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Responding to Political Corruption: Some Institutional Considerations

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Earlier this year, *New York Times* columnist Gail Collins asked which state has the most corrupt political culture. As one might expect, she focused on the Empire State, where the governor who was elected in 2006 was forced from office in a sex scandal, his successor is under several ethical clouds, and a state senator who was briefly involved in an abortive coup against his party's leadership was expelled from the legislature after being convicted of domestic assault.[1] In the end, though, she gave the nod to Illinois, where the governor elected in 2006 was impeached and removed from office for misconduct and is now facing a retrial for allegedly trying to auction President Obama's former U.S. Senate seat to the highest bidder, among other charges, and the Democratic nominee for lieutenant governor withdrew amid personal scandals.[2] Many readers suggested that other states deserved consideration for this questionable honor.[3]

As a native Bostonian, I would like to nominate Massachusetts for consideration. My home state has the dubious distinction of having three consecutive Speakers of the House of Representatives indicted for felonies; two later pleaded guilty, while the third case is still pending (a fourth was indicted in 1964 but died before the case was resolved).[4]

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1. Gail Collins, *The Biggest Losers*, N.Y. TIMES, Feb. 11, 2010, at A33.

2. *Id.* This column focused on very recent developments. It did not mention some legendary New York grafters such as Boss Tweed or Jimmy Walker, nor did it discuss former Illinois Governor George Ryan or the scandal that led to the withdrawal of Barack Obama's original Republican opponent for the U.S. Senate in 2004.

3. *See* Gail Collins, *There's Always California*, N.Y. TIMES, Feb. 13, 2010, at A23 (listing readers' suggestions for the most politically corrupt state).

4. Brian C. Mooney, *Concentration of Power Held by Speaker Blamed as a Key Factor*, BOS. GLOBE, June 3, 2009, at 11. Of course, not all officials with criminal records are corrupt. *See, e.g.*, Calvin Trillin, *U.S. Journal: Madison, Wisconsin—The Red Mayor and the Ideal Place*, NEW YORKER, Dec. 3, 1973, at 150, 152 (noting that the arrests of members of a city council in connection with Vietnam War protests "might make the Eighth District of Madison the only aldermanic district in the country in which two consecutive incumbents have been arrested on

Several members of Congress from the Bay State have also been convicted of corruption.[5] In addition, Massachusetts has something of a tradition of reelecting imprisoned incumbents: James Michael Curley was returned to the Boston City Council by his constituents in 1904 while serving a jail sentence for taking a civil service examination on behalf of a constituent;[6] more than half a century later a state representative was reelected while serving a prison sentence for less altruistic misbehavior.[7] Then there is the Governor's Council, a curious body with roots in the colonial era that serves as an advisor to and occasional check on the governor[8]: among its powers, this body must approve the appointment of judges and a wide range of other officials,[9] as well as various public contracts and other expenditures not specifically authorized by the legislature.[10] At one point during my youth, four of the eight members of the Governor's Council were either in jail or under indictment, prompting my mother (who grew up in the Bronx) to observe: "The difference between New York and Massachusetts is that in New York the stealing is organized."[11]

charges that had nothing to do with stealing").

5. *See* Martin F. Nolan, *In Mass., Prison Doesn't Always Preclude One's Future in Politics*, BOS. GLOBE, Aug. 30, 1992, at 34 (listing members of Congress from Massachusetts who have been reelected after a conviction on corruption charges).

6. THOMAS H. O'CONNOR, THE BOSTON IRISH: A POLITICAL HISTORY 181–82 (1995); Charles H. Trout, *Curley of Boston: The Search for Irish Legitimacy*, *in* BOSTON 1700–1980: THE EVOLUTION OF URBAN POLITICS 165, 175–76 (Ronald P. Formisano & Constance K. Burns eds., 1984). Curley capped his political career in 1945 by winning his fourth term as mayor by a record margin even though he was under indictment for mail fraud on election day. He was imprisoned for several months during that term but was pardoned by President Harry Truman. Although welcomed as a conquering hero on his return from the federal penitentiary in late 1947, Curley was defeated for reelection in 1949. O'CONNOR, *supra*, at 209–12; Trout, *supra*, at 188–89.

7. *See* Nolan, *supra* note 5, at 34 (noting that Rep. Charles Iannello was reelected while imprisoned for larceny).

8. MASS. CONST., pt. 2, ch. II, § III, art. I.

9. *Id.* § I, art. IX; *see also, e.g.*, MASS. GEN. LAWS ANN. ch. 6, §§ 26 (board of commissioners on uniform state laws), 35 (state librarian), 70 (board of trustees of Holyoke soldiers' home), 97 (finance advisory board), 99 (boxers' fund board), 101 (obscene literature control commission) (West 2006); *id.* ch. 13, §§ 39 (board of registration of barbers), 48 (board of registration of dispensing opticians), 54 (board of registration of real estate brokers and salesmen) (West 2002); *id.* ch. 22, § 11 (board of elevator regulations) (2002); *id.* ch. 23E, § 4 (industrial accident board) (West 2002).

10. MASS. CONST., pt. 2, ch. II, § I, art. XI.

11. One of my high school classmates discovered a loophole in the state election law that did not require independent candidates for state office to be registered voters. He promptly announced that he was running as an independent for the Governor's Council. The Secretary of State, the chief election officer, persuaded him to drop his quixotic effort and arranged to have the loophole closed by an embarrassed legislature.

This less-than-serious debate over the least honest political culture does have a serious point. The existence of corruption confirms Madison's observation: "If men were angels, no government would be necessary."[12] Of course, if men (and women) are not angels, those who hold governmental authority are not angels, either. Madison focused on institutional structures that would "enable the government to control the governed" while also "oblig[ing] it to control itself."[13] One important way to get the government to control itself is to address the problem of corruption.

This paper focuses on corruption involving higher-level officials. Of course, corruption can occur at every level of government and at every rank of officialdom. But the corrosive effect of corruption at the top raises special concern. As Justice Brandeis explained, "If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[14] We can address this sort of corruption ex ante and ex post: through institutional mechanisms that are designed to prevent corruption in the first place, and through mechanisms designed to prosecute and punish corruption after it has already occurred. Neither prevention nor prosecution has completely succeeded in eradicating political corruption. The following discussion will examine and suggest the limitations of some institutional arrangements that have been developed to prevent and prosecute corruption. The paper concludes by asking whether corruption, at least in moderation, might actually serve some socially useful function.

I. PREVENTION

Among the institutional measures that have been proposed to prevent corruption are open meeting laws and term limits. This section will address each of these approaches in turn.

A. Open Meeting Laws

Open meeting laws are designed to compel the government to make most decisions in public. Such laws exist at the federal level and in almost every state.[15] Justice Brandeis offered a pithy justification for

12. THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961).

13. *Id.*

14. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347, 353 (1967).

15. *See, e.g.*, 5 U.S.C. § 552b (2006); CAL. GOV'T CODE §§ 11120–11132 (West 2005 & Supp. 2010); FLA. STAT. ANN. §§ 286.011–.0115 (West 2009); 5 ILL. COMP. STAT. ANN. 120/1–7.5 (West 2005 & Supp. 2010); MASS. GEN. LAWS ANN. ch. 30A, § 11A 1/2 (West 2001); N.Y. PUB. OFF. LAW §§ 100–111 (McKinney 2008 & Supp. 2010); OHIO REV. CODE ANN. § 121.22

this approach: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[16] The notion of open meetings promotes two complementary constitutional values: it encourages elected officials to act in the public interest rather than for their own private gain, and by permitting the citizenry at large to participate in the political process, it reduces the risk that factions will gain excessive influence over public policy.[17]

Although the Supreme Court has not addressed the extent to which the Constitution might create a presumption of open legislative and executive sessions, it has recognized that the First Amendment provides a qualified right of public access to judicial proceedings.[18] The Court's reasoning in the cases involving judicial proceedings reflects many of the justifications advanced by proponents of open meeting laws.[19] First, openness promotes the appearance of fairness and enhances public confidence in the integrity of official proceedings.[20] As Chief Justice Burger explained, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[21]

Second, public access can educate the citizenry in the workings of government, which in turn facilitates informed political discussion and debate.[22] Open meetings in which officials address difficult issues of public policy can enlighten the public on the conflicting values and intractable trade-offs that affect the resolution of many problems, which

(West Supp. 2009); TEX. GOV'T CODE ANN. §§ 551.001–.128 (West 2004 & Supp. 2009); WASH. REV. CODE ANN. §§ 42.30.010–.920 (West 2006).

16. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 89 (Melvin I. Urofsky ed., Bedford Books 1995) (1914).

17. *See* Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 892 (1986) (describing a Jeffersonian conception of the purposes of the constitutional guarantee of freedom of expression).

18. *See* Press-Enter. Co. v. Super. Ct. (*Press-Enter. II*), 478 U.S. 1, 10 (1986) (access to preliminary hearings); Press-Enter. Co. v. Super. Ct. (*Press-Enter. I*), 464 U.S. 501, 511 (1984) (access to voir dire of prospective jurors in criminal trials); Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 606 (1982) (access to testimony of juvenile victim of sex crime); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980) (access to criminal trials).

19. For an argument that a First Amendment presumption of openness should apply to meetings of local governmental bodies, see generally R. James Assaf, Note, *Mr. Smith Comes Home: The Constitutional Presumption of Openness in Local Legislative Meetings*, 40 CASE W. RES. L. REV. 227 (1989).

20. *Press-Enter. II*, 478 U.S. at 12–13; *Press-Enter. I*, 464 U.S. at 508; *Globe Newspaper*, 457 U.S. at 606; *Richmond Newspapers*, 448 U.S. at 571; *id.* at 595 (Brennan, J., concurring).

21. *Richmond Newspapers*, 448 U.S. at 572.

22. *Globe Newspaper*, 457 U.S. at 604–05; Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979).

can promote greater appreciation for the political skills needed to promote effective governance. This in turn can stimulate more knowledgeable public consideration of these issues and perhaps even encourage individual citizens to come forward with constructive suggestions.[23]

Third, openness serves as a check against incompetence, venality, or bias.[24] This consideration explicitly reflects the framers' concerns with faction as a principal evil to be addressed in any system of effective government.[25]

Whatever might be said for open meeting laws in principle, we should recognize their limitations. To begin with, such laws do not require all public business to take place in public session. All open meeting laws contain exceptions.[26] In this sense, open meeting laws are analogous to the constitutional right of public access to judicial proceedings, which is not absolute but only qualified. In fact, it might be more difficult to rebut the First Amendment presumption of access to the courts than it is to close all or part of a session under an open meeting law because many exemptions under open meeting laws are categorical, whereas a court must satisfy a very demanding legal standard to close all or part of a proceeding that is presumptively open to the public.[27]

23. *See Gannett Co.*, 443 U.S. at 383 (discussing the possibility that in public trials, previously unknown witnesses may come forward to testify).

24. *Press-Enter. I*, 464 U.S. at 508; *Globe Newspaper*, 457 U.S. at 606; *Richmond Newspapers*, 448 U.S. at 569; *id.* at 595 (Brennan, J., concurring).

25. *See generally* THE FEDERALIST NO. 10, at 72–73, 75 (James Madison) (Clinton Rossiter ed., 1961) (noting that factions cannot be prevented without infringing on the people's liberties, but that factions can be controlled through appropriate institutional arrangements).

26. *See, e.g.*, 5 U.S.C. § 552b(c) (2006) (listing exceptions to the open meeting policy); CAL. GOV'T CODE §§ 11122.5(c), 11126 (West 2005 & Supp. 2010) (allowing closed meetings to consider the appointment, employment, evaluation, or dismissal of a public employee); FLA. STAT. ANN. § 286.0113 (West 2009) (providing that meetings involving security system plans may be closed to the public); 5 ILL. COMP. STAT. ANN. 120/2(c) (West 2005) (providing a number of exceptions to the requirement that all public bodies hold open meetings); N.Y. PUB. OFF. LAW § 108 (McKinney 2008) (excluding from open meeting requirements judicial or quasi-judicial proceedings, the deliberations of political committees, and matters made confidential by state or federal law); OHIO REV. CODE ANN. § 121.22(D) (West Supp. 2009) (listing specific subjects that are exempt from a general policy of open public meetings); TEX. GOV'T CODE ANN. §§ 551.071–.088 (West 2004 & Supp. 2009) (providing exceptions to the general rule that a public body may not consult with an attorney in private).

27. *See, e.g.*, Press-Enter. Co. v. Super. Ct. (*Press-Enter. II*), 478 U.S. 1, 13–14 (1986) (holding that a preliminary hearing may not be closed "unless specific, on the record findings are made" showing "a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity" and "reasonable alternatives to closure cannot adequately protect" the defendant's rights); *Press-Enter. I*, 464 U.S. at 510 (finding that the right of public access to trials may be defeated "only by an overriding interest based on findings that closure is essential to

Further, at least some provisions of open meeting laws might run afoul of the First Amendment in that such laws regulate the content of speech by government officials. Specifically, these laws forbid a majority of a multi-member body from discussing public business except in public sessions. Private communications violate open meeting laws. A panel of the United States Court of Appeals for the Fifth Circuit, in *Rangra v. Brown*,[28] held that a provision of the Texas Open Meeting Act that authorized criminal sanctions for statutory violations[29] should be assessed under strict scrutiny because that provision was a content-based regulation of official speech.[30] The full court set the case for rehearing en banc,[31] but subsequently ordered it dismissed as moot because the plaintiff's term in office had expired.[32]

Although the Supreme Court has never addressed the constitutionality of open meeting laws,[33] several lower courts have held that elected officials have First Amendment rights that afford them constitutional protection in voting on public business. For example, in *Miller v. Town of Hull*,[34] the United States Court of Appeals for the First Circuit affirmed a ruling that a town council had violated the First Amendment by removing members of the local redevelopment authority in a dispute over a proposed housing project for the elderly. The court had "no difficulty" in concluding that "the act of voting on public issues by a member of a public agency" implicated the constitutional right to freedom of speech, a conclusion buttressed by the fact that the members of the redevelopment authority were elected as required by state law.[35]

preserve higher values and is narrowly tailored to serve that interest"); *Globe Newspaper*, 457 U.S. at 606–07 (holding that closure of courtroom during testimony of juvenile victim of sex offense requires a showing that "the denial [of public access] is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest").

28. 566 F.3d 515 (5th Cir.), *reh'g en banc granted*, 576 F.3d 531 (5th Cir.), *dismissed as moot*, 584 F.3d 206 (5th Cir. 2009).

29. TEX. GOV'T CODE ANN. § 551.144.

30. *Rangra*, 566 F.3d at 521.

31. *Rangra*, 576 F.3d at 532.

32. *Rangra*, 584 F.3d at 207; *id.* at 209 (Dennis, J., dissenting).

33. The Supreme Court has held that candidates for elective office have free speech rights. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (holding that a rule forbidding candidates for elected judicial offices from announcing their views on controversial legal issues violated the First Amendment); Bond v. Floyd, 385 U.S. 116, 137 (1966) (holding that a state legislature could not exclude a newly elected representative from membership in the legislature on the basis of the representative's prior criticisms of American foreign and military policy).

34. 878 F.2d 523 (1st Cir. 1989).

35. *Id.* at 532.

Similarly, in *Clarke v. United States*,[36] the United States Court of Appeals for the District of Columbia Circuit found that an official's vote was "inherently expressive" and therefore protected by the First Amendment.[37] Accordingly, the court invalidated a congressional rider conditioning the annual federal appropriation for the District of Columbia on the D.C. Council's exempting religious and religiously affiliated educational institutions from a gay rights ordinance.[38] As in *Rangra*, this dispute ultimately was mooted. The appropriations bill to which the rider was attached expired at the end of the fiscal year, and Congress preempted the issue by directly enacting an exemption to the D.C. gay rights ordinance for religious and religiously affiliated educational institutions.[39]

Finally, in *Wrzeski v. City of Madison*,[40] the United States District Court for the Western District of Wisconsin enjoined the enforcement of a municipal ordinance prohibiting city council members who were present at a meeting from abstaining on any vote. Under the ordinance, a member who refused to vote "aye" or "no" was subject to censure and, for a repeat offense, to a $100 fine.[41] The court reasoned that this ordinance compelled a member to speak when she did not want to do so, and that the city was unlikely to demonstrate a compelling interest in support of its requirement.[42] Because any proposal needed an absolute majority to succeed, prohibiting abstentions would not prevent the council from functioning.[43] Moreover, constituents who objected to a representative's unwillingness to take a clear position could vote out the vacillator at the next election.[44]

To be sure, there are cases pointing in the other direction. For instance, the United States Court of Appeals for the Second Circuit summarily rebuffed a First Amendment defense in *United States v. City of Yonkers*.[45] In *Yonkers*, members of the city council were held in

36. 886 F.2d 404 (D.C. Cir. 1989), *vacated as moot en banc*, 915 F.2d 699 (D.C. Cir. 1990).

37. *Id.* at 411, 413.

38. *Id.* at 417 (concluding that the rider was invalid "under *any* standard of First Amendment review" (emphasis added)). The rider was enacted in response to a judicial ruling that the D.C. gay rights ordinance applied to Georgetown University. *Id.* at 405.

39. *Clarke*, 915 F.2d at 700.

40. 558 F. Supp. 664 (W.D. Wis. 1983).

41. *Id.* at 665.

42. *Id.* at 667–68.

43. *Id.* at 668 & n.4.

44. *Id.* at 668. Nor was the abstention ban saved by another ordinance that allowed members of the council to explain the reasons for their vote. *Id.* at 669.

45. 856 F.2d 444 (2d Cir. 1988), *rev'd on other grounds sub nom.* Spallone v. United States, 493 U.S. 265 (1990).

contempt for refusing to enact measures to remedy housing and school segregation.[46] The Second Circuit concluded that any First Amendment interest that the officials might have possessed in refusing to vote for the remedial measures was overridden by the public interest in securing compliance with judicial orders to correct the city's failure to comply with the Constitution.[47] The Supreme Court ultimately set aside the contempt findings against the officials without reaching the First Amendment issues, holding that the district court had abused its discretion in finding the individual defendants in contempt; it sufficed to impose harsh fines on the city for its failure to comply with the remedial order.[48]

Similarly, an expansive reading of the Supreme Court's ruling in *Garcetti v. Ceballos*[49] might support the notion that elected officials have no First Amendment rights in connection with their discussion of public business. *Garcetti* held that "public employees [who] make statements pursuant to their official duties . . . are not speaking as citizens for First Amendment purposes" and so enjoy no constitutional protections for their speech.[50] Applying this limited view of public employee speech rights to elected officials (and high-level appointed officials such as agency heads and commissioners) would obviate any First Amendment concerns about open meeting laws, but it is far from clear that these persons should be viewed as public employees. Elected officials, in particular, are not mere employees, but rather exercise political authority for which they are directly accountable to the voters.[51]

Assuming that the *Rangra* court was correct in concluding that at least some open meeting laws raise First Amendment issues, let us consider whether those provisions could withstand a constitutional challenge. With no Supreme Court precedent directly on point, we

46. *Id.* at 451.

47. *Id.* at 457.

48. *Spallone*, 493 U.S. at 280. The First Amendment issues in *Yonkers* were complicated by the fact that the city had entered into a consent decree, which the city council explicitly approved, that agreed to implement the remedial order. *Yonkers*, 856 F.2d at 448; LISA BELKIN, SHOW ME A HERO: A TALE OF MURDER, SUICIDE, RACE, AND REDEMPTION 28–34 (1999).

49. 547 U.S. 410 (2006).

50. *Id.* at 421.

51. *See* Rangra v. Brown, 566 F.3d 515, 523–26 (5th Cir.) (discussing Supreme Court cases that address the protection of elected officials' free speech rights, and noting that the public has the power to hire and fire elected officials), *reh'g en banc granted*, 576 F.3d 531 (5th Cir.), *dismissed as moot*, 584 F.3d 206 (5th Cir. 2009). For a detailed critique of the elected-official-as-employee theory, see Christopher J. Diehl, Note, *Open Meetings and Closed Mouths: Elected Officials' Free Speech Rights After* Garcetti v. Ceballos, 61 CASE W. RES. L. REV. (forthcoming 2010).

might turn to an analogous area of regulation of the political process: campaign finance law. The interests served by open meeting laws—preventing officials from acting in their private interest and reducing the risk of factional influence[52]—are similar to the interests advanced in support of campaign finance regulation.

In a line of cases beginning with *Buckley v. Valeo*,[53] the Supreme Court has found that "the prevention of corruption and the appearance of corruption" constitute a compelling governmental interest.[54] The *Buckley* Court held that this anti-corruption interest could justify restrictions on the amount of individual political contributions,[55] but this interest could not justify restrictions on independent expenditures.[56] The recent decision in *Citizens United v. Federal Election Commission*[57] appears to have narrowed the nature of the anti-corruption interest that can support campaign finance regulations. The majority opinion repeatedly emphasizes that only quid pro quo corruption—political favors resulting from campaign money—can justify campaign finance restrictions.[58] *Citizens United* therefore might undermine a general anti-corruption rationale for open meeting laws. Absent a fairly direct link between closed meetings and self-interested decision-making, open meeting laws might impermissibly restrict the speech of public officials by preventing them from communicating with each other in private.

It is not clear, however, that the *Rangra* panel was correct in concluding that open meeting laws should trigger strict scrutiny. After all, open meeting laws are not viewpoint-based regulations. The requirement of public discussion of official business applies across the board, regardless of opinion or political affiliation. In other words, open meeting laws do regulate the content of officials' speech, but they do so in a viewpoint-neutral way. They are, in short, subject-matter regulations. Because open meeting laws are not designed to distort political debate or to favor one side of controversial public issues—indeed, they are meant to promote public discussion and political accountability—perhaps they should be evaluated under a less

52. *See supra* text accompanying note 17 (explaining that open meetings promote the constitutional values of encouraging elected officials to act in the public interest and permitting citizens to participate in the political process).

53. 424 U.S. 1 (1976) (per curiam).

54. *Id.* at 25–26.

55. *Id.*

56. *Id.* at 47–48.

57. 130 S. Ct. 876 (2010).

58. *Id.* at 908–10.

demanding First Amendment standard.[59] The Supreme Court might reject this suggestion, if its campaign finance jurisprudence is any guide. After all, the prohibition on corporate expenditures in candidate elections that was at the heart of the *Citizens United* decision was viewpoint-neutral as well; the ban applied across the board and prevented companies from spending their own funds to promote or oppose candidates for public office. Although the regulation was based on subject matter rather than viewpoint, the Court nevertheless subjected it to strict scrutiny.[60]

Entirely apart from whether open meeting laws can withstand a First Amendment challenge, we should consider the effectiveness of such measures in achieving their goals of preventing self-interested decision making by public officials and enhancing citizens' engagement with civic affairs. Assessments of open meeting laws have not specifically addressed the extent to which those laws affect the incidence of corruption, but they do suggest that mandatory public decision making has costs as well as benefits. Although such laws have enhanced public access to information,[61] they might have harmed the quality of decision making. For example, commentators and analysts have suggested that government bodies that are subject to open meeting laws tend to hold fewer official meetings and to engage in less discussion of matters in those meetings; officials depend more on their staff members because open meeting laws do not cover conversations between officials and their staff; and many decisions are made by notational voting (a system under which matters are approved without a meeting through seriatim consideration of decisional memoranda, a practice originally intended for routine items but sometimes used for other matters).[62] Having considered the anti-corruptive effects and First Amendment implications of open meeting laws, this paper turns now to a discussion of the relationship between term limits and corruption.

59. *See generally* Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978) (discussing how the Supreme Court evaluates restrictions on speech related to subjects such as partisan politics).

60. *Citizens United*, 130 S. Ct. at 898 (describing the "strict scrutiny" review of laws that "would suppress [political speech], whether by design or inadvertence").

61. David M. Welborn et al., *The Federal Government in the Sunshine Act and Agency Decision Making*, 20 ADMIN. & SOC'Y 465, 482 (1989).

62. *See, e.g.*, Kathy Bradley, Note, *Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals and Effect on the FCC* and You, 49 FED. COMM. L.J. 473, 481–85 (1997) (evaluating the costs of the Sunshine Act); Nicholas Johnson, *Open Meetings and Closed Minds: Another Road to the Mountaintop*, 53 DRAKE L. REV. 11, 20–29 (2004) (explaining the negative aspects of open meetings, drawing in part on the author's experience as a member of the Federal Communications Commission); Welborn et al., *supra* note 61, at 471–75 (discussing the perceived effects of the Sunshine Act).

B. Term Limits

Term limits have been promoted as a way to reform government by forcing turnover in office. Proponents contend that this will reduce or eliminate careerism, bring more citizens into office who will return to the private sector after a relatively short period of public service, and promote more effective government.[63] The Supreme Court held that states may not impose term limits on members of Congress,[64] but nearly half the states adopted such measures for state legislators.[65]

As with open meeting laws, studies of the impact of term limits have not specifically addressed questions of corruption. Those studies, which have focused on state legislatures and mostly in the first decade (or less) of term limits, generally find that term limits are associated with increased power for legislative staff and executive officials at the expense of individual legislators and the legislature as a whole; less individual expertise and shorter time horizons on the part of legislators;

63. *See, e.g.*, JAMES K. COYNE & JOHN H. FUND, CLEANING HOUSE: AMERICA'S CAMPAIGN FOR TERM LIMITS 10–12, 18–19, 120–24 (1992) (explaining that term limits work in many other occupations and will attract many talented people to run for public office); Paul Jacob, *From the Voters with Care*, *in* THE POLITICS AND LAW OF TERM LIMITS 27, 29–38 (Edward H. Crane & Roger Pilon eds., 1994) (discussing how term limits rejuvenate the election process and restore a citizen legislature); Mark P. Petracca, *Restoring "The University in Rotation": An Essay in Defense of Term Limitation*, *in* THE POLITICS AND LAW OF TERM LIMITS, *supra*, at 57, 68, 73 (defending term limits on the grounds that they assure accountability in politics and prevent the professionalization of legislative politics). *See generally* GEORGE F. WILL, RESTORATION: CONGRESS, TERM LIMITS, AND THE RECOVERY OF DELIBERATIVE DEMOCRACY (1992) (arguing that term limits can help restore respect and competence to Congress).

64. U.S. Terms Limits, Inc. v. Thornton, 514 U.S. 779, 837–38 (1995).

65. At present, fifteen states have term limits for state legislators. Between 1990 and 2000, twenty-one states adopted such limits. State supreme courts invalidated four of those measures, and two others have been repealed. No term limits for state legislators have been adopted since 2000. *See* Nat'l Conf. of State Legislatures, *The Term Limited States*, http://www.ncsl.org/Default.aspx?TabId=14844 (last updated June 2009) (listing states that currently have term limits and those in which term limits have been repealed).

Term limits for local officials have fared inconsistently in the courts. Federal constitutional challenges have failed. *See, e.g.*, Dutmer v. City of San Antonio, 937 F. Supp. 587, 595 (W.D. Tex. 1996) (members of city council); Miyazawa v. City of Cincinnati, 825 F. Supp. 816, 822 (S.D. Ohio 1993) (members of city council), *aff'd*, 45 F.3d 126 (6th Cir. 1995). Several challenges based on state law have succeeded. *See, e.g.*, Allred v. McLoud, 31 S.W.3d 836, 839 (Ark. 2000) (invalidating locally adopted term limits for county officials); Polis v. City of La Palma, 12 Cal. Rptr. 2d 322, 325 (Ct. App. 1992) (concluding that state law preempted municipal term-limit ordinance); Cook v. City of Jacksonville, 823 So. 2d 86, 94–95 (Fla. 2002) (holding that local term limits violated the state constitution); Chi. Bar Ass'n v. Ill. State Bd. of Elections, 641 N.E.2d 525, 534 (Ill. 1994) (per curiam) (finding improper a proposed constitutional amendment limiting terms of state legislators); Minneapolis Term Limits Coal. v. Keefe, 535 N.W.2d 306, 309 (Minn. 1995) (concluding that term limits for city officials would violate state constitution); Cottrell v. Santillanes, 901 P.2d 785, 789 (N.M. Ct. App.) (finding term limits for members of city council inconsistent with state law), *cert. denied*, 900 P.2d 962 (N.M. 1995).

and reduced incentives for cooperation.[66] Evidence about the impact of term limits in other respects is less negative but inconsistent. For example, term-limited legislators apparently make more policy proposals than do those in states without term limits,[67] but legislatures in term-limits states tend to produce less innovative policies.[68] Similarly, the demographic composition of legislatures has not changed much in states that have adopted term limits.[69]

Whatever the impact of term limits on the quality of public policy-making, we lack reliable information about whether they can reduce or prevent corruption. By requiring turnover in office, such limits might reduce the power of officials that may tempt them into corrupt arrangements. On the other hand, by shortening officials' time horizons, term limits might make corruption or self-dealing more attractive as officials would have to think about what to do when term limits force them from office. Regardless, it seems unlikely that the extent of term limits at the state level will change any time soon; no new term limits have been adopted since 2000,[70] and efforts to repeal or modify term limits in the states that have them have generally failed.[71] Thus, term limits are unlikely to be adopted on a sufficiently wide scale to reduce political corruption even if they do in fact promote official integrity.

II. PROSECUTION

If corruption cannot be prevented, it should be punished. Prosecuting corrupt officials poses a variety of institutional challenges. At the state level, for example, prosecutorial authority is often divided. The

66. *See, e.g.*, JOHN M. CAREY ET AL., TERM LIMITS IN THE STATE LEGISLATURES 124–29 (2000) (studying the negative and positive effects of term limits); THAD KOUSSER, TERM LIMITS AND THE DISMANTLING OF STATE LEGISLATIVE PROFESSIONALISM 205–12 (2005) (detailing the advantages of legislative professionalism); MARJORIE SARBAUGH-THOMPSON ET AL., THE POLITICAL AND INSTITUTIONAL EFFECTS OF TERM LIMITS 185–98 (2004) (evaluating the goals of term limits and whether or not they were achieved). For the views of a former state legislator who initially supported term limits but now opposes them (apparently for reasons that do not include a thwarted political career), see Robert W. Naylor, *The Good and the Bad of Term Limits*, 2 CAL. J. POL. & POL'Y art. 8 (2010), *available at* http://www.bepress.com/cjpp/vol2/iss1/8 (last visited Nov. 15, 2010).

67. *See* CAREY ET AL., *supra* note 66, at 124–25 (pointing out that newcomers in term-limit states spend more time promoting their own legislation).

68. *Id.* at 124; KOUSSER, *supra* note 66, at 207.

69. CAREY ET AL., *supra* note 66, at 123–24; KOUSSER, *supra* note 66, at 205.

70. *See* Nat'l Conf. of State Legislatures, *supra* note 65 (listing states with term limits).

71. *See* Carol S. Weissert & Karen Halperin, *The Paradox of Term Limit Support: To Know Them Is NOT to Love Them*, 60 POL. RES. Q. 516, 516 (2007) (detailing examples of states that have tried to amend or eliminate term limits provisions and have failed).

attorney general typically does not initiate criminal cases. That authority usually rests with a local district attorney. At the federal level, the attorney general might sign off on decisions to file corruption charges, but the primary authority for prosecution rests with the U.S. attorney for the district in which the charges are laid. Corruption cases are, to put it mildly, politically sensitive. District attorneys might hesitate to go after local officials with whom they have personal and political relationships, and U.S. attorneys are not immune from political pressure, as the controversy over the dismissal of several federal prosecutors during the second term of President George W. Bush attests. For these reasons, some special arrangements have been devised to investigate and prosecute political corruption. This section will discuss some of these special mechanisms at both federal and state levels.

A. The Rise and Fall of the Independent Counsel

The Watergate scandal, which began when operatives of President Nixon's reelection campaign were arrested for breaking into the Democratic National Committee headquarters and ultimately implicated officials close to Nixon and even the chief executive himself, led to the appointment of a special prosecutor. The first special prosecutor, Archibald Cox, was fired at President Nixon's direction. The ensuing political firestorm led to the appointment of a second special prosecutor, Leon Jaworski, who went to the Supreme Court to enforce a subpoena leading to the release of crucial evidence that led to Nixon's resignation.[72]

The controversy over the firing of Cox as the first Watergate special prosecutor led to the enactment of the independent counsel provisions of the Ethics in Government Act.[73] The Supreme Court, over a vigorous dissent by Justice Scalia, upheld the constitutionality of the independent counsel law in *Morrison v. Olson*.[74] That law worked as

72. United States v. Nixon, 418 U.S. 683, 716 (1974). There is an enormous literature about the Watergate scandal. For a well-regarded account by a prominent historian, see generally STANLEY I. KUTLER, THE WARS OF WATERGATE (1990).

73. Pub. L. No. 95-521, tit. VI, 92 Stat. 1824, 1867–73 (1978) (amended 1983, renewed 1988, expired 1992, reenacted 1994, expired 1999); *In re* Sealed Case, 838 F.2d 476, 527 (D.C. Cir.) (Ginsburg, J., dissenting), *rev'd sub nom.* Morrison v. Olson, 487 U.S. 654 (1988); *see also* KEN GORMLEY, THE DEATH OF AMERICAN VIRTUE: CLINTON VS. STARR 95 (2010) (detailing Kenneth Starr's role as a special prosecutor in the investigation of President Bill Clinton); KUTLER, *supra* note 72, at 581–82 (describing the dismissal of Archibald Cox as special prosecutor and the ensuing battle between President Nixon and Congress over the independence of the special prosecutor).

74. 487 U.S. 654 (1988).

follows: The Attorney General, on receipt of information suggesting that the President, other high-ranking executive officials, or high-level officials of the President's political campaign had committed a serious federal crime, had up to ninety days to determine whether there were "no reasonable grounds to believe that further investigation is warranted."[75] Otherwise, the Attorney General was to inform a special division of the United States Court of Appeals for the District of Columbia Circuit of the situation.[76] The special division would then appoint an independent counsel, who would exercise powers that otherwise belonged to the Department of Justice.[77] An independent counsel could be removed from office only for cause and only by the Attorney General.[78]

Chief Justice Rehnquist's majority opinion rejected claims that the independent counsel law violated the Appointments Clause, infringed on presidential power, and ran afoul of general principles of separation of powers.[79] First, the independent counsel could be appointed by the special division because she was an inferior officer—the Appointments Clause authorizes Congress to "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[80] This was because the independent counsel was subject to removal by a higher-level executive official (the Attorney General), exercised limited duties, and had limited jurisdiction and tenure.[81] Moreover, there was no incongruity in vesting the appointment in the special division, which was precluded from hearing any matters brought by an independent counsel, as the statute sought to avoid conflicts of interest in the executive branch, so conferring the power on that court was entirely sensible.[82]

Second, the removal procedure—under which the independent counsel could be removed only by the Attorney General and only for cause—was constitutionally permissible.[83] Congress did not reserve for itself any role in removal and conferred that power on a high-level executive official who was directly accountable to the President.[84] The

75. *Id.* at 660–61.
76. *Id.* at 661.
77. *Id.* at 661–62.
78. *Id.* at 663.
79. *Id.* at 696–97.
80. *Id.* at 672; U.S. CONST. art. II, § 2, cl. 2.
81. *Morrison*, 487 U.S. at 671–72.
82. *Id.* at 676–77.
83. *Id.* at 691.
84. *Id.* at 686.

cause requirement was also constitutionally permissible because it did not "unduly trammel[] on executive authority."[85]

Third, the statute was consistent with the overall scheme of separation of powers embodied in the Constitution. Congress had not sought to aggrandize power for itself at the expense of the President;[86] the law did not permit the judiciary to exercise power that properly belonged to the executive branch;[87] and it gave the executive enough control over the independent counsel to permit the President to exercise his constitutional duties.[88]

Justice Scalia strenuously dissented, lamenting what he characterized as the demise of "our former constitutional system."[89] Detailed consideration of his argument is beyond the scope of this paper.[90] Two more recent decisions affecting *Morrison*'s continuing vitality deserve mention, however. Some language in *Edmond v. United States*[91] might raise questions about *Morrison*'s analysis of the independent counsel's status as an inferior officer. *Edmond* addressed the constitutionality of the Secretary of Transportation's appointment of civilian members of the Coast Guard Court of Criminal Appeals. In the course of concluding that those persons were inferior officers, Justice Scalia wrote for the Court, explaining that "the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior."[92] As Justice Souter explained in his concurring opinion, this analysis is not entirely consistent with *Morrison*'s approach to the question: in *Morrison*, the Court focused on factors beyond whether the independent counsel had a nominal superior to determine whether she was an inferior officer.[93]

85. *Id.* at 691.

86. *Id.* at 694.

87. *Id.* at 695.

88. *Id.* at 696.

89. *Id.* at 715 (Scalia, J., dissenting).

90. For more detailed analysis of both opinions in *Morrison*, see, for example, Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 201–06 (1990) (summarizing and explicating the reasoning behind *Morrison v. Olson*).

91. 520 U.S. 651 (1997).

92. *Id.* at 662.

93. *Id.* at 667–68 (Souter, J., concurring). Some commentators have noted the apparent tension between *Morrison* and *Edmond*. *See, e.g.*, Nick Bravin, Note, *Is* Morrison v. Olson *Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1107 (1998) (suggesting that *Morrison*'s Appointments Clause holding is ripe for reconsideration in light of *Edmond*); Andrew Croner, Essay, Morrison, Edmond, *and the Power of Appointments*, 77 GEO. WASH. L. REV. 1002, 1003 (2009) (arguing that the term "Officers of the United States"

The recent decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*[94] used the *Edmond* analysis to uphold a key provision of the Sarbanes-Oxley Act[95] that created a new agency (the Public Company Accounting Oversight Board) to register accounting firms, establish substantive and ethical accounting standards, and investigate registered accounting firms. Members of the Board are appointed by the Securities and Exchange Commission in consultation with the Chairman of the Board of Governors of the Federal Reserve and the Secretary of the Treasury.[96] The Court had "no hesitation" about concluding that, "under *Edmond*," these officials "are inferior officers" and that their appointment by the SEC was constitutionally permissible.[97]

The *Edmond* approach, endorsed in *Free Enterprise Fund*, might imply that the Court would find a violation of the Appointments Clause in the independent counsel law if *Morrison* had arisen today rather than a quarter-century ago. This approach suggests that the independent counsel might not be an inferior officer for lack of a sufficiently close relationship with high executive branch officials. The *Free Enterprise Fund* Court had no occasion to address this question, but that case probably will not be the last word on the subject. Chief Justice Roberts explained in the second paragraph of the majority opinion that "[t]he parties d[id] not ask us to reexamine" *Morrison*, so the Court "d[id] not do so."[98] This statement does not preclude a subsequent effort to overrule *Morrison*. Indeed, the dissenting opinion in the court of appeals invited the Supreme Court to revisit the independent counsel ruling in *Free Enterprise Fund*.[99]

In a very important sense, *Morrison*'s continuing vitality does not matter very much. The independent counsel law was often

is a term intended to have substantive meaning).

94. 130 S. Ct. 3138 (2010).

95. 15 U.S.C. §§ 7211–7219 (2006).

96. *Id.* § 7211(e)(4)(A).

97. *Free Enter. Fund*, 130 S. Ct. at 3162. Justice Breyer, who dissented from the Court's holding that the statutory restrictions on the SEC's power to remove Board members violated the Constitution and therefore had to be excised, agreed with the majority's analysis of the Board members' status as inferior officers. *Id.* at 3164 (Breyer, J., dissenting).

98. *Id.* at 3147 (majority opinion).

99. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 696–97 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (noting that *Morrison* and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), on which *Morrison* partially relied, "have long been criticized by many as inconsistent with the text of the Constitution, with the understanding of the text that largely prevailed from 1789 through 1935, and with prior precedents" but adding that "we cannot, need not, and do not relitigate those two cases here" because, "[f]or this [lower] Court, those cases are binding precedents"), *aff'd in part, rev'd in part*, 130 S. Ct. 3138 (2010).

controversial. To finesse objections, the law contained a sunset provision that required its periodic reauthorization. After being reauthorized in 1983 and 1988, it lapsed in 1992 but was reauthorized in 1994 as the Whitewater scandal broke around President Clinton. Kenneth Starr was appointed independent counsel, and the storm over his performance led to the law's almost completely unlamented expiration in 1999.[100] It seems extremely unlikely that this or any similar statute will have sufficient political support to be enacted in the foreseeable future. The political demise of the independent counsel law suggests the difficulty of crafting special institutions to deal with political corruption and raises the question whether traditional arrangements in the Department of Justice and at the state and local level, as imperfect as they might be, could be at least as effective as innovations that turn out badly in practice.

B. The Limits of State Ethics Commissions

Meanwhile, a number of states have created special procedures for handling allegations of official misconduct. Among these are ethics commissions charged with enforcing conflict of interest rules to reduce the risk of corruption. Two recent judicial rulings that took a restrictive view of the authority of ethics commissions suggest the limitations of this approach to dealing with corruption.

In *Commission on Ethics v. Hardy*,[101] the Nevada Supreme Court held that the ethics commission lacked constitutional authority to investigate allegations that a state senator violated the conflict of interest law by voting for legislation that benefited members of a building contractors' association of which he served as president and not disclosing the connection between the bill and its effect on the group's members.[102] The court first noted that the Nevada Constitution explicitly forbids any branch of state government from "exercis[ing] any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution."[103] Of particular significance, the state constitution gives the legislature the power to

100. *See* GORMLEY, *supra* note 73, at 95–96, 655–56 (pointing out that Kenneth Starr's prosecutorial overzealousness and lack of self restraint buried the independent counsel law); KUTLER, *supra* note 72, at 582–84 (describing practical and constitutional criticisms of the independent prosecutor prior to *Morrison v. Olson*); PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND MATERIALS 170–71 (rev. 10th ed. 2003).

101. 212 P.3d 1098 (Nev. 2009) (per curiam).

102. *Id.* at 1100–01 & n.1.

103. *Id.* at 1104 (quoting NEV. CONST. art. III, § 1(1)).

discipline its members for "disorderly conduct."[104] This power to discipline members may not be delegated.[105] Any investigation or discipline related to a member's core legislative function of voting on bills, therefore, must be undertaken by the legislature itself. Because any disclosure of conflicts of interest in connection with pending bills relates to this core function, only that branch may discipline a member for failure to disclose.[106] As an executive agency, the ethics commission could not take any action in connection with the senator's voting on the bill about which he had a conflict of interest.[107]

Some of the language in the Nevada court's opinion seems to suggest that an expansive definition of "disorderly conduct" could preclude the prosecution of a legislator for soliciting or accepting a bribe in connection with her vote. After all, the attorney general or the district attorney who might investigate and try any bribery charge exercises executive power. On this view, allowing a criminal case to go forward would undermine the express protection of separation of powers in the state constitution. We should hesitate to read the case so broadly, however, because the court did not discuss or even hint at this possibility. Nor did the court allude to the definition of disorderly conduct except to observe that violations of conflict of interest rules represented a species of disorderly conduct. The other recent case reached a similar conclusion but on narrower grounds that rules out the potential immunity for a legislator who seeks or accepts a bribe in connection with a vote on a bill.

Just a month before the Nevada ruling, the Rhode Island Supreme Court, in *Irons v. Rhode Island Ethics Commission*,[108] held that legislative immunity protected a former president of the state senate from prosecution on charges that he had voted against a proposal to allow consumers to choose where to have their prescriptions filled when he privately represented a major pharmacy retailer and a leading health insurance company that would be affected by the proposal.[109] The decision relied on the Speech in Debate Clause of the state constitution.[110] Invoking earlier decisions that construed this provision expansively, the court emphasized that the legislative privilege was "a

104. *Id.* (quoting NEV. CONST. art. IV, § 6).

105. *Id.* at 1105.

106. *Id.* at 1106–07.

107. *Id.* at 1108.

108. 973 A.2d 1124 (R.I. 2009).

109. *Id.* at 1134.

110. R.I. CONST. art. VI, § 5 ("For any speech in debate in either house, no member shall be questioned in any other place.").

venerable and important product of historical travails in England" that "was most definitely embraced by this country" following the Revolution and was expressly reaffirmed when the voters had ratified a revision of the state constitution in 1986.[111] The privilege protects the people by allowing their representatives to do their work without improper interference from the executive and judicial branches.[112] Moreover, a constitutional amendment establishing the ethics commission did not supersede legislative immunity because there was no evidence that the amendment "was intended to abrogate speech-in-debate immunity."[113] Because this amendment was approved by the voters at the same time that they endorsed a general revision of the rest of the constitution that was not intended to have substantive significance and the amendment did not explicitly suggest any limitation of legislative immunity, the expansive reading of the Speech in Debate Clause remained appropriate.[114]

Despite its broad construction of this provision, the court emphasized that the immunity was not absolute. The opinion explicitly remarked that the Speech in Debate Clause did not protect legislators from prosecution for "solicitation and acceptance of bribes" as well as for other "criminal activities, even those committed to further legislative activity."[115] In support of this observation, the Rhode Island court invoked cases construing the Speech or Debate Clause of the U.S. Constitution, which contains language that is functionally identical to the state provision.[116] A careful reading of those cases should lead to some qualification of the broad language in the *Irons* opinion.

Although it is accurate to say that members of Congress may be prosecuted for soliciting or accepting bribes, only certain kinds of evidence may be used to prove the crime. In *United States v. Brewster*,[117] the Supreme Court held that a former Senator could be prosecuted for seeking and taking payments in exchange for votes on postal rate legislation.[118] The Court reasoned that "the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties

111. *Irons*, 973 A.2d at 1130.

112. *Id.* at 1131.

113. *Id.* at 1133.

114. *Id.* at 1134.

115. *Id.* at 1131.

116. U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.").

117. 408 U.S. 501 (1972).

118. *Id.* at 528–29.

and into the motivation for those acts."[119] In this instance, the government had to prove only that Brewster sought and accepted the bribes; the prosecutor did not have to establish that the Senator performed any legislative act in conformity with his promise.[120] This point was underscored in *United States v. Helstoski*,[121] which held that the government could not use evidence of past legislative actions by a member of Congress in a bribery prosecution.[122] Helstoski, a former Representative, was indicted for taking money to introduce private bills to suspend deportation orders against immigrants who wanted to remain in this country.[123] Although the Speech or Debate Clause precluded the introduction of evidence of past legislative actions, which undoubtedly would make bribery cases more difficult to prove,[124] the prosecution was free to use evidence of promises to perform future acts in exchange for illicit payments.[125]

In short, constitutional protections for legislators might complicate the process of forcing those officials who engage in bribery—probably the quintessential form of personal corruption—to account for their misdeeds. Keep in mind, however, that *Hardy* and *Irons* involved claims of conflict of interest—another form of conduct that promotes private gain at the expense of the public interest. Although the analysis of the Nevada and Rhode Island courts differed in certain respects, both cases suggest that only legislative bodies may enforce conflict of interest rules against their members. Of course, legislators are not the only officials who engage in corruption, but the prospects for vigorous enforcement of conflict of interest rules by legislatures against their own members do not seem very promising, at least if the pace of recent congressional investigations is any indication.[126]

119. *Id.* at 512.

120. *Id.* at 526.

121. 442 U.S. 477 (1979).

122. *Id.* at 494.

123. *Id.* at 479.

124. *Id.* at 487–88.

125. *Id.* at 489.

126. *See, e.g.*, Erich Lichtblau, *Congressional Ethics Inquiries Drag On, Despite Vows to End Corruption*, N.Y. TIMES, Oct. 18, 2009, at A21 (explaining how Congress has struggled to police itself even when its ethics committees were labeled as ineffectual). Recently, nearly two dozen House members co-sponsored a resolution to prevent the new Office of Congressional Ethics from initiating investigations without a sworn complaint from someone with personal knowledge of alleged wrongdoing and from releasing public statements about complaints for which it recommends dismissal. The resolution has drawn criticism from those who believe that these changes would make it more difficult to promote higher standards of conduct in Congress. *See* Eric Lipton, *20 in Black Caucus Ask for Curbs on Ethics Office*, N.Y. TIMES, June 1, 2010, at A17 (explaining the details of the proposed legislation and its drawbacks); *Fudge Factor; A*

III. CONCLUSION

Readers who have persevered to this point should not take these comments as a sign of despair. The task of preventing and punishing corruption presents daunting challenges, but we should put those challenges into perspective. I want to conclude with a seemingly paradoxical observation: corruption, at least to some extent, might actually serve some socially useful functions.

Earlier I quoted Madison's recognition of the fallibility of humanity.[127] More than a decade before Madison wrote, a member of the Continental Congress warned: "It is prudent not to put Virtue to too serious a Test. I would use American Virtue, as sparingly as possible lest We wear it out."[128] Both of these views take certain forms of behavior as all too common and therefore undesirable. Of course, crime and corruption fit into that category. But can they be eliminated? Should they be eradicated?

Most lawyers, indeed most people, believe that the answer to those questions is indubitably yes. Emile Durkheim, the great French sociologist, suggested a more nuanced response. Durkheim argued that crime occurs in all societies and that it is simultaneously "an inevitable though regrettable phenomenon" and "an integrative element in any healthy society."[129] Crime elicits widespread indignation and reinforces social norms about appropriate behavior. "From all the similar impressions exchanged and all the different expressions of wrath there rises up a single fount of anger, more or less clear-cut according to the particular case, anger which is that of everybody without being that of anybody in particular. It is public anger."[130]

If Durkheim is correct, we should regard a certain degree of corruption as inevitable. This does not mean, it bears emphasis, that we should treat corruption as appropriate. Instead, we should recognize that corruption harms the body politic and that it offends our sense of

Proposal by Rep. Marcia Fudge Would Gut the New Congressional Ethics Office, WASH. POST, June 4, 2010, at A18 (detailing the contents of the Fudge resolution).

127. *See supra* text accompanying note 12 ("If men were angels, no government would be necessary.").

128. John Adams, Notes of Debates in the Continental Congress (Oct. 5, 1775), *in* 2 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 192, 193 (L.H. Butterfield et al. eds., 1961). The speaker, John Joachim Zubly, was referring to the need for international trade, but the quotation has been used for broader purposes. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 95 (1969) (stating the doubts Americans had of the suitability of republicanism for their society circa 1775).

129. EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 98 (Steven Lukes ed. & W.D. Halls trans., 1982).

130. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 58 (W.D. Halls trans., 1984).

propriety, morality, and integrity. The fight against corruption, in other words, helps us gain "mutual assurance that [we] are still in unison."[131] Corruption, by reminding us of our common interests and dominant values, helps us define and reinforce who we are as a society.[132] But it can do so only if we continue to regard corruption as legally and morally unacceptable so that we can do our best to minimize the phenomenon. Our institutions that seek to combat corruption are imperfect, but imperfection does not mean that the battle against corruption is a failure. Perhaps we can design better institutions, but failure will come only when we see corruption exclusively as normal.

131. *Id.*

132. *See* KAI T. ERIKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE 4 (1966) (arguing that crime may actually draw people together in a common posture of anger and indignation, therefore developing a tighter bond of solidarity than previously existed).