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Boatright, Robert G. and Molly Brigid Flynn. "The Poverly of 'Corruption': On Reframing the Debate on Money in Politics." *Albany Government Law Review* 9.2 (2016): 341.
<http://www.albanygovernmentlawreview.org>.

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THE POVERTY OF “CORRUPTION”: ON REFRAMING THE DEBATE ON MONEY IN POLITICS

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INTRODUCTION

It has long been noted that there is something unusual about the way Americans think about political corruption.³ Americans are substantially more likely than citizens of other Western democracies to claim that their government is corrupt,⁴ yet they are slightly less likely than residents of similar countries to claim any firsthand experience with corruption.⁵ This is a disparity that merits our concern: do Americans harbor a paranoid streak, or a healthy skepticism about government? Or do we simply think about corruption differently than do the citizens of other nations? And what consequences does this disparity have for governance? Bruce Cain argues convincingly that this disparity has its roots in the artificial discussion that has been prompted by our Supreme Court,⁶ forced to accept that preventing corruption is the sole constitutionally permissible rationale for regulating political spending, proponents of campaign finance reform have looked for corruption everywhere, and in the process have twisted the word so that it embraces a wide range of political and social phenomena that other nations' citizens might not regard as corrupt.⁷

Cain's allegations are of particular relevance in today's political climate.⁸ Although we lack empirical evidence to prove this point,⁹ it seems apparent to us that there has been an increase over the past few years in talk of corruption in American politics.¹⁰ Much of

³ See generally 75% in U.S. See *Widespread Government Corruption*, GALLUP (Sept. 19, 2015), <http://www.gallup.com/poll/185759/widespread-government-corruption.aspx> (discussing perceptions of adults who view corruption as pervasive over the past decade).

⁴ See generally William Tate, *Gallup CEO: Belief that Current Government is Corrupt Fuels Trump Popularity*, AM. THINKER (Jan. 9, 2016), http://www.americanthinker.com/blog/2016/01/gallup_ceo_belief_that_current_government_is_corrupt_fuels_trump_popularity.html (comparing the seventy-five of the American public that believe their government is corrupt in comparison to other Western democracies).

⁵ See generally LESLIE HOLMES, *CORRUPTION: A VERY SHORT INTRODUCTION* 78 (Oxford University Press, 1st ed. 2015) (discussing comparative levels of corruption between countries in North-Western Europe than those is South-Eastern Europe).

⁶ See generally BRUCE E. CAIN, *DEMOCRACY MORE OR LESS: AMERICA'S POLITICAL REFORM QUANDARY* 166 (Cambridge University Press 2015) (discussing strategies to prevent corruption and achieve political equality).

⁷ See *id.* at 165–66.

⁸ See generally *id.* at 161 (discussing recent politics involving Hillary Clinton).

⁹ See generally *id.* at 2 (discussing examples of how political corruption is only perceived in a particular way).

¹⁰ See generally *id.* (discussing how Americans have ranked public officials as

this increase is due to the two related efforts: the establishment of a research program on corruption undertaken by Harvard University’s Edmond J. Safra Center on Ethics from 2009 to 2014,¹¹ and the effort by legal scholars to develop a more expansive definition of corruption¹² so as to respond to the narrow *quid pro quo* definition at the heart of the Supreme Court’s *Citizens United v. FEC* decision.¹³ Perhaps because the Court has highlighted the threat of corruption, both of these efforts, though largely led by lawyers and legal scholars, seem to aim to expose types of alleged corruption not captured by the word in its narrower legal or criminal senses.¹⁴ At the same time, they implicitly assimilate these other phenomena to criminal corruption, and the new, broader sense of corruption seems to draw on the connotations of the legal or criminal sense of corruption.¹⁵

Richard Briffault suggests that these efforts aim to “dejudicialize” political finance—to reclaim from the courts a degree of democratic control over our politics and to bring our politics in line with the norms and values expressed in the Constitution.¹⁶ Political finance is certainly not the only arena of political contestation where this has been said to be a problem,¹⁷ but it provides a useful starting point. It may make sense for legal

negatively as car salesmen in recent years).

¹¹ *About*, EDMOND J. SAFRA CTR. FOR ETHICS, <http://ethics.harvard.edu/pages/about> (last visited Apr. 9, 2016); Arthur Applbaum, *Lawrence Lessig Appointed New Center Director*, EDMOND J. SAFRA CTR. FOR ETHICS (Mar. 9, 2009), <http://ethics.harvard.edu/news/lawrence-lessig-appointed-new-center-director>; *New E-Books from Edmond J. Safra Research Lab*, EDMOND J. SAFRA CTR. FOR ETHICS (June 30, 2015), <http://ethics.harvard.edu/news/new-e-books-edmond-j-safra-research-lab>.

¹² See generally CAIN, *supra* note 6, at 2, 164 (discussing the number of recent books published on the topic of American politics and corruption and the different definitions that corruption has been given).

¹³ See generally *id.* at 163 (discussing how the case mentioned is restrictive and how campaign finance restricts material corruption).

¹⁴ See generally *id.* at 164 (discussing and distinguishing two types of corruption between democratic distortion and material corruption).

¹⁵ See generally *id.* at 162–63 (discussing bribery and extortion as forms of material corruption).

¹⁶ See Richard Briffault, *On Dejudicializing American Campaign Finance Law*, in *MONEY, POLITICS, AND THE CONSTITUTION: BEYOND CITIZENS UNITED* 175 (Monica Youn ed., 2011).

¹⁷ Consider, for instance, the meaning of the “well-regulated militia” of the Second Amendment, the ongoing debate over whether the constitution grants, without using the word, a right to privacy, or whether the “state” as specified in the tenth amendment, should be construed as the state government or the people of a state. U.S. CONST. amend. II; U.S. CONST. amend. IV; U.S. CONST. amend. X. See generally Briffault, *supra* note 16, at 174 (discussing the Constitution).

scholars to use legal language in talking about such matters, but it strikes us—a social scientist and a philosopher—as a bit odd to adopt legal language if one wishes to wrest this particular conversation away from the lawyers. If corruption is indeed a serious problem in contemporary politics,¹⁸ we should talk about it the way we want to talk amongst ourselves about it—we shouldn't just talk to the current or future Supreme Court about it. If, on the other hand, there's something else bothering us, we should call that something by its proper name.

This article is our contribution to talking about how we should talk about corruption: how Americans can have an honest conversation about it, and how some of the more peculiar aspects of the American conversation of late can be reconciled with the way in which it has been discussed in other places and other times.¹⁹ We are not writing this as a defense of the Supreme Court's stance on corruption, nor are we seeking to challenge or justify any particular set of regulations on political finance. We do, however, wish to take seriously this "corruption talk," or what John C. Coates refers to as "the New New Corruption."²⁰ The two endeavors we note above are linked in that the latter proposes to broaden the definition of corruption for an immediate political end,²¹ and the former proposes to apply the findings of a research program on corruption in one sphere of society—elections²²—and broaden the definitions therein to include areas such as corporate support for scientific research, banking laws, and other activities that are not strictly governmental.²³ If one wishes to broaden a term, it is natural to look beyond the phenomena that prompted this course of action, as a means of legitimating the enterprise to one's self and others.²⁴ While there are clearly many rotten things

¹⁸ See generally CAIN, *supra* note 6, at 2 (discussing examples of published materials that support the proposition that there is a current problem in American politics).

¹⁹ See *infra* notes 179–337 and accompanying text.

²⁰ See John C. Coates, Corporate Speech and the First Amendment: History, Data, and Implications 31 (Feb. 27, 2015) (unpublished manuscript) (on file with Harvard University Law School).

²¹ See generally *id.* at 33 (discussing some definitions of corruption that achieve political influence).

²² See generally *id.* at 32 (quoting Justice Kennedy in an opinion discussing how elected officials can succumb to corruption as a result of improper influences).

²³ See generally *id.* at 33, 38–39 (discussing how the court's definition of corruption is too narrow).

²⁴ See generally *id.* at 33 (discussing a theoretical approach to broaden the definition of corruption through having a vision).

afoot in United States and the rest of the world the idea that a word can simply be redefined to advance one’s goals is, as we shall argue, problematic. Perhaps the Court has left reform advocates no alternative rhetorical strategy here,²⁵ but to assert this merely shifts the blame; it does not mitigate the consequences.

This is so because corruption, as a term, has three important qualities. First, corruption is a loaded word.²⁶ Although, as we discuss below, we disagree with some elements of Laura Underkuffler’s argument,²⁷ we agree with her that to call someone corrupt is to make a categorical, moral statement about that person’s character.²⁸ Underkuffler finds this to be problematic in a legal sense—it is a moral term, she says, that is ill suited to a system that evaluates actions, not character.²⁹ We are more concerned with the political or rhetorical ramifications of corruption. To label someone corrupt is to delegitimize that person’s actions, goals, or political views.³⁰ It is perhaps more delegitimizing than to accuse one of racism, sexism, or any other “ism,” insofar as these “isms” presuppose a value structure, even if it is a wrong or morally objectionable one.³¹ Or to put matters in other terms, one might atone for one’s past racist or sexist acts, but to label someone as being corrupt is to contend that whatever argument that person makes will be self-serving, disingenuous—not to be taken at face value. In many instances, such conclusions are likely warranted—there are no doubt many corrupt politicians who have concocted creative but entirely false arguments to justify their plunder.³² It may be possible, in an attempt to avoid the loaded moral connotations of the word, to separate individuals from institutions—that is, to argue that a system, process, or institution is corrupt or corrupting but that the individuals within it are not corrupt.³³ Yet it seems plausible to respond that

²⁵ See generally *id.* at 32 (discussing how a binding court decision has narrowed the definition of corruption).

²⁶ See Coates, *supra* note 20, at 31–32.

²⁷ See generally LAURA S. UNDERKUFFLER, CAPTURED BY EVIL: THE IDEA OF CORRUPTION IN LAW 7 (2013) (discussing one part of Laura’s argument surrounding corruption).

²⁸ See generally *id.* at 8 (discussing the substantive theory of corruption).

²⁹ See *id.* at 13–14.

³⁰ See generally *id.* at 139–40 (discussing corruption as a breach of duty).

³¹ See generally *id.* at 139 (discussing and distinguishing a difference between illegality and corruption).

³² See, e.g., *id.* at 140, 143 (discussing the notion of the corrupt politician and examples of such).

³³ See UNDERKUFFLER, *supra* note 27, at 140.

individuals within that system remain complicit in that corruption or that those who wish to condemn institutions but not their agents are naïve about the innocence of the institutional agents or their ability to rise above its corruption.³⁴

Second, virtually all of those who study corruption begin from the same point: that its precise definition is in dispute.³⁵ For instance, Lowenstein refers to corruption as an “essentially contested concept” with no clear boundary.³⁶ Johnston and Klitgaard both note that the definition of corruption is necessarily imprecise because it is culturally determined and hence varies from one culture to the next.³⁷ Yet most of the literature that begins from such claims proceeds to document activities that any reasonable person would conclude are corrupt—or, at least, are bad things that one should avoid.³⁸ Much of the empirical anticorruption research agenda addresses behaviors that are undoubtedly corrupt,³⁹ and we would not question the motives of one who seeks to find ways to prevent, for instance, the sorts of widespread vote buying, bribe taking, or price fixing that are rampant in many political regimes.⁴⁰ We have little quarrel, in addition, with the enterprise of identifying and quantifying the world’s most corrupt political regimes.⁴¹ Even without an airtight definition of corruption, the empirical research on these countries seems to us to show that they are rotten places to live.⁴² In some instances, corruption is like pornography—we know it when we see it.⁴³ The sheer volume of efforts to define and redefine corruption, however, suggests that demarcating the boundaries of it is more

³⁴ See generally Coates, *supra* note 20, at 30–31 (discussing Vermont’s Attorney General’s decision to condemn employees and management in Vermont’s legal department).

³⁵ See MICHAEL JOHNSTON, *SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY* 11 (Cambridge University Press 2005).

³⁶ See Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 *UCLA L. REV.* 784, 851 (1985).

³⁷ ROBERT KLITGAARD, *CONTROLLING CORRUPTION* 3 (University of California Press, 1988); see JOHNSTON, *supra* note 35, at 11.

³⁸ See JOHNSTON, *supra* note 35, at 3 (describing four syndromes reflecting commonly found combinations of corruption).

³⁹ See *id.* at 18.

⁴⁰ See *id.* at 17–18.

⁴¹ See *Corruption Perceptions Index 2015*, TRANSPARENCY INT’L, <http://www.transparency.org/cpi2015> (last visited Apr. 11, 2016).

⁴² *Id.*

⁴³ Claire Berlinski, *The Dark Figure of Corruption*, HOOVER INST. (May 29, 2009), <http://www.hoover.org/research/dark-figure-corruption>.

important than is doing so for other politically disputed terms.⁴⁴

Third, corruption is in some ways what public opinion researchers refer to as a “valence issue.”⁴⁵ Although it is not (as per the first characteristic above) easily scalable (as valence issues such as competence, integrity, honesty, and so forth are), it is, like these examples, nonideological.⁴⁶ No one, left or right, advocates for corruption.⁴⁷ Despite the ambiguity of the term around the edges,⁴⁸ there is often agreement in recognizing certain types of action as corrupt.⁴⁹ Once a behavior can be defined as corrupt, political foes can join in their condemnation of it.⁵⁰ In a political environment as polarized as that of the contemporary United States,⁵¹ such an opportunity is not to be taken lightly. Although the two efforts we reference above originate from the political left,⁵² it is important to note that corruption has been central to political arguments, both theoretical and practical, among American conservatives as well.⁵³ A shared language regarding corruption poses the tantalizing possibility of a policy agenda that can avoid the partisan gridlock that has characterized so much of American politics over the past two decades.⁵⁴

As a consequence, expanding the definition of corruption—redefining corruption, rather than clarifying it—can, we would argue, be harmful.⁵⁵ Much of the recent American effort of late has, as we shall demonstrate, sought to recast legal but distasteful (or degrading) activities as corrupt or corrupting.⁵⁶ Such a focus risks

⁴⁴ See JOHNSTON, *supra* note 35, at 11.

⁴⁵ See Donald E. Stokes, *Spatial Models of Party Competition*, 57 AM. POL. SCI. REV. 368, 373 (1963) (Valence issues, as articulated by Stokes, are issues where all voters share an ideal point; such issues include honesty, competence, or morality).

⁴⁶ *Id.* at 372–73.

⁴⁷ See *id.* at 372.

⁴⁸ See *id.*

⁴⁹ See *id.* at 372–73 (discussing that when evidence of malfeasance turned up in the Democratic Party, many voters felt the party had strayed from virtue).

⁵⁰ See *id.* at 372–73.

⁵¹ See CAIN, *supra* note 6, at 2.

⁵² See RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL 153 (2015).

⁵³ See CAIN, *supra* note 6, at 2; STOKES, *supra* note 45, at 372.

⁵⁴ See CAIN, *supra* note 6, at 2.

⁵⁵ See generally ROBERT E. MUTCH, BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM 197–98 (2014) (discussing the lack of trust in government to create reform without partisan political intentions and citing to past reform scandals).

⁵⁶ See UNDERKUFFLER, *supra* note 27, at 11; *supra* note 8 and accompanying text.

politicizing the issue, thereby casting into doubt the things that have not been contested.⁵⁷ In other words, if corruption becomes a matter of partisan or ideological contestation, this can render research into the really bad stuff suspect.⁵⁸ Such an effort can also risk turning matters of scale (such as political contributions or lobbying restrictions in the political world, limitations on grant-supported research in academia, or gift-giving and its concomitant attached strings in virtually every walk of life) into categorical issues, or turning political, ethical, or moral decisions into legal ones.⁵⁹ We concur with Robert Mutch that much of what gets subsumed by contemporary American corruption talk is properly political;⁶⁰ it reflects enduring disagreements about American values that cannot be adjudicated by the courts.⁶¹

Our argument, in a nutshell is this: it is clear what those who discuss corruption in contemporary American politics mean.⁶² But they misuse the term: they are not, in fact, talking about corruption as it is commonly understood in contemporary America.⁶³ And while this new meaning is clear, there are underlying philosophical problems with it, problems that (a) render the definitional attempts confused about how corruption within an institution works, and (b) hinder constructive discourse about the underlying problems that have prompted contemporary American “corruption talk.”⁶⁴ Accordingly, in this paper we describe the contours of contemporary corruption talk; we demonstrate the novelty of such claims; and we outline our concerns about this talk as philosophical project and rhetorical tool.

⁵⁷ See MUTCH, *supra* note 55, at 198 (explaining that politicizing the issue can lead to dysfunction and an inability to reform).

⁵⁸ *Id.* (describing the risk of partisan gridlock).

⁵⁹ See *id.* at 197 (discussing how *Bellotti* and *Citizens United* politicized reform efforts and the history of economic, social, political, and cultural differences in the country which have maintained a fault line in our politics).

⁶⁰ See MUTCH, *supra* note 55, at 184.

⁶¹ See *id.*

⁶² See UNDERKUFFLER, *supra* note 27, at 2–3.

⁶³ See *id.* at 11; JOHNSTON, *supra* note 35, at 18 (showing examples of the term corruption).

⁶⁴ See *supra* notes 35–39 and accompanying text (definition problems); *supra* notes 62–63 and accompanying text (confusion); *infra* notes 65–68 and accompanying text (American corruption talk).

I. AMERICAN CORRUPTION TALK

The contemporary era of “corruption talk” can be traced back to the Supreme Court’s *Buckley v. Valeo* decision,⁶⁵ and to three distinct definitions of corruption that have dominated American political discourse since that time.⁶⁶ While these definitions have been intertwined with the debate over money in politics,⁶⁷ the stakes here and the formulation of them are somewhat larger.⁶⁸ Nonetheless, let us start with the Court.

A. *The Political Story*

In *Buckley*, the Supreme Court famously equated political spending with speech and responded to recently passed campaign finance legislation by declaring that the prevention of “corruption or the appearance of corruption”⁶⁹ was the only legitimate reason for restrictions on such speech; it declared that other plausible goals, such as equality, limiting the role of money, or allowing for a diversity of voices were not constitutionally permissible.⁷⁰ There, and in subsequent decisions,⁷¹ the Court went on to develop a definition of corruption that was limited to instances of direct *quid pro quo* corruption—that is, instances where the corrupted was an individual politician.⁷² The Court would go on, as well, to largely abandon its concern about the appearance of corruption.⁷³ The problem here was that if we regard the public as the ultimate arbiter of what appears to be corrupt, then virtually any governmental action is suspect—surveys have shown that not only do most Americans (and residents of other nations, as well) believe politicians to be corrupt, but that no change in election regulation has any effect on that belief. So there’s not much government can do to make itself appear less corrupt.⁷⁴

⁶⁵ See *Buckley v. Valeo*, 424 U.S. 1, 45 (1976); MUTCH, *supra* note 55, at 9–10.

⁶⁶ See CAIN, *supra* note 6, at 163–64.

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ *Buckley*, 424 U.S. at 45–47 (1976) (explaining that limits on independent expenditures do not prevent “corruption [or] the appearance of corruption”).

⁷⁰ *Id.* at 19–21, 25.

⁷¹ *Id.* at 246; see MUTCH, *supra* note 55, at 192. (discussing that *Citizens United* further narrowed the Court’s definition of corruption).

⁷² *Buckley*, 424 U.S. at 26–27, 246.

⁷³ *Id.* at 45.

⁷⁴ See UNDERKUFFLER, *supra* note 27, at 4–5 (discussing that laws cannot be made to address issues of this nature, such as cultural and emotional).

The Court's definition has been adopted and elaborated upon by anti-regulation writers such as Bradley Smith and John Samples.⁷⁵ It presents a view of a legislature not as an institution but as a collection of individuals; to make a claim that an institution is corrupt, one would have to demonstrate that many, if not all, members of that institution are corrupt.⁷⁶ There have since this time been two plausible responses to *Buckley*: to challenge the idea that corruption is what matters, or to challenge the definition of corruption.⁷⁷ While both approaches have proven to be largely futile, to date, for advocates of regulation,⁷⁸ there is ample history to suggest that the second approach has always seemed a bit more plausible if one's goal is to win in the courts.⁷⁹ It is not uncommon for the court to reject legislation but then to go on to counsel Congress on how it might achieve similar ends by slightly reframing its goals.⁸⁰ Proponents of the most comprehensive post-*Buckley* campaign finance legislation, the Bipartisan Campaign Reform Act, did just this, making direct reference to the prevention of corruption and assembling a lengthy record of statements by political contributors on the potentially corrupting nature of their activities.⁸¹ There is, perhaps, something fundamentally disingenuous in presenting such comprehensive legislation as an anti-corruption measure, but the court's rules were clear.⁸²

The so-called "new corruption" arguments that were presented in the 1980s and 1990s in the legal community, sought to present an alternate understanding of corruption that allowed for

⁷⁵ See JOHN C. SAMPLES, *THE FALLACY OF CAMPAIGN FINANCE REFORM* 65–66 (University of Chicago Press 2006); BRADLEY A. SMITH, *UNFREE SPEECH: THE FOLLY OF CAMPAIGN* 123 (Princeton University Press 2001).

⁷⁶ SMITH, *supra* note 75, at 215 (discussing corruption of a system which allows law makers to determine who can spend money, and how much).

⁷⁷ See *id.* at 123 (breakdown of the Court's *Buckley* ruling demonstrating its implications and reactions to the ruling).

⁷⁸ See *generally id.* at 18, 20 (giving a brief history of campaign spending, regulation, and reform during a time that corruption was not seen to be a threat, discussing an act which prevented abuse of power by elected officials but which was not created until nearly the 20th century).

⁷⁹ See *generally id.* at 18, 20 (creating an act through Congress creates regulations which could be upheld or struck down by the Court in creating a definition or standard for corruption).

⁸⁰ See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 589–90 (2000) (Kennedy, J., concurring) (the Court rejected California's blanket primary law yet instructed the state on how to write a new, constitutionally permissible law that essentially created the same system).

⁸¹ See *McConnell v. FEC*, 540 U.S. 93, 132–33 (2003).

⁸² See *Cal. Democratic Party*, 530 U.S. at 589–90 (Kennedy, J., concurring).

prophylactic measures—efforts to prevent harm to an institution itself by making it clear that suspect individual transactions are prohibited.⁸³ Under this understanding of corruption, proof of a quid pro quo transaction is not required;⁸⁴ if the practices of an institution are deemed by the public to be corrupt, then this is ample reason to take steps to prevent them from happening.⁸⁵ Instances of quid pro quo corruption can still be identified and punished, but laws that remove the temptation to engage in such corruption⁸⁶—laws that, for instance, limit contacts between legislators and lobbyists or limit unregulated contributions⁸⁷—can be implemented without proof that corruption has occurred as a result of such actions or would occur in the absence of regulation.⁸⁸ Many prophylactic measures of this nature have been quite popular with the public.⁸⁹ In *Citizens United*, however, the court held that “influence, gratitude, or access” are not equivalent to corruption in the sense they hold to be relevant for limiting political speech through independent expenditures.⁹⁰ As long as no explicit agreement has been made between the spender and the politician, this is not corrupt. This holding has established an almost insurmountable barrier for those who would allege corruption in campaign financing.⁹¹ At the same time, more easily identifiable instances of individual corruption have shown that the obvious examples of individual corruption stand far outside of conventional political squabbles.⁹²

B. *Bigger than Politics*

So much for the legal story about corruption in campaign finance. American discussions about corruption have never just

⁸³ See IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS 182–83 (Joshua E. Rosenkranz ed., 1999) [hereinafter IF BUCKLEY FELL].

⁸⁴ *Id.*

⁸⁵ See *id.* at 183–84.

⁸⁶ *Id.*

⁸⁷ *Id.* at 184.

⁸⁸ *Id.*

⁸⁹ See IF BUCKLEY FELL, *supra* note 83, at 95.

⁹⁰ *Citizens United v. FEC*, 558 U.S. 310, 355–59 (2010).

⁹¹ See *id.*

⁹² See *generally* LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT XII* (2012) (debating that the academic view of corruption showcases the danger in a light not easily identifiable while the activist creates extremes that are not always relevant to politics but instead truly individual) [hereinafter *REPUBLIC, LOST*].

been about electoral politics, and in the past several years a growing number of writers on the left (mostly) and the right have sought to articulate a broader argument about corruption.⁹³ While the Court may have inspired some of this, one might contend that the Court is no longer the intended audience of this discussion.⁹⁴ And although the principals in this discussion have mostly been law professors, the argument is hardly a legal one. It has sought to tap into larger American concerns—it is not merely that our politicians might be beholden to lobbyists or wealthy donors, it is that Americans have become increasingly disenchanted with politics,⁹⁵ that America's standing on a variety of cross-national indicators of well-being has fallen, and that our government seems less capable of addressing problems today that it was in prior decades.⁹⁶ Might this be because of “corruption” in a more epic sense? Or its consequence?

It seems to us that there are currently three different theories of corruption on the loose in American politics.⁹⁷ None of these is that of the Court,⁹⁸ although the Court perhaps instigated the corruption debate, its definition is sufficiently minimalist that there have been few serious efforts to elaborate upon it.⁹⁹

The most prominent theory of corruption today is associated with Harvard Law Professor Lawrence Lessig, who has sought to articulate a theory of what he alternately refers to as institutional corruption, or “dependence corruption.”¹⁰⁰ Whereas individual corruption, for Lessig, is essentially a *quid pro quo* exchange in which a public official seeks some sort of personal benefit in exchange for provision of a private benefit to someone outside of government, institutional corruption occurs when a system tends to promote private interests due to influence, rather than deals.¹⁰¹ Institutional corruption is characterized by improper

⁹³ See SMITH, *supra* note 75, at 123 (discussing how the Court has denied a broader definition of corruption while implying this would be a topic worth discussion). See generally SAMPLES, *supra* note 75, at 257 (discussing how corruption can be in politics even if not involved in the election process).

⁹⁴ See IF BUCKLEY FELL, *supra* note 83, at 68–69 (explaining legislative ideas for campaign financing reform).

⁹⁵ See *supra* notes 3–5, 10–14 and accompanying text.

⁹⁶ *Id.*

⁹⁷ See IF BUCKLEY FELL, *supra* note 83, at 182–84.

⁹⁸ See *id.*

⁹⁹ *Id.* (implying that the categories within the article were created because of the lack of clarity and intrusiveness into the matter by the Court).

¹⁰⁰ REPUBLIC, LOST, *supra* note 92, at 16–17.

¹⁰¹ *Id.* at 15–17.

dependence.¹⁰² That is, contemporary social science might predict that self-interested politicians seek to stay in office, and in doing so they provide benefits to voters or blocs of voters.¹⁰³ There is nothing noble in this, but if we believe that votes are a means of ensuring accountability and that winning votes is a way of seeking the common good, this may not seem corrupt.¹⁰⁴ The institution is working as it is supposed to.¹⁰⁵ If, on the other hand, government officials are dependent upon something other than votes—“funders,” perhaps¹⁰⁶—for their well-being, and are providing benefits to them rather than to voters, then the institution is not dependent in the manner that we expect it to be.¹⁰⁷ The institution is corrupt, regardless of the culpability of individual members in corrupt deals.¹⁰⁸ Individual politicians might all regret this occurrence, and they might even speak out against it, but they nonetheless will need to cater to donors rather than voters (perhaps viewing themselves as better or more ethical than those who might replace them).¹⁰⁹ An institution can be corrupt, for Lessig, when its members are influenced improperly, even if we cannot punish individual members for corrupt deals.¹¹⁰

Lessig has openly drawn upon the work of Dennis Thompson, but there is a crucial difference.¹¹¹ In his early work on *Ethics in Congress*, Thompson sought to distinguish between individual corruption, in which a legislator exchanged favor for personal benefit, and institutional corruption, in which a legislator exchanged favors for political benefit.¹¹² Thompson argued that

¹⁰² *Id.* at 17.

¹⁰³ *See generally id.* at 15–16 (illustrating allegorically how a doctor’s decision-making may be compromised through receipt of benefits and implying similar results would occur in the case of a politician).

¹⁰⁴ *See id.* at 16 (illustrating the choices made by doctors and a conception of corruption).

¹⁰⁵ *See id.* at 16–17.

¹⁰⁶ *See* REPUBLIC, LOST, *supra* note 92, at 16–18 (arguing that if the benefits received alter the official to be concerned with only the gift providers well being, then the corruption is not the level of dependency expected).

¹⁰⁷ *Id.* at 15–18.

¹⁰⁸ *Id.* at 15.

¹⁰⁹ *Id.* at 15–16.

¹¹⁰ *See* REPUBLIC, LOST, *supra* note 92, at 15–16 (explaining that the influence on a member of an institution may result in the corruption of the institution without the individual actually being corrupt and therefore not liable for punishment).

¹¹¹ *See id.* at 328.

¹¹² *See* DENNIS F. THOMPSON, *ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION* 7 (1995).

institutional corruption is ultimately more difficult to identify and prosecute, insofar as it often does not yield corrupt results and is not always easily distinguishable from accepted behavior.¹¹³ He insists, however, that instances of institutional corruption are individual acts that are “mediated” by the practices of the institution.¹¹⁴ Institutional corruption may bring the norms and practices of the institution into question, but for Thompson, it is ultimately an action of individuals (whom he lists in an appendix to his book).¹¹⁵ Lessig, on the other hand, although he reiterates Thompson’s distinction, emphasizes that he does not wish to single out individuals.¹¹⁶ It is the institution of Congress, itself, that is corrupt.¹¹⁷ In *Republic, Lost*, he writes that

This corruption has two elements, each of which feeds the other. The first element is bad governance, which means simply that our government doesn’t track the expressed will of the people The second element is lost trust: when democracy seems a charade, we lose faith in its process.¹¹⁸

It is hard to imagine listing the perpetrators of this corruption—which is much of Lessig’s point.

The turn in Lessig’s story is necessary because he is not talking only about Congress, and he is not talking only to the Court.¹¹⁹ He is not interested in a legal case, but in fostering dialogue.¹²⁰ He makes this explicit in his Randy L. and Melvin R. Berlin Family Lectures, delivered in 2014 and 2015, at the University of Chicago.¹²¹ There, he summarizes much of the research he and others pursued at the Safra Center, where he served as the director

¹¹³ *Id.* at 7–8.

¹¹⁴ *See id.* at 7 (describing the ways in which corrupt political institutions can be regulated by members’ actions).

¹¹⁵ *Id.* at 7–8, 182–90.

¹¹⁶ *See* Lawrence Lessig, *Institutional Corruptions* 5–6, 15 (Edmond J. Safra Research Lab at Harvard Univ., Working Paper No. 1, 2013)[hereinafter Lessig, *Institutional Corruptions*].

¹¹⁷ *Id.* at 4, 15.

¹¹⁸ *REPUBLIC, LOST*, *supra* note 92, at 8–9.

¹¹⁹ *See id.* at 227–28 (discussing both legislative and judiciary powers to prevent and deal with corruption).

¹²⁰ *See id.* (discussing the way corruption can be dealt with through the branches of government, and the powers required to effectively deal with it).

¹²¹ *See* Video: Lawrence Lessig, *America: Compromised Studies in Institutional Corruption*, RANDY L. & MELVIN R. BERLIN FAMILY LECTURES AT THE UNIVERSITY OF CHICAGO (Oct. 16–Nov. 13, 2014), <https://berlinfamilylectures.uchicago.edu/2014-lawrence-lessig> [hereinafter *Berlin*].

from 1987 to 2009.¹²² He proposes a definition of corruption as “influence within an economy of influence that illegitimately weakens the effectiveness of an institution, especially by weakening the public trust of the institution.”¹²³ Whatever one thinks of the specifics of this definition (and we will consider these later), the intent here is clear—it can be applied, as Lessig proceeds to do, to a variety of different types of institutions, including the academy, the financial industry, and the media.¹²⁴ There is no pretense that we are telling the Supreme Court who is corrupt; the intention, rather, is to develop a unified theory.¹²⁵ Lessig clearly does document, both here and in the Safra Center work, a variety of ills that have befallen these institutions.¹²⁶ Yet, as with government, the extent to which these ills constitute “corruption” according to this definition is determined by the appropriate dependency relationship or purpose.¹²⁷

The other principal articulator of this expanded theory of corruption has been Fordham University law professor Zephyr Teachout.¹²⁸ In *Corruption in America*, Teachout connects contemporary disputes over money in politics to the historical treatment of corruption in American political thought.¹²⁹ Like Lessig, she argues for a more expansive, extra-legal view of corruption,¹³⁰ but unlike Lessig, she explicitly locates this view in most references to corruption in eighteenth and nineteenth century American thought.¹³¹ Teachout notes that American “corruption talk” has historically had to do with the perversion of discourse that might occur, for instance, if foreign interests were

¹²² Dennis F. Thompson, *Two Concepts of Corruption 2* (Edmond J. Safra Center for Ethics at Harvard University) (Working Paper No. 16, 2013); see Berlin, *supra* note 121.

¹²³ Lessig, *Institutional Corruptions*, *supra* note 116, at 2.

¹²⁴ Berlin, *supra* note 121.

¹²⁵ *Id.*

¹²⁶ See Berlin, *supra* note 121; Lessig, *Institutional Corruptions*, *supra* note 116, at 4.

¹²⁷ See Berlin, *supra* note 121; Lessig, *Institutional Corruptions*, *supra* note 116, at 17.

¹²⁸ See ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED 2* (Harvard University Press, 2014); Zephyr Teachout, FORDHAM UNIV. SCH. OF LAW, https://www.fordham.edu/info/23186/zephyr_teachout (last visited Mar. 29, 2016).

¹²⁹ TEACHOUT, *supra* note 128, at 2–4 (explaining that the historical fear of monetary corruption is the same that exists in contemporary politics).

¹³⁰ See *id.* at 3–4.

¹³¹ See *id.* at 2–3, 14.

able to insert themselves into American politics.¹³² The corruption inherent here is one of duplicity,¹³³ in that the influences behind a particular argument would not be known, and, as in Lessig's case, one of improper dependency.¹³⁴ While Teachout distinguishes corruption from dependency,¹³⁵ she concludes that improper dependency can lead to corruption (of an institution or of a people),¹³⁶ and that one solution to this is "bright line" prophylactic laws, which both deter corrupt behavior and send a clear signal about the "moral weight" of the law itself.¹³⁷

For both Lessig and Teachout, (but not for Thompson) defining corruption and establishing a dichotomous view of corruption—either it is an individual or an institutional trait—is crucial.¹³⁸ Neither disputes that individual, i.e., venal or quid pro quo, corruption exists,¹³⁹ but both emphasize that that is not what they are talking about—and moreover, in Teachout's case, that that is not what the Founders were talking about.¹⁴⁰ Teachout's more historical approach to corruption calls our attention to differences between contemporary corruption talk and the American reference points we often use in that talk,¹⁴¹ but it is, like Lessig's book, very much an attempt to reintroduce and expand the concept in contemporary politics.¹⁴² It is important to note that in this latter

¹³² *Id.* at 3–4 (explaining that corruption through diplomats would allow foreign interests to enter into and potentially disrupt the American political system).

¹³³ *Id.* at 15–16 (explaining the different sides of Franklin's beliefs and the corruption possible).

¹³⁴ REPUBLIC, LOST, *supra* note 92, at 17; TEACHOUT, *supra* note 128, at 15–16 (illustrating how the example of Jefferson keeping the diamonds showcases a dependency on a foreign government unknown to Congress).

¹³⁵ See generally TEACHOUT, *supra* note 128, at 16, 45 (describing how there was a fear of corruption through dependency as well as a fear of general corruption created through foreign interests).

¹³⁶ See generally *id.* at 15–16, 45 (explaining the possibility that one who become dependent on foreign interests will create a corrupt institution to continue receiving benefits from that interest).

¹³⁷ *Id.* at 184.

¹³⁸ See TEACHOUT, *supra* note 128, at 14; see Berlin, *supra* note 121, at 5.

¹³⁹ See TEACHOUT, *supra* note 128, at 7, 10; see Berlin, *supra* note 121, at 5 (clearly stating the dichotomy of corruption).

¹⁴⁰ See TEACHOUT, *supra* note 128, at 10 (discussing the history of corruption in politics from the ratification of the Constitution).

¹⁴¹ See REPUBLIC, LOST, *supra* note 92, at 18 (discussing the reason behind a portion of the Constitution); TEACHOUT, *supra* note 128, at 38, 39 (explaining that the way in which corruption was described during the creation of the nation bears similar comparisons at times to remarks made in current political debates).

¹⁴² See LESSIG, REPUBLIC LOST *supra* note 92, at 18; TEACHOUT, *supra* note 128, at 38, 39 (explaining that the description of corruption during the Founders time

regard, Lessig and Teachout (both of whom have a long track record of advocacy for left-leaning Democratic candidates)¹⁴³ have actively sought out areas of agreement with conservative writers such as Jay Cost and Peter Schweizer.¹⁴⁴ As Teachout, in particular, shows, the left in no way owns the idea that political institutions can be corrupted.¹⁴⁵

A second opposing theory of corruption is offered by Cornell Law Professor, Laura Underkuffler.¹⁴⁶ In *Captured by Evil*, Underkuffler provides a survey of definitions of corruption in theoretical and empirical research.¹⁴⁷ She concludes that references to corruption virtually always are used to make moral judgments about an individual’s character.¹⁴⁸ It is a moral,

still matches to the public thought of corruption in today’s world).

¹⁴³ Brian Tumulty, *Zephyr Teachout will Run in 19th Congressional District*, POUGHKEEPSIE J. (Jan. 25, 2016), <http://www.poughkeepsiejournal.com/story/news/local/new-york/2016/01/25/zephyr-teachout-running-congress-19th-cd/79302000/> (reporting that Teachout is an active member of the Democratic political party and currently running for a Congressional seat); Alan Rappeport, *Lawrence Lessig’s Presidential Bid Endures in Relative Obscurity*, N.Y. TIMES, Oct. 26, 2015, at A17, <http://www.nytimes.com/2015/10/27/us/politics/lawrence-lessigs-presidential-bid-endures-in-relative-obscurity.html> (reporting that Lessig intended to run as a Democrat in the 2016 presidential election).

¹⁴⁴ See JAY COST, *A REPUBLIC NO MORE: BIG GOVERNMENT AND THE RISE OF AMERICAN POLITICAL CORRUPTION* xi-xii (2015) (explaining the premise of the book, in that corruption exists within governmental institutions and elected officials); PETER SCHWEIZER, *CLINTON CASH: THE UNTOLD STORY OF HOW AND WHY FOREIGN GOVERNMENTS AND BUSINESSES HELPED MAKE BILL AND HILLARY RICH* 2–3, 17 (2015) (describing the way in which the Clinton family has amassed their fortune as questionably corrupt given the possible abuse of power); TEACHOUT, *supra* note 128, at 14–16 (describing generally the layout of the book and the way in which the topic of corruption will be discussed which is politically neutral given the historical framing); Lawrence Lessig, *Democrats Embrace the Logic of Citizens United*, WASHINGTON POST (May 8, 2015), https://www.washingtonpost.com/opinions/the-clintons-citizens-united-and-21st-century-corruption/2015/05/08/7f11a0d6-f57b-11e4-b2f3-af5479e6bbdd_story.html.

¹⁴⁵ TEACHOUT, *supra* note 128, at 14–16 (describing corruption in general, and the history of political corruption in the U.S. was in no way controlled or tempered by one party or another, but rather by all, citing James Madison, Ben Franklin, and Thomas Jefferson and their thoughts on corruption, given the historical viewpoint of the book).

¹⁴⁶ See UNDERKUFFLER, *supra* note 27, at 5; *Faculty*, CORNELL LAW SCH., http://www.lawschool.cornell.edu/faculty/bio_laura_underkuffler.cfm (last visited Apr. 13, 2016); *supra* notes 32–34 and accompanying text.

¹⁴⁷ UNDERKUFFLER, *supra* note 27, at 2.

¹⁴⁸ UNDERKUFFLER, *supra* note 27, at 2; *supra* notes 2–34 and accompanying text.

dispositional concept, and as such is unsuitable for use in law.¹⁴⁹ One cannot commit a corrupt act without being a corrupt person.¹⁵⁰ The moral taint associated with corruption suggests that one is unsuited to engage in politics or public life at all—one's actions simply cannot be trusted.¹⁵¹ Such corruption certainly exists, but for Underkuffler the accusation of corruption must be used sparingly.¹⁵² If corruption implies "evil," one is effectively banishing one's antagonist from the political sphere when one levels the accusation.¹⁵³ Furthermore, the institutional argument runs into problems here: can an institution be evil, or captured by evil?¹⁵⁴ Is it possible to sustain an individual/institutional distinction where one effectively argues "the institution is evil but its members are not"?¹⁵⁵ Underkuffler does not provide any conclusive evidence that she is right (or that Lessig is wrong),¹⁵⁶ but her argument at a minimum provides enough historical detail to convince that the connotations of talking about corruption are at odds with Lessig's task and render that task problematic.¹⁵⁷ Underkuffler's notion of individual corruption requires no quid or quo;¹⁵⁸ there are people who would engage in quid pro quo corruption, but it does not matter if they actually have.¹⁵⁹ There are, furthermore, people who engaged in minor instances of individual corruption but have revealed themselves as the sort of people who would do far worse if they could get away with it.¹⁶⁰

A third theoretical approach to corruption is presented in the work of Bruce Cain and Nancy Rosenblum.¹⁶¹ Neither Cain nor

¹⁴⁹ UNDERKUFFLER, *supra* note 27, at 3–5 (describing how a moral subject can not easily be explained or regulated through law).

¹⁵⁰ *See id.* (explaining that a corrupt act can be seen as evil, and an evil act can therefore only be done by an evil person, a corrupt person will perform a corrupt act and thus the inverse is true).

¹⁵¹ *See id.* at 4, 6 (discussing how a corrupt official can not be trusted to serve in their positions).

¹⁵² *See id.* at 4–5 (describing why corrupt is not the proper description given the various moral issues which can be created by its usage).

¹⁵³ *See generally* REPUBLIC, LOST, *supra* note 92, at 5–6 (noting how progressives at the turn of the century attacked political entities they saw as being corrupt).

¹⁵⁴ *See generally id.* at 15–16 (proposing that if one doctor is corrupt that the whole institution of medicine is not).

¹⁵⁵ *Id.* at 15.

¹⁵⁶ *See* UNDERKUFFLER, *supra* note 27, at 212.

¹⁵⁷ *See id.* at 7.

¹⁵⁸ *See supra* notes 146–52 and accompanying text.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *See* CAIN, *supra* note 6, at 168; *see also* NANCY L. ROSENBLUM, ON THE SIDE

Rosenblum bill their efforts as being exclusively about corruption, and neither disputes the notion that there is a difference between institutional and individual corruption.¹⁶² Both share a broader theoretical orientation which Cain identifies as “reform pluralis[m].”¹⁶³ In Cain’s argument, however, there are in fact a number of different ways to talk about corruption.¹⁶⁴ There is room for talk of a “corruption of democratic ideals” (which is what he takes Lessig to be talking about),¹⁶⁵ there is room for talk of inappropriate dependence (which is what Lessig takes himself to be discussing)¹⁶⁶ and there is also room for talk of a corruption as a “debasement of public deliberation”¹⁶⁷ in which self-serving arguments are deceptively framed as appeals to public ideals.¹⁶⁸ Likewise, Rosenblum catalogs the various ways in which “corruption” is used as an umbrella term to cover “implicit understandings, ambiguous favors, and political advantage.”¹⁶⁹ At some point the definition of corruption may be expanded to the point of meaninglessness. This is a problem because the audience for corruption talk maintains the sort of “gut” response to the word that Underkuffler describes.¹⁷⁰

Cain’s argument is also taken up by La Raja and Schaffner in their argument for strengthening the capacity of political parties to influence elections.¹⁷¹ For La Raja and Schaffner, there is a trade-off to be made between addressing corruption and addressing political polarization; one cannot do both, and given the ambiguity of the term corruption, it can be applied to all manner of political ills.¹⁷² The anticorruption agenda, however, has focused so narrowly on the allegedly corrosive effect of money in politics that it has crowded out concerns such as “fairness, stability, and accountability,”¹⁷³ concerns that are not easily reconciled with

OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP 172 (2008).

¹⁶² CAIN, *supra* note 6, at 168; ROSENBLUM, *supra* note 161, at 172.

¹⁶³ CAIN, *supra* note 6, at 168–69.

¹⁶⁴ *Id.* at 164.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ ROSENBLUM, *supra* note 161, at 212.

¹⁷⁰ *See generally* UNDERKUFFLER, *supra* note 27, at 144 (noting that the emotional reaction to a politician’s corrupt acts may be toward the idea of the politician’s corruption rather than to the act itself).

¹⁷¹ *See* LA RAJA & SCHAFFNER, *supra* note 52, at 152.

¹⁷² *Id.*

¹⁷³ *Id.*

existing campaign finance regulation proposals.¹⁷⁴ Even if the court does not see these as legitimate reasons to abridge constitutional rights, they can still serve as rationales for some types of laws, and they are, in addition, valid starting points for political conversation.¹⁷⁵

Unlike Underkuffler, and like Lessig, however, a pluralist theory of corruption would admit that political actors are, at least in part, self-interested—and if that alone can constitute corruption, then it might be plausible to argue that we are all a little bit corrupt.¹⁷⁶ Cain and Rosenblum both prescribe aggregation as a means of combatting corruption,¹⁷⁷ the premier aggregative institutions in American politics are, and always have been, political parties and reputation-bearing interest groups.¹⁷⁸ Given the priors we bring to any discussion of corruption, it is hard to talk about institutional corruption if one is a pluralist; one cannot describe political parties or interest groups as corrupt and then suggest that these things be strengthened.¹⁷⁹ The same would seem to apply to arguments about other allegedly corrupt institutions—if the institution is corrupt, why should it be strengthened or why would enhancing intermediate institutions be an appropriate palliative?

There is a perhaps unintentional irony to the development of recent arguments about corruption. As Teachout notes, and as Wallis documents, the story about corruption propounded by moral reformers during the nineteenth century was the one most likely to emphasize institutional or systemic corruption—it posited an uncorrupted American ideal rooted in the founding, in Christian values, or in the agrarian, antebellum American ideal, and presented early 20th century America, with political machines and vote-seeking career politicians as a corruption of that ideal.¹⁸⁰ The

¹⁷⁴ *Id.* at 153.

¹⁷⁵ *See id.*

¹⁷⁶ *See* CAIN, *supra* note 6, at 122; ROSENBLUM, *supra* note 161, at 252.

¹⁷⁷ *See* CAIN, *supra* note 6, at 168; ROSENBLUM, *supra* note 161, at 299.

¹⁷⁸ That is, well-known groups that expect to remain active across multiple elections. *See* CAIN, *supra* note 6, at 168–69 (noting that reform movements would have been better off aggregating their contributions within the established political parties or large political action committees (“PACs”)); Robert G. Boatright, *Campaign Finance Law and Functional Differentiation among Nonparty Groups in the United States*, in *THE DEREGULATORY MOMENT? COMPARATIVE PERSPECTIVES ON CHANGING CAMPAIGN FINANCE LAWS* 71, 99–101 (Robert G. Boatright ed., forthcoming 2016).

¹⁷⁹ *See* CAIN, *supra* note 6, at 168.

¹⁸⁰ *See* TEACHOUT, *supra* note 128; John Joseph Wallis, *The Concept of*

Progressive argument about corruption may have been inspired by similar circumstances, but took aim at individual politicians and posited prophylactic measures—primary elections, the Australian ballot, and so forth—as means of preventing individual corruption.¹⁸¹ In some ways the contemporary alignment has matters backwards; it is self-styled modern progressives (with a small “p”) who have championed the nineteenth century conservative view,¹⁸² albeit without as clear a reference point, and it is today’s conservatives who have argued that individual corruption is the major subject of concern (with the caveat the prophylactic measures have been shown not to work very well).¹⁸³

To summarize, the contemporary discussion about corruption can be understood in part as a response to the U.S. Supreme Court,¹⁸⁴ but it represents an acknowledgment that the Court is not listening, and that the appropriate audience is someone else – the legal advocates of tomorrow, members of the opposing party, or simply the public.¹⁸⁵ It is easy to conclude that the institutional corruption argument championed by Lessig is “winning”—it has frequently been written about,¹⁸⁶ it prompted a presidential campaign,¹⁸⁷ and it has the clearest political implications,¹⁸⁸ and yet its implications are not reflexively partisan in nature.¹⁸⁹ But this facility is, for those who articulate opposing views, precisely the problem.¹⁹⁰ The fact that this definition does not appear to “fit” our priors about what corruption is (even if the Supreme Court’s definition does not, either) and the fact that it purports to be a redefinition or at least a rediscovery of a lost word suggests that this thing, however lamentable, that many people today are calling

Systematic Corruption in American History, in CORRUPTION AND REFORM: LESSONS FROM AMERICA’S ECONOMIC HISTORY 32, 50–55 (Edward L. Glaeser & Claudia Goldin eds., 2006).

¹⁸¹ See TEACHOUT, *supra* note 128, at 180; Wallis, *supra* note 175, at 52–54.

¹⁸² See generally TEACHOUT, *supra* note 128, at 9 (noting that “an act is corrupt when private interests trump public ones in the exercise of public power”).

¹⁸³ See generally *id.* at 7 (noting that both Justices Kennedy and Roberts, in separate opinions, determined that corruption was only quid pro quo).

¹⁸⁴ See *Buckley v. Valeo*, 424 U.S. 1, 4142–43 (1976).

¹⁸⁵ See *supra* text and accompanying notes 65–178.

¹⁸⁶ See, e.g., LESSIG, *supra* note 92, at 15–16.

¹⁸⁷ See *id.* at 4; see also LESSIG, <https://lessig2016.us/> (last visited Apr. 21, 2016) (Democratic Presidential Campaign).

¹⁸⁸ See *id.* at 7–9.

¹⁸⁹ See generally *id.* at 7 (noting Lessig’s intent as being to rally Republicans and Democrats against a corrupt system).

¹⁹⁰ See LA RAJA & SCHAFFNER, *supra* note 52, at 153 (noting the difference between the Democratic and Republican parties’ views on campaign finance).

corruption is not, in fact, corruption.¹⁹¹

II. CONFUSIONS

We contend—and we have explained this contention at length elsewhere—that in virtually all political, moral, and religious definitions of corruption, there is a broad agreement that corrupt action shows a turning away of the agent from his proper ends or function, for the sake of serving other, often lower and more selfish, goods (e.g., money, power, honor) or a partial interest rather than a common good.¹⁹² This general framework can encompass a wide variety of actions, but ultimately it is not the action itself that is of principal concern. Although the legal category targets,¹⁹³ as it must, particular criminal acts, the reason citizens take single acts of criminal corruption so seriously is that we see them as indications of something less isolated and more damaging.¹⁹⁴ The guilt of criminal corruption has the psychological and political effect of covering the person categorically and permanently:¹⁹⁵ the person is stained. Thus, a single action, though the legal target, is not primarily the social concern when an accusation of corruption is made.¹⁹⁶ Rather, the corrupt act is taken as a symptom of the corruption *of the person*.¹⁹⁷ An inward truth about the agent has pierced through his public show: the particular act of turning away indicates a condition, an established character, consisting in the agent's perhaps habitual orientation toward these other interests, proving the agent a false or at least undependable servant of his proper ends.¹⁹⁸ It is the process of turning away that *precedes* the

¹⁹¹ See M.E. Newhouse, *Institutional Corruption: A Fiduciary Theory*, 23 CORNELL J. L. & PUB. POL'Y 553, 554–55, 594 (2013) (discussing the various definitions and interpretations of institutional corruption and the impacts made on the political system).

¹⁹² See JOHNSTON, *supra* note 35, at 11; Robert G. Boatright & Molly B. Flynn, *Confusions and Disagreements about the Rotten in Politics*, in CORRUPTION AND GOVERNMENTAL LEGITIMACY: A TWENTY-FIRST CENTURY PERSPECTIVE (Jonathan Mendilow & Ilan Peleg eds., forthcoming 2016) (galleries on file with author).

¹⁹³ See *Political Corruption*, FBI.GOV, <https://www.fbi.gov/about-us/investigate/corruption> (last visited Mar. 30, 2016).

¹⁹⁴ See generally JOHNSTON, *supra* note 35, at 11 (discussing how the social significance of corruption is cultural and public opinion of corruption can affect the definition in a way which views the corrupt act as more serious).

¹⁹⁵ See UNDERKUFFLER, *supra* note 27, at 55.

¹⁹⁶ See *id.* at 55–56 (demonstrating Spiro Agnew's demise as a bribe-taker was far worse than his committing a felony, based on the public's perception as a flaw in his humanity).

¹⁹⁷ See *id.* at 56 (emphasis added).

¹⁹⁸ See *id.*

particular action that is of most importance.¹⁹⁹

In this, we largely agree with Underkuffler: the accusation suggests the person is wholly untrustworthy with important matters, because his character has been captured, if not by evil, then by baser interests.²⁰⁰ We likewise agree with her that this point is not properly converted into a new legal definition: we cannot wish to criminalize dispositions, however corrupt.²⁰¹ The broader definition does, however, shed light on why we are bothered by acts that appear somewhat like corrupt actions even when they are not, and should not be, legally categorized as such.²⁰² They reveal the action we cannot directly observe, the turning away.²⁰³

This conception of corruption—as a turning away from the public good toward something else, throws into relief a central area of confusion in contemporary corruption talk:²⁰⁴ what sense does it make to say that an institution, but not its members, turn away from its proper good, toward something else?

A. *The Parts and the Whole*

There are three different additive issues posited among institutional corruption claims. First, contemporary American “corruption talk,” especially that of legal theorists, political scientists, and other elite commentators, is dominated by the attempt to apply the idea of corruption to further domains and practices.²⁰⁵ So corruption definitions (such as Lessig’s claim above regarding corruption as “influence”)²⁰⁶ are said to be further illuminated when applied across multiple domains.²⁰⁷ Second, it has recently become common to see arguments that an institution can be corrupt even when none of its members are corrupt.²⁰⁸ And third, it has also become common to see references to some

¹⁹⁹ *See id.*

²⁰⁰ *See id.* at 68.

²⁰¹ *See* UNDERKUFFLER, *supra* note 27, at 69.

²⁰² *See generally id.* at 72 (noting the powerful visceral impact of labelling something corrupt and the relative ease with which this is done).

²⁰³ *See id.*

²⁰⁴ *See id.* at 139 (distinguishing evil conduct from corrupt conduct by highlighting that corruption “threatens the entire governmental system of reliance, trust, and shared values of which [a politician] is part.”).

²⁰⁵ REPUBLIC, LOST, *supra* note 92, at 28–29.

²⁰⁶ *See supra* note 123 and accompanying text.

²⁰⁷ *See* REPUBLIC, LOST, *supra* note 92, at 28–29.

²⁰⁸ *See id.* at 17.

imagined “tipping point” at which institutions become corrupt—that is, if just one or two members are corrupt, they are aberrations, but if enough members are, the entire institution is compromised.²⁰⁹ How do we make sense of these various claims? One way to think about these matters is to think about the notion of corruption as a “turning.”²¹⁰

Examples from Multiple Domains: One intriguing feature of some recent corruption arguments is their taking examples from multiple, non-political domains.²¹¹ The question here is whether we get additional leverage on the concept or consequences of corruption by exploring multiple different instances.²¹² This is not a novel observation.²¹³ As Plato shows in the *Euthyphro*, providing multiple instances that are said to be examples of a larger concept (there, it is holiness or piety) does not bring one closer to a definition of the thing itself²¹⁴ (or, as Catherine Zuckert puts matters, “knowledge is not simply analytic nor synthetic”).²¹⁵ We might be able to rule out particular things, but we cannot be certain that we have a large enough taxonomy to draw conclusions about the thing itself or about all instances that are examples of the thing.

Many of the examples of undue influence that Lessig and others provide are indeed cringe-worthy.²¹⁶ But enumerating examples (as helpful as this may be in spurring thought about definitions) is not the same as defining.²¹⁷ Being bothered is different from understanding.²¹⁸ There very well may be valid descriptive reasons to enumerate and classify incidences of corruption in different domains;²¹⁹ this is a major task in much of the empirical literature on corruption,²²⁰ and it can tell us things such as whether country

²⁰⁹ See generally *id.* at 18 (providing an example of a point where democratically elected officials are unduly influenced by outside benefit).

²¹⁰ *Id.* at 16–17 (discussing the way in which one corrupt person does not create a corrupt institution, but rather this could be the turning point in which the corruption takes hold).

²¹¹ See REPUBLIC, LOST, *supra* note 92, at 28–29.

²¹² *Id.*

²¹³ See, e.g., CATHERINE H. ZUCKERT, PLATO’S PHILOSOPHERS: THE COHERENCE OF THE DIALOGUES 639–40 (2009).

²¹⁴ *Id.*

²¹⁵ *Id.* at 635.

²¹⁶ See, e.g., REPUBLIC, LOST, *supra* note 92, at 15–16.

²¹⁷ *Id.* at 17, 18.

²¹⁸ See *id.*

²¹⁹ See generally *id.* at 28–29 (recounting an experiment attempting to classify what corruption is in the domains of “politics, medicine, and consumer products.”).

²²⁰ See *id.*

A has experienced more instances of corruption than country B.²²¹ This would seem to be useful in a sheerly practical sense: where would one wish to live? Where would one wish to engage in philanthropic efforts? Yet if the corruption itself involves a turning from the public good, it seems irrelevant where the turning took place.²²² A corrupt banker is functionally the same as a corrupt politician, as a corrupt university administrator. The corruption took place before the action. Now it may be of interest that corruption is more common in some domains than others,²²³ but if so, we have shifted our conversation to one about the circumstances under which individuals might become corrupt. We have neither clarified the definition nor have we absolved these individuals.

Indeed, it is not merely officials who can be turned away from their proper purposes, and it is not merely by committing a criminal act that an agent can evidence a distorted orientation by which he, operating as an official, values lower and private goods over higher and common goods.²²⁴ If we adopt the view common in the philosophical literature on our natural human tendency toward corruption, perhaps we are all potentially corrupt²²⁵—but we might only act upon that inclination in certain circumstances, within certain institutional frameworks.²²⁶ Yet this does not make these frameworks themselves corrupt. Despite examples offered from multiple domains,²²⁷ we are left with the question of whether the concept of institutional corruption makes sense.

Corrupt Institutions full of Uncorrupted People?: Another classic matter in separating types of corruption is what one might call the

²²¹ See generally BO ROTHSTEIN, *THE QUALITY OF GOVERNMENT: CORRUPTION, SOCIAL TRUST, AND INEQUALITY IN INTERNATIONAL PERSPECTIVE* 3–4 (The University of Chicago Press 2011) (detailing and comparing how corruption affects water access in several different countries).

²²² See JOHNSTON, *supra* note 35, at 68 (detailing allegations of corruption by various politicians at different periods of time and under diverse circumstances).

²²³ See, e.g., Peter Rodriguez et al., *Three Lenses on the Multinational Enterprise: Politics, Corruption, and Corporate Social Responsibility*, 37 *J. OF INT'L BUS. STUDIES* 733, 739 (2006) (noting that “[c]orruption is quite common in government procurement, in the provision of infrastructure services, and in business licensing[,]” for example).

²²⁴ See UNDERKUFFLER, *supra* note 27, at 68.

²²⁵ See REPUBLIC, LOST, *supra* note 92, at 15–16; UNDERKUFFLER, *supra* note 27, at 68.

²²⁶ See REPUBLIC, LOST, *supra* note 92, at 15–16 (noting how a doctor might be corrupted in the context of recommending pharmaceuticals based on benefits received from a pharmaceutical company).

²²⁷ See REPUBLIC, LOST, *supra* note 92, at 28–29.

“McConnell Paradox.”²²⁸ During the debate over what was then known as the McCain-Feingold campaign finance reform bill, Senator Mitch McConnell took issue with the claim that the bill would combat corruption.²²⁹ “How can there be corruption if no one is corrupt?” McConnell asked, “That’s like saying the gang is corrupt but none of the gangsters are.”²³⁰ While this rhetorical trope is not original to Senator McConnell,²³¹ it has served as an effective riposte for those who would challenge regulation of any activity that tended toward corruption.²³² As Thompson has shown, it can be rhetorically effective in some circumstances to personify what he, Lessig, and others have described as institutional corruption, but in other circumstances the response to the McConnell paradox has been to repeat their definition and to emphasize that institutional corruption does not implicate individuals.²³³

The difference here may in part be a semantic one. If corruption is represented as a “turning” then it seems only individuals can be corrupt.²³⁴ Institutions cannot turn.²³⁵ They can *be* turned, but if this is the case one might argue that they *have been corrupted*, not that they are corrupt.²³⁶ In other words, there has to be some personal agency here somewhere.²³⁷ A group of persons can have a will, and may constitute itself in a manner that establishes institutions to do their will or seek their good.²³⁸ Some might argue, with Rousseau, however, that any institution that is not strictly

²²⁸ See Lawrence Lessig, *Congress Can Be Corrupt Without Corrupt People*, THE DAILY BEAST (Dec. 13, 2013, 5:45 AM), <http://www.thedailybeast.com/articles/2013/12/13/congress-can-be-corrupt-without-corrupt-people.html>.

²²⁹ See Alison Mitchell, *Republicans Pillory McCain in Debate Over Soft Money*, N.Y. TIMES (Oct. 15, 1999), <http://www.nytimes.com/1999/10/15/us/republicans-pillory-mccain-in-debate-over-soft-money.html>.

²³⁰ *Id.*

²³¹ *See id.*

²³² *See generally* Lessig, *Congress Can Be Corrupt Without Corrupt People*, *supra* note 228 (noting how a particular advocacy group has launched political advertisements in line with McConnell’s philosophy against a politician they believe to be corrupt).

²³³ *See* Thompson, *Two Concepts of Corruption*, *supra* note 122, at 5–6; Lessig, *Institutional Corruptions*, *supra* note 116, at 3.

²³⁴ *See* UNDERKUFFLER, *supra* note 27, at 68.

²³⁵ *See* Thompson, *Two Concepts of Corruption*, *supra* note 122, at 5–6.

²³⁶ *See id.* at 15–16 (emphasis added).

²³⁷ *See* Lessig, *Institutional Corruptions*, *supra* note 116, at 6.

²³⁸ *See generally* Thompson, *Two Concepts of Corruption*, *supra* note 122, at 16 (providing an example of how medical institutions prioritize the demands of their industry in limiting transparency and accountability).

acting on orders from the people who have constituted it, which has deviated from its purpose whether by an individual's nefarious designs or through inattention of the people, has been corrupted.²³⁹ But, if so, it has still been corrupted through the actions of individuals.²⁴⁰ Properly speaking, there are not really agentively independent institutions at all in social contract theories such as Rousseau's.²⁴¹ Nor do such institutions exist in contemporary rational choice literature,²⁴² when motives are attributed to groups of people, they are almost always attributed not to institutions but to *organizations*, deliberately constituted by individuals to facilitate deliberation and pursue common ends.²⁴³

This may be why references to institutional corruption are scarce in the older political philosophy literature.²⁴⁴ It is much more common to see references to the corruption of a people.²⁴⁵ If one wishes to excuse individuals, this may be a more accurate approach.²⁴⁶ We can become corrupt without necessarily being aware of it; in fact, if all of us become corrupt together, then we may be too compromised to see the corruption in others.²⁴⁷ When Machiavelli, for instance, presents instances of corrupt peoples, it is perhaps easy for the modern reader to envision a world constituted of tiny principalities, some of which have the bad fortune to be made up of thoroughly rotten individuals.²⁴⁸ Yet, it is

²³⁹ See JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 15, 18 (Roger G. Masters ed., Judith R. Masters trans., Bedford St. Martins 1978) (1762).

²⁴⁰ See *id.* at 15.

²⁴¹ See Edward W. Younkins, *Rousseau's "General Will" and Well-ordered Society*, LE QUEBECIOS LIBRE (July 15, 2005), <http://www.quebecoislibre.org/05/050715-16.htm>.

²⁴² See Paul J. Quirk & Sarah A. Binder, *Congress and American Democracy: Institutions and Performance*, in *INSTITUTIONS OF AMERICAN DEMOCRACY XIX, XX* (Paul J. Quirk & Sarah A. Binder eds., 2005).

²⁴³ See, e.g., Jack Knight, *Models, Interpretations, and Theories: Constructing Explanations of Institutional Emergence and Change*, in *EXPLAINING SOCIAL INSTITUTIONS* 95, 96 (Jack Knight & Itai Sened eds., 1995); Douglas C. North, *Five Propositions about Social Change*, in *EXPLAINING SOCIAL INSTITUTIONS* 15, 15–18, 20 (Jack Knight & Itai Sened eds., 1995); Kenneth A. Shepsle & Barry R. Weingast, *Positive Theories of Congressional Institutions*, in *POSITIVE THEORIES OF CONGRESSIONAL INSTITUTIONS* 5, 10 (Kenneth A. Shepsle & Barry R. Weingast eds., 1995); DONALD WITTMAN, *THE MYTH OF DEMOCRATIC FAILURE: WHY POLITICAL INSTITUTIONS ARE EFFICIENT* 15 (1995); Paul J. Quirk & Sarah A. Binder, *supra* note 242, at xx.

²⁴⁴ *CORRUPTION, EXPANDING THE FOCUS* 8 (Manuhua Barcham et al. eds., Australian National University Press 2012).

²⁴⁵ *Id.*

²⁴⁶ See, e.g., *id.* at 68–69.

²⁴⁷ See, e.g., *id.*

²⁴⁸ See NICCOLO MACHIAVELLI, *THE PRINCE AND THE DISCOURSES* 3–28, 35, 42,

harder to imagine similarly implicating a modern nation of over 300 million people, especially when the imaginer is one of the 300 million. But perhaps this is a possibility that would be more consistent with the manner in which the term was used in the classic literature.²⁴⁹

This corruption of a people may not, however, be what Lessig wishes to talk about. Lessig's definition makes frequent reference to replacing criminal *quid pro quo* with a certain type of influence.²⁵⁰ We would suggest, rather, that his definition confuses corruption for influence.²⁵¹ While an honest politician will indeed avoid any *quid pro quo* agreements, no politician can avoid influence, indeed, multiple influences from myriad sources.²⁵² He may turn away from his proper purposes in response to a bad influence, but that does not make influence itself corruption: it would make the individual agent corrupt.²⁵³ Indeed, Lessig's definition nods to this fact by specifying the corrupting influence as occurring within "an economy of influence."²⁵⁴ The phrase implies that politicians, and other institutional agents, operate within systems of people creating and trading influences.²⁵⁵ In her discussion of parties and corruption, Nancy Rosenblum comments, aptly, "[n]othing is more elusive than influence (except 'undue')."²⁵⁶ Lessig's definition gets caught on this point.²⁵⁷ The influences his definition labels as corrupting, the influences which allegedly entwine politicians in institutional corruption, are those that "weaken the effectiveness of the institution."²⁵⁸ This specification does not do much to reduce the elusiveness of what counts as improper influence, since this leaves the difficult empirical task of determining the conditions under which an institution operates most effectively.²⁵⁹ (For example, the definition implies that public trust is required for the proper functioning of these institutions: but what amount of public trust of the institution allows it to

49, 55 (Max Lerner trans., 1950) (providing examples of corruption).

²⁴⁹ See *id.*; CORRUPTION, *supra* note 244, at 8.

²⁵⁰ See Lessig, *Institutional Corruptions*, *supra* note 116, at 2, 15.

²⁵¹ See *supra* notes 101–10 and accompanying text.

²⁵² See Lessig, *Institutional Corruptions*, *supra* note 116, at 15.

²⁵³ *Contra id.* at 2.

²⁵⁴ See *id.*

²⁵⁵ See *id.*

²⁵⁶ Rosenblum, *supra* note 161, at 246.

²⁵⁷ See Lessig, *Institutional Corruptions*, *supra* note 116, at 2.

²⁵⁸ *Id.*

²⁵⁹ See Thompson, *Two Concepts of Corruption*, *supra* note 122, at 5.

function most effectively?²⁶⁰ What degree of public distrust, or *trust*, hinders it? Mustn't the institutional corruption theorists believe some distrust will help our institutions operate more effectively, or else they themselves would be damaging these institutions?)²⁶¹

Distinguishing between those influences that enhance and those that hamper an institution's effectiveness requires us to face, even beyond the empirical difficulties, the deeper, and philosophically prior, difficulty of understanding the purpose of the institution in question.²⁶² This difficulty is philosophically prior because it is only in light of these proper purposes that the notion of an institution's "effectiveness" gains any meaning at all.²⁶³ It follows from our above claims that institutions are not corrupt except insofar as they are corrupted by individual agents;²⁶⁴ and if this happens under corrupting influences, we are still left to ponder which influences help and which hinder the individuals in serving the institution's proper ends.²⁶⁵

Corrupt Practices, or, the Theseus's Ship Problem: Before turning directly to the matter of institutional purposes, let us consider a weaker variant of the McConnell paradox:²⁶⁶ while perhaps the institution cannot be corrupted without its members being corrupt, is it possible for it to be corrupted without all of them being so? Perhaps one or two corrupt individuals may not be symptomatic of a corrupt institution, but once the number of demonstrably corrupt individuals reaches a certain level, we might then start describing the institution itself as being corrupt. This is a convenient and common shorthand. For instance, Democratic politicians characterized the Republican-led Congress as being "the most corrupt Congress in history" in the run-up to the 2006 election.²⁶⁷ Did they mean that the institution was corrupt, or was this merely a way of saying that a large number of individual politicians were corrupt? Most likely (especially since these words

²⁶⁰ See Lessig, *Institutional Corruptions*, *supra* note 116, at 2; Thompson, *Two Concepts of Corruption*, *supra* note 122, at 5–6.

²⁶¹ See *id.*

²⁶² See Thompson, *Two Concepts of Corruption*, *supra* note 122, at 4–5.

²⁶³ See *id.* at 5.

²⁶⁴ See *id.*

²⁶⁵ See *id.*

²⁶⁶ See *supra* notes 228–30 and accompanying text.

²⁶⁷ See Thomas Edsall, *Republicans Say Mollohan Should Quit Ethics Post*, WASHINGTON POST (Apr. 8, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/07/AR2006040701800.html>.

were spoken by fellow members of the Congress who did not radically alter Congressional rules or practices when they gained control)²⁶⁸ it was the latter.

If I purchase a bag of grapes, and one of them is rotten, I can easily remove that grape and eat the others. There comes some point, however, when I have gone through the bag finding rotten grapes, that I give up and discard the bag, concluding that the lot of them is rotten. Perhaps I do not mean that they all are, only that the effort it would take to find a fresh one is not worth it. It is a matter of the degree of precision I have in my description. This is another classic problem in philosophy, of nobler origin than the McConnell paradox: the Theseus's ship problem (described by Plutarch) or the Heraclitean claim, presented in Plato's *Cratylus*, that a person can never step in the same river twice.²⁶⁹ At what point does change in the parts constitute a transformation of the whole? The parallel here is that we cannot with precision identify a point at which individual parts can corrupt the whole, although even a small number of parts change the character of it.²⁷⁰ A further parallel, in modern terminology, might be made to computer parts; we say that a computer drive has become corrupted when only a small part of it fails to work properly. A problem with one small part can destroy the whole.

This variant view of institutional corruption may be more promising than claiming that an institution can be corrupted without its members being so. One broken plank on a ship cannot break another plank. Rot can, however, spread from one piece of fruit to another if the two are next to each other. This may be a more accurate way of thinking about institutional corruption.²⁷¹ One corrupt individual amongst a body of the uncorrupt may be cast out. If the corrupt proliferate in number past a certain point, however, they may influence the practices of the group.²⁷²

To see why this is so, we must distinguish between singly corrupt acts or persons and corruption as a practice.²⁷³ In fact, one

²⁶⁸ See generally *id.* (discussing how Republican House leaders charged that the GOP has fostered a "culture of corruption").

²⁶⁹ See THE COLLECTED DIALOGUES OF PLATO 421, 439 (Edith Hamilton & Huntington Cairns eds., 1961)[hereinafter PLATO]; Plutarch, *Theseus*, THE INTERNET CLASSICS ARCHIVE (1994–2009), <http://classics.mit.edu/Plutarch/theseus.html>.

²⁷⁰ See PLATO, *supra* note 269, at 423; Plutarch, *Theseus*, *supra* note 269.

²⁷¹ See Thompson, *Two Concepts of Corruption*, *supra* note 116, at 15–16.

²⁷² See *id.*

²⁷³ See *id.* at 17 (discussing the different effects of each type of corruption,

reason citizens worry about corruption scandals, in addition to whatever injustice they directly sow, is their power to “cause scandal” in the older sense.²⁷⁴ Contemporary theorists of corruption are quite concerned with the fact that corrupt actions and agents damage the people’s faith in their government.²⁷⁵ A citizen’s moderate skepticism about government and governmental officials is, however, healthy.²⁷⁶ Distinct from this concern is the worry that singly corrupt actions and individually corrupt agents encourage others in like positions to act as they have acted, to become like them.²⁷⁷ Corruption displayed is corrupting.²⁷⁸

There are two levels at which the corrupting power of corruption can operate.²⁷⁹ First, human beings are often inspired to act according to the models they witness.²⁸⁰ The corrupt agent sets up a model for any others who witness the corruption, whether this behavior be publicly known or not, whether it be taken by a witness as exceptional or as a practice involving multiple individuals.²⁸¹ Thus an infectious tendency belongs to corruption, as to all human behaviors.²⁸² A corrupt individual corrupts other individuals.²⁸³ Second, a corrupt pattern corrupts the norm. Human beings act always in a milieu of socially established norms.²⁸⁴ The witness may take the corrupt action or agent as presenting a social norm, as indicating “how things are done.”²⁸⁵ When this presentation is more or less accurate, corruption has become not just an

individual and institutional).

²⁷⁴ See, e.g., Paul Wadell, *The Dangerous Power of a Scandalous Life*, THE CHICAGO TRIBUNE (Sept. 14, 1997), http://articles.chicagotribune.com/1997-09-14/news/9709140300_1_mother-teresa-scandal-goodness.

²⁷⁵ See, e.g., REPUBLIC, LOST, *supra* note 92, at 9; Thompson, *Two Concepts of Corruption*, *supra* note 116, at 15–16.

²⁷⁶ See generally, Kevin Williamson, *Defining ‘Corruption’ Corruptly*, NAT’L REVIEW (May 9, 2015, 3:04 PM), <http://www.nationalreview.com/corner/418158/defining-corruption-corruptly-kevin-d-williamson> (discussing the inevitability of moral corruptions).

²⁷⁷ See THOMAS AQUINAS, THE SUMMA THEOLOGICA OF ST. THOMAS AQUINAS PT. II 520–21 (Fathers of the English Dominican Province trans., 1917) (1485).

²⁷⁸ See *id.* See generally Williamson, *supra* note 272 (discussing public officials’ use of corruption talk to perpetuate “corruption writ large” without crossing the line into “legally actionable corruption”).

²⁷⁹ See *infra* notes 280–85.

²⁸⁰ See Jong-sung You & Sanjeev Khagram, *A Comparative Study of Inequality and Corruption*, 70 AM. SOCIOLOGICAL REV. 136, 140 (2005).

²⁸¹ See *id.*

²⁸² *Id.*

²⁸³ See *id.*

²⁸⁴ See *id.*

²⁸⁵ *Id.*

exceptional single action and possibly contagious, but customary and epidemic.²⁸⁶ This presentation of a pattern of corruption involving many individuals is more powerfully corrupting, more scandalous, than are scattered corrupt individuals.²⁸⁷ One must make oneself an exception not to participate; failing to go along with the pattern may seem either supererogatory or naïve.²⁸⁸

If we take the corrupt act or behavior as “how things are done,” what is the social rule by which we judge the violation as a violation?²⁸⁹ In the case of individual corruption in a healthy system, the corrupt action or agent is recognized as exceptional, whereas in the case of corruption-as-a-practice, the individually corrupt action or agent is seen as normal (average), and the norm itself is seen as exceptional though still operative as norm, operative in thought insofar as we recognize corruption as corrupt.²⁹⁰ In such a case, there must be two simultaneous and conflicting set of social rules, where one is inherently parasitic on the other.²⁹¹ It is an unstable situation, threatening the survival of the official norm.²⁹² For those still in possession of the higher norm, who still recognize corruption even when it has become established practice, the situation asks for the return of the true and rightful king, the restoration of the legal order.²⁹³

What happens if the official norm is totally lost? Individual corruption and corruption as a practice must therefore be distinguished from a third type, namely corruption as loss of the ideal, in which society no longer honors the normatively primary “official” institution on which corruption as practice is parasitic,

²⁸⁶ See Thompson, *Two Concepts of Corruption*, *supra* note 122, at 17 (quoting Charles “Buddy” Roemer as saying “It’s the system that’s corrupt. . . . People within the system can’t imagine the system functioning any other way.”).

²⁸⁷ See *id.*

²⁸⁸ See REPUBLIC, LOST, *supra* note 92, at 124.

²⁸⁹ See, e.g., You & Khagram, *supra* note 280, at 140.

²⁹⁰ See REPUBLIC, LOST, *supra* note 92, at 124; You & Khagram, *supra* note 280, at 140. See generally Rod Blagojevich, *Former Illinois Governor, Sentenced to 14 Years on Corruption Charges*, THE WASHINGTON POST (Dec. 7, 2011), https://www.washingtonpost.com/politics/rod-bлагоjevich-former-illinois-governor-sentenced-to-14-years-on-corruption-charges/2011/12/07/gIQA1tAHdO_story.html (reporting a former politician’s conviction and sentencing for corruption charges).

²⁹¹ See Lessig, *Institutional Corruption*, *supra* note 116, at 14.

²⁹² See *id.*

²⁹³ See generally Maarten de Jong et al., *Eliminating Corruption in Our Engineering/Construction Industry*, 9 LEADERSHIP & MANAGEMENT IN ENGINEERING 105, 108 (July 2009) (calling for changes in the construction industry as part of an effort to combat perceived corruption).

such that bribery, etc., is not only “the way things are done,” but is considered—from the viewpoint of socially established rules—the way things are properly done. It is no longer seen as corrupt.²⁹⁴

B. The Need for an Ideal (or, What’s a Heaven For?)

All of this brings us to the question of what, in fact, institutions are. Lessig’s definition of corruption requires that we identify in advance for any institution what its purposes are and which sources and degrees of influence on its agents are helpful for these purposes and which are not.²⁹⁵ Similarly, the framework we have posited here presumes that there is a public purpose in which we are engaged; we have constructed institutional, public roles and assigned them certain functions that are different, and differently understood, than our personal desires and tasks, and these public roles make sense as serving goods of the institutions of which the roles are, by definition, subservient.²⁹⁶

These functions can serve as an ideal—they are constructs to which we attach rules (both formal and informal), responsibilities, and expectations.²⁹⁷ These roles are what Searle refers to as a “status function.”²⁹⁸ Consider, for instance, the role of “senator.” If an individual politician has turned away from doing what a senator should do, we might (with Thompson)²⁹⁹ identify this as a particular type of corruption (a type that Thompson, as we have noted above, identifies as institutional corruption, but which is distinct from claiming that the larger institution, such as Congress, is corrupt).³⁰⁰ This claim can only be made, however, if we have an ideal of what a “senator” should be and do. But this is different from saying that the institution is corrupt.

²⁹⁴ See REPUBLIC, LOST, *supra* note 92, at 124; You & Khagram, *supra* note 280, at 140. Perhaps one might say it no longer is corrupt. To conceive of the social norms themselves as corrupt requires appeal to some other norm viewed as a higher or more fundamental norm—a more supreme social norm or a norm not socially recognized at all. See LESSIG, REPUBLIC, LOST, *supra* note 92, at 124.

²⁹⁵ See Lessig, *Institutional Corruption*, *supra* note 116, at 2; Thompson, *supra* note 122, at 4–5, 7 n.7. *But see* Lessig, *Institutional Corruption*, *supra* note 116, at 7, 16.

²⁹⁶ See generally Thompson, *supra* note 122, at 4–5, 7 n.7 (explaining that if a public figure is dependent on anything other than “the people” it is corruption). *But see* Lessig, *Institutional Corruption*, *supra* note 116, at 7, 16.

²⁹⁷ See generally John R. Searle, *What is an Institution?*, 1 J. INST. ECON. 1, 7 (2005).

²⁹⁸ See *id.*

²⁹⁹ See Thompson, *Two Concepts of Corruption*, *supra* note 122, at 6, 18.

³⁰⁰ *Id.*

In this sense, the institutional role in question is that of the “senator.” Yet one can only be a senator within a larger institution, such as (obviously) the Senate (again, a point made by Searle).³⁰¹ And the Senate, in turn, is also comprised of a set of rules, responsibilities, and norms.³⁰² In one sense, it is these that constitute the institution of the Senate; in another sense (following from our point above regarding rational choice theorists’ distinctions between organizations and institutions),³⁰³ the Senate is an organization, a body of 100 people. And what are we really talking about if we say that the Senate is ‘corrupt’? We would contend that corruption of the group has clear, public meaning, while corruption of the institution apart from the group is far trickier, lacking a clear, public meaning. The rules exist for a purpose (which may be good or bad), but they are in themselves value-neutral.³⁰⁴ We can only talk about their corruption if we specify a purpose behind the rules, responsibilities, and norms, and then discuss their failures to conduce to that purpose. If the rules are inadequate to enable the people to achieve that purpose, we might talk about improper fit. If the members, on the other hand, have flouted the rules, then we might allege corruption at the individual level.

Influence and Dependence: Lessig claims that we can skirt the purposes argument about Congress by simply recognizing the “improper dependency” of Congressional campaign procedures on donors,³⁰⁵ where the dependency is recognized as improper because the dependency was supposed to be, according to Madison in *Federalist #52*, “the people alone.”³⁰⁶

This is questionable as a descriptive claim, as the quotation from *Federalist #52* is taken out of context. Madison is there emphasizing that the House of Representatives was not to be dependent upon the state legislatures.³⁰⁷ We are reminded that there is a much more mundane sense in which the House is

³⁰¹ See generally Searle, *supra* note 297, at 10–11 (explaining that subgroups and roles within subgroups can exist within larger groups, using families as an example).

³⁰² *Rules and Procedure*, UNITED STATES SENATE, http://www.senate.gov/reference/reference_index_subjects/Rules_and_Procedure_vrd.htm (last visited Apr. 4, 2016).

³⁰³ *Supra* note 243 and accompanying text.

³⁰⁴ See *Rules and Procedure*, *supra* note 302.

³⁰⁵ See REPUBLIC, LOST, *supra* note 92, at 245.

³⁰⁶ THE FEDERALIST NO. 52, at 483 (James Madison) (The Heritage Press 1945).

³⁰⁷ THE FEDERALIST NO. 52, at 483 (James Madison).

dependent upon the people alone: its members were (prior to the 17th amendment) the only officials of the federal government directly elected, rather than elected or appointed by other officials.³⁰⁸ We do not need to like the influence of donors upon elections; still, we should recognize as controversial rather than as obvious, Lessig’s argument that members of Congress should not rely on citizen donations in their campaigns.³⁰⁹ Lessig’s example therefore fails to show that we can identify improper influence without appealing to purposes of an institution.³¹⁰

Two points about this project undermine, we contend, the helpfulness of Lessig’s definition of corruption. First, while improper influence is meant to be illuminated by the purposes of our public institutions, those purposes are often just as elusive and contested as the idea of undue influence.³¹¹ Thus, ultimately, the definition of institutional corruption is un-illuminating outside a discussion of these institutional purposes.³¹² Second, governmental institutions in our democratic republic seem designed to respond to this human situation of un-clarity about ultimate purposes of our most important institutions.³¹³ They do this by allowing—within a constitutional framework that imposes limits as well as creating places for debate and decision—the play of influences in the country to determine the particular purposes to be sought.³¹⁴ This we call politics.³¹⁵ Thus, ultimately, the definition of institutional corruption seems either to shortchange, or simply challenge, the constitutional system as a framework for politics,

³⁰⁸ See *The People of the People’s House*, HISTORY, ART & ARCHIVES, U. S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/People/> (last visited Apr. 17, 2016).

³⁰⁹ See REPUBLIC, LOST, *supra* note 92, at 157.

³¹⁰ See *generally id.* (the primary method of campaign finance being through corporate donations in the hopes of influencing outcomes, which requires a corrupt institution because the individuals are corrupted in their use of power within the institution).

³¹¹ See REPUBLIC, LOST, *supra* note 92, at 8–9, 15–16 (demonstrating how corruption should be easily identifiable within a public institution given the purpose of the institutions existence, however it can be blurred or unclear to the public eye whether a wrong has been done); Lessig, *Institutional Corruption*, *supra* note 116, at 8–9; Thompson, *supra* note 122, at 5.

³¹² See REPUBLIC, LOST, *supra* note 92, at 19–20 (demonstrating, for example, that receiving gifts from the Crown corrupted members of Parliament because it pulled their focus from the good of the people and towards the good of the king); Lessig, *Institutional Corruption*, *supra* note 116, at 14–15.

³¹³ See *generally* REPUBLIC, LOST, *supra* note 92, at 19 (explaining that the Constitution was framed in a way which was believed to alleviate the corruption of foreign powers).

³¹⁴ See Thompson, *supra* note 122, at 5–6.

³¹⁵ See *id.*

which is supposed to involve contesting opinions or “influences.”³¹⁶

These two points fit together in an important way: it is by having discussions of purposes within the framework that the framework is best maintained.³¹⁷ That is to say, our being a *political* community is constituted in discussions in which we, especially through our intermural disagreements, define what these purposes are.³¹⁸ And this is not a once and for all affair: we continue to constitute ourselves as a political community as we recontest our various consensuses and deliberate about how to apply our vaguely and imperfectly agreed upon purposes in new situations.³¹⁹

Thus, the proper response to Lessig’s definition of institutional corruption is, we believe, a call to further discuss together the purposes of our institutions.³²⁰ There is certainly nothing wrong with such discussions. Yet we fear that broad acceptance of Lessig’s definition of institutional corruption would hinder this discussion in two ways: first, the definition purports to be able to diagnose a major problem of our institutions without our needing to dirty ourselves with the more fundamental discussion of purposes;³²¹ second, it uses a term with powerful criminal connotations to describe politics and its inevitable play of influences, thus threatening to cast out of the discussion those who disagree about the purpose of the institution, just as we cast out from political life officials caught taking bribes.³²²

Institutions, then, seem insufficiently powerful to be said to be corrupt.³²³ They may fail, they may not fit our needs, they may not be updated to account for changing circumstances, they may be subverted by individuals pursuing their own private interests, or

³¹⁶ See Lessig, *Institutional Corruptions*, *supra* note 116, at 2; Thompson, *Two Concepts of Corruption*, *supra* note 122, at 6.

³¹⁷ See Thompson, *supra* note 122, at 5–6; see also Lessig, *Institutional Corruptions*, *supra* note 116, at 8 (noting that identifying when a tendency becomes institutional corruption, one must identify a baseline).

³¹⁸ See Thompson, *supra* note 122, at 5–6; see also Lessig, *Institutional Corruptions*, *supra* note 116, at 7–8 (discussing the types of corruption that are done within the political community and the purposes they serve).

³¹⁹ See Lessig, *Institutional Corruptions*, *supra* note 116, at 7–8.

³²⁰ See *id.* at 2.

³²¹ See *id.* at 16, 19.

³²² REPUBLIC, LOST, *supra* note 92, at 226–27 (clear corruption within an institution on the most basic level can threaten the discussion of institutional corruption).

³²³ See generally *id.* at 17 (demonstrating that because of the reliance on individuals, the institution itself is not corrupted given the power is with individuals and their actions within the institution).

they may calcify, becoming overly complex or opaque.³²⁴ They can be turned away.³²⁵ But they have no agency—they cannot turn without someone turning them, either through malice, sloth, or self-interest.³²⁶ If we want to talk about this, we cannot separate institutions from individuals, groups of individuals, or people.³²⁷ It is they who may be corrupt in such instances.³²⁸ And yet, if we want to make a secondary point—that an institution *has been* corrupted, we can only do this by positing an ideal from which that institution has been turned—an idealized institution up to which we hold our actual ones.³²⁹ Perhaps this means that the actual will always fail to match the ideal, but at the least we might be able to talk about the distance between the two.³³⁰

This, finally, poses a problem for discourse. What we are saying is that any claim about institutional corruption is a regime argument: an argument about what purpose our association should serve, what the common good is.³³¹ Thus, allegations of institutional corruption seem to be reduced to accusing other people of disagreeing with us about the common good.³³² It would be better for us simply to say so, and to admit the ideals we are asserting. We are holding the individuals in, say, the Senate, up against our idealized notion of what the Senate is supposed to be: a concept of “the Senate” which may have existed at some point in time, may have been articulated in the Constitution or the *Federalist Papers*, or may exist in the popular imagination (say, as

³²⁴ See generally ARISTOTLE, THE BASIC WORKS OF ARISTOTLE 1130–31 (Richard McKeon ed., Random House 1968) (1941) (discussing how a household is the basic form of a political institution and the way in which circumstances can alter within a household, be it a possession becoming something capable of action or an actor failing to produce).

³²⁵ See *id.*

³²⁶ See *id.*

³²⁷ See REPUBLIC, LOST, *supra* note 92, at 16–17 (showing how institutional corruption sometimes cannot be separated from individual corruption given that people are what make the institution corrupt).

³²⁸ *Id.*

³²⁹ See Lessig, *Institutional Corruptions*, *supra* note 116, at 8 (noting that identifying when a tendency becomes institutional corruption, one must identify a baseline).

³³⁰ See REPUBLIC, LOST, *supra* note 92, at 278 (discussing how even within a party the ideal and reality can vary).

³³¹ See Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1395–96, 1421–22 (2013) (arguing that corruption cannot be precisely defined by the court without also developing a theory of representative democracy—a theory which is beyond the scope of the court’s powers).

³³² See *id.* at 1392.

a consequence of watching *Mr. Smith Goes to Washington*).³³³ Or, to take matters a step further, we may, with Quirk and Binder, prefer to hold as an ideal a loosely defined good and be flexible about the institutional features that will be necessary to achieve that.³³⁴ But, it is this construction in language and public discourse that drives our debate. We need to talk about what this regime looks like.

And if we don't all share this ideal or norm? If, for instance, one person's "Senate" is a sacrosanct constitutional treasure, while for others it is a reminder of slavery and undemocratic privilege? How do we proceed? For Thompson, we can still find common ground by stating our acceptance of procedures—that is, we might reach a grudging acceptance that we will, at least, allow majority rule or some other decision rule serve as the institutional means of cutting short our regime argument.³³⁵ But this acceptance is not necessarily facilitated by branding a person, or a person's practices, or even the organization to which one belongs, as corrupt.³³⁶

At this point in the analysis of institutions it seems that to allege that an institution, in the proper sense, is corrupt is either to argue that it has *been* corrupted, by individuals who are themselves at least agents of corruption, that it is entirely too broad (a shorthand for categorizing things that one does not care for), or that it is without meaning at all, simply an epithet to toss at one's foes.

One final point on this matter: one might respond to our argument by noting that we have inserted one academic definition (that of "institutions") and branded it the "correct" one, and used that to brand another academic definition (of "institutional corruption") as "wrong."³³⁷ This is not our intent here. Language changes over time.³³⁸ It is beyond our means here to address the question of why language changes (whether naturally or through deliberate decisions by individuals), but we do not mean to suggest

³³³ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 371 (2010); see also Hellman, *supra* note 331, at 1394 (noting that what we see as corruption of legislators depends on what we believe to be proper "decisionmaking [sic] by elected officials").

³³⁴ See Quirk & Binder, *supra* note 242, at 527.

³³⁵ See Thompson, *Ethics in Congress*, *supra* note 112, at 28.

³³⁶ See generally *id.* (noting that the main difference between corruption and public purpose is whether private interests, regardless of whether they are those of individuals, contentious factions, or mass movements, bypass democratic processes).

³³⁷ See *supra* notes 123–27, 309–310 and accompanying text.

³³⁸ See *supra* notes 53–56 and accompanying text.

that one cannot redefine a term.³³⁹ We mean, instead, to note that if this is the task, it should be owned up to, and the reason for that task—the end—should also be specified.

III. WHAT’S THE HARM?

The above discussion documents a very broad political agenda—one that goes far beyond the initial impetus for this effort, the Supreme Court’s skeptical approach toward regulating political contributions.³⁴⁰ There are many valid reasons for Americans to consider changes in our campaign finance laws, and one of us has written frequently in support of various reform proposals.³⁴¹ Many of Lessig’s proposals, when shorn of their “corruption” framework,³⁴² are welcome additions to our political discussion. The question is not whether we should have a serious discussion about reform, but rather what sort of frame we should use in that discussion. As we have sought to document above, we find the “corruption” frame to be problematic as a theoretical premise. In addition to its theoretical problems, however, we also find the “corruption” frame to be objectionable rhetorically; the problems with the rhetoric of corruption derive from the theoretical problems outlined above.

First, an accusation of corruption seems to impugn the whole person in a way that undermines dialogue.³⁴³ As we have shown, corruption is not an easily scalable concept; contrary to Lessig’s claims, it is difficult to claim that being “a little bit corrupt” is a sustainable equilibrium.³⁴⁴ It is also difficult to sustain the individual vs. institutional dichotomy; even if we know what the

³³⁹ See JOHN R. SEARLE, MAKING THE SOCIAL WORLD: THE STRUCTURE OF HUMAN CIVILIZATION 104 (2010) (“One sees the role of the vocabulary in the activities of revolutionary and reformist movements. They try to get hold of the vocabulary in order to alter the system of status functions. . . . [W]e get away with it to the extent that we can get other people to accept it.”).

³⁴⁰ See ROBERT G. BOATRIGHT, POLITICAL ADVERTISING VOUCHERS FOR CONGRESSIONAL CANDIDATES: WHAT DIFFERENCE COULD THEY MAKE? 23 (2005) (discussing the ways in which the court has broached the subject of campaign reform); see also *supra* notes 19–25 and accompanying text.

³⁴¹ See, e.g., BOATRIGHT, *supra* note 340, at 23; Robert G. Boatright & Michael J. Malbin, *Political Contribution Tax Credits and Citizen Participation*, 33 AM. POL. RES. 787, 788–89 (2005) (discussing a study on tax credits and the political interest and contribution gathered through their use). The other author of this paper is skeptical of these proposals.

³⁴² See, e.g., Lessig, *Institutional Corruptions*, *supra* note 116, at 6.

³⁴³ See UNDERKUFFLER, *supra* note 27, at 4–6.

³⁴⁴ See Lessig, *Institutional Corruptions*, *supra* note 116, at 4, 15, 19.

articulators of institutional corruption theories want to say, they are still not actually saying it; we bring our prior understandings of corruption to the table.³⁴⁵ These two problems make allegations of corruption problematic in maintaining civility of political discourse.³⁴⁶ One cannot expect an individual who has been accused of corruption or of being a participant in an allegedly corrupt institution to be an eager partner in a sincere discussion of alternatives.³⁴⁷

Second, since this rhetoric assumes but does not articulate our differences about the functions of our institution, we risk exacerbating polarization and diminishing our ability to understand opposing viewpoints.³⁴⁸ We have argued that claims about corruption succeed only if there is a shared reference point—an example, real or symbolic, of an uncorrupted institution. If there is no such shared starting point, then those making claims about corruption effectively talk past each other.³⁴⁹

Third, with a much broadened concept of corruption thrown around in public rhetoric, we run into the ‘boy who cried wolf’ problem.³⁵⁰ In his earlier work, Thompson recognized this.³⁵¹ He describes the manner in which corruption allegations became a political tool in the waning days of the Democratic Party’s forty-year long rule in the House of Representatives.³⁵² Both sides, he argues, took part in a “cycle of accusation” in which each accused the other of corruption.³⁵³ As a result of this, he claims, the charges lost their moral authority, and it became difficult to separate individual from institutional corruption and major ethical violations from minor ones.³⁵⁴ It is easy to see this taking place now, outside of Congress.³⁵⁵ A big theory of corruption, especially

³⁴⁵ See *id.* at 4–6 (defining individual and institutional corruption by focusing on what one would gain by way of the corrupt conduct, yet still not defining what corruption is).

³⁴⁶ See THOMPSON, *ETHICS IN CONGRESS*, *supra* note 112, at 48 (noting how each side of the aisle trades corruption allegations for political purposes).

³⁴⁷ See *generally id.* (noting how accusations of ethical violation lead Congress to stop taking such charges seriously).

³⁴⁸ See *id.*

³⁴⁹ See REPUBLIC, LOST, *supra* note 92, at xii.

³⁵⁰ See THOMPSON, *ETHICS IN CONGRESS*, *supra* note 112, at 48.

³⁵¹ *Id.*

³⁵² *Id.* at 47–48.

³⁵³ *Id.* at 48.

³⁵⁴ *Id.*

³⁵⁵ See, e.g., CAIN, *supra* note 6, at 42; Erik Schmeltzer, *Yes, the Tone of the Sanders Campaign Matters, and Yes, It's Too Ugly*, THE HUFFINGTON POST (Apr. 4, 2016, 9:03 AM), <http://www.huffingtonpost.com/eric-schmeltzer/yes-the-tone->

one that seems to implicate all of us, can make identifying the egregious cases difficult, and can force everyone to choose sides.³⁵⁶ One might argue that talking about corruption can, in limited doses, be helpful.³⁵⁷ As Cain writes, allegations of corruption can be an effective deterrent, even if they are unproven.³⁵⁸ Political candidates may shy away from questionable activities not because they fear legal sanction but because just being accused of being corrupt may harm them.³⁵⁹ But if everyone is calling everyone else corrupt, the charge may be less effective.³⁶⁰

And fourth, it draws us into calling for solutions out of proportion to the problems. When taken away from the individual context, in which the meaning of the accusation can be pinned down to particular events and agents, claims about corruption often become “epic” in nature.³⁶¹ One line of thought (drawn from Montesquieu and Rousseau) holds that corruption is a virtually unstoppable process.³⁶² This may or may not be true. It is, however, a process that seems much larger than day-to-day politics.³⁶³ Many of the “solutions” that tend to be proposed, however, seem rather small in nature.³⁶⁴ Lessig recognizes this.³⁶⁵ He closes *Republic, Lost* with a mixture of conventional and quite radical proposals—starting with clean elections, overturning *Citizens United*, having more primary challenges, and a call for the president to demand substantial Congressional reform,³⁶⁶ and from

of-the-sande_b_9601978.html.

³⁵⁶ See THOMPSON, ETHICS IN CONGRESS, *supra* note 112, at 48; see also CAIN, *supra* note 6, at 42 (noting that pressures from the press and political organizations make accusations of impropriety a divisive and effective weapon).

³⁵⁷ See THOMPSON, ETHICS IN CONGRESS, *supra* note 112, at 48 (noting that when talk of corruption is pervasive, it can damage institutions like Congress).

³⁵⁸ CAIN, *supra* note 6, at 42

³⁵⁹ See *generally id.* (noting that “[a]llegations of impropriety can have more political value than truth, especially in hotly contested situations.”).

³⁶⁰ THOMPSON, ETHICS IN CONGRESS, *supra* note 112, at 48.

³⁶¹ See *id.*

³⁶² See JOSE MARI MARAVALL & ADAM PRZEWORSKI, DEMOCRACY AND THE RULE OF LAW 47 (2003).

³⁶³ See CAIN, *supra* note 6, at 1–2.

³⁶⁴ See, e.g., REPUBLIC, LOST, *supra* note 92, at 250.

³⁶⁵ See *id.*

³⁶⁶ *Id.* at 272, 276, 285. The precise proposal here is difficult to summarize succinctly. Lessig proposes a “regent president” who will take office and refuse to sign any legislation until Congress radically reforms itself. This proposal is not entirely dissimilar to the concept of ethics tribunals, or having an outside organization enforce anti-corruption standards upon an institutionally corrupt body that is unable to do so itself. One might even trace this idea to Rousseau’s description in the *Social Contract* of tribunals. *Id.* at 288; THOMPSON, ETHICS IN

there moving on to calling for a new constitutional convention.³⁶⁷ It seems that one must pick sides: On the one hand, if we truly have a crisis of epic, institutional corruption, then the dramatic solutions should, as in Rousseau, be embraced.³⁶⁸ We do not endorse this idea, but it seems like the logical conclusion from a larger theory and tipping point rhetoric. On the other hand, if we have something smaller, more manageable, perhaps we can be more polite and talk about adjusting the mechanics.³⁶⁹ But it seems hard to advocate both. Moreover, if the rhetoric has been used for the purpose of alleging that other institutions are also riddled with this new, broader sense of corruption, we might need to advocate similar proposals for radical change in many other areas.³⁷⁰ Should we refound the academy, or the banking industry? The lack of radical suggestions for these other areas undermines the claim that this is a comprehensive, and not merely a political, theory.³⁷¹ Moreover, accusations of amorphous widespread “institutional” corruption not tied to individual agency seem to become epic and trap us into advocating unhelpfully epic responses.³⁷²

Despite the problems we have always had in defining it, the concept of corruption has a long and rich history. There are, in addition, many similarly useful terms and frames that have been presented in looking at the role of money and self-interest in politics.³⁷³ “Corrosion,” “distortion,” “influence,” and other terms have been used without either the scalability problems, the individual/institutional problems, or the pretense that a grand theory or epic accusation is being developed.³⁷⁴ There is no reason not to continue to employ such terms. Veteran campaign finance lawyer Robert Bauer has written about the unprecedented nature of contemporary campaign expenditures and the novel role of large campaign donors, while at the same time making it clear that

CONGRESS, *supra* note 112, at 131.

³⁶⁷ REPUBLIC, LOST, *supra* note 92, at 293.

³⁶⁸ See *id.* at 305 (showing the expansive challenges posed by taking on institutional corruption and strategies to attack it).

³⁶⁹ Although as Cain notes, it can become hard in such circumstances to separate reforms that aim to reduce corruption from reforms that just seem like good ideas. See CAIN, *supra* note 6 at 7, 40.

³⁷⁰ See CAIN, *supra* note 6, at 162–63.

³⁷¹ See generally MUTCH, *supra* note 55, at 165 (reporting that observers have noted Wall Street’s increased influence on elections).

³⁷² See THOMPSON, ETHICS IN CONGRESS, *supra* note 112, at 48.

³⁷³ See CAIN, *supra* note 6, at 18–19.

³⁷⁴ *Id.*

“corruption” has nothing to do with his description.³⁷⁵ As we have seen, Mutch, La Raja and Schaffner, and Cain also take up this basic point; there is much one might object to in contemporary politics, but that does not make those things corrupt; subsuming them under that rubric cheapens the term.³⁷⁶ Whether one agrees with the sentiments of these pieces or not, whether the language chosen in them was adopted with the same concerns in mind that we have, they show that we can have a heated discussion about what American politics and our public purpose more broadly should be without distorting—some might say corrupting—our language to fit vague notions of what might appeal to five men in black robes.³⁷⁷

³⁷⁵ See Robert Bauer, *The New Donors*, MORE SOFT MONEY HARD LAW (Apr. 15, 2015), <http://www.moresoftmoneyhardlaw.com/2015/04/new-donor/>.

³⁷⁶ See CAIN, *supra* note 6, at 163; LA RAJA & SCHAFFNER, *supra* note 52, at 152; MUTCH, *supra* note 55, at 184, 193.

³⁷⁷ *Citizens United v. FEC*, 558 U.S. 310, 371–72 (2010); *Buckley v. Valeo*, 424 U.S. 1, 142–44 (1976) (We say “men” here because the *Buckley* and *Citizens United* majorities included no women; so presumably the female members of the Court do not need convincing).