

# The Restoration of Anti-Corruption as a Constitutional Principle

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## I. INTRODUCTION

“Corruption is more than a crime; it’s a threat to democracy.”  
 – Professor Michael Gilbert, Virginia School of Law<sup>1</sup>

This Note will explore the history of political corruption as a constitutional principle.<sup>2</sup> First, a definition of corruption will be established. Then, the Note will move through classical thought about corruption. Next, the Note’s historical analysis will examine 17<sup>th</sup> and 18<sup>th</sup> century British history where corruption existed as a political question,<sup>3</sup> the decisive reaction of the American founding fathers to constitutionalize anti-corruption<sup>4</sup> as a core principle,<sup>5</sup> and the 20<sup>th</sup> century movement in America back towards corruption as a political question. The historical analysis will end with modern America, where corruption is both a political question and ignobly enshrined as a constitutional principle in others.<sup>6</sup>

After concluding the historical analysis, this Note presents three prongs of modern political corruption: (1) direct and indirect

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\* J.D., University of Virginia School of Law, 2021. I would like to thank Professor A.E. Dick Howard for his kindness, insight, and encouragement to chase the ideas that keep me up at night. I also thank my wife Kandice Law for her support and for listening. All errors are my own.

<sup>1</sup> Eric Williamson, *Professors Want To Make Corruption CLEAR*, VA. L. NEWS & MEDIA (Nov. 4, 2019), <https://www.law.virginia.edu/news/201911/professors-want-make-corruption-clear> [<https://perma.cc/9GK9-2HXS>].

<sup>2</sup> See Appendix I for a visual representation of the spectrum of corruption and anti-corruption as a constitutional principle and its effects on form of government.

<sup>3</sup> Corruption as a political question refers to a system where the legislature has the constitutional authority to act against corruption but is not mandated to.

<sup>4</sup> The concept of anti-corruption as a constitutional principle refers to the idea that the legislature is not permitted to act in a way that would enable corruption to be explicitly barred in the Constitution.

<sup>5</sup> See Notes of Robert Yates (June 23, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 391, 392 (Max Farrand ed., 1911) [hereinafter RECORDS] (“But if we do not provide against corruption, our government will soon be at an end. . .”).

<sup>6</sup> The concept of corruption as a constitutional principle refers to the idea that the legislature is not permitted to act in a way that would limit corruption that is explicitly protected by the Constitution.

graft, (2) process corruption, and (3) contribution corruption.<sup>7</sup>

The first prong is split into direct and indirect graft but are part of the same prong because they are a complimentary pair. Direct graft includes classic bribery and is the only area of the analysis where anti-corruption remains a constitutional principle in modern America. This will be explored through an analysis of the impeachment of President Donald Trump. Indirect graft will be illuminated by presenting a case study of the Norcross Political Machine of Southern New Jersey. This Democratic party apparatus provides illustrative examples of many areas of “soft” or indirect corruption.

Second, the process corruption prong will be presented by discussing relevant jurisprudence and by showcasing various practices that result in process corruption, such as the use of phantom candidates, manipulative ballot construction, vote-by-mail schemes, voter ID laws, voter purging attempts, and gerrymandering.

Third, the current jurisprudence around contribution corruption will be presented along with an analysis of the effects of those rulings.

Human society has almost always had corruption as an element of government.<sup>8</sup> However, there are fundamental questions about how we treat it. Is corruption a necessary and valuable part of government efficiency? Ought anti-corruption be a constitutional principle, set for the ages, to prevent the misaligned interest of the current group of politicians from changing the rules to their benefit? Or, should corruption be a political question, impossible to define in permanence, and left to the wisdom of each generation to vote on? American society has answered these questions differently over time.

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<sup>7</sup> See Appendix II for a visual breakdown of the three prongs.

<sup>8</sup> See Hassan El-Saady, *Considerations on Bribery in Ancient Egypt*, 25 *STUDIEN ZUR ALTÄGYPTISCHEN KULTUR* [SAK] 295–304 (1998) (Ger.) (evidence of corruption in the judiciary); Eric W. Robinson, *Reexamining the Alcmeonid Role in the Liberation of Athens*, 43 *HISTORIA: ZEITSCHRIFT FÜR ALTE GESCHICHTE* [J. ANCIENT HIST.] 363–69 (1994) (Ger.) (story told by Herodotus about bribing of the Oracle of Delphi in return for political favors); *THE FEDERALIST* NO. 18 (James Madison) (Gideon ed., 2001) (history from Plutarch about corruption in ancient Greek courts in favor of the more powerful party).

## II. DEFINING CORRUPTION

“It is possible that these may all be insufficient to control the caprice and wickedness of men. But are they not all that government will admit, and that human prudence can devise?”

– James Madison, *The Federalist No. 57*<sup>9</sup>

The Oxford dictionary defines corruption as “dishonest or fraudulent conduct by those in power, typically involving bribery.”<sup>10</sup> This tracks the limited direct corruption that is illegal in modern America. A definition that includes forms of indirect corruption requires more. Anti-Corruption crusader and law professor Zephyr Teachout believes breaking down the etymology results in a better definition:

Corruption derives from the Latin *corrumpere*: to break up, to spoil. *Rumpo* means “to break, to shatter, to burst open, destroy, violate,” and *co* means “with,”- instead of two things breaking apart (*dirumpo*), or one thing breaking open (*erumpo*), corruption is when something breaks within itself: the apple rots on the shelf; narcissism corrodes the soul; government internally disintegrates. The integrity of the object of corruption is threatened by internal decay.<sup>11</sup>

Under Teachout’s definition, the heart of anti-corruption reveals itself: corrupt actions are acts taken by members of society that threaten the internal decay of the system of government by damaging the integrity of trust and core principles.<sup>12</sup>

### A. Classic and Enlightenment Thought

Plato believed that the most virtuous members of society, in his measure, the philosophers, ought to rule.<sup>13</sup> Plato expanded on the

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<sup>9</sup> THE FEDERALIST, *supra* note 8, No. 57, at 298 (James Madison) (suggesting that the founders tried to define corruption as best they could, and that if they could have foreseen other kinds of corruption, they would have included mechanisms to prevent it in the Constitution).

<sup>10</sup> *Corruption*, THE NEW OXFORD AMERICAN DICTIONARY (Elizabeth J. Jewell & Frank Abate eds., 2001).

<sup>11</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 347 (2009).

<sup>12</sup> *See id.*

<sup>13</sup> *See id.* at 350–51. *See generally* PLATO, THE STATESMAN (Benjamin Jowett trans., 3d ed., London, Oxford Univ. Press 1888).

importance of wisdom and virtue, calling them “the true blessings of life.”<sup>14</sup> Aristotle agreed with Plato regarding the importance of rulers who are wise and virtuous,<sup>15</sup> but believed a virtuous family or broader aristocracy could competently lead without corruption. For both Plato and Aristotle, virtue was the defense against corruption. For them, individual actions of corruption were exhibitiv symptoms of a societal corruption of virtue. If left unchecked, “[t]he imagined corruption of the ideal state and its decline to tyranny through descending stages of moral degradation can be read as a gradual assertion of individual self-interest and a retreat from commitment to the common good.”<sup>16</sup> Aristotle trusted the rich to be law-abiding<sup>17</sup> and believed corruption in the poor could be controlled with robust public education of societal values to promote virtuous social cohesion<sup>18</sup> and by ensuring the availability of constant work to prevent idle hands from seeking desperate solutions.<sup>19</sup>

During the Enlightenment, thought about corruption shifted back to secular government. In Baron de Montesquieu’s *The Spirit of the Laws*, Book VIII stands as his treatise on corruption and virtue. Reanimating the ancient Greeks, Montesquieu said, “the corruption of each government generally begins with that of the principles.”<sup>20</sup> Montesquieu continued, saying:

The corruption will increase among the corrupters, and likewise among those who are already corrupted. The people will divide the public money among themselves, and, having added the

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<sup>14</sup> See PLATO, *THE REPUBLIC OF PLATO* 221 (Benjamin Jowett trans., 3d ed., London, Oxford Univ. Press 1888).

<sup>15</sup> See ARISTOTLE, *POLITICS IV* 1289a30–32 (Benjamin Jowett trans., n.p. 1885).

<sup>16</sup> Richard Mulgan, *Aristotle on Legality and Corruption*, in *CORRUPTION, EXPANDING THE FOCUS* 25, 29 (Manuhaia Barcham, Barry Hindness & Peter Larmour eds., 2012). See ARISTOTLE, *POL III* 1279a28–32, (B. Jowett trans., n.p. 1885). Aristotle’s expression of corruption as putting self-interest over the common good when in a position of duty to the common good is an early expression of the macro definition this paper endorses for corruption generally. See *id.*

<sup>17</sup> See ARISTOTLE, *POLITICS IV* 1295b2–34 (Benjamin Jowett trans., n.p. 1885).

<sup>18</sup> See ARISTOTLE, *POLITICS V* 1310a14–18 (Benjamin Jowett trans., n.p. 1885).

<sup>19</sup> See ARISTOTLE, *POLITICS IV* 1293a17–19 (Benjamin Jowett trans., n.p. 1885).

<sup>20</sup> MONTESQUIEU, *THE SPIRIT OF THE LAWS* 130 (Thomas Nugent trans., 1912) (1748).

administration of affairs to their indolence, will be for blending their poverty with the amusements of luxury. But, with their indolence and luxury, nothing but the public treasure will be able to satisfy their demands.<sup>21</sup>

This prediction highlights the dangers of allowing corruption to become a political question. The incentives of politicians are misaligned with preventing corruption. Montesquieu predicted, as has often been the case, that corruption breeds more corruption.<sup>22</sup>

Montesquieu accepted that in any republic there is likely to be a ruling class, even if not an official aristocracy. Crucially, the political elite, or “reigning families,” must follow the law to have a successful government; if corruption is allowed to take root in the reigning families, “the government,” he predicted, “will devolve into a despotic state swayed by a great many despotic princes.”<sup>23</sup> “In an extensive republic,” he worried, “the public good is sacrificed to a thousand private views; it is subordinate to exceptions, and depends on accidents.”<sup>24</sup> Montesquieu argued that while virtue is a core necessity for a republic to function, there is an inherent risk that when a republic becomes too large or too successful, virtue may decline in the most powerful and influential members of society.<sup>25</sup>

### III. ANALYSIS OF BRITISH CORRUPTION FROM CHARLES I THRU THE GEORGIAN ERA

“You see with what zeal and vehemence these gentlemen oppose, and yet I know the price of everyman in this House except three.”

– Sir Robert Walpole in the House of Commons<sup>26</sup>

Corruption did not begin in England with Charles I, but his reign was in many ways defined by it. During his penultimate conflict with Parliament, ultimately ending in the British Civil War, the King argued that he was supreme because of the trust

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<sup>21</sup> *Id.* at 131.

<sup>22</sup> *See id.*

<sup>23</sup> *Id.* at 133.

<sup>24</sup> *Id.* at 140.

<sup>25</sup> *See id.*

<sup>26</sup> Anecdotes of Robert Walpole, in *WIT, WISDOM AND FOIBLES OF THE GREAT 625* (Charles Anthony Shriner, comp., Gale Research Co. 1918).

he had received from God. Henry Parker, a leading lawyer of the time, noted that “[t]he word *Trust* is frequent in the Kings Papers, and therefore I conceive the king does admit that his interest in the Crowne is not absolute, or by a mere donation of the people, but in part conditionate and fiduciary.”<sup>27</sup> The Puritan William Prynne also declared that the king was “in nature of the Heire of a Feoffee in trust, for the use and service of the kingdome. . . .” In other words, Parker and Prynne applied the legal notion of trust, which had largely been related to just private property, to public office.<sup>28</sup> Fundamental in the definition of corruption is the idea of a trust being broken leading to the decay of the integrity of the whole. This emergence of focus on trust during Charles I’s England through to colonial America is crucial to understanding the conceptions many of the Framers held regarding corruption.<sup>29</sup>

#### A. *Georgian Politics: Walpole, Burke, and Pitt*

Around seventy years after Charles I was executed, Sir Robert Walpole became the *de facto* first Prime Minister of Great Britain. While he is remembered for his accomplishments such as “sustaining the Whig party, safeguarding the Hanoverian succession, and defending the principles of the Glorious Revolution,”<sup>30</sup> he is also renowned for ushering a new age of political corruption.

During his tenure, Walpole and his government were relentlessly assaulted by the popular newspaper *The Craftsman* for perceived rampant corruption and a break in trust between Parliament and the citizenry.<sup>31</sup> The group chose the name

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<sup>27</sup> HENRY PARKER, OBSERVATIONS UPON SOME OF HIS MAJESTIES LATE ANSWERS AND EXPRESSES 4 (London, 1642).

<sup>28</sup> WILLIAM PRYNNE, THE SOVERAIGNE POWER OF PARLIAMENTS AND KINGDOMES 12 (n.p., 1643).

<sup>29</sup> See, e.g., John Adams, Letter LII, Rome, in 1 A DEFENCE OF THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA 334, 357 (Scientia Verlag Aalen 1979) (1797); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 135–36 (1967); 6 MARCUS TULLIUS CICERO, TULLY’S THREE BOOKS OF OFFICES 80 (T. Cockman ed., 6th ed., London, 1739); John M. Murrin, *Escaping Perfidious Albion: Federalism, Fear of Aristocracy, and the Democratization of Corruption in Post-revolutionary America*, in VIRTUE, CORRUPTION, AND SELF-INTEREST 103, 109 (R.K. Matthews ed., 1994).

<sup>30</sup> H.T. Dickinson, *Walpole, Sir Robert*, in READER’S GUIDE TO BRITISH HISTORY 1338 (David Loades, ed., 2003).

<sup>31</sup> See J.H. PLUMB, SIR ROBERT WALPOLE: THE KING’S MINISTER (1960);

“Craftsmen” to symbolize their intention to cut out corruption from their government, writing:

Let the Ax be laid to the Root of the Tree, if you would effectually stop the Growth of this Evil . . . The fame malignant Contagion has infected the other learned Faculties and polite Professions. It has crept into the Camp as well as the Court . . . and work'd itself into every Part of our Constitution, from the highest Offices of Life, down to the lowest Occupations, in a regular and gradual Descent.<sup>32</sup>

Due to a lack of constitutionalized protection against corruption, *The Craftsman* was largely unsuccessful in its battle against Walpole and he was never prosecuted successfully.<sup>33</sup>

While the British ultimately remembered Walpole fondly, his world of old corruption, “the widespread use of pensions, sinecures, and gratuitous emoluments granted to persons whom the British government . . . wished to bribe, reward or buy,”<sup>34</sup> was not defeated through a grand constitutional change. Rather, Walpole’s system was brought down by time and a change in political opinion about corruption.<sup>35</sup> Although the transition from Walpole’s corrupt government to a less corrupt government was a positive improvement accomplished through political means, the transition took nearly a century for the public to finally marshal the will to overcome the clout of the political elite. A century might seem like a reasonable amount of time for society to sort itself out, but in that time, four generations passed. People and their children lived their entire lives under a reign of political corruption.

Even in Georgian Britain, some acts were so flagrant that there were prosecutions. Reviewing these cases is illustrative as

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POLITICAL BALLADS ILLUSTRATING THE ADMINISTRATION OF SIR ROBERT WALPOLE (Milton Percival ed., 1916); CHARLES BECHDOLT REALEY, *THE EARLY OPPOSITION TO SIR ROBERT WALPOLE, 1720–1727* (1931).

<sup>32</sup> 1 CALEB D’ANVERS, *THE CRAFTSMAN* 5 (London, R. Franklin 1731).

<sup>33</sup> See PAUL LANGFORD, *A POLITE AND COMMERCIAL PEOPLE: ENGLAND 1727–1783*, 56 (1998).

<sup>34</sup> W.D. Rubinstein, *The End of “Old Corruption” in Britain 1780–1860*, 101 *PAST & PRESENT* 55, 55 (1983).

<sup>35</sup> See JOHN STEVEN WATSON, *THE REIGN OF GEORGE III 1760–1815*, 439 (George Clark ed. 1960). William Pitt the Younger served as Prime Minister from 1783 until 1801 and again from 1804 until 1806. See *id.* The “economic reform, the cutting away of sinecures and influence . . . had rather been Pitt’s quiet achievement.” *Id.*

to kinds of corruption that the American Framers would have thought about as worth constitutional prohibition.

1. Cases: The Trial of the Earl of Macclesfield, Action for False Imprisonment, and The Trials of R. Smith and T.B. Hollis

In 1725, the highest law officer in the land, Lord Chancellor Macclesfield, was prosecuted in Parliament for selling offices in the court of Chancery. During his trial, the Lord Chancellor argued that offices under his control were a private property and that “every man has a natural right to dispose of his own estate or interest, his own friendship or favour, upon what consideration he pleases.”<sup>36</sup> Thus, Macclesfield argued taking a bribe to use the power of his office was not a crime.<sup>37</sup> This argument was rejected and he was convicted. However, even such severe corruption was not considered a serious crime. He was fined £40,000, and no further action was taken.<sup>38</sup> This kind of case was a likely inspiration behind the American impeachment process that does not allow those convicted to hold offices of honor again.<sup>39</sup>

In a different case, Lord Coke declared that a judge cannot be questioned by other judges for corruption, except by the King.<sup>40</sup> For many in Britain, the authority to rule flowed from its divine source to the king, then to his ministers, then to the people. Lord Coke argued that because ministers are in the same point of the stream of trust, they cannot call each other’s performance of their oath to the king into question. The American Framers reimagined this flow of trust to go from God, to the people, to the government, and then, finally, to the officials of the government. In the American model, the people were always upstream.

In another case, two political actors, Mr. Smith and Mr. Hollis, arranged for an extensive scheme of bribing voters.<sup>41</sup> In considering the stream of trust presented above, these men

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<sup>36</sup> Trial of the Earl of Macclesfield, *in* 16 A COMPLETE COLLECTION OF STATE TRIALS 767, 1087 (London, T.B. Howell, comp., 1816).

<sup>37</sup> *See id.* at 1088.

<sup>38</sup> *See id.*

<sup>39</sup> *See* U.S. CONST. art. I, § 3, cl. 7.

<sup>40</sup> *Fabrigas v. Mostyn: Action for False Imprisonment*, *in* 20 A COMPLETE COLLECTION OF STATE TRIALS 82, 204 (London, T.B. Howell comp., 1814).

<sup>41</sup> Trials of R. Smith and T.B. Hollis for Bribery at the Hindon Election, *in* 20 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 40, at 1226.

appear to be convicted because they presumed to try and corrupt the connection between the king and his people. The Framers were concerned with this kind of local corruption of federal elections and explicitly gave the federal government a constitutional right to step in and correct local decisions found to be unwise.<sup>42</sup>

These cases show the British did not view corruption as a major crime. This attitude had a significant impact on early Americans as they often felt they were taken advantage of by the corrupt system. When America broke from the old world, the Framers changed the flow of trust.

#### IV. ANALYSIS OF CORRUPTION IN AMERICAN HISTORY: COLONIAL, FOUNDING, POST-CIVIL WAR AND FALL OF TAMMANY HALL

“Beware of the man who works hard to learn something, learns it, and finds himself no wiser than before. . . . He is full of murderous resentment of people who are ignorant without having come by their ignorance the hard way.”

– Kurt Vonnegut, *Cat's Cradle*<sup>43</sup>

The American story of corruption began with a promising movement towards embracing anti-corruption principles. Lessons hard earned through colonial toil ingrained in the Framers a deep commitment to constitutionalizing anti-corruption principles rather than relying on the virtue of the government on its own.

##### A. *The Colonial Era*

The colonial era in the American journey of corruption was one of reaction to perceived British corruption, attempts to work within the political system to reduce the corruption they felt, and ultimately a rejection of that system for a new government that definitively constitutionalized anti-corruption principles.

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<sup>42</sup> See U.S CONST. art. I, § 4, cl. 1.

<sup>43</sup> KURT VONNEGUT, JR., *CAT'S CRADLE* 136 (1963).

## 1. The Origin of Trust in America

In the Virginia Declaration of Rights of 1776, drafters wrote, “[t]hat all power is vested in, and consequently derived from, the people: that magistrates are their trustees and servants and at all times amenable to them.”<sup>44</sup> Additionally, five of the founding colonial charters specifically mention a trust granted for the benefit of the settlers.<sup>45</sup>

Perhaps more than any other founding father, John Adams focused on the concept of trust. To him, “[r]ulers are no more than the attorneys, agents and trustees, for the people. . . .”<sup>46</sup> Like attorneys, agents and trustees have robust rules to prevent direct and indirect corruption, John Adams believed so should the government. Like many of the Framers, John Adams’ education was based in a study of the classics. Through this, his sentiment about government being trustees was influenced by Cicero who wrote “[t]he Government of a State is much like the Office of a Guardian or Trustee; which should always be managed for the good of the Pupil, and not of the Persons to whom he is entrusted. . . .”<sup>47</sup> When colonists felt the government had irreparably corrupted the public trust, they were forced to act.

## 2. The Inception of Corruption in the New World

British-style corruption found no easy home in colonial American society. In one account, Virginia Lieutenant Governor Alexander Spotswood convinced the House of Burgesses to pass a bill to create lucrative tobacco inspectorships, of which he distributed to members that supported him.<sup>48</sup> In the next election, the corrupt members were defeated, but Spotswood dissolved the 1715 House of Burgesses as a push back against the

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<sup>44</sup> THE VA. DECLARATION OF RIGHTS art I, § 2 (1776).

<sup>45</sup> See CHARTER OF CONN. (1662). See also CHARTER OF CAROLINA (1665); CHARTER OF GA. (1732); THE FUNDAMENTAL CONST. FOR THE PROVINCE OF EAST N.J. IN AMERICA art. XVII (1683); CHARTER FOR THE PROVINCE OF PA. (1681).

<sup>46</sup> WILLIAM CRANCH, MEMOIR OF THE LIFE, CHARACTER, AND WRITINGS OF JOHN ADAMS 18 (D.C., S.A. Elliot, 1827).

<sup>47</sup> CICERO, *supra* note 29, at 80.

<sup>48</sup> See Randall Shrock, *Alexander Spotswood (1676–1740)*, ENCYCLOPEDIA VA. (July 25, 2011), [https://www.encyclopediavirginia.org/spotswood\\_alexander\\_1676-1740](https://www.encyclopediavirginia.org/spotswood_alexander_1676-1740) [https://perma.cc/7R3T-PXDA].

anti-corruption demands of the new members.<sup>49</sup> He stubbornly ruled without a legislature until 1718.<sup>50</sup>

In New York, the Lewis Morris political faction supported John Peter Zenger's *New York Weekly Journal* as North America's first political newspaper to force Governor William Cosby to call a general election. Instead, Cosby indicted Zenger for seditious libel.<sup>51</sup> Incidents like these were the seeds that spurred the uniquely American near-absolute commitment to freedom of speech amongst the Framers.

Across the colonies for fifty years leading up to the revolution, Americans struggled against corruption. These years of persistence entrenched the importance of having constitutional protections against corruption—rather than condemning the people to hoping rulers would be virtuous—in the minds of the Framers. The Framers wanted to trust the virtue of the American people, but they had the wisdom to, as the old Russian proverb says, set checks to verify it.<sup>52</sup>

### *B. The Framers' Decisive Reaction to Prevent British-Style Corruption*

“Liberty,’ John Adams wrote, ‘can no more exist without virtue and independence than the body can live and move without a soul,’ and what liberty can be expected to flow from England where . . . ‘both electors and elected are become one mass of corruption?’”<sup>53</sup> England, Adams declared, was “precisely at the point ‘where the Roman republic was when Jugurtha left it, and pronounced it “a venal city, ripe for destruction, if it can only find a purchaser.””<sup>54</sup> The Framers’ decision to form a constitutional

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<sup>49</sup> *See id.*

<sup>50</sup> *See id.*

<sup>51</sup> *See* Murrin, *supra* note 29, at 103, 109.

<sup>52</sup> *Doveryai, no proveryai*, GOOGLE TRANSLATE, <https://translate.google.com> (search in search bar for “doveryai, no proveryai”) [<https://perma.cc/H5N6-S5YS>] (last visited Oct. 18, 2020) (“Doveryai, no proveryai,” translates to “trust but verify.”).

<sup>53</sup> BAILYN, *supra* note 29, at 135–36.

<sup>54</sup> *Id.* *See also* John Adams, Letter LII, Rome, in 1 A DEFENCE OF THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA, *supra* note 29, at 334, 357 (“The nobles began to avail themselves of the high authority and advantages of their station, and to accumulate property as well as honours. . . . [T]hey brought back from their government a profusion of wealth ill acquired, and the habit of arbitrary and uncontrolled command. . . . [W]hen suddenly possessed of great wealth, they became the agents of corruption, to disseminate idleness and the love of ruinous amusements in the minds of the people.”).

government rather than a mirror of the British system was itself an acknowledgement of the importance of anti-corruption principles.

### 1. Framers' Definition of Corruption

To the Framers, the term 'corruption' did "not merely [mean] theft (that was covered by the word 'peculation'), but the use of government power and assets to benefit localities or other special interests ('factions')." <sup>55</sup> On their mind was Britain, "a great experiment in good governance [that] had fallen prey to the parochial interests of the monarch and of wealth-seeking individuals by way of payments and gifts of offices and titles." <sup>56</sup> The Framers understood corruption to be a failure of the trustees of the people to fulfill their duty with virtue and act in good faith for the common good. In other words, they believed that an individual is corrupt if he uses his public office primarily to serve his own ends. <sup>57</sup>

### 2. Elevating Corruption to a Constitutional Principle in Early America

During the constitutional convention, "Madison's notes record[ed] that [fifteen] delegates used the term 'corruption' no less than [fifty-four] times [and that] [e]ighty percent of these references were uttered by seven of the most important delegates, including Madison, Morris, Mason, and Wilson." <sup>58</sup>

James Madison described the goal of the Constitution and the reasoning behind that goal in *The Federalist No. 57*, writing they were "first, to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; [next], to take the most effectual precautions for keeping

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<sup>55</sup> Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 48 (2003).

<sup>56</sup> Karl A. Racine & Elizabeth Wilkins, *Enforcing the Anti-Corruption Provisions of the Constitution*, 13 HARV. L. & POL'Y REV. 449, 458 (2019) (citing ZEPHYR TEACHOUT, CORRUPTION IN AMERICA 18 (2014)). See also James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. POL. 174, 175 (1994).

<sup>57</sup> See Teachout, *supra* note 11, at 374.

<sup>58</sup> Savage, *supra* note 56, at 177.

them virtuous whilst they continue to hold their public trust.”<sup>59</sup> In the first half of the sentence he describes a Montesquieu-influenced affirmative goal of society; in the second half, he forcefully advocates for constitutional precautions to prevent the corruption of that goal because of the risk that, “in every political institution, a power to advance the public happiness, involves a discretion which may be misapplied and abused.”<sup>60</sup>

One great area of concern was the propensity of elected bodies to grant corrupt defense contracts for indefinite terms. To this end, the Framers placed anti-corruption principles in the Constitution to help prevent this element of corruption. Madison described that decision in *The Federalist No. 41*:

Now, if in Great Britain . . . where the electors are so corrupted by the representatives, and the representatives so corrupted by the crown, the representative body can possess a power to make appropriations to the army for an indefinite term, without desiring, or without daring, to extend the term beyond a single year; ought not suspicion herself to blush, in pretending that the representatives of the United States, elected FREELY by the WHOLE BODY of the people, every SECOND YEAR, cannot be safely intrusted with the discretion over such appropriations, expressly limited to the short period of TWO YEARS?<sup>61</sup>

Madison was writing about mistrust. Even in the most virtuous society, the Framers believed reasonable guardrails were necessary to prevent corruption of purpose. Madison’s Vice-President Elbridge Gerry wrote to a friend during the Constitutional Convention about his hopes for the document, penning, “they will not be engrafted with principles of mutability, corruption or despotism, principles which some, you and I know, would not dislike to find in our national constitution.”<sup>62</sup> This emphasizes how important constitutionalizing anti-corruption principles was to the Framers, as they did not believe thrusting off the yolk of the British crown would herald an age of unbridled virtue.

Thinking about the possibility of Representatives and Senators becoming improperly incentivized away from the public good, the

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<sup>59</sup> THE FEDERALIST, *supra* note 8, No. 57, at 295 (James Madison).

<sup>60</sup> *Id.* No. 41, at 207–08 (James Madison).

<sup>61</sup> *Id.* at 211.

<sup>62</sup> Letter from Elbridge Gerry to General Warren (Aug. 13, 1787), in 3 RECORDS, *supra* note 5, at 69, 69.

Framers included a clause that forbade Senators from holding other government posts while in office. They “considered it essentially necessary to preserve the integrity, independence, and dignity of the legislature, and to secure its members from corruption.”<sup>63</sup>

Some historians have argued that the Framers were more concerned primarily with moral and ethical corruption and the effects it might have on the society they hoped to create.<sup>64</sup> Indeed, “[c]orruption as a theme in Anglo-American social thought in the eighteenth century was not a monolithic notion.”<sup>65</sup> However, whichever philosophical route individual Framers took towards thinking about corruption, they took unprecedented steps to formally constitutionalize anti-corruption principles.

For all their designs against corruption, the Framers believed that even the cleverest plans could be undone if America one day found itself lacking Montesquieu’s concept of virtue in its electorate. In defending the Constitution, John Adams wrote, “[Congress] is a body of men which contains the greatest collection of virtues and abilities in a free government; is the brightest ornament and glory of the nation; and may always be made the greatest blessing of society, if it be judiciously managed in the constitution.”<sup>66</sup> Adams then posed an important question: “if it is not, it is always the most dangerous; nay, it may be added, it never fails to be the destruction of the commonwealth. What shall be done to guard against it?”<sup>67</sup> He recounted corruption in Venice, Geneva, Biscay, and Poland, commenting that when virtue failed, the governments failed to represent the people. Chillingly, Adams rejected the American exceptionalism espoused by Patrick Henry,<sup>68</sup> warning that “[t]here is no special providence

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<sup>63</sup> LUTHER MARTIN, GENUINE INFORMATION, (1788) in 3 RECORDS, *supra* note 5, at 172, 201.

<sup>64</sup> Jack P. Greene, *The Concept of Virtue in Late Colonial British America*, in VIRTUE, CORRUPTION, AND SELF-INTEREST, *supra* note 29, at 27, 40 (“[T]he sort of corruption that primarily worried colonial commentators was not political, but social and moral, corruption.”).

<sup>65</sup> Isaac Kramnick, *Corruption in Eighteenth Century English and American Political Discourse*, in VIRTUE, CORRUPTION, AND SELF-INTEREST, *supra* note 29, at 55, 74.

<sup>66</sup> John Adams, Letter XXV, Dr. Franklin, in 1 A DEFENCE OF THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA, *supra* note 29, at 105, 116–17.

<sup>67</sup> *Id.*

<sup>68</sup> Speech of Patrick Henry on the Expediency of Adopting the Federal Constitution (June 7, 1788) (delivered in the Convention of Virginia), in

for Americans, and their natures are the same with others.”<sup>69</sup>

*C. Post-Civil War Amendments Address Corruption*

After the Civil War through Reconstruction, anti-corruption remained thought of as a constitutional principle. Concerns about corruption rallied the ratification of post-Civil War constitutional amendments. The prohibition of slavery, due process, equal protection, and African American enfranchisement all address concerns about the likelihood of corruption of the public trust by state governments. When Reconstruction ended with the Compromise of 1877 and Samuel Tilden was denied the Presidency in favor of Rutherford B. Hayes despite receiving a majority of the popular vote, anti-corruption began to lose favor against political expediency.

Although future Amendments addressed corruption,<sup>70</sup> two twentieth century political regimes exemplified American politicians using corruption to maintain power: Jim Crow in the South and the rise of Tammany Hall<sup>71</sup> in the North. Anti-corruption crusaders found little success in moving forward constitutional prohibitions against the increasingly entrenched power and deep pockets of those benefiting from corruption. Rather than try and beat them with the rules, reformers, at least in the North, found success beating them at the ballot box. In many southern states, minorities still live in a society where their government systemically works to prevent their enfranchisement,

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AMERICAN ORATORY 54, 59 (Edward Biddle ed., 1840) (“[I]f our senators will not be corrupted, it will be because they will be good men, and not because the constitution provides against corruption; for there is no real check secured in it, and the most abandoned and profligate acts may with impunity be committed by them.”). Henry implicitly poses the same question as Adams: if virtue degrades, what more can be done to stop it? See John Adams, Letter XXV, Dr. Franklin, *supra* note 66, at 116.

<sup>69</sup> John Adams, Letter XXV, Dr. Franklin, *supra* note 66, at 121.

<sup>70</sup> TEACHOUT, *supra* note 56, at 5 (“The Seventeenth Amendment (allowing for the direct election of Senators) and the Twenty-Seventh Amendment (providing that Congressional salary raises do not take effect until the beginning of the next session of Congress).”).

<sup>71</sup> Tammany Hall was a Democratic political organization based in New York City that came to embody the practice of using patronage to reward loyalty. See History.com Editors, *Tammany Hall*, HISTORY (Dec. 2, 2009) <https://www.history.com/topics/us-politics/tammany-hall> [<https://perma.cc/2WL7-KE9M>]. Huey Long created a similar political machine in Louisiana. See History.com Editors, *Huey Long*, HISTORY (Nov. 9, 2009), <https://www.history.com/topics/crime/huey-long> [<https://perma.cc/D9NN-844D>].

opportunity, and civil liberties.

*D. The Rise and Fall of Tammany Hall: Modern Political  
Corruption Doctrine*

At the turn of the century, there was debate about whether corruption was wrong or an admirable American trait that should be respected and protected. Politicians who benefited from the political machine system of graft openly admitted it. Senator Plunkitt was one of the Tammany Hall leaders that publicly advocated for the benefits of what he called “honest graft”:

They didn't steal a dollar from the city treasury. They just seen their opportunities and took them. That is why, when a reform administration comes in and spends a half million dollars in tryin' to find the public robberies they talked about in the campaign, they don't find them. . . . All they can show is that the Tammany heads of departments looked after their friends, within the law, and gave them what opportunities they could to make honest graft.<sup>72</sup>

James Emmet Finegan, an anti-Tammany Democrat, provided the opposing argument in his 1933 campaign, “Tammanyism is . . . both result and cause. It causes corruption and results from corruption. It causes inefficiency and thrives upon it. It starts wherever there is corruption, favoritism, or bungling in government and multiplies them to gratify its own appetite and perpetuate its own power.”<sup>73</sup> Finegan argued that one of the main reasons for Tammany's waning influence by the 1930s was because of the increased circulation of newspapers that educated readers about Tammany evils.<sup>74</sup> At the head of the political debate against Tammany was Franklin D. Roosevelt. His victories for governor and president showed that the machine could be defeated at the ballot box. However, rather than push for amendments that struck at the heart of American corruption, one machine was replaced by another. No stake found corruption's heart, encouraging political machines to rise in the

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<sup>72</sup> Senator George Washington Plunkitt, *Honest Graft and Dishonest Graft*, in PLUNKITT OF TAMMANY HALL 3, 8 (William L. Riordon ed., 1905).

<sup>73</sup> JAMES E. FINEGAN, TAMMANY AT BAY 3 (1933).

<sup>74</sup> See *id.* at 8.

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V. THREE-PRONGS OF POLITICAL CORRUPTION: ILLUSTRATIVE  
CASE STUDIES

“We must not make a scarecrow of the law,  
Setting it up to fear the birds of prey,  
And let it keep one shape, till custom make it  
Their perch and not their terror.”  
– Angelo in William Shakespeare’s *Measure for Measure*<sup>75</sup>

Constitutional protections against corruption have not substantially expanded since Reconstruction. This stagnation has allowed corrupt actors to become more devious in their machinations and more creative in their explanations.

The Supreme Court has only been willing to defend constitutional principles around direct corruption. This occurs when government officials illegally abuse public office for private gain through *quid pro quo* transactions, including acts of bribery. The other fork under graft corruption is indirect graft corruption, which occurs when elected officials make decisions and award public contracts without regard for the public interest “with the purpose of serving a relatively small group of political funders and spenders, rather than decision-making that is done with the purpose of serving the people.”<sup>76</sup> As this Note has argued, the Framers were intensely concerned with this latter type of corruption and hoped to prevent it from gaining a foothold in American society.

The second of the three prongs, process corruption, includes all efforts to manipulate election processes to decrease the voice or enfranchisement of opposing groups. Practices like demanding voter ID cards, gerrymandering, and ballot manipulation are all common ways in which this corruption is present in modern America.

The final prong of corruption is contribution corruption. This deals with the unspoken *quid pro quo* that occurs when contributions are made to legislators with an expectation that legislators will be allies on crucial votes and in the public debate

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<sup>75</sup> WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 2., sc. 3, <http://shakespeare.mit.edu/measure/full.html> [<https://perma.cc/J4AF-AFBG>].

<sup>76</sup> M. Patrick Yingling, *Conventional and Unconventional Corruption*, 51 DUQ. L. REV. 263, 264 (2013) (emphasis omitted).

of issues the donor cares about. Harvard Constitutional Law Professor Lawrence Lessig calls this “dependence corruption” due to an elected official’s dependence on campaign contributions in order to be elected<sup>77</sup> and elected officials can only feed this dependency if they can provide something of value to their suppliers, who are often political bosses, private companies, or lobbyists.<sup>78</sup> These suppliers demand access into the electoral and governing process through campaign finance and lobbying, and often seek patronage in the form of government contracts or specific votes on regulations that will benefit their private interests. Even though “[s]uch practices, all of which pass legal muster, are unethical and work against the public interest. . . . [N]o one should dismiss them by saying, ‘That’s politics.’”<sup>79</sup> Although engaging with wealthy donors, lobbyists, and political bosses is not *per se* soft corruption, it is often enough that it ought to be prevented. However, many of those practices have been protected from prohibition under Free Speech doctrines despite the idea that Free Speech is meant to be our ultimate weapon to fight against corruption.

The Court, unlike the Framers, seems blissfully willing to trust in the virtue of American citizens to vote out corruption, but stubbornly unwilling to provide the citizens any support to do so, even going so far as to prevent legislatures from acting against perceived corruption.

### A. *Graft Corruption*

Under graft corruption, this Note will use two case studies, one from each party: the presidency of Donald Trump and the Norcross Machine of Southern New Jersey.

#### 1. Direct Graft: President Donald Trump

This Note will focus on the broad fit of the allegations against President Trump and how they relate to the constitutional

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<sup>77</sup> LAWRENCE LESSIG, *REPUBLIC, LOST* 17 (2011).

<sup>78</sup> *See id.* at 104.

<sup>79</sup> NJ Spotlight Staff, *How Soft Corruption Works in New Jersey*, WHYY (Aug. 24, 2017), <https://whyy.org/articles/book-highlights-how-easy-it-is-for-politicians-to-steal-money-legally/> [<https://perma.cc/VDW8-N3PE>] (quoting WILLIAM E. SCHLUTER, *SOFT CORRUPTION* 19 (2017)).

principle of anti-corruption. Rather than argue the truth of the allegations, this Note will consider the allegations and how they fit with constitutional corruption if they were true. The allegations against the President are: (1) he and his campaign team colluded with a foreign country to win the presidential election in 2016 against Sec. Hillary Clinton and (2) while in office, tried to force the leader of another country into manufacturing an investigation into the family of one of his chief political rivals by conditionally withholding aid allocated by Congress to go to that leader's country. The former was the subject of the Special Counsel investigation. The latter was the subject of his impeachment.

The Framers deeply considered the corruptive influence of foreign countries on American government. Alexander Hamilton specifically warned about this issue, writing, "of the weak sides of republics, among their numerous advantages, is, that they afford too easy an inlet to foreign corruption."<sup>80</sup> In John Adam's inaugural address, he warned of "the pestilence of foreign influence, which is the angel of destruction to elective governments."<sup>81</sup> George Washington famously cautioned America to stay out of foreign wars, implying that foreign influence should be kept out of America.<sup>82</sup>

This is one area where the courts have largely upheld anti-corruption as a constitutionally protected principle with the exception of in *Bluman v. FEC*, then Circuit Court Judge Brett Kavanaugh read any "issue advocacy" out of the 2002 McCain–Feingold law that sought to prevent foreign campaign spending.<sup>83</sup>

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<sup>80</sup> THE FEDERALIST, *supra* note 8, NO. 22, at 109 (Alexander Hamilton).

<sup>81</sup> President John Adams, Inaugural Address (March 4, 1797), UVA MILLER CTR.: PRESIDENTIAL SPEECHES, <https://millercenter.org/the-presidency/presidential-speeches/march-4-1797-inaugural-address> [<https://perma.cc/5TUD-2XRT>] (last visited Nov. 14, 2020).

<sup>82</sup> President George Washington, Washington's Farewell Address (1796), YALE LAW SCH.: THE AVALON PROJECT, [https://avalon.law.yale.edu/18th\\_century/washing.asp](https://avalon.law.yale.edu/18th_century/washing.asp) [<https://perma.cc/M6TR-STFF>] (last visited Nov. 14, 2020) ("It opens the door to foreign influence and corruption, which finds a facilitated access to the government itself through the channels of party passions.").

<sup>83</sup> *Bluman v. FEC*, 800 F. Supp. 2d 281, 284, 290 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012) (noting the Court's interpretation of the statute "does not restrain foreign nationals from speaking out about issues or spending money to advocate their views about issues. It restrains them only from a certain form of expressive activity closely tied to the voting process—providing money for a candidate or political party or spending money in order to expressly advocate for or against the election of a candidate.").

While the ruling did allow the government to “exclude foreign citizens from activities ‘intimately related to the process of democratic self-government,’”<sup>84</sup> it created a loophole that the Russian government allegedly exploited in the 2016. This loophole allowed foreign speech in elections if the speech did not specifically advocate for the election of a candidate. This perhaps overzealous defense of free speech has potentially opened the door for constitutional protections against direct graft to be eroded. Even with this loophole, the direct collusion with a foreign nation for help with a campaign would violate campaign finance laws and the spirit underlying our entire democracy. If President Trump did coordinate with Russia to win the 2016 election as alleged, a future Madison feared has arrived: one where American leaders have become “the dupes, or the hirelings, of the common enemy.”<sup>85</sup>

The Framers believed the impeachment procedure would be enough to prevent the corruption of the President. Because the impeachment procedure is explicit both in its process and its punishment, it has endured as a guardrail against presidential corruption.

The inquiry into Donald Trump has been met with tremendous partisan battle. Even so, Hamilton mused about this scenario and believed even if the legislature were full of corrupt members, “[w]e may thus far count upon their pride, if not upon their virtue,”<sup>86</sup> to convict a guilty president. As President Trump was not convicted by the Senate, Hamilton’s bet may finally be lost. The Framers knew we would not always have a George Washington to lead the nation. James Winthrop, writing as Agrippa in the *Massachusetts Gazette* said, “[l]et us not flatter ourselves that we shall always have good men to govern us.”<sup>87</sup> Hamilton, writing as Cæsar, worried about future leaders that might put their own interests ahead of the public: “[t]he great source for all the evils which afflict Republics, is, that the people are too apt to make choice of rulers, who are either Politicians without being Patriots, or Patriots without being Politicians.”<sup>88</sup>

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<sup>84</sup> *Id.* at 287 (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)).

<sup>85</sup> THE FEDERALIST, *supra* note 8, NO. 18, at 85 (James Madison).

<sup>86</sup> *Id.* No. 66, at 347 (Alexander Hamilton).

<sup>87</sup> James Winthrop, *Agrippa*, XVII, MASS. GAZETTE, Jan. 20, 1788, *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 113, 117 (Brooklyn, Paul Leicester Ford ed. 1892).

<sup>88</sup> Alexander Hamilton, *Cæsar*, II, N.Y. DAILY ADVERTISER, Oct. 17, 1787,

The Framers created the process of impeachment to constitutionalize the anti-corruption principle of removing a corrupt leader. It has endured because, unlike anti-corruption principles left as political questions, impeachment is enshrined in the Constitution and protected from temporary corrupt actors.<sup>89</sup> However, even with this clear constitutional provision, protecting anti-corruption as a principle may have transformed into a political question during the Trump impeachment trial. Ultimately, the impeachment clause's fate as a fundamental bastion against corruption may be determined by the political fallout of its use against President Trump. If he wins another term, the impeachment clause's efficacy to deter executive overreach may permanently wane.

## 2. Indirect Graft: The Norcross Machine of Southern New Jersey<sup>90</sup>

As a society, we have become more attuned to the direct graft. However, when some of those same corrupt actions are taken

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reprinted in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES*, *supra* note 87, at 283.

<sup>89</sup> See Thomas Jipping & Hans von Spakovsky, *The Impeachment Process: The Constitution and Historical Practice*, HERITAGE FOUND. (July 29, 2019), <https://www.heritage.org/political-process/report/the-impeachment-process-the-constitution-and-historical-practice> [<https://perma.cc/C5KQ-8X67>] (Although, even the most strident anti-corruption principles require members of government to follow them. If the Senate refuses to do its constitutional duty by making a farce of the trial, anti-corruption as a principle might be truly dead in modern America.)

<sup>90</sup> Like the previous section that addressed the alleged corruption of President Donald Trump and discussed the subject with the presumption that the allegations were true in order to discuss the constitutional implications rather than debate the merit of the claims, this section will proceed in a similar manner. One of the challenges in studying political corruption is the grey area that much of it sits in, falling somewhere between illegal and corrupt, if not necessarily illegal. There is no better example of that than the recent Supreme Court case *Kelly v. United States*, 140 S. Ct. 1565 (2020), where Justice Kagan wrote a unanimous opinion for the Court exonerating the convicted politicians involved in the "Bridgegate" scandal during the Christie Administration in New Jersey of their criminal liability. Despite the exoneration, Justice Kagan wrote, "The evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power. But the federal fraud statutes at issue do not criminalize all such conduct." *Id.* at 1568. This Note does not accuse anyone, President Trump or the Norcross Machine, of illegal behavior. Rather, this Note seeks to discuss actions as they may fit into the theoretical debate of how corruption ought to be treated in our society's decision of how to treat political corruption as a constitutional question.

indirectly, corrupt actors become extremely difficult to prosecute both because of the obscured nature of their actions as well as the way the law often fails to entirely encapsulate all actions that might reasonably be considered corrupt. One example in modern America is the “Norcross Machine”<sup>91</sup> of Southern New Jersey, named for a trio of brothers: insurance executive and political boss George Norcross, lawyer and lobbyist Phil Norcross, and former New Jersey State Senator and current United States Congressman Donald Norcross.<sup>92</sup> Through decades<sup>93</sup> of alleged indirect corruption, their political machine has generated billions of dollars in soft corruption<sup>94</sup> and quietly changed the face of politics in America.

The Norcross Machine began when George went all in on an old political principle credited to Mark Hanna, the famed Republican kingmaker from the turn of the century, who said, “[t]here are two things that are important in politics. The first is money, and I can’t remember the second.”<sup>95</sup> Beginning in the

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<sup>91</sup> Steve Volk, *George Norcross: The Man Who Destroyed Democracy*, PHILA. MAG.: CITY LIFE (Mar. 29, 2013), <https://www.phillymag.com/news/2013/03/29/george-norcross-man-destroyed-democracy/> [<https://perma.cc/FA7M-VQ7A>] (named because of the long history of calling political organizations “machines” as well as possibly from George Norcross’ own way of describing the organization he built: “[w]hat we have here, and I say ‘we’ because it’s not just me, is a sophisticated apparatus that . . . achieves a result.”).

<sup>92</sup> These examples can be very difficult to identify without intimate local experience. I have chosen the Norcross example because of my personal experience in South Jersey. In addition to growing up in Camden County, I also ran for U.S. Congress against Donald Norcross in the Democratic primary in 2016. Acknowledging that bias, I have avoided references to that specific election where possible. Additionally, I want to reiterate that the selection of the Norcross organization is not out of a desire to stain their record. If that were my desire, a law article on constitutional philosophy would be just about the least effective manner by which to achieve that goal. I discuss the Norcross organization here because of my extensive knowledge of political life in Southern New Jersey, which I hope can provide a more vivid picture of some of the practices various political organizations are utilizing across the country.

<sup>93</sup> See generally TOM KNOCHE, COMMON SENSE FOR CAMDEN: TAKING BACK OUR CITY (2005) (discussing a history of the Norcross Machine’s actions in the 1990s, which are not exhaustively examined in this paper).

<sup>94</sup> See WILLIAM E. SCHULTER, SOFT CORRUPTION, ix (2017) (defining soft corruption as inherently legal in most instances, even if it is immoral and ought to be unconstitutional).

<sup>95</sup> Bruce Bartlett, *Money and Politics*, FORBES (Jun. 11, 2009, 11:01 PM), <https://www.forbes.com/2009/06/11/terry-mcauliffe-virginia-primaries-opinions-columnists-fundraising.html#52f6e0952b77> [<https://perma.cc/M8P3-WC4E>]. See KNOCHE, *supra* note 93, at 17 (showing the different groups who give money to political campaigns in exchange for privileges and benefits).

early 1990s, as the Camden County Democratic Party Chairman, George aggressively worked to place allies in key positions from state office down to local political committee positions.<sup>96</sup> Once in place, the machine politicians closed ranks, making it extremely difficult for any outsider to get a foothold to run for any office at any level in the Democratic party.<sup>97</sup> George boasted about his hold over all offices, including the Governor's mansion on the infamous Palmyra tapes where he was secretly recorded as part of a corruption investigation,<sup>98</sup> saying, "I'm not going to tell you this to insult you, but in the end the McGreeveys, the Corzines, they're all going to be with me. Not because they like me, but because they have no choice."<sup>99</sup>

Progressive Democrats in South Jersey allege that George and his network of business associates provided fundraising support for candidates, and that once candidates were elected, George "leverage[d] his political power to gain public contracts"<sup>100</sup> by expecting the candidates to support anti-competitive bidding for municipal, county, and state contracts for the business part of George's network.<sup>101</sup> To remove opposition media, George bought the largest newspaper in the region, *The Philadelphia Inquirer*.<sup>102</sup> Additionally, lucrative bills were written by then State Senator Donald Norcross and lawyers from Parker McKay, where

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<sup>96</sup> See Volk, *supra* note 91.

<sup>97</sup> See *Boss Tweed Biography*, BIOGRAPHY, (Jan. 2, 2015), <https://www.biography.com/political-figure/boss-tweed> [<https://perma.cc/5XKE-8Q8J>] (this behavior embraces the William Magear "Boss" Tweed ideal of "I don't care who does the electing, so long as I get to do the nominating.").

<sup>98</sup> See Volk, *supra* note 91 (states that no charges were ultimately filed due to George's behavior).

<sup>99</sup> *Id.*

<sup>100</sup> *Camden County Progressive Groups Picket Norcross Rally in Blackwood*, INSIDER NJ (Feb. 29, 2020, 2:30 PM), <https://www.insidernj.com/press-release/camden-county-progressive-groups-picket-norcross-rally-blackwood/> [<https://perma.cc/R55T-HSNK>].

<sup>101</sup> See Kate Delany, *Norcross' Political Machine Collects Millions from Local Governments, Dem Chairwoman Says*, NJ.COM (Sept. 25, 2019), <https://www.nj.com/opinion/2019/09/norcross-political-machine-collects-millions-from-local-governments-dem-chairwoman-says.html> [<https://perma.cc/E95C-6CR3>].

<sup>102</sup> See Steve Volk, *George Norcross Now the Majority Owner of Inquirer, Daily News, Philly.com*, PHILA. MAG.: CITY LIFE (Dec. 9, 2013, 1:00 PM), <https://www.phillymag.com/news/2013/12/09/george-norcross-now-majority-owner-inquirer-daily-news-philly-com/> [<https://perma.cc/TLP8-UNJ5>] (describing Norcross's buyout before he was later sued by his partners and removed as owner).

George's brother Phil Norcross was the managing shareholder, and other allies in state government to bring huge tax credits to companies that support George's political machine.<sup>103</sup>

### 3. Tax Credit Scheme

Tax incentive schemes are bad public policies.<sup>104</sup> But, they are not inherently corrupt. The New Jersey Economic Opportunity Act of 2013, however, was both bad policy and one of the most horrific examples of indirect corruption in American history. New Jersey's current governor, Phil Murphy, has launched a formal investigation into the law, and his task force has issued a "scathing" review of the Norcross machine's role,<sup>105</sup> but to date, no formal charges have been filed, as the machine wrote the law in a way that allowed corruption. This is the danger of corruption being thought of as a political question. Without firm prohibitions against violating the trust of the people, creative lawyers find ways to write confusing bills that steal from the public for private gain.

In this case, a group of companies wanted the state to give them sellable tax credits. The owners of those companies banded together to contribute to the campaigns of a large group of politicians. When that group of politicians won their elections, the companies directed their law firm to assist loyal politicians in writing a bill to create a tax credit scheme. In order to qualify for the credits, the new law stated a company had to be one considering moving out of state, for which the bar was set very low, and be willing to move into certain cities where the companies already had huge influence; a company that had a

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<sup>103</sup> See Matt Friedman & Ryan Hutchins, *The Camden Exception: Lawyer for Norcross-Linked Firm Wrote Key Part of Tax Credit Law*, POLITICO (May 10, 2019, 5:00 AM), <https://www.politico.com/states/new-jersey/story/2019/05/10/the-camden-exception-lawyer-from-norcross-firm-wrote-key-part-of-tax-credit-law-1012464> [https://perma.cc/675N-52AQ].

<sup>104</sup> See SHEILA REYNERTSON, N.J. POLICY PERSPECTIVE, REINING IN CORPORATE TAX SUBSIDIES: A BETTER ECONOMIC DEVELOPMENT PLAYBOOK FOR NEW JERSEY 1, 1–3 (2019), <https://www.njpp.org/wp-content/uploads/2019/11/NJPP-Report-Reining-in-Corporate-Tax-Subsidies.pdf> [https://perma.cc/S4T4-BAMT].

<sup>105</sup> Matt Friedman & Katherine Landergan, *EDA Task Force Issues Scathing Report with Heavy Focus on Norcross-Linked Firms*, POLITICO (June 17, 2019, 10:34 PM), <https://www.politico.com/states/new-jersey/story/2019/06/17/eda-task-force-issues-scathing-report-with-heavy-focus-on-norcross-linked-firms-1065486> [https://perma.cc/ZA3U-234A].

headquarters less than five miles from these cities would qualify even if it did not actually create any new jobs but rather merely moved the jobs from the neighboring town into the city.<sup>106</sup> The law had no requirements that any “jobs created,” even temporary construction jobs, had to go to residents of the cities the law insincerely said to be created to help.<sup>107</sup> After just five years, nearly five billion dollars had been awarded with a cost of hundreds of thousands of dollars per “new” job.

In a particularly egregious award of tax credits, New Jersey’s analysis at the time of award indicated that for the \$260 million tax credit to Holtec,<sup>108</sup> “the net benefit to taxpayers would be tiny: \$155,520 in potential benefits for the state over 35 years, including new tax revenue, as well as the creation of 235 new jobs and the retention of 160 jobs. That is about \$650,000 in tax credits for each job.”<sup>109</sup> George Norcross’s insurance firm, Conner Strong & Buckelew, also benefited, receiving approval for an \$86.2 million tax credit to relocate to an 18-story office tower in Camden. “Companies relocating to Camden have been awarded \$1.6 billion of the \$4.9 billion” awarded across the state, as a last-minute change to the bill carved out special bonuses and lenient rules for companies moving there.<sup>110</sup>

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<sup>106</sup> *See id.* Even with a very low bar, the companies trying to take advantage of the law may have totally ignored even the strawman requirements by lying about considering out of state locations. *See* Nick Corasaniti & Matthew Haag, *The Tax Break was \$260 Million. Benefit to the State was Tiny: \$155,520*, N.Y. TIMES (May 1, 2019), <https://www.nytimes.com/2019/05/01/nyregion/nj-tax-break-kevin-sheehan.html> [<https://perma.cc/R4WU-W2T8>] (“New Jersey’s Economic Development Authority [the agency created to be responsible for the applications] said Holtec had received a similar offer of tax credits from South Carolina. But the mayor of Charleston. . . [and t]he Charleston Regional Development Alliance. . . said [they were] also unaware of the company weighing a move there.”).

<sup>107</sup> Catherine Dunn, *N.J. Tax-Break Projects Hired Just 27 Camden Residents for Construction Jobs, a State Analysis Found*, PHILA. INQUIRER (Sept. 12, 2019, 9:51 AM), <https://www.inquirer.com/business/nj-tax-breaks-camden-jobs-construction-economic-development-authority-20190912.html> [<https://perma.cc/2QAH-ZVAE>] (stating that only two percent of construction jobs went to Camden residents).

<sup>108</sup> Holtec is a company of which George Norcross sits on the board. *George E. Norcross*, HOLTEC INTERNATIONAL: BOARD OF DIRECTORS, <https://holtecinternational.com/company/leadership/board-of-directors/george-e-norcross/> [<https://perma.cc/TM6S-T4LQ>] (last visited Nov. 15, 2020).

<sup>109</sup> Corasaniti & Haag, *supra* note 106.

<sup>110</sup> *Id.* *See also* NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY, OFFICE OF THE STATE COMPTROLLER, A PERFORMANCE AUDIT OF SELECTED STATE TAX INCENTIVE PROGRAMS 9 (2019), [https://www.state.nj.us/comptroller/news/docs/eda\\_final\\_report.pdf](https://www.state.nj.us/comptroller/news/docs/eda_final_report.pdf) [<https://perma.cc/SND9-QENN>].

Governor Murphy's statement on the tax credit scheme is shockingly blunt coming from a politician of the same party as those responsible for the gargantuan soft corruption; "[i]t is time to put this broken system—a system that has become a national embarrassment—behind us. . . ."<sup>111</sup> However, even with a full-scale investigation that may or may not bring about indictments there is nothing stopping this machine, or another machine, from doing a similar thing in the future while soft corruption remains a political question.

#### 4. Local Contracts

The backbone of any political machine is an ability to provide patronage to its supporters. The Norcross machine is no different. It has an iron grip on state, county, and local contracts south of Trenton, New Jersey.<sup>112</sup> For example, more than \$1 million in no-bid contracts were awarded by the state-controlled Camden School District, many to firms connected with the Norcross machine.<sup>113</sup> Among the professional service agreements approved were contracts with the law firms of Brown & Connery;<sup>114</sup> Parker McKay; and Florio Perucci Steinhardt Capelli Tipton & Taylor.<sup>115</sup>

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<sup>111</sup> Press Release, Office of N.J. Governor Phil Murphy, Statement by Governor Murphy on N.Y. Times Investigative Story on Tax Incentives (Sept. 24, 2019), <https://www.nj.gov/governor/news/news/562019/20190924b.shtml> [<https://perma.cc/4M3Y-6J5P>].

<sup>112</sup> Other political machines largely control North Jersey. But it is split, and there are some areas where no machine has corruptive control.

<sup>113</sup> See Melanie Burney, *Camden Advocates Want State to Rescind City School Contracts Awarded to Firms with Ties to George Norcross III and Other Leading Democrats*, PHILA. INQUIRER (Aug. 2, 2019), <https://www.inquirer.com/news/camden-school-norcross-murphy-democrats-contracts-20190803.html> [<https://perma.cc/U4S5-4CF9>].

<sup>114</sup> Attorney William Tambussi, a partner of Brown & Connery, is representing Norcross in connection with a governor's task force investigating the New Jersey Economic Development Authority. Ted Sherman, *Murphy Law Charge Democratic Power Broke with Intimidation after Legal Warning Letter Sent Directly to Governor's Home*, NJ.COM (May 17, 2019), <https://www.nj.com/politics/2019/05/murphy-lawyers-charge-democratic-power-broker-with-intimidation-after-legal-warning-letter-sent-directly-to-governors-home.html> [<https://perma.cc/5QSK-YWYN>]. He is also the Norcross family's long-time lawyer. See *id.*

<sup>115</sup> Partners include former machine politician and Governor, James J. Florio, and current machine leader and Director of the Camden County Board of Chosen Freeholders, Lou Cappelli Jr. See *Attorneys, FLORIO PERUCCI STEINHARDT CAPELLI TIPTON & TAYLOR LLC*,

Mike Friedman, a former Committeeman in Voorhees Township in Southern New Jersey, has been a frequent critic of no-bid contracts awarded to political allies of the machine, often at non-competitive rates. In an open letter to his hometown newspaper, he penned that in five instances in a single appropriations session, “the professionals selected were considerably more expensive than one or all of their competitors who likewise had responded . . . [and] in some cases either did not present the proper qualifications or were not the best suited for the position.”<sup>116</sup> This kind of indirect, soft corruption is present in nearly every town in the Garden State.

In South Jersey, municipal insurance contracts have been conglomerated into a joint insurance fund (JIF) to theoretically save taxpayers money.<sup>117</sup> But it just makes it easier for the machine to direct lucrative contracts to the Norcross-owned firm Connor Strong & Buckelew.

Conner Strong & Buckelew . . . is the insurance brokerage for many towns that participate in the Camden County JIF, and others throughout the state. Its subsidiary, PERMA Risk Management Services, provides an executive director for the management of the fund. A second Conner Strong subsidiary, J.A. Montgomery Risk Control, provides loss control services for the JIF. Together, those businesses generated more than \$1 million in professional service fees from the Camden County JIF in 2018 . . . .<sup>118</sup>

The JIF is an excellent example of modern American indirect corruption: it has a plausible excuse for existing, it is an obscure and technical concept most people do not understand, and it provides millions in government dollars awarded by conflicted

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<https://www.floriolaw.com/attorneys/> [<https://perma.cc/4Y43-HAW4>] (last visited Nov. 15, 2020).

<sup>116</sup> Michael Friedman, *Voorhees Committeeman Speaks Out About Municipal Appointments*, VOORHEES SUN (Jan. 24, 2012), <https://medium.com/the-voorhees-sun/voorhees-committeeman-speaks-out-about-municipal-appointments-646aa4ad9d8d> [<https://perma.cc/5WJL-GPL2>].

<sup>117</sup> See *What is a Joint Insurance Fund (JIF)*, N.J. MUN. SELF INSURERS' JOINT INS. FUND, <https://njmsijif.org/about-2/what-is-a-jif/> [<https://perma.cc/484N-MUTA>] (last visited Nov. 15, 2020).

<sup>118</sup> Matt Skoufalos, *Norcross Critics Blitz Camden County Joint Insurance Fund Meeting*, NJ PEN (Aug. 27, 2019), <https://www.njpen.com/norcross-critics-blitz-camden-county-joint-insurance-fund-meeting> [<https://perma.cc/M2WA-SXEL>].

officials to private actors.

While many Americans understand the direct corruption alleged against President Trump, even if they do not agree he is guilty, the soft corruption of the Norcross machine is much harder to conceptualize. It is confusing and involves obscure state agencies and low-profile government officials. The only permanent protection is constitutionalizing anti-corruption measures to prevent political machines from violating the public trust.

### *B. Process Corruption*

Process corruption is a particularly insidious form of corruption because it often presents as legitimate efforts to improve efficiency, safety, or legitimacy when in-fact, the real motive behind actions is to reduce the political voice of minority groups. By allowing certain corrupt actors, as the Court has in recent years, to use strategy and analytic data to minimize the impact of political opponents, American society is fundamentally rejecting free and fair elections.

#### 1. Phantom Candidates, Ballot Construction, Vote-by-Mail: Norcross Machine, Pt. II.

Actively utilizing phantom candidates to manipulate voters is unfortunately no longer limited to South Jersey.<sup>119</sup> Phantom candidates are candidates for public office recruited by another candidate to run “phantom campaigns” and siphon off opposition votes from confused voters.

This is a dangerous practice. Consider this hypothetical example: let’s say John Smith is the favorite in a primary election for US Congress. But he only estimates his support to be around fifty-five percent, so he is concerned if the opposition candidate, Mary Rodgers, gets organized, the election might be closer than he is comfortable with it being. Because he is the favorite, the

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<sup>119</sup> See Brent Batten, *Phantom Candidates Will Continue to Haunt Election Season*, NAPLES DAILY NEWS (June 27, 2019, 5:00 AM), <https://www.naplesnews.com/story/news/columnists/brent-batten/2019/06/27/brent-batten-phantom-candidates-continue-haunt-election-season/1574825001/> [https://perma.cc/Y2GH-ANPJ].

party is happy to help him, so they recruit eight other candidates to run in the primary for US Congress and gather the signatures these candidates need to get on the ballot. These eight other candidates are told not to talk to the media, not to have a campaign website, and not to do anything to draw attention to themselves. Additionally, they are all given slogans that will appear next to their name on the ballot that mimic the Mary's slogan so when voters go to vote, they are unsure which person they really mean to support. This results in John Smith receiving forty-nine percent of the vote, Mary receiving thirty percent, and the eight other candidates splitting twenty-one percent. If only candidates with intention of winning or advocating for ideas had run, Mary would have received at least fifty-one percent and won. But, because of the phantom candidates, John won.

In the 2019 Democratic primary, journalists investigated this practice. One of the phantom candidates that was interviewed could not remember the name of his running mate and only had a vague idea of why he was running in the first place.<sup>120</sup> He was one of six candidates who came from obscurity and filed petitions this year for Camden County freeholder. “[D]espite being the types of candidates who would typically jump at the chance for publicity, have no interest in talking to the press. They have no campaign websites that explain why they’re running or their positions. Most weren’t even registered Democrats as of last year, according to public documents.”<sup>121</sup> “An examination of the nominating petitions of the six candidates shows several were signed by people with close connections to the Camden County Democratic machine.”<sup>122</sup>

Rena Margulis, one of the legitimate opposition candidates in the 2019 Democratic primary commented,

Imagine you live in Camden County. You are not happy with the behavior of the machine. You want to vote for an opponent. Well, instead of your opposition vote being spread among one pair of freeholders, it’s now being spread across four, five, six pairs of

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<sup>120</sup> See Matt Friedman, *Anti-Machine Democrats in Camden County Complain of ‘Phantom Candidates’*, POLITICO (Apr. 10, 2019, 5:00 AM), <https://www.politico.com/states/new-jersey/story/2019/04/09/anti-machine-democrats-in-camden-county-complain-of-phantom-candidates-960442> [https://perma.cc/4ZEW-AUJ8].

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

freeholders, and therefore the opposition does not have a legitimate chance.<sup>123</sup>

Additionally, New Jersey gives county clerks almost unlimited discretion to construct ballots.<sup>124</sup> Although there is a requirement for a random drawing, a loophole has developed as state law does not forbid clerks from manufacturing arbitrary rules to separate candidates into groups and conduct multiple drawings.<sup>125</sup> This often leads to what has come to be known as the “party line” where all of the machine candidates for all offices are stacked in a neat line in a column, often the first column, and all opposition candidates are spread across the ballot into “ballot Siberia.”<sup>126</sup> The county clerk “often come[s] up with a technicality to deny insurgents” favorable ballot placement.<sup>127</sup> And, in some counties, the “line is drawn up and submitted at the sole discretion of the party boss.”<sup>128</sup> This creates a system where the county clerk, who is elected on the party line and relies on fundraising from the machine, designs a ballot to benefit the party line, which is determined by the party chairman, who similarly relies on being elected on the party line and relies on fundraising from the machine.

The technicalities used by the county clerks have been as inventive as they are nonsensical. In some election years, the clerk determines that only those bracketed <sup>129</sup> with candidates for county office will be in the first drawing for ballot position, and all other slates or individual candidates will be put into a separate drawing for the far side of the ballot. What this results in is machine candidates stacked neatly in column one, while challengers are clustered on the other side of the fold<sup>130</sup> after six

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> See N.J. REV. STAT. § 19:14-12 (2013).

<sup>126</sup> Yael Niv, *The Voting Shell Game*, GOOD GOV'T COALITION N.J. (Feb. 25, 2018), <https://www.ggcnj.org/lineoped> [<https://perma.cc/HL8U-9UK6>].

<sup>127</sup> SCHLUTER, *supra* note 79, at 165.

<sup>128</sup> *Id.*

<sup>129</sup> See J.T. Aregood, *Alex Law Claims He Was Stonewalled by Camden County Clerk*, OBSERVER (Jan. 13, 2016), <https://observer.com/2016/01/alex-law-claims-he-was-stonewalled-by-camden-county-clerk/> [<https://perma.cc/ZK7K-ZMAW>] (To bracket with another candidate means to declare you have the same slogan and would like to be placed together on the ballot. Despite numerous requests for a form or instruction on how to do this, the Camden County clerk repeatedly refused to provide any guidance.).

<sup>130</sup> See Julia Sass Rubin, *Toeing the Line: New Jersey Primary Ballots Enable*

to eight empty columns to the right.

While the procedural technicalities used by clerks in New Jersey could be easily remedied, the phantom candidate issue is much harder to grapple with. Totally neutral roadblocks to nonserious candidates running, such as signature requirements, are overcome because measures like that measure seriousness of wanting to get onto a ballot rather than seriousness of wanting to win or advocate for ideas. Measures can be imagined that would evaluate the sincerity of a candidate running for office, but that is a slippery slope that almost certainly would be found to be unconstitutional by any court in the United States. If political machines around the country are allowed to continue to proliferate, there ought to be fear that insidious, but effective, practices like this might become more common.

## 2. Voter ID Laws and Voter Registration Purging: Crawford, Brakebill, and Husted

Requiring voter identification is the practice of demanding state-issued proof of identification when attempting to vote. These laws have been presented as an attempt to prevent voter fraud despite very little evidence existing that voter fraud takes place with statistically significant regularity.<sup>131</sup> This process corruption is discriminatory and the true motive behind these laws is likely to make it harder for minority and poor citizens to vote as getting to a government office and procuring an acceptable form of identification has been proven to be a substantial burden.<sup>132</sup> However, in *Crawford v. Marion County Election Board*, the Court ruled that requiring a picture ID to vote does not violate the constitution.<sup>133</sup> Justice Scalia wrote in

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*Party Insiders to Pick Winners*, N.J. POL'Y PERSP. (June 29, 2020), <https://www.njpp.org/reports/toeing-the-line-new-jersey-primary-ballots-enable-party-insiders-to-pick-winners> [<https://perma.cc/2MMS-B7EB>] (The mail-in ballots are constructed in such a way it would be easy to open the ballot and not even realize there was another fold where more candidates appeared.).

<sup>131</sup> See JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE AT N.Y.U. SCH. OF LAW, THE TRUTH ABOUT VOTER FRAUD 3 (2019), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Truth-About-Voter-Fraud.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf) [<https://perma.cc/PB7B-NNJU>].

<sup>132</sup> See *Oppose Voter ID Legislation - Fact Sheet*, AM. C. L. UNION (May 2017), <https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet> [<https://perma.cc/M2G7-EU7G>].

<sup>133</sup> *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 209 (2008) (Scalia, J., concurring).

his concurrence, “[i]t is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class.”<sup>134</sup> In this ruling of corruption as a political question for legislatures, the Court did not find requiring identification to be a “severe and unjustified” burden despite compelling evidence showing that it likely is.

In 2018, the Court declined to intervene in a challenge to a North Dakota law that required voters to present identification that included a current residential street address despite lawyers for the plaintiffs showing that the ruling will prevent thousands of Native American voters who often do not have street addresses on reservations from casting a ballot.<sup>135</sup> The Court seems determined to stay on a path of process corruption being a political issue for state legislatures to decide, regardless of the impact on voters.

Another form of process corruption is voter purging where a state requires a response from registered voters within a certain time. Non-responsive voters are stripped of their voting registration in the state. Georgia has been a state where Republicans have aggressively sought to de-register voters, many of them Democrats, through this method. Currently, the state is seeking to remove 330,000 voter registrations. This comes after Georgia canceled 534,119 registrations in July 2017, “the largest single removal of voters in U.S. history.”<sup>136</sup>

In a case arising from a similar practice in Ohio, the Court has upheld mass voter purging, saying it is a political question.<sup>137</sup> Writing in dissent, Justice Sotomayor criticized the majority, writing “[c]oncerted state efforts to prevent minorities from voting and to undermine the efficacy of their votes are an

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<sup>134</sup> *Id.* at 208.

<sup>135</sup> See *Brakebill v. Jaeger*, 139 S. Ct. 10, 10–11 (2018) (Ginsburg, J., dissenting).

<sup>136</sup> Mark Niese, *Purge of More Than 300,000 Voter Registrations Planned in Georgia*, ATLANTA J.-CONST. (Oct. 30, 2019), <https://www.ajc.com/news/state--regional-govt--politics/purge-about-300-000-voter-registrations-planned-georgia/qfxvTqS7KenXjvKN208yII/> [<https://perma.cc/CN9D-SDFK>].

<sup>137</sup> See *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1848 (2018) (“We have no authority to second-guess Congress or to decide whether Ohio’s Supplemental Process is the ideal method for keeping its voting rolls up to date.”).

unfortunate feature of our country's history."<sup>138</sup> She continued, "[o]ur democracy rests on the ability of all individuals, regardless of race, income, or status, to exercise their right to vote. The majority of States have found ways to maintain accurate voter rolls without initiating removal processes based solely on an individual's failure to vote."<sup>139</sup>

### 3. Gerrymandering: Rucho

Historically, some element of partisan consideration was thought to be a necessary evil of drawing districts, as there was no scientific way to guarantee fairness. The Supreme Court's opinion in *Gaffney v. Cummings* (1973) reflects this as the majority wrote "districting inevitably has and is intended to have substantial political consequences."<sup>140</sup> This is no longer the case, as modern technology can district fairly.<sup>141</sup> This gave anti-corruption actors hope that a revisiting of partisan gerrymandering could result in a victory. They got their shot in 2019 with *Rucho v. Common Cause*, but the Court doubled down against science and against historical evidence.

In *Rucho*, the Court held that partisan gerrymandering claims present political questions beyond the reach of the federal courts and that federal judges have no license to reallocate political power between the two major political parties as they have no plausible grant of authority in the Constitution, and no legal standards exists to limit and direct their decisions.<sup>142</sup> Additionally, "[t]o hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust

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<sup>138</sup> *Id.* at 1863 (Sotomayor, J., dissenting) (citation omitted).

<sup>139</sup> *Id.* at 1865 (citation omitted).

<sup>140</sup> *Gaffney v. Cummings*, 412 U.S. 738, 753 (1973).

<sup>141</sup> See Christopher Ingraham, *This is Actually What America Would Look Like Without Gerrymandering*, WASH. POST (Jan. 13, 2016, 12:49 PM), <https://www.washingtonpost.com/news/wonk/wp/2016/01/13/this-is-actually-what-america-would-look-like-without-gerrymandering> [<https://perma.cc/S4Z9-2AEF>] ("From a technological standpoint it's fairly straightforward -- a software engineer in Massachusetts named Brian Olson wrote an algorithm to do it in his spare time. . . . Olson's algorithm creates 'optimally compact' equal-population congressional districts in each state, based on 2010 census data. It draws districts that respect the boundaries of census blocks, which are the smallest geographic units used by the Census Bureau. This ensures that the district boundaries reflect actual neighborhoods and don't, say, cut an arbitrary line through somebody's house.")

<sup>142</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019).

districting to political entities.”<sup>143</sup> The Court is wrong. The Framers entrusted drawing district lines to political entities because they believed it to be the best way to limit partisan corruption, not because they accepted partisan corruption as an acceptable reality. It is hard to imagine the Framers endorsing Dr. Seuss shapes from the worst gerrymandering maps<sup>144</sup> devised in recent years.

In *Rucho*, the Court was especially concerned with how to provide a standard for deciding how much partisan dominance is too much. Sometimes the simple answer is the best answer: any amount is too much because we have the tools available to us to limit corruption and make our democracy more representative of the people. Justice Kagan is much more in line with the Framers understanding of corruption when she wrote in dissent:

The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters’ preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.<sup>145</sup>

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<sup>143</sup> *Id.*

<sup>144</sup> See Christopher Ingraham, *America’s Most Gerrymandered Congressional Districts*, WASH. POST (May 15, 2014, 10:22 AM), <https://www.washingtonpost.com/news/wonk/wp/2014/05/15/americas-most-gerrymandered-congressional-districts/> [<https://perma.cc/QXY7-VQRG>] (giving examples of unusually shaped, gerrymandered districts).

<sup>145</sup> *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting). In her dissent, Justice Kagan channels Madison’s idea that addressing the mischief of factions is of chief importance for government. See THE FEDERALIST, *supra* note 8, NO. 10, at 45 (James Madison) (“The inference to which we are brought, is, that the *causes* of faction cannot be removed; and that relief is only to be sought in the means of controlling its *effects*.”).

*C. Contribution Corruption*

Prior to the impeachment inquiry into President Trump, contribution corruption was the primary focus of public discourse around corruption. In no other area has the Court acted more decisively to constitutionalize corruption. Contribution corruption was generally considered to be a political question for much of our country's history. That fundamentally changed with *Buckley v. Valeo*, where the Court narrowed their understanding of corruption to just direct *quid pro quo* and stopped prioritizing liberty for the majority of citizens in favor of protecting the absolute speech rights of the very powerful.

1. Current Framework: Buckley, McConnell, McCutcheon, and Citizens United

While there were cases regarding political corruption and political contributions,<sup>146</sup> the Court welcomes a new age of thinking regarding these crucial areas in *Buckley*.<sup>147</sup> In analyzing *Buckley*, Professor Teachout writes that it:

[H]olds [1] that corruption is an interest that might outweigh First Amendment interests, but it does not ground the concept of corruption in constitutional history. . . . [2] the idea that corruption and *quid pro quo* might be interchangeable. In prior opinions about corruption, this was not the model, and while it was hinted at, the *quid pro quo* model of corruption ended up being critically important for defining the direction of the use of the concept in modern cases. . . . [3] [that there is] a new role for the citizen in the concept of corruption . . . The citizen in *Buckley* is most important for her faith in the government. While the Framers were concerned about citizens who wanted to use government to serve their own ends, the *Buckley* Justices were most concerned about citizens who had grown cynical about government.<sup>148</sup>

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<sup>146</sup> See, e.g., *Ex Parte Yarbrough* (The Ku-Klux Cases), 110 U.S. 651, 666–67 (1884); *Trist v. Child*, 88 U.S. (21 Wall.) 441, 451 (1874); *Bartle v. Nutt*, 29 U.S. (4 Pet.) 184, 188 (1830); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810).

<sup>147</sup> See Yingling, *supra* note 76, at 293 (“One of the most questionable aspects of the Court’s decision was its failure to account for the Framers’ vision and concern with regard to corruption. Instead of turning to the Framers, the Court turned to *Buckley*, which was treated as if it were itself its own beginning. The result is a modern framework for analyzing corruption that lacks fidelity to the Framers and previous case law.”).

<sup>148</sup> Teachout, *supra* note 11, at 385–86. See also *Buckley v. Valeo*, 424 U.S.

This shift in thinking about corruption changed modern American politics and placed the political ambitions of the wealthy above the aspirations and enfranchisement of the poor.

After *Buckley*, the Court only sought to deal with direct graft, the kind of obvious *quid pro quo* corruption that is easily sidestepped with experience. This kind of corruption is inherently difficult to prove, because “while it is possible to show that contributions correlate with votes, determining causation is more difficult; contributions might cause votes to shift or contributions might go to legislators precisely because they already support a contributor’s causes.”<sup>149</sup> Even the best quantitative models struggle to “go beyond correlation to resolve the causation question,”<sup>150</sup> even when common sense is staring everyone in the face.<sup>151</sup>

The shift by the Court from pre-*Buckley* was led by Justice Scalia who did not believe in corruption arguments to begin with. With a dismissive tone harkening back to Tammany leaders advocating for the benefits of corruption, Justice Scalia wrote:

When the vessel labeled “corruption” begins to founder under weight too great to be logically sustained, the argumentation jumps to the good ship “special privilege”; and when that in turn begins to go down, it returns to “corruption.” Thus hopping back and forth between the two, the argumentation may survive but makes no headway towards port, where its conclusion waits in vain.<sup>152</sup>

In *Citizens United v. FEC*, the Court held that political spending is a form of protected speech under the First

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1, 45, 58 (1976) (the limitations on contributions and the disclosure requirements were upheld because a majority concluded that they served the governmental interests of limiting corruption and the “appearance of corruption”).

<sup>149</sup> Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 135 (2004) (footnotes omitted).

<sup>150</sup> *Id.*

<sup>151</sup> See *McConnell v. FEC*, 540 U.S. 93, 130–34 (2003) (The *McConnell* Court invoked the testimony of several former senators who were willing to testify about the effects of campaign financing on both major political parties, none of these senators suggested that their own votes had been bought outright).

<sup>152</sup> *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 685 (1990) (Scalia, J., dissenting).

Amendment and that the “Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”<sup>153</sup> In discussing *Citizens United* in *SpeechNow.org* less than a week later, the D.C. Circuit Court ruled that independent expenditures by special interests “do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption,” whereas, “limits on direct contributions to candidates, unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption.”<sup>154</sup> These rulings obliterated anti-corruption as a constitutional principle around political contributions and paved the way for the modern era of unlimited expenditures in politics. The principles of *Citizens United* and *SpeechNow.org* were firmly reinforced four years later in *McCutcheon v. FEC* where the Court found that the only constitutionally cognizable corruption is direct *quid pro quo* corruption, and classified influence-seeking as normal and acceptable political behavior.<sup>155</sup>

Today, there is rampant “soft-*quid pro quo*” corruption in Congress. “For every \$1 the industry spends on campaign contributions and lobbying in DC, it gets back \$119 in subsidies.”<sup>156</sup> Even though the Court is concerned about traditional direct *quid pro quo* bribery corruption, the real concern should be “inequality and the dangers of interest group politics.”<sup>157</sup> The limited disclosure rules are insufficient for eliminating unconventional corruption and “limits on third-party independent expenditures can now only be achieved through a

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<sup>153</sup> *Citizens United v. FEC*, 558 U.S. 310, 319 (2010).

<sup>154</sup> *SpeechNow.org v. FEC*, 599 F.3d 686, 694–95 (D.C. 2010).

<sup>155</sup> See *McCutcheon v. FEC*, 572 U.S. 185, 234–35 (2014) (Breyer, J., dissenting).

<sup>156</sup> *Fossil Fuel Funding to Congress: Industry Influence in the U.S.*, OIL CHANGE INT’L, <http://priceofoil.org/fossil-fuel-industry-influence-in-the-u-s/> [<https://perma.cc/6RVZ-D35M>] (last visited Oct. 18, 2020) (“Here’s how it works: Amount the fossil fuel industry spent during the 113th Congress (2013 & 2014) on contributions to Congress’ campaigns: \$42,373,561 Oil, Gas, and Coal lobbying total 2013: \$156,776,386 Oil, Gas, and Coal lobbying total 2014: \$151,437,335 TOTAL amount spent by Big Oil, Gas, and Coal in 113th Congress: \$350,587,282 (\$350 million and change) TOTAL 2013 & 2014 amount given to fossils in federal production and exploration subsidies: \$41,840,275,998 (41.8 billion and change)”).

<sup>157</sup> David Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370 (1994).

change in the Constitution.”<sup>158</sup>

VI. PROPOSED SOLUTIONS: ELEVATING ANTI-CORRUPTION AS A  
CONSTITUTIONAL PRINCIPLE TO MEET THE MODERN ERA

“Officials are corruptible, but also capable of great civic virtue—  
—and every effort, including every structural effort, must be made  
to enable that virtue to flourish.”

— Professor Zephyr Teachout<sup>159</sup>

As a society, we must make choices about what principles we hold high enough to give them special protection against future generations of politicians. That is what the constitutional government is at its core: identifying who we are and enshrining those principles for future generations. It falls to the people to use Article V to amend the Constitution. Drafted amendments are often narrow due to the extreme difficulty in mustering the requisite support to pass. Recognizing this, the following suggested amendment is meant to be a broad theoretical example, exhibitivite of the amount of work ahead to address each prong raised in this Note.

A. *The Anti-Corruption Amendment*

Clause 1: Only human citizens of the United States of America and registered political parties have a right to political speech. Corporations, political action committees, and foreign entities or governments are prohibited from contributing to or coordinating with candidates for public office. Attempts to circumvent these prohibitions must be a criminal offense defined by Congress with a mandatory minimum punishment of five-years in prison.<sup>160</sup>

Clause 2: Any political action committee must be licensed by Congress. All political action committees must annually publicly publish a full and complete accounting of the origin of all monies received and all expenditures. All political action committees

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<sup>158</sup> Yingling, *supra* note 76, at 300.

<sup>159</sup> Teachout, *supra* note 11, at 375.

<sup>160</sup> This would overrule *Citizens United* and provide reasonable mandatory punishment for those who would try to subvert our democracy through loopholes or technicalities.

must annually publish a list of all employees, independent contractors, and consultants compensated by the committee over the previous fiscal year.<sup>161</sup>

Clause 3: If a citizen makes a contribution to a candidate for any public office and that candidate is elected, the citizen and any company that the contributing citizen owns more than 10% of may not be awarded a government contract, tax credit, or other program in which the citizen or company receives benefit from the government for any matter in which the supported officeholder is entitled to a vote, even if the office holder declines to vote. If a political action committee expresses support for a candidate for public office and that candidate is elected, any company that any contributor to the political action committee owns 10% or more may not be awarded a government contract, tax credit, or other program in which the citizen or company receives benefit from the government for any matter in which the supported officeholder is entitled to a vote, even if the office holder declines to vote. If a corporation expresses support for a candidate for public office and that candidate is elected, that company and all of its subsidiaries may not be awarded a government contract, tax credit, or other program in which the company receives benefit from the government for any matter in which the supported officeholder is entitled to a vote, even if the office holder declines to vote.<sup>162</sup>

Clause 4: All federal elections must be held on a weekend. All federal elections must be held on an official federal holiday.<sup>163</sup>

Clause 5: All citizens are permanently registered to vote upon birth or upon becoming a citizen. No citizen may be denied the right to vote due to criminal conviction.<sup>164</sup>

Clause 6: The practice of partisan gerrymandering is prohibited.

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<sup>161</sup> This would give Congress the authority to regulate political action committees and require transparency to give voters a reasonable ability to follow all trails of money when considering who to vote for.

<sup>162</sup> This clause attempts to grapple with the problem of cronyism, patronage, and soft corruption by preventing donors from supporting politicians who can provide them with taxpayer dollars; this incentivizes politicians to align their interest with voters rather than special interests.

<sup>163</sup> This clause addresses a major element of process corruption: by making elections inconvenient for poor Americans, politicians are *de facto* disenfranchising them; this clause would make elections accessible for Americans and dramatically increase participation.

<sup>164</sup> This clause addresses another major element of process corruption and would make voter roll purges impossible.

Clause 7: Members of the House of Representatives may only serve fourteen years minus a day in Congress. Members of the United States Senate may only serve eighteen years minus a day in the Senate.<sup>165</sup>

Clause 8: All citizens of a jurisdiction must have access to enroll in any health insurance plan that any of the jurisdiction's legislative body provides its members.<sup>166</sup>

Clause 9: No member of a legislature may be compensated to be a lobbyist of a legislature in which that individual was formerly a member. Members of all legislatures must publicly publish the time, date, length, subject, and attendees of any meeting with lobbyists in a timely manner.<sup>167</sup>

Clause 10: Any citizen selected by their political party to be a candidate for President of the United States must publicly publish their previous ten years of federal tax returns.<sup>168</sup>

Clause 11: Citizens may not contribute more than one-thousand dollars to a political campaign, with the exception of a citizen's own campaign where a citizen may not contribute more than one-million dollars for a local campaign, five-million dollars for a state legislative or House of Representatives campaign, ten-million dollars for a state-wide campaign, or twenty-five million dollars for an campaign for President of the United States, with any contributions from previous campaigns run by the citizen to a subsequent campaign run by the citizen as counting towards the citizen's individual limit. All contribution limits are to be adjusted based upon inflation.<sup>169</sup>

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<sup>165</sup> Term limits would prevent an endless cycle of fundraising and a goal to remain in office for life. Rather, politicians' incentives would be realigned towards working towards the public good.

<sup>166</sup> Like the pay-raise Amendment, this strikes at the idea that Congress ought not be able to put itself above the people at our expense. The stream of trust flows from the people and our government should not have better access to lifesaving care than we do.

<sup>167</sup> Lobbying is not automatically corrupt, but there is tremendous incentive for it to be. By forcing transparency and preventing previous members from profiting off their years of service through lobbying, the people would have better guardrails against our tax dollars being spent in wasteful ways.

<sup>168</sup> No person in government has more power. As such, voters ought to have greater access to their history of decisions than they have for other public officials. A candidate for President is asking for trust from us. That trust should be earned with transparency and ideas, not a charlatan roadshow of half-truths.

<sup>169</sup> There is something inherently corrupt about any one individual having more say than thousands of others in an election. We have chosen a democracy

## VII. CONCLUSION

“When someone can give you \$250,000 or \$300,000 for a campaign, you owe them. When an important vote comes up, do you vote your conscience, or do you do what the leadership wants?”

—Then State Senator, now former Governor of New Jersey, Dick Codey in 1997<sup>170</sup>

Our Framers were proud of their work, but they knew we should not expect “perfection at once.”<sup>171</sup> For them, anti-corruption was a core principle of the Constitution. In modern America, the Court has determined anti-corruption to be a political issue even though “when a government has been corrupted, no troubles that arise can be appropriately remedied until corruption, in all forms, is effectively curtailed.”<sup>172</sup> But, our virtue is not lost. We have the tools we need to enshrine the anti-corruption into the Constitution and declare for all time that politicians work for us, the people, not the special interests that seek to confuse, divide, and profit from us. As Alexander Hamilton wrote, “[t]he fabric of American empire ought to rest on the solid basis of the consent of the people. The streams of national power ought to flow immediately from that pure original foundation of all legitimate authority.”<sup>173</sup>

Even in these divided times, we must remember that the consent to govern comes from us, and we have the power to stop the decay of the institutions that have made our democracy the envy of the world.

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as a government, but our current rules promote oligarchy. This must be corrected, especially as income inequality increases and more billionaires decide to buy our elections.

<sup>170</sup> SCHLUTER, *supra* note 79, at 63.

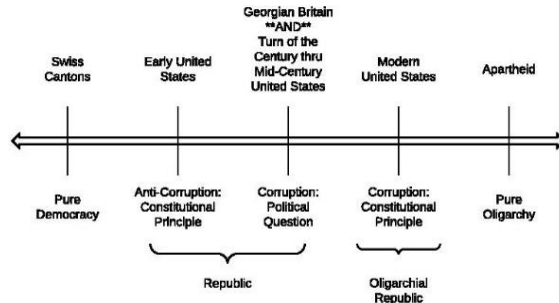
<sup>171</sup> *Cæsar, II*, *supra* note 88, at 288. *See also Agrippa, XVII*, *supra* note 87, at 113–14 (“In our constitution we have aimed at delegating the necessary powers of government and confining their operation to beneficial purposes. At present we appear to have come very near the truth. Let us therefore have wisdom and virtue enough to preserve it inviolate. It is a stale contrivance, to get the people into a passion, in order to make them sacrifice their liberty. Repentance always comes, but it comes too late.”).

<sup>172</sup> Yingling, *supra* note 76, at 320.

<sup>173</sup> THE FEDERALIST, *supra* note 8, NO. 22, at 112 (Alexander Hamilton).

Appendix

I.



II.

