RETURN OF THE KING: CORRUPTION BACKSLIDING IN AMERICA

Pedro Gerson†

ABSTRACT

The United States appears to be going through a crisis of corruption. However, it is hard to know whether this is a matter of appearance or if the country is at risk of high levels of corruption making a comeback. The Article applies the equilibrium model of corruption—the leading social science account of how corruption operates—to the current U.S. system, and shows that the United States may indeed be backsliding. The potential for corruption to creep back up is due to more than the political moment. Rather, it is the result of politics combined with the relatively powerless institutional controls for corruption in the United States. Recent Supreme Court decisions have narrowed the statutory definition of criminal corruption while at the same time widened the possibilities for corporate influences in politics. Meanwhile, the current Federal executive has shown that there are essentially no avenues to force compliance with governance norms. While these changes on their own do not imply that widespread, unchecked corruption is around the corner, they expose the weaknesses of the current system and the possibility that America could see high levels of corruption return.

TABLE OF CONTENTS

I. INTRODUCTION

Corruption is in the news. Ever since President Trump came to power, reports on conflicts of interests and the use of the presidency for his family's private enrichment have littered U.S. press. The examples seem endless. In 2019, for example, the Justice Department booked President Trump's hotel for the agency's holiday party at a cost of over $30,000.[1] More alarming, perhaps, is that the Trump Organization owes Deutsche bank $300 million in loans, while at the same time President Trump sits on top of the federal agencies currently investigating the bank for multiple allegations of wrongdoing.[2] A repeated point of tension is the reports on the use of the Trump International Hotel in Washington by foreign government officials, lobbying firms, and other groups seeking to curry favor with the current administration.[3] It is not only stories of public officials' personal enrichment

†Visiting Assistant Professor of Law, Louisiana State University Paul M. Hebert Law Center. *I am very grateful to Tom Ginsburg, Anthony Casey, Ken Levy, Bob Lancaster, and Lisa Avalos for your helpful feedback and comments. I am especially indebted to Clare Ryan, as this work owes a lot to her helpful edits and ideas. Many thanks also to Candace Square and McKenzie LeMaire for providing terrific research assistance. Of course, all errors are my own.*

1 Katie Benner, *Barr Plans to Throw $30,000 Holiday Party at the Trump Hotel in Washington*, N.Y. TIMES (Aug. 28, 2019), https://www.nytimes.com/2019/08/28/us/politics/barr-trump-Hotel-Party.Html?searchResultPosition=6.

2 Jesse Eisinger, *Deutsche Bank Remains Trump's Biggest Conflict of Interest Despite Settlements*, PROPUBLICA (Feb. 9, 2017, 11:16 AM), https://www.propublica.org/article/Deutsche-bank-Trump-conflict-of-interest-Despite-settlements.

3 Eric Lipton & Annie Karni, *Checking In at Trump Hotels, for Kinship (and Maybe Some Sway)*, N.Y. TIMES (Oct. 25, 2019), https://www.nytimes.com/2019/09/07/us/politics/trump-hotel.html.

that have appeared, but also of new policy directions. It was recently reported, for example, that the Trump administration is looking at ways to curtail the Foreign Corrupt Practices Act.[4] Though these reports have increased since 2016, they have not all been about the Trump presidency. In 2017, for example, Senator Bob Menendez, a Democrat, was accused of using his office to help for the personal benefit of ophthalmologist Salomon Melgen.[5] At the center of all these reports and allegations are the impeachment proceedings against the president.[6] The President was impeached for withholding military aid to Ukraine which he would release in exchange for Ukraine announcing an investigation against one of Mr. Trump's political rivals—Joe Biden—and, for obstruction of justice.

Not all these stories are equally troubling, of course, but their cumulative effect on people's perception of corruption cannot be ignored. Google trends search, for example, show that during the Trump administration, on average, people have been more than twice as interested in corruption news than during President Obama's second term.[7] More to the point, Transparency International ("TI"), one of the premier global nonprofits devoted to the study and fight against corruption, reports that in 2017 44% of Americans believed corruption to be pervasive in the White House, up from 36% in 2016. TI also reported that 70% of people believe the government is failing to fight corruption.[8] The organization has stated that the issue is not just the Trump administration, but also the increasing reliance on private and concentrated wealth for political spending.[9]

Up until recently, Americans were relatively unpreoccupied with corruption.[10] Even within the academic realm, the issue of corruption

4 Christina Wilkie, *Trump Economic Advisor Larry Kudlow Says White House Is 'Looking at' Changes to Global Anti-Bribery Law*, CNBC (Jan. 17, 2020, 7:03 PM), https://www.cnbc.com/2020/01/17/kudlow-white-house-is-Looking-at-reforms-to-global-anti-bribery-law.htm.

5 Sarah Jorgensen, *Bob Menendez Charges, Explained*, CNN (Nov. 8, 2017, 2:47 PM), https://www.cnn.com/2017/11/08/politics/menendez-trial-highlights/index.html.

6 At the moment of publishing President Trump had been impeached, but was acquitted in the Senate in February 2020.

7 GOOGLE TRENDS, shorturl.at/vBNRS (last visited Feb. 3, 2020).

8 *Corruption in the USA: The Difference a Year Makes*, TRANSPARENCY INT'L (Dec. 12, 2017), https://www.transparency.org/news/feature/corruption_in_the_usa_the_difference_a_year_makes.

9 *Id.*

10 Comparing interest in the United States for corruption news versus the world shows that worldwide attention from 2010 to 2016 was consistently higher than in the United States. *See* GOOGLE TRENDS, shorturl.at/oDFWZ (last visited Feb. 3,

was ignored. As political scientist Michael Johnston put it, "American political science as an institutionalized discipline has remained steadfastly uninterested in corruption for generations."[11] Some legal scholars[12] also expressed dismay about the fact that, with a few[13] exceptions[14] notwithstanding, corruption has been under-examined by the legal academy in the United States.

The fact that corruption in the U.S. had up until recently attracted little interest is not surprising given that it seemed corruption was under control. For the last twenty years the incidence of corruption in the U.S. had remained low and constant.[15] Furthermore, most countries

2020) (for U.S. trends); GOOGLE TRENDS, shorturl.at/aeuy1, (last visited Feb. 3, 2020) (for global trends).

11 Michael Johnston, *From Thucydides to Mayor Daley: Bad Politics, and a Culture of Corruption?*, 39 PS: POLITICAL SCI. & POL. 809, 809 (2006).

12 Jacob Eisler, McDonnell *and Anti-Corruption's Last Stand*, 50 U.C. DAVIS L. REV. 1619, 1621 n.3 (2017).

13 Dan Lowenstein, George Brown, Zephyr Teachout, and Matthew Stephenson, whose work is discussed *infra*, are clear exceptions of this.

14 Probably the area that has received the most attention is campaign finance regulation. This is likely a result of Citizens United v. FEC, 130 U.S. 876 (2010). *See, e.g.*, Heather K. Gerken, *Boden Lecture: The Real Problem with* Citizens United*: Campaign Finance, Dark Money, and Shadow Parties*, 97 MARQ. L. REV. 904 (2014) (arguing that *Citizens United* was not a seismic shift in campaign finance, but was one in terms of anticorruption and the influence of money in politics); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 120-121 (2010) (discussing corruption but focusing exclusively on campaign finance regulation).

15 *See, e.g.*, *Corruption Perceptions Index (CPI)*, TRANSPARENCY INT'L, https://www.transparency.org/cpi2018 (last visited Feb. 3, 2020) (for incidence as measured by any of the indexes that measure corruption) [hereinafter TI CPI]. However, there are many issues with these indexes, both in terms of accuracy and of the incentives they create. *See* Kevin E. Davis, *Legal Indicators: The Power of Quantitative Measures of Law*, 10 ANN. REV. L. & SOC. SCI. 37, 49 (2014). I will use the CPI index as a proxy for levels of corruption throughout this paper. Published yearly, the latest edition is referenced above. The CPI scores countries from 0-100, where 100 is not corrupt at all and 0 is extremely corrupt. It is worth recognizing that the CPI has a number of problems. The CPI is an aggregator of several indices that each in turn has different methodologies, but which mostly are based on opinions about the prevalence of corruption. Although most of these are expert opinions, we must still question the reliability of perception as a tool for measuring reality. Even experts—or especially experts—may not really know how much corruption is going on. After all, without reliable data, dedicating so much attention to an issue may even lead to the misconception that that issue is far more prevalent than it actually is. *See* Mathias Siems, *Measuring the Immeasurable: How to Turn Law into Numbers*, *in* DOES LAW MATTER? ON LAW AND ECONOMIC GROWTH (Michael Faure & Jan Smits eds., 1st ed. 2011) (for a more thorough discussion of these issues). Frydman Benoît & Arnaud Van Waeyenbergen, *Gouverner par les standards et les indicateurs: De Hume au rankings* (Penser le droit Ser., Bruylant 2014). Besides the fact that these indices are unreliable, some have argued that they, in fact, can have distortionary effects on the performance of legal systems by influencing the perception

that have controlled corruption have remained low-corruption countries.[16] And yet, the recent surge in corruption or corruption-related reports in the U.S. show that we must consider whether corruption may make a comeback.

The election of Donald Trump and the ascendancy of nationalism in Europe, have inspired a surge of legal and social science scholarship positing and trying to answer the question of how liberal democracies can devolve generally.[17] Scholars have looked at, for example,

of those countries and thereby the "behavior and distribution of power and resources." Davis, *supra*. TI and others are aware of the issues briefly outlined above. They have tried to make their perception indices as reliable as possible given the constraints. TI Mexico, for example, created a "Transparency, Anticorruption, and Impunity Coefficient" which seeks to address some of the issues discussed, by incorporating metrics for all three and being more explicit about what is being measured and what is not. *See* Eduardo Bohórquez, Roberto Castillo, Luna Mancini, Irene Tello Arista & Gustavo H. Torres, *Coeficiente TAI (Transparencia, Anticorrupción e Impunidad Cero), una nueva métrica integral*, ESTE PAÍS 1-4 (2017), https://www.impunidadcero.org/uploads/app/articulo/51/archivo/1526575325O94.pdf. Despite all of the issues with metric evaluations of corruption generally, or the CPI specifically, the Index provides a useful starting point and framework for a comparative discussion of corruption. In other words, it is a good estimate of corruption levels even after allowing for its inexactitude.

16 A look at the history of successful anti-corruption campaigns show that they share a few common characteristics. The most important is that the end of corruption is generally the result of some exogenous shock to the political order that pushes for strong measures of reform. Second, corruption has not creeped back up in these countries. Sweden's trajectory, for example, involved the country's defeat in the 1809 war with Finland. This war led the political elites to see the need to overhaul governance norms in order to ensure the viability of the nation-state itself. This led, among other reforms, to the establishment of a meritocratic hiring system, eliminating the old "accord system" by which political actors and military personnel gave what amounted to bribes to civil servants in higher positions to secure promotions. *See* Bo Rothstein & Jan Teorell, *Getting to Sweden, Part II: Breaking with Corruption in the Nineteenth Century*, 38 SCANDINAVIAN POL. STUD. 238, 246 (2015). A more-cited example is Singapore which adopted a number of institutional reforms in the wake of the election of Lee Kuan Yew ("LKY") in the late 1950's. Many of the explanations for these reforms have been tied to LKY's personality and conviction that a transparent and ethical civil service was a key factor in maintaining democracy and avoiding the fate of other countries such as Pakistan, Indonesia, or Burma. *See* Jon S.T. Quah, *Combating Corruption Singapore-Style: Lessons for Other Asian Countries*, 2 MD. SERIES CONTEMP. ASIAN STUD. 1, 37-39 (2007).

17 *See generally* STEVEN R. LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018) (arguing that "democratic backsliding" is the nearly imperceptibly slowly moving change in political atmosphere brought about by legal, legitimate exercises of power as opposed to a sudden show of force or a usurpation); TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY (2017) (arguing that "authoritarianism" is fostered by slowly changing norms and relies upon social cohesion to deter or punish anti-normative behavior).

whether or not the United States is susceptible to authoritarianism[18] or to having its courts undermine the "liberal democratic constitutional order."[19] One of the questions that has been hinted at in this literature, though not addressed head-on, is the extent to which corruption can arise in low corruption countries. This paper contributes to that literature by looking at that question specifically from the American perspective.

The idea that the United States could be at risk of corruption backsliding may sound far-fetched when we consider the many institutional protections that currently exist in the country to combat graft. As I explore in more detail[20] *infra*, the U.S. has a wide array of laws, committees, rules, guidelines, and institutions to increase government transparency, create a meritocratic and open public service, enforce antitrust laws, create mechanisms to promote and protect whistleblowers, develop the prosecutorial skills to ensure the proper enforcement of anti-corruption laws, and ensure the existence of an independent press and third-sector watch dogs.[21] Furthermore, the United States is even a world leader when it comes to combating international

18 *See generally* TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2019) (arguing there are two means by which a liberal democracy may be subverted: the first is overt, powerful and sudden, like a coup, but the second is a gradual degradation or erosion of the pillars of liberal democracy, which the authors identify as competitive elections, freedom of political speech and association, and "rule of law." Ginsburg and Huq identify the United States as a liberal democracy subject to this second type of subversion, which they call "constitutional retrogression," primarily because of the weakness or absence of institutional safeguards); CASS R. SUNSTEIN, CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA (2018) (arguing that the legal concentration of wealth and power and the subsequent (legal) exercise of that power can undermine classic institutions of liberal democracy such as press and public trust that could ultimately mean a shift towards oligarchy or fascism in America).

19 David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV 1313, 1384 (2020) (arguing that the United States lacks the defenses "against the kind of judicial capture that usually forms part of a regime strategy of abusive judicial review," where, abusive judicial review is defined as the use of courts to "intentional[ly] attack . . . the core of electoral democracy.").

20 In fact, even creating a catalogue of all the mechanisms that corruption is sought to be controlled in this country is a sisyphean task. After all, numerous rules within each agency and branch of government are created with the specific purpose of ensuring transparency, accountability, meritocracy, or one of the other policy goals that are often linked to strong anti-corruption programs. This paper will not be outlining every single one of these.

21 These are all objectives of most anticorruption "toolkits." *See* Anna Persson et al., *Why Anticorruption Reforms Fail—Systemic Corruption as a Collective Action Problem*, 26 GOVERNANCE 449, 453 (2012) (for a good synthesis of these discussed later in this paper).

corruption thanks in part to the ever growing enforcement[22] of the Foreign Corrupt Practices Act.[23] Whether these policies in and of themselves are actually effective in combating corruption is still very much an open question.[24]

The problem of controlling corruption is particularly acute because of how the phenomenon of public corruption works.[25] Although, traditionally,[26] corruption has been understood as a cost-benefit

22 Letter from Gibson, Dunn & Crutcher LLP to Clients and Friends, 2019 Year End FCPA Update (Jan. 6, 2020), https://perma.cc/F7YT-HYQJ.

23 This law is seen as a model worldwide and has been replicated by countries such as Britain and Mexico.

24 There are reasons to doubt that some of the policies are indeed effective. For example, transparency policies, sometimes labeled sunshine policies because they are meant to shine a light on nefarious activities, have largely been unsuccessful in ensuring greater accountability. *See, e.g.*, Omri Ben-Shahar, *The Failure of Mandated Disclosure*, 159 U. PENN. L. REV. 647 (2010). In fact, Anna Persson et. al, *supra* note 20, argue that these policy measures are relatively ineffective in reducing corruption. However, Matthew Stephenson, *Corruption as a Self-Reinforcing "Trap": Implications for Reform Strategy* (QoG Working Paper No. 2019:10, June, 2019) [hereinafter Matthew Stephenson, *Corruption as a Self-Reinforcing "Trap"*], among others, has argued that these incremental measures have been effective even if in many instances it has only been on a small scale. *See also* Jeremy Pope, TRANSPARENCY INTERNATIONAL SOURCEBOOK 2000, CONFRONTING CORRUPTION: THE ELEMENTS OF A NATIONAL INTEGRITY SYSTEM (2004). However, the extent to which each policy is effective is an empirical question that is beyond the scope of this paper.

25 Corruption is indeed a problem. That view is mainstream now. *See, e.g.*, Daniel Kaufmann & Shang-Jin Wei, *Does 'Grease Money' Speed Up the Wheels of Commerce?*, 15 (Nat'l Bureau of Econ. Research, Working Paper No. 7093, 1999), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=629191 (showing that corruption tends to reduce development); Benjamin A. Olken & Rohini Pande, *Corruption in Developing Countries*, 4 ANN. REV. ECON. 479, 493 (2012) (suggesting that corruption decreases the impact of antipoverty programs); Rose Jacobs, *How to Fight Corruption—and Why We Should*, CHI. BOOTH REV. (May 20, 2019), https://review.chicagobooth.edu/economics/2019/article/how-fight-corruption-and-why-we-should (for examples in the popular press).However, this consensus was not always the case. *See, e.g.*, Nathaniel H. Leff, *Economic Development Through Bureaucratic Corruption*, 8 AM. BEHAV. SCIENTIST 8, 8 (1964) (arguing that corruption was able to cut red tape and thus increase efficiency); SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 59-92 (1st ed. 1969) (arguing that corruption provided access to the political process to groups that may have been alienated from them).

26 *See* Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 3 (1974); *see, e.g.*, SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY (1st ed. 1978).

problem,[27] more recently,[28] scholarship has moved in the direction of viewing it as an equilibrium[29] or as a collective-action problem.[30] Both of these frameworks explain corruption as a problem grounded in contextual incentives. According to these theories, people engage in corruption either because it is appropriate, or because not doing so would be more difficult than doing so. Importantly, the individual ideologies or beliefs with regards to corruption become irrelevant because if the expectation is that others will engage in or expect corruption, then most individuals will do so also.[31] Corruption's imperviousness to individual beliefs means that even if all Americans believed corruption to be nefarious, if corrupt actions were met with impunity of it then we would expect corruption to rise.

This paper applies the equilibrium framework to the United States to show that there are signs that the country is backsliding. The paper discusses three key developments over the past decade that are responsible for this. The first development is the Supreme Court's narrowing

27 Scholarship has looked at a great number of institutional settings and triggers (i.e., costs and benefits) that could impact the level of corruption. *See* James E. Alt & David D. Lassen, *The Political Economy of Institutions and Corruption in American States*, 15 J. THEORETICAL POL. 341, 350-55 (2003) (voter initiatives, political competition, open primaries, and campaign expenditure restrictions); Rafael Di Tella & Ernesto Schargrodsky, *The Role of Wages and Auditing during a Crackdown on Corruption in the City of Buenos Aires*, 46 J. L. & ECON. 269, 279-85 (2003) (monitoring mechanisms); Torsten Persson et al., *Electoral Rules and Corruption*, 1 J. EUR. ECON. ASSOC'N 958, 964-69 (2003) (electoral rules); Benjamin A. Olken, *Corruption Perceptions vs. Corruption Reality*, 93 J. PUB. ECON. 950 (2009) (judicial enforcement).

28 I do not mean to say that the idea is novel. In fact, Max Weber articulated that culture is an important factor in determining corruption. *See* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans., 1st ed. 1930). This idea has also echoed in other works of social science. *See, e.g.*, EDWARD C. BANFIELD, THE MORAL BASIS OF A BACKWARD SOCIETY (1st ed. 1958). The only argument put forth is that scholarship on corruption has mostly, up until recently ignored the idea of culture.

29 RAY FISMAN & MIRIAM A. GOLDEN, CORRUPTION: WHAT EVERYONE NEEDS TO KNOW 4-11 (1st ed. 2017).

30 Anna Persson et al., *supra* note 21.

31 Two things must be noted. The first is that this model does allow for individuals to break from the norm, however it is rare because in that context it is very hard (costly) to do so. The second is that much of the scholarship in this area has been reticent to speak about social norms and instead adopts the framework or language of economics or rational choice theory. Ray Fisman and Miriam Golden, for example, refer to corruption as an equilibrium. In that equilibrium, the reason people either do or do not engage in corruption is because of the expectations of what other people will do. This is saying that people live in places where corruption is or is not accepted or expected, and that is what determines the levels of corruption (and its intractability). *See* FISMAN & GOLDEN, *supra* note 29, at 6.

definition of what acts count as corruption. While many, discussed *infra*, have found the Supreme Court's interpretation of corruption criminal law statutes to be shortsighted at best, and pernicious at worst,[32] I argue that the outcomes in these cases were not unpredictable or incorrect. Rather, they are entirely consistent with criminal law's traditional protections and the tools used to interpret said body of law. In fact, criminal law reveals itself to be a limited anti-corruption tool because what constitutes corruption is so indeterminate that it is hard to convict people for crimes that have such porous borders. The reason the Supreme Court's anticorruption decisions have led to such outcry is that the various protections found in criminal procedure are designed to address a power and information asymmetry between the state and the individual accused.[33] In cases of grand scale corruption,[34] that asymmetry is much narrower, and in sometimes nonexistent.

Supreme Court jurisprudence has indeed shown that interpreting corrupt acts within the framework of criminal law can be very limiting. As discussed *infra* in Part II, in one line of decisions, the Supreme Court has shrunk the reach and scope of anti-corruption criminal statutes. Whether it was looking at bribery or gratuity statutes, the Court has winnowed out the types of people that can be considered to be involved in criminal corruption, as well as the types of interactions that are precluded by law. In other words, it is not only that the Court has narrowed bribery[35] only to explicit *quid pro quos*, but that it has reduced what can be a *quid* or a *quo*, who can be charged with giving or receiving one, and even what constitutes a *pro*.

The second development that can affect corruption backsliding is the expansion/creation of corporate personhood and the way in which this can lead to private interests driving politics and policy. This debate has been much more at the center of public debate and legal

32 *See* Lynn Adelman*, The Supreme Court and the Corruption of Democracy*, 38 RARITAN Q. R. 6, 9-11 (2019) (arguing that the Supreme Court is obtuse about corruption.).

33 *See, e.g.*, Daniel R. Pastor, *La Víctima y los Delicados Equilibrios del Proceso Penal: Una Reflexión Comparada* [*The Victim and the Delicate Balances of the Criminal Process: A Comparative Reflection*], DIRITTO PENALE CONTEMPORANEO (2014) (arguing that "a penal model that truly considers fundamental rights . . . is characterized by [its focus] on preventing the use of the State's repressive elements.") (translation by Author).

34 It should be clear that here I am discussing cases of corruption involving high ranking officials and large sums of money, not petty bribes.

35 Usually with respect to embezzlement, which is thought of as the clearest corruption crime. The issue of defining corruption will be addressed in Part I.

scholarship.[36] As I argue *infra*, the core disagreement in these cases has to do with when (if ever) private influence becomes corrupting,[37] which the Court's majority has found seldom occurs. This disagreement revolves around, again, what corruption is. The court has decidedly held that private interests are rarely corrupting, and moreover, are the *sine qua non* of democratic practice.

Nonetheless, for the Court's decisions to have an impact on corruption one need not resolve the issue of when influence becomes inappropriate. As discussed *infra*, a key determinant of corruption is whether people perceive it to be occurring or not, not whether it is in fact happening. The Court invalidating many of the mechanisms to control corporate influences in government can increase people's perception of corruption prevalence, which can in turn cause corruption to increase.

Finally, this article argues that in light of the general inadequacy of criminal law and campaign finance laws to target corruption, and the fact that much of corruption seems to be determined by expectations of behavior, informal or semi-formal governance norms are essential to control public graft. It is because of this that the unpunished and repeated abuses of public governance norms carried about by President Trump and his administration are so concerning. Whatever one may think of President Trump's administration, the fact that it has significantly defied presidential and governance norms is undeniable. From not releasing the President's tax records, to asking foreign nations to investigate political opponents, to hosting foreign dignitaries in hotels owned by his family, and to refusing to answer subpoenas, the executive has consistently gone against precedent in refusing to comply with ethics and other norms that have no actual enforcement mechanisms.[38] This context of repeated legal norm violations coming

36 For this reason, it occupies less of the analytical space in this paper.

37 As explained in Section I, I am referring to corruption as the abuse of public power for personal gain, not only as the existence of *quid pro quos*.

38 *See* Tanya Ballard Brown, *President Trump Doesn't Need To Release His Tax Returns—For Now*, NAT'L PUB. RADIO (Oct. 7, 2019, 10:10 AM), https://www.npr.org/2019/10/07/767830713/federal-judge-rules-trump-must-hand-over-8-years-of-tax-returns (regarding Donald Trump's refusal to provide his tax returns); Kate Brannen, *Trump's True Betrayal: A Pattern of Soliciting Foreign Interference in US Elections*, JUST SECURITY (Dec. 3, 2019), https://www.justsecurity.org/67581/trumps-true-betrayal-a-pattern-of-soliciting-foreign-interference-in-us-elections/ (discussing Donald's Trump's calls for foreign governments to investigate his political opponents); Alex Altman, *Trump Hotel: Conflicts of Interest in Washington, DC*, TIME (June 8, 2017), https://time.com/donald-trumps-suite-of-power/ (discussing potential personal conflicts on interest with Donald Trump

from the executive gives us reason to question whether our ropes can protect us from the sirens. After all, the institutional apparatus built to promote accountability and enforcement has largely been ineffective in reigning in Mr. Trump. And so, if we rely so much on norms, what could be the consequences of norm-erosion?

The notion that corruption is a multiple equilibria problem means that just like a country can become less corrupt, it can also become more so. Furthermore, moving out of a particular position in the equilibrium is very hard to do.[39] It is because of this that backsliding is so alarming. Of course, just like there are arguments as to how countries precisely move out of high corruption equilibria,[40] there can also be disagreements as to how a country may devolve. One may think that the legal developments outlined here are not enough for backsliding to occur. However, given the amount of uncertainty around how corruption is defeated, we should be wary of arguments that dismiss the idea of backsliding.[41]

This paper makes the argument that although the United States is not at immediate risk of becoming a high-corruption country, there are worrying signs and only partial answers. This article is organized as follows: Part I addresses the definition of corruption and how it has been characterized to function. This discussion is important because, as we will see in the next section, the U.S. government is only empowered to prosecute a narrow range of the behavior that can be considered corruption. Moreover, to understand why the U.S. is at risk of backsliding, we need to understand how corruption works. Part II outlines the legal and policy framework that exists in the United States to

hosting foreign dignitaries in his own hotels); Frank O. Bowman III, *Trump's Defense Against Subpoenas Makes No Legal Sense*, ATLANTIC (Jan 28, 2020), https://www.theatlantic.com/ideas/archive/2020/01/trumps-defense-against-subpoenas/605635/ (regarding Donald Trump's refusal to comply with subpoenas).

39 *See generally* Persson et al., *supra* note 21 (outlining the failure of a plethora of anticorruption reforms worldwide.).

40 *Compare* Stephenson, *Corruption as a Self-Reinforcing "Trap"*, *supra* note 24, at 6, *with* Bo Rothstein, *Anti-Corruption – A Big Bang Theory* (QoG Working Paper No. 2007:3, 2007) (describing the need for a "big bang approach" to anticorruption).

41 There is also an argument to be made in favor of being overly cautious. There are very high costs of corruption, addressed *infra* note 53, while there are few benefits of not protecting zealously against it. It may be argued that there are chilling effects as to the responsiveness of politicians to individuals or groups by curbing corruption, as the Supreme Court has done. However, as addressed in Section II this is a superficial conception of public representation, and also it is at the least very questionable that those chilling effects outweigh the potential costs of corruption uptick.

combat corruption; explaining why only a few and extreme set of actions can (and should) be criminally prosecuted, and the jurisprudential developments that have led to an expanded systemic or institutional corruption in the United States. The next part makes the case for the importance of governance and anti-corruption norms and how, given all of the above, corruption backsliding can happen (and may already be happening) in the United States. That section also addresses some objections to the idea of corruption backsliding. The final section outlines some policy proposals.

II. DEFINING CORRUPTION

A. A Problem with No Clear Boundaries

Despite corruption's long history, the definition of the term has remained elusive. As Francis Fukuyama pointed out, one of the problems of studying corruption is that it elicits limited conceptual precision.[42] The problem is not minor. Some have even taken the position that partly because corruption is difficult to define, a more constructive idea is to define its opposite.[43] Yet, because this paper addresses a set of behaviors it identifies as corrupt—and therefore problematic—it is worth outlining what those behaviors are.

The most widely used[44] definition of corruption is provided by TI: "abuse of entrusted power for private gain."[45] This definition, though popular, is not particularly useful. The word "abuse" is especially problematic because it invites relativism. Although there are clear instances of behavior that enter the definition, there are others that could very well fall within the scope of this definition that we may not consider corrupt per se. An example of the former is a public official guaranteeing a government contract after receiving a payment for

42 Francis Fukuyama, *What is Governance?*, 26 GOVERNANCE 347, 350-351 (2013).

43 *See* Bo Rothstein & Jan Teorell, *What Is Quality of Government? A Theory of Impartial Government Institutions*, 21 GOVERNANCE 165, 169 (2008) (arriving at the conclusion that the opposite is "impartiality in the exercise of public power"); Marcus Agnafors, *Quality of Government: Toward a More Complex Definition*, 107 AM. POL. SCI. REV. 433, 433 (2013); Bo Rothstein, *What is the Opposite of Corruption?*, 35 THIRD WORLD Q. 737, 745 (2014).

44 The World Bank has adopted this definition. *See, e.g.*, Vinay Bhargava, *The Cancer of Corruption*, WORLD BANK GLOBAL ISSUES SEMINAR SERIES (2005), *available at* https://perma.cc/YU8R-7BTJ. *See also* FISMAN & GOLDEN, *supra* note 29.

45 Anne Peters, *Corruption as a Violation of International Human Right*, 29 EUR. J. INT'L L. 1251, 1254 (2019); FISMAN & GOLDEN, *supra* note 29.

a private party. An example of the latter may be the revolving door between government and private industry. Recently, former mayor of Chicago, Rahm Emanuel, took an employment position with an investment bank.[46] Is this an abuse of entrusted power he had or not? On the one hand, it makes sense for an investment bank to hire Mr. Emanuel given his relevant experience, but on the other is he not now making a lot of money because of his prior positions in public office? The answer to the question of whether or not this is corruption probably falls in the eye of the beholder. However, a definition that leaves open such questions is not particularly useful for social science, let alone law.

Another problem with TI's definition is that "it focuses on the conduct of public officials and ignores the roles of private actors such as bribe payers and money launderers."[47] When thinking about corruption from a societal perspective we must think of it as a two way street. Of course, the police officer taking a bribe is engaging in corruption, but so is the individual paying the officer. There may be questions revolving around which is the more morally reprehensible party, but such questions are irrelevant with regard to the question of *what* corruption is.

In order to counter these problems with TI's definition, some scholars take a much more formalistic approach to describe the issue of corruption. Kevin Davis, for example, defines corruption as the legal terms "bribery" and "embezzlement."[48] I classify this definition as formalistic because it ties corruption to particular legal definitions. The issue with such a formalistic constraint is that each court may have varied interpretations of the acts of bribery or embezzlement such that its definitions may include non-corrupt acts and exclude corrupt acts. As further discussed *infra*, the Supreme Court in *McDonell v. U.S.*[49] defined bribery so narrowly that it is hard to fathom this type of bribery

46 Ben Miller, *Former Chicago Mayor Rahm Emanuel Gets New Job with NYC Investment Bank*, CHI. BUS. J. (June 7, 2019, 9:18 AM EDT), https://www.bizjournals.com/newyork/news/2019/06/06/former-chicago-mayor-rahm-emanuel-gets-new-job.html.

47 Kevin E. Davis, *Corruption as a Violation of International Human Rights: A Reply to Anne Peters*, 29 EUR. J. INT'L. L. 1289, 1290 (2019).

48 *Id.*

49 McDonnell v. United States, 136 S.Ct. 2355, 2370 (2016).

ever actually occurring in low-corruption[50] countries or among sophisticated parties.[51]

The Court's definition of bribery in *McDonell* excludes actions by public officials that may in fact be considered as *quo* to the private individuals *quid*, but that do not arise to the level of a public act. For example, recommending the hiring of the payer's son to a position in a particular government department would not be an official act according to the Court. However, actions like these are precisely what we mean when we talk about corruption. They are actions that lead public officials to act on behalf of private individuals after they have received a payment, when the official has no real purpose to act on the individual's behalf but for the payment they received. Notably, such actions would be covered by TI's definition.

McDonell is not a case about corruption generally. Rather, it is a case about the statutory definition of bribery. The purpose of mentioning it here is simply to point out that narrowing the definition of corruption to "bribery" or "embezzlement" alone carries significant problems as well. Different statutes will have different borders and different courts will reach different conclusions as to the location of those borders.

So, we are back to where we started: a place of limited conceptual precision. Part of the problem is that any definition of corruption is tied down to other concepts which in turn have no fixed or even common understanding: abuse, bribery, embezzlement. However, the above discussion serves to roughly delineate the behaviors that corruption as I understand it refers to: public officials requesting money or goods to act in a particular way, paying (or promising future payment) to public officials to act now or in the future in a way that they would not otherwise act but for said payment or promise, and officials stealing public funds for their own use. I will refer to these as the "core corruption acts" throughout the paper. This may not be satisfying insofar as it does not tell us whether behaviors such as clientelism,[52]

50 Albeit plagued with biases and inexact, TI's "Corruption Perception Index" is a tool that can be used to identify which countries are low corruption. Because index scores countries on a scale of 0-100, it is possible to use a minimum score as a benchmark for which countries can be considered low corruption. I propose a score of 70, meaning only 24 countries would be in this category.

51 Referring to parties that have access to lawyers, accountants, and financiers that can devise schemes to curtail the law.

52 Susan C. Stokes, *Political Clientelism*, *in* THE OXFORD HANDBOOK OF POLITICAL SCIENCE, 604 (Robert T. Goodin & Susan C. Stokes eds., 2011) (clientelism defined as giving material goods in return for electoral support).

nepotism, or favoritism are corrupt. However, for the purposes of this paper, the attention should lie on the core acts of corruption. Not because these are the only destructive[53] behaviors, but because these are the most obviously problematic and universally condemned.[54]

B. What Kind of Problem is Corruption?

Despite the fact that we cannot find a satisfactory definition of corruption, we can still describe what kind of problem it is. Many scholars have followed traditional law and economics account of crime generally,[55] and identified corruption to be a problem of incentives. In simple terms, according to this framework, people engage in corruption because its expected payoff is greater than the cost of punishment (usually because the probability of punishment is low or the severity thereof is limited). Mainstream models of corruption today have grown[56] from these basic conceptualizations to frame corruption

53 Corruption has been linked to a great number of development struggles. *See* Paolo Mauro, *Corruption and Growth*, 110 Q. J. ECON. 681, 681 (1995) (corruption has been found to decrease total investment); Cheryl W. Gray & Daniel Kaufmann, *Corruption and Development*, FIN. & DEV. 7, 9 (March 1998) (corruption has been found to affect foreign direct investment); DANIEL KAUFMANN ET AL., GOVERNANCE MATTERS (World Bank Institute 2009) (corruption has been found to affect per capita income); Sanjeev Gupta et al., *Does Corruption Affect Income Inequality and Poverty?*, 3 ECON. GOVERNANCE 23, 23 (2003) (corruption has been found to have an impact on inefficient government spending); Toke S. Aidt, *Corruption, Institutions, and Economic Development*, 15 OXFORD REV. ECON. POL'Y 271, 288 (2009) (even those who contest the view that corruption has an impact on GDP acknowledge that it leads to "unsustainable development").

54 Persson et al., *supra* note 21, at 455 (perhaps surprisingly for some, studies have shown that no matter what the level of corruption in a country actually is, individuals think the outlined corrupt behaviors are wrong).

55 *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, *in* ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 1 (Gary S. Becker and William M. Landes, eds., 1974).

56 This can be explained in part due to the challenges posed by psychology, generally, and behavioral economics, specifically, on rational choice models of crime. *See*, *e.g.*, DAN ARIELY, THE (HONEST) TRUTH ABOUT DISHONESTY 11-30 (2012) (arguing that people do not actually think of the odds or consequences of punishment when committing crimes or lying).

either as an equilibrium[57] or a collective action problem.[58] These notions, though distinct, are similar descriptors of the phenomenon. This section explains how these frameworks help understand corruption and proposes that they provide the clearest and most accurate way to understand the phenomenon.

The equilibrium framework holds, in sum, that corruption can have multiple equilibria in society, meaning that any society could be in a position of high or low corruption (for simplicity sake, imagine there are only two possible equilibria). According to the model, people live in either equilibria based on what individuals' expectations are of each other's behavior. Places in the high-corruption equilibrium self-reinforce corrupt behavior because "the ubiquity of corruption strengthens individuals to behave corruptly,"[59] and vice versa. The equilibria are reinforcing for numerous reasons: the more corruption becomes widespread, the probability of detection and punishment lowers; corruption can buy out the judicial and political system thereby securing it; as more people engage in the behavior it is less shameful or stigmatizing (and thus more likely) for anyone to do so; if it occurs a lot in an industry, then only those people willing to engage in it will be attracted to that industry; and corruption can have macro-economic or social impacts that in turn cement corruption in any given State. The same, but opposite, is true for countries at low-equilibrium levels: the less corruption occurs, the probability of detection and punishment increases, the harder it can be to carry political and judicial clout, the more shameful and stigmatizing it will be, et-cetera.

Importantly, under an equilibrium model, what people actually want or believe is irrelevant. Whether people believe corruption is right or wrong—in a moral and/or practical sense—has no bearing on the amount of corruption there is in that place because corruption is

57 *See generally* FISMAN & GOLDEN, *supra* note 29; Christopher Kingston, *Social Structure and Cultures of Corruption*, 67 J. ECON. BEHAV. & ORG. 90, 91 (2008); SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM, 7-88 (1999). Some have formalized the equilibrium dynamic through experiments or models arriving at the same conclusions. *See*, *e.g.*, Elvio Accinelli & Edgar J. Sánchez Carrera, *Corruption Driven by Imitative Behavior*, 117 ECON. LETTERS 84, 85-86 (2012); Monica Violeta Achim, *Cultural Dimension of Corruption: A Cross-Country Survey*, 22 INT'L ADVANCES ECON. RES. 333, 334-35 (2016).

58 Persson, et al., *supra* note 21.

59 Stephenson, *Corruption as a Self-Reinforcing "Trap"*, *supra* note 24, at 10.

not determined by individuals' beliefs but rather the equilibria in which they live. Each equilibrium is, in a sense, a trap.[60]

This model is very similar to the framing of corruption as a collective action problem.[61] Under this view, corruption—like any collective action problem—endures because the cost of confronting corrupt institutions is too concentrated, but the benefits are spread out.[62] This is true regardless of whether the people want to fight corruption or not. Even those who believe corruption is wrong[63] will engage in it because of the expectations of what others will do.[64]

It is worth clarifying that both equilibrium models and collective action ones allow for certain individuals to defy social expectations. It is not that there is either all corruption or no corruption. Individuals can go against the grain in either case, but because those individuals bear many costs and (almost) no benefits, breaking out of the collective action problem or changing equilibria is extremely complicated.

Although most scholars would resist the urge to use the language of social norms in this context, it is a useful shorthand to explain the models.[65] Under an equilibrium view or a collective action view,

60 *Id.*

61 *See* Persson et al., *supra* note 21; Monika Bauhr & Naghmeh Nasiritousi, *Why Pay Bribes? Collective Action and Anticorruption Efforts* (QoG Working Paper Series 2011:18, December, 2011), https://perma.cc/RAE7-DGQT.

62 *See* Persson et al., *supra* note 21 (for a more complete breakdown of this thesis).

63 *See id.* (data shows that regardless of actual levels of corruption, people all across the globe agree that certain corrupt actions are bad. Perhaps there are differences in terms of attitudes of the reprehensibility of particular corrupt acts but all over there is consensus that acts of corruption are undesirable).

64 *See* Rothstein & Teorell, *supra* note 16 (a particularly compelling illustration of the theory is in the context of electoral politics. Even a candidate who, in principle, refuses to embezzle funds for improper campaign use, will in the end succumb to doing so if she believes her opponent will do so. Because in high corruption countries the expectation is that the rival will engage in corruption, then the incentives for the "honest" candidate will be to also do so, otherwise she will lose); Pedro Gerson, *Trampas de Corrupcion en Mexico*, FOREIGN AFF. LATINOAMÉRICA (I have referred to this phenomenon previously as a "corruption trap.").

65 *See generally* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995) (By this I do not mean that corruption is cultural. Firstly, even the notion that corruption is cultural does not mean that it is fixed—that would be to argue that it is biological. Quite the contrary, social theory has a long tradition of seeking answers as to how and why particular social expectations do change (and therefore clearly acknowledging the possibility for change. Nonetheless, my use of

corruption is predicated on and predicted by the extent to which corruption is a social norm. Although gathering empirical evidence of this matter is notoriously complicated,[66] some empirical analyses have tried to isolate the impact of social norms on corruption and have found that social norms are indeed determinative in understanding the prevalence of corruption. One study found, for example, "that bribery attitudes persist through generational change [and that] corruption attitudes are associated with, and potentially a significant driver of, corrupt behavior."[67] Another study concluded that "about half of the level of corruption in countries is explained by the national culture."[68]

This literature is not suggesting that corruption persists because people have different thresholds of what is acceptable behavior. It is not that bribes in the "Western" context are just considered gift-giving in other countries and this is why corruption prevails in those other

social norm here is only as a more readable and understandable term for societal expectations.).

66 *See e.g.*, ALBERT O. HIRSCHMAN, RIVAL VIEWS OF MARKET SOCIETY AND OTHER RECENT ESSAYS 176-182 (1986). This is not only because of the already-addressed issues of studying and measuring corruption generally, but also because disentangling the existence and the direction of causality in this context is particularly fraught. After all, how does one isolate culture from institutions and structures? The way institutions are actually lived and played out, is impacted by social norms and vice versa.); DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL, 368-403 (2013).

67 Alberto Simpser, *The Culture of Corruption Across Generations: An Empirical Study of Bribery Attitudes and Behavior*, at 3 (May 1, 2016), https://perma.cc/QF87-7KUM.

68 Monica V. Achim, *Cultural Dimension of Corruption: A Cross-Country Survey*, 22 INT'L. ADVANCES ECON. RES. 333, 343 (2016). *See* Abigail Barr & Danila Serra, *Corruption and Culture: An Experimental Analysis*, 94 J. PUB. ECON. 862, 869 (2010) (finding a correlation between cheating and country of origin.); Raymond Fisman & Edward Miguel, *Corruption, Norms, and Legal Enforcement: Evidence from Diplomatic Parking Tickets*, 115 J. POL. ECON. 1020, 1045-46 (2007) (for the widely-cited paper showing that the number of parking tickets that U.N. diplomats tracked inversely with the prevalence of the rule of law in the country of origin, meaning that diplomats from corrupt countries received more tickets than those from non-corrupt countries). *But see* Raquel Fernandez, *Does Culture Matter*, *in* HANDBOOK OF SOCIAL ECONOMICS 481-510 (Jess Benhabib et al. ed. 2011) (as others have argued, both Fisman and Miguel and Barr and Serra's findings could be because of the likelihood of punishment and not because of social norms); *see also* Simpser, *supra* note 67.

places.[69] This reading would be incongruent with the evidence showing that there "seems to be decisive moral disapproval of corruption in the majority of countries, including the most corrupt ones."[70] Quite the contrary, precisely because of the difficulty of ascribing causality in these studies, at most what we can infer from these studies is that corruption—as the equilibrium and collective models described above predicted—is reinforcing.

It is not only that empirical evidence suggests the validity of the equilibrium or collective action models, but that other leading[71] competing frameworks do not seem to track as well with reality.[72] In many policy circles, corruption is discussed not as an equilibrium, but rather as a particular kind of principal-agent problem.[73] This can be articulated in a number of ways. Most commonly it means that citizens are

69 *See, e.g.*, Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 J. ECON. LITERATURE 1320, 1330 (1997); SUSAN ROSE-ACKERMAN, *supra* note 57.

70 Persson et al.*, supra* note 21, at 455.

71 There are many different ways in which corruption has been understood. For example, the modernization argument posits poverty as the culprit of corruption because in poor countries it is much easier for government officials to accept bribes. *See* FISMAN & GOLDEN, *supra* note 29, at 15. The rent-seeking argument explains corruption as a behavior of public officials and private actors who see opportunities to squeeze rents. Under this view we expect countries with more regulations to be more corrupt because those regulations can be opportunities for rents. Also, there are those who argue that corruption is a feature of non-democratic regimes. This last explanation has been greatly called into theoretical and empirical question. *See* Matthew Stephenson, *Corruption and Democratic Institutions: A Review and Synthesis*, *in* CORRUPTION: GLOBAL INFLUENCES, POLITICS AND THE MARKET 92-133 (Susan Rose-Ackerman & Paul Lagunes eds., 2015) (for a good synthesis of the scholarship). However, all of these either are marginal within the literature or are different versions of the principal-agent problem discussed.

72 My argument is not that they are mutually exclusive, but simply that even as complementary explanations the collective action/equilibria articulation serves better to explain many features of corruption, most saliently its stickiness.

73 *See* Nico Groenendijk, *A Principal-Agent Model of Corruption*, 27 CRIME, L. & SOC. CHANGE 207, 217-22 (1997). Corruption can clearly be both a collective action problem and a principal-agent problem. Heather Marquette & Caryn Peiffer, *Corruption and Collective Action* (DLP Research Paper 32, 2015). Some have argued that the explanatory power may be more context-based. *See* Grant Walton & Ainsley Jones, *The Geographies of Collective Action*, *Principal-Agent Theory and Potential Corruption in Papua New Guinea* (Develop. Pol'y. Ctr. Discussion Paper No. 58, Jun. 28, 2017), http://devpolicy.org/publications/discussion_papers/DP58_Geographies-collective-action-PNG.pdf.

the principals and bureaucrats are the agents.[74] This model emphasizes that the problem of corruption boils down to information asymmetries between agents and principals. For example, citizens do not want their officials to take bribes, but they have no way of knowing if they do, so officials take them. If that were the case, the solutions would be to create ways to eliminate or lessen those information asymmetries.[75]

This model is attractive because it provides an institutional blueprint for reducing levels of corruption. It has been translated into anti-corruption packages that prioritize policies that enhance transparency, create mechanisms for auditing, and seek to solidify the position of certain institutions like the press.[76] The issue is not whether individually each of these policies are good or not, or valuable in a particular way (they may be), but if they have helped in reducing levels of corruption. The overwhelming conclusion is that they have not. In fact, it is not an exaggeration to note that these policy measures have failed almost entirely.[77] Most countries that have implemented some version of these packages have similar levels of corruption than they did before the policies were implemented.[78]

If the principal-agent theory were complete, we would expect that policy prescriptions creating oversight and transparency would have a significant impact on corruption levels; empirically, they have not. On the other hand, the equilibrium models predict that these measures are unlikely to be successful unless they are able to change social attitudes because corruption is a product of expectations (or, as I've referred to

74 Another articulation, which has become more common in the U.S. after the election of Donald Trump, is that elected officials are the principals and bureaucrats are the agents.

75 Similar conclusions are reached by following a cost-benefit analysis.

76 More specifically, these packages have pushed for more meritocratic recruitment, less public official discretionary spending (or discretion in general), increased political and economic competition, and more public accountability mechanisms, as well as rigorous administrative audits, increased public officials' salaries, and more public transparency. *See* U.N. OFF. ON DRUGS & CRIME, THE GLOBAL PROGRAMME AGAINST CORRUPTION: U.N. ANTI-CORRUPTION TOOLKIT (2d., Feb. 2004); U.N. DEV. PROGRAMME, ANTI-CORRUPTION PRACTICE NOTE (Feb. 2004).

77 Persson et al, *supra* note 21.

78 The number of countries that have successfully moved from high corruption to low corruption is very small. Furthermore, often these countries reduced corruption while at the same time adopting antidemocratic measures at which most people living in democratic countries would balk. S*ee* Jon S.T. Quah, *supra* note 16 (for examples of Singapore and Hong Kong outline).

them *supra*, social norms). This is not only because the equilibria are reinforcing, but because of the strong social punishments for deviating from expectations.[79] One would think that the law is stronger than these informal punishments;[80] however, evidence suggests that legal reforms that have not been accompanied by a transformation in social attitudes could have the opposite intended effect.[81]

An institutional understanding of corruption implies that once the right institutions are in place then the country in question will have a functioning and non-corrupt government. However, the literature surveyed suggests that regardless of the institutions, if people live in a system where corrupt behavior is the norm[82] then that will be a determinant of their interactions, regardless of oversight. It is, one could say, the proverbial elephant in the room. This is true both at high and low levels of government. If an individual expects a policeman will accept or demand a bribe to let her go from a traffic stop, or that a governor will do the same to grant her a government contract, then she will engage in corruption because she believes that is the expectation of the other party. It does not matter what she believes about the value or reprehensibility of bribery; because it is the norm, it then will be

79 There is a wide variety of literature explaining how these mechanisms work. *See*, *e.g.*, James J. Chriss, *Chapter 3: Informal Control*, *in* SOCIAL CONTROL: AN INTRODUCTION (2013), for a general overview of informal measures of social control.

80 The problem of what causes legal compliance is unresolved. While standard accounts have focused on law as deterrence or law as legitimate, newer accounts have focused on its expressive powers to coordinate and inform individuals. *See* RICHARD MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS (2014) (explaining that it is probable that each of these mechanisms does some of the work, and how much varies contextually. However as suggested here, laws by themselves—through whichever mechanism it may be—are not solely responsible for their own compliance).

81 *See* Daron Acemoglu & Matthew O. Jackson, *Social Norms and the Enforcement of Laws*, 15 J. EUR. ECON. ASS'N 245, 245 (2017) (concluding "that laws that are in strong conflict with prevailing social norms may backfire, while gradual tightening of laws can be more effective by changing social norms.").

82 A fuller account of corruption will necessarily involve an account of how corruption occurs, of the different actions that lead to it, and how a generalized understanding came to be. Although I believe legal reformers should engage with this anthropological understanding of corruption to fully understand and address corruption, this paper is not the place for said discussion. *See* Lessig, *supra* note 65, at 1019-34 (for an understanding of why this process of construction is so important.).

followed. As long as this is unchanged then transparency and oversight measures are just obstacles to get around.

Understanding corruption as an equilibrium leads us to the conclusion that institutional arrangements will not be able to fully protect a country that becomes increasingly tolerant of corruption. Fortunately, countries with low corruption levels should expect the same corruption stickiness, meaning that corruption will not be able to spring up overnight. Nonetheless, the model and the literature outlined in this section suggests that if unpunished, corrupt behavior starts to become the norm, expectations about corruption may then change, and then there is no reason why a low-corruption country cannot move into a high-corruption equilibrium. The next section describes the current institutional and legal framework in the United States and shows why much corrupt behavior (or at least one that people perceive to be corrupt) is not punished or punishable.

III. CORRUPTION IN THE UNITED STATES: STRUCTURAL WEAKNESSES HIDDEN BY INSTITUTIONAL SOUNDNESS

A. Institutional Quality to Fight Corruption

Summarizing the entire administrative apparatus in the U.S. devoted in some way to control corruption is an incredibly daunting task. The fundamental issue is that many laws, committees, rules, and procedures are not devised with an anti-corruption focus in mind, but still in some way play a part in promoting anti-corruption goals. For example, the Government Accountability Office ("GAO") is mainly designed to ensure the effective and efficient operation of government programs. The GAO carries out a number of cost-benefit analyses that necessarily lead to looking at whether any government program is being defrauded or if there are signs of embezzlement.[83]

Nonetheless, for the purposes of this article, it is not necessary to outline all the institutions that can, and potentially do, have an anti-corruption effect; rather it is necessary only to point out the varied nature, "strength[,] and high development [of U.S.] anti-corruption laws and enforcement agencies."[84] A way to see this is to look at the

83 *See, e.g.*, *About FraudNet*, U.S. GOV'T ACCOUNTABILITY OFF., https://perma.cc/D76H-EWHQ (last visited Mar. 22, 2020).

84 *U.S. Anti-Corruption Oversight: A State-by-State Survey*, COLUM. L. SCH.: CTR. FOR THE ADVANCEMENT OF PUB. INTEGRITY (2016), https://www.law.columbia.edu/capi-map.

various "anti-corruption toolkits"[85] formulated by international experts and see how the U.S. has implemented policies in line with these recommendations. Anna Persson et al., have summarized the content of these toolkits very effectively, saying:

> In particular, to close the loopholes for corruption the international community prescribes a holistic anticorruption strategy, targeted at reducing discretion of public officials through privatization, deregulation, and meritocratic recruitment; reducing monopoly by promoting political and economic competition; increasing accountability by supporting democratization and increased public awareness (for political accountability) and bureaucratization (for administrative accountability); improving salaries of public officials, thereby increasing the opportunity cost of corruption if detected; improving the rule of law so that corrupt bureaucrats and politicians can be prosecuted and punished; and encouraging greater transparency of government decision making through deepening decentralization, increased public oversight through parliament, an independent media, as well as through the creation and encouragement of civil society watchdogs.[86]

The extent to which the United States is effectively pursuing these goals at a national or subnational level can be—and often is—contested. Nonetheless, it is fairly uncontroversial to say that if we look at each component part of the toolkit as an objective, there are at the very least efforts, and more likely institutions and laws, that promote said objectives. What follows is a discussion of some of the various institutions devoted to these objectives.[87]

---

85 *See* Persson et al., *supra* note 21, at 453 (for mainly legal reforms tools designed to curb corruption around the world).

86 *Id.*

87 It is not necessary to discuss how each objective is reached because often these debates will sidetrack the discussion. For example, the deregulation objective. It is true that in the U.S. "regulation is more common than deregulation," however deregulation can be ignored in the context of discussing anti-corruption toolkits in the U.S., because that objective is related to the use of extensive red tape in state-owned enterprises that is then used as an excuse or justification of corruption (at times by foreign companies). Because of the lack of state-owned industry in the United States, we can avoid discussing deregulation here because it is a reality in the sense that anti-corruption reformers mean it. For an analysis of the extent of regulation in the

In terms of meritocratic recruitment, the United States has the Federal Civil Service and the Office of Special Counsel, which ensures that meritocratic employment practices occur at the Federal level.[88] Ensuring and promoting economic competition are various laws like the Sherman and the Clayton Acts, as well as institutions like the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice. Administrative accountability is also pursued by various mechanisms. Most importantly in the executive, perhaps,[89] is the Federal Inspectors General, which is "tasked with conducting audits and investigations to combat waste, fraud, and abuse in the agency's programs and operations."[90] The legislative and the judicial branches also have various committees and offices devoted to ethics and accountability.[91]

More at the center of the toolkit, and directly focused on anti-corruption, there are numerous institutions designed to improve the rule of law. The Department of Justice has the specialized Public Integrity Section which has specialized skills and capabilities to prosecute corruption. Similarly, the Federal Bureau of Investigation has a Public Corruption Unit that is similarly situated to develop institutional capital for the particular and complicated task of investigating corruption schemes. Also, there are numerous mechanisms

U.S., *see* Saul Levmore, *Addictive Law*, (U. Chi. L. Sch. Aug. 20, 2019), https://ssrn.com/abstract=3441870.

88 There is some evidence showing that this service is indeed meritocratic. *See* Song Soo Oh & Gregory B. Lewis, *Performance Ratings and Career Advancement in the US Federal Civil Service,* 15 PUB. MGMT. REV. 3 (2013) (analyzing panel data from 1998-2003 and finding that positive and negative ratings made individuals more and less likely to receive promotions (respectively) to the averagely ranked employees).

89 There are various others like the above-mentioned GAO, but also the Office of Government Ethics.

90 Oversight and Enforcement of Public Integrity: A state-by-state study, *supra* note 54.

91 The legislature has the Senate Select and the House Committees on Ethics as well as the Office of Congressional Ethics, which can investigate and/or recommend administrative actions for violations of conduct codes or laws. The judiciary has the Circuit-Level Judicial Councils which investigates complaints against federal judges and the Administrative Office of the United States Courts which focuses on financial disclosure guidelines.

promoting[92] and protecting[93] whistleblowers. There are laws criminalizing bribery,[94] conflicts of interest,[95] conspiring to defraud the government,[96] embezzlement,[97] nepotism,[98] obstruction of justice,[99] false statements,[100] fraud,[101] gratuities,[102] extortion,[103] and a few long-arm statutes[104] targeting state and local conduct.[105] Administratively, there

92 The availability of *qui tam* suits, for example, has been successful in bringing to light numerous fraud claims (as well as creating a specialized industry of whistleblower attorneys). Just in the fiscal year 2019, for example, the U.S. Department of Justice recovered $ 3 billion in False Claims Act suits. *See* Press Release, U.S. Dep't of Justice, Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 9, 2020), https://perma.cc/GKD6-Q6WS.

93 5 U.S.C. §§ 2302(b)(8), 2302(b)(8) (prohibiting retaliation against whistleblowers for disclosing information or filing a complaint); 5 U.S.C. § 2302(b)(13) prohibits requiring federal employees to sign a non-disclosure agreement, precluding whistleblowing.

94 18 U.S.C. §§ 201, 203; 5 U.S.C. § 7353.

95 18 U.S.C. §§ 204-211, 219; 5 U.S.C. app. 4 §§ 501-502; 5 U.S.C. § 7321-26; 5 U.S.C. app. 1 §§ 101-11; 5 U.S.C. § 7351; 5 U.S.C. § 7342.

96 18 U.S.C § 286-87; 31 U.S.C. § 1341.

97 18 U.S.C. §§ 641, 648, 872; 18 U.S.C. § 1951.

98 5 U.S.C. § 3110.

99 18 U.S.C. §§ 1503, 1505, 1510 (2020).

100 18 U.S.C. §§ 1001, 1621 (2020).

101 18 U.S.C. §§ 1341, 1343 (2020).

102 18 U.S.C. § 201(c) (2020), it is considered a lesser included of bribery. Discussed *infra*.

103 The Hobbs Act, 18 U.S.C. §1951, criminalizes obtaining property from another "with his consent . . . under color of official right," discussed *infra* at Part B.

104 18 U.S.C. § 666; Federal Program Bribery and Travel Act, 18 U.S.C. § 1952. The extent to which Federal law can reach State conduct is discussed in the next section.

105 In this section and in the subsequent ones, I am not discussing every law related to corruption, of course. I will not be addressing the Foreign Corrupt Practices Act, for example, which is central to U.S. law enforcement, although as its title suggests is mainly concerned with corruption abroad. There are two statutes not outlined but that feature in a number of anti-corruption prosecutions: 18 U.S.C. § 1001 (prohibiting making a false statement to the Federal government, which can happen frequently in the conduct of a graft investigation), and 12 U.S.C. § 1961 *et. seq*. (the RICO provision which allows the prosecution of a wide range of corrupt acts in one single charge). I do not outline these in detail because, rather than creating more grounds for prosecution, they are tools that can be used in enforcing anti-corruption laws.

are rules guiding what to do in cases of conflicts of interest and precluding the misuse of public position.

Beyond government, there is a healthy third sector that focuses on transparency and anti-corruption issues. For example, there is Transparency International, which works on improving transparency and civil engagement. There is also the Sunlight Foundation, which, as its name suggests, tries to use transparency to ensure government accountability. Another one, cited in this paper, is the Center for the Advancement of Public Integrity at Columbia Law School, which carries research on corruption and integrity. The extent of non-governmental organizations and a robust First Amendment[106] means that the United States also satisfies the toolkit requirements for civil sector engagement and participation.

With the anti-corruption institutional robustness just described, it would seem that enough efforts are being made to protect against backsliding in the United States. However, recent events have shown that many rules designed to promote good conduct have no enforcement teeth or mechanisms.[107] This means that criminal liability remains as the most important deterrent for corruption. The next section discusses the efficacy of this regime.

B. Criminal Liability for Official Corruption in America: A Small and Shrinking Regime

Part I alludes to the fact that anti-corruption is riddled with a massive line-drawing problem. If we have a hard time defining what corruption is, then it should be obvious that we will have a hard time devising statutes that punish it. Nonetheless, criminal statutes can try to

106 There is, of course, great debate about the extent to which the First Amendment protects all kinds of speech; however, that speech concerned with politics is protected is uncontroversial. *See* Michele Cotton, *Correcting the Generally Accepted but Unjustified Interpretation of the Free Speech Clause,* 17 FIRST AMEND. L. REV. 1, 14-18 (2018).

107 This is further discussed *infra* in Part III. Briefly, many legal scholars and public commentators have discussed the extent to which the current President has deviated from informal and formal-but-not-punishable norms used to constrain officials. *See e.g.*, Neil Seigel, *Political Norms, Constitutional Conventions, and President Trump*, 93 IND. L. J. (2018) (describing some of the ways President Trump has violated political norms and constitutional conventions, and the implications this has on the American political system as a whole); David A. Graham, *The Last Constraint on Trump*, ATLANTIC (Apr. 16, 2019) (arguing that the president's aides disobeying his wishes have proven to be the best protection for the Rule of Law in the U.S.).

be written to match a more expansive or more restrictive idea of what corruption is. Some may argue that compared to some countries,[108] U.S. criminal law is corruption-lenient. However, the reality is that Federal anti-corruption criminal statutes in the United States are largely consistent with most criminal anti-corruption laws worldwide. A feature of the American system is that there is no public corruption chapter or code.[109] Not only that, but there is not even a uniform definition of bribery.[110] The lack of uniformity does not mean that the American federal system is weaker than other legal regimes that do centralize anti-corruption provisions; it only means that it is more

108 Other countries have been much more expansive in determining what is considered criminal. For example, the Canadian Criminal Code prohibits both active and passive bribery, and the objects of bribery are not limited only to money. Also it criminalizes "frauds on the government" to include an expansive list of impermissible acts outside of promises for money or benefits committed to influence officials. Canada Criminal Code, R.S.C. 1985, c. C-46, § 380(1). This section of the code also expressly prohibits and imposes criminal liability including terms of imprisonment for "breach of trust" by a public officer, selling or purchasing offices, influencing municipal officers, and influencing or negotiating officer appointments. Canada Criminal Code, R.S.C. 1985, c. C-46, § 122. France and Mexico meanwhile, recognizing the problem of defining corruption, have created independent agencies tasked with better defining and proposing new regulations for what should be precluded. They have both imposed affirmative obligations on businesses to create, implement, and enforce anti-corruption policies; and introduced a deferred prosecution mechanism for legal entities. German law also imposes a positive duty on business owners/employers to prevent employees or agents of that business from engaging in prohibited behavior. In South Korea, both acts of corruption, including bribery, and the term "public official" have been interpreted very broadly (bribery can include monetary gifts as little as $27 and non-monetary gifts or benefits and "public officials" can include private journalists and public school teachers). This brief list is not meant to be a showcase of best practices, but rather as an example of other countries taking a more comprehensive or punitive approach to the criminalization of corruption.

109 This is different than in many countries around the world. Germany and Mexico, for example, have a chapter in their criminal codes directly targeting corruption. *See* STRAFGESETZBUCH [StGB] [PENAL CODE], §§ 331-338, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (Chapter 30, "Offenses Committed in Public Office" in Germany); Title 10, "Crimes committed by public servants" in Mexico). Both of these countries have other regulations impacting corruption as well, but the criminal law is much more unified than in America.

110 *See* United States v. Zacher, 586 F.2d 912, 915 (2d Cir. 1978); *see also* U.S. v. Ng Lap Seng, 2019 WL 3755676, (2d Cir. Aug. 9, 2019) and McDonnell v. United States, 136 S.Ct. 2355 (2016), discussed *infra*, where courts found that the meaning of bribery was different in 18 U.S.C. § 201 and § 666.

dispersed.[111] As I discuss in this section, the Supreme Court has consistently interpreted these statutes narrowly, paving a treacherous route for prosecutors seeking to enforce bribery and embezzlement statutes.

The Supreme Court's analyses of anti-corruption statutes can be explained by looking at how criminal law is interpreted generally. While not all Supreme Court decisions have been pro-defendant, the Roberts Court has handed down several opinions in this direction.[112]

111 *See* Peter Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ J. INT'L & COMP. L. 793, 798 (2001) (explaining that "the United States does not have a coherent set of domestic anti-corruption laws," and that "one can best describe the federal law as a hodgepodge.").

112 *See e.g.*, Elonis v. United States, 135 S. Ct. 2001 (2015) (The petitioner Elonis was convicted under 18 U.S.C.S. § 875(c), for posting threatening statements on a social media website. His conviction, however, was overturned because there was insufficient evidence to prove that his mental state was such that he believed he was communicating a threat. The jury had been wrongly instructed that the government need only prove that a reasonable person would consider Elonis' communication a threat. However, this negligence standard was not enough to convict the petitioner under 18 U.S.C.S. § 875(c).); McFadden v. United States, 135 S. Ct. 2298 (2015) (Petitioner McFadden was arrested and charged with distributing controlled substance analogues under 21 U.S.C.S. § 841(a)(1). This statute required when dealing with a controlled substance analogue, the defendant must have knowledge that the substance was controlled under the Controlled Substances Act or the Controlled Substance Analogue Enforcement Act of 1986. The district court and the appellate court failed to apply the knowledge standard which led the Court to reverse McFadden's conviction.); Henderson v. United States, 568 U.S. 266 (2013), (Petitioner Henderson was criminally convicted and sentenced, but before his appeal was heard, the Supreme Court issued a ruling making his sentence unlawful. When Henderson claimed error of law in his sentencing at the appellate court, the court said the defendant could not show that the error was plain because and that an error was plain only if it was clear under current law at the time of the initial trial. The Supreme Court remanded his case because it found that the error only need to be plain at the time of appellate review. The Court's ruling was based in part on an aversion to treating similarly situated individuals unjustifiably different from each other based on timing.); Riley v. California, 573 U.S. 373 (2014) (Petitioner Riley was stopped for a traffic violation which led to an arrest on weapons charges. During and after the arrest, police searched the digital content on Riley's phone for evidence. The Supreme Court ruled that the search was unlawful because police officers generally could not, without a warrant, search cell phones seized from a defendant. The Court's ruling was in part based on privacy concerns, given the large capacity that cell phones have for storing data. As a result, Riley's conviction was reversed.); Johnson v. United States, 576 U.S. 591 (2015) (Petitioner Johnson pled guilty to weapons charges resulting from him being a felon in possession of a firearm. He was sentenced to a 15-year prison term under the Armed Career Criminal Act. His

These decisions have turned on foundational elements of criminal law, as well as doctrines of interpretation, all of which favor the defendant.[113] Something as foundational as the presumption of innocence does much to ensure criminal procedure (and substance)[114] protects the individual from the State. When read in this light, the Supreme Court's reading of anti-corruption criminal statutes is no longer agonistic,[115] but rather entirely consistent with much of criminal law jurisprudence, generally. Before further developing that argument however, it is important to understand how the Supreme Court has narrowed the understanding of anti-corruption statutes.

At the center of the statutory constellation punishing bribery is 18 U.S.C. §201, the federal bribery statute. This section targets both the choate crime of paying and taking bribes, as well as the inchoate crimes of offering/promising and/or accepting bribes. The statute is particularly targeted at public officials as the payees, and this has been broadly interpreted to include anyone who "occupies a position of public trust with official federal responsibilities," regardless of the "form of delegation of authority."[116] What is considered a bribe has also been interpreted with some breadth. The statute says that the

conviction was reversed and remanded because imposing that increased sentence under 18 U.S.C.S. § 924(e)(2)(B)'s residual clause violated the Fifth Amendment's guarantee of due process. That ruling was in part based on the vagueness of the residual clause, the lack of fair notice to the defendant, and the possibility that judges would enforce the residual clause arbitrarily.).

113 A discussion of all these elements and doctrines is beyond the scope of this paper. As discussed *infra*, I am referring to doctrines such as the Rule of Lenity and the need for criminal law not to be "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."

114 Victor Tadros, The Ideal of the Presumption of Innocence, 8 CRIM. L. & PHIL. 449 (2014) (arguing that the presumption of innocence is not merely a procedural tool but has implications on substantive law as well). Contrast this with Hamish Stewart, who argues that the presumption of innocence has many effects on trial procedures, but little on the definition of criminal laws. Hamish Stewart, *The Right to Be Presumed Innocent*, 8 CRIM. L. & PHIL. 407 (2014).

115 *See generally* Eisler, *supra* note 12. It is important to note that this section will refer repeatedly to Eisler's on this issue. Eisler has also delineated the Supreme Court's narrowing of the anticorruption statutes. Where we differ is in the explanation for the Court's motivation. While he views the Court as reflecting a particular interpretation of democracy, I view the Court as using the interpretative tools at its disposal. Nonetheless, his analysis is careful and detailed and has informed much of my thinking. I will thus discuss him at length in this section.

116 Dixson v. United States, 465 U.S. 482, 496 (1984).

payment can be "anything of value" and courts have been consistent in explaining that payment need not be money, nor go to the public official herself. On the other hand, the exchange of a political favor, what is commonly referred to as logrolling is not a thing of value under the statute.[117]

The Court has been very clear that the only type of interaction that is prohibited by the bribery statute is a *quid pro quo*. This narrow interpretation of criminal bribery and gratuities is so well established, at least at the federal level,[118] that it seems ridiculous to question it. Yet the history of anti-corruption laws in America shows the statutes were not drafted to be exclusively about *quid pro quo* exchanges.[119] One of the justifications for this definition of bribery is that it clarifies a nebulous concept. By excluding transactions that are not explicitly *quid pro quo* then, in theory, you are distinguishing favors from bribes. Asking someone to do something for you (a favor) is different than eliciting the same action through a payment or something else of value.

However, it is not clear that the Supreme Court's interpretation of bribery is as clarifying as it is made out to be. After all, each element of a *quid pro quo* can be subject to interpretation. Is a job recommendation a *quo*? Is booking the politician's daughter's restaurant a *quid*? Does the passage of time obviate the *pro*? Like Jacob Eisler writes: "the *quid* the public official receives, the *quo* he performs for the private party, and the *pro* connecting them—can be variously parsed, producing shifting levels of obligation."[120] Or, as the Sixth Circuit put it: "Not all *quid pro quos* are made of the same stuff."[121] Nevertheless,

117 United States v. Blagojevich, 794 F.3d 729 (7th Cir. 2015) (holding that "a proposal to trade one public act for another, a form of logrolling, is fundamentally unlike the swap of an official act for a private payment.").

118 Many states have eschewed this definition of bribery: New York, Arizona, Alabama, and Michigan for example. *See* ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 240 (2016).

119 Zephyr Teachout, notes that "prior to *Buckley*, quid pro quo was not part of any definition of corruption." *Id.* at 239.

120 Eisler, *supra* note 12, at 1629. Eisler points to Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784 (1985).

121 United States v. Abbey, 560 F.3d 513 (6th Cir. 2009). The Court in that case held that the *quo* need not be a specific act, but the understanding that the official would curry favor for the bribe-giver when the opportunity arose. In that particular case the Court was looking at extortion under the Hobbs Act, which the court defined

at the federal level, the Supreme Court has now circumscribed criminal liability for bribery—and most related crimes—to *quid pro quo* exchanges. That, however, is not the only—nor necessarily the most significant—constraint faced by federal prosecutors seeking to bring corruption charges.[122]

Probably the most significant bribery Supreme Court case decided in the last decade is *McDonell v. U.S.* In that case, former Virginia Governor, Robert McDonnell, and his wife, Maureen McDonnell, were indicted by the Federal Government on honest services fraud and Hobbs Act extortion after they accepted $175,000 in loans, vacations, and gifts (like a Rolex and a $20,000 shopping spree) from Jonnie Williams, a businessman. In return, Mr. and Mrs. McDonnell hosted an event at the governor's mansion to promote a product produced by Mr. Williams, a supplement called Anatabloc, and encouraged public universities to do research on the product.

The main issue, the Court explained, was what constitutes an "official act," as used in 18 U.S.C. § 201 (a)(3). The court adopted a "more bounded interpretation of 'official act.'"[123] Holding that the term refers to a "decision or action on a 'question, matter, cause, suit, proceeding or controversy' . . . [the] 'question, matter, cause, suit, proceeding or controversy' must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee."[124] This definition is not so narrow as to require that only actions deriving from

as a public official knowingly receiving a bribe. The Supreme Court denied certiorari, but given the arguments in *McDonnell* and *Skilling*, discussed *infra*, it is questionable whether the Court would have upheld the Sixth Circuit's reasoning. The Sixth Circuit ignored *Sun-Diamond*, discussed *infra*, relying on statutory differences between the Hobbs Act and 18 U.S.C. § 201. While those differences are there, the discussion *infra* shows that, more than statutory construction, the Supreme Court has been preoccupied with limiting prosecutions to a very discrete set of behaviors: actually giving/promising bribes for actions. The holding that criminal law prohibits the buying of indeterminate influence sits uneasily in the wake of *Skilling*, *McDonnell*, and even *Citizens United* (also discussed *infra*).

122 As stated *supra*, I am not suggesting that this interpretation is problematic. I do not wish to put forward a normative claim about that, but rather a positive one. Some have argued, in fact, that such an interpretation is a good thing. *See generally* Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 FORDHAM L. REV. 463 (2015) (making the case that broad interpretations of anti-corruption statutes creates a risk of too much prosecution).

123 *McDonnell*, 136 S.Ct. at 2368.

124 *McDonnell*, 136 S.Ct. at 2371–72.

formal legal powers constitute legal acts. After all, the Court found that pressuring another official to do an "official act" was enough to violate the statute. Whether the things that McDonnell did on Mr. Williams' behalf, like hosting events for him, expressing support for his product, and having subordinates meet with him were "official acts," is a question the Court said could be reviewed in a new trial with jury instructions reflecting the new "official act" definition.

As the Court itself said, this is a narrow interpretation of the statute. By adopting a very formal definition of "official act," the Court is saying that all the other ways a public official may influence a particular outcome, as long as they are not "official acts," are not subject to criminal liability under Section 201. The problem is, therefore, what is an official act? Clearly, promising a public contract is an official act, but what about a promise to call the head of the office in charge of that contract's solicitation process to enthusiastically support the individual making the payment? The Court signals that—like in McDonnell's case—that answer is best left to a finder of fact that can look at all the facts and determine whether or not *quid pro quo* corruption occurred.

Many[125] have argued that the Court's reasoning is illusory. Matthew Stephenson, for example, argued that "the Court's opinion both bespeaks an unrealistic view of how senior politicians exert influence over policy, and places undue weight on concerns about chilling (allegedly) desirable conduct."[126] Others have argued the opposite. For Gordon Brown, for example, *McDonnell* was not a fundamental shift in anti-corruption jurisprudence,[127] nor did it actually limit the

125 *See* George Will, *Virgina's Former Governor Faces Prison Over Politics*, WASH. POST (Jan. 6, 2016), https://www.washingtonpost.com/opinions/virginias-former-governor-faces-prison-over-politics/2016/01/06/2af3ff74-b3e6-11e5-9388-466021d971de_story.html (giving a look at how the case was seen in the media and commentary before the decision); Eric Lipton & Benjamin Weiser, *Supreme Court Complicates Corruption Cases from New York to Illinois*, N.Y. TIMES (June 27, 2016), https://www.nytimes.com/2016/06/28/us/politics/supreme-court-complicates-corruption-cases-from-new-york-to-illinois.html (giving a look at how the case was seen in the media and commentary after the decision).

126 Matthew Stephenson, *The Supreme Court's* McDonnell *Opinion: A Post-Mortem*, GLOBAL ANTICORRUPTION BLOG (July 19, 2016), https://globalanticorruptionblog.com/2016/07/19/the-supreme-courts-mcdonnell-opinion-a-post-mortem/.

127 *See e.g.*, U.S. v. Ng Lap Seng, 2019 WL 3755676, (2d Cir. Aug. 9, 2019) (where the 2d Circuit did not follow *McDonnell*, and rather upheld a bribery

prosecution of conduct like the one at issue in the case (the Court in fact left the retrying of the case as a possibility).[128] The Court acknowledges that this case is not about a "normal political interaction between public officials and their constituents . . . but the Government's legal interpretation is not confined to cases involving extravagant gifts or large sums of money, and we cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'"[129] In other words, the Court recognizes that what happened in McDonnell's case was probably wrong, but adopting a broad understanding of the statute that goes against the canons of construction as well as its own precedent is unwarranted. The important point is that, rightly or wrongly decided, *McDonnell* cements that criminal prohibition of bribery precludes only a small subset of activities.

This should not be surprising, as it is entirely consistent with how the Court has interpreted anti-corruption laws in the U.S. in the recent past.[130] As Jacob Eisler succinctly put it, "*McDonell* is merely the predictable culmination of the Court's blackletter treatment of corruption."[131] The history of the Honest Services statute, the same one used to prosecute McDonell, is instructive here.

In 1909, Congress amended an 1872 mail-fraud statute, to prohibit "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[132] This statute remains the same today. Throughout almost all of the twentieth century, this statute was interpreted to include the preclusion of schemes that lead to no pecuniary harm, but instead deprived people from the "honest services" of a person or group (what came to be known as the "honest-services" doctrine).[133] This meant that the government could prosecute corruption cases where "a betrayed party suffered no deprivation of money or property . . . . For example, if a city mayor (the offender) accepted a bribe from a third

conviction under 18 U.S.C. § 666 because that section is more expansive than 18 U.S.C. § 201(a)(3), which was at issue in *McDonnell*).

128 George D. Brown, *McDonnell and the Criminalization of Politics*, 5 VA. J. CRIM. L. 1, 9, 36 (2017).

129 *McDonnell*, 136 S.Ct. at 2372–73, (citing United States v. Stevens, 559 U.S. 460, 480 (2010)).

130 *See* Brown, *supra* note 128 (who makes this argument as a means of critiquing what he views as overreactions to *McDonnell*'s significance).

131 Eisler, *supra* note 12, at 1633 (2017)

132 18 U.S.C. § 1341.

133 18 U.S.C. § 1346.

party in exchange for awarding that party a city contract, yet the contract terms were the same as any that could have been negotiated at arm's length, the city (the betrayed party) would suffer no tangible loss."[134]

The Supreme Court in *McNally v. U.S.* reversed the course of the statute's interpretation jurisprudence, holding that it would only be applicable to property rights. Adding that "if Congress desires to go further, it must speak more clearly than it has."[135] Congress did just that and enacted § 1346 clarifying the "terms scheme or artifice to defraud" found in §§ 1341 and 1343. The swiftness of the reversal speaks to the fact that Congress was signaling their strong disagreement with *McNally*, and their desire to equip prosecutors with better anti-corruption tools. In 2010, the Court reviewed this statute in a case focusing on the prosecution of Jeffrey Skilling, one of Enron's[136] leading executives. Though the Court did find that the statute was not unconstitutionally vague, it also held that the statute only encompasses "bribery and kickback schemes."[137] The Court did not support the Government's position that § 1346 proscribed "undisclosed self-dealing by a public official or private employee—i.e., the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty."[138] The Court viewed this as a compromise, a limiting principle that preserved the statute, but did not allow its extension to any number of conducts.[139]

Another perhaps more obvious example of the Supreme Court's narrow interpretation of criminal anti-corruption statutes is the Court's reading of the gratuity statute. In *United States v. Sun Diamond*, the Court looked at a case where a trade association had given a number of gifts totaling over $5,000 in value to the then-Secretary of

134 Skilling v. United States, 561 U.S. 358, 400 (2010).

135 McNally v. United States, 483 U.S. 350, 360 (1987).

136 Enron was an energy, services, and commodities company that went bankrupt in 2001 (at the time it was the largest bankruptcy in history). The fallout lead to a number of investigations that uncovered extensive accounting fraud and corruption. Jeffrey Skilling was one of the top executives implicated in the scandal.

137 *Skilling*, 561 U.S. at 412.

138 *Id.* at 409 (citing Government's Brief).

139 By reaching this holding, the Court struck down Skilling's honest services convictions. On remand the 5th Circuit sustained Skilling's guilty verdict because of the overwhelming evidence against him. He ended up spending fourteen years in prison.

Agriculture, Mike Espy. Espy was prosecuted under 18 U.S.C. § 201(c)(1)(A), which forbids gifts "for or because of any official act performed or to be performed." The basis of the prosecution was that Espy had received the gifts at the time he was considering two policies[140] that would impact Sun Diamond, a trade association of growers of raisins, figs, walnuts, prunes, and hazelnuts. The Court held that for a gift to be a criminal gratuity, there needs to be a connection between the gift and the official act performed.[141]

It is evident that not every single decision at the federal appellate level looking at federal anti-corruption statutes has favored narrow constructions;[142] however, this brief review exemplifies the Supreme Court's restrictive anti-corruption jurisprudence. Note that *McDonnell*, *Skilling*, and *Sun Diamond* were all unanimous decisions. This record of broad agreement is at least an indication that the Court has not considered the questions in these cases to be particularly hard. This should be an indication that the Supreme Court's trajectory of interpreting these statutes in a narrow light has nothing to do with corruption specifically, but with criminal law generally.

An explanation for the Supreme Court's anti-corruption jurisprudence is that the Court is simply interpreting criminal law in such a way that protects individuals against executive overreach. Many of the tools of interpretation of criminal law, as well as the design of criminal procedure generally, are precisely developed with the goal of preventing the government from abusing individuals. At bottom, criminal law deals with profound personal property and—more importantly—liberty interests and thus many tools exist to guard those interests. From

140 One was a plan to provide federal funds to fray international marketing costs for companies like the ones represented by Sun Diamond. The other was a regulation of methyl bromide, a pesticide.

141 United States v. Sun-Diamond Growers of California, 526 U.S. 398, 405 (1999).

142 For example, when Circuit Courts have looked at 18 U.S.C. § 1951 they have recognized that the term "property" (as opposed to "anything of value" found elsewhere in the statute) is "expansive," encompassing "in a broad sense, any valuable right considered as a source or element of wealth, including a right to solicit business." United States v. Arena, 180 F.3d 380, 392 (2d Cir. 1999), quoting United States v. Tropiano, 418 F.2d 1069, 1075 (2d Cir. 1969). They have also broadly interpreted the extent to which interstate commerce needs to be affected for the statute to apply, finding that the government need only demonstrate a de minimis effect on commerce, United States v. Re, 401 F.3d 828, 834–35 (7th Cir. 2005), or a "realistic probability of an effect . . . on interstate commerce." United States v. Peterson, 236 F.3d 848, 852 (7th Cir. 2001).

things as fundamental as the presumption of innocence, to a stricter standard of proof than in civil cases, and doctrines such as the Rule of Lenity, which is used to interpret ambiguous criminal statutes in favor of the defendant, it is clear that criminal law in general is designed to guard against the awesome powers of the State.[143] I am not suggesting that all of the Roberts Court's jurisprudence in criminal regime has been consistently pro-defendant,[144] but simply that framing the decisions within the context of criminal law more generally helps explain what at first hand may seem like myopic, pro-corruption decisions. After all, most of the decisions discussed in this section have been unanimous, which should make us question how much political preferences are driving the Court's reasoning. It is not that the Court is insensitive towards issues of corruption, but it is more sensitive to protecting individuals from the State.

This reading helps explain some of the recurring themes in the dicta of these cases. Late Justice Scalia, for example, took the unusual step of filing a dissent in a writ of certiorari denial, arguing that the honest services statute "invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct."[145] The same concern about "overzealous prosecutions" was echoed by Chief Justice Roberts in *McDonell* and was previously articulated by the Court in *U.S. v. Sun-Diamond*.[146]

143 *See* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 886 (2004) (The consistent use of doctrines such as the Rule of Lenity is questionable. Some have argued that the Rule of Lenity "appears occasionally as a supplemental justification for interpretations favored on other grounds; it never stands alone to compel narrow readings."). For a different view *see, e.g.*, EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 168 (2008) (explaining that the rule of lenity is used to favor defendants to balance their lack of power vis-à-vis the government).

144 However, as mentioned *supra*, note 112, the Roberts court has sided with defendants in numerous cases.

145 Sorich v. United States, 555 U.S. 1204, 1206 (2009) (Scalia, J., dissenting).

146 *See* U.S. v. Sun-Diamond Growers of California, 526 U.S. 398, 406-407 (1999) (In a revealing bit of dicta, the Court explained that it was preoccupied with an expansive reading that "would criminalize, for example, token gifts to the President based on his official position and not linked to any identifiable act—such as the replica jerseys given by championship sports teams each year during ceremonial White House visits."). A more cynical interpretation is that it is not that justices are concerned about defendants, but are rather driven by personal preoccupations.

The reason that these decisions may stand out so much is that official corruption does not function like most crimes because it "occurs when those privileged *through access to governmental resources* abuse their unique power."[147] So, in a sense, parties in corruption cases are not the traditional parties that suffer power asymmetries vis-à-vis the State. However, it is hard to think how the Court should treat these cases differently without fundamentally altering the protections found in much of criminal law.[148] In the end, the Court has interpreted anti-corruption criminal statutes like *any* other criminal statute. This may be a problem given corruption's uniqueness, however, it is hard to argue that the Court has adopted "incorrect" statutory interpretations.

All of this points to the fact that federal anti-corruption criminal statutes are rather blunt tools for fighting public corruption.[149] It may be that this is the Supreme Court's fault,[150] or it may simply be the product of criminalizing conduct in which wrongness is extremely contextual. As discussed in Part I, corruption is very hard to define.

147 Eisler, *supra* note 12, at 48. Eisler has used this to argue for a transformation of criminal procedure in cases of corruption. For him, because the "Court's pruning of the official corruption seems motivated . . . in part to protect defendants from the tremendous power of government," a reconceptualization of "how the canons of interpretation and due process rights apply" in the anticorruption space. Because corruption is "predicated upon access to power," the application of traditional notions of due process and canons of construction "may perversely reinforce power inequities." Because of this, Eisler argues, jurisprudential approaches to corruption must be reconsidered to ensure that the most vulnerable—citizens, not people with access (or with actual) to political power. While I have argued that the criminal law as currently construed is a blunt tool for fighting corruption, I do not mean to argue in favor of a revamping of criminal procedure or expect the Supreme Court to undertake this task. Additionally, a full consideration of Eisler's proposal is beyond the scope of this article.

148 *Id.*.

149 As alluded to *supra* notes 131 and 145, some Circuit Courts have pushed back on many of the limiting principles handed down by the Supreme Court. The Second and Sixth Circuits, for example, have treated bribery as defined in 18 U.S.C. § 666 more broadly than the one in 18 U.S.C. § 201. However, this pushback is just that: pushback. The winds of anticorruption jurisprudence have been going in one direction, blowing past or going around at least the voices of dissent.

150 As Eisler put it: "the Court consistently hands down judgments that narrow the scope of anti-corruption legislation and raise standards for corruption prosecutions. . . . [It] thus expects both the legislature and the executive to implement anti-corruption with scrupulous exactitude and seems unwilling to accommodate either a legislative intent to sweep broadly with anti-corruption legislation." Eisler, *supra* note 12, at 1637.

Given the extreme consequences of criminal convictions, a Potterian standard of "I know it when I see it" is simply insufficient. In other words, it is logical that criminal statutes are narrowly interpreted as the only actions that should lead to imprisonment are those where most people agree that wrongdoing actually occurred. This preserves criminal liability for clear instances of bribery or theft of public funds for personal use, while allowing other mechanisms to serve as deterrents and/or retribution for acts that do not rise to that level. This is not necessarily a bad thing. Accountability for wrongdoing has often implied imprisonment, but other forms of accountability are possible and perhaps preferable.[151] The main problem, as discussed *infra*, is that those other mechanisms are not working.

C. Systemic or Institutional Corruption

Criminal law is not the only way that corruption can be understood, targeted or punished. As discussed above, criminal statutes and agencies are hardly the only ones concerned with corruption.[152] In fact, in the early years of the American republic, corruption was rarely associated with crime.[153] Some of that was due to the much more limited role that criminal law generally played in society at the time.[154] But it was also because people at the time recognized that corruption "encompassed lawful abuses of power, not merely unlawful abuses or usurpations."[155] In other words, corruption is not only a problem of crime, but rather a problem of norms more generally.

---

151 *See generally* Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015) (urging legal scholars to seriously consider an abolitionist framework—which she defines as "an aspirational ethic and a framework of gradual decarceration, which entails a positive substitution of other regulatory forms for criminal regulation" for remediating social harms).

152 Civil and administrative sanctions going from monetary fines to precluding a company found to have engaged in corrupt behavior from contracting with the government again and prohibiting individuals from working in or with government for some time are common features of anti-corruption laws around the world. The reason for this is that eliminating corruption will not only be achieved through better and more criminal law enforcement.

153 KRISTOFER ALLERFELDT, CRIME AND THE RISE OF MODERN AMERICA: A HISTORY FROM 1865-1941 (2011)

154 *See id.*

155 TEACHOUT, *supra* note 118, at 49-50, 55 (citing concerns of Gouverneur Morris, a signatory of the Articles of Confederation and the U.S. Constitution).

In Latin America, and in much of the developing world, corruption has been defined as systemic.[156] The main purpose of this designation is that it allows one to imagine corruption not as an action or series of actions, but as a permanent component in the actual function of institutions. That is to say that without corruption the system ceases to operate. In contrast, scholars usually do not describe corruption in developed countries as so essential to their function. Rather, as the above discussion suggests, the focus in those countries is generally limited to bad actors and the criminalization of their behavior.

Yet another interpretation comes from American politicians[157] and pundits,[158] who have started to define corruption as the influence money can have on political outcomes. Their focus, necessarily, has

156 *See e.g.*, Roberto Laver, *Systemic Corruption: Considering Culture in Second-Generation Reforms* 10 (Edmond J. Safra Working Papers, No. 45, June 5, 2014), https://ssrn.com/abstract=2446657 (arguing that "[a]s corruption emerged on the global agenda, the focus of international development agencies has been on corruption as a systemic, not just an isolated and isolatable, phenomenon); SARAH CHAYES, WHEN CORRUPTION IS THE OPERATING SYSTEM: THE CASE OF HONDURAS iii (2017) https://perma.cc/P9G9-2XM9 (arguing that corruption is integral to the functioning of Honduras, citing, for example, a senior Honduran government official who said: "Corruption is not a scandal, but the result of the functioning of a system."); MAURICIO MERINO HUERTA, MEXICO: THE FIGHT AGAINST CORRUPTION 14 (Wilson Ctr., June 2015) (describing approaches to solve "Mexico's systemic corruption problem").

157 Presidential candidate Elizabeth Warren, for example, has made anticorruption one of her main campaign proposals. On her campaign website she announces, for example, that she plans to: "improv[e] public integrity rules for federal officials in every branch of government . . . end[] . . . lobbying as we know it, fix[] . . . the criminal laws to hold corrupt politicians to account, and ensur[e] our federal agencies and courts are free from corrupting influences." Elizabeth Warren, *My Plan to End Washington Corruption*, MEDIUM (Sept. 16, 2019), https://medium.com/@teamwarren/my-plan-to-end-washington-corruption-554c7f01aaa5. By pointing out to the centrality of "ending lobbying as we know it" and insulating agencies from influences, her plan indicates that she views private wealth as a corrupting element of the public process.

158 *See e.g.*, Jay Cost, *The Swamp Isn't Easy to Drain*, ATLANTIC (July 14, 2018), https://www.theatlantic.com/ideas/archive/2018/07/the-swamp-isnt-easy-to-drain/565151/; Isabel V. Sawhill, Forget Collusion, the Problem is Corruption and Complacency, BROOKINGS INSTITUTION BLOG (Mar. 28, 2019), https://www.brookings.edu/blog/up-front/2019/03/28/forget-collusion-the-problem-is-corruption-and-complacency/; Charles Homans, *Americans Think 'Corruption' Is Everywhere. Is That Why We Vote for It?*, N.Y. TIMES MAG. (July 10, 2018), https://www.nytimes.com/2018/07/10/magazine/americans-think-corruption-is-everywhere-is-that-why-we-vote-for-it.html

centered around campaign finance laws/regulations, and, more recently, the Constitution's emoluments clause.[159] It is beyond the scope of this article to wholly address whether or not this behavior is properly understood as corruption.[160] For the purposes of this paper, it is sufficient to believe that money in politics may be corrupting[161] insofar as it can lead to the use of public power over private gain.[162] If

159 *See e.g.*, Joshua Matz & Laurence Tribe, *President Trump Has No Defense Under the Foreign Emoluments Clause*, AM. CONST. SOC'Y (https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/Trump%20and%20the%20Emoluments%20Clause.pdf (last visited March 22, 2020) (arguing that President Trumps' many foreign financial interests and transactions may violate the Constitution's foreign emoluments clause, because he has allowed his personal interests to interfere with impartial government. Foreign powers have used things like booking rooms in Trump's hotels, and other commercial, regulatory, and licensing transactions to leverage influence over the administration).

160 There is already much work here that explicitly addresses when political pressure becomes undue influence rising to corruption. For a historical look, *see* TEACHOUT, *supra* at 118, at 4 (arguing that from America's foundation up to the 1970s Courts had "remained committed to a broad view of corruption," and that the Framers explicitly took steps to limit the influence of private parties on public officials); *see also* Eisler, *supra* note 12, at 1642 (arguing that the Supreme Court has shown a preference for a interest group politics, over "governance as a collective project," and outlining proposals for how to reverse course); LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS–AND A PLAN TO STOP IT 49-76 (2012) (arguing that the revolving door between industry and government blurs the line between private and public and can destroy public virtue). *But see* Guy-Uriel E. Charles, *Corruption Temptation*, 102 CALIF. L. REV. 25, 34 (2014) (arguing against Lessig's understanding of the problem as corruption, but rather seeing it as a problem of inequality).

161 This position is also consistent with Transparency International's definition of corruption as the use of public power for private gain. Because influencing political outcomes through financial contributions (whether they are electoral or not) is precisely using public power (one's own or others') for one's own benefit.

162 Sheila Krumholz, *Campaign Cash and Corruption: Money in Politics*, *Post-*Citizens United, 80 SOC. RES. 1119 (2013); *Taking Back Our Democracy: Responding to Citizens United and the Rise of Super PACs: Hearing before the Subcomm. on Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. (July 24, 2012); Chris Cillizza, *How Citizens United Changed Politics, in 7 Charts*, WASH. POST (Jan. 22, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/01/21/how-citizens-united-changed-politics-in-6-charts/; Sarah Childress, *Report: After Citizens United, Outside Spending Doubles*, PUB. BROADCASTING SYS. (Jan. 14, 2015), https://www.pbs.org/wgbh/frontline/article/report-after-citizens-united-outside-spending-doubles/.

we accept this proposition, in either a weak or strong version,[163] then the American political system can be described as being exposed to systemic corruption. To be clear, in the American case, "systemic" does not mean the exact same thing as it does in the Latin American context. It is not that corruption in the United States, like in Latin America, drives the functioning of political administration, but rather that the existing legal framework accepts as a *fait accompli* the essentially unfettered,[164] patronage-driven constituent-to-policymaker relationships.[165] In other words, the validity of almost any level of private

163 Weak being that private wealth can be corrupting; strong in that it is always corrupting.

164 Though there are campaign spending limits for individuals, one of the effects of the ever-expanding First Amendment jurisprudence is precisely a set of regulations that allow for individuals, through a number of different vehicles, to spend more than the individual limits. *See* Nicole L. Jones, Citizens United *Round II: Campaign Finance Disclosure, the First Amendment, and Expanding Exemptions and Loopholes for Corporate Influence on Election*, 93 DENV. L. REV. 749, 773-77 (2017); Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the "Dark Money" Election*, 27 NOTRE DAME J. L., ETHICS & PUB. POL'Y 383, 400 (2013). *See generally* Validity, Construction, and Application of Campaign Finance Laws—Supreme Court Cases, 19 A.L.R. Fed. 2d 1.

165 This view has been historically, widely, and hotly contested. Most prominently, those who have argued in favor of a delegate theory of democracy, namely that representatives advance the particular interests of those they represent. For an outline of this theory *see generally* Donald J. McCrone & James H. Kuklinski, *The Delegate Theory of Representation*, 23 AM. J. OF POL. SCI., 278 (1979). This theory is consistent with a pluralist view of democracy, which holds that "politics mediates the struggle among self-interested groups for scarce resources." Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32 (1985). The pluralist view has been analyzed within the context of interest groups and their influences of the political process. *See id.* For an overview of theory on the impact of interest groups on democracy, *see generally* Andreas Dür & Dirk De Bièvre, *The Question of Interest Group Influence*, 27 J. PUB. POL'Y 1 (2007). Both delegate theory and pluralism posit that it is natural, normal, good, or value-neutral that the interests are determined by those who fund elections. *See* Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 112 (arguing that "moralist/idealist" notions of how politics operates leads to futile campaign finance reforms). A full engagement with these ideas is beyond the scope of this article, nor is it necessary at this point. The argument advanced by this article does not require one to reject the validity of a delegation theory or pluralist theory of politics. Quite the contrary, it is consistent with that view. The argument in this paper only requires one to accept the notion that money can influence elected representatives (delegates) in ways that only benefit the patrons. As discussed in the next few paragraphs, the point at which these pressures become corruption is debatable. *See*

influence on public actions or decisions is so endemic to the American system of government that the country is effectively exposed to systemic corruption.

It is worth noting that the Supreme Court has completely rejected this interpretation of the American political system. From *Citizens United* to *McDonell* [166] (to name only a couple of the cases most on point) the Court has articulated the view that patronage is part and parcel of representative democracy. In *McDonnell*, the Court worried that the bribery statute, as interpreted by the government, put in jeopardy the "basic compact underlying representative government . . . that public officials will hear from their constituents and act appropriately on their concerns."[167] This is quite myopic of the Court.[168] As Jacob Eisler articulated, "by describing McDonnell's conduct as prospectively constituent service . . . the Court implies a characterization of politicians as the pawns of whichever constituent can offer the strongest incentives to take a particular course of action."[169] In reality, insofar as the government's interpretation of bribery in *McDonnell* jeopardized "representative democracy," it did so for a very small subset of individuals or corporations that are in a position to provide something resembling a *quid* to a politician. [170]

Floyd Abrams, *Symposium Address: Protecting the Heart of the First Amendment, Defending* Citizens United, 9 FIRST AMEND. L. REV. 193, 197 (2011); James Bopp Jr., Joseph E. La Rue & Elizabeth M. Kosel, *The Game Changer:* Citizens United*'s Impact on Campaign Finance Law in General and Corporate Political Speech in Particular*, 9 FIRST AMEND. L. REV. 257, 260 (2011); James Bopp Jr. & Kaylan Lytle Phillips, *The Limits of Citizens United v. Federal Election Commission: Analytical and Practical Reasons Why the Sky Is Not Falling*, 46 U. S.F. L. REV. 281, 297-99 (2011); Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217, 218-23 (2010); Carol Herdman, *Citizens United: Strengthening the First Amendment in American Elections*, 39 CAP. U. L. REV. 723, 753 (2011).

166 Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding that the government may not suppress political speech on the basis of the speaker's corporate identity.); McDonnell v. United States, 136 S.Ct. 2355 (2016).

167 *McDonnell*, at 2372.

168 It is also strange that the Court even went there. The statement at issue is complete dicta that has no bearing on the analysis or holding. This is important because the Court could have reached the conclusion with regard to the statutory limits of bribery, without espousing that view of representative democracy.

169 Eisler, *supra* note 12, at 1641.

170 *See* Lynn Adelman*, The Supreme Court and the Corruption of Democracy*, 38 RARITAN 6, 9-11 (2019).

In *Citizens United* the Court was even more explicit about this agonist[171] view of politics. In an oft-cited passage Justice Kennedy wrote:

> The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt: "Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessity corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness."[172]

Zephyr Teachout, in her extended analysis of the opinion and of this passage in general, explains that Kennedy's argument is too clever by half. While it is true that access is not corruption, Teachout explains, it is not true that access cannot lead to corruption. Similarly, favoritism is unavoidable, but that does not mean we should not seek to limit it. And, yes, democracy is premised on responsiveness, but that responsiveness should not only be for the wealthy. Teachout, concludes: "[c]itizens, in Kennedy's view, are supposed to use money to achieve personal benefits in the public sphere."[173]

At the core of the passages in *Citizens United* and *McDonell* is a debate that has vexed the Court[174] tremendously over the last century:

---

171 Eisler argues that this interpretation is consistent with "agonist understandings of democracy, which treat political life as a conflict between actors to achieve instrumental control of government decision-making and resource allocation." According to Eisler the Court's conception of politics in the anti-corruption domain at least are consistent with this view. Eisler, *supra* note 12, at 1624.

172 Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 359, (2010) (citing McConnell v. Fed. Election Comm'n, 540 U.S. 93, 297 (2003)). It is worth noting that the citation was of Justice Kennedy's own concurrence in part in *McConnell* where he argued, in part, that the Court's interpretation of corruption was far too broad. 540 U.S. at 293, 315.

173 TEACHOUT, *supra* note 118, at 233-34.

174 *See e.g.*, United States v. Classic 313 U.S. 299 (1941) (where the Court ruled that Congress could regulate primary elections even though it gave the legislature control over private associations); United States v. Auto Workers, 352 U.S. 567, 588 (1957) (where the Court held that the use of union dues to sponsor an electoral TV ad would violate the Corrupt Practices Act); *McConnell*, 540 U.S. at 297 (2003)

how do we balance the competing interests of free speech and corruption? The Court has landed squarely on practically invalidating the idea of limiting institutional or systemic corruption. This has to do with the fact that defining the contours of what behavior is and is not corrupt is particularly vexing. If, as mentioned *supra*, the problem belies the *quid pro quo* framework, then it is even more complicated for actions or behaviors outside of that framework. Some have argued that this definitional indeterminacy is a feature, not a bug: "when conduct is corrupt ultimately devolves upon legitimacy of reason-giving, which itself depends upon political norms."[175] In other words, laws cannot fully capture corrupt reprehensible conduct.[176] This is why some scholars have argued that good governance depends on following unwritten norms,[177] and for others it depends on institutional arrangements precluding probably innocuous but potentially corrupting behavior.[178]

Nonetheless, it is clear where the United States has landed, practically and legally, on this debate. The Supreme Court has rejected the idea of systemic corruption and validated most political spending. Although this interpretation need not mean that the American political system will now be overrun by corruption, it means that the potential for corrupt behavior, or the perception of corrupt behavior, is heightened. The reason for this is explained fully in the next section.

(upholding campaign finance limits); and of course Buckley v. Valeo*,* 424 U.S. 1, 17-18 (1976) (creating the modern framework for campaign finance jurisprudence by establishing that the First Amendment extends to campaign contributions, though accepting regulatory limits thereof).

175 Eisler, *supra* note 12, at 1623 n. 11.

176 *See* MARK PHILP, CONCEPTUALIZING POLITICAL CORRUPTION: CONCEPTS & CONTEXTS 453 (Michael Johnston ed., 2017) (arguing that rules are inadequate in capturing how inappropriate a corrupt behavior is).

177 *See* Ina Kubbe & Annika Engelbert, *Introduction*, *in* CORRUPTION AND NORMS: WHY INFORMAL RULES MATTER 1-10 (Ina Kubbe & Annika Engelbert eds., 2018).

178 This is the thrust of Zephyr Teachout's argument. The Framers limited, for example, the ability of U.S. officials to receive gifts, putting diplomats at odds with the sensibilities of their hosts (who viewed gift-giving not as patronage but as courtesy). Nonetheless, the Framers saw that accepting gifts *could* be corrupting, for it potentially laid the willingness to put the interests of the giver on top of that of the polity, and thus prohibited the practice. *See* TEACHOUT, *supra* note 118, at 3.

IV. CHANGING NORMS: THE POTENTIAL FOR BACKSLIDING

A. Current Laws and Institutions Role in Greater Corruption Perception

In Part I, I subscribed to the view that corruption was best described as an equilibrium problem. Under this view, a defining feature of corrupt systems is that people expect corruption to occur. I have referred to this expectation as a social norm. Describing corruption in this way sounds unsatisfactory because it seems tautological: corruption happens because it is a social norm, and it is a norm because it happens. However, the reality is that norms did not just happen, they came to be. Even though for most people the meaning of any norm appears to be "natural" or fixed, the reality is that norms go through processes of construction (and deconstruction).[179] This necessarily implies that social norms can change, and can *be* changed. The issue in terms of U.S. backsliding is thus whether social norms around corruption in this country can be changed.

A full account of the mechanisms by which these changes occur is evidently beyond the scope of this paper. Nonetheless even a superficial account is enough for the purposes here. Christina Bicchieri and Hugo Mercier[180] explain that social norms "are behavioral rules

179 Modern social theory is dominated by the idea of constructivism, as is much of critical legal theory. I point this out because any definition thrown in a footnote will be reductionist. And yet, a clarification here is needed. The definition used here is the same one articulated by Lawrence Lessig in his paper *The Regulation of Social Meaning*, *supra* note 65, at 991-93. Constructivism holds that social reality is not given in any sense, but "must be fashioned by individuals out of the culture into which they are born." DAVID KERTZER, RITUAL, POLITICS AND POWER 3-4 (1989). Lessig provides a helpful review of the literature to warn against three misconceptions: the first is that no construction is stable, it is in fact ever changing, second not every construction is possible at all times in any place, and finally the role of government in constructing a reality is limited. *See* Lessig, *supra* note 65, at 949-950 n. 19 (1995).

180 Although here I will refer mainly to the work spearheaded by Cristina Bicchieri, cited *infra* in note 181, there are many who have contributed to this research both within and outside of the legal academy. Lawrence Lessig articulated strategies for social norm (or in his articulation meaning) transformation. Lessig, *supra* note 65. Like Bicchieri and Mercier, his emphasis was on changing "associations" with particular actions. For a survey of social norms research, *see generally* Hillary C. Shulman et. al., *The State of the Field of Social Norms Research*, 11 INT'L J. COMM. 1192 (2017).

supported by a combination of empirical and normative expectations."[181] Empirical expectations have to do with our beliefs of what others will actually do. Contrastingly, normative expectations are what we think others believe. Therefore, change relies on the extent to which these expectations can change or *are* changed. Speaking specifically about corruption means that change can happen if people's expectations as to how much it is occurring or what a normal interaction between a public or private official should be changes.

For corruption to take a foothold in America or elsewhere, people's notions of how much corruption is happening or examples of the proper relationships between public officials and private individuals must change. In other words, people must start believing that corruption is happening more or that it is no longer punished or has become acceptable. The question is, can there be or is there enough tolerance of corrupt behavior for people to perceive high levels of corruption despite the country's robust institutional arrangement designed specifically to curb corruption?

It should be clear from the outset that there is no data to fully answer this question. First, we do not have contemporary examples of countries moving from a low to high corruption equilibrium.[182] Second, the jurisprudential transformation in the United States is too recent for us to see a visible transformation in social expectations.[183] Finally, the same issues with measuring corruption in high-corruption countries appear in low-corruption ones. Our knowledge of how much corruption occurs depends greatly on perception, and corruption—when successful—is unperceivable.[184] Therefore, if it is successfully occurring, we simply do not know about it. Nonetheless, my objective

181 Cristina Bicchieri & Hugo Mercier, *Norms and Beliefs: How Change Occurs*, 63 JERUSALEM PHIL. Q. 60, 61 (2014); s*ee also,* CHRISTINA BICCHIERI, THE GRAMMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS (2006); Cristina Bicchieri & Peter McNally, *Shrieking Sirens: Schemata, Scripts, and Social Norms: How Change Occurs*, 35 SOC. PHIL. & POL'Y 23 (2018).

182 As addressed *infra*, this is an argument for why the cause for concern should be tapered.

183 The literature on norm change suggests that—when they are not the result of a major exogenous shock on the system, such as a war or crisis—they often take a long time. *See* Rothstein & Teorell, *supra* at 26; *see also* Cristina Bicchieri, *supra* note 186.

184 This is not true of all crimes, as it is different than "getting away with it." In the case of robbery, larceny, assault, and a long et cetera, many people (starting with the victims) know the crime occurred. Corruption, as with most white-collar crimes, is designed to avoid that anyone have knowledge of the event.

is not to show that corruption is indeed on the rise in the United States.[185] Rather, this section focuses on whether there is a possibility for it and therefore if there is a need for action.

Part II outlined the complicated panorama for federal anti-corruption criminal law enforcement. The Supreme Court has narrowed the meaning of anti-corruption statutes so much that only the most brute forms of corruption are criminalized. As a result, this can lead to heightened perceptions of high-level corruption because it is relatively easy for sophisticated parties to skirt these rules. After all, a high ranking public official and a wealthy patron can design schemes or hire professionals to structure arrangements to elude this direct tit-for-tat. While it is true that aiding in a criminal endeavor is both criminal and precluded by various professional rules, the issue is precisely that the likelihood of a conviction sticking (taking for granted that law enforcement would be able to detect the criminal action), to the principal or her affiliates is highly unlikely when the law is so narrow. In other words, high-profile actors can get away with a lot, and when they do, this can lead to the perception that corruption is rampant (or ramping up).

McDonell is precisely a case on point. When the Supreme Court redefined "official act," the Court sent the case back down to where it could be retried with new jury instructions. The Justice Department chose not to prosecute, and so former Governor McDonell was acquitted of all charges despite the fact that it was clear that he accepted over $170,000 in payments. We cannot know for certain what the impact of this one case was on the perception of corruption. However, we know that unsuccessful attempts at punishing public malfeasance can be one powerful ingredient in changing corruption perception.[186]

The international experience is instructive. It is not only that failed prosecutions weaken the stick and thus potentially increase the likelihood of someone engaging in corruption,[187] but that they cement expectations about levels and acceptability of corruption. The case of

185 Although it is worthwhile noting that TI rang that particular alarm bell in its latest Corruption Perception Index, citing the United States as one of the countries to watch. *See* TI CPI, *supra* note 15.

186 *See generally* Bo Rothstein, *Corruption and Social Trust: Why the Fish Rots from the Head Down*, 80 SOC. RES. 1009 (2013).

187 If we use the standard law and economics model for explaining criminal behavior, then corruption is a function of the probability of sanction by its severity. *See* Becker, *supra* note 55. If prosecutions fail, then the perception of the probability of sanction decreases.

Javier Duarte in Mexico, for example, is emblematic of the problems of botched anti-corruption prosecution. Duarte, the former governor of the Eastern state of Veracruz, was accused of embezzling over $45 million. Despite extensive media coverage substantiating many of the allegations, in the end, Mr. Duarte pled guilty and in return received a nine-year prison sentence.[188] Regardless of the sentence, many of his assets were untouched.[189] This, unsurprisingly, only cemented the perception of corruption in Mexico.[190]

As has been articulated throughout this article, criminal corruption is only one aspect of corruption generally. Even if law enforcement has a harder time prosecuting bribery cases, this is unlikely to make a dent in corruption perceptions. Just like high-corruption countries will not reduce corruption through prosecutions,[191] low corruption ones will not become corrupt solely through failed ones. The other, of course, can be the presence or appearance of public corruption.

The extent to which the Supreme Court has validated, although with much less consensus than in the criminal anti-corruption jurisprudence, the legality of most influence of wealth on policy, at the very least creates the possibility for greater corruption.[192] As explored above, the Supreme Court's First Amendment jurisprudence has opened the door for essentially unrestricted contributions from private

[188] David Agren, *Mexico: "Worst Governor in History" Sentenced to Nine Years for Corruption*, GUARDIAN (Sept. 27, 2018, 12:16 PM), https://www.theguardian.com/world/2018/sep/27/javier-duarte-mexico-veracruz-guilty-sentenced-corruption.

[189] Kate Linthicum & Patrick McDonnell, *Ex-Mexican Governor Accused of Embezzling Billions Just Got 9 Years in Prison. Many Think That's Not Enough*, L.A. TIMES (Sept. 27, 2018, 9:30 AM), https://www.latimes.com/world/la-fg-mexico-governor-20180927-story.html.

[190] *See* Tania L. Montalvo, *Lo que dejó Duarte a Veracruz: récord en homicidios, fosas, deuda y más pobreza*, ANIMAL POLÍTICO (Apr. 17, 2017), https://www.animalpolitico.com/2017/04/duarte-veracruz-violencia-deuda-fosas/.

[191] Matthew Stephenson, *Aggressive Criminal Law Enforcement Is Insufficient to Combat Systemic Corruption. But That Doesn't Mean It's Not Necessary*, GLOBAL ANTI-CORRUPTION BLOG, (Nov. 19, 2019), https://globalanticorruptionblog.com/2019/11/19/aggressive-criminal-law-enforcement-is-insufficient-to-combat-systemic-corruption-but-that-doesnt-mean-its-not-necessary/ [https://perma.cc/X5JH-GTLF].

[192] Justin Levitt, *Confronting the Impact of* Citizens United, 29 YALE L. & POL'Y REV. 217, 233 (2010); Carol Herdman, *Citizens United: Strengthening the First Amendment in American Elections*, 39 CAP. U.L. REV. 723 (2011); Citizens United v. FEC, 558 U.S. 310 (2010).

individuals and corporations in the electoral as well as political processes. The issue is not a normative one, but a positive one. That is, whether the Court's Constitutional interpretation is correct is irrelevant.[193] Rather, the Court's validation of private involvement in politics has led[194] to more private wealth in campaigns and for politicians generally. Though this involvement will not *necessarily* lead to corruption, it *can* create either more corruption or the perception of more corruption.

As a threshold issue it is important to assert that perception of corruption in the U.S. is indeed on the rise. TI reports that in 2017, 44% of Americans believed corruption to be pervasive in the White House, up from 36% in 2016. Also, around 70% of people believe the government is failing to fight corruption.[195] The problem is so alarming that TI included the United States as a country to watch in terms of corruption in its report last year. According to TI, the problem is partly based on the increasing reliance on private wealth for political spending.[196]

193 Arguing that the Court misinterpreted the 1st Amendment, *see generally* Molly J. Walker Wilson*, Too Much of a Good Thing: Campaign Speech After* Citizens United, 31 CARDOZO L. REV. 2365 (2010); Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts' Role in Eroding "We The People's" Ability to Constrain our Corporate Creations*, 51 HARV. CIV. RTS.-CIV. LIBERTIES. L. REV. 423 (2016); Lawrence Lessig, *What an Originalist Would Understand "Corruption" to Mean*, 102 CALIF. L. REV. 1, 23-24 (2014) [hereinafter Lessig, *What an Originalist Would Understand "Corruption" to Mean*]. For a response, *see* R. Glenn Hubbard & Tim Kane, *In Defense of Citizens United: Why Campaign Finance Reform Threatens American Democracy*, FOREIGN AFF. (July/Aug. 2013), https://www.foreignaffairs.com/articles/united-states/2013-06-11/defense-citizens-united; Richard A. Epstein, Citizens United v. FEC*: The Constitutional Right That Big Corporations Should Have But Do Not Want*, 34 HARV. J. L. & PUB. POL'Y 639, 645-651 (2011); Robert Weissman, *Let the People Speak: The Case for a Constitutional Amendment to Remove Corporate Speech from the Ambit of the First Amendment*, 83 TEMP. L. REV. 979, 989-90 (2011).

194 *See e.g.*, Cillizza, *supra* note 162; Ian Vandewalker, *Election Spending in 2014: Outside Spending in Senate Races since* Citizens United, (Brennan Ctr. for Justice 2015), https://www.brennancenter.org/our-work/research-reports/election-spending-2014-outside-spending-senate-races-citizens-united.

195 *Corruption in the USA: The Difference a Year Makes*, TRANSPARENCY INT'L (Dec. 12, 2017), https://www.transparency.org/en/news/corruption-in-the-usa-the-difference-a-year-makes.

196 *Id.*

As stated in Part II, in *McDonnell* and *Citizens United* the Court rejected[197] this view. But these decisions are about balancing a Free Speech interest with the interest of the government in controlling corruption. The argument here is not about that balance (and as stated *supra*, not about whether *Citizens United* or its progeny are correct), but rather about whether they create the legal environment where people can start to believe corruption is acceptable.[198]

There are strong reasons to believe these decisions do affect public opinion. The first is that, as a matter of fact, it could be that corruption (as defined in this paper) is on the rise. It could be that the use of private funds has become so integral to the operation of the political apparatus that corruption has now become systemic. Many politicians[199] and advocates[200] now seem to be making precisely this case

197 It must be said that the Court does believe there is something to the argument. After all, in *Buckley* the Court sustained limits on campaign contributions as a way of "safeguarding the integrity of the electoral process." *Buckley v. Valeo*, 424 U.S. 1, 58 (1976).

198 Whether or not the increase in probability is tolerable because of First Amendment concerns, or whether restricting speech or contributions is actually the best way to temper the potential for corruption is a policy question that is not at issue here. Many have written on this. *See e.g.* Lessig, *What an Originalist Would Understand "Corruption" to Mean*, *supra* note 193, at 23 (arguing that the framers view of the First Amendment would allow Congress to limit political contributions); Weissman, *supra* note 193 (arguing that a constitutional amendment that removes for-profit corporations from the speech protections of the First Amendment is both appropriate and necessary); Bopp Jr. et al., *supra* note 165, at 260 (arguing that campaign finance law must not discriminate against corporate speakers because the First Amendment protects all speech regardless of the speaker); Ryan Rodoni, *The New First Amendment: Allowing Unlimited Corporate Election Speech Free from Response*, 34 U. HAW. L. REV. 263, 290 (2012) (arguing *Citizens United* interprets the First Amendment in a manner that usurps the power of the American people and allows the massively wealthy to use their disproportionate economic means to get their way).

199 *See e.g.*, Warren, *supra* note 157; *see also* Eliza Relman, *Alexandria Ocasio-Cortez Invented a 'Corruption Game' to Slam Lax Government Ethics Laws During a Viral Oversight Committee Hearing*, BUS. INSIDER (Feb. 7, 2019), https://www.businessinsider.com/alexandria-ocasio-cortez-slams-corruption-in-oversight-hearing-2019-2 (describing efforts by other politicians like Alexandria Ocasio-Cortez).

200 LESSIG, *supra* note 164 (arguing widespread corruption is the fault of systemic economic deregulation, not of individual politicians. According to Lessig, financial interests are dominating politics as opposed to national interests, which is caused by a dedication to fundraising and donors, above all other concerns, for politicians. He proposes campaign finance reform to remedy the situation and proposes a constitutional convention to implement reform); *see also* the litigation and advocacy efforts

and are pushing for reform.[201] If this is the case, then increases in perception of corruption have to do with actual increases in corruption levels.

The second reason is that as more money flows into politics, there are more opportunities for corrupt transactions, with few legal recourses for private individuals.[202] If we think of every large[203]

by the organization Citizens for Responsibility and Ethics in Washington ("CREW"), which has as their mission: "reducing the influence of money in politics and helping to foster a government that is ethical and accountable." *What We Do*, CITIZENS FOR RESP. & ETHICS IN WASH., https://perma.cc/5UZH-4SRC (last visited Jan. 20, 2020).

201 I have no claim with regard to whether or not campaign reform is the correct policy solution. For a look countering the need for reform, *see* Hubbard & Kane, *supra* note 199 (arguing that *Citizens United* has been widely misinterpreted and that in fact fewer campaign restrictions will lead to new constituents and coalitions); Cleta Mitchell, *Donor Disclosure: Undermining the First Amendment*, 96 MINN. L. REV. 5, 1759-62 (2012) (arguing that *Citizens United* protects speech and political freedom and should be extended).

202 The current emoluments litigation is instructive. The Fourth Circuit recently threw out a case brought by Washington, D.C. and Maryland over whether Donald Trump had violated the domestic and foreign emoluments clauses of the U.S. Constitution by accepting money from state and foreign governments via his Washington hotel and businesses for lacking standing. The Court held that "the District and Maryland's interest in enforcing the Emoluments Clauses is so attenuated and abstract that their prosecution of this case readily provokes the question of whether this action against the President is an appropriate use of the courts, which were created to resolve real cases and controversies between the parties." *In re* Trump, 928 F.3d 360, 379 (4th Cir. 2019). This decision is consistent with the Court's general narrowing of individual remedies. *See* Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1500-06 (2018) (arguing that remedies for constitutional rights have converged and collapsed in such a way as to render most remedies unavailable); *see generally* ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE (2017). More specifically to questions of corruption, the Trump administration has used the Court's "zone of interest" jurisprudence. The "zone of interest test" forecloses suit where a plaintiff's interests are "marginally related to or inconsistent with the purposes implicit" in the relevant law. The Court has basically never applied the test to a constitutional question, and this has been effectively argued by the Trump administration in its Emoluments Clause litigation. *See* Reply Brief for Petitioner, *In re* Donald J. Trump, (No. 18-2486), 2019 WL 913478 (C.A.4) (it is true that another suit brought in Washington D.C. by 200 Democrats in Congress has so far survived, but the thin thread on which it holds supports rather than belies this point).

203The emphasis is on large contributions because advocates of reform argue that we should see more donations but of the smaller kind. The idea is that if you have millions of donations then not one can be influencing, and so a greater number of

campaign contribution or independent expenditure[204] as an opportunity to influence a public actor to act for private gain,[205] then a rise in these creates more opportunities for corruption. The argument is not based on "generic favoritism or influence theory,"[206] but rather that the probability of undue influence is greater when more influence is possible.

Finally, even if campaign or political contributions and/or independent expenditures do not lead to corruption, many people perceive them to. Much of the current campaign for campaign finance reform is predicated on that idea.[207] As mentioned previously, the issue of perception is fundamental to corruption levels. Therefore, we should be concerned about a set of policies that are believed to allow corruption to grow. This is especially true in the current political context.

donations are a sign of democracy in action. However, only a small number of actors can make the large donations that I am referring to here. The issue is whether there are more opportunities for those actors to step in.

204 An independent expenditure is an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate and which is not made in coordination with any candidate or his or her campaign or political party. *See Understanding Independent Expenditures*, FED. ELECTION COMM'N, https://perma.cc/3YCN-WGQY (last visited Nov. 14, 2019). The growth in campaign finance is largely concentrated in expenditures.

205 In *Citizens United*, the Court held that independent expenditures were not to be restricted, for they "do not give rise to corruption or the appearance of corruption [because] the absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Citizens United*, 558 U.S. at 357. (citations omitted). And yet, we know that political corruption is carried out by actors that can create mechanisms that make coordinated and pre-arranged contributions seem like expenditures. In other words, the distinction between contributions and expenditures can be illusory when applied to sophisticated actors; precisely the type of actors most likely to be engaged in the type of corruption at issue in this article. As Sheila Krumholz has written, "this ban on coordination, while perhaps technically obeyed, is complicated by the fact that many of the staff who work for super PACs used to work for the candidate whom the super PACs supports. The founders of Priorities USA, a super PAC devoted to the re-election of Barack Obama, were both former White House officials prior to the 2012 campaign." Krumholz, *supra* note 162, at 1126.

206 *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 296 (2003).

207 *See supra* notes 205 and 207.

B. The Current Assault on Norms and the Corrosive Effect

The potential for corruption backsliding in the United States as described in the preceding subsection seems quite limited. Both the narrow scope of anti-corruption criminal laws, as well as the expansion of campaign spending, are unlikely to have such an impact on social expectations of corruption tolerance writ large to change the country's corruption equilibrium. However, when both of these developments are analyzed in the context of Donald Trump's presidency,[208] there is more cause for concern.

Matthew Stephenson has taken up the painstaking and ongoing task of documenting "Corruption and Conflicts in the Trump Administration."[209] At the moment of writing, this document exceeds 25,000 words. In it, Mr. Stephenson has explained the small and the large: from the many payments the U.S. Government has made to the Trump Organizations,[210] to the government decisions benefitting the interests of the Trump family and close advisors,[211] passing through how

208 Some have suggested that Donald Trump's presidency is so atypical that we should not infer systemic weaknesses from it. However, the opposite is true. While it is true that Mr. Trump is an atypical figure, that is precisely what makes the areas for potential disruption apparent. Perhaps we decide that there is nothing to be done legally or public-policy wise, however, that should be after a discussion of the revealed weaknesses, not before.

209 Matthew Stephenson, *Tracking Corruption and Conflicts in the Trump Administration—August 2020 Update*, GLOBAL ANTICORRUPTION BLOG (Aug. 6, 2020), https://globalanticorruptionblog.com/2020/08/06/tracking-corruption-and-conflicts-of-interest-in-the-trump-administration-august-2020-update/.

210 As an illustrative, but not exhaustive, list of examples, *see*, *e.g.*, Jim Zarroli, *Defense Department Renting at Trump Tower Is Another Step into Ethical Murk*, NAT'L PUB. RADIO (Feb. 9, 2017), https://www.npr.org/sections/thetwo-way/2017/02/09/514192988/defense-department-renting-at-trump-tower-is-another-step-into-ethical-murk; Paul Sonne, *U.S. Military's Space in Trump Tower Costs $130,000 a Month*, WALL ST. J. (July 19, 2017), https://www.wsj.com/articles/u-s-militarys-space-in-trump-tower-costs-130-000-a-month-1500428508; Derek Kravitz, *How Taxpayers Covered a $1,000 Liquor Bill for Trump Staffers (and More) at Trump's Club*, PROPUBLICA (May 1, 2019), https://www.propublica.org/article/trump-inc-podcast-taxpayers-covered-liquor-bill-for-trump-staffers-and-more-mar-a-lago.

211 *See* Shawn Boburg, *Trump Seeks Sharp Cuts to Housing Aid, Except for Program that Brings Him Millions*, WASH. POST (June 20, 2017), https://www.washingtonpost.com/investigations/trump-seeks-sharp-cuts-to-housing-aid-except-for-program-that-brings-him-millions/2017/06/20/bf1fb2b8-5531-11e7-ba90-f5875b7d1876_story.html; Peter Grant & Ted Mann, *Donald Trump Asks Richard LeFrak, Steven Roth to Monitor Infrastructure Plan's Costs*, WALL ST. J. (Jan. 16,

private individuals and foreign citizens have used Trump businesses to influence the current administration.[212]

Many have pointed out the many ways in which all of this behavior amounts to a violation of both political norms and constitutional conventions, meaning "principles of proper governmental behavior that are derived, at least in part, from the historical practices of governmental institutions and that advance a purpose of the constitution."[213] That President Trump has circumvented, overstepped, and/or avoided consequences for the repeated norms violations[214] calls into question the robustness of the American public integrity system. All of the Executive accountability offices, ethics rules, and other institutions outlined in Part II were shown to be—at the very least—inefficacious in preventing norm violation.

Despite the fact that President Trump was impeached, most of his egregious conduct has gone unpunished. Most importantly for corruption, he has avoided any repercussions of his self-dealing—whether it be through using of the Trump Organization for government events or having foreign dignitaries do the same to curry favor from this administration. As long as this type of behavior goes unpunished and is

2017), https://www.wsj.com/articles/donald-trump-asks-richard-lefrak-steven-roth-to-monitor-infrastructure-plans-costs-1484591989; Stephanie Kirchgaessner, *Democrats Question Trump 'Conflict of Interest' with Deutsche Bank Investigation*, GUARDIAN (Mar. 11, 2017), https://www.theguardian.com/business/2017/mar/11/democrats-question-trump-conflict-of-interest-deutsche-bank-investigation-money-laundering.

212 *See* Steve Reilly, *Trump Hasn't Donated Hotel Profits from Foreign Governments Yet*, USA TODAY (Mar. 17, 2017), https://www.usatoday.com/story/news/politics/2017/03/17/trump-wait-until-after-end-year-donate-profits-foreign-governments/99313784/; Summer Meza, *Is the President Making Money Off the White House? Trump Properties Made $1.2 Million from Political Groups Last Year*, NEWSWEEK (Jan. 20, 2018), https://www.newsweek.com/trump-properties-special-interest-political-groups-spending-786016; Dan Alexander & Matt Drange, *Trump's Biggest Potential Conflict of Interest Is Hiding in Plain Sight*, FORBES (Feb. 28, 2018), https://www.forbes.com/sites/danalexander/2018/02/13/trump-conflicts-of-interest-tenants-donald-business-organization-real-estate-assets-pay/.

213 Niel S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L. J. 1, 177, 182 (2018).

214 This piece was written in the midst of the President's impeachment proceedings. Although he ultimately was not convicted, the question of whether or not he would be convicted is irrelevant. Prior to the disclosure of the events that led to impeachment, President Trump consistently violated many rules and norms and went unpunished.

protected through arguments of executive privilege, it is possible that it becomes replicated throughout the country at different levels of government and scale.

It is in this context that the weakness of current anti-bribery criminal laws becomes ever more important. In both *Citizens United* and *McDonnell*, the Court heard arguments about corruption concerns, but ultimately sided in one case on the side of free speech, and in the other on a narrow statutory interpretation, in part because the Court considered that there are ample mechanisms to fight corruption. In *McDonnell* the Court concluded: "[a] more limited interpretation of the term "official act" leaves ample room for prosecuting corruption," implying that the Court is satisfied with the various anti-corruption prosecution tools.[215] Similarly, in *Citizens United*, the Court distinguished between the government's (unconstitutional) stated efforts to prevent influence, and the (more legitimate) interest in precluding *quid pro quos*. Again, this assumes that the tools that the United States has to prevent those are adequate. They are not.

The potential for backsliding is not a result of any one of the transformations discussed; rather it is a combination of them all. They all reinforce each other into potentially changing corruption perception levels and, with that, moving the United States towards higher corruption levels. Just like anti-corruption efforts characterized by sustained, multi-prong, cumulative incremental efforts are thought to be successful,[216] sustained, multi-prong, cumulative incremental transformations in the opposite direction can also be.

C. Is There Really a Cause for Concern?

A first counter to the possibility of backsliding is that norm transformation is extremely complicated. This is because "social [norms] are collective enterprises . . . [and therefore] to change the[m] . . . requires a collective effort."[217] Furthermore, when it comes to social norms, people tend to be conservative. By this I do not mean politically conservative, but rather that they (we) display a reticence towards change. We could even push this further; it is not only that people do not want to change social meanings, but that those who do are

[215] McDonnell v. United States, 136 S.Ct. 2355, 2373 (2016).

[216] Stephenson, *Corruption as a Self-Reinforcing "Trap"*, *supra* note 24, at 2.

[217] Lawrence Lessig, *The Regulation of Social Meaning*, *supra* note 85, at 999-1000.

sanctioned for doing so, at least initially.[218] In other words, norm change is in-and-of-itself a collective action problem. Just like places with high levels of corruption have largely not been able to vanquish corruption, so too will places of low corruption levels retain their status quo. Nonetheless, just because the transformation of social norms is a collective action problem does not mean that it does not happen. In fact, it happens all the time.[219] Although they are the exception, corrupt countries like Sweden, Singapore, South Korea, Georgia, and Botswana—to name a few examples—have all reduced corruption significantly (although at different levels). There is no reason why this cannot happen in the opposite direction.

Another potential objection is that people so heavily disapprove of corruption that it is unlikely to arise. However, history is littered with practices surviving even in the face of intense moral opposition.[220] Furthermore, as we have seen, corruption itself is disapproved of in the majority of the world, despite its prevalence.[221] This means that if enough people see it as a course of fact in politics, then the country's moral compass will become irrelevant.

A final and perhaps more compelling consideration is that while local efforts to curb corruption seem to be failing, the United States is heavily combating corruption abroad through instruments such as the Foreign Corrupt Practices Act ("FCPA"). FCPA enforcement has increased consistently over the last decade. In 2019, over $2.6 billion

218 We can think of any number of examples. One of them is the current struggle about what constitutes misogyny. *See* KATE MANNE, DOWN GIRL: THE LOGIC OF MISOGYNY 18 (2019) (arguing that misogyny is not about hatred of women by men, but rather the policing of traditional gender roles and punishing women who behave outside those roles. This suggests that women can be misogynous, thereby contesting the "traditional" meaning of misogyny (Merriam-Webster defines it as a hatred of women). Ms. Manne's views are not widely shared. People still mostly understand misogyny to be hatred of women. The issue is not one about definition, but in fact leads to very different understandings of who can be and what actions are misogynous. What I think of Manne's interpretation is irrelevant, the point only serves as an example of the struggle to change social meanings).

219 After all, collective action is both one of the main drivers of human history and a tremendous challenge to neoclassical economics for it has, to my knowledge, not been able to account theoretically for how it happens.

220 *See* KWAME ANTONY APPIAH, THE HONOR CODE: HOW MORAL REVOLUTIONS HAPPEN (2010) (discussing the survival of the Atlantic slave trade, dueling in Britain, Chinese footbinding, and the honor killings of women in Pakistan even in the face of growing moral opposition).

221 Anna Persson et al., *supra* note 21.

were recovered by the U.S. government in FCPA enforcement, the most ever imposed in the history of the statute.[222] If FCPA enforcement is so high, should we worry about a shift in social norms so intense as to lead the country to higher corruption levels?

The answer is: yes. FCPA enforcement is largely irrelevant to the possibility of backsliding. The government's actions towards what happens *in* the country are far more important than they are about what happens *outside* of it. Even if what gives the U.S. a jurisdictional hook in FCPA cases is some connection to the United States, often times that connection is tenuous at best.[223] Moreover, the FCPA is not particularly relevant to creating perceptions of corruption nationally. Even amongst lawyers, the FCPA is a niche industry. Increased FCPA enforcement is irrelevant when governors are not punished for receiving bribes, public actors follow a particular donors every wish, and public officials use their authority to become wealthier. These are the actions that make the news and change perceptions, and so it is these that are cause for concern.

V. PREVENTING BACKSLIDING: WHAT CAN WE DO?

One of the complications for thinking of reform in a country like the U.S. is that most of the international anti-corruption tool-kits provide suggestions for implementing policies and creating institutions that already exist in this country.[224] As was surveyed in Part II of this Article, the U.S. has a vast set of norms and institutions devoted to promoting transparency and access to information, investigating instances of potential corruption, and enforcing anti-corruption statutes. However, this is a strength rather than a weakness. Since many of the institutions and laws necessary to combat corruption already exist, the solutions need not involve major policy re-engineering.

The argument laid out in this paper is that for corruption to increase in this country, expectations about the acceptability of corruption need to shift. I have argued that it is not just one development law and policy, but many that are driving this perception shift in a

222 Letter from Gibson, Dunn & Crutcher LLP to Clients and Friends, *supra* note 22.

223 Corney C. Thomas, *Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained*, *Defended, and Justified*, 29 REV. LITIG. 439 (2009-2010) (showing that even ten years ago the statute was being progressively used more for conduct that had little connection with the U.S.).

224 *See* Anna Persson et al., *supra* note 21.

dangerous direction: criminal statutes that are difficult to enforce, campaign finance laws that allow more spending, and repeated norm violations from the executive office that show that many of our anti-corruption tools are weaker. If this is the state of the country, then reform in each of these areas should be necessary.

The reality, however, is that reform in these areas is unlikely to be successful. I do not mean to say that the political coalition necessary to push for these reforms is unlikely, though that may be the case, but rather that campaign finance regulations, broader anti-corruption statutes, and limits on executive power are likely to be struck-down, curtailed, or other-wise diminished by the Supreme Court. The previous sections pointed out how the Court has consistently (and correctly in my view) tapered anti-corruption criminal statutes, and allowed for barely any restrictions on electoral finance. Furthermore, though not addressed at length here, many commentators have already pointed out that, under our current constitutional arrangement, executive power, in practice, is less constrained than many assume.[225]

It would be possible, of course, to undertake a reform agenda to make some of these more structural changes. Though some policy measures may require constitutional amendments, thus making them unlikely in the short or medium term, others may not. Some have suggested, for example, changing criminal procedure in corruption cases due to the dampened necessity of protecting the individual vis-à-vis the State.[226] Nonetheless, even if this policy measure were found to be constitutional, completely revolutionizing criminal procedure to enforce criminal laws that look remarkably like those in any low-corruption country would be an extreme and complicated policy response.

There are more immediate responses that do not require a major constitutional overhaul. An important question about normative change is whether it happens from the top-down or bottom-up. Although the answer depends on what kind of norm, Bo Rothstein has made the compelling argument that for corruption, "the fish rots from

225 *See generally*, JOHN P. BURKE, PRESIDENTIAL POWER: THEORIES AND DILEMMAS (2016) (updating Richard Neustadt's seminal study of the presidency and affirming that the president has more power than that of a bargainer); Eric Posner, *Presidential Leadership and the Separation of Powers*, 45 DAEDALUS 35 (2016) (arguing that the constraints on the President are not a product of a system of checks and balances but rather of a president's complicated and conflicting leadership obligations).

226 *See* Eisler, *supra* note 12.

the head down."[227] For Rothstein, the key issue is whether high levels of social trust—which are necessary to create the expectations for non-corrupt behavior—are caused because of people having created mechanisms that engender trust (bottom-up), or there is a robust public administration (top-down) that pushes these mechanisms.[228] After doing an extensive literature review, Rothstein found that "institution-centered accounts" track much better empirically, and that thus the driver of social trust is government.[229] So, politics can be messy and partisan, as long as the arm of the State that people interact with most often—police, courts, social services, etc.—are perceived to be neutral.

Therefore, to prevent backsliding, policymakers need to promote measures that achieve two things: the first is to guarantee that many public arenas like courts, police departments, and tax and welfare offices remain depoliticized, and second, to ensure that when anti-corruption investigations and prosecutions occur, they are perceived to not be politically motivated. Given the current political dynamics in the U.S., ensuring the neutrality of all of these public arenas is a complicated task that exceeds the contours of this paper. Furthermore it is not only the job of policymakers to carry it out. For example, as the Supreme Court is increasingly perceived as a political institution, it also behooves the Court to adopt measures to prevent it from becoming politicized.[230]

One important response policymakers could push for is to promote a more independent and better funded operation of the Department of Justice's Public Integrity Section. Independence could be achieved in a number of ways. The DOJ's Public Integrity Section Chief, for example, could be required to be nominated by members of a different party than that of the Attorney General. Or, the Section Chief could be mandated to serve fixed terms that alternated with elections. Another more complicated option would be for the Section to become an independent agency. This way, it would be governed by commissioners from different parties. Whichever way independence

227 Bo Rothstein, *supra* note 186.

228 *Id.* at 1025-26.

229 *Id.* at 1016.

230 *See e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (5th ed., 2010) (reviewing the history of the Supreme Court and the many ways in which at different times its members responded to political realities to both acquire a power not granted to it by constitutional design but also limit that power and it's perception as a political actor.).

is ensured, the objective is to protect prosecutions from becoming politically motivated.

Equally important is that this Section become more funded and staffed to be able to prosecute cases successfully. As has been outlined, criminal prosecutions in anti-corruption cases are hard. The solution, in my view, is not to make it easier to prosecute corruption acts, but rather to equip law enforcement with the tools they need to successfully pursue these cases.

Finally, precisely because criminal convictions will be hard to obtain, the Section should not only deal with criminally corrupt conduct but also find avenues to seek accountability for reprehensible, albeit not criminal, conduct. U.S. public officials can be administratively or civilly sanctioned for any number of violations. Some of these violations are acts of bribery, embezzlement, or conflicts of interest. These punishments can be severe, ranging from heavy fines to prohibition from working in government. The Public Integrity Section could take some of the cases where it concludes that criminal sanctions would not be available to another forum of accountability. This means formally coordinating with auditing and internal control departments in different agencies and branches of government and assisting those offices in pursuing administrative or civil sanctions. This would of course require re-writing the role for the Public Integrity Section and perhaps its place it in the administrative state.

These changes would lead to more enforcement of the anti-corruption laws in place. By enforcement, I do not necessarily mean that there will be more criminal consequences for corrupt actions, though that may be the case. I simply mean that by granting more authority and independence to corruption prosecutors, public officials are more likely to be made accountable for acts of corruption. The fact that accountability may or may not be criminal should not concern us—after all, we are in the midst of rethinking the value of and use of penal law and institutions nationwide.[231] Given their visibility, by holding more public officials accountable for instances of wrongdoing, perceptions of the acceptability of corruption may be tamed, thus impeding an equilibrium shift.

Evidently, what has been outlined here is not exhaustive. Other measures such as carrying out reforms to be able to better enforce the Emoluments Clause against the President, or mandating the President

231 McLeod, *supra* note 151; *see also* Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 12-19 (2019).

to comply with what are now norms of government (such as releasing his tax records), or further restricting the ability of the president and his or her family from maintaining financial interests while in office must be explored as well. I have focused on enforcement however, because the next administration can pursue these changes with relative ease while more long lasting proposals are crafted and pushed.

VI. CONCLUSION

We have evidence of corruption as a public issue dating back at least to the Roman Empire.[232] The long history of the problem is enough to make us worried about its return. After all, "in antiquity, greasing the wheels was a custom every bit as widespread as it is today."[233] Despite this long history, we do not have many examples of countries successfully eliminating it.[234] Today, only 36 out of 180 countries receive a passing grade[235] in Transparency International's Corruption Perception Index. This fact alone means that all countries should remain vigilant.

This paper has used the framework to explain how and why the United States could be backsliding. For a country to become more corrupt, social expectations around corruption need to change. I have argued that while the United States is not at alarming risk of this

232 Gaius Verres, the governor and propraetor of Sicily from 73 to 70 BCE, is probably the most famous case due to his being prosecuted by Marcus Tullius Cicero. It is estimated that Verres stole more than 40 million sesterces during his administration (a legionary earned around 900 sesterces a year at the time). Despite the extent of looting, Cicero argued that in fact Verres was only an extreme example of what happened in Rome. Nonetheless, it is said that Verres did not pay enough in bribes to his jurors and was eventually found guilty, but he escaped to live in exile in Marseille. For more details of this very interesting case, *see generally* Douglas Linder, *The Trial of Gaius (or Caius) Verres: An Account* (2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1305177. The problem of corruption could in fact be much older. Plato in *The Republic*, for example, already suggests that "public officials" (or guardians of the state) should never deal with money, that way it "will be kept safe, and they will keep the city safe." PLATO, REPUBLIC 418 (Tom Griffith trans., Cambridge University Press 2000).

233 CARLO ALBERTO BRIOSCHI, CORRUPTION: A SHORT HISTORY [21] (2017); *see also*, JOHN NOONAN, BRIBES: THE INTELLECTUAL HISTORY OF A MORAL IDEA 1-136 (1984) (Finding evidence of bribery dating back at least to the Roman Empire).

234 Of course I do not mean completely eliminating it, but rather lessening it to such an extent that it is exceptional.

235 Defined as 60 or above. If the passing is 50 or above then there are still only 57 countries that pass—less than a third of those evaluated.

happening, three major developments deserve attention and preoccupation. The first is the realization that only a small number of conducts can be prosecuted for crimes, the second is the increasing use of private wealth to drive politics, and the third is the current executive administration's repeated assault on governance norms and how it has revealed the relative inadequacy of current institutions to curb such violations.

The question moving forward is how to respond to this risk. While reform may be necessary, it could be that as currently designed, the U.S. has plenty of institutions and laws that can be used to better combat corruption. The way forward is perhaps simply to recognize that corruption can indeed arise here and to use the many tools at the government's disposal to ensure the impartial administration of public office.