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Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?

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Are federal prosecutions of non-federal officials for corruption likely to improve non-federal government? This essay suggests that such prosecutions can undermine the distinctive style of democracy at the state and local level, an effect that can be harmful to democracy in America overall. This conclusion rests on a larger argument about the different nature of federal and non-federal democracy in the United States. To insure that each official maintains impartial loyalty to values defined by a single, popularly accountable policymaker, the federal system of bureaucratic populism strictly separates the officials' public and private interests, through various devices such as civil service protection for executive officials, Article III life tenure, and fixed salary for federal judges, specialized training for federal officers, and conflict-of-interest rules that bar federal officers from acting when their judgment could be compromised by private interests. By contrast, participatory populism rejects this separation of the public and private spheres, instead mixing professional and lay decision-making by using thousands of part-time, under-paid executive and legislative officers who are expected to have substantial private interests in the communities that they represent.

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The essay argues that each style of democracy has mutually exclusive advantages and disadvantages. However, enforcement of federal anti-corruption law against non-federal democracies can undermine their system of mingled private and public interests, reducing the degree to which such governments can provide laypersons with opportunities for political activity. As an illustration of the overextension of federal criminal law, I examine the First Circuit's interpretation of 18 U.S.C. §§ 1341 and 1346, the federal mail fraud statute in United States v. Sawyer. Sawyer comes dangerously close to declaring that any undisclosed state or local officer's conflict of interest constitutes a violation of § 1346 when it involves the U.S. mails. I argue that this view of § 1346 is an error. Participatory populism requires that private and public tasks be closely mingled in ways that bureaucratic populism forbids. Undoubtedly, this mixture of public and private creates a risk that public office will be used for private gain. However, it also avoids some of the bureaucratic sclerosis and lack of lay participation that can be endemic to the more centralized federal tradition. In conclusion, I suggest that federal prosecutors ought to content themselves with using § 1346 to enforce already-existing state criminal conflict-of-interest rules, for the sake of preserving a place in our federal regime for participatory populism.

INTRODUCTION

Since at least 1976, when the Office of Public Integrity was created as a section of the Department of Justice, the federal government has played a major role in prosecuting state and local politicians and officials for corruption. Are such prosecutions likely to improve non-federal government? This essay offers a cautiously pessimistic answer. The more ambitious efforts brewing in U.S. Attorneys' offices to enforce federal norms of good government against state and local officials have a non-trivial chance of being harmful. In particular, these prosecutions could impose on non-federal governments federal conflict-of-interest rules that are fundamentally inconsistent with the style of democracy that flourishes at the non-federal level.

Beyond defending this specific claim about the interpretation of certain federal anti-corruption statutes, this essay also sets forth a more general description of democracy in America. In particular, I argue that federalism in the United States, at its best, allows two different styles of democracy to flourish. The federal government tends to follow a style of democracy

that I call "bureaucratic populism," while non-federal governments tend to follow what I shall call "participatory populism." Bureaucratic populism is essentially a Jacobin invention: it consists of general values being announced by a central democratically-elected legislature (Congress, the French Assembly, etc.), while full-time appointed policy experts (prefects, U.S. attorneys, etc.) implement the details of these general policies. The central value of bureaucratic populism is bureaucrats' impartial fidelity to those centrally announced values, *sine ira et studio*, in Weber's phrase. Towards this end, federal bureaucrats must be rigidly insulated from private interests that might divert their judgment from national values. Institutions that achieve such impartiality include various rules to protect officers' tenure and salary (civil service protection for executive officials, Article III life tenure and fixed salary for federal judges), specialized training for federal officers, and conflict-of-interest rules that bar federal officers from acting when their judgment could be compromised by private interests. The critical point of these arrangements is to separate public from private influences to insure that federal officials are loyal only to the former.

Participatory populism rejects this separation of public and private spheres, instead mixing professional and lay decision-making. The elected legislators are often — indeed, usually — part-time, under-paid officers with substantial private interests in the community. The administrative officers who carry out legislative policy are also usually laypeople who serve part-time on supervisory bodies like planning commissions and school boards. They, too, have full-time private interests. This whole structure of lay decision-making is pervasively subjected to neighborhood, municipal, and state-wide plebiscites, allowing private citizens to sit as a kind of super-legislature. In short, the entire system of participatory populism is designed to maximize private access to public decision-making, promiscuously mingling public and private interests in the process.

Rhetoric declaring that one or the other of these two styles of democracy is "closer to the people" or "more democratic" tends to be misleading and confused. In reality, neither the federal style nor non-federal style of democracy is "more democratic": as I shall describe below in Part I, each style of democracy maximizes some democratic values at the expense of others. The important point, elaborated in Part I, is that enforcing federal conflict-of-interest rules against non-federal participatory democracy would severely endanger the latter. One cannot rigorously separate public and private interests in non-federal democracies without destroying those characteristics that make them distinct from, and, in some respects, more efficient and democratic than, the federal government.

Because a specific case study helps focus the abstract theory, I will

conclude the essay (in Part II) with the suggestion that some sorts of aggressive enforcement of federal anti-corruption statutes have the risk of undermining non-federal, participatory democracy. As an illustration of the overextension of federal criminal law, I will examine the First Circuit's interpretation of 18 U.S.C.S. §§ 1341 and 1346, the federal mail fraud statute in *United States v. Sawyer*.[1] *Sawyer* comes dangerously close to declaring that any undisclosed state or local officers' conflict of interest constitutes a violation of § 1346, when it involves the U.S. mails. I will argue that this view of § 1346 is an error. Participatory populism requires that private and public tasks be closely mingled in ways that bureaucratic populism forbids. Undoubtedly, this mixture of public and private creates a risk that public office will be used for private gain. However, it also avoids some of the bureaucratic sclerosis and lack of lay participation that can be endemic to the Jacobin tradition.

In conclusion, I will suggest in Part III that federal prosecutors ought to content themselves with using § 1346 to enforce already-existing state criminal conflict-of-interest rules, for the sake of preserving a place in our federal regime for participatory populism.

I. BUREAUCRATIC VERSUS PARTICIPATORY POPULISM

Too often, legal scholars argue over whether federal laws threaten federalism. Framed in these terms, it is hard not to echo the reaction of Ed Rubin and Malcom Feeley: Who cares?[2] "Federalism" is a governmental arrangement no different than, say, Proportional Representation or Bicameralism: it is a means to more basic ends, not an end in itself. Therefore, I prefer to frame debates about federalism as debates about the more foundational value of democracy.[3] In particular, I maintain that federalism in the United States is best

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1 239 F.3d 31 (1st Cir. 2001).

2 Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903 (1994).

3 Edward Rubin would be equally skeptical about invocations of the value of "democracy." Edward L. Rubin, *Getting Past Democracy*, 149 U. Pa. L. Rev. 711, 760 (2001). To the extent that he is simply arguing that elections cannot be deemed automatically to be better methods of measuring or educating public opinion than administrative processes, I agree with Rubin. Indeed, *infra* Part I.C. offers a comparison of bureaucratic and lay governance that by no means privileges the latter over the former. However, to the extent that Rubin is arguing that electoral mechanisms have no special value for educating voters, I respectfully disagree with his position at *infra* Part I.C.4.

understood as a device to preserve two different styles of democracy, which I call "bureaucratic" and "participatory" populism, respectively. The federal regime in the United States allows the former to flourish at the federal level and the latter to flourish in non-federal regimes. As I shall argue below, both styles are equally democratic, albeit in different ways. Federalism flourishes best when neither style is allowed to destroy the other.

A. Bureaucratic Populism

Bureaucratic populism can best be summarized by Pudd'nhead Wilson's calendar: "Put all your eggs in the one basket and — WATCH THAT BASKET."[4] The essence of bureaucratic populism is that the deepest values of the national citizenry are best articulated in a single, highly visible legislative body elected by the entire nation. Such a body will attract the most-talented and best-educated speakers, policy-makers, and staff in the nation. It will also deal with the most interesting issues of public policy. Far more than any city council or state legislature, the national legislature will have the salience to command the attention of the citizenry. Therefore, the national legislature alone will have the democratic legitimacy to speak for, and educate, the People.[5]

Once the People have spoken through their national legislature, then those values should be implemented by executive and judicial officials who are loyal to those values and uninfluenced by private interests that could diverge from the national will. Those officials are not elected, for they can represent the will of the people only through fidelity to national law, not through any popular mandate of their own. Moreover, those officials should not be laypersons or part-time employees, for laypersons have private interests that could distract them from impartial pursuit of national policy. Instead, the executive and judicial officials ought to be full-time, professional civil service insulated from private influences.[6] In fact, the federal government does not reserve a large place for decision-making by

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4 14 Mark Twain, *Pudd'nhead Wilson*, *in* The Writings of Mark Twain 145 (New York, Harper 1899) (epigraph to chapter XV).

5 On the educational function of a highly visible national legislature, see Walter Bagehot, The English Constitution 102, 123-25 (Oxford Univ. Press 2001) (1873).

6 Of course, Congress is not the pure embodiment of the Jacobinical tradition — the national assembly that enunciates the will of the people and directs a *dirigiste* corps of bureaucrats. Both bicameralism and Presidentialism prevent Congress from frequently speaking with a clear voice. But where the combination of the President and two congressional Houses unite to enact national policy, there is an end to representation of the People. The executive and judicial officials who carry out the policies of the national legislature (the President + Congress) are not themselves

laypersons. Aside from civil and criminal juries (which are constitutionally required), there are few lay decision-makers in the federal system. Indeed, at least one federal statute prohibits volunteers from performing unpaid services to the federal government.[7] Federal statutes give the lay public some rights to attend hearings and make comments on pending regulations. However, these "public participation" requirements give the public no formal powers to veto any governmental decision. Even so, they often tend to be weakly enforced.[8]

Such a regime separating public bureaucrats from private interests requires an elaborate federal code governing potential conflicts of interest. Such a code would essentially be designed to constrain the motives of public officials, insuring that they acted out of loyalty to the people's values and not out of loyalty to their own or other persons' private ends. But, as Andrew Stark has noted, motives are invisible: the law cannot directly detect or regulate what an official thinks or desires.[9] Instead, conflict-of-interest rules are inevitably prophylactic rules. Such rules define objective circumstances in which officials' decisions would *likely* or even *possibly* be influenced by their own or others' personal ends. Precisely because they are prophylactic rules, codes of ethics tend to cut broadly to forbid activities that are likely innocent but have the possibility of clouding official judgment with personal considerations. Thus, the head of a large agency might be guilty of illegal self-dealing in violation of 18 U.S.C.S. § 208 if his agency were to lease his warehouse, even if the chief took no part in the decision to enter into the lease agreement and even if the decision were objectively reasonable.[10] Likewise, an executive official in one agency who,

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supposed to represent private interests: they are not themselves laypersons, nor do they have any electoral mandate independent of their national masters. Instead, they are the loyal agents of the national will, as expressed by the 537 elected officials who alone have any electoral mandate in the federal government.

7 Anti-Deficiency Act, 31 U.S.C.S. § 1342 (2004) ("An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.").

8 Audrey McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 Brook. L. Rev. 861 (2001); Jeffrey M. Berry et al., The Rebirth of Urban Democracy 34-44 (1993) (describing failure of public participation requirements in federal statutes and attributing failure to statutes' failure to "offer[] a share of real policymaking authority at the grassroots").

9 Andrew Stark, Conflict of Interest in American Public Life 21-25 (2000).

10 *In re* Smith, 305 F.2d 197, 210 (9th Cir. 1962).

acting entirely in his personal capacity, lobbies another official in another agency to make a governmental decision that is personally beneficial to the lobbyist's client can violate federal rules against undue influence, codified at 18 U.S.C.S. § 203, even if the lobbying official has neither the capacity nor the intent to use his official position to exert any pressure on the decision-maker and even if the decision-maker makes an objectively reasonable decision in response to the lobbying. Other statutes restrict the ability of federal officials to accept honoraria or even travel expenses to address groups interested in the officials' views. Still other federal rules severely limit the employment of federal officials after they leave governmental service. And so forth. The important point is that an elaborate network of statutes and regulations attempts to separate federal officials' public duties from their private interests.

It is obvious that such a draconian separation of the public official from private interests has dramatic effects on the life of the federal official. Certainly, such restrictions can deter individuals from undertaking public service.[11] Moreover, the more stringent sorts of prophylactic conflict-of-interest rules can even encroach on federal constitutional rights of free speech or procedural due process.[12] There is an ongoing debate about whether the costs of these rules exceed the benefits.[13] One can argue that, at least in the context of the federal government, the costs of separating federal officials' public duties from their private interests is not excessive, because federal career bureaucrats do not need to pursue private interests: they have a governmental salary and tenure as substitutes. Moreover, for political appointees with shorter stints in the federal government, the high dignity of having a congressionally confirmed post might outweigh the annoyance of federal ethics rules.

Regardless of whether one approves of the effort to separate the public duties and private interests of federal officials, the important point is that federal law does attempt such a separation. Such a separation is part and parcel of the democratic tradition that I call "bureaucratic populism."

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11 *See The Effects of Federal Ethics Restrictions on Recruitment and Retention of Employees: Hearing before the Subcomm. on Human Res. of the House Comm. on the Post Office and Civil Serv.*, 101st Cong. (1989).

12 *See, e.g.*, Sanjour v. EPA, 56 F.3d 85 (D.C. Cir. 1995).

13 For an argument that the costs can be too high, see Frank Anechiarico & James Jacobs, The Pursuit of Absolute Integrity: How Corruption Control Makes Government Ineffective (1996).

B. Participatory Populism

Consider, by contrast, a different democratic tradition, which I term "participatory populism." I argue below that this tradition is dominant in the state and local governments of the United States. I also argue that this tradition cannot survive the sort of separation of public and private functions upon which federal law routinely insists.

Participatory populism can best be described by contrast with bureaucratic populism. The central idea behind bureaucratic populism is to have one central, highly visible focus for democracy — Congress and the President. All other officials, judicial or executive, derive their democratic authority from this central source (just as priests get their sacred authority from the laying on of hands from Jesus through St. Peter to the Popes to the bishops who ordain the priests). By contrast, the central idea behind participatory populism is to diffuse the sources of democratic legitimacy throughout government, so that literally thousands of executive, judicial, quasi-judicial, and legislative officials can claim an independent popular mandate. To continue the religious analogy, the participatory populist resembles the Congregationalist who insists on distributing power over ministers to hundreds of individual congregations.

The most obvious and specific practical manifestation of participatory populism is the ubiquitous elections of state and local officials. Far from having one elected legislature and a couple of elected executives, each state typically has hundreds or even thousands of elected officials of every stripe. The governor, lieutenant governor, attorney general, and secretary of state are generally elected officials. In addition, state constitutions provide for the election of state judges and various state boards and commissioners. When one examines local governments, the number of elected officials explodes. There are 25,000 general purpose local governments — counties, townships, and municipalities — in the United States, each with some sort of elected "legislative" board or council. (As discussed below, the division between executive and legislative responsibilities at the local level is notoriously obscure.) In addition, there is an array of locally elected executive officials — district attorneys, sheriffs, drain commissioners, etc. — that implement state policy even though they are elected from a jurisdiction smaller than the state. On top of these elected officials are the thousands of elected board members of special districts, including, most importantly, school districts.

State law and local law also provide a much larger role for lay participation than federal law. To an extent, this claim simply restates the fact that non-federal governments have a lot of elected officials because these officials are typically unpaid or under-paid. Even at the highest reaches of state

government — the state legislature — state legislators frequently are part-time officers. Farther down in the pecking order, members of city councils and county commissions are typically unpaid except in the largest cities.

But local governments are also rife with boards composed of appointed laypersons serving part-time to administer (for instance) the jurisdiction's land-use policy. About 3% of the population has served at one time or another on some sort of local government board, which frequently has significant decision-making power.[14] Planning commissions and boards of zoning appeals, for instance, are composed of unpaid laypersons who typically determine whether a landowner is entitled to site plan approval, conditional use permit, a variance, a non-conforming use, or a zoning compliance permit. Moreover, neighbors themselves have not only the right to be consulted but also typically have the right to force legislative bodies to make decisions by a super majority. In some cases, neighbors have the right to veto governmental decisions altogether by a neighborhood referendum. On a larger scale, the residents of municipalities and counties frequently have the right to approve or reject regulatory changes (typically, amendments to the zoning ordinance) and bond issues and tax increases. The residents of thirty-five states have some statutory or constitutional right to enact legislation by plebiscite. In eighteen states, residents can enact amendments of the state constitution by initiated referendum.[15]

The underlying philosophy of participatory populism is that a wide array of elected officials and the lay public more generally have an independent mandate to shape public policy. They are not merely bound to carry out the strict instructions of one central locus of popular authority, but also, to some degree, to present a rival vision of public opinion. Their job is not, *sine ira et studio*, to be the conduits of some superior's democratic legitimacy, but also to themselves embody such legitimacy. Where the superior has left something unspecified, they have the entitlement to fill that gap with their own ideas of good public policy, representing the ideology of their constituents or supporters.

Such participatory populism precludes the sorts of conflict-of-interest rules used by the federal government. One cannot insist on the prophylactic separation of public and private motives where most decision-makers are part-time officials with extensive private interests. As one court notes, "[i]t would be difficult to find competent people willing to serve, commonly

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14 Sidney Verba et al., Voice and Equality: Civic Voluntarism in American Politics 51 (1995).

15 Robert L. Maddex, State Constitutions of the United States at xxx-xli (1998).

without recompense, upon numerous boards and commissions in this state if any connection with such agencies, however remotely related to the matters they are called upon to decide, were deemed to disqualify them."[16] Thus, state courts frequently hold that, absent actual bias, local elected officials can make administrative decisions regarding private parties with whom they have other independent financial dealings.[17] Of course, such dealings present a risk of abuse of office, but it is a risk that state law seems willing to tolerate for the sake of recruiting laypeople into state and local government. Divestiture, or even disclosure, of private interests is rarely required by state law of lay decision-makers, perhaps because the cost of these remedies would deter what is, after all, unpaid and unglamorous service.

C. Bureaucratic and Participatory Populism, Compared: Salience versus Access as Aspects of Democratic Legitimacy

Is participatory populism "more democratic" or "closer to the people" than bureaucratic populism? Hardly. Indeed, the very phrase "more democratic" betrays a misunderstanding of democracy, as if democracy could be regarded as a single quantity rather than a family of different, often mutually inconsistent, qualities. The two styles of democracy each have advantages plausibly described as "democratic" — advantages that, nonetheless, are often mutually exclusive as a practical matter. In what follows, I will first define two democratic virtues, which I will call "access" and "salience." I will then offer an argument for why participatory populism tends to do a good job providing access but a poor job providing salience, whereas bureaucratic populism, as a general matter, does better at providing salience but poorer at insuring access.

1. Salience and Access, Defined

Consider two traits that a successful democratic process must have, which, for the sake of convenience, I shall dub "salience" and "access." By "salience," I mean the public prominence of an issue that is subject to democratic decision-making. Salience is a product of the interaction between voters and the political culture that voters inhabit — the environment of interest groups, media, political parties, and activists that mobilize voters and publicize issues. Salient issues are issues that are more likely to come

16 Petrowski v. Norwich Free Acad., 506 A.2d 139, 142 (Conn. 1986).

17 *See, e.g.*, 1,000 Friends of Oregon v. Wasco County Court, 742 P.2d 39 (Or. 1987) (en banc) (per Linde, J.).

to the attention of voters either because (1) they are inherently dramatic or easy to understand (for instance, the impeachment of President Clinton, the war against Iraq, debates over "hot button" issues like partial birth abortion or gay marriage) or because (2) the voters are mobilized by a broad array of political parties, activists, interest groups, and media, which invest resources in bringing the issues to the attention of the public (for instance, Ralph Nader's campaign to publicize the issue of automobile safety). By contrast, "access" refers to legal rules that enable an already mobilized and informed citizen to affect the decision-making process through voting, lobbying a governmental official, personally running for office, helping someone else run for office, speaking at a hearing, attending a rally, etc.

The democratic legitimacy of any process can be regarded as a function of these factors of salience and access. A process lacking salient issues would hardly be regarded as a model of democracy, regardless of the accessibility of its processes to laypeople, if citizen confusion and apathy were to practically prevent anyone from showing up and voting. For instance, even if there were numerous legal means for an informed and interested citizen to control a county commission's contracting decisions (through personal lobbying of both the county and state legislature, public demonstrations, voting against incumbent officers, attending public hearings, etc.), one might not regard Boss William Marcy Tweed's corrupt control over the construction of the Manhattan Courthouse in 1872 as an ideally democratic decision, because few residents paid any attention to the decision before reformers brought it into public scrutiny. Likewise, an extraordinarily salient process that dealt with extraordinarily salient issues — for instance, abortion, the death penalty, gay rights — would hardly qualify as a model of democracy if it were inaccessible to the public. For instance, the process of adjudication in the United States Supreme Court, although extraordinarily salient, is too inaccessible to be regarded as ideally democratic, because the great mass of people have no right to vote for, or lobby, the Justices or even attend oral argument.[18]

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18 For a debate about the democratic legitimacy of the U.S. Supreme Court, see Christopher Eisgruber, *Constitutional Self-Government and Judicial Review: A Reply to Five Critics*, 37 U.S.F. L. Rev. 115, 138 (2002) (defending the democratic legitimacy of the Court), and Roderick M. Hills, Jr., *Are Judges Really More Impartial than Voters?*, 37 U.S.F. L. Rev. 37 (2002) (questioning such legitimacy). That the general public knows less about the U.S. Supreme Court than Congress or the President does is well-established. Indeed, minuscule percentages of Americans know who the Chief Justice is or even that he is generally conservative in his ideology. *See* Michael X. Delli Carpini & Scott Keeter, What Americans Know About Politics and Why It Matters 217 (1996).

2. Participatory Populism as Low-Salience, High-Access Democracy; Bureaucratic Populism as High-Salience, Low-Access Democracy

One could reasonably argue that democratic legitimacy is maximized by maximizing the sum of access and salience. The difficulty is that salience and access tend to vary inversely with each other. Moreover, bureaucratic and participatory populism each tend to protect one of these democratic virtues but slight the other.

The Jacobin style of bureaucratic populism maximizes the visibility of a few issues, protecting salience by economizing the political energy of the nation so that it can act as the rapt audience for certain inherently dramatic public debates taking place in the capital. The most salient decisions — war and peace, policies concerning fundamental rights, etc. — tend to be made by highly visible institutions of the national government. Indeed, the very national scale of the decision-maker can lend salience to an issue, making not only the President but also the U.S. Supreme Court and Congress "bully pulpits." But bureaucratic populism will generally rank low in terms of access: the very national scale of the decision-maker insures that the vast majority of citizens will participate merely as onlookers and voters, not as active decision-makers. They will not give testimony, submit any *amicus* brief, make any oral argument, or say anything before a decision-maker with broad policy-making discretion to respond to the speech. Instead, they will watch C-Span or read *New York Times* editorials — edifying and even educational activities, but not activities calculated to give the participants deep, first-hand experience in the arts of government.

By contrast, participatory populism scores well on access but poorly on salience. Municipal and county decision-making processes tend to be much more accessible, especially in the mid-sized jurisdictions where most Americans live. The local resident is more likely to get face time with a county commissioner or city council person simply because these representatives have fewer constituents to serve than members of Congress. The votes of such a citizen count for more, because the jurisdiction will have a small population; and the costs of running for office tend to be low simply because the relevant electoral districts tend to be small. Thus, in-person participation in hearings, elections, and lobbying is common at the local level. However, the very characteristics that increase access also reduce salience: local governments focus their attention on those issues that especially concern their own residents, and these issues, precisely because they are parochial, tend to be dull. Thus, it is a well-known paradox that voter turnout varies inversely with the opportunity that the voters have to affect the outcome: turnout is low for state and local offices and high for Presidential elections. Moreover, the small number and low sophistication

of interest groups, political parties, and media at the local level tend to reduce public interest in state and local politics even further.

In short, it is difficult (although not impossible) to combine all of the democratic virtues in the same political process or the same level of government. To be sure, one should be wary about these generalizations, as the matrix below suggests: sometimes a single process scores well (or poorly) on both access and salience. Using the issue of governmental regulation of suicide, the matrix rates four decision-making processes, both federal and non-federal, in terms of their salience and access. Two of the four examples fit the description of participatory and bureaucratic populism offered above.[19] Nevertheless, one can also unequivocally brand some federal processes as undemocratic, while praising non-federal processes as democratic, on *both* salience and access. For instance, the U.S. Department of Justice ("DOJ") issued an interpretative ruling in 2001, maintaining that the federal Controlled Substances Act barred the use of scheduled drugs such as barbiturates for the purpose of inducing suicide. The DOJ's process — an instance of bureaucratic populism — flunked on both grounds of access and salience: as an interpretative ruling, it was not subject to notice and comment by the public, so laypersons had no right to play any role in the decision. At the same time, the technical nature of the issue — interpretation of a lengthy federal statute — insured that it would not capture the attention of the public. By contrast, some instances of participatory populism manage to combine both salience and access: the two referenda enacting and refusing to repeal the Death with Dignity Act in Oregon in 1994 and 1997 certainly did so. Any Oregon resident could vote and lobby in the referenda (insuring high access), and the "hot button" nature of the issue insured that many groups played a prominent role in the vociferous debate and that turnout was relatively high — both aspects of high salience.

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19 Thus, the quintessential institution of bureaucratic populism, the U.S. Supreme Court, produced a highly visible decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997) — but it did so by way of a process to which only a few legal insiders had access. Likewise, county decisions concerning the funding of suicide hotlines, although accessible, will also tend to have low salience, especially if (as is likely) there is no local interest group or newspaper that will feature the decision prominently.

	High Access	**Low Access**
High Salience	1994 and 1997 Oregon referenda respectively enacting and refusing to repeal the Death with Dignity Act (Or. Rev. Stat. §§ 127.800-127.995 (2003))	U.S. Supreme Court's decision in *Washington v. Glucksberg* (521 U.S. 702 (1997)), allowing states to prohibit physician-assisted suicide
Low Salience	County commission's decision to cut budget of programs providing counseling for depression and suicide prevention hotline	Interpretative Rule on the Dispensing of Controlled Substances to Assist Suicide, Rules & Regulations of the Dept. of Justice, 21 C.F.R. § 1306.04, AG Order No. 2534-2001 (Nov. 9, 2001).

3. Participatory Populism and Corruption

The referendum process in Oregon could maintain sufficient salience only because the topic was emotionally controversial enough to motivate participation. As the issues become more technical or dull, the salience of state-wide plebiscites declines rapidly, and a dynamic described by Mancur Olson prevails: citizens do not vote, voters do not inform themselves about the ballot issue, and the process becomes dominated by interest groups narrowly focused on the immediate advantage of their members to be attentive.

One can generalize from this observation to suggest the following hypothesis: participatory populism is prone to corruption to the extent that it cannot motivate a reasonably representative sample of the citizenry to inform itself about the relevant issues and show up to vote. Participatory populism increases access by reducing the scale of government and multiplying the number of elected officials. This strategy of multiplying elections places ever-higher demands on the citizenry to be politically attentive in order to monitor and punish corrupt behavior. Precisely because a system of participatory populism relies on a vast array of part-time, under- or unpaid volunteers, such a system cannot install strict, well-defined

separation between officials' public and private interests. Thus, the only corrective mechanism available is citizen monitoring rather than civil or criminal law. However, participatory populism relies on an enormous number of elective and volunteer offices dealing with a mind-numbing array of mundane governmental issues. As a result, it is not easy to mobilize voters to engage in the necessary monitoring task: by requiring so much public involvement, participatory populism risks inflicting what Alan Ehrenhalt calls "electoral overload" on voters, who cannot possibly inform themselves about the candidates for, say, insurance commissioner or state treasurer, let alone county drain commissioner or probate judge. As Ehrenhalt notes, "[p]lacing these offices on an election ballot doesn't empower the electorate — it empowers the regulated interests that finance the campaign."[20] Thus, participatory populism creates a risk that state and local elections will be dominated by citizens with especially low organizational costs or especially high stakes in the regulatory process. Typically, these more motivated constituents are service providers with an interest in collecting the revenue needed to fund the governmental service. Under these circumstances, the ostensible purpose of the institution — to provide some service (e.g., education, parks, courthouses, etc.) to the public — can be subordinated to the purpose of the service providers (kickback-wielding contractors, unions of government employees, "machines" of the elected politicians themselves, etc.) to enrich themselves. Ironically, policies such as decentralization to small-scale governments, which are designed to empower service recipients, can end up creating opportunities for looting of the public fisc by service providers.

One could describe this sort of "Olsonian" state as a corrupt state if one were to regard all rent-seeking as *ipso facto* corrupt.[21] However, if democratic legitimacy, and not some anti-redistributivist ethic, is taken as the benchmark for democratic legitimacy, then the only corruption of such a "rent-seeking" system is its approval by a skewed electorate, in which a large, inattentive portion of the constituency had its pocket picked simply because it was unaware and never showed up to vote or protest. If a fully informed citizenry votes to fund the construction of buildings to promote the building trades, reduce unemployment, etc., then such a redistribution of wealth from

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20 Alan Ehrenhalt, *Electoral Overload*, Governing Mag., Aug. 2001, at 7.

21 Susan Rose-Ackerman suggests that corruption through bribery and other illegal *quid pro quo* self-dealing and rent-seeking are interchangeable evils. *See* Susan Rose-Ackerman, Corruption and Government: Causes, Consequences, and Reform 128 (1999).

one class of citizens to another will be unobjectionable, at least according to the definition of "democratic legitimacy" on which I rely.

Against such a "publicity" theory of corruption, one can argue that it is difficult to identify the "public" whose opinion is to determine whether some arrangement is "corrupt."[22] The entire populace, of course, will never be aware of any political arrangement, because the vast majority of citizens will always be inattentive to the details of politics.[23] The question, then, arises whether the awareness of some subgroup — building contractors, for instance — suffices to make a system of interlocking benefits "non-corrupt." Since there will always be *some* group with such awareness (namely, the beneficiaries of the allegedly corrupt arrangement), the requirement of publicity so understood is trivial. But a more focused definition of "publicity" requires a more specific definition of what constitutes a sufficiently attentive public.

I suggest that a thin definition of "public awareness" suffices to capture our intuitions about what is distinctive about corrupt behavior. My requirement of publicity requires only that *any* set of interests disagree with each other sufficiently over the legitimacy of some arrangement that one of the interests "blows the whistle" and thus forces its beneficiaries to offer some public defense of the arrangement. Any system of incentives that can survive such an attack and public defense is unlikely to be deemed "corrupt" as this word is used in our culture (although it might be deemed undesirable). Undoubtedly, such a debate will occur only within the tiny "political class" of minimally attentive citizens. But if cleavages of interest insure that this political class will debate the arrangement vigorously, then I suggest that any arrangement that survives the debate is not to be deemed corrupt. Thus, I endorse a theory of political legitimacy similar to Habermas' theory of communicative action, where norms of open debate define substantive values.[24] I emphasize that I make no global claims about the sufficiency of such norms to define *all* values. I also do not stipulate that the conflicting interests must somehow balance each other such that their struggles lead to some efficient equilibrium, as certain neo-pluralist accounts of politics

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22 *See, e.g.*, James C. Scott, Comparative Political Corruption 3-4 (1972); Michael Johnston, Political Corruption and Public Policy in America 7 (1982).

23 On the political ignorance of the vast majority of the population, see John R. Zaller, The Nature and Origins of Mass Opinion 15-18 (1992). *See also* Stephen Bennett, *"Know-Nothings" Revisited: The Meaning of Political Ignorance Today*, 69 Soc. Sci. Q. 476 (1989); Philip Converse, *Public Opinion and Voting Behavior, in* Handbook of Political Science 75 (Fred Greenstein & Nelson Polsby eds., 1975); Robert Luskin, *Measuring Political Sophistication*, 31 Am. J. Pol. Sci. 856 (1987).

24 *See* Jurgen Habermas, Theory of Communicative Action (1981).

argue.[25] Instead, I assert only that, in the specific context of rhetoric about "corruption," the *sine qua non* defining "corrupt behavior" is secrecy and any conflict of interest sufficient to dispel such secrecy by forcing the beneficiaries of some social practice to defend the practice is *ipso facto* not corrupt.[26]

With this definition of "corruption" and "democratic legitimacy" in mind, one can plausibly state that the hazard of participatory populism is that lack of salience will produce democratically illegitimate corruption, because the corrupt activities will be practically invisible to the community. It is not inherently corrupt for county commissioners to give themselves a raise. It is not even corrupt for government employees to pay themselves by retaining a percentage of the revenue that they collect on behalf of the public. (In its approval of "prizes" as a way of funding naval wars, Article I, Section 8, of the Constitution expressly approves at least one such arrangement.) The corruption results solely from the violation of the norms of publicity and sanction by a vote in which a reasonably representative sample of the population participates.[27] Because participatory populism makes such high

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25 For an example of such an optimistic view of interest group competition, see Gary Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. Econ. 371 (1983). As Steven Croley has observed, any such theory rests on the undefended and implausible assumption that the interest groups capable of overcoming collective action obstacles to their formation will somehow faithfully mirror the relative values and beliefs of the general public. Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 Colum. L. Rev. 1, 60-65 (1998).

26 Thus, virtually every academic discussion of corruption seems to proceed from the assumption that corrupt behaviors are "dirty secrets," "lies," etc., in that the beneficiaries of the particular behavior will not defend the behavior as legitimate. *See, e.g.*, Michael Reisman, Folded Lies: Bribery, Crusades, and Reforms (1979); Larry J. Sabato & Glenn R. Simpson, Dirty Little Secrets: The Persistence of Corruption in American Politics (1996). According to one humorous and pithy formulation, secrecy defines the essential distinction between bribes and gifts: with gifts, the recipient says "Thank you," while the giver says "Don't mention it," whereas, with bribes, the giver says "Thank you" and the recipient says "Don't mention it." Roderick M. Hills, Sr., *The Economics of Corruption*, Looking Ahead, July 2001, at 3, 4 (John Miller Memorial Lecture, delivered Apr. 11, 2001).

27 There is a thicker notion of democratic legitimacy under which any redistribution from one portion of the population to another is illegitimate, if such a redistribution can be justified only by the brute political power and naked preferences of the former group and not by any more public-minded reason. Such a view of democratic legitimacy was the foundation for the old doctrine against "class legislation." *See* Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence (1993). Cass Sunstein has famously defended the ban

demands on citizens, one can surmise that it is unusually prone to this sort of corruption.

4. Bureaucratic Populism, the Loss of the Democratic Schoolhouse, and Bureaucratic Sclerosis

Given that it is prone to corruption, one might ask why we should not simply replace participatory populism with bureaucratic populism. Much of the so-called Progressive agenda for political reform in the late nineteenth and early twentieth centuries in the United States — for instance, the "short ballot" movement, civil service reform, at-large electoral districts, reliance on city managers, etc. — could be reasonably characterized as an effort to move to the bureaucratic model of democracy as a means of promoting democracy by curbing corruption, on the theory that the People were simply not equal to the demands of monitoring a complex administrative state.[28] By relying on a professional bureaucracy to carry out more governmental functions, bureaucratic populism makes possible more rigid separation of officials' public and private interests. Although the statement is hard to verify, it is intuitively plausible that such separation will eliminate at least the grosser forms of corruption, without overly taxing citizens' capacity to monitor politics. Thus, bureaucratic populism can be seen as an effort to eliminate the conflicts of interest that plague any governmental system requiring widespread use of volunteers and elected officials.

Such centralization of elections, however, comes at a price: bureaucratic populism tends to reduce opportunities for direct citizen participation in government. If one values such participation for its capacity to increase the political skills of the citizenry, then bureaucratic populism will lack the same educational potential as participatory populism.

Since Tocqueville and J.S. Mill advanced the "schoolhouse-of-democracy" hypothesis, political theorists have asserted that laypersons benefit from in-person participation in government. On this theory, the multitude of elected offices in the United States serve the same function as the minor leagues in baseball — to be a training ground for citizens who aspire to higher office and to provide cheap exposure to some form of the democratic

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on class legislation as an essentially correct view of the Constitution. Cass Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873 (1987).

28 *See* Alexander Keysar, The Right to Vote: The Contested History of Democracy in the United States 117-71 (2000) (Chapter 5); Robert Wiebe, Self-Rule: A Cultural History of American Democracy 135 (1995); Mark Lawrence Kornbluh, Why America Stopped Voting: The Decline of Participatory Democracy and the Emergence of Modern American Politics 118-37 (2000).

sport for those who lack the time and talents for the major leagues. Eliminate those minor leagues and the citizens' competence as voters and activists will suffer.

Is this hypothesis concerning the educational value of participatory democracy supported by persuasive evidence? Testing the Mill-Tocqueville "schoolhouse" thesis is plagued by the problem of reciprocal causation. One could, of course, compare participating and non-participating citizens' political knowledge or self-confidence. But there would be a substantial difficulty in determining the direction of causation: interest in, or knowledge about, politics might obviously be the cause as well as the effect of political participation. To eliminate reciprocal causation, one would need to use a non-recursive statistical model comparing the relationship between preexisting political attitudes and later participation with the relationship between preexisting levels of participation and later political attitudes. But such non-recursive models require large amounts of data, which might be difficult to obtain for more intense forms of political activity, such as holding office or giving speeches at hearings. Some studies indicate that this sort of "thick" participation tends to increase the participating citizens' sense of confidence in the responsiveness of the political system (so-called "external efficacy"), although the effect tends to be modest.[29] As Jane Mansbridge has observed, it is strikingly difficult to confirm or disconfirm the schoolhouse thesis with statistical data, because it is difficult to generate large numbers of citizens with sufficiently intense experiences of political participation to allow those effects to be measured statistically.[30] But this lack of confirmation suggests the limits of statistical social science more than the falsity of the theory: less statistically-oriented empirical research provides some support for the view that political participation gives citizens a stronger sense of social equality and political confidence.[31]

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29 Steven E. Finkel, *Reciprocal Effects of Participation and Political Efficacy: A Panel Analysis*, 29 Am. J. Pol. Sci. 891 (1985) (finding relationship between "external efficacy" and voting and campaigning in national Congressional elections, based on survey responses gathered by the Survey Research Center); Berry et al., *supra* note 8, at 268-70 (finding relationship between participation in cities with strong systems of neighborhood governance and sense of external efficacy).

30 Jane Mansbridge, *On the Idea That Participation Makes Better Citizens, in* Citizen Competence and Democratic Institutions 316-17 (Stephen Elkin & Karol Edward Soltan eds., 1999). Mansbridge's review of the literature finds no studies definitively proving or disproving Mill's thesis. *See id.* at 316 n.57.

31 *See* Mark Schneider & Paul Teske, Public Entrepreneurs: Agents for Change in American Government 136 (1995) (arguing that desire for leadership plays critical factor in motivating candidates for political office); Robert H. Wiebe, Self

To play it safe, one might remain agnostic about whether political participation transforms the psyche of laypersons. Instead, one might ask whether participatory populism transforms policymakers. Do elected generalists and appointed/volunteer laypersons (the decision-makers in participatory populism) have a different style of decision-making or produce different decisions than appointed policy specialists who dominate bureaucratic populism?

On one view associated most famously with Walter Lippman,[32] the broad array of elections provided by participatory populism only empowers a handful of self-interested lobbyists and otherwise makes no practical difference whatsoever to the broader nature of government decision-making. The reason for this skepticism about political participation's effect on decision-making is that voters are hopelessly uninformed about the people and issues on which they vote and cannot possibly affect political outcomes with their meaningless voting. As an example of such a view, consider Professor Edward Rubin's statement: "Elections do not enable the citizens to govern the country, do not provide personal fulfillment through political participation, do not ensure that government will be responsive to organizations representing all sectors of the population, and do not generate collective deliberation in civil society."[33] In true neo-Lippmannite fashion, Rubin supports these claims by pointing to the cognitive limits on lay voters: "[o]rdinary citizens can vote for only a small number of government positions" and "citizens will not, and perhaps cannot, absorb the information necessary to elect the

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Rule: A Cultural History of American Democracy 69-85 (1995) (arguing that the nineteenth-century process of elections, with its gaudy displays of laypersons' political supremacy, symbolized the social equality between the governed and the governing class).

32 Walter Lippmann, Public Opinion (1922), was an extraordinarily influential book urging a reevaluation of mass democracy in light of the ignorance and apathy of the mass electorate. Partly inspired by what he regarded as Americans' mass war hysteria, Lippmann argued that there was no informed or independent "public opinion" on most political questions. Instead, the lay public relied on the "stereotypes" — simplified pictures and ideologies promoted by experts in ideology, publicity, politics, etc. — as a way of making sense of an impossibly complex society. Walter Lippmann, The Phantom Public (1930), Lippmann's sequel to *Public Opinion*, argues that the idea of a stable, informed, public opinion is a "phantom" — a myth promulgated by traditional democratic ideology. Instead, public opinion is a passive and reactive force in politics, controlled by canny political entrepreneurs who manipulate public opinion with symbols and slogans.

33 Rubin, *supra* note 4, at 760.

hundreds of currently appointed officials who constitute the leadership of the administrative state."[34]

Undoubtedly, these statements are sometimes true — especially where salience is low, because there are few interest groups, active news media, or competitive political parties. But there is a large social science literature suggesting that this skepticism about elections is often unjustified: given the right cues from interest groups and political parties, voters not only accurately represent their own preferences but also reflect the views of non-voters.[35] Thus, voters meaningfully constrain politicians and give them an incentive to compete with each other to mobilize rival constituencies.

This incentive to mobilize voters makes elected politicians fundamentally different in their culture and outlook from bureaucrats. By contrast to appointed policy experts, elected politicians will tend to be more

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34 *Id.* at 760-61.

35 Even where voting turnout is low, for instance, voters seem to accurately represent the beliefs and values of non-voters. *See* Raymond Wolfinger & Steven J. Rosenstone, Who Votes? (1980). Wolginger's data famously disclosed that "socioeconomic status" is an imperfect measure for variables that affect voting rates. The reason is that the variable combines educational level with income. It turns out, however, that income has a much smaller effect on voter turnout than educational level. *Id.* at 34. Moreover, there is no relationship between the social status of an occupation and the likelihood that the person pursuing that occupation will vote. *Id.* at 35. Rather, individuals are more likely to vote if they have those modes of thought and cognitive skills necessary to deal with bureaucratic relationships (e.g., filling out forms, meeting deadlines, etc.) and appreciate abstract policy issues. Education tends to impart such skills and habits.

Most important, there seems to be little evidence that voters do not represent the views of non-voters. This is not because voters are demographically identical to non-voters: they are not. Voters tend to be better educated, whiter, and richer. *Id.* at 108. However, the views of voters do not differ drastically from the views of non-voters, because (surprisingly) the preferences for policies and parties do not vary dramatically from one social class to the next. *Id.* at 109. Wolfinger's interesting finding, which Rubin ignores, is supported by both older empirical literature, *see, e.g.*, Richard E. Dawson, Public Opinion and Contemporary Democracy (1973), and for more recent studies, see Verba, *supra* note 14, at 167-68.

Moreover, voters can use various cues and informational shortcuts to vote in a coherent, reasonably stable manner. On the role of endorsements and other cues in insuring rational voting, using experiments with undergraduate volunteers, see Arthur Lupia & Matthew D. McCubbins, The Democratic Dilemma: Can Citizens Learn What They Need to Know? (1996). For survey data suggesting similar results, see Samuel Popkin, The Reasoning Voter (1991). On the stability and coherence of public opinion, see Benjamin Page & Robert Y. Shapiro, The Rational Public: Fifty Years of Trends in Americans' Policy Preferences (1992).

entrepreneurial in putting innovative policies on the agenda, more aggressive in organizing latent interests, and more willing to invoke abstract rhetoric of justice and policy for such purposes of constituent mobilization.[36] This contrast should hardly be surprising: if nothing else, politicians are experts at getting out the vote. The skills necessary for such mass mobilization are numerous: they include an ear for a catchy slogan, an eye for the next headline issue, a gift for gab, a capacity to remember first names, a Rolodex stuffed with consultants who are experts at mass mail campaigns, and computer programs packed with precinct data. Not the least, these skills include the capacity to deliver and sometimes even write a stirring speech.

Whatever else can be said for appointed policy experts, their educational background, professional incentives, and professional culture tend to leave them devoid of these skills. Thus, one would predict that bureaucratic efforts at mass mobilization would be dismal failures, a prediction that the data tend to support.[37] More important, those individuals with such organizational skills have little incentive to use them in the administrative process, because getting people to show up at hearings does not predictably affect the result. Appointed policy experts do not count noses to make their decisions. Politically adept organizers are unlikely to launch a campaign to mobilize laypersons to show up at OSHA rule-making hearings, because those organizers know that OSHA is only modestly influenced by the turnout at hearings: the bureaucratic standards of expertise governing, say, the safe level of cotton dust in the workplace simply leave little room for OSHA to count noses. By contrast, organizers have ample incentive to mobilize minimally

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36 Mark Schneider et al., Public Entrepreneurs: Agents for Change in American Government 167 (1995) (comparing mayors and city managers); John W. Kingdon, Agendas, Alternatives, and Public Policies 19, 30-34 (2d ed. 1995); Joel Aberbach et al., Bureaucrats and Politicians in Western Democracies 106-14 (1981); Renate Mayntz & Fritz Scharpf, Policymaking in the German Federal Bureaucracy 69-76 (1975).

37 As an example of such a failure, consider the Community Action program of the Economic Opportunity Act, in which Ford Foundation intellectuals combined with the Economic Opportunity Agency to bestow federal funds on non-profit organizations that promote maximum feasible public participation. The miserably low turnout in elections for the boards of these community action agencies was one of the reasons cited by Congress for giving mayors and governors veto power over the distribution of federal funds. *See* Debates on Green Amendment, 113 Cong. Rec. 32643 (1967). This is not to say that federal agencies never attempt to increase political participation. However, the efforts of agencies have been described as largely perfunctory and symbolic, in part because of agency personnel's confidence in their own expertise and the lack of formal decision-making power on the part of the lay public. *See* Berry et al., *supra* note 8, at 37-44.

informed voters in an election, because turnout *is* decisive in the electoral context. The rewards of mass mobilization for the political entrepreneur are, therefore, greater in the electoral than the administrative arena. One would reasonably assume that the process of elections is far more effective than the administrative process at mobilizing the public.[38]

Why care about political mobilization? Mobilization is relevant to the schoolhouse thesis because mobilization leads to political engagement, and political engagement is an important predictor of political knowledge.[39] If one is interested in creating an informed citizenry, one will want to mobilize as diverse an array of people as possible, in hopes of creating a "political class" of newspaper-reading, argumentative, inquisitive citizens with a taste for politics. Non-federal elections conducted by politicians are more likely to accomplish this result than federal administrative processes run by appointed bureaucrats. Indeed, such an assertion would seem like an obvious truism were it not for claims by advocates of administrative procedures that those procedures can somehow perform some of the functions of elections. Of course, as Rubin notes,[40] a broad array of interest groups *do* appear before administrative agencies, but these groups represent overwhelmingly middle-class and upper-middle-class interests.[41] They also tend to be staff-led organizations whose members "participate" by cutting a check and sending it to the organization's headquarters in return for a magazine or newsletter. Given that the membership of such groups tends to be highly educated, such groups do not perform much of an entrepreneurial function in mobilizing latent interests that otherwise would not express themselves politically. Thus, federal administrative processes do little to increase the political education

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38 This is, at least, the assumption of the leading empirical study on mobilization and democratic participation. *See* Steven J. Rosenstone & John Mark Hansen, Mobilization, Participation, and Democracy in America (1993):

> Finally, people are more likely to be mobilized to participate in politics when issues come before legislatures than when they come before bureaucracies and courts. .... [P]ublic participation potentially has more impact when elected officials make decisions than when civil servants and judges do. Accordingly, politicians and activists pursue mobilization strategies when issues are before legislatures, but they favor other strategies when decisions are before agencies and courts.

Id. at 36.

39 *See* Carpini & Keeter, *supra* note 18, at 213-14; Rosenstone & Hansen, *supra* note 38, at 211-27 (Chapter 7).

40 Rubin, *supra* note 5, at 782-83.

41 Jeffrey M. Berry, *The Rise of Citizen Groups, in* Civic Engagement in American Democracy 391 (Theda Skocpol & Morris P. Fiorina eds., 1999).

of the citizenry: at most, they provide additional outlets of political power for the over-represented. By contrast, elections — especially hotly contested elections — have the potential of mobilizing and informing a far broader array of people.[42]

In short, J.S. Mill's insight — now conventional wisdom — about the relationship between decision-making power and political participation seems intuitively persuasive: unless citizens have decision-making power through voting, they are unlikely to show up (or to be induced to show up by others) for what are, after all, generally boring processes.[43] It is perhaps not a coincidence that Americans have both institutions that favor participatory populism and also greater confidence in their ability to change political outcomes.[44] Of course, it is difficult to determine whether there is any causal relationship between American institutions and American self-confidence and, if there is such a relationship, which way the causal arrow points. But common sense would suggest an intuitive connection between political participation and political knowledge: it seems odd to believe that one can organize an electoral campaign, lobby an elected official, or run for office without learning more about what the elected officer does as a result. The risk-averse policymaker, therefore, would logically foster institutions of participatory populism until evidence is unearthed that conclusively casts doubt on the educational effects of participation.

This does not mean that one should foster participatory institutions willy-nilly, without considering the cognitive limits of the citizenry. Instead,

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42 On the capacity of contested elections to increase political knowledge, see Carpini & Keeter, *supra* note 18, at 210. E.E. Schattschneider offered a famous early defense of heated electoral conflict as a method for mobilizing a broader array of citizens, E.E. Schattschneider, The Semisovereign People 1-19, 126-39 (Harcourt Brace College ed. 1975).

43 John Stuart Mill, Considerations on Representative Government 172 (Prometheus Books 1991) (1861) ("political discussions fly over the heads of those who have no votes"). Mill's argument can be understood as an under-theorized variety of Jon Elster's argument that civic education is a byproduct of decision-making power. Jon Elster, *The Market and the Forum: Three Varieties of Political Theory, in* Foundations of Social Choice Theory 103, 120-27 (Jon Elster & Aanund Hylland eds., 1986) (noting that "the satisfaction one derives from political discussion is parasitic on decision making" such that political debate cannot produce beneficial side effects such as self-respect, civic energy, etc., unless the participants believe that they actually possess decision-making power and are exercising such power for reasons other than civic education).

44 The classic study supporting this view is the 1963 study by Gabriel A. Almond & Sidney Verba, The Civic Culture: Political Attitude and Democracy in Five Nations 142 (2d ed. 1989).

one must carefully design opportunities for participation to insure, as much as possible, that a representative sample of the affected populace has an incentive to show up. Nor does this mean that one should promote participatory populism at any cost: there are goals besides political education. However, *ceteris paribus*, one should avoid policies that gratuitously circumscribe participatory populism. As the following Part suggests, aggressive enforcement of federal anti-corruption laws constitutes precisely such a gratuitous affront to political participation.

II. How Federal Anti-Corruption Law Can Undermine Participatory Democracy

Federal conflict-of-interest rules, of course, do not apply directly to non-federal officials. However, a misguided zeal for the federal, bureaucratic model of democracy could lead to the extension of such rules to state and local government. This Part of the article argues that recent attempts to extend the federal mail fraud statute to acts not illegal under state law have the tendency to undermine participatory democracy.

As an illustration of a current effort at such extension, consider the First Circuit's decision in *United States v. Sawyer*.[45] *Sawyer* concerns the scope of the federal mail fraud statute, which prohibits the use of mail in "any scheme or artifice to defraud."[46] In 1987, the U.S. Supreme Court construed this statute in *McNally v. United States* to exclude schemes to defraud citizens of their intangible right to honest services.[47] In response to the *McNally* decision, Congress amended the mail fraud statute to define "scheme or artifice to defraud" to include any "scheme or artifice to deprive another of the intangible right of honest services."[48]

It is well-established that this 1988 amendment was intended to criminalize at least some forms of "corrupt" behavior by non-federal officials. The Congress, however, shed little light on the meaning of the

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45 239 F.3d 31 (1st Cir. 2001).

46 18 U.S.C.S. § 1341 (2004), provides, in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud ... for the purpose of executing such scheme or artifice or attempting to do so, places in any post office ... any matter or thing whatever to be sent or delivered by the Postal Service ... shall be fined under this title or imprisoned not more than five years, or both.

47 483 U.S. 350, 355 (1987).

48 18 U.S.C.S. § 1346 (2004).

phrase "honest services." Such a statutory ambiguity has provided federal prosecutors with the opportunity to construe the mail fraud statute broadly to prohibit non-federal officials from engaging in activities that would violate federal conflict-of-interest rules, an opportunity that the U.S. Attorney in Massachusetts took in *Sawyer*.

F. William Sawyer was a lobbyist employed by the John Hancock Insurance Company. His job was to promote the interests of his employer in the Massachusetts legislature. Sawyer cultivated the Massachusetts legislators' good will by paying for their entertainment — dinners, golf rounds, and $4000 worth of expenses incurred by legislators who accompanied Sawyer on a trip to a legislative conference in Puerto Rico. After the *Boston Globe* investigated Sawyer's entertainment of state lawmakers, the U.S. Attorney's Office for the District of Massachusetts began an investigation of Sawyer's expenditures on the theory that they deprived the citizens of Massachusetts of "honest services" within the meaning of the mail fraud statute. The United States eventually prosecuted Sawyer under the Travel Act, which prohibits travel in interstate commerce with the purpose of carrying on an illegal activity, where "illegal activity" is defined as "bribery ... in violation of the laws of the State in which committed or of the United States."[49]

The government's Travel Act theory, however, ran aground on the fact that Sawyer's entertaining the Massachusetts legislators did not violate any state law. Following the U.S. Supreme Court's construction of the federal anti-gratuity statute, the state supreme court had construed Massachusetts' anti-gratuity statute to require proof of a link between payment of a gratuity to an official and some official act. There was no evidence that Sawyer's wining and dining had procured anything beyond the legislators' general good will and a respectful hearing from the legislators that he entertained. For all that the government had proven, the same legislators had been given the same attention from trial lawyers who used similar tactics to defeat the political agenda of the insurers. After Sawyer's first Travel Act conviction was vacated, therefore, the government prosecuted Sawyer for mail fraud, on the theory that his entertainment of the legislators had corrupted them in ways that deprived the citizens of Massachusetts of honest services even if such gifts did not violate any state law.[50]

Sawyer's analysis of the concept of "honest services" suggests that the Court was tone-deaf to the distinction between the norms that ought to govern

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49 18 U.S.C.S. § 1952(b) (2004).

50 The facts of *Sawyer* are drawn from *Sawyer*, 239 F.3d at 35-39.

political and bureaucratic behavior. In particular, the First Circuit invoked the distinction between officials' "public" responsibilities and "personal" interests without indicating any awareness that the personal and public interests of elected officials might properly mingle in fundamentally different ways from appointed, full-time bureaucrats. Quoting an Eleventh Circuit opinion, *Sawyer* provided this description of how its definition of "honest services" depends on the "personal"-"public" distinction:

> When a government officer decides how to proceed in an official endeavor — as when a legislator decides how to vote on an issue — his constituents have a right to have their best interests form the basis of that decision. If the official instead secretly makes his decision based on his own personal interests — as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest — the official has defrauded the public of his honest services.[51]

This passage's confident exclusion of "personal interests" as proper official motives conceals the difficulty of distinguishing between elected officials' personal and public motives. Unlike appointed policy experts, who derive their authority from detached loyalty to regulatory goals and mastery of impersonal scientific technique, elected officials derive their legitimacy from their capacity to create a personal following through their charisma and organizational skills. This expectation makes prohibitively difficult *Sawyer*'s assignment of distinguishing the personal from the public.

The point of elections is to insure that elected officials work aggressively to organize latent interests into effective interest groups: the public goal is harnessed to the elected official's personal ambition of retaining her job. Moreover, the fact that the elected official has self-interested reasons for taking the part of her constituents is not obviously corrupt: under one theory of representation, the elected official is expected to share material self-interest with her constituents, in the same way that a director is expected to buy stock in the company on the board of which he or she sits.[52] Because the organization of interests is a costly undertaking, the elected official is expected to build political organizations — parties — to help bear this cost. Creating parties frequently involves the trading of public goods (including, for instance, government jobs) for private support (campaign contributions,

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51 *Id.* at 39 (quoting United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997)).

52 For an example of such an argument, see George F. Carpinello, *Should Practicing Lawyers Be Legislators?*, 41 Hastings L.J. 92 (1989). For a subtle attack on such a theory of representation, see Andrew Stark, *supra* note 9, at 190-95.

endorsements, votes, etc.). Thus, elected officials are expected to solicit campaign contributions of money or labor from organizations interested in those officials' decisions. Those officials also trade their votes to other officials in return for the beneficiary's political support.

The normal operations of electoral politics, therefore, create a pervasive problem of separating the elected officials' public and personal motives that simply does not exist with appointed bureaucrats. A bureaucrat who refuses to provide service unless the private patron agrees to recommend the bureaucrat for promotion would be guilty of obvious corruption. The politician who refuses to vote for a bill unless the bill's supporters are likely to vote for him in the next election engages in ordinary politics. Thus, it becomes an exercise in political theory trying to distinguish between a politician's "corrupt" personal motives and acceptable "political" motives. For instance, is it corrupt for a politician to vote for a judicial nominee because that nominee belongs to, or has made large donations to, the politician's political party? Is it corrupt for a politician to trade his vote on Bill *X* to get another politician to endorse the former politician in the next election? Under the literal terms of most corruption statutes, such actions could constitute *quid pro quo* bribery. As Daniel Lowenstein has observed, however, such a construction would endanger mechanisms of party democracy that might be essential to the well-functioning of a democratic system.[53] Lowenstein argues that an "intermediate political theory" is needed with which to define "corruption" — one that is less abstract than a theory that defines as corrupt any arrangement that does not substantively serve the public good. But he admits that, in the end, he cannot offer such a theory, because he cannot give a simple account of which arrangements are harmful to American democratic governance.[54]

Take, for instance, Sawyer's practice of wining and dining legislators in order to influence their votes. Should this practice be deemed a corrupt deprivation of honest services? The difficulty is that, in order to meaningfully evaluate such a system, one would need to know much more about Massachusetts political culture than *Sawyer* reveals or that the federal mail fraud statute requires the court to consider. At the very least, one would want to learn whether (1) rival interest groups (e.g., trial lawyers) also wined and dined lawmakers, getting equal access to influence-peddling, and (2) those social interactions funded by such interest groups served any purpose

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53 Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784, 808-13 (1985).

54 *Id.* at 843-44.

beyond massaging lawmakers to favor the host of the event — for instance, by bringing together lawmakers for informal socialization in ways that forge cross-partisan ties and facilitate pragmatic horse-trading. Although uncompromising moralists will scoff at the second hypothesis, there is at least anecdotal evidence to support the view that strict enforcement of anti-gratuities laws makes legislatures dysfunctional by making informal socialization by legislators much more costly.[55]

No simple measure of political corruption can make sense in a system of participatory populism precisely because such a system requires a pervasive mixing of public and private motivation. Lay officials in such a system must necessarily be unpaid to avoid a crushing burden of taxation. But one cannot hope to attract competent people to staff these part-time, temporary positions if the administrative burdens of complying with conflict-of-interest rules become too onerous.[56] Thus, even apparently uncontroversial ethical prohibitions, such as a ban on nepotism, can undermine the capacity to recruit part-timers for low-level part-time local offices.[57] One need not go so far as to defend officials' gaining small private perks of office as partial compensation for the costs of service. One might instead simply note that rules banning nepotism, like all other conflict-of-interest rules, are prophylactic rules that can impose severe costs on even the most impartial office-holder. Anti-nepotism rules, for instance, can discourage any member of a family from taking office for fear of disqualifying their kin. If a state foregoes tight controls on potential nepotism but does so openly and with

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55 *See* Christopher Swope, *Winning Without Steak and Cigars*, Governing Mag., Nov. 2000, *available at* www.governing.com. According to one Kentucky lobbyist, partisan rancor increased in the Kentucky legislature as a result of an extraordinarily strict ethics law prohibiting acceptance of any meal or drink from lobbyists: "'It makes for a different tenor in the General Assembly,' says [the lobbyist]. 'You see a little bit more in the way of bitterness, arguments and personality conflicts, and it's simply due to the fact that members don't know each other as well.'" Kentucky lobbyists argued that the wine-and-dine culture was the legislature's social lubricant: "'We provided the opportunity,' [another lobbyist] says, 'and they did the talking to each other.'" *Id.*

56 *See* Anechiarico & Jacobs, *supra* note 13, at 199.

57 *See* Alan Ehrenhalt, *Nepotism and the Meat Ax*, Governing Mag., Feb. 2001, at 7. Ehrenhalt notes that there is a "nepotism belt" running from West Virginia and Kentucky through southern Indiana and Illinois, in which it is a longstanding tradition for officials to place a family member on the payroll. He is skeptical, however, about aggressive efforts to ban such conflicts of interest, noting that, in smaller communities, such prophylactic prohibitions severely burden the capacity to serve in part-time offices.

apparent community support, it is not obvious why it should be regarded as corrupt.

Sawyer attempts to qualify its broad denunciation of officials' personal interests affecting official acts by noting that such interests violate the mail fraud statute only when they are secret. Thus, the Court found that Sawyer deprived the public of honest services of legislators because he failed to disclose all of the gratuities bestowed upon those legislators, choosing to make such disclosures only when required by state law. So constrained, *Sawyer*'s theory of the mail fraud statute does not prevent state and local politicians from combining personal and public purposes. Instead, federal law simply requires that they disclose all such potential conflicts.

Would such limiting of the mail fraud statute to undisclosed conflicts of interest prevent it from wreaking havoc on participatory populism? Such a view of federal law seems, at first glance, sufficient for two reasons. First, it seems to address the institutional shortcoming of state and local government that leads to corruption in the first place — namely, lack of salience. By bringing personal interests into the light of day, federal law would address the root causes of corruption in participatory populism. Second, as noted above, secrecy seems intuitively essential to any definition of "corruption" that maps on to popular intuitions about the meaning of the term.

Despite these virtues, however, enforcing the mail fraud statute as a federal disclosure requirement has costs that *Sawyer* ignores and that probably outweigh any benefits. To begin with, disclosure is costly.[58] Quite apart from the mind-numbing length of personal disclosure forms, publicizing personal information can be embarrassing or economically painful even when the embarrassment has nothing to do with the desire to abuse office. No developer, for instance, will want to disclose all of his or her options in land for fear of tipping off competitors concerning private land assembly plans. Likewise, consider the plight of Housing and Urban Development Henry Cisneros, who was forced by federal ethics laws to disclose that he had a mistress. Cisneros was willing to disclose his extramarital sexual relationship in order to win the prize of being head of HUD.[59] But state and local office offer much more slender allures to ambition: the requirement that one display one's financial or other personal information can be too high a price to pay for the opportunity to serve on a board of zoning appeals. The costs of disclosure become far greater as they extend to more trivial personal interests — say, a developer's picking

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58 Stark, *supra* note 9, at 250-62.

59 Although one might think Cisneros' plight is fanciful, at least one state has been forced to write exceptions into its ethics laws to exempt personal relationships from state disclosure and ethics rules. Prior to the amendment, Maryland's ethics rules

up the lunch tab or a plaque awarded by some local chamber of commerce. But it is natural for disclosure requirements to metastasize when they are contained as implicit requirements of some federal criminal law: when the penalty for under-disclosure is an indictment, the incentive to disclose a mass of personal information becomes overwhelming.

Disclosure's costs might not be matched with commensurate benefits. The difficulty is that disclosure cannot truly solve the problem of low salience in state and local government because disclosure itself has low salience. Statements buried in disclosure forms that are unread by the press or public serve no function in insuring that public officials' personal interests are ratified by the public. For such forms to be useful, there must be a competitive party system, a vigorous local newspaper, or some other mechanism for bestowing salience. But the absence of such institutions is precisely why corruption can flourish at the state and local levels.

Worse yet, aggressive efforts to eliminate "personal" interests from non-federal politics can actually undermine institutions that promote salience. Take, for instance, a competitive two-party system. Political parties promote the salience of candidates' viewpoints and voting records by giving voters a simple cue to use at the polls in deciding whether candidates roughly reflect the voters' preferences. But political parties cannot sustain themselves without soliciting campaign contributions and trading endorsements for votes and other signs of political support. Such patronage politics skirts the definition of "corruption," because it enlists public power in the service of private ambition. Politicians who insist that political appointments be made only to persons who show loyalty to the party through service, votes, or campaign contributions arguably deprive citizens of their intangible right to honest services, because they "bias" their public decisions based on the "partial" or "personal" consideration of partisan loyalty. If U.S. Attorneys were to outlaw such vote-trading, however, they could critically weaken political parties, depriving party leaders of control over candidates who run under a particular partisan banner and diluting the value of the party label

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imposed bizarre costs on lawmakers and lobbyists. One Maryland state legislator had to disclose gifts and dinners that he had shared with his wife, who was a registered lobbyist with the state. There was an open question whether the father of his bride could give his son-in-law a wedding present because it would have violated a gift-giving ban. The legislator's father was faced with the prospect of itemizing and reporting every dollar he had spent to entertain legislators who had attended the wedding reception. *See* Charles Mahtesian, *They Call It Lobby Love*, Governing Mag., Apr. 1997, *available at* www.governing.com.

as a credible signal to voters. Such prosecutions reduce *both* salience and access simultaneously.

In short, *Sawyer*'s extension of the federal mail fraud statute to prohibit non-federal officials' personal motives, even when these do not violate state law, has the potential for pervasively undermining participatory populism. If corruption is the product of low salience, as this article has argued, then federal anti-corruption law risks increasing corruption.

III. WHAT IS TO BE DONE?

What, then, should be done about federal anti-corruption law? One could, of course, abandon the whole enterprise as inconsistent with participatory democracy. However, such a response would be confused for (at least) two reasons. First, as emphasized above in Part II.C., participatory populism is not "more democratic" than bureaucratic populism. To the contrary, the loss of salience in state and local elections can be a far greater blow to democratic accountability than the loss of access in the federal administrative state. Second, the mail fraud statute unquestionably prohibits some forms of non-federal officials' corruption, at least since it was amended in 1988 in response to the Court's *McNally* decision. The issue, therefore, is to define what it means "to defraud citizens of their intangible right to honest services" in a way that does not destroy participatory populism but that reduces the tendency of such a system of government to corruption resulting from voter inattention. In what follows, I will (1) criticize one argument in favor of a broad reach for federal anti-corruption law and (2) suggest two possible limits on federal anti-corruption law that might address the problems of such a broad view: (a) limiting mail fraud prosecutions to conduct that violates some independent state-law rule of ethics or (b) requiring the Public Integrity Section of the Department of Justice to pre-approve any indictments of non-federal officials.

A. Protecting a "Republican Form of Government" through Federal Prosecutions of Corruption?

One argument in favor of a broad federal power to attack non-federal corruption is that corruption is undemocratic. According to this argument, corrupt politicians do not represent the broad public that elects them but, instead, the narrow interests that bribe them. Therefore, corruption deprives the citizens of a republican — meaning fairly representative — government. One could argue that the Congress and U.S. Attorneys have the power to

attack such corruption pursuant to their power to guarantee a republican form of government to each state's citizens under Article IV, Section 4, of the Constitution.[60] Such a theory rests on a complex web of notions that, where state officials have demonstratively failed to represent the preferences of their constituents "fairly," federal officials should step in to correct this demonstrated state failure.

This argument, however, assumes that democracy is a simple thing, for federal officials are well-suited to deliver. But democracy is not simple: as this article argues above, it requires a complex mix of access and salience. By shining a spotlight on otherwise hidden "personal" motives of non-federal officials, federal prosecutions can increase salience and thereby eliminate one threat to democracy endemic to non-federal systems. But this promotion of salience creates another threat to democracy, because it makes volunteer, part-time service more risky and burdensome. The inexorable tendency of federal criminal prosecutions is to encourage the professionalization of non-federal government, requiring the separation of public and personal interests and thus eroding participatory populism. To argue, as Professor Little does,[61] that state failure to prosecute some targeted behavior justifies federal prosecution is to beg the central question of when the behavior constitutes "failure" to be democratic: Are the benefits of more salience worth the costs of lost access? A similar difficulty plagues Professor George Brown's efforts to justify a federal "protective role" by invoking the interrelated notions that corruption undermines the rule of law, equal access to government, and the right to cast an equally weighted vote.[62] To say that "corruption" is "undemocratic" because it gives special access to some private interest is to beg the central question of determining which sorts of access undermine democracy and which sorts of access constitute democracy. It is the essence, not the corruption, of democracy to give special access to those citizens who are mobilized, who pay attention to government, who bother to lobby or vote. Government is not corruptly "partial" because it favors the mobilized over the quiescent or gives more attention to civic activists than to civic slobs. It is only when salience drops below a certain level that we brand the mixture of personal and public interests as "corrupt."

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60 Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. Cal. L. Rev. 367, 490 (1989).

61 Rory K. Little, *Myths and Principles of Federalization*, 46 Hastings L.J. 1029, 1077-81 (1995).

62 George D. Brown, *Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption?*, 60 Wash. & Lee L. Rev. 417, 484-96 (2003).

Professor Brown insightfully recognizes that the Court's First Amendment jurisprudence on patronage sheds light on the Court's willingness to give the federal government free reign to prosecute non-federal corruption.[63] As Professor Brown observes, the Court has moved, albeit ambivalently, to a condemnation of patronage as a violation of the First Amendment, and he acutely notes that this position dovetails closely with the view that the federal government should have free reign to "protect" citizens from non-federal corruption.[64] But the confusions in this First Amendment jurisprudence indicate that no simple formula can ever define when non-federal government has failed to render "honest services" to its citizens. The First Amendment decisions, read in light of the fierce dissents and concurrences that they provoked, indicate that the struggle is not between "corruption" and "democracy" but rather between two conceptions of democracy — one that relies on fluid access between private and public actors to recruit candidates and underwrite elections and another that seeks to separate the public and the private, professionalizing the executive function as much as possible to eliminate "partiality" in the delivery of governmental services. In short, the struggle of federal prosecutors against what they deem to be corrupt public-private entanglements is a conflict between bureaucratic populism and participatory populism. One cannot give the former generalized oversight over the latter without answering the question of how the two ought to be combined.

B. Limiting Federal Prosecutions to Enforcement of State Ethics Laws

The simplest answer to the problem of the mail fraud statute is to take the position adopted by the Fifth Circuit in *United States v. Brumley*[65] and define the reference to "honest services" in the statute to mean "services that comply with state law." Under this view, there can be no "scheme or artifice to deprive another of the intangible right of honest services"[66] unless the challenged scheme violates some civil or criminal obligation under some state statute.[67]

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63 *Id.* at 456-80.

64 *Id.* at 497 (the First Amendment patronage cases "offer strong support for the protective role in general and, by inference, for the [federal] prosecutions [of non-federal officials' corruption]").

65 116 F.3d 728 (5th Cir. 1997).

66 18 U.S.C.S. § 1346 (2004).

67 *Brumley* did not resolve the question of whether the federal mail fraud statute should be construed to prohibit violations of all state laws or only criminal laws. *Brumley*, 116 F.3d at 734.

The justification for such a limit on the mail fraud statute is that federal prosecutors have no special expertise in designing systems of democracy. Therefore, they ought not to attempt to enforce conflict-of-interest rules that raise tough questions about whether and how to mix personal and public motives to foster lay participation in government. Instead, federal prosecutors should focus on those practices that are obviously and uncontroversially dysfunctional products of voter inattention — practices *that are already understood to be corrupt under state law.* Where non-federal officers' conduct already violates state law, it is hard to argue that the mixture of personal and public motivations has some special value in fostering participatory populism, for the system of participatory populism embodied in the state legislature has already condemned the activity. Because they are insulated from local political networks, federal prosecutors have a comparative advantage over local district attorneys in bringing such uncontroversially corrupt practices into the light of day.

Federal prosecutors' insulation from politics, however, gives them no special expertise in how best to mix public and personal motives so as to create a system of participatory populism. Indeed, anecdotal evidence suggests that bureaucratic independence from political pressure can be a liability when it comes to making such nuanced policy judgments. Precisely because they are insulated from electoral pressures, federal prosecutors can suffer from tunnel vision, giving excessive weight to those goals that are central to their bureaucratic mission. In the context of U.S. Attorneys, this can lead to enforcement of the strictest version of the duty to provide "honest services," regardless of the costs of such single-minded pursuit of purity.[68] This sort of persistence, indeed, is precisely what one would expect from a system of bureaucratic populism: the bureaucratic agents of the center would doggedly pursue those values entrusted to them, *sine ira et studio*, regardless of collateral consequences to goals that fall outside their agency's jurisdiction. But it is a delicate and difficult question whether political patronage, campaign contributions, or interest-group gratuities corrupt or constitute normal politics. *Sawyer*'s extension of federal criminal law beyond state laws has practical significance only when simple *quid pro*

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68 The most famous instances of such monomaniacal pursuit of virtue come from the activities of the independent counsels who prosecuted Henry Cisneros and Mike Espy for what seemed to be trivial violations of ethics rules, which would have been better handled through the political process. *See, e.g.*, David Grann, *Prosecutorial Indiscretion: Espy and the Criminalization of Politics*, New Republic, Feb. 2, 1998, at 18; Anthony Lewis, *The Prosecutorial State: Criminalizing American Politics*, Am. Prospect, Jan.-Feb. 1999, at 26 (discussing Cisneros investigation).

quo bribery is not at issue, for simple bribery is generally prohibited by every state's criminal code. Thus, federal prosecutors who wish to apply federal law to activities that fall outside the state's criminal law will tend to be attacking activities straddling the border between corruption and simple hardball politics — activities such as campaign contributions, log-rolling and vote-trading, interest group funding of conferences and other junkets, partisan criteria for political nominations, nepotism, or non-disclosure of potential conflicts of interest. The federal prosecutors are not competent to enforce their own notions of political morality in this twilight zone.

Commentators have made two objections to this attack on *Sawyer*. First, it is frequently observed that state law enforcement officials commonly do not prosecute ethical lapses of non-federal officials, because the district attorneys themselves are beholden to the political system that produced those self-same lapses. Second, John Coffee argues that the failure to disclose gratuities given to public officials is so harmful that a federal disclosure requirement is essential to prevent the evil.[69] Both of these arguments rest on a common assumption that the benefits of a federal disclosure requirement, enforced with criminal sanctions by federal prosecutors, outweigh the costs.

The first objection begs the question by assuming that criminal prosecution is the best way to insure the right mix of public and private interests. The burden of this article has been to challenge the notion that one can easily — meaning bureaucratically, with legal standards — define when public and personal motives ought to be isolated from each other. In any system of lay participation in government such as elections, these motives will necessarily mingle. Why should one assume that prosecutors *ought* to attack such arrangements? Take, for instance, the efforts by the New York State Special Prosecutor Maurice Nadjari in the 1970s to prosecute then-Bronx Democratic Party Chairman Patrick Cunningham for using partisan loyalty as a standard for selecting state court judges. One could certainly brand such a practice as corrupt — but only if one started from the premise that non-programmatic political parties themselves are a bad idea. Otherwise, one would realize that such parties mobilize allies by (in part) trading political jobs for political support. Where such practices are well-publicized in the local media (as they certainly are in New York),[70] it is not obvious that they are evil. It is true that Nadjari's efforts were foiled by New York's political establishment:

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69 John Coffee, *Modern Mail Fraud: The Restoration of the Public-Private Distinction*, 35 Am. Crim. L. Rev. 427, 453-54, 462-63 (1998).

70 Clifford J. Levy, *Where Parties Select Judges, Donor List Is a Court Roll Call*, N.Y. Times, Aug. 18, 2003, at A1.

Democratic judges invalidated his convictions, while Governor Hugh Carey sacked him.[71] But what is wrong with this outcome? Why is the political suppression of an arguably politicized prosecutor necessarily an evil requiring correction through federal prosecution?

In evaluating whether a political system can police itself, it is not enough to show that local prosecutors are deterred from prosecuting activities that one might deem corrupt. One must also show that non-prosecutorial systems — for instance, administrative remedies or highly visible blue-ribbon commissions — have also failed. Even when New York prosecutors were not attacking corruption in New York City, for instance, a series of politically appointed commissions — the Seabury Commission, the Knapp Commission, the Mollen Commission, etc. — were bringing the problem to the attention of New York voters, who brought pressure on New York politicians to correct the problem.[72] Sometimes the solution is the appointment of a special prosecutor like Thomas Dewey or Nadjari, but sometimes criminal prosecution can actually interfere with administrative remedies.[73]

Professor Coffee's argument also assumes that undisclosed potential conflicts of interest are such a great evil among public fiduciaries that a federal criminal remedy is essential. Coffee's only argument in support of this view, however, is the observation that exit is not an easily available remedy for citizens of corrupt jurisdictions, as it is for shareholders of corporations.[74] But such an argument ignores the power of non-federal political processes: as William Fischel has documented, precisely because homeowners cannot easily sell their houses and exit a corrupt jurisdiction, they have an incentive to monitor local politics with care.[75] This is not to maintain that "homevoters" are a panacea for local corruption. Where the local population is dominated by commuters who live in distant subdivisions, work in another jurisdiction, and have few social ties to one another, the costs of local organizing might

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71 Frank Annechiarico & James Jacobs, The Pursuit of Absolute Integrity: How Corruption Control Makes Governments Ineffective 97-100 (1996).

72 *Id.* at 94-97.

73 *Id.* at 107. Annechiarico & Jacobs note that Mayor Edward Koch's efforts to fire Herb Ryan, a corrupt Taxi & Limousine Commissioner, were hampered by criticism that the termination of the officer would interfere with a criminal investigation. In general, Annechiarico and Jacobs note that administrative discipline can be placed on hold pending resolution of a criminal case, leaving corrupt employees in place and sapping agency morale.

74 Coffee, *supra* note 69, at 462-63.

75 William Fischel, The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance and Land-Use Policies (2000).

swamp the benefits of protecting one's down-payment from corrupt cost-padding by local politicians.[76] However, one must compare the costs of political organization with the cost of the disclosure requirements that criminal prosecution forces on the local community. Such requirements tend to invade the privacy of volunteers and chill political participation, which is why Frank Annechiarico and James Jacobs recommend that disclosure requirements *not* be enforced against unpaid lay decision-makers.[77] There is also the danger that the federal prosecution will be perceived by the constituency that elected the defendant as a political attack on an enemy of the prosecutor's party. Consider, for instance, the widespread reaction of Philadelphia voters to the U.S. Department of Justice's investigation of Mayor Street.

The typical arguments in favor of a federal common-law of corruption rest on the notion that corruption is such an unmitigated evil that the costs of eliminating it root and branch from non-federal systems can be ignored. But Annechiarico and Jacobs persuasively document the extraordinary bureaucratic inefficiency of what they call the "anti-corruption project" — the delays, defensive management, goal displacement, and other pathologies that accompany such a relentless pursuit of purity above efficiency.[78] They give less attention to another cost of the anti-corruption project: the chilling effect on lay participation in government. But this effect on participatory populism is equally a cost of corruption controls to which supporters of federal prosecutions of local corruption ought to give more attention.

C. Requiring the Public Integrity Section of "Main Justice" to Screen Federal Anti-Corruption Prosecutions

Despite the considerations outlined above, however, one might still persist in believing that federal prosecutors should be able to attack corruption even when the allegedly corrupt acts being prosecuted have not been identified

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76 The prevalence of commuters in San Bernadino County was one explanation proffered by observers for the extraordinary corruption of county commissioners there. *See* William Fulton & Paul Shigley, *Addicted to Corruption*, Governing Mag., Nov. 2002, at 36, 40 (noting that "newer residents" spent "so much time commuting to distant jobs that they had neither time nor energy to connect to local government"). More generally, Robert Putnam has provided some evidence that patterns of low-density residential development seem to erode the social capital that reduces costs of collective action and thus promotes local political participation. Robert Putnam, Bowling Alone: The Collapse and Revival of American Community 204-15 (2000).

77 Annechiarico & Jacobs, *supra* note 72, at 199.

78 For a summary of such costs, see *id.* at 174-85.

as such in some state statute. If so, I urge at least one modest restraint on such prosecutions: the U.S. Department of Justice's Public Integrity Section ought to screen all such proposals for prosecutions *before an indictment is filed by the U.S. Attorney.*

The criteria for such screening would be roughly analogous to the policy that the Department of Justice uses for "*Petite* prosecutions."[79] When deciding whether to re-prosecute a defendant who has already been prosecuted by state prosecutors, the U.S. Attorney is expected to determine whether there is a "substantial federal interest" in re-prosecution that the local state prosecutors failed to vindicate because of (among other factors) state prosecutorial "incompetence, corruption, intimidation, or undue influence" or "state court or jury nullification in clear disregard of the evidence or the law."[80] The gist of these criteria is that the federal prosecutor ought not to duplicate the efforts of his or her state counterparts unless the efforts of those counterparts have failed to vindicate some interest that the federal prosecutor has some institutional advantage in protecting — say, interstate commerce or the voting rights of discrete and insular minorities.

What exactly is "the federal interest" in insuring that non-federal officials do not behave corruptly? The typical interest cited is some sort of interest in insuring that non-federal governments have democratically representative systems of government such that they are responsive to constituent concerns. Corruption of the government is said to undermine the "republican form of government" insured by the Guarantee Clause of Article IV.[81]

If this is the most plausible federal interest justifying federal anti-corruption prosecutions (as it indeed seems to be),[82] then the relevant federal

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79 In *Petite v. United States*, 361 U.S. 529 (1960), the U.S. Supreme Court noted that the Department of Justice has broad discretion to avoid prosecution of individuals for federal crimes who have already been prosecuted by state authorities under state law for analogous offenses, even though the Double Jeopardy clause does not bar such re-prosecution. Pursuant to this discretion, the Department of Justice has issued guidelines restricting such federal prosecutions absent a compelling reason to believe that state officials have failed to vindicate some federal interest. For an overview of these considerations, see Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 Annals Am. Acad. Pol. & Soc. Sci. 72 (1996).

80 Dept. of Justice, U.S. Attorneys' Manual, Title 9: Criminal Resource Manual § 9-2.031(H) (Dual and Successive Prosecution Policy ("Petite Policy")) (on substantive criteria for re-prosecution under the *Petite* Policy) [hereinafter U.S. Attorneys' Manual].

81 *See* Kurland, *supra* note 60, at 379 n.26.

82 Of course, one might argue that there is a federal interest in protecting the integrity of the federal mails or federal grants, which are, indeed, two of the jurisdictional

officials ought to make a serious inquiry into whether federal prosecutions will help or hinder the "fair" representation of interests in non-federal political processes. Such an inquiry should not simply involve asking whether the activity in question is being prosecuted by district attorneys. After all, it might be that the activity *ought not to be prosecuted at all* — that the blunt tool of criminal prosecution is ill-suited to the delicate task of creating an effective political process. Rather, the inquiry ought to be whether local voters are sufficiently organized and mobilized that they can bring pressure to bear on the political leadership to end the allegedly offensive practice. Relevant considerations would include whether the local press is vigorous or quiescent; whether there are competitive political parties or networks of civic groups, neighborhood associations, homeowners, etc.; and whether the state legislature has created a civil framework for conflicts of interest and disclosure that would supplant the need for a federal version enforced with criminal penalties. The federal authorities ought also to consider the costs of prosecutions — in particular, whether making a federal crime out of ethically questionable practices might deter laypersons from volunteering for unpaid posts.

I would suggest that this inquiry ought to be conducted by the Public Integrity Section of the U.S. Department of Justice rather than the U.S. Attorney, for two reasons. First, there is a non-trivial chance that the U.S. Attorney will suffer from a conflict of interest in deciding whether to attack local corruption. U.S. Attorneys themselves tend to be local political figures: they have a stake in making a name for themselves as latter-day Thomas Deweys, heroically rooting out corruption where the local machine — often controlled by a rival political party — is allowing it to exist. Even an unsuccessful prosecution can be used as a smear tactic in a political campaign, a strategy that can be effective even if the indictment is later dismissed on appeal. Second, there are economies of scale in having a national office with a bird's eye view of all jurisdictions in the United States come up with some reasonably uniform criteria for what constitutes an unresponsive political process. The notion that a U.S. Attorney office will have the staff or incentive to perform what amounts to an exercise in political theory seems laughable.

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requirements for the application of two statutes that criminalize state and local corruption. *See* 18 U.S.C.S. § 1346 (2004) (mail fraud); 18 U.S.C.S. § 666 (2004) (federally funded programs). However, the U.S. Supreme Court has permitted prosecutions under these statutes that are utterly unrelated to these federal interests, making the jurisdictional prerequisites of involvement with mail or federal funds sheer formalities. *See* United States v. Salinas, 522 U.S. 52 (1997).

Certainly, the remarkable expansion of federal criminal prosecutions of corruption since the 1970s suggests that U.S. Attorneys have not shown the self-restraint that some academics attribute to them.[83] As Charles Ruff noted almost thirty years ago, once an indictment is obtained, it is politically and practically difficult for the Department of Justice to dismiss it.[84] Therefore, it would make sense for such prosecutions to be cleared by Main Justice before they commence. In any case, the practice of justifying federal prosecutions by noting the absence of state prosecutions should cease, for such argument is egregiously circular. Instead, the federal political system needs to consider carefully the costs as well as the benefits of enforcing norms of bureaucratic detachment on systems of participatory populism that resist such norms.

CONCLUSION

Corruption erodes democracy through secret influence of private interests. Salience and bureaucratic impartiality can help cure corruption, by eliminating the secrecy and the mixture of public and personal interests. Because the federal government specializes in producing impartial bureaucrats enforcing highly salient rules, there is a strong argument for a federal role in prosecuting non-federal corruption.

But corruption is not the only way that a regime can become less

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83 For an extremely optimistic argument that federal prosecutors will consider state interests in making decisions to prosecute, see Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 Hastings L.J. 967 (1995). Gorelick and Litman cite little more than the Department of Justice's U.S. Attorneys' Manual as justification for this optimism. Absent data on how U.S. Attorneys implement the Manual, however, this source provides little meaningful evidence of self-restraint. Moreover, even this Manual tends to allow federal prosecutions even when there is no apparent federal interest. For instance, the Manual maintains that it is sufficient justification for a federal prosecution that the federal penalty for a crime is higher than the state penalty. U.S. Attorneys' Manual, *supra* note 80, § 9-27.240 ("Initiating and Declining Charges — Prosecution in Another Jurisdiction"). However, it is hard to understand why there is some institutional reason to believe that higher penalties are better or that the feds are better at determining the appropriate severity of a penalty than the non-federal political process.

84 Charles F.C. Ruff, *Federal Prosecution of Local Corruption*, 65 Geo. L.J. 1171, 1208 (1977). As Ruff notes, the expansion of the Hobbs Act to bring bribery under the term "extortion" even when bribery was unaccompanied by intimidation was largely driven by U.S. Attorneys' grab for jurisdiction rather than any mandate from Congress. *Id.* at 1183.

democratic. In their zeal for pushing bureaucratic impartiality, the proponents of federal anti-corruption law forget that democracy requires lay access to power as well as salience. Such access is simultaneously democratizing and potentially corrupting. To preserve the former characteristic while suppressing the latter tendency, the federal role in policing non-federal corruption should be strong but narrow — ideally, to shine the bright light of federal prosecutions on non-federal practices that are unquestionably corrupting because they are already condemned by state law. U.S. Attorneys have no special expertise on the wisdom of campaign finance reform or conflicts of interest. They have only the power to make salient that which is obscure, free from the personal ties that prevent local law enforcement from performing this task. We do not need federal prosecutors to play the role of political philosophers by making hard judgment calls about how much the personal and political should mix.