT. ANN. § 19:44A-20.15 (West 1999 & Supp. 2007).

¹⁸⁵ *See supra* Part III.B.

¹⁸⁶ N.J. STAT. ANN. § 19:44A-20.14 (West 1999 & Supp. 2007). A law firm or engineering firm could donate as much as it wanted to a state agency or authority, and since the public contract would be going to the developer itself and not to the lawyers or engineers, the pay-to-play statutes would not be triggered because the law firm or engineering firm would not fall under the definition of an ineligible contributor. *Id.*

¹⁸⁷ *See, e.g.*, A398, 213th Leg., 1st Sess. (N.J. 2007).

a ban in New Jersey, though roughly half the states have completely banned direct corporate contributions.¹⁸⁸ Short of a total ban on all corporate contributions, there is an impetus to tighten the rules on those businesses seeking and holding government contracts. Many have called for an outright statewide ban on pay-to-play applicable at all levels of government by the legislature.¹⁸⁹ However, with New Jersey's strong history of "home rule,"¹⁹⁰ it is not clear that the legislature and governor will seek to promulgate the entire spectrum of campaign finance and contract procurement as a purely state-level issue, as doing so would be politically risky in a state where local leaders are extremely influential statewide.

Such legislation would certainly be constitutional, as there is a compelling state government interest in curbing the appearance of corruption at all levels of government, and it has been shown that all levels of government (state, county, local) are intertwined and interdependent in New Jersey's campaign finance system.¹⁹¹ If proposed legislation regulating campaign contributions could merely describe and detail a "sufficient linkage between the award of state contracts and contributions to county committees, a court is likely to find that the limitation is closely drawn to match the sufficiently important government interest of upholding the integrity of the state contracting process."¹⁹² Thus, it would not be unconstitutional for the state to enact a uniform pay-to-play ban on all levels of government, whereby a prospective contractor's donations to *any* candidate or committee at *any* level of government would bar that business from receiving a no-bid contract from *all* levels of government.

However, in the event that the legislature and the governor will not enact pay-to-play legislation regulating all levels of government, there are a number of actions that could be taken to eliminate the gaps in the current statutory framework, and expand the scope of the current law. For instance, an Assembly Bill says that a business that "has made a campaign contribution would be prohibited for one year from performing a contract for a public entity at *any level of government* until one year after the contribution is made."¹⁹³ And as a penalty, a business that "willfully and knowingly violates the bill's provi-

¹⁸⁸ Public Affairs Council, *supra* note 90.

¹⁸⁹ See *supra* Part III.B.

¹⁹⁰ BLACK'S LAW DICTIONARY 750 (8th ed. 2004). "A state legislative provision or action allocating a measure of autonomy to a local government, conditional on its acceptance of certain terms." *Id.*

¹⁹¹ See *supra* Parts III.B and III.G.

¹⁹² Sholk, *supra* note 103, at 40.

¹⁹³ A691, 212th Leg., 1st Sess. (N.J. 2006) (emphasis added).

sions would be subject to a penalty of up to twice the value of its contract and debarment from public contracting for up to five years.”¹⁹⁴

Another proposed bill would bar any business entity making a campaign contribution from performing any government contract in excess of \$17,500 for one year.¹⁹⁵ This bill essentially recognizes that under New Jersey’s pay-to-play and contract procurement laws, a business making donations is barred only from no-bid contracts but can currently still receive contracts that have been put out to bid.¹⁹⁶ Furthermore, since the awarding agencies have wide latitude,¹⁹⁷ pay-to-play is ongoing. This bill would bar donating businesses from receiving contracts that have been advertised and competitively bid, supplementing the current legislation that applies only to no-bid contracts.

Governor Corzine has publicly said that he wants to close the so-called ten percent loophole, where partners in law firms and other businesses are free to give as much as is allowable, so long as they own less than ten percent of the business which is bidding on a state contract.¹⁹⁸ This would be a substantial reform, as some partnerships (law firms, specifically) are among the biggest participants in the pay-to-play system.¹⁹⁹ Currently, bill A1488 in the Assembly would change the definition of “business entity” to include “all principals who own two percent or more of the equity in the corporation or business trust”²⁰⁰ This bill would have a drastic effect on the ability of the partners in some of New Jersey’s larger law firms to make donations to their favored candidate, as doing so would bar their firms from receiving no-bid state contracts.

During the 2005 gubernatorial campaign, candidate Corzine pledged to end the practice of “wheeling.”²⁰¹ As of yet, this has not been accomplished. However, some members of the legislature have drafted bills to end the practice and tighten current regulations. One proposed Assembly Bill “provides that no county committee of a political party may make a contribution of money or other thing of

¹⁹⁴ *Id.*

¹⁹⁵ A528, 212th Leg., 1st Sess. (N.J. 2006).

¹⁹⁶ *See supra* Part III.A.

¹⁹⁷ *Id.*

¹⁹⁸ Joe Donahue, *Pay-to-Play Ban Working . . . Some Say Too Well: Analysis Shows Many Once-Generous Firms Have Cut Back on Donations in N.J.*, STAR-LEDGER (Newark, N.J.), June 11, 2006, at 1.

¹⁹⁹ *See supra* Part III.C.

²⁰⁰ A1488, 212th Leg., 1st Sess. (N.J. 2006).

²⁰¹ Editorial, *Slow Road to Reform; Towns, Counties Get OK to End Pay-to-Play*, BERGEN RECORD (Bergen County, N.J.), Dec. 12, 2005, at L6.

value to any other such committee, nor may any such committee accept a contribution from a county committee of a political party.”²⁰² Essentially, this bill would take the current ban on transferring money from January 1 through June 30,²⁰³ and extend it throughout the entire year. A violation would be a crime of the third degree, carrying a penalty of three to five years in prison and a fine of up to \$15,000.²⁰⁴ There is also a proposal that would bar county committees, other than the home county of a candidate, from making donations greater than \$7200, rather than the \$37,000 which is currently allowable.²⁰⁵

Additional bills are pending in the legislature that go much further to reign in the influence of money on elections. For instance, Assembly Bill A1682 would abolish legislative leadership committees,²⁰⁶ reduce the maximum annual contribution to state parties from \$25,000 to \$12,500, reduce the yearly contribution limit to county parties from \$37,000 to \$10,000, and reduce the contribution limit to individual candidates from \$7200 to \$5000 per year.²⁰⁷ There is also a bill which would make the contribution limit \$2000 for all elective offices, bringing New Jersey’s campaign limits comparable to federal limits.²⁰⁸

As Governor Corzine and Senate President Codey have made public pledges to reform New Jersey’s culture of corruption,²⁰⁹ and there is significant public support for such bills, it is possible that the legislature and the governor will seek to implement a reform package in the near future.²¹⁰

²⁰² A1489, 212th Leg., 1st Sess. (N.J. 2006).

²⁰³ N.J. STAT. ANN. § 19:44A-11.3a (West 1999 & Supp. 2007).

²⁰⁴ A1489, 212th Leg., 1st Sess. (N.J. 2006).

²⁰⁵ A1484, 212th Leg., 1st Sess. (N.J. 2006).

²⁰⁶ See *supra* Parts III.E & III.G.

²⁰⁷ A1682, 212th Leg., 1st Sess. (N.J. 2006).

²⁰⁸ S1466, 212th Leg., 1st Sess. (N.J. 2006).

²⁰⁹ See Codey, *supra* note 4 (Governor Codey reiterating his pledge to ban pay-to-play at all levels of government and institute a ban on wheeling); see also Jon Corzine, New Jersey Governor, State of the State Address (Jan. 9, 2007) (transcript available at <http://www.state.nj.us/governor/news/news/approved/20070109.html>) (“On ethics reform, we should push even further with a ban on wheeling and pay-to-play at all levels of government.”).

²¹⁰ It should be noted that Republicans in electorally competitive legislative districts proposed several of these reform bills. As the Assembly and Senate are currently under Democratic control, it is doubtful that many of these proposals will ever come up for a vote in front of the full legislature, as it would grant a major legislative victory to the Republican opposition. See, e.g., A102, 212th Leg., 1st Sess. (N.J. 2006); A691, 212th Leg., 1st Sess. (N.J. 2006); A1484, 212th Leg., 1st Sess. (N.J. 2006); A1487, 212th Leg., 1st Sess. (N.J. 2006); A1489, 212th Leg., 1st Sess. (N.J. 2006). As-

B. The Connecticut Model

In June 2004, two months before Governor McGreevey's resignation in New Jersey, John Rowland, the Republican Governor of Connecticut, resigned amid a scandal involving state contractors doing work on his home.²¹¹ Rowland's successor as governor, M. Jodi Rell, and the Connecticut Legislature passed a series of campaign finance reforms, similar in many respects to the reform efforts instituted by Governors McGreevey and Codey during New Jersey's transition of power.²¹² The subsequent legislation passed by Connecticut and New Jersey took varied approaches to correcting a similar problem: the pervasive influence of government contractor campaign donations in state politics.

The Connecticut statutory framework is more restrictive than New Jersey's version, holding "[n]o business entity²¹³ shall make *any* contributions or expenditures to, or for the benefit of, *any* candidate's campaign for election to *any* public office,"²¹⁴ and goes on to bar not only these corporate donations, but also donations from any "officer, director, owner, limited or general partner or holder of stock constituting five per cent or more of the total outstanding stock of any class of the business entity."²¹⁵ Contrasted with New Jersey's laws that allow businesses to make donations (so long as the procurement laws are followed) and do not bar most partners and directors from donating as well, it is clear that Connecticut's legislation is more restrictive.²¹⁶

Additionally, Connecticut legislators set more restrictive contribution limits than New Jersey's legislators passed.²¹⁷ For example, in

semblyman (now Senator) Bill Baroni (R-Mercer/Middlesex) was a sponsor on each of these bills. *See id.* Baroni represents one of the few districts with a two-party legislative delegation. New Jersey Legislative Roster, <http://www.njleg.state.nj.us/members/roster.asp> (last visited Feb. 20, 2008).

²¹¹ William Yardley, *Under Pressure, Rowland Resigns Governor's Post*, N.Y. TIMES, June 22, 2004, at A1.

²¹² Avi Salzman, *On the Lookout for Loopholes*, N.Y. TIMES, Dec. 18, 2005, at 14CN-19 (giving an overview of Connecticut's recent reform efforts).

²¹³ CONN. GEN. STAT. ANN. § 9-601(8) (West 2002 & Supp. forthcoming) (defining "business entity" to include corporations, partnerships, etc.).

²¹⁴ *Id.* § 9-613(a) (emphasis added).

²¹⁵ *Id.*

²¹⁶ *Id.* § 9-615. Connecticut does allow business political committees to make donations, with limits up to \$5000 for gubernatorial candidates. *See id.*

²¹⁷ *See* Connecticut State Elections Enforcement Commission, Contribution Limits, http://www.ct.gov/seec/lib/seec/contribution_limits_2007.pdf (last visited Apr. 17, 2008) (posting an updated chart for current contribution limits).

New Jersey, a business-created PAC can donate up to \$7200²¹⁸ to a candidate (for any level of elective office), while a similar PAC in Connecticut would be limited to a \$5000 donation to a gubernatorial candidate, \$1500 to a State legislative candidate, and as little as \$375 to a city council candidate.²¹⁹ Since Connecticut and New Jersey are in the same region, have similarly wealthy populations (compared to the rest of the nation), and operate within the same New York City media market, it would be difficult to argue that New Jersey candidates require such larger donations than candidates in Connecticut require to run similar campaigns. If one is to believe that more restrictive contribution limits are a positive reform,²²⁰ then certainly New Jersey's limits are higher than is necessary.

C. The Argument for Preserving the Status Quo

Beyond those who call for the outright elimination of campaign finance restrictions, some feel New Jersey's current pay-to-play law is working, and further reform is not needed. These anti-reformists want to preserve the status quo, fearing that further tightening the system will have negative repercussions.²²¹ Anti-reformists also note that "donations to the Democratic State Committee . . . dropped seventy-eight percent from its recent peak in 2001 through 2005, and contractor donations to the PAC plunged eighty-six percent in the same period," after the pay-to-play law was enacted.²²²

Furthermore, "[c]ontractor contributions to the 'big six' fundraising committees—the two state party committees and four legislative leadership PACs—fell from \$5.4 million in 2001 to \$1.8 million [in 2005]."²²³ Beyond the argument made above that the money is

²¹⁸ N.J. STAT. ANN. § 19:44A-11.5 (West 1999 & Supp. 2007).

²¹⁹ See Connecticut State Elections Enforcement Commission, *supra* note 217.

²²⁰ See Issacharoff & Karlan, *supra* note 19, at 1736.

²²¹ Donahue, *supra* note 198, at 1. Assemblyman Joe Cryan, Chairman of the N.J. Democratic State Committee, said that the pay-to-play law is "chasing good people from the process. It's as if we've made participating in the process something wrong, something un-American." *Id.*

²²² *Id.* ("In 2004, one-third of the money the [Democratic State Committee] raised came from contractors; last year [2005], it was 6 percent.").

²²³ *Id.*; see also James W. Prado Roberts & Gergory J. Volpe, *Political Contributors Take Detour Around New Rules*, ASBURY PARK PRESS (Asbury Park, N.J.), Oct. 2, 2007, at A1.

Overall giving by all businesses and their political action committees to county and state parties has similarly dropped—from a peak of \$20 million in 2003 to just \$3.3 million in 2005, and \$1.6 million last year, according to state Election Law Enforcement Commission records. In 2003, the Democratic State Committee raised 70 percent of its \$14 mil-

merely flowing to other outlets and has not been eliminated from the system,²²⁴ there are other factors that may explain the above date, such as that Governor Corzine largely self-funded his campaign²²⁵ and perhaps was not as aggressive in fundraising as his predecessors.

Senate President Codey noted that the legislature has “cut off so many avenues to raise money—at what point can only the rich run? . . . At what point do you hinder people of regular means against someone with unlimited resources of their own?”²²⁶ Others have echoed this thought, noting that “restrictions on private donors give a bigger advantage to candidates like Corzine and his 2005 opponent for governor, Republican Doug Forrester, who are wealthy enough to bankroll their own campaigns.”²²⁷

VI. THE REFORMS NEW JERSEY SHOULD ADOPT

The pay-to-play reforms enacted through Governor McGreevey’s Executive Order and the subsequent legislation were perceived as a major victory for campaign reform in New Jersey. Their effect, however, has been minimal. Though it perhaps took several scandals and indictments of public officials²²⁸ to push the issue to the forefront, the influence of contractors on state candidates has, it appears, decreased since the enactment.²²⁹ More importantly, the pay-to-play statute and subsequent enabling legislation allows for county and local governments to begin more stringently regulating their own campaigns. In this sense, the reforms have an aggregate positive effect on the system, as many local and county governments have also passed more stringent reforms.

But logically, pay-to-play and all campaign finance should be uniformly regulated by the state, rather than piecemeal, where every individual municipality and county has a unique campaign finance law. The state is already the regulatory body for policing elections

lion in receipts from businesses; last year businesses giving to that committee amounted to just 10 percent, according to ELEC records.

Id.

²²⁴ *Supra* Part III.

²²⁵ Patrick D. Healy, *Pity the Rich In Politics: They Tend To Fare Poorly*, N.Y. TIMES, Nov. 13, 2005, §1, at 37 (noting that Corzine spent \$43 million on his gubernatorial victory).

²²⁶ Tom Moran, *For Real Reform, Corzine Needs GOP*, STAR-LEDGER (Newark, N.J.), Oct. 13, 2006, at 23.

²²⁷ Donahue, *supra* note 198, at 1.

²²⁸ See NJ.com, *supra* note 16.

²²⁹ Donahue, *supra* note 198, at 1.

and filing reports.²³⁰ Furthermore, local and county elections are heavily influenced by state parties, PACs, and outside county committees not under the jurisdiction of individual towns and counties.²³¹ After leaving office, Governor McGreevey acknowledged that prospective contractors made donations to entities other than his specific campaign committee in an effort to influence him.²³² This is definitive proof that campaign money in New Jersey changes hands and is transferred among campaign entities with the underlying purpose of influence. Thus, it should be centrally regulated by the state.

There is no valid policy reason why the state should not ban pay-to-play at the local level, other than New Jersey's history of allowing municipalities wide discretion in managing their own affairs. However, this is a historical rather than a practical reason, and in today's evolved system of campaigning, best practices would dictate that a uniform statewide ban on pay-to-play at all levels of government would be more practical than a patchwork system of different standards at local levels. As the state already governs nearly all aspects of campaign law and regulation, it is counter-intuitive to argue that a variety of local pay-to-play measures would be preferable or stronger than a statewide initiative. As was discussed previously, Connecticut has a model that New Jersey legislators would be wise to study and possibly adopt.

An absolutely necessary reform in New Jersey is a stronger provision to ban wheeling, as the current statutory language is grossly inadequate and does little to stop the large-scale transfers of cash among party committees during campaigns. There is a counter-argument against such a law, as some party insiders believe that growing a political party in an area where it is historically weak requires the influence and outside help from state leaders and county committees from where the party is historically strong.²³³ Such proponents feel they are building a stronger statewide political base by infusing weaker county and municipal committees with an influx of

²³⁰ See N.J. STAT. ANN. § 19:44A-8.1 (West 1999 & Supp. 2007) (stating all candidate committees must file with ELEC).

²³¹ See *supra* Parts III.B and III.G.

²³² MCGREEVEY WITH FRANCE, *supra* note 41, at 337.

²³³ Stainton, *supra* note 172, at A17 (noting that the Hudson County donor and the Ocean County Democratic Chairman in question defended the transfer of funds as the financially strong Democrats in Hudson County merely helping to strengthen the Democratic party in other parts of the state). Every state legislator from Hudson County is a Democrat, while none of the state legislators from Ocean County is Democrat. See New Jersey Legislative Roster, <http://www.njleg.state.nj.us/members/roster.asp> (last visited Feb. 20, 2008).

cash, as weaker county parties are unable to raise such funds themselves.²³⁴ This is a reasonable argument, though somewhat disingenuous. Investigative reports have shown that the cash is not routinely going to underperforming counties, but rather back to the strong county committees, and that the transfers are largely used to circumvent the contribution limit laws, not to build the party.²³⁵

There is danger in some of the proposed reforms. The proposed bill to abolish legislative leadership committees altogether²³⁶ goes too far. Legislative leadership committees are invaluable tools for maintaining party order and discipline, though some would argue this stifles independence and is hardly a positive attribute.²³⁷ It is imperative that legislative leaders raise money to fund campaigns that would otherwise attract little attention. To reform these committees, the Legislature should ban the legislative leadership committees' power to transfer cash to anything other than a legislative candidate committee. The ability of these specially created committees to wheel cash to county, municipal, and other state committees has harmed their image and is contrary to their statutory purpose.

Another sensible proposal is to lower all the contribution limits. It is a somewhat bizarre system of campaign finance in which candidates at the local level in New Jersey, seeking perhaps as little as a few thousand votes, can legally raise more money from an individual, a Continuing Political Committee (or PAC), and of course a business, than a candidate for U.S. Senate, Congress, or even President.²³⁸ The contribution limits, it would appear, are artificially high for candi-

²³⁴ Stainton, *supra* note 172, at A17.

²³⁵ *Id.* (noting that the money did not stay with the Ocean County Democrats for party building efforts but was transferred back to Jersey City council candidates almost immediately).

²³⁶ A1682, 212th Leg., 1st Sess. (N.J. 2006).

²³⁷ The Legislative Leadership Committees raise large amounts of money, and spend nearly all of it every cycle getting their members re-elected. Since the leader of that caucus has complete control over this committee, they have complete discretion as to which candidates will receive the money. Arguably, this could force legislators to vote in lock-step with the leadership.

²³⁸ The federal limit for an individual donating to presidential, senate, or congressional candidates is \$2300. Federal Election Commission, Quick Answers [hereinafter *FEC Quick Answers*], http://www.fec.gov/ans/answers_general.shtml#How_much_can_I_contribute (last visited Apr. 17, 2008). But importantly, a New Jersey candidate could receive up to \$8200 from a CPC, while a Federal candidate could receive \$5000, or perhaps as little as \$2300, depending on the type of PAC. New Jersey Election Law Enforcement Commission, Contribution Limits [hereinafter *NJELEC Contribution Limits*], http://www.elec.state.nj.us/forcandidates/elect_limits.htm (last visited Apr. 17, 2008).

dates for minor elected offices,²³⁹ and it would be logical and appropriate to bring New Jersey's contribution limits in line with the federal limits. Opponents of this measure would argue that such limits are unneeded, as there are less stringent restrictions on campaign donations in neighboring states, such as Pennsylvania, which do have the same aura of corruption as New Jersey.²⁴⁰

What policy argument can be made for having individual contribution limits greater than the current \$2300 limit for individual contributions and \$5000 PAC contributions to federal candidates? Campaign spending reports confirm that federal candidates have no problem raising a sufficient amount of funds.²⁴¹ It seems evident that something is awry when an individual in New Jersey can contribute \$2600 to a candidate for minor office in New Jersey, but only \$2300 to a Presidential candidate. Moreover, a business can directly contribute \$2600 to a New Jersey candidate, but nothing to a federal candidate; a CPC could contribute \$8200 to a New Jersey candidate, but a PAC only \$5000 to a federal candidate; and other party committees (county, state, or legislative leadership committee) can contribute *unlimited* amounts to a New Jersey candidate committee, but these same party committees may only contribute \$5000 *combined* to federal candidates.²⁴²

This is not to say that the federal system is perfect—far from it. However, aligning all facets of New Jersey's campaign finance system with the current federal law would be a positive step. Drastically scaling back contribution limits to individual candidate committees, as well as tighter restrictions on corporate contributions (perhaps even a total ban) would, at minimum, show that New Jersey elected officials are committed to stemming corruption and the appearance of corruption.

²³⁹ *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (finding that contribution limits are subject to the closest scrutiny and must be "closely drawn to avoid unnecessary abridgment of associational freedoms").

²⁴⁰ See 25 PA. STAT. ANN. §§ 3241–3260 (West 1994 & Supp. 2006). There is no Pennsylvania statute limiting the amount that can be contributed to a state candidate.

²⁴¹ Anne Kornblut, *Menendez Retains His Senate Seat; Lieberman Finally Prevails Over Lamont*, N.Y. TIMES, Nov. 8, 2006, at P6. Senator Menendez raised \$10 million on his own and received another \$9 million from national Democrats, and Tom Kean Jr. raised over \$5 million on his own and received about \$5 million from the national GOP in their 2006 N.J. Senate race. *Id.*

²⁴² See FEC Quick Answers, *supra* note 238; NJELEC Contribution Limits, *supra* note 238.