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The Regulatory Challenge of Public Corruption

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BOOK REVIEW

THE REGULATORY CHALLENGE OF PUBLIC CORRUPTION

LAUREN M. OUZIEL*

TABLE OF CONTENTS

INTRODUCTION.....	639
I. DEFINING PUBLIC CORRUPTION BROADLY	642
II. TEACHING PUBLIC CORRUPTION HOLISTICALLY	649

JULIET S. SORENSEN AND DAVID H. HOFFMAN, *PUBLIC CORRUPTION AND THE LAW: CASES AND MATERIALS* (WEST ACADEMIC 2017). 894 PP.

INTRODUCTION

Corruption in America is an evolving concept. What it means has been, and remains, a source of fierce debate,¹ as is the law’s place in regulating it.² As political developments in America over recent years have shown, these debates are intensely significant for the future of American governance. An overarching theme of the 2016 election was corruption and its relationship to inequality: whom has the American political establishment helped, and to

* Assistant Professor, Temple University Beasley School of Law. Thanks to Juliet Sorensen for helpful comments, Osazenoriwa Ebose and Casey James for research assistance, and the editors of the *Journal of Criminal Law and Criminology*. And thanks to the authors of this terrific book for inviting me to review it.

¹ See, e.g., Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1387–90 (2013) (observing that “the Court has vacillated between expansive and restrictive conceptions of corruption” and has failed to reconcile the tension between cases involving gerrymandering and apportionment, which “defin[e] the proper legislative role,” and those involving campaign finance, which “defin[e] corruption of that role”); Jed Handelsman Shugerman, Foreword, *Fighting Corruption in America and Abroad*, 84 FORDHAM L. REV. 407, 408 (2015) (setting out the debate between narrow and broad definitions of the concept).

² Shugerman, *supra* note 1, at 408–09 (discussing how the Court’s narrower definition of corruption has limited law’s regulation largely to quid pro quo corruption).

whose benefit?³ In Donald Trump, Americans elected a candidate who campaigned on, among other things, “draining the swamp” and returning political power to the “people.”⁴ At the same time, Trump’s financial holdings and business entanglements present conflicts of interest unprecedented in the history of the American Presidency.⁵

In short, we are in a pivotal moment for the study of corruption in America. And so it is that *Public Corruption and the Law*,⁶ the first comprehensive collection of cases and materials geared towards law students’ study of corruption, arrives not a moment too soon. If it only filled this gaping hole in the casebook offerings, David Hoffman and Juliet Sorensen’s book would be worthwhile. But it does more. Through its selection and presentation of materials, the book implicitly advances two

³ See Sarah Chayes, *It Was a Corruption Election. It’s Time We Realized It.*, FOREIGN POL’Y (Dec. 6, 2016), <http://foreignpolicy.com/2016/12/06/it-was-a-corruption-election-its-time-we-realized-it-trump-united-states/> (noting that, as candidates, Donald Trump and Bernie Sanders each “made the word ‘corruption’ central to their campaigns,” and arguing that the 2016 election heralds America’s membership in a growing list of nations in which embedded structural corruption has contributed to the rise of political extremism); Michael Pollard & Joshua Mendelsohn, *RAND Kicks off 2016 Presidential Election Panel Survey*, RAND BLOG (Jan. 27, 2016), <http://www.rand.org/blog/2016/01/rand-kicks-off-2016-presidential-election-panel-survey.html> (explaining that a survey of Republican primary voters found respondents nearly 90% more likely to favor Donald Trump if they agreed with the statement, “people like me don’t have any say about what the government does,” and that such preference was statistically significant “over and beyond any preferences based on respondent gender, age, race/ethnicity, employment status, educational attainment, household income, attitudes towards Muslims, attitudes towards illegal immigrants, or attitudes towards Hispanics.”).

⁴ See Russell Berman, *Donald Trump’s Last-Ditch Plan to Drain the Swamp*, ATLANTIC (Oct. 18, 2016), <https://www.theatlantic.com/politics/archive/2016/10/donald-trumps-plan-to-drain-the-swamp/504569/> (describing specifics of Trump’s campaign pledge, which revolved primarily around efforts to limit lobbying by former government officials); Sarah McCammon, Annotation, *President Trump’s Inaugural Address, Annotated*, NAT’L PUB. RADIO (Jan. 20, 2017), <http://www.npr.org/2017/01/20/510629447/watch-live-president-trumps-inauguration-ceremony> (“Trump’s inaugural speech strongly echoes the themes that were central to his campaign: a populist, anti-establishment message combined with a promise to transfer power to ‘the people.’ Trump tapped into a feeling among many voters that the political system was broken and the Washington establishment was not serving them.”).

⁵ See Walter M. Shaub, Jr., Director, U.S. Off. of Gov. Ethics, Remarks at the Brookings Institution (Jan. 11, 2017), available at <https://www.brookings.edu/events/white-house-ethics-experts-repond-to-donald-trumps-announcement/> (explaining how Trump’s business holdings and failure to divest from them creates conflicts of interest unprecedented for the office of the presidency); Jeremy Venook, *Trump’s Interests vs. America’s, Dubai Edition*, ATLANTIC (Aug. 9, 2017), <https://www.theatlantic.com/business/archive/2017/08/donald-trump-conflicts-of-interests/508382/> (detailing fifty-three different business dealings of Trump’s that raise serious conflict-of-interest problems).

⁶ JULIET S. SORENSEN & DAVID H. HOFFMAN, PUBLIC CORRUPTION AND THE LAW: CASES AND MATERIALS (2017).

important arguments.

First, the book's authors stake their place squarely on one side of the debate over corruption's definition. The book covers not just the classic, *quid pro quo* corruption of public officials, but also structural corruption within the broader political process, through abuses of campaign finance, patronage, and redistricting. Second, the book functions as a compelling argument for teaching corruption as a stand-alone law school course. When domestic public corruption is taught as a part of a course on something else—white collar crime, compliance, or international business regulation, for example—students miss the unique and confounding regulatory challenge that corruption presents. By seeing the full panoply of laws and processes that regulate public corruption, students can appreciate how regulatory modalities interrelate. They can see how courts', legislatures', and enforcers' choices among these regulatory modalities affect which forms of corruption are constrained and which are left unimpeded. And they learn to appreciate how these choices ultimately influence democratic governance.

In this Review, I will elaborate on these implicit themes of the book and advance them more directly. Part I provides an overview of the book's broad approach. The book covers the full spectrum of conduct constituting abuse of official power for personal benefit—from the classic criminal prosecutions of *quid pro quo* corruption, to structural corruption of the political process, to corruption abroad, to corruption within legally-insulated institutions (police departments, the military, Congress, and the White House). It also surveys the theoretical debates on what, exactly, corruption is. This Part articulates the key insights enabled by such a holistic approach: corruption in all its varied forms, and the regulation of corruption, is a *system*—a set of interrelated, responsive forces.⁷ A change in one part of that system—for instance, a reduction or enlargement of one form of corruption or regulatory modality—has cascading effects on the others.

In service of these insights, Part II argues for teaching domestic public corruption holistically, as a stand-alone course, rather than compartmentally through other courses (for instance, on white collar crime or campaign finance law). It is only by examining the full panoply of available regulatory modalities (criminal, civil, electoral) and the cascading effects that ensue when any one of those regulatory modalities is relaxed, that students will appreciate the regulatory challenge public corruption presents. Yet, as an empirical examination of law school course offerings reveals, few law

⁷ DONELLA H. MEADOWS, THINKING IN SYSTEMS 2 (Diana Wright, 1st ed. 2008) (theorizing dynamics of regulation in systems, described as “a set of things . . . interconnected in such a way that they produce their own pattern of behavior over time”).

schools teach domestic public corruption in this manner.⁸ This curricular omission is problematic. It is only by understanding public corruption and its regulation as a system that students can appreciate the unique regulatory challenge corruption presents. As the next generation of American lawyers, elected officials, judges, policymakers, and engaged citizens, it is our students who must understand that challenge, if our society is ever to rise to it.

I. DEFINING PUBLIC CORRUPTION BROADLY

What is public corruption? This is the most pressing question in corruption scholarship and doctrine because its answer determines how law should regulate public officials' actions.⁹ Few would contest that a public official acts corruptly when he wields the power of his office in return for a personal benefit: the so-called "quid pro quo."¹⁰ But what about less clearly transactional, but still undesirable, forms of influence—such as when a public official accepts gifts or campaign donations from interested persons or entities seeking to curry favor, or when a public official seeks to alter the structures of governance in ways that will benefit her own (or her party's own) continued electoral success? If we define corruption in a way that excludes these sorts of actions, we necessarily limit law's power to regulate them.

In this respect, defining corruption is fundamentally about defining law's role in the regulation of the democratic process. And law's role in this space is not self-evident. Democracy in a pluralistic society necessarily produces winners and losers, conferring power to one at the expense of the other. To what extent should law regulate the contest and the benefits power confers? And how should courts and legislatures set the parameters of legal regulation?

Sorensen and Hoffman present this existential thicket at the outset. They preface their case materials with a collection of readings that lays bare the difficulty of defining corruption, as well as the unique problems of identifying and measuring conduct that undermines the very institutions tasked with rooting it out. For instance, what distinguishes a gift from a

⁸ See *infra* note 63 and accompanying text (finding just thirteen schools that teach anything arguably fitting a stand-alone, holistic examination of public corruption and its regulation).

⁹ Shugerman, *supra* note 1, at 408.

¹⁰ See generally, Richard L. Hasen, *Why Isn't Congress More Corrupt? A Preliminary Inquiry*, 84 *FORDHAM L. REV.* 429 (2015) (drawing implicit distinction between quid pro quo "corruption" by legislators and other forms of outside influence).

bribe?¹¹ How can we measure corruption's prevalence and effects within economies?¹² And how is corruption exposed and prosecuted?¹³ These materials are richly drawn from across disciplines, presenting corruption's challenges from the vantage point of political science, economics, and prosecution. The readings also effectively demonstrate the stakes of the enterprise, demonstrating the ways in which corruption affects governance and the rule of law, economic growth, and the legitimacy of institutions.

Within these materials the authors devote a fair amount of attention to the case-fixing scandal that rocked the Cook County court system in the early 1980s, in which a years-long undercover FBI investigation known as Operation Greylord resulted in ninety-seven convictions of judges, lawyers, and other court personnel for federal crimes including fraud, extortion, and bribery.¹⁴ The excerpts provided—from appellate decisions upholding two of the convictions—provide a piercing illustration of corruption's effects and the intense resources required to successfully expose and combat it.

The Greylord materials bring to mind a more recent example of judicial corruption in Luzerne County, Pennsylvania (not included in the book), in which two judges accepted millions of dollars in bribes from for-profit juvenile detention center owners in return for sentencing thousands of children to long terms of confinement in those centers.¹⁵ It is not only their courthouse locus that makes both the Greylord and Luzerne County scandals so notable, but that they continued for years in plain sight—with many institutional actors aware of the corruption, but hard-pressed to stop it.¹⁶ It is cases like these that crystallize why public corruption crimes pose such a unique threat and investigatory challenge, a theme the authors revisit in more detail in a later chapter.¹⁷

The Operation Greylord materials are a perfect segue to the book's

¹¹ SORENSEN & HOFFMAN, *supra* note 6, at 12–21, as excerpted in Susan Rose-Ackerman, *Bribes, Patronage and Gift-Giving*, in SUSAN ROSE ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* (1999).

¹² *Id.* at 21–32, as excerpted in William Easterly, *Corruption and Growth*, in WILLIAM EASTERLY, *THE ELUSIVE QUEST FOR GROWTH: ECONOMISTS' ADVENTURES AND MISADVENTURES IN THE TROPICS* (2001)).

¹³ *Id.* at 32–45 (excerpts of cases arising from the federal investigation of the Cook County judicial system in the late 1970s and early 1980s).

¹⁴ *Id.*

¹⁵ Ian Urbina, *Despite Red Flags About Judges, a Kickback Scheme Flourished*, N.Y. TIMES (Mar. 27, 2009), http://www.nytimes.com/2009/03/28/us/28judges.html?_r=1 (this has become commonly known as the “Kids for Cash” scandal).

¹⁶ *Id.*; SORENSEN & HOFFMAN, *supra* note 6, at 32.

¹⁷ SORENSEN & HOFFMAN, *supra* note 6, at ch. 5, Section II (discussing the unique challenges of investigating public corruption, and providing selected scholars' prescriptions for how to mitigate them).

second chapter, on traditional bribery, extortion, and fraud. The chapter is titled “Individual Public Corruption,” as distinguished from the sort of structural influence-peddling the book covers in its later section on patronage, campaign finance, and electoral redistricting.¹⁸ The “individual” descriptor has been elsewhere used for the same distinguishing purpose,¹⁹ but it is somewhat of a misnomer. Many cases of traditional graft, including those covered in the chapter,²⁰ involve a group of public officials whose collective conduct comprises *systemic* corruption within a public institution, and often reflects a broader *institutional culture* of corruption.²¹ (And some cases covered in later chapters of Sorensen and Hoffman’s book, for instance, those for violations of the Foreign Corrupt Practices Act, involve discrete corrupt acts by individual defendants.²²)

What distinguishes the subject of the second chapter from the remainder of the book, then, is less who has committed the corrupt acts than which laws those acts implicate: all involve statutory crimes with common law roots. These are the “classic” corruption cases involving fraud, extortion, and bribery. And indeed, the Court has drawn on the common-law origins of these statutes when interpreting them.²³

The point is not to quibble about nomenclature, but to raise a broader

¹⁸ *Id.* at ch. 3.

¹⁹ *See, e.g.*, Shugerman, *supra* note 1, at 408 (distinguishing between “the intuitive image of individual corruption—such as quid pro quo bribery—and the deeper structural problem of institutional corruption”).

²⁰ *See, e.g.*, SORENSEN & HOFFMAN, *supra* note 6, at 71–76, *as excerpted in* United States v. Alfisi, 308 F.3d 144 (2d Cir. 2002) (systemic bribery among USDA inspectors at the Hunt’s Point Terminal Market in New York); *id.* at 113–16, *as excerpted in* United States v. Massey, 89 F.3d 1433 (11th Cir. 1996) (systemic corruption among judges and laws in the Circuit Court of Dade County, Florida); *id.* at 175–88, *as excerpted in* Evans v. United States, 504 U.S. 255 (1992) (widespread corruption in property rezoning process in the Atlanta metro area).

²¹ The chapter also includes cases involving lone wolf corrupt officials. *See, e.g., id.* at 62–70, *as excerpted in* United States v. Ganim, 510 F.3d 134 (2d Cir. 2007) (corrupt acts by Mayor of Bridgeport, Connecticut); *id.* at 84–90, *as excerpted in* United States v. Blagojevich, 794 F.3d 729 (7th Cir. 2015) (corrupt acts by Governor of Illinois); *id.* at 92–110, *as excerpted in* McDonnell v. United States, 136 S. Ct. 2355 (2016) (alleged corrupt acts by Governor of Virginia).

²² *See, e.g., id.* at 506–10, *as excerpted in* SEC v. Straub, 921 F. Supp. 2d 244 (S.D.N.Y. 2013) (involving allegations against three executives of a telecommunications company for violations of the FCPA).

²³ *See* Evans v. United States, 504 U.S. 255 (1992) (interpreting Hobbs Act extortion statute in relation to common law definition of extortion), *as excerpted in* SORENSEN & HOFFMAN, *supra* note 6, at 146–58; McNally v. United States, 483 U.S. 350 (1987) (interpreting mail fraud statute in reference to common law understanding of fraud as limited to deprivations of property rights); *id.* at 369–75 (Stevens, J., dissenting) (disputing that mail fraud statute maps onto common law fraud), *as excerpted in* SORENSEN & HOFFMAN, *supra* note 6, at 209–23.

concern about framing. By labeling these cases as “individual” corruption, we shortchange the structural features within institutions that give rise to quid pro quo corruption.²⁴ And by glossing over the common-law origins of these particular crimes, we overlook an important constraint within the laws themselves: these crimes were defined, by both courts and legislatures, long before the explosion of money in politics.²⁵ They are, in this sense, relics of a different political and regulatory era.

Seen in this light, the second chapter materials reveal the difficulty of distinguishing criminal corruption from standard operating procedure in the modern political era. It is precisely this difficulty that renders statutory interpretation in these cases an exercise in influence-peddling relativism. If liability for extortion could be predicated on campaign contributions without proof of a quid pro quo, what prevents an elected official’s criminal conviction for supporting legislation furthering the interests of constituent donors?²⁶ If liability under the federal gratuity statute required proof merely of a gift given because of the recipient’s official position, what would prevent prosecution of a winning sports team invited to the White House from gifting the President with a replica team jersey?²⁷ If liability under the federal bribery statute can be predicated on informal exercises of influence—for instance, setting up meetings, talking with officials, or organizing events—what prevents the prosecution of an elected official for simply responding to

²⁴ See, e.g., Zephyr Teachout, *Legalized Bribery*, N.Y. TIMES (Jan. 26, 2015), <https://www.nytimes.com/2015/01/26/opinion/zephyr-teachout-on-sheldon-silver-corruption-and-new-york-politics.html> (“The structure of private campaign finance has essentially pre-corrupted our politicians, so that they can’t even recognize explicit bribery because it feels the same as what they do every day.”).

²⁵ According to data from the Campaign Finance Institute, between 1974 and 2014, spending on Senate races increased by over \$250 million, a growth of 882%. *Senate Campaign Expenditures: Major Party General Election Candidates, 1974–2016*, Campaign Fin. Inst., http://www.cfinst.org/pdf/vital/VitalStats_t5.pdf (last visited Jan. 16, 2018). In that same time, spending on House races increased by over \$378 million, a growth of 859%. *House Campaign Expenditures: Major Party General Election Candidates, 1974–2016*, Campaign Fin. Inst., http://www.cfinst.org/pdf/vital/VitalStats_t2.pdf (last visited Jan. 16, 2018).

²⁶ See *McCormick v. United States*, 500 U.S. 257, 272 (1991) (reversing a state legislator’s extortion conviction predicated on payments made to him by constituents who stood to benefit from legislator’s sponsorship of certain legislation, noting that criminalizing such payments without proof of a quid pro quo “would open to prosecution . . . conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions”), as excerpted in SORENSEN & HOFFMAN, *supra* note 6, at 163.

²⁷ See *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 414 (1999) (reversing conviction of trade association for illegal gratuities, predicated on gifts made to U.S. Agriculture Secretary, where prosecution made no showing that gifts were given for or because of any particular official act), as excerpted in SORENSEN & HOFFMAN, *supra* note 6, at 133.

constituent concerns, if the constituent has given campaign contributions or other gifts in the past?²⁸

Of course, each of these scenarios (all hypothesized by the Supreme Court in service of narrower statutory construction), are a far cry from the actual conduct at issue in the given case at hand. None of those cases (or others, for that matter) involved such unremarkable conduct; federal prosecutors have, by and large, prosecuted officials for clearly undesirable and uncommon acts.²⁹ Yet the slippery slope concerns that surface repeatedly in the Chapter Two cases are all of a piece—a judicial recognition of, and deference to, the realities of our representative democracy.³⁰

The most troublesome of those realities are the subject of the book's third chapter on patronage and campaign finance. The authors' juxtaposition of Chapters Two and Three puts the challenge of corruption regulation in sharp relief. If courts are hesitant to police corruption too robustly at the back-end (by way of criminal sanctions for past transgressions), then regulation must lie at the front-end—by way of monitoring and limiting the financial access of those who would exert corrupting influence. And yet, as the materials in the third chapter show, the Supreme Court has in recent years eschewed front-end regulation, too.

The Chapter Three materials are detailed and thorough. They begin with the history of patronage systems and the machine politics of the early twentieth century. The authors then provide a history of campaign finance regulation through the key statutes and Supreme Court cases interpreting them. Through this overview, the reader can trace the doctrinal origins of First Amendment constraints on campaign finance regulation,³¹ the constitutional significance of distinguishing campaign contributions from

²⁸ See *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (reversing bribery conviction of state governor predicated on gifts given ostensibly in return for the governor's arranging meetings, organizing events, and speaking with other officials—all, without more, falling short of "official acts"), as excerpted in SORENSEN & HOFFMAN, *supra* note 6, at 92.

²⁹ See, e.g., *McDonnell*, 136 S. Ct. at 2375, as excerpted in SORENSEN & HOFFMAN, *supra* note 6, at 110 ("There is no doubt that this case is distasteful; it may be worse than that. But our concern is . . . with the broader legal implications of the Government's boundless interpretation of the federal bribery statute."); *Sun-Diamond Growers of Cal.*, 526 U.S. at 408 ("When . . . the giving of gifts by reason of the recipient's mere tenure in office constitutes a violation, nothing but the Government's discretion prevents the foregoing examples [as distinguished from the more serious charged conduct] from being prosecuted."), as excerpted in SORENSEN & HOFFMAN, *supra* note 6, at 138.

³⁰ See Teachout, *supra* note 24.

³¹ See SORENSEN & HOFFMAN, *supra* note 6, at 307–19 (discussing *Buckley v. Valeo*, 424 U.S. 1 (1976), and its legacy equating political spending and constitutionally protected speech).

expenditures,³² and the Court's narrowing conception of the government's interest in campaign finance regulation.³³ The doctrinal arc the authors present culminates in a detailed, forty-page distillation of the *Citizens United v. Federal Election Commission*³⁴ opinion (no mean feat on a decision that clocks in at 183 pages).³⁵ The authors helpfully present that case through excerpts of each of the opinions (majority, concurrence, and dissent) interspersed with explication and analysis. In all, Sorensen and Hoffman do a tremendous job explaining the long, convoluted history of campaign finance law in America.

The chapter then considers an alternative theory of state interest in campaign finance regulation, apart from combatting corruption: so-called "equalization," the idea of leveling the playing field of electoral politics.³⁶ However laudable as a policy goal, equalization has proven an inadequate theory for winning campaign finance cases.³⁷ More recently, some scholars have suggested an alternative state interest in campaign finance reform, rooted in ensuring greater political participation.³⁸ Reforms aimed at enhancing political participation seek not to curtail political expenditures, but rather to expand the number of people making them.³⁹ It remains to be seen

³² See SORENSEN & HOFFMAN, *supra* note 6, at 307–47.

³³ Compare *McConnell v. FEC*, 540 U.S. 93, 150 (2003) (conceiving broadly of Congress' regulatory interest in preventing "undue influence on an officeholder's judgment," or even "the appearance of such influence"), with *Citizens United v. FEC*, 558 U.S. 310 (2010) (declining to uphold regulation aimed at limiting purchased "ingratiation and access").

³⁴ *Citizens United*, 558 U.S. at 361–62 (holding unconstitutional federal campaign finance law restricting political expenditures by corporations as violating corporations' First Amendment rights to make political speech).

³⁵ See SORENSEN & HOFFMAN, *supra* note 6, at 404–44.

³⁶ For scholarly articulations of this theory, see, e.g., Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 577–78 (1999) ("[D]ramatically unequal campaign spending that reflects underlying inequalities of wealth is in sharp tension with the one person, one vote principle enshrined in our civic culture and our constitutional law."); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 27–28 (1996) (stating that "egalitarian pluralism aims to equalize the ability of different individuals to affect the political process," based on the theory that "disparities in wealth and ability to organize are not relevant to the individual's right to influence political outcomes").

³⁷ See *Citizens United*, 558 U.S. at 350 ("But Buckley [v. Valeo] rejected the premise that the Government has an interest 'in equalizing the relative ability of individuals and groups to influence the outcome of elections.'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976))).

³⁸ See generally Spencer Overton, *The Participation Interest*, 100 GEO. L.J. 1259 (2012) (arguing in favor of campaign finance reform focused on increasing political participation by a broader portion of the electorate).

³⁹ *Id.* at 1263 (advocating reforms such as a \$100 tax credit for political contributions, donor matching funds, and relaxation of some of the restrictions around political action committees).

whether such reforms will be adopted and, if so, what the Court will do in the event they are challenged.

Chapter Three also covers the issue of corruption in judicial elections, an area in which the Court has been far more willing to exert regulatory muscle than it has in the field of legislative and executive elections.⁴⁰ It ends with consideration of redistricting and gerrymandering. These practices, though lawful under federal law as of this writing,⁴¹ nevertheless present problems of abuse of power and improper influence. Partisan redistricting by elected officials is, by definition, the use of public office to entrench those officials' (and their party's) power. And elected officials in gerrymandered districts become less accountable to their constituents than to the party officials who control the boundaries.⁴²

In a casebook on corruption, gerrymandering thus amply earns its place. But its inclusion in this context also serves to make a larger point: corruption and its regulation are *systemic* challenges. If regulation at the back end (criminal liability) and the front (campaign finance) has been limited, the only regulatory modality remaining in the system is elections themselves: voters will oust the bad apples at the polls. Yet for the election modality of corruption regulation to work, voters must actually choose their elected officials. In gerrymandered districts, the converse is true.⁴³

The remaining chapters of the book examine more discrete issues within corruption law. Chapter Four is devoted to corporate corruption abroad and the Foreign Corrupt Practices Act.⁴⁴ Chapter Five revisits in more depth the unique challenges of investigating and prosecuting public corruption first highlighted in Chapter One, focusing in particular on the thorny problems inherent in investigation of corruption in police departments, the military, the United States Congress and, finally, the President (with a study of the Watergate prosecution).⁴⁵ The timeliness of the Watergate coverage hardly

⁴⁰ SORENSEN & HOFFMAN, *supra* note 6, at 477–80 (discussing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (upholding a prohibition on contributions and expenditures to a judge by litigants in a case pending before that judge); *Williams-Yulee v. The Fla. Bar*, 135 S. Ct. 1656 (2015) (upholding Florida's ban on personal solicitation of campaign funds by judicial candidates).

⁴¹ The Court will revisit the question this term in *Gill v. Whitford*, 137 S. Ct. 2266 (No. 16-1161), and *Benisek v. Lamone*, 136 S. Ct. 543 (No. 17-333).

⁴² SORENSEN & HOFFMAN, *supra* note 6, at 480. See also Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 597 (2002) (describing gerrymandering as “insider manipulation of the process for partisan gain,” and diagnosing a “failure of constitutional law to ensure the competitive vitality of the political process”).

⁴³ Issacharoff, *supra* note 42.

⁴⁴ 15 U.S.C. § 78dd-1 (1996); SORENSEN & HOFFMAN, *supra* note 6, at ch. 4.

⁴⁵ *Id.* at ch. 5.

bears mention,⁴⁶ and it seems certain that future editions of the book (which was published before the outcome of the 2016 election) will contain updated materials on such topics as the Emoluments Clause,⁴⁷ the conflicts-of-interest and anti-nepotism laws governing executive branch officials,⁴⁸ and the scandal that birthed a custom—but not a legal requirement—that presidents disclose their federal tax returns.⁴⁹

The book concludes in Chapter Six with a deeper exploration of the philosophical debates around corruption. It offers a series of readings that collectively theorize corruption through a variety of perspectives—economic, moral, cultural, and constitutional.⁵⁰ Through these readings, students will be challenged to think about what, precisely, makes corruption a societal problem, how a society’s own values and governance structure influences the extent to which corruption is, in fact, a problem, and how these factors affect how we ultimately choose to define corruption.

II. TEACHING PUBLIC CORRUPTION HOLISTICALLY

Some scholars have likened corruption to hydraulic processes: if

⁴⁶ Peter Baker, *In Trump’s Firing of James Comey, Echoes of Watergate*, N.Y. TIMES (May 9, 2017), https://www.nytimes.com/2017/05/09/us/politics/trump-fbi-investigation-nixon.html?_r=0; Jon Marshall, *7 differences between Trump turmoil and Watergate*, CHI. TRIB. (May 23, 2017), <http://www.chicagotribune.com/news/opinion/commentary/ct-watergate-trump-investigations-differences-perspec-0524-md-20170523-story.html>.

⁴⁷ Norman Eisen, Richard Painter & Lawrence H. Tribe, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump*, BROOKINGS INST. (Dec. 16, 2016), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf.

⁴⁸ Shaub, *supra* note 5; J. Jackson Walter, *The Ethics in Government Act, Conflict of Interest Laws and Presidential Recruiting*, 41 PUB. ADMIN. REV. 659 (1981).

⁴⁹ See Joseph J. Thorndike, *JCT Investigation of Nixon’s Tax Returns* (Feb. 2016), <http://uschs.org/wp-content/uploads/2016/02/USCHS-History-Role-Joint-Committee-Taxation-Thorndike.pdf> (unpublished manuscript prepared for United States Capitol Historical Society, program on The History and Role of the Joint Committee: the Joint Committee and Tax History) (detailing history of President Nixon’s \$476,431 tax dodge, press reports of which led to a federal investigation, Nixon’s ultimate disclosure of his returns, and his infamous statement to the American public—ultimately proven false by the tax investigation—that “I am not a crook”); Mark A. Patterson, *Many public officials must share their tax returns. Why not the president?*, WASH. POST (Aug. 17, 2016), https://www.washingtonpost.com/opinions/many-public-officials-must-share-their-tax-returns-why-not-the-president/2016/08/17/196e2b8c-63f2-11e6-be4e-23fc4d4d12b4_story.html (discussing absence of law requiring disclosure of President’s tax returns).

⁵⁰ SORENSEN & HOFFMAN, *supra* note 6, at ch. 6 (surveying the writings of, among others, Richard A. Posner on the economics of corruption; John T. Noonan, Jr. on the intellectual history of anti-bribery law; Lawrence Lessig on the culture of corruption bred by elected officials’ dependence on campaign funding; and Zephyr Teachout on the “anti-corruption principle” embedded in the U.S. Constitution).

regulators seek to dam one stream of corrupt influence, it will simply find another opening.⁵¹ Others have applied the hydraulic analogy to anti-corruption enforcement, observing that “if you dam up one source of reform, you flood the other sources.”⁵² Here, I want to tweak the analogy somewhat: *systemic deregulation* is also a hydraulic process. As each regulatory pathway in a system is limited or blocked, the pressure mounts on the remaining ones—until the last is lifted and corruption finally gushes freely, without constraint.

This is our current predicament. Criminal law has been limited substantially by the Court as a regulatory tool. It now serves only to constrain the most blatant form of graft—the quid pro quo; and because of the high burden of proof in criminal cases and the difficulties inherent in investigating such cases, its practical efficacy is further limited to the most extreme and obvious scenarios.⁵³ Campaign finance regulation would seem to be the obvious antidote to criminal law’s regulatory shortcomings: it prevents corruption at the front-end by limiting the financial benefits influence-peddlers could confer on public officials. Yet the Court has hobbled campaign finance regulation in service of free speech.⁵⁴

This leaves elections themselves as a regulatory bulwark. As Sorensen and Hoffman correctly note, elections are “a key—perhaps the key—anti-corruption mechanism in a democracy.”⁵⁵ That is, voters believing their elected officials have been bought can oust them at the polls. Yet this regulatory option has likewise been limited—not so much by the courts as by the elected officials themselves, who have manipulated the districting process to shield themselves from electoral accountability.⁵⁶ To these corrupting influences on the electoral process I would add another (which is not covered in the book but made prominent in the 2016 election): the dissemination by interest groups (and foreign powers) of political propaganda.⁵⁷ Such

⁵¹ See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1998).

⁵² Shugerman, *supra* note 1, at 409 (discussing how the Court’s resistance to campaign finance regulation has left prosecutors to pick up the regulatory slack, resulting in prosecutorial overreaching in a number of cases).

⁵³ See *supra* notes 26–30 and accompanying text.

⁵⁴ See *supra* notes 31–35 and accompanying text.

⁵⁵ SORENSEN & HOFFMAN, *supra* note 6, at 2.

⁵⁶ See *supra* notes 42–43 and accompanying text. Whether the Court this term jettisons its traditional reluctance to curtail partisan (as opposed to race-based) gerrymandering remains to be seen. *Supra* note 41.

⁵⁷ Craig Timberg, *Russian propaganda effort helped spread ‘fake news’ during election, experts say*, WASH. POST (Nov. 24, 2016), <https://www.washingtonpost.com/business/economy/russian-propaganda-effort-helped-spread-fake-news-during-election-experts->

propaganda is corrupting, to be sure; it is also, practically speaking, difficult to curtail, and in any event most likely protected (as to dissemination by American persons) by the First Amendment.⁵⁸

The pathways to effective regulation of corrupting influence, in short, have nearly all been blocked. It should not be entirely surprising, then, that in 2016, the United States Presidential election was defined largely as a contest between entrenched, corrupted power and disruptive, outside change,⁵⁹ that paradoxically, the winner of that contest maintains financial and business holdings presenting unprecedented conflicts of interest and potential for corruption,⁶⁰ that in the 2016 election cycle, combined political expenditures by political parties, outside groups, and donors exceeded \$2.1 billion,⁶¹ and that in 2012, the first election after 2010's multi-state redistricting surge, incumbents in Congress benefitted from non-competitive races, even in states that had split nearly evenly in that year's presidential race.⁶² Each of these developments is concerning. Together, they present symptoms of a larger problem: a systemic breakdown of public corruption regulation.

Where do we go from here? Lost in the prescriptive debate is the single most important prerequisite for viable reform: that Americans—including American civic leaders—care about the integrity of their public institutions and understand regulation's importance in maintaining it.

As scholars, we can and should endeavor to make this case. But our more influential contribution here is as teachers. Law schools not only educate the next generation of lawyers; they mold the next generation of civic leaders. If we want those leaders to care about public corruption and the

say/2016/11/24/793903b6-8a40-4ca9-b712-716af66098fe_story.html?utm_term=.88abf98fceb8.

⁵⁸ *Meese v. Keene*, 481 U.S. 465 (1987) (upholding a statute requiring that foreign political propaganda be labeled as such) is not to the contrary. The case held that the labeling requirement did *not* restrain the exercise of a film distributor's free speech rights; if it had, the act presumably would be unconstitutional.

⁵⁹ See *supra* note 3 and accompanying text.

⁶⁰ See Schaub, *supra* note 5; Venook, *supra* note 5.

⁶¹ This data comes from the Center for Responsive Politics, a nonpartisan, nonprofit research group, based on compilations of filings with the Federal Election Commission. *2016 Presidential Race: Summary*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/pres16> (last visited Jan. 16, 2018).

⁶² See Sundeep Iyer, *Redistricting and Congressional Control Following the 2012 Election*, BRENNAN CTR. FOR JUST. (Nov. 28, 2012), https://www.brennancenter.org/sites/default/files/analysis/Redistricting_Post_2012.pdf; Mike Maciag, *Analysis: Redistricting Mostly Protected Incumbents in 2012 Congressional Races*, GOVERNING (Nov. 16, 2012), <http://www.governing.com/blogs/by-the-numbers/redistricting-gerrymandering-effect-2012-congressional-elections.html>.

imperative of restraining it, we must begin by giving public corruption law the curricular attention it deserves. This means, at a minimum, teaching public corruption as a stand-alone course that examines the full panoply of regulatory modalities—criminal, civil, electoral—and efforts to displace them.

Few law schools do. Of the 225 ABA-accredited law schools that make course offerings publicly available on their websites, just ten appear to offer what could arguably be considered a holistic, domestically-focused public corruption course.⁶³ A larger number of schools offer courses covering discrete topics in corruption, such as the Foreign Corrupt Practices Act, or global corruption, or white-collar crime, or campaign finance and election law. But the vast majority of law students today will complete their legal education without any understanding of public corruption as a systemic regulatory challenge. This is a serious omission.

Fortunately, it is one easily remedied. For professors who might consider teaching a wide-ranging public corruption course, Sorensen and Hoffman's new book lowers the bar to entry, as it obviates the need to compile one's own materials from disparate sources. Of course, the book also is a useful resource for those teaching discrete courses on, for instance, criminal corruption prosecutions or global corruption law. But offering such discrete courses without also offering a holistic course on public corruption and the law is, I believe, a curricular shortcoming. As law schools and law professors, we have a special responsibility to inculcate in the next generation of civic leaders an understanding of, and appreciation for, public corruption as a regulatory challenge. By meeting this responsibility, we can help ensure our civic institutions of the future are stronger than those of the present.

⁶³ These include the law schools at the University of Denver, Fordham University, the University of Michigan, Temple University, Hofstra University, George Washington University, the University of Chicago, Northwestern University, the University of Pennsylvania, and Rutgers University. (It is perhaps not a coincidence that of the ten schools, seven are in either the Chicago, New York, or Philadelphia metro area, all cities with long histories of public corruption.)

A brief explication of survey methodology is in order. There are 230 ABA-accredited law schools in the United States. Of these, 225 maintain full course listings and descriptions on their websites. (The missing five are the University of Arkansas, Fayetteville; the University of Arkansas, Little Rock; Georgia State University; Pontifical Catholic of Puerto Rico; and Puerto Rico University.) Under my supervision, my research assistant reviewed the course listings for the 225 law schools and searched within them using the terms "corrupt*," "compliance," "foreign corrupt*," and "campaign." All available course listings were searched. While for the vast majority of schools this included multiple years, for others it included only the 2017–18 year; therefore, missed through this survey method would be schools publishing only courses for the current year which did not offer a public corruption class in the current year, but do offer it biennially or triennially.