THE VARIETIES OF CORRUPTION AND THE PROBLEM OF APPEARANCE:

A RESPONSE TO PROFESSOR SAMAHA

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Neither the same as actual corruption nor well defined in its own right, the "appearance of corruption" as a basis for campaign finance regulation is suspect on two counts, depending on the observer: appearances are either useless appendages to demonstrated instances of quid pro quo corruption, or they are rhetorical compensation for their absence. If there is corruption, then the appearance of it may be self-evident, but beside the point. Absent corruption, placing the full weight of the state regulatory interest on "appearances" guarantees contention, since the regulatory regime's advocates will often perceive what its critics do not see.

The courts' unconvincing treatment of appearances is largely at fault for the unsatisfactory state of "appearances" doctrine, and remedial scholarship has been sparse. Professor Samaha now aims, with considerable insight and subtlety, to enhance the theoretical support for this constitutionally permissible ground of regulation.[1]

Yet for all its strengths, Samaha's analysis does not identify, in the field of campaign finance regulation, a major weakness in this branch of constitutional doctrine: it is concerned only with the appearance of governmental corruption, without attention paid to perceived corruption of the *electoral* process. Campaigns may matter in the standard analysis of appearances, but only to the extent that campaign fundraising and spending may be linked to corrupt conduct by officials. Yet the contemporary debate over campaign finance reveals a perception that corruption can infect electoral politics on their own terms, distorting the way that elections should function in framing issues, supporting competition, engaging the electorate, and accurately tracking voter preference. The suggestion that this is an overlooked element of the problem of "appearances" can be tested against the most prominent issue in the era of *Citizens United*[2] and Super PACs: the making of unlimited "independent expenditures."

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[1] Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563 (2012).

[2] Citizens United v. FEC, 130 S. Ct. 876 (2010).

Professor Samaha is surely right that the courts have done a disservice to the appearances doctrine, and these difficulties can be traced to its earliest formulation. Beginning with *Buckley v. Valeo*,[3] averting the appearance of corruption has been cited as important but *not quite* as important as preventing corruption. "Of almost equal concern" is the qualification the Court employed.[4] And yet cutting the other direction is the reason that the Court gives for appearances' importance: safeguarding citizen confidence in the political process and assuring that such confidence does not collapse to such a "disastrous" extent that citizens bail out of the political process.[5] As a ground for government regulation, this is surely weighty. The periodic occurrence of real corruption is certainly of great concern, but so too — and no less so — would be a "disastrous" loss of American confidence in, and withdrawal from, the political process. Adding to the unstable compound here is the flimsy empiricism practiced by the Court when it issues broad predictions of citizen despair over appearances. So Professor Samaha correctly observes that "[j]udicial treatment [of appearances] is simultaneously too permissive, insufficiently creative, and disengaged from serious empirical inquiry."[6]

Professor Samaha directs the reader's attention primarily to two models of justifying state regulation of appearances. Most on display in campaign finance litigation and jurisprudence is the "bridge model," which presumes the importance of appearance as a means of drawing people to the political process, or avoiding their alienation from it, much as the look of a bridge can draw or deter traffic. But this model can be faulted for a hazardous lack of transparency: good cosmetics may mislead observers away from vigorous monitoring of real corruption or attention to needed reforms. Samaha finds more "intriguing" the "bank model,"[7] which would have us consider that appearances can promote conditions for real corruption. People perceiving corrupt norms may adopt them; competitive pressures can reinforce the attractions of corrupt conduct; and elected officials may conclude that, where all officials are perceived unfavorably (as corrupt), there is little incentive not to join the crowd. Samaha argues that the "[t]otal absence of the bank model in most of our campaign finance debates is, all told, a glaring omission."[8]

How does each model advance the understanding of appearances? Certainly, a bridge model grounded entirely in how things look will

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[3] 424 U.S. 1 (1976).
[4] *Id.* at 27.
[5] *Id.* (quoting CSC v. Letter Carriers, 413 U.S. 548, 565 (1973)).
[6] Samaha, *supra* note 1, at 1619.
[7] *Id.* at 1609.
[8] *Id.* at 1618.

have limited appeal. And it is not clear how far a legislature would have to go, and with what success, to structure appearances sufficient to win over a stubbornly skeptical citizenry. The evidence on this score is discouraging.[9]

But neither will the "bank model" necessarily improve the prospects for the appearance standard. This model opens up new avenues for empirical inquiry into when, and under what conditions, actual corruption is fostered by untoward appearances. It commits the Court to preside over empirical disputes or complexities that, in this field, it has not shown it can successfully manage. Samaha notes, rightly, that "[j]udges are hardly the most careful empiricists,"[10] and it is uncertain that the Court would ever have available empirical evidence sufficient in both quality and persuasiveness to support a jurisprudentially workable connection between actual and apparent corruption.

The larger problem with the "bank model" is that collapsing corruption and its appearance deprives the latter of what makes it distinctive. The danger of appearance lies in the appearance itself — in its effects on citizen trust in government. It does not depend on the type of appearance one might associate with a growth in the potential for actual corruption. If observers cannot agree about the extent to which particular appearances would have that potential, would that mean they would be less concerned with those appearances? If the appearance of corruption undermines, to a "disastrous extent,"[11] citizen confidence in government, then it does so regardless of whether it can be linked persuasively to actual corruption.

This is not to say that the appearance of corruption, severed from actual corruption, is easily supported as a ground of regulation. It can be subjectively experienced and loosely argued. Moreover, where we have appearance but not the reality of actual misconduct, then we also risk calling into question practices that are accepted and legitimate features of political life. For example, to the extent that appearances are considered untoward in the making of contributions to, or the raising of contributions for, elected officials, then the very act of supporting candidates or parties comes under deep suspicion. The line between routine politics and questionable if not outright corrupt conduct

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[9] *See* Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 121, 149 n.90 (2004) (perceptions of corruption do not vary with the existence or type of campaign finance regulation but instead rise or fall along with other variables of public opinion, such as presidential approval or opinions on the state of the economy).

[10] Samaha, *supra* note 1, at 1603.

[11] *Id.* at 1600.

becomes hard to define.[12] As Nathaniel Persily and Kelli Lammie have shown, the public judges corruption to be inherent in "contributions of almost any size."[13] Appearances, in other words, can tarnish as corrupt what is not, and the regulatory regime, in the chase after appearances, can raise the costs of participating in politics.

These analytical difficulties may follow in large measure from the type of "corruption" — namely, corruption of the government — giving rise to the appearance problem. Under contemporary campaign finance jurisprudence, corruption is tethered tightly to quid pro quo corruption — effectively, sale of office. Yet it has long been clear that corruption as it is discussed in the *electoral* sphere is viewed more expansively. It has been argued that money sluicing in high volume through the political process distracts candidates from engagement with the voters (and incumbents from their official duties) as they pursue an ever larger campaign budget, underwrites negative political advertising at odds with ideals of deliberative democracy, allows independent organizations to dominate the political debate to the detriment of candidates and political parties, and enables candidates to escape accountability for the tone and message of their campaigns. And, of course, there is also resistance to the prospect and to the appearance that those with money have more of a say about electoral outcomes than the rest of electorate. All of these criticisms, singly but also taken together, may be fairly taken to be threats to what has been referred to as the "integrity of the electoral process."[14] While contemporary formulations of the appearance standard look beyond campaigns to effects on government post-election, much of the complaint is really rooted in or related to the electoral process itself.

The Court has so far rejected a conception of "electoral integrity" that is grounded in the failings of the electoral process itself. It did so decisively in *Randall v. Sorrell*,[15] when the State of Vermont argued that the Court should consider state interests in regulation beyond a narrow focus on quid pro quo corruption.[16] The Second Circuit had concluded that the state could regulate to protect officeholder time from the pressures and distractions of fundraising, but it noted that other rationales might also carry weight, including "bolstering voter

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[12] *Compare* McCormick v. United States, 500 U.S. 257 (1991), *with* Evans v. United States, 504 U.S. 255 (1992). *See also* Daniel H. Lowenstein, *When Is a Campaign Contribution a Bribe?*, *in* PRIVATE AND PUBLIC CORRUPTION 127 (William C. Heffernan & John Kleinig eds., 2004).

[13] Persily & Lammie, *supra* note 9, at 122.

[14] Landell v. Sorrell, 382 F.3d 91, 108 (2002) (quoting Nixon v. Shrink Mo. PAC, 528 U.S. 377, 401 (2000) (Breyer, J., concurring)); *see also Shrink*, 528 U.S. at 401 (defining electoral integrity to mean more generally "the means through which a free society democratically translates political speech into concrete governmental action").

[15] 548 U.S. 230 (2006).

[16] *Id.* at 245.

interest and engagement in elective politics" and "encouraging public debates and other forms of meaningful constituent contact in place of the growing reliance on 30-second commercials."[17] The high Court chose instead to read *Buckley* as limiting the permissible grounds of regulation to quid pro quo corruption or its appearance[18] — corruption of the governmental, not the electoral, process.

The consequence is a jurisprudential debate that cannot directly confront the form of corruption that may shape much of the troubled public perception of "appearances." Consider the "Super PACs" and the spate of commentaries about their ill effects on the political process.[19] Because only quid pro quo corruption or its appearance counts in the critique, critics tend to focus on the ways in which their expenditures might not be truly "independent" of candidates and therefore corruptive, or whether their independence, if bona fide, is truly a protection against either corruption or its appearance. But beyond these claims are heard other complaints that have echoed throughout years of campaign finance debate, and that have now been renewed with force against Super PACs: about the quality of campaign ("negative") speech, the fairness of competition, the absence of accountability of candidates and parties, or just the outsized impact that a single wealthy individual can have on electoral outcomes.[20] And the Super PAC debate has brought to the fore an additional objection that this independent activity by committees dedicated to one particular candidate has tended to prolong the campaigns of weak candidates who, if left to fend for themselves, would have to exit the race for lack of broad-based support and allow for a clearer view of the true choices.[21] Yes, the unifying theme running through these complaints is one of unhealthy effects within the electoral process, but it is also one of unsavory appearances: that all this cash *disfigures* the electoral process. One commentator observes that "because Americans routinely say they

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[17] *Landell*, 382 F.3d at 125.

[18] *See Randall*, 548 U.S. at 245–46.

[19] *See The Hands That Prod, the Wallets That Feed: Super PACs Are Changing the Face of American Politics. And It May Be Impossible to Stop Their Startling Advance*, THE ECONOMIST, http://www.economist.com/node/21548244.

[20] *See Sunday Dialogue: Money and Influence in US Elections*, N.Y. TIMES, Mar. 11, 2012, § SR (Sunday Review), at 2; *see also* Editorial, *The Wrong Way to Shake Up Congress*, N.Y. TIMES, Mar. 18, 2012, at A18 ("Attack ads, which are [the Super PACs'] stock in trade, are tainting the political process and turning off many voters.").

[21] Naureen Khan & Alex Roarty, *Super PAC Lifelines Keep Weakened Candidates in the Game*, NAT'L J. (Mar. 5, 2012), http://www.nationaljournal.com/2012-presidential-campaign/super-pac-lifelines-keep-weakened-candidates-in-the-game-20120228.

want more money out of politics, it's no surprise the argument against [S]uper PACs has stuck."[22]

So the appearance of corruption may rest on the various effects of money in politics in the aggregate — on perceived corruption defined as the threat to "electoral integrity" that arises from frenzied fundraising and unlimited spending. The corruption in question attacks the electoral process; it does not consist exclusively of debts incurred to campaign donors and spenders who expect post-election repayment. One might even consider whether the references to the "appearance" of corruption have become the means, not explicitly recognized, by which these other concerns with money in electoral politics have come to be expressed.

The coherence of contemporary jurisprudence has suffered from the Court's validation of an "appearance" basis for regulation — the potential for "disastrous" citizen disengagement — at the same time that its consideration of appearance issues focuses only on quid pro quo governmental corruption. Of course, even if the Court acknowledged this electorally centered source of untoward appearances, it would not likely conclude that legislatures have the latitude, on this ground, to regulate electoral processes. Its decision in *Randall v. Sorrell* speaks to this point. It is nonetheless useful to consider the gap between the appearance problem that the Court will weigh in the constitutional balance and those questions of appearance that animate much campaign finance debate and controversy. This gap is among other reasons, including those cited by Professor Samaha, that the appeal to appearances in the limited form available will remain vulnerable to attack and unpersuasive in application.

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[22] John Hudson, *The Media Convinced Everyone to Hate Super PACs*, THE ATLANTIC WIRE (Mar. 13, 2012), http://www.theatlanticwire.com/politics/2012/03/media-convinced-everyone-hate-super-pacs/49834/.