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The Rejection of the Anti-Corruption Principle and its Effect on Human Rights at Home

Juliet S. Sorensen
Northwestern University

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THE REJECTION OF THE ANTI-CORRUPTION PRINCIPLE AND ITS EFFECT ON HUMAN RIGHTS AT HOME

Juliet S. Sorensen

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INTRODUCTION

The Framers were fixated on corruption. As they sought to distance the young republic from the British monarchy, they infused their new constitution with myriad means of accountability and transparency, the better to establish a meritocracy without fear or favor. Their view of corruption as a threat, and their commitment to implementing measures to prevent corruption as a strategic priority, are reflected throughout the U.S. Constitution.

21st century scholarship analyzing the Framers' treatment of corruption asserts that their incorporation of anti-corruption means in the Constitution should be interpreted as a framework to inform contemporary judicial review and jurisprudence. Led by Zephyr Teachout's article "The Anti-Corruption Principle,"¹ this school of thought asserts that the anti-corruption principle should be on par with separation of powers and freedom of expression, a guiding lodestar in interpreting the Constitution.

This article submits that the anti-corruption principle of constitutional interpretation is, in fact, a rights-based approach to corruption, equating freedom from corruption with the other rights and liberties enshrined in the Constitution. In that sense, the anti-corruption principle is not only in harmony with, but protects and enhances, the Constitution's other provisions. Indeed, the anti-corruption principle itself can be regarded as a right. The conceptualization of freedom from corruption as a human right—distinct from the characterization of corruption as an impediment to the enjoyment of other human rights—has gained traction in recent years, in parallel with scholarship about the anti-corruption principle, as new constitutions and public international bodies invoke this rights-based approach.²

Nonetheless, in recent years, the U.S. Supreme Court has rejected the anti-corruption principle, at least as a constitutional tenet. Instead, the Court has relegated case after case of self-dealing, trading in influence, and patronage to the realm of politics, not law. It has narrowed its working definition of corruption in violation of the public trust to quid pro quo bribery and kickbacks.³ It has simultaneously limited which official acts can be treated under the law as criminal quid pro quo and, earlier this year, narrowed

¹ Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).

² See, e.g., Morten Koch Andersen, *Why Corruption Matters in Human Rights*, 10 J. HUM. RTS. PRAC. 179 (2018); Anand N. Asthana, *Human Rights and Corruption: Evidence from a Natural Experiment*, 11 J. HUM. RTS. 526 (2012); Julio Bacio-Terracino, *Corruption as a Violation of Human Rights*, INT'L COUNCIL HUM. RTS. POL., January 2008; Julio Bacio-Terracino, *Linking Corruption and Human Rights*, 104 PROCEEDINGS OF THE ANNUAL MEETING (AM. SOC'Y INT'L L.) 243 (2010).

³ *United States v. Skilling*, 561 U.S. 358, 408-09 (2010).

whom the law considers a public official for the purposes of anti-corruption law.⁴

The cumulative effect of the Supreme Court's rejection of a broad anti-corruption principle is insidious. Honest government is an entitlement of the social contract, a human right articulated in the Universal Declaration of Human Rights.⁵ For the modern Court to treat corruption as nothing more problematic than politics as usual is deeply cynical, a jurisprudential shrug in response to the body politic's intangible right to honest services and the expectation that public servants be, in the Court's own words, "animated in the discharge of their duties solely by considerations of right, justice, and the public good."⁶

In this article, I analyze the Supreme Court's increasingly narrow treatment of public corruption over the last twenty years and its effects not only on the law itself, but also on democracy and human rights in the U.S. I conclude with a solutions-based analysis of a local anti-corruption intervention that furthers both the anti-corruption principle and a rights-based approach to corruption.

I. THE ANTI-CORRUPTION PRINCIPLE

A. The Anti-Corruption Principle as a Core Value of the Constitution

Public corruption is the abuse of public office for private gain.⁷ That gain can be financial, such as a cash bribe; it can be personal, such as a demand for favorable treatment of a family member; or it can be professional, such as using a patronage network to retain and consolidate power. Regardless of the type of gain, public corruption impedes both democracy and economic growth, violating the citizenry's intangible right to honest government services, siphoning funds into public officials' pockets that could otherwise go into the economy, and injecting considerations of private gain into governance that should be based solely on considerations of the public interest.

The anti-corruption principle is reflected in the Constitution's system of separation of powers, ensuring that each branch of the federal government functions distinctly from the others; it is reflected in constitutional criminal procedure, such as the judiciary's review of applications for search warrants for probable cause, and the right of the accused to confront witnesses against

⁴ *Percoco v. United States*, 598 U.S. 319 (2023).

⁵ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 21 (Dec. 10, 1948).

⁶ *Trist v. Child*, 88 U.S. 441, 450 (1875).

⁷ SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* 9 (1999).

them; it is reflected in express protections of the functions of one branch from incursion by another, such as the Speech and Debate Clause; and it is, of course, reflected in the Constitution's express limitations on public officials' accepting things of value, such as the Emoluments Clause.⁸

As such, the anti-corruption principle is a core value of the Constitution. Its pervasiveness in the text, as well as in the Federalist Papers and the very origins of the U.S., makes Teachout's argument that the anti-corruption principle should be given "independent weight, like these other principles, in deciding difficult questions concerning how we govern ourselves" persuasive.⁹ In campaign finance cases, for example, the anti-corruption principle would be considered in conjunction with freedom of expression.¹⁰ In questions of statutory interpretation, congressional intent would be considered through the lens of the anti-corruption principle as well as others. Application of the anti-corruption principle would not occur in a vacuum, but rather in "a structural, legal commitment made and remade hundreds of times throughout the Constitutional Convention and embodied in dozens of clauses."¹¹

B. *A Rights-Based Approach to Corruption*

Reading the anti-corruption principle into the Constitution is consistent with a human rights-based approach to corruption. A human rights-based approach to corruption seeks to emphasize individuals as "rights-holders" and the role of the state as "duty-bearer," similar to the state's duty to protect and provide the rights of freedom of speech, equal protection of the laws, free and fair elections, and more.¹² The rights-based approach focuses on whether the state has breached its obligations towards the public by failing to protect it from corruption and on the need for remedies by the state in the event of a breach. Just as the Constitution enshrines other rights and liberties, recognition of the anti-corruption principle would elevate freedom from corruption as a core entitlement of the social contract.

If the anti-corruption principle and its rights-based approach to freedom from corruption were a core tenet of judicial review, the reasoning and perhaps also the outcome of governance cases before the Court might be very different from recent jurisprudence. But the modern Court has treated corruption more like a petty crime than a human rights violation. Its

⁸ See generally Teachout, *supra* note 1.

⁹ *Id.* at 342.

¹⁰ *Id.* at 343.

¹¹ *Id.* at 398.

¹² Anne Peters, *Corruption as a Violation of International Human Rights*, 29 EUR. J. INT'L L. 1251, 1277 (2018).

omnipresence in the Constitution notwithstanding, the anticorruption principle has been given short shrift by the Court in modern times.

II. THE REJECTION OF THE ANTI-CORRUPTION PRINCIPLE BY THE MODERN SUPREME COURT

A. *An Increasingly Narrow Definition of Public Corruption*

Corruption is a complex social phenomenon. And yet, case after case, the modern Supreme Court has taken a narrow view of corruption, focusing on what the law does *not* address. The Court acknowledges forms of corruption even as they decline to regulate them—the jurisprudential equivalent of delicately holding one’s nose with a raised pinky finger. This trend holds that the “quid pro quo corruption interest” is the only permissible legal response.¹³ The result is an actionable definition of corruption that has grown significantly narrower over time.

In *United States v. McDonnell*, for example, the Court found that former Virginia Governor McDonnell’s acceptance of \$175,000 in loans, gifts, and other benefits (the “quid”) from a wealthy donor intent on securing the Governor’s support for his company and the company’s product did not rise to the level of criminal corruption without more significant official acts by McDonnell (the “quo”).¹⁴ The Court concluded that the official acts McDonnell undertook in exchange, including arranging meetings with Virginia government officials to discuss and promote the product; hosting and attending events at the Governor’s Mansion designed to promote the product; contacting other government officials as part of an effort to encourage Virginia state research universities to initiate studies of the product; and recommending that senior government officials meet with company executives to discuss ways that the company’s products could lower healthcare costs were insufficiently significant to amount to corruption.¹⁵

Writing for a unanimous Court, Chief Justice Roberts dismissed the Governor’s actions as tacky and focused his constitutional analysis on the excessive power that a broader interpretation of improper official acts would give the executive branch. “There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government’s boundless interpretation of the federal bribery statute.”¹⁶

¹³ Fed. Election Comm’n v. Wis. Right to Life, Inc., 551 U.S. 449, 478 (2007).

¹⁴ McDonnell v. United States, 579 U.S. 550, 578-79 (2016).

¹⁵ *Id.* at 567.

¹⁶ *Id.* at 580-81.

Similarly, in *United States v. Skilling*, the Supreme Court used the case of private corruption and fraud at Enron to curtail the scope of the federal honest services fraud statute,¹⁷ most frequently used in cases of public corruption. In 1989, Congress enacted the honest services fraud statute as an expansion of the mail and wire fraud statutes for the specific purpose of providing for prosecutions based on violations of intangible rights. It amended the definition of “scheme or artifice to defraud” to include “a scheme or artifice to deprive another of the intangible right to honest services.”¹⁸ § 1346 was a direct response to the Supreme Court’s rejection in 1987.¹⁹ After the passage of § 1346, in the years leading up to *Skilling*, courts of appeals took a rights-based approach to honest services fraud, applying it to a wide range of conduct and terming it a deprivation of “intangible rights” to honest services, also described²⁰

Although § 1346 lacks a definition section or any limiting language, the *Skilling* Court, in an opinion by Justice Ginsburg, asserted that bribery and kickbacks were at the “core” of the behavior that § 1346 sought to regulate and were, therefore, essential elements of the offense.²¹ The alternative, according to the Court, was to declare the statute void for vagueness in light of the lack of due process and potential for absurd and overreaching enforcement that broadly worded criminal statutes invite.²²

Not all violations of the public’s right to the honest services of their public officials involve bribery or kickbacks. Political machines use patronage systems to trade public jobs for political benefits that help the machines stay in power, with officials abusing their public office to retain and consolidate power. In *United States v. Sorich*, for example, the defendants were convicted of mail fraud for their roles in a scheme to award City of Chicago jobs and promotions to favored applicants. Despite a court order forbidding the award of City jobs on the basis of any political reason or factor, political campaign coordinators and others gave the defendants lists of campaign workers and volunteers for whom they sought City jobs or promotions, which would then be passed on to the heads of various City departments.²³ Department managers held sham interviews and falsified interview forms in favor of clouted applicants. The defendants repeatedly

¹⁷ 561 U.S. 358 (2010); 18 U.S.C. § 1346.

¹⁸ § 1346; see generally Brette M. Tannenbaum, *Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud after Skilling*, 112 COLUM. L. REV. 359 (2012).

¹⁹ *McNally v. United States*, 483 U.S. 350 (1987).

²⁰ *United States v. Skilling*, 561 U.S. 358, 399 (2010); *Evans v. United States*, 504 U.S. 255, 292 (1992).

²¹ *Skilling*, 561 U.S. at 404.

²² *Id.*

²³ *United States v. Sorich*, 523 F.3d 702 (7th Cir., 2008).

and falsely signed certifications attesting that political patronage had not affected hiring decisions. Sorich and his co-defendants misused their public office to amass power for the political machine, in violation of the public's intangible right to the honest services of their government. The charged conduct did not, however, include bribery or kickbacks.

As a result of *Skilling*, efforts to prosecute political patronage, political machines, and nepotism under the mail and wire fraud statutes have been curtailed.²⁴ The Court's overriding behavioral concern appears not to be corruption itself, but a rogue executive branch: whenever a corruption statute appears to apply to a range of behavior, the Court seeks to narrow it.

B. *An Increasingly Technical Definition of Public Corruption*

In 2023, the Supreme Court has again applied its narrow and technical approach in *Percoco v. United States*.²⁵ Joseph Percoco, a confidant of former New York governor Andrew Cuomo, was convicted of bribery and honest services fraud for bribes he accepted from a real estate developer after he had temporarily left his state job to manage Governor Cuomo's reelection campaign. His access, influence, and role in the executive branch, however, were unchanged.²⁶

According to Percoco, the question for the Court's consideration on writ of certiorari to the Second Circuit was "whether a private citizen who holds no elected office or government employment but has informal political or other influence over governmental decision-making owes a fiduciary duty to the general public such that he can be convicted of honest-services fraud."²⁷ The Court responded in the negative, asserting that "[T]he intangible right of honest services' must be defined with the clarity typical of criminal statutes and should not be held to reach an ill-defined category of circumstances"²⁸

The Court cabined its ruling by rejecting the argument that "a person nominally outside public employment can *never* have the necessary fiduciary duty to the public," noting that an agency theory of liability could be appropriate.²⁹ Nonetheless, the Court's assertion that the jury instructions in *Percoco* reflected an overbroad conception of corruption is "the latest in which the court has seemed to play down, even minimize, the power of

²⁴ See, e.g., *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020) (rejecting prosecution of gridlock as political retribution and asserting that "not every corrupt act . . . is a federal crime").

²⁵ *Percoco v. United States*, 598 U.S. 319 (2023).

²⁶ *United States v. Percoco*, 13 F. 4th 158 (2d Cir. 2021).

²⁷ *Id.*

²⁸ *Percoco*, 598 U.S. at 328.

²⁹ *Id.* at 1137

money to influence outcomes.”³⁰ Not only has the Court continued to narrow the range of conduct considered by the law to be public corruption, but its analysis of that conduct has become more technical, ignoring the policy behind anti-corruption law in the process. In other words, the Court has amplified what the law does not address, while requiring what the law does address to be precisely articulated.

To be sure, due process requires clarity. But to be effective, efforts by the law to regulate corruption must also be pragmatic. The objective of anti-corruption law is to address, deter, and prevent corruption. That policy objective is only realized if the law recognizes the stickiness of public corruption as a social phenomenon and its plethora of forms, rejecting a “surface inquiry” and “[looking] behind the names” at the reality of the interdependence that fuels it.³¹

The case law that has developed around the Foreign Corrupt Practices Act (FCPA) does just that, acknowledging that a “flexible” approach to identifying foreign public officials and government instrumentalities is necessary. In *United States v. Esquinazi*, for example, the Eleventh Circuit emphasized the need to use a flexible approach in determining whether a foreign firm that accepted bribes was an “instrumentality” of a foreign government.³² Similarly, in *United States v. Kay*, the Fifth Circuit rejected a *per se* inclusion of bribes to circumvent customs as within the ambit of the FCPA, but it endorsed a fact-specific test: whether the bribes in question were intended to produce an effect that would assist in obtaining or retaining business.³³ The Court acknowledged the broadly stated intent and history of the FCPA and noted that the statute did not specify the scope of the element. However, rather than reading a narrow or technical meaning into its terms, the Fifth Circuit allowed for fact-specific inquiries.³⁴

By refusing to “look behind names,” the Supreme Court runs the risk of reaching conclusions that are at odds with public policy and common sense.³⁵ While public corruption requires a technical legal response, it also requires jurisprudential recognition that it is a more amorphous moral problem. Proponents of the anti-corruption principle assert that the Constitution was intended to provide a “technical and moral response to what

³⁰ Carl Huse, *Is the Supreme Court Clueless About Corruption? Ask Jack Abramoff*, N.Y. TIMES (July 5, 2016), <https://www.nytimes.com/2016/07/06/us/politics/is-the-supreme-court-clueless-about-corruption-ask-jack-abramoff.html>.

³¹ *United States v. Nixon*, 418 U.S. 683, 693 (1974).

³² *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014).

³³ *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004).

³⁴ *Id.*

³⁵ *Nixon*, 418 U.S. at 693.

[the Framers] saw as a technical and moral problem.”³⁶ Nonetheless, Teachout noted in 2009 that “in the last thirty years, not a single majority opinion has mentioned or discussed the delegates’ attitudes towards corruption, or the anti-corruption principle embedded by the Framers in the Constitution”;³⁷ that has not changed in the ensuing fourteen years.

III. THE EFFECT ON HUMAN RIGHTS AT HOME

A. Democracy

The abuse of public office for private gain in all its forms impedes democracy. Where public corruption flourishes, it threatens the foundations of democracy and the international human rights that gird it. These rights are reflected locally and globally, including in state constitutions and binding international treaties.³⁸ Constitutions throughout the U.S. federalist system regard corruption as a disqualifier for public office.³⁹

The Universal Declaration of Human Rights, enacted by the United Nations General Assembly in 1948 and considered a common standard and foundational document for multilateral human rights treaties and modern constitutions,⁴⁰ also speaks directly to corruption as an impediment to human rights in general and to the Article 21 right to free and fair elections in particular.⁴¹ These provisions are undermined if a public official violates the people’s intangible right to their honest services, whether by taking a bribe

³⁶ Teachout, *supra* note 1, at 352.

³⁷ *Id.*, at 372.

³⁸ See, e.g., ILL. CONST., art. III (“All elections shall be free and equal”); see also International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”).

³⁹ See, e.g., ILL. CONST. art. XIII, § 1 (“A person convicted of a felony, bribery, perjury or other infamous crime shall be ineligible to hold an office created by this Constitution”); U.S. CONST. art. II, § 4 (“The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

⁴⁰ Colin J. Beck, John W. Meyer, Ralph I. Hosoki, & Gili S. Drori, *Constitutions in World Society: A New Measure of Human Rights* (2017) (inclusion of human rights language and legal provisions positively associated with the length of a constitution and the number of core human rights treaties signed) (“Among the articulations of human rights produced by the United Nations, the Universal Declaration of Human Rights has a special place. Not only is it the first explicit articulation of human rights for the post-World War II states system; it is also widely known and legitimated by actors of the global-transnational system. It is the most translated document in the modern world and provides the discursive and legal basis for international human rights law. As such, it provides a baseline description of what a human right is, even as subsequent treaties have extended and elaborated its protections”).

⁴¹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 21, (Dec. 10, 1948) (“1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right to equal access to public service in his country”).

or hiring through a network of clout and patronage, trading in influence, or self-dealing.⁴²

The Supreme Court's dismissal of corruption as a petty crime, rather than an existential danger to participatory government that the Constitution expressly seeks to prevent, is a threat to democracy itself. Corruption's negative effect on democracy is reflected in the opening paragraph of the Preamble to the United Nations Convention Against Corruption, which assert that the parties to the treaty are "[c]oncerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law."⁴³ In the words of the Court, if the government cannot ensure democratic processes through law, "it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption."⁴⁴

B. Human Rights

The conceptualization of corruption as an impediment to human rights and also as a human rights violation itself has gained significant credence in the international community in recent years. As one recent example among too many, Guatemala is illustrative of high-level corruption's translation into human rights violations: in the last two years, the government expelled a U.N. anti-corruption body from the country, the attorney general terminated career prosecutors investigating high-level public corruption, and independent judges have faced escalating death threats from criminal organizations in response to their oversight of investigations into abuses of power.⁴⁵ In the words of George Washington, there is a constant danger of "corruption of morals, profligacy of manners, and listlessness for the preservation of the natural and unalienable rights."⁴⁶

⁴² See U.N. General Assembly, *United Nations Convention Against Corruption*, art. 18, art. 19, U.N. Doc. A/58/422 (Oct. 31, 2003).

⁴³ *Id.*

⁴⁴ *Ex Parte Yarborough*, 110 U.S. 651 (1884).

⁴⁵ See Tyler Mattiace & Juan Pappier, *In Guatemala, A Fresh Crackdown on Prosecutors*, HUM. RTS. WATCH, (Mar. 1, 2022), <https://www.hrw.org/news/2022/03/01/guatemala-fresh-crackdown-prosecutors>; Enrique Garcia, *Guatemalan Anti-Graft Judge Resigns, Blasts Manipulation of Justice*, REUTERS (Nov. 15, 2022), <https://www.reuters.com/world/americas/guatemalan-anti-graft-judge-resigns-blasts-manipulation-justice-2022-11-16/>; Yulia Krylova, *Outsourcing the Fight against Corruption: Lessons from the International Commission against Impunity in Guatemala*, 9 GLOB. POL'Y 95 (2018); Sonia Pérez, *Guatemala Judge Threatened after Decision on Civil War Crime*, ASSOCIATED PRESS (May 11, 2022), <https://apnews.com/article/crime-caribbean-arrests-war-crimes-guatemala-0b83e9e5b31e81903f3b97bbebb79667>.

⁴⁶ Letter from George Washington to the Marquis de Lafayette (Feb. 7, 1788), in *THE WRITINGS OF GEORGE WASHINGTON* 291 (Lawrence Boyd Evans ed. 1908).

A corrupt public official possesses both the incentive and the means to repress human rights. If the official is motivated by private gain or the desire to retain power, they are incentivized to neglect human rights; they have the means to do so because of the power of the office that they hold. As a result, the abuse of public office for private gain often results in patterns of repeated violations of human rights.⁴⁷ A rights-based approach to corruption seeks to integrate and reinforce international law's complementary objectives of the anti-corruption principle and the protection of human rights.⁴⁸

The international community's consideration of corruption as an impediment to human rights includes not only its effect on civil and political rights, but also on those social and economic rights that the U.S. Constitution ignores. The 2015 report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights offers examples of human rights that can be violated by corruption related to education, the courts, health, government aid programs, and the principle of non-discrimination.⁴⁹ Indeed, "it is difficult to find a human right that could not be violated by corruption."⁵⁰

Finally, a rights-based approach to corruption expressly considers corruption's impact on economic growth and development. Prevention of corruption is a tenet of Target 5 of U.N. Sustainable Development Goal 16, "Peace, Justice and Strong Institutions," which calls for U.N. General Assembly member states to "[s]ubstantially reduce corruption and bribery in all their forms."⁵¹ The United Nations Convention Against Corruption, a multilateral treaty with 140 signatories, including the U.S., asserts in its preamble that it is "[c]onvinced that the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies and the rule of law."⁵² Contemporary economics literature related to corruption can be summarized by Easterly's assertion that "[c]orruption not

⁴⁷ See generally UN Human Rights Council Res. 35/25, U.N. Doc. A/HRC/35/L.34 (June 20, 2017).

⁴⁸ *Id.*

⁴⁹ Rep. of the G.A., at X, U.N. DOC. A/HRC/28/73 (2015).

⁵⁰ *Id.* ¶ 17.

⁵¹ *Goal 16: Peace Justice and Strong Institutions*, U.N. SUSTAINABLE DEVELOPMENT GOALS, <https://www.un.org/sustainabledevelopment/peace-justice/> ("Goal 16 is about promoting peaceful and inclusive societies, providing access to justice for all and building effective, accountable and inclusive institutions at all levels . . . Strengthening the rule of law and promoting human rights is key to this process, as is reducing the flow of illicit arms, combating corruption, and ensuring inclusive participation at all times").

⁵² U.N. Office on Drugs and Crime, United Nations Convention Against Corruption 5 (2004), https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (emphasis original).

only has a direct effect on growth; it also has an indirect effect because it makes other policies that affect growth worse.”⁵³

Thus, corruption’s impact on democracy, on a wide range of human rights, and on development is acknowledged in instruments from local to global. These instruments implicitly and explicitly recognize that the right to be free from corruption is inextricably intertwined with a functioning democracy, other human rights, and social and economic well-being.

IV. A LOCAL SOLUTION

The U.S. Supreme Court seems unlikely—for now, if not forever—to incorporate the anti-corruption principle into its constitutional analysis. Nonetheless, state and local governments have picked up the baton, adopting a rights-based approach to corruption as they have done with other essential rights.⁵⁴ Even where local governments have not articulated the right to be free from corruption in their constitutions, they have endeavored to adopt a rights-based approach through an “intricate web of regulations, both administrative and criminal” and in a “more precise and more administrable fashion” than the federal criminal anti-corruption law that the Court regards as a threat to due process and the separation of powers.⁵⁵ Indeed, “this is an area where precisely targeted prohibitions are commonplace,”⁵⁶ and it is in local laws—typically, non-criminal ordinances enforced by a variety of city and county departments—that the anti-corruption principle is most fully realized today.

A. *“Fool Me Once:” Lessons in Governance and Reform from the Cook County Board of Ethics*

The Cook County Ethics Ordinance exemplifies one local government’s holistic approach to public corruption. First enacted in 1993, the Cook County Ethics Ordinance is a set of local laws in Illinois governing the ethical conduct of Cook County employees, including its elected officials.⁵⁷ The ordinance is interpreted and enforced by the Cook County Board of Ethics, a quasi-adjudicative local government body appointed by the Cook County Board President that has the power to investigate possible

⁵³ WILLIAM EASTERLY, *THE ELUSIVE QUEST FOR GROWTH: ECONOMISTS’ ADVENTURES AND MISADVENTURES IN THE TROPICS* 246 (2001).

⁵⁴ For example, the Illinois constitution guarantees freedom from discrimination on the basis of sex and ability, and the rights to collective bargaining, education, and a healthful environment. ILL. CONST. art. I §§ 18, 19, 25, art. X § 1, art. XI § 2.

⁵⁵ *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 408, 409 (1999).

⁵⁶ *Id.* at 412.

⁵⁷ CODE OF ORDINANCES OF COOK CNTY., ILL. ord. 20-4404 § 2-561 (2006).

violations of the ethics ordinance and impose a range of sanctions in the event of a violation.⁵⁸

The ordinance itself addresses a wide range of ethical conduct in government, including nepotism; dual employment; conflicts of interest; gifts; campaign finance; and the “revolving door” between government and the lobbying industry. In 2019, the Board of Ethics determined that revisions to the ordinance were in the best interests of Cook County, and after a period of study, voted to expand the ambit of the ordinance. The recommendations of the Board were largely adopted by the Cook County Board of Commissioners and enacted in 2021.

Illinois courts have upheld the jurisdiction of the Board of Ethics and recognized its essential role. In what approaches a rights-based framework, the courts have recognized and embraced the anti-corruption principle that the Ethics Ordinance embodies, as well as the resistance to the ordinance of public officials seeking to retain and consolidate power. “In Illinois there is a clear limit on the campaign contributions to prevent this very type of quid pro quo corruption as shown by the Ethics Ordinance . . . Berrios only took issue with the Ethics Ordinance once his goal became preserving his power, and he abused his position as Assessor to fulfill that goal.”⁵⁹

In contrast with the Supreme Court’s recent treatment of public corruption, Illinois courts treat the enforcement power of the Board of Ethics neither narrowly nor technically. Rather, Illinois courts speak to the policy objectives behind the ordinance—the same anti-corruption policy objectives that exist on the national level—with a heightened sense of urgency, given their impact on democratic governance and Cook County’s history of public corruption.

The County Board’s rationale for enacting Section 2-585 [campaign finance regulations] is no different, and *no less constitutionally important* than the federal or any state government’s interest in doing the same. *Buckley v. Valeo*, 424 US 1, 25-29 (1976); *Nixon v. Shrink Missouri Gov’t PAC*, 528 US 377, 390-95 (2000). The history of corruption in Cook County government is well known . . . moreover, the public’s acute concern about the appearance of *quid pro quo* corruption with respect to the influence of campaign donors who seek official action from Cook County officials they supported as candidates is also well documented.⁶⁰

Unlike the U.S. Supreme Court, which conjectures absurd applications of the anti-corruption principle, the Illinois appellate court draws on lessons

⁵⁸ *Id.*

⁵⁹ *Berrios v. Cook Cnty. Bd. Ethics*, 18-CH-4717, 18-CH-6937 10, 22 (Ill. Cir. Ct. 2020).

⁶⁰ *Id.* at 23 (emphasis added).

from history to forecast the undoing of the democratic process if the anti-corruption principle is not applied.

If there were not limits on the campaign contributions, these donors with clear connections to the office up for election could inundate a race for a Cook County election position, like the Assessor's office race. With Cook County's history including 'pay-for-play' allegations and other serious misconduct in the County's tax assessment offices, section 2-585(b) is well within the bounds to keep these races for elected office as bipartisan as possible.⁶¹

In recognizing the policy objectives of Cook County's Board of Ethics, Illinois courts have adopted an anti-corruption principle and recognized the role of the executive branch at the local level in preventing and addressing corruption. While the Ethics Ordinance has hardly eliminated corruption in Cook County, its targeted, practicable approach to eliminating a culture of corruption, upheld by the Illinois courts, engenders compliance. In this way, the public's intangible right to the honest services of government can be fully realized.

CONCLUSION

Nations may someday reach a utopian point where no anti-corruption oversight by the courts is needed, but recent events have shown that the U.S. has not achieved that dream. If corruption is "a threat to the integrity of self-government,"⁶² it deserves recognition as an impediment to human rights and democracy. The anti-corruption principle, fully acknowledged, amounts to a right to be free from corruption that is tantamount to other human rights.

The Supreme Court's rejection of the principle and the narrow and technical lens through which it views corruption is not the end of integrity in government. Local independent bodies like the Cook County Board of Ethics and state and local courts recognize and lift up its importance. The right to be free from corruption in America will be a right that is realized from the ground up.

⁶¹ *Id.* at 25.

⁶² Teachout, *supra* note 1, at 342.