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A First Amendment Right to Corrupt Your Politician

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NOTE

A FIRST AMENDMENT RIGHT TO CORRUPT YOUR POLITICIAN

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Are you dealing with state or federal agencies, to no avail? Do you need someone on top to advocate for you? You may have a right to buy your Governor's help. It is well-established that the Constitution protects the right of political association, which includes contributions to candidates in return for ingra-tiation and access. Nonetheless, courts and scholars have generally limited this right to contributions to campaigns for public office. After McDonnell v. United States, *that may change. Reading the* McDonnell *opinion in light of* McCutch-eon, *this Note and other commentators conclude that the Su-preme Court may have inadvertently created a First Amendment right to buy a politician's influence, favor, and advocacy even outside the campaign finance setting. Undoubtedly, to the general public this must appear as nothing other than a First Amendment right to bribery. Yet this right has already been articulated in courts and has the support of at least one U.S. Circuit Court of Appeals judge. These findings suggest that Congress may no longer be able to criminalize certain types of corruption. Some courts have begun to reverse convictions and invalidate parts of existing anti-corruption statutes. While the impact of the First Amendment right remains unclear, the dismantling of the United States' anti-corruption framework may already have begun.*

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† Boston University, B.A. Political Science & Philosophy, 2012; Cornell Law School, J.D. candidate, 2018; Executive Editor, *Cornell Law Review*, Volume 103. I am deeply grateful to Adoree Kim for inspiring my interest in white collar offenses. I would also like to thank Professor Michael Dorf and Professor Stephen Garvey for their guidance and thoughtful comments during the writing of this Note and the members of the *Cornell Law Review*, namely: Rachel Bachtel, J. Xander Saide, Jesse Sherman, Grant Giel, John Ready, Nicholas Halliburton, Peter Kahnert, Scott Cohen, Sue Pado, and the Volume 103 Associates. Finally, utmost gratitude to my parents for their support of my academic pursuits.

INTRODUCTION

To protect speech, the Court forsakes integrity in government. This has been the trend in campaign finance cases, beginning with *Buckley v. Valeo*[1] and becoming notorious in *Citizens United*[2]: laws that shield us from corruption concede to the First Amendment right of political association.[3] Can an incumbent demand that her constituents pay tribute in return for having their concerns heard? Can a company purchase the advocacy of an incumbent? Thus far, scholars have asserted that *Citizens United* applies only in the campaign context, such that the First Amendment protects campaign financing but not bribery or extortion.[4] After *McDonnell v. United States*,[5] how-

1 424 U.S. 1 (1976).

2 558 U.S. 310 (2010).

3 For discussion of case law on campaign financing, see Jon Ellingson, *How the Court Got It Wrong and Jeopardized Our Democracy*, MONT. LAW., May 2016, at 10, 22–23.

4 *See, e.g.*, Nicholas Almendares & Catherine Hafer, *Beyond* Citizens United, 84 FORDHAM L. REV. 2755, 2777 (2016) (arguing that "*Citizens United*'s use of 'corruption' is very much a term of art" that is applicable only in campaign finance cases).

5 136 S. Ct. 2355 (2016).

ever, *Citizens United* may have force outside the campaign-financing context—there may be a constitutional right to corrupt your politician.

In *McDonnell*, the Supreme Court attempted to draw the line between criminal corruption and permissible constituent service.[6] The case involved the Governor of Virginia who, in exchange for hundreds of thousands of dollars' worth of gifts and loans, used his position as the governor to champion a dietary supplement.[7] The jury found the Governor guilty of taking a bribe[8] under the Hobbs Act, 18 U.S.C. § 1951, but the Supreme Court reversed the conviction, holding that sale of influence alone was not punishable.[9]

This holding prompted varying responses. Some asserted that the Court's holding "opens the door to a corrupt 'pay to play' culture" and the "selling [of] office for personal gain."[10] Others asserted that the Court simply rejected "novel prosecution theories that convert traditional constituent services into federal crimes."[11] Still others find significant the question McDonnell briefed but the Court did not address: Did the First Amendment protect McDonnell's sale of influence, favor, and access?[12] Questions thus abound in *McDonnell*: Why did the Court permit such abuse of public office? Does the Court's holding legalize a form of corruption? Is there a First Amendment right to corrupt your politician? This Note will address these questions.

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6 *See* Tara Malloy, *Symposium: Is It Bribery or "the Basic Compact Underlying Representative Government"?*, SCOTUSBLOG (June 28, 2016, 4:03 PM), http://www.scotusblog.com/2016/06/symposium-is-it-bribery-or-the-basic-compact-underlying-representative-government/ [http://perma.cc/U63V-A6MK].

7 United States v. McDonnell, 792 F.3d 478, 488–93 (4th Cir. 2015).

8 Although the text of the Hobbs Act criminalizes the "obtaining of property from another, with his consent . . . under color of official right," 18 U.S.C. § 1951(b)(2) (2012), courts treat this crime as "the rough equivalent of . . . 'taking a bribe.'" Evans v. United States, 504 U.S. 255, 260 (1992); *see also* Ocasio v. United States, 136 S. Ct. 1423, 1428 (2016).

9 *See McDonnell*, 136 S. Ct. at 2365, 2372.

10 Fred Wertheimer, *Symposium:* McDonnell *Decision Substantially Weakens the Government's Ability to Prevent Corruption and Protect Citizens*, SCOTUSBLOG (June 28, 2016, 12:38 PM), http://www.scotusblog.com/2016/06/symposium-mcdonnell-decision-substantially-weakens-the-governments-bbility-to-prevent-corruption-and-protect-citizens/ [http://perma.cc/U42Q-LSWX].

11 Jeffrey Green & Ivan Dominguez, *Symposium: Federal Criminal Statutes Are Not Blank Checks for Prosecutors*, SCOTUSBLOG (June 28, 2016, 11:44 AM), http://www.scotusblog.com/2016/06/symposium-federal-criminal-statutes-are-not-blank-checks-for-prosecutors/ [http://perma.cc/QD6W-TNHX] (asserting that the Supreme Court in *McDonnell* merely prevented prosecutor overreach).

12 *See* Malloy, *supra* note 6.

As a preliminary matter, however, one ought to consider whether we should be concerned about the selling of influence, favor, and advocacy at all. Most would characterize such sales as corruption.[13] Yet some empirical studies suggest corruption is neither prevalent in, nor harmful to, the United States.[14] One ought to reject this conclusion for two reasons. First, political scientists have long cautioned that corruption can transform a representative democracy into a tyranny.[15] Congress appreciated this threat and so enacted statutes to prevent corruption of public office.[16] In fact, a number of studies substantiate these fears, finding significant and detrimental effect of money on politics.[17] Second, corruption harms public trust in government.[18] As of 2015, 75% of Americans perceived corruption as widespread on Capitol Hill.[19] This distrust in the U.S. political system was also evident in the 2016 election.[20] Ac-

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13 *See, e.g.*, Telink, Inc. v. United States, 24 F.3d 42, 43 (9th Cir. 1994) (noting that the prosecution listed "influence peddling" among allegedly corrupt acts); Seropian v. Forman, 652 So. 2d 490, 502 (Fla. Dist. Ct. App. 1995) (Stone, J., concurring in part and dissenting in part) ("Accusing a government official of influence peddling is arguably the equivalent of a charge of corruption.").

14 *Cf.* Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder Jr., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 127 (2003) (suggesting that private interest group money plays an insignificant role in influencing U.S. politicians); Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681, 681 (1995) (listing studies that "suggest[ ] that corruption might *raise* economic growth").

15 *See, e.g.*, ARISTOTLE, POLITICS (C. 350 B.C.E.), *reprinted in* 2 THE COMPLETE WORKS OF ARISTOTLE 1986, 2068 (Jonathan Barnes, ed. 2014) ("When the magistrates are insolent and grasping they conspire against one another and also against the constitution from which they derive their power, making their gains either at the expense of individuals or of the public."); *accord* BERNARD BAILYN, THE ORIGINS OF AMERICAN POLITICS 56, 79, 105, 139–40 (Vintage, 1970) (noting that the founding fathers saw corruption as a threat to liberty).

16 *See* CONG. GLOBE, 32d Cong., 2d Sess. 242 (1853) (explaining that 10 Stat. 170 was enacted to preserve the honor of offices and the "character of the Government").

17 *Cf.* Michael M. Franz, *Addressing Conservatives and (Mis)using Social Science in the Debate over Campaign Finance*, 51 TULSA L. REV. 359, 369 (2016) (listing the findings of various studies and noting that these studies tend to disagree on whether money actually influences politics).

18 Eric M. Uslaner, *Political Trust, Corruption, and Inequality*, *in* HANDBOOK ON POLITICAL TRUST 302, 304, 307 (Sonja Zmerli & Tom W.G. van der Meer eds., 2017); *see also* Jacobus v. Alaska, 338 F.3d 1095, 1113 (9th Cir. 2003) ("Like direct influence-peddling by candidates, this kind of access-peddling creates a danger of corruption and the appearance of corruption.").

19 *75% in U.S. See Widespread Government Corruption*, GALLUP (Sept. 19, 2015), http://www.gallup.com/poll/185759/widespread-government-corruption.aspx [http://perma.cc/KMJ5-7F55].

20 *See Trump Blasts Clinton for 'Pay-for-Play Corruption,'* BLOOMBERG (Nov. 3, 2016, 1:44 PM), http://www.bloomberg.com/politics/videos/2016-11-03/trump-blasts-clinton-for-pay-for-play-corruption [http://perma.cc/686E-ACDY]; *see also* Francesca Chambers, *FBI Clinton Foundation Probe Finds 'Avalanche' of*

cordingly, we must not delay in addressing corruption—its problems are present and immediate.[21]

Being concerned with corruption does not mean, however, that we ought to conduct a witch-hunt to root out every appearance of corruption. Whereas under-regulation can cause social discord,[22] overzealous regulation can freeze the government and harm the economy.[23] State and federal governments must neither over-regulate nor under-regulate. This Note will not, however, attempt to determine the optimal level of regulation or expound on the dangers of corruption.[24] It suffices to say that our anti-corruption laws must be carefully studied and discussed.[25] Rather, this Note focuses on the interaction between the U.S. anti-corruption framework and Constitutional Law. Specifically, this Note investigates whether recent Supreme Court cases created a constitutional right to engage in some form of corruption.

Part I of the Note focuses on the Supreme Court's most recent bribery case—*McDonnell v. United States*. The Note summarizes the prosecution of Governor McDonnell, beginning with a review of the facts and the relevant lower courts' holdings, then looks at the Supreme Court's decision. The Note finds no flaw with the Court's reasoning and concludes that the bribery statute never covered the sale of influence, favor, or advocacy. Nonetheless, the Note asserts that the *McDonnell* holding complicates future bribery prosecutions by imposing additional mens rea requirements.

Corruption Evidence Against Her - but Agents Fear Justice Department Will Stop Her Going on Trial, DAILYMAIL (Nov. 3, 2016, 8:52 AM), http://www.dailymail.co.uk/news/article-3901376/Secret-recordings-fueled-FBI-s-desire-probe-Clinton-Foundation-case-moves-likely-indictment.html [http://perma.cc/EGG9-KCYU].

21 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 173 (Thomas Nugent trans., D. Appleton & Co. 1900) ("When once a republic is corrupted, there is no possibility of remedying any of the growing evils but by removing the corruption and restoring its lost principles.").

22 *See* Sarah Dix, Karen Hussmann & Grant Walton, *Risks of Corruption to State Legitimacy and Stability in Fragile Situations*, 2012 U4 ISSUE 1, 6 (2012).

23 *See* Robert E. Hall & Charles I. Jones, *Why Do Some Countries Produce So Much More Output per Worker than Others?*, 114 Q.J. ECON. 83, 84 (1999).

24 For a discussion of these topics, see Rick Hubbard, *Restoring Citizen Representation in Our Democratic Republic: Congress Is Lagging—Do We Have the Will to Force Change?*, 40 VT. B.J. 20 (2014).

25 *Cf.* JOHN ADAMS, A DISSERTATION ON THE CANON AND FEUDAL LAW (1765), *reprinted in* 3 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS 447, 457 (Charles C. Little & James Brown eds., 1851) (extolling the virtues of the press and discourse as shields against "the ambition or avarice of any great man" and "the jaws of power").

In Part II, the Note explores the question of whether the Governor engaged in any corruption at all. Here, the Note finds that the *McDonnell* Court adopted a definition of corruption identical to that established in *Citizens United* and *McCutcheon*. Under this definition, the Governor was not corrupt. The Note contends that this definition may extend First Amendment protection to the sale of political influence and favor, "rules-free policymaking and electioneering."[26]

Finally, Part III of the Note explores whether the First Amendment can be used as a defense to bribery or other corruption charges. The Note finds that such use of the First Amendment is possible, but that doctrines developed in the U.S. Courts of Appeals decrease the likelihood of success. Thus, the Note concludes that it may be your constitutional right to pay for your governor's influence, favor, and advocacy. Just make sure you are prepared to fight to the Supreme Court.

I
MCDONNELL V. UNITED STATES: SUPREME COURT DEFINES THE BRIBERY STATUTE'S "OFFICIAL ACT" REQUIREMENT

Prosecutors often charge officials with violations of the Hobbs Act, 18 U.S.C. § 1951, or with honest services fraud, 18 U.S.C. § 1346, by establishing bribery, as defined in 18 U.S.C. § 201.[27] To establish bribery, the government must prove that (i) something of value was offered to or received by (ii) an incumbent official or a candidate for office, with the (iii) intent to either "influence any official act" or "be[ ] influenced in the performance of any official act."[28] Yet the Supreme Court's guidance on this statute is somewhat lacking. The Court has not addressed the bribery statute since 1999, when in *United States v. Sun-Diamond Growers of California* the Court required

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26 Brent Ferguson, *Does the First Amendment Justify Corruption?*, AM. PROSPECT (Apr. 26, 2016), http://prospect.org/article/does-first-amendment-justify-corruption [http://perma.cc/3F2V-D4Y9] (expressing the fear that the *McDonnell* Court will establish a First Amendment right to some forms of corruption).

27 *See, e.g.*, United States v. Ring, 706 F.3d 460, 465 (D.C. Cir. 2013) (charging defendant on a bribery theory of honest-services fraud); United States v. Gaw, 2014 WL 2435269, at *2 (D. Mass. May 30, 2014) (charging the same). The Supreme Court permitted such use of the honest services fraud statute and the Hobbs Act. *See* Skilling v. United States, 561 U.S. 358, 408–09 (2010) (honest services fraud covers bribery); Evans v. United States, 504 U.S. 255, 269 (1992) (Hobbs Act encompasses bribery); *see also* Stephanie E. Lapidus & Mariya Mogilevich, *Public Corruption*, 47 AM. CRIM. L. REV. 915, 921, 930 n.117 (2010) (outlining the elements of criminal bribery).

28 18 U.S.C. § 201 (2012).

the prosecution to prove a quid pro quo—that something of value was given in exchange for an official act.[29] The Court did not, however, address what constitutes an "official act," and this ambiguity became the primary issue in *McDonnell v. United States*.[30]

A. The Governor of Virginia Sells Special Treatment for a Rolex

Robert F. McDonnell, the seventy-first Governor of Virginia ("McDonnell"), was living beyond his means: at the time of his inauguration in 2010, he and his wife, Maureen McDonnell ("Maureen"), owed over ninety thousand dollars in credit card debt; his real-estate business was losing money, and, by 2012, his business owed nearly two-and-a-half million dollars.[31] In the depths of economic despair, McDonnell ran into Jonnie Williams, the founder and chief executive of Star Scientific, Inc.[32] McDonnell had met Williams once before—in 2009, before his inauguration as governor, when they shared a five-thousand-dollar bottle of cognac and discussed an expensive dress Maureen was to wear to the inauguration.[33] Their second meeting was on a six-hour flight from California to Virginia, and Williams spent the flight "extoll[ing] the virtues of Anatabloc," a product he created to treat chronic inflammation.[34] By the end of the flight, McDonnell agreed to introduce Williams to Virginia's secretary of health and human resources.[35]

Thereafter, the McDonnells' interaction with Williams became increasingly venal. After Maureen seated Williams next to McDonnell at a political rally, Williams took Maureen on a shopping spree, spending approximately twenty thousand dollars in a single day.[36] In May of 2011, Williams loaned sixty-five thousand dollars to the McDonnells to help their financial crisis, and funded McDonnell's golfing trip with his two sons, covering a $2,380.24 bill.[37] Then over the summer of 2011, Williams presented the McDonnells with various gifts, includ-

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29 *See* 526 U.S. 398, 404–06 (1999).
30 *See* United States v. McDonnell, 64 F. Supp. 3d 783, 788 (E.D. Va. 2014), *aff'd*, 792 F.3d 478, 506 (4th Cir. 2015), *rev'd*, 136 S. Ct. 2355, 2359–60 (2016).
31 *See* United States v. McDonnell, 792 F.3d 478, 486–90 (4th Cir. 2015).
32 *See id.* at 487.
33 *See id.*
34 *Id.*
35 *See id.*
36 *See id.* at 487–88.
37 *See id.* at 488–89.

ing a vacation at Williams's multimillion-dollar home, a boat rental, use of Williams's Ferrari and Range Rover, a Rolex watch, and new golf clubs and bags.[38]

During the same time period, Maureen purchased over six thousand shares of Star Scientific, Inc.[39] McDonnell directed his staff to meet Williams to discuss Anatabloc clinical trials at Virginia's public institutions, while Maureen met members of those institutions to notify them of how important Anatabloc was to McDonnell.[40] McDonnell also hosted luncheons funded with his PAC, where he publicly advocated for Anatabloc.[41] Allegedly, McDonnell's influence was necessary to induce the Commonwealth of Virginia to fund the Anatabloc research.[42]

This relationship continued for four years, purposefully hidden from the public: Williams later testified that he "didn't want anyone to know that [he] was helping [McDonnell] financially with his problems while [McDonnell] was helping [Williams's] company."[43] Similarly, McDonnell "did not tell his staff about the personal benefits he received from Williams," and his "public financial disclosure[s] . . . omitted most of them."[44] Thus, the Governor of Virginia used his influence and position to promote a private product in exchange for expensive gifts.

B. The Jury Believes the Sale Is Corrupt and Criminal

When these transactions went public, the U.S. Government charged McDonnell "with honest-services fraud, Hobbs Act extortion, and conspiracy to commit those offenses."[45] The government sought to convict McDonnell by showing that he had taken a bribe.[46] This, in turn, required the prosecution to establish that McDonnell performed an "official act," which the

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38 *See id.* at 489–90.

39 *See id.*

40 *See id.* at 490.

41 *See id.*

42 *See* Indictment at ¶¶ 12, 44, United States v. McDonnell, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. CR 14-00012) (noting that Star Scientific used Robert to solicit research funding); Arthur Allen, *The Real Scandal in Virginia*, SLATE (Jan. 29, 2014, 11:49 PM), http://www.slate.com/articles/health_and_science/medical_examiner/2014/01/virginia_gov_bob_mcdonnell_scandal_star_scientific_in_trouble_with_fda_over.html [http://perma.cc/RZ3U-UCSR] (noting that Star Scientific could not afford research on its own).

43 *McDonnell*, 792 F.3d at 491.

44 Brief of Respondent at 10–11, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474).

45 *Id.* at 11.

46 *See* McDonnell v. United States, 136 S. Ct. 2355, 2365 (2016) ("The theory underlying both the honest services fraud and Hobbs Act extortion charges was that Governor McDonnell had accepted bribes from Williams.").

parties agreed to define pursuant to the Federal Bribery Statute, 18 U.S.C. § 201 as:

> [A]ny decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.[47]

Following a five-week trial, the jury found McDonnell guilty.[48] McDonnell filed a motion to vacate the jury verdict and a motion for a new trial, but the district court denied both motions.[49]

McDonnell appealed to the U.S. Court of Appeals for the Fourth Circuit, arguing that the following jury instruction on the meaning of "official act" was erroneous[50]:

> The term official action . . . includes those actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law. In other words, official actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description. And a public official need not have actual or final authority over the end result sought by a bribe payor so long as the alleged bribe payor reasonably believes that the public official had influence, power or authority over a means to the end sought by the bribe payor. In addition, official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.[51]

The Court of Appeals found these instructions proper, despite McDonnell's argument that the instructions encompassed ceremonial acts such as receptions and speeches.[52] The Court of

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47 18 U.S.C. § 201(a)(3) (2012); *McDonnell*, 792 F.3d at 505.

48 *See McDonnell*, 792 F.3d at 486.

49 *See* United States v. McDonnell, 64 F. Supp. 3d 783, 802 (E.D. Va. 2014) (denying the first motion); United States v. McDonnell, 2014 WL 6772486, at *8 (E.D. Va. Dec. 1, 2014) (denying the second motion).

50 *See McDonnell*, 792 F.3d at 494. The Governor also raised several procedural and substantive arguments, which the Court of Appeals dismissed. *Id.* at 486. This Note will not address these challenges.

51 *Id.* at 505–06.

52 *See id.* at 506–08 (citing United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999); United States v. Birdsall, 233 U.S. 223 (1914)) (noting that the district court's instructions were not overbroad and conformed to Supreme Court precedent).

Appeals also upheld the district court's decision to reject McDonnell's proposed instructions.[53]

The Court of Appeals then reviewed the evidence submitted to the jury and concluded that it was sufficient to sustain a conviction. The Court of Appeals first identified three official acts McDonnell performed. First, McDonnell "exploited the power of his office in furtherance of an ongoing effort to influence . . . state university researchers" to study Anatabloc.[54] Second, McDonnell used his influence to urge "the state-created Tobacco Indemnification and Community Revitalization Commission . . . [to] allocate money for the study of anatabine"—the basis of Anatabloc.[55] And third, McDonnell used his influence to urge health department officials to "include Anatabloc as a covered drug" in the health insurance plan for state employees.[56] For each of these acts—the *quo*—the Court of Appeals found a contribution of money or service—the *quid*.[57] Accordingly, the Court of Appeals held that McDonnell "received a fair trial and was duly convicted by a jury of his fellow Virginians."[58] Thereafter, McDonnell petitioned the Supreme Court for a writ of certiorari, which the Court granted but limited to the question of whether McDonnell performed an official act.[59]

C. The Supreme Court Disagrees

The Supreme Court began its review by noting that McDonnell's Hobbs Act and honest services fraud convictions depended wholly on the district court's interpretation of "official act."[60] The Government contended that an official act "encompasses nearly any activity by a public official . . . includ[ing] arranging a meeting, contacting another public official, or hosting an event—without more—concerning any subject, including a broad policy issue."[61] Speaking on behalf of a unanimous court, Chief Justice John Roberts rejected such an interpretation, holding that "setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as

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53 *See id.* at 513 (noting the Governor's proposed instructions that "'[m]any settled practices of government officials are not official acts' . . . [was] not a statement of law . . . [but] a thinly veiled attempt to argue the defense's case").

54 *Id.* at 517.

55 *Id.* at 516.

56 *Id.*

57 *See id.* at 518–20.

58 *Id.* at 520.

59 *See* McDonnell v. United States, 136 S. Ct. 891, 891 (2016) (mem.).

60 *See* McDonnell v. United States, 136 S. Ct. 2355, 2365, 2367 (2016).

61 *Id.* at 2367.

an 'official act.'"[62] In reaching this conclusion, the Supreme Court developed a two-part test to determine whether a public official acted officially. First, did the public official's conduct constitute a "formal exercise of governmental power"?[63] Second, did the public official decide a matter that by law is the official's duty to decide, or intentionally influence another official to decide such a matter?[64]

According to Chief Justice Roberts, an official act denotes "a formal exercise of governmental power" because 18 U.S.C. § 201 requires an action on a "question, matter, cause, suit, proceeding or controversy"—terms traditionally used to refer to "lawsuit[s], hearing[s], and administrative determination[s]."[65] Moreover, the statute also requires "that the question or matter . . . be 'pending' or 'may by law be brought' before 'any public official.'"[66] The Court held that the phrase "'may *by law* be brought' conveys something within the specific duties of an official's position," while the word "'any' conveys that the matter may be pending either before the public official who is performing the official act, or before another public official."[67] Therefore, to prove that a public official performed an official act, the government must demonstrate that the government action that was the object of bribery could normally be requested of some public official by law.[68]

Thereafter, the Court set out to determine the conduct that would constitute a "decision or action" on the official matter or question.[69] Here, the Court rejected the Fourth Circuit's interpretation, holding that "the public official must make a deci-

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62 *Id.* at 2368.

63 *Id.* at 2369.

64 *See id.* at 2372; *see also* United States v. Jones, 207 F. Supp. 3d 576, 580–81 (E.D.N.C. 2016) (summarizing the two-part test).

65 *McDonnell*, 136 S. Ct. at 2368 (citing Crimes Act of 1790, 1 Stat. 117 (for use of these terms in judicial proceeding context); BLACK'S LAW DICTIONARY 278–79, 400, 1602–03 (4th ed. 1951) (for definition of these terms); 18 U.S.C. § 201(b)(3) (for use of these terms within the same statute)). The Chief Justice also noted that while "question" and "matter" could be defined broadly, "the familiar interpretive canon *noscitur a sociis*, 'a word is known by the company it keeps,'" urged a narrow reading. *Id.* Moreover, interpreting "question" and "matter" broadly would render the other terms impermissibly superfluous. *See id.* at 2369 (citing Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy, 548 U.S. 291, 299 n.1 (2006)).

66 *Id.* (quoting 18 U.S.C. § 201(a)(3)).

67 *Id.*

68 *See id.* ("Economic development is not naturally described as a matter 'pending' before a public official—or something that may be brought 'by law' before him—any more than 'justice' is pending or may be brought by law before a judge, or 'national security' is pending or may be brought by law before an officer of the Armed Forces.").

69 *See id.* at 2370.

sion or take an action *on*" an official matter or question, not merely act in a manner "related to a pending question or matter."[70] An official could also be prosecuted for agreeing to perform the official act, even if the official never intended to perform.[71] Nonetheless, "meeting with other officials, or speaking with interested parties is not, standing alone, a 'decision or action.'"[72] That being said, such meetings and parties could "serve as evidence of an agreement to take an official act," if the "official was attempting to pressure or advise another official on a pending matter."[73] What the prosecution must show is that "the public official . . . intend[ed] to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an 'official act.'"[74]

Applying these rules to the facts of the case, the Court found that the jury instructions were inadequate, because it was neither clear that the "jury reached its verdict after finding . . . formal exercise of governmental power," nor that McDonnell "agree[d] to make a decision or take an action on" that formal exercise.[75] In other words, it was unclear whether McDonnell "expected [his subordinates] to do anything other than" attend the meeting; a conviction requires evidence that McDonnell intended to pressure or advise his subordinates to adopt Anatabloc.[76] Accordingly, the Court vacated the judgment of the Court of Appeals and remanded for further proceedings.[77]

D. No Mens Rea, No Corruption

Reactions to the *McDonnell* decision were quite polarized, with some condemning it as a "decimation of . . . anti-corruption laws"[78] and others dismissing it as unremarkable.[79] In *Tawdry or Corrupt?*—currently one of the most extensive re-

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70 *Id.*

71 *Id.* at 2371.

72 *Id.* at 2370 (citing United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 407 (1999)).

73 *Id.* at 2371.

74 *Id.*

75 *Id.* at 2374–75.

76 *See id.*

77 *Id.* at 2375.

78 Rob Hager, *Supreme Court Legalizes Influence Peddling:* McDonnell v. United States, COUNTERPUNCH (June 30, 2016), http://www.counterpunch.org/2016/06/30/supreme-court-legalizes-influence-peddling-mcdonnell-v-united-states [http://perma.cc/LQW7-TU2Q].

79 *See* Case Comment, *Federal Corruption Statutes—Bribery—Definition of "Official Act"*—McDonnell v. United States, 130 HARV. L. REV. 467, 476 (2016) ("*McDonnell* may best be understood as revising jury instructions rather than rewriting what constitutes corruption itself.").

views of *McDonnell*—Harvey Silverglate and Emma Quinn-Judge assert that the Court's definition of official action is still too ambiguous and "poses grave risks of prosecution without fair notice."[80] According to their article, too fine of a line exists between, for example, "narrowing down the list of potential research topics"—an official act, and "gather[ing] additional information"—not an official act.[81] Silverglate and Quinn-Judge claim that "this very fine distinction . . . disappears completely when the question shifts to performance of an official act,"[82] because the jury is permitted to conclude that "the official was attempting to pressure or advise another official on a pending matter."[83] Accordingly, they conclude that the prosecution could hold any official liable "so long as it can find *some* connection to an official act—be it a 'qualifying step' on the road to a decision or an attempt to exert pressure or offer advice to another official who is performing an official act."[84]

The analysis of Silverglate and Quinn-Judge, while appealing at first glance, fails to fully extrapolate the two-part test the Court created. They err in their claim that the prosecution could establish an official act by showing that "the official was attempting to pressure or advise another official on a pending matter."[85] That is, the article confounds three distinct scenarios the Court attempted to keep separate: first, where officials act within their duty; second, where officials attempt to influence other officials in performance of their duty; and third, where officials advise other officials.[86] The elements necessary to prove each of these scenarios differ. First, when an official performs "the function conferred by the authority of his office," the prosecution must prove no more than that the official

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80 Harvey A. Silverglate & Emma Quinn-Judge, *Tawdry or Corrupt?* McDonnell *Fails to Draw a Clear Line for Federal Prosecution of State Officials*, 2016 CATO SUP. CT. REV. 189, 206–07 (2016) (quoting McDonnell v. United States, 136 S. Ct. 2355, 2373 (2016)) (internal quotations omitted).

81 *Id.* at 205 (quoting *McDonnell*, 136 S. Ct. at 2370) (internal quotations omitted).

82 *Id.* at 205.

83 *Id.* at 206 (quoting *McDonnell*, 136 S. Ct. at 2371) (internal quotations omitted).

84 *Id.* (quoting *McDonnell*, 136 S. Ct. at 2370).

85 *Id.* (quoting *McDonnell*, 136 S. Ct. at 2371) (internal quotations omitted).

86 *See McDonnell*, 136 S. Ct at 2372 ("[T]he public official must make a decision or take an action on [a] question . . . or . . . us[e] his official position to exert pressure on another official . . . or . . . advise another official." (internal quotations omitted)).

"agreed to perform . . . at the time of the alleged *quid pro quo*."[87] Second, when an official "us[es] his official position to exert pressure on *another* official to perform an 'official act,'" the prosecution must show that the official *intended to* exert pressure.[88] Third, the official act requirement is established if an official "advise[s] another official, *knowing* or *intending* that such advice will form the basis for an 'official act' by another official."[89] In other words, the Court added mens rea requirements for prosecutions arising out of bribes received in exchange for advice or influence, whereas bribes in exchange for an act lack such a requirement.

The Court's addition of a mens rea requirement is not without significance. Lower tribunals generally do not require the prosecution to prove the public official's mental state as to performing the official act, but merely that he or she knew the nature of what he or she was receiving.[90] Mens rea requirements complicate prosecutions, as prosecutors must invest more time and resources to obtain the requisite evidence.[91] This is particularly true in the white-collar crime context, where the presence of many actors diffuses evidence of individual involvement.[92] Furthermore, the intent requirement would also introduce the possibility of mistake of fact as a defense—

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87 *Id.* at 2369, 2371 (noting that for such cases "[t]he jury may consider a broad range of pertinent evidence, including the nature of the transaction, to answer that question").

88 *Id.* at 2370, 2371 ("Simply expressing support for the research study at a meeting, event, or call—or sending a subordinate to such a meeting, event, or call—similarly does not qualify as a decision or action on the study, as long as the public official does not *intend* to exert pressure on another official." (emphasis added)).

89 *Id.* at 2372 (emphasis added). Courts of Appeals have begun to require the government to prove knowledge. *See, e.g.*, United States v. Repak, 852 F.3d 230, 258 (3d Cir. 2017) ("Evidence of Repak's receipt of items *knowing* he was to facilitate the award of those contracts provided a sufficient basis for a rational trier of fact to convict him of the Hobbs Act . . . ." (emphasis added)).

90 *See, e.g.*, United States v. Nagin, 810 F.3d 348, 351 (5th Cir. 2016) ("[A] conviction for bribery . . . does not require proof that the official intended to be influenced in his official actions."); United States v. Morgan, 635 F. App'x 423, 431 & n.13 (10th Cir. 2015) ("The key question in this case . . . is . . . whether [the defendant] had the intent to receive the retainer fees . . . in exchange for his legislative influence. . . . [I]t was not necessary for [the defendant] to have contemplated . . . any . . . specific act . . . ."); United States v. Peleti, 576 F.3d 377, 382 (7th Cir. 2009) ("To commit bribery, the public official must receive the money 'corruptly.' An officer can act corruptly without intending to be influenced." (citation omitted)).

91 *Cf.* Andrew J. Ceresney, Gordon Eng & Sean R. Nuttall, *Regulatory Investigations and the Credit Crisis: The Search for Villains*, 46 AM. CRIM. L. REV. 225, 228 (2009) (in the credit fraud context).

92 *See* John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579, 593 (2005).

that a defendant "honestly believed in a set of facts that would prevent him from forming the requisite *mens rea*."[93] Thus, the Court established additional hurdles the prosecutions would have to overcome in addition to traditional defenses—e.g., entrapment, due process, duress, or coercion[94]—and the defendants' claim that extensive media coverage of their case—corruption cases make front-page headlines[95]—unduly influenced the jurors.[96]

This is not to say, however, that by introducing an additional mens rea requirement, the Court has "decimat[ed] . . . anti-corruption laws."[97] The Court is unlikely to require direct evidence of the public official's intent to influence another official, because such a requirement could allow "the law's effects [to] be frustrated by knowing winks and nods."[98] Lower tribunals, therefore, generally permit use of circumstantial evidence to infer intent, particularly where direct evidence is likely to be scanty.[99] Accordingly, courts will almost certainly allow circumstantial evidence to prove the public official's intent to influence another official.

Unfortunately, *McDonnell* did not address whether the circumstantial evidence in the record was sufficient to establish intent. It remains to be seen, therefore, just how difficult it would be for the prosecution to prove an intent to influence. For the time being, however, one cannot conclude that the *McDonnell* decision is overall insignificant. Fundamentally, the Court is admitting that without the mens rea, McDonnell's con-

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93 David A. Maas, Comment, *Policing the Ratings Agencies: The Case for Stronger Criminal Disincentives in the Credit Rating Market*, 101 J. CRIM. L. & CRIMINOLOGY 1005, 1027 (2011) (citing Model Penal Code § 2.04 (1985)).

94 For a summary of these defenses and citation to cases where such defenses have been raised, see Lapidus & Mogilevich, *supra* note 27, at 926–29.

95 *See In re* Providence Journal Co., Inc., 293 F.3d 1, 14 (1st Cir. 2002).

96 *See* Patton v. Yount, 467 U.S. 1025, 1031–32 (1984) (citing Irvin v. Dowd, 366 U.S. 717 (1961)).

97 Hager, *supra* note 78; *see also* Wertheimer, *supra* note 10 ("[T]he Court has substantially weakened the legal protections that currently exist against government corruption.").

98 Evans v. United States, 504 U.S. 255, 274 (1992) (allowing circumstantial evidence to prove an implicit agreement).

99 *See, e.g.*, United States v. Rohn, 964 F.2d 310, 313 (4th Cir. 1992) ("Because intent is 'rarely capable of direct proof,' . . . '[a] defendant's intent can be inferred from his conduct and all the surrounding circumstances.'" (alteration in original) (first quoting United States v. Johnson, 767 F.2d 673, 676 (10th Cir. 1985); then quoting United States v. Vigil-Montanel, 753 F.2d 996, 999 (11th Cir. 1985))); United States v. Reeves, 730 F.2d 1189, 1195 (8th Cir. 1984) ("[T]he jury must determine the issue of intent from all the circumstances of the case '[b]ecause the element of knowledge is rarely capable of direct proof.'" (alteration in original) (citation omitted)).

duct is not criminal.[100] *McDonnell* will necessarily result in convictions overturned and charges dismissed.[101] After all, the *McDonnell* decision resulted in the Department of Justice dismissing the charges against Governor McDonnell.[102]

II
DRAWING A LINE BETWEEN CORRUPTION AND POLITICAL SPEECH

In his brief, Governor McDonnell argued that the bribery statute, as applied by the government, implicates First Amendment rights per the *Citizens United v. Federal Election Commission* line of cases.[103] The Court neither addressed nor cited *Citizens United* in its decision, choosing instead to offer constitutional concerns of vagueness and broadness in support of its decision.[104] As this Part will show, however, the Court's holding conforms to the law established by *Citizens United* and *McCutcheon*.[105] This interpretation suggests that *Citizens United* and *McCutcheon* may affect anti-corruption efforts beyond the campaign financing setting.

Prior to *McDonnell*, Professor George Brown argued in *Applying* Citizens United *to Ordinary Corruption* that *Citizens United* is limited to the campaign finance setting and that campaign finance corruption differs from criminal corruption.[106]

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100 *See* Elonis v. United States, 135 S. Ct. 2001, 2009 (2015) ("[W]rongdoing must be conscious to be criminal." (quoting Morissette v. United States, 342 U.S. 246, 250 (1952)).

101 *See* Daniel Richman & Jennifer Rodgers, *Rewarding Subtlety:* McDonnell v. United States, COMPLIANCE & ENFORCEMENT (Jul. 5, 2016), https://wp.nyu.edu/compliance_enforcement/2016/07/05/rewarding-subtlety-mcdonnell-v-united-states/ [http://perma.cc/D9MU-WWXG] (noting that *McDonnell* may affect a "small number of cases" where "it is not entirely clear that governmental power was exercise[d] or promised").

102 *See* Press Release, U.S. Dep't of Justice, Justice Department Moves to Dismiss McDonnell Charges (Sept. 8, 2016), https://www.justice.gov/opa/pr/justice-department-moves-dismiss-mcdonnell-charges [http://perma.cc/UC49-VY76].

103 *See* Brief of Petitioner at 24–25, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474).

104 *See McDonnell*, 136 S. Ct. at 2372–73 (2016) (noting that the government asserted that receipt of anything "from a campaign contribution to lunch . . . counts as a *quid*," but that such an interpretation would prevent officials from meeting with a "union [that] had given a campaign contribution in the past").

105 *See also* Malloy, *supra* note 6 (noting that the Court's reading of "official acts" reflected "[t]he vision of politics articulated in *Citizens United* and *McCutcheon*").

106 *See* George D. Brown, *Applying* Citizens United *to Ordinary Corruption: With a Note on* Blagojevich, McDonnell, *and the Criminalization of Politics*, 91 NOTRE DAME L. REV. 177, 233 (2015) [hereinafter Brown, *Applying* Citizens United]. There are other scholars who agree with Professor Brown. *See, e.g.*,

Other scholars, like Professor Zephyr Teachout in *Corruption in America*, suggest that the Supreme Court may be adopting a uniform and narrow definition of corruption in campaign finance cases and criminal prosecutions.[107] This Note agrees with Professor Teachout's observation. As the following discussion shows, the Supreme Court traditionally held a single definition of corruption applicable in both campaign finance and criminal law settings, and although the Court later distinguished criminal corruption from campaign finance corruption, the Court is moving to unify the definitions again.

A. Originally, Corruption Was Viewed as the Bane of Society, a Moral Evil, and an Act Entirely Separate from Political Activity

The founding years evince American society's conscious struggle against corruption. The founding fathers sought to combat corruption by establishing procedural safeguards against it within the Constitution.[108] State and federal jurisprudence reflected the belief that combatting corruption was a natural prerogative of government.[109] Thus, Congress could vote to charge individuals with corruption and adjudicate the charges within its halls.[110] Some federal and state courts per-

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Ilissa B. Gold, *Explicit, Express, and Everything in Between: The Quid Pro Quo Requirement for Bribery and Hobbs Act Prosecutions in the 2000s*, 36 WASH. U. J.L. & POL'Y 261, 288 (2011) (noting that the U.S. Court of Appeals for the Eleventh Circuit requires explicit quid pro quo agreement to be shown in all cases of corruption, while other Courts of Appeals require this only in campaign contribution context). After *McDonnell*, Professor Brown admitted that the Supreme Court blurred the line between ordinary and campaign finance corruption, but he ultimately concluded that the law remains unchanged. *See* George D. Brown, McDonnell *and the Criminalization of Politics*, 5 VA. J. CRIM. L. 1, 31 (2017) [hereinafter Brown, *Criminalization of Politics*].

107 *See* ZEPHYR TEACHOUT, CORRUPTION IN AMERICA 227–29 (2014) (noting that the Court lacks "understanding of the corrosive power of gifts and subtle influence," and that the Court's bribery decisions, "[i]f . . . read . . . as political theory, . . . suggest[ ] that using money to influence power through gifts is both inevitable and not troubling. In so doing, [the Court] set the table for . . . [its] major corruption decision in *Citizens United*"); *see also* Jacob Eisler, *The Unspoken Institutional Battle over Anticorruption:* Citizens United, *Honest Services, and the Legislative-Judicial Divide*, 9 FIRST AMEND. L. REV. 363, 365–66 (2011) (discussing how in both the campaign finance and criminal corruption contexts the Court has constrained broad anti-corruption measures passed by Congress).

108 *See* Zephyr Teachout, *The Historical Roots of* Citizens United v. FEC*: How Anarchists and Academics Accidentally Created Corporate Speech Rights*, 5 HARV. L. & POL'Y REV. 163, 165 (2011) (citing Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 353 (2009)).

109 *See id.* at 166 (citing *Ex parte* Yarbrough, 110 U.S. 651, 657–58 (1884).

110 *See, e.g.*, 5 ANNALS OF CONG. 166–70 (1795) (discussing the case of Randall and Whitney).

mitted corruption to be prosecuted as a common law offense.[111] Throughout this ardent war on corruption, Congress and the Court believed corruption could undo governments. Senators believed themselves to be enacting statutes, for example, to preserve the proper "character of the Government" and the honor of public office.[112] Likewise, the Supreme Court harshly decried attempts to influence politicians with gifts and bribes, believing that such conduct would cause "corruption [to] become the normal condition of the body politic."[113] The Court sought to prevent nations to speak "of us as of Rome—'*omne Romæ venale.*'"[114] Similarly, in the campaign finance setting, the Court condemned lobbying as corruption and concluded that its proscription was necessary to maintain public morals.[115]

The Court retained this view of campaign finance corruption well into the mid-twentieth century and so granted Congress broad latitude in regulating campaign contributions. In *Burroughs v. United States*, for example, the Court authorized Congress to "safeguard . . . an election from the improper use of money" and "preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption."[116] A broad grant of power was necessary because the Court defined corruption broadly to include the "evil . . . [known as] the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party."[117] In other words, any form of campaign contributions was viewed as corrupting and morally deplorable. The only corruption Congress could not tackle was one it had no Constitutional power to reach.[118]

During the same time period, the Court defined criminal corruption broadly to encompass any attempt to unduly influ-

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111 *See, e.g.*, United States v. Coolidge, 25 F. Cas. 619, 620 (C.C.D. Mass. 1813), *rev'd* 14 U.S. (1 Wheat.) 415 (1816) (noting that federal courts have jurisdiction over bribery crimes committed against the United States under common law); Bedinger v. Commonwealth, 7 Va. (3 Call) 461, 463 (1803) ("An attempt to bribe is criminal, at common law.").

112 CONG. GLOBE, 32d Cong., 2d Sess. 242 (1853) (explaining the purpose behind the Act to Prevent Frauds upon the Treasury of the United States, 10 Stat 170).

113 Marshall v. Balt. & Ohio R.R. Co., 57 U.S. (16 How.) 314, 335–36 (1853).

114 *Id.*

115 *See* Trist v. Child, 88 U.S. (21 Wall.) 441, 450–51 (1874).

116 Burroughs v. United States, 290 U.S. 534, 545 (1934).

117 United States v. UAW, 352 U.S. 567, 589 (1957).

118 *See* Newberry v. United States, 256 U.S. 232, 247–49 (1921) (holding that Congress had no power to criminalize solicitation of campaign contributions or restricting "the maximum sum which a candidate [for office] . . . may spend").

ence a public official. In 1914, the Court held that the bribery statute encompassed "[e]very action that is within the range of official dut[ies]," including those "established by settled practice."[119] Just as it did in the campaign finance context, the Court recognized attempts to unduly influence a public official as corruption and a moral evil. The Court in *United States v. Hood*, for example, upheld a statute criminalizing sale of public office on the grounds that it "attack[ed] that evil" of "the operation of purchased . . . influence in determining the occupants of federal office."[120] Similarly in *United States v. Shirey*, the Court permitted Congress "to proscribe payments to political parties in return for influence."[121] Again, the Court's view on criminal corruption did not differ from campaign finance corruption.

The Court held a single view of corruption in both campaign finance and criminal law settings. No case illustrates this better than *United States v. Brewster*, where the Court considered "whether a Member of Congress may be prosecuted [for bribery] under 18 U.S.C. §§ 201(c)(1), 201(g)."[122] The defendant-appellee argued that the Speech and Debate clause of the Constitution prevented the government from alleging that he supported a bill in return for a bribe, but the majority dismissed this argument.[123] Writing for the majority, Chief Justice Warren Burger held any receipt of funds as corruption that could "not, by any conceivable interpretation, [be] an act performed as a part of or even incidental to the role of a legislator."[124] In other words, Chief Justice Burger could not imagine a setting where payments in exchange for legislation could be anything other than criminal corruption. The Court simply lacked a distinction between campaign finance and criminal corruption.

B. To Protect Campaign Financing, the Court Diverged Corruption into Campaign Finance Corruption and Criminal Corruption

Just as *Brewster* illustrated the unity of corruption in those early cases, it also paved the way for the birth of the distinction between campaign finance corruption and criminal corruption. Writing for the *Brewster* dissent, Justice William

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119 United States v. Birdsall, 233 U.S. 223, 230–31 (1914).
120 *See* 343 U.S. 148, 150–51 (1952).
121 *See* United States v. Shirey, 359 U.S. 255, 259–60 (1959). Sale of influence was likewise viewed as an evil. *See id.* at 261–62.
122 408 U.S. 501, 502 (1972).
123 *See id.* at 506–07.
124 *Id.* at 526.

Brennan argued that the Speech and Debate clause barred Brewster's prosecution, and that 18 U.S.C. § 201 impermissibly "adjust[ed] . . . [the Congressman's] rights to due process and free expression."[125] A majority of the Supreme Court echoed Justice Brennan's concern in *Buckley v. Valeo*[126]—the origin of the contemporary campaign finance law.[127] There, the Supreme Court examined whether Congress could impose limits on contributions and expenditures.[128] Though it upheld contribution limits,[129] the Court declared expenditure limits as burdening "core First Amendment expression."[130] Most relevantly, the Court argued that, unlike direct contributions, expenditures lack "prearrangement and coordination . . . with the candidate or his agent," and this "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[131] The distinguishing factor between contribution limitations and expenditure limitations was, therefore, whether the Court believed that the limitation adequately prevented corruption. Here, however, corruption carried a definition unique to the campaign contribution setting.[132]

From this point, campaign finance corruption began to diverge from criminal corruption. The Court still continued to articulate a broad definition of campaign finance corruption. In 1990, the Court upheld Michigan's expenditure regulation not because it addressed the "danger of 'financial *quid pro quo*' corruption," but because it "aim[ed] at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth."[133] In *Nixon v. Shrink Missouri Government PAC*, the Court upheld a Missouri contribution limitation, stating that "Congress could constitutionally address the power of money 'to influence governmental ac-

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125 *Id.* at 544 (Brennan, J., dissenting).

126 424 U.S. 1, 13 (1976) (per curiam).

127 *See, e.g.*, Jordan May, Note, *"Are We Corrupt Enough Yet?" The Ambiguous Quid Pro Quo Corruption Requirement in Campaign Finance Restrictions*, 54 WASHBURN L.J. 357, 361 (2015) (discussing how the Court's jurisprudence evolved when defining how compelling government interests must be to justify campaign finance restrictions).

128 *See Buckley*, 424 U.S. at 13–14.

129 *See id.* at 29–30, 35–38.

130 *Id.* at 48.

131 *Id.* at 47.

132 *See* Almendares & Hafer, *supra* note 4, at 2777 ("[W]hen the Supreme Court's majority and plurality opinions in . . . [campaign finance] cases use the term 'corruption,' they are best understood as saying 'corruption as defined by *Buckley*.'").

133 Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659–60 (1990).

tion.'"[134] The Court thus recognized that "in addition to '*quid pro quo* arrangements,'" Congress had to address the problems of "'improper influence' and 'opportunities for abuse.'"[135] Based on this broader understanding of corruption, the government had broad power to regulate campaign financing. This language culminated in *McConnell v. Federal Election Commission*, where the Court upheld limitations on campaign contributions and expenditures, stating that Congress had the power to limit "undue influence on an officeholder's judgment, and the appearance of such influence."[136]

The definition of criminal corruption, on the other hand, the Court began to narrow. In *McCormick v. United States*, the Court could not have been more explicit in separating the two areas of law: it reversed a conviction because the jury instructions failed to properly separate voluntary campaign contributions from extortion.[137] Writing for the majority, Justice Byron White defined criminal corruption as excluding favoritism in exchange for campaign contributions:

> [T]o hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another . . . "under color of official right."[138]

Whereas in *Brewster* such conduct amounted to a crime, Justice White argued in *McCormick* that this conduct was "the everyday business of a legislator" that has "long been thought to be well within the law [and] . . . in a very real sense . . . unavoidable so long as election campaigns are financed by private contributions or expenditures."[139] This view of corruption is in stark odds with the one advanced in *Austin*: that corruption includes "the corrosive and distorting effects of immense aggregations of wealth."[140] Thus, criminal corruption diverged from campaign finance corruption. While some could reconcile

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134 528 U.S. 377, 389 (2000).

135 *Id.*

136 McConnell v. FEC, 540 U.S. 93, 95 (2003) (quoting FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001)).

137 *See* 500 U.S. 257, 271–73 (1991) (discussing Hobbs Act extortion, 18 U.S.C. § 1951 (2012)).

138 *Id.* at 272.

139 *Id.*

140 Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659–60 (1990).

the differences outlined above,[141] it suffices to say that the Supreme Court has treated corruption in the campaign finance setting differently than in the criminal setting.

C. Recently, the Court Began to Reunify Corruption, Conforming Criminal Corruption to Campaign Finance Corruption

Professor Brown asserts that the two views of corruption thus separated, remained separate, and ought to remain separate.[142] The normative assertion aside, this Note disagrees with Professor Brown's conclusion because the Court began to re-unify its views of corruption. In *Austin*, Justice Anthony Kennedy condemned the majority's decision to expand the definition of corruption.[143] Similarly, in *Shrink Missouri Government PAC*, Justice Clarence Thomas doubted whether campaign contribution regulation adequately addressed corruption.[144] The Court began to agree with Justices Kennedy and Thomas starting in the 2006 case of *Randall v. Sorrell*, holding that limits on individual contributions and expenditure limits are unconstitutional when they are not narrowly tailored.[145] By 2010, in *Citizens United v. Federal Election Commission*, the Court's majority sided with Justice Kennedy and Justice Thomas when it declared independent expenditure limitations unconstitutional, overruling *Austin* and *McConnell*.[146] The Court dispelled any notion that the government could justify campaign financing regulation by claiming to curb improper influence, stating "[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt."[147] In other words, the Court's definition of corruption changed. Congress could no longer pro-

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141 *See* Eisler, *supra* note 107, at 401, 425 (noting that both *Austin* and *McCormick* advance a competitive approach to politics).

142 *See* Brown, *Applying* Citizens United, *supra* note 106, at 182, 209.

143 494 U.S. at 703 (Kennedy, J., dissenting) ("Since the specter of corruption . . . is missing in this case, the majority invents a new interest . . . [which] [t]he majority styles . . . as simply a different kind of corruption . . . .").

144 Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 425 (2000) (Thomas, J., dissenting) ("I cannot fathom how a $251 contribution could pose a substantial risk of 'secur[ing] a political *quid pro quo*.'" (quoting Buckley v. Valeo, 424 U.S. 1, 26 (1976)).

145 *See* 548 U.S. 230, 261 (2006) ("[T]he Act burdens First Amendment interests by threatening to inhibit effective advocacy by those who seek election, particularly challengers; its contribution limits mute the voice of political parties; they hamper participation in campaigns through volunteer activities; and they are not indexed for inflation.").

146 *See* 558 U.S. 310, 365–66 (2010).

147 *Id.* at 359.

hibit campaign contributions that resulted in ingratiation and access because "[i]ngratiation and access . . . are not corruption."[148] Regulation was unconstitutional if it did not target the Court's definition of corruption.[149] This is true even if the regulation was in response to actual corruption.[150]

The previously broad understanding of corruption was narrowed significantly in 2014, when Chief Justice Roberts, writing for the plurality in *McCutcheon v. Federal Election Commission*, curtailed corruption to quid pro quo arrangements and appearance thereof.[151] "[A]ppearance of corruption," the plurality noted, "'stem[s] from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions' to particular candidates."[152] Nonetheless, federal and state governments could only seek to prevent "the appearance of *quid pro quo* corruption[—]the Government may not seek to limit the appearance of mere influence or access."[153] Thus limited, the Chief Justice had little trouble dismissing the federal government's claim that aggregate limits on contributions prevented quid pro quo corruption.[154]

Just as Justice Kennedy's view of corruption prevailed in the context of campaign finance, so too his view prevailed in criminal law. In 1992, Justice Kennedy earned a spot in the limelight, composing an often-cited concurring opinion in *Evans v. United States*.[155] There, he explicitly limited an anti-corruption statute to quid pro quo corruption and delineated the requisite evidence for proving a quid pro quo.[156] His explanation, however, granted the government broad latitude in proving their case: quid pro quo could be "implied from [the official's] words and actions," to avoid having "the law's effect . . . frustrated by knowing winks and nods."[157] This language led Professor Brown to interpret Justice Kennedy as endorsing

148 *Id.* at 360.

149 *See* Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490, 2491 (2012) (per curiam) (holding Montana's independent expenditure limitation unconstitutional).

150 *See id.* (Breyer, J., dissenting) ("[I]ndependent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana.").

151 134 S. Ct. 1434, 1450 (2014) ("Congress may target only a specific type of corruption—'*quid pro quo*' corruption.").

152 *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 27 (1976)) (citing *Citizens United*, 558 U.S. at 359).

153 *Id.* at 1451 (citing *Citizens United*, 558 U.S. at 360).

154 *See id.* at 1451.

155 *See* Evans v. United States, 504 U.S. 255, 273–78 (1992) (Kennedy, J., concurring) (in the context of Hobbs Act, 18 U.S.C. § 1951 (2012) extortion).

156 *See id.* at 274–75

157 *Id.* at 274.

a broad view of corruption, inconsistent with the narrow view advanced in campaign finance cases.[158] While it is true that Justice Kennedy's opinion allowed the prosecution greater latitude in proving its case—at least in non-campaign contribution cases[159]—his definition of corruption did not change from his dissent in *Austin*. In the concurring opinion in *Evans* and the dissent in *Austin*, Justice Kennedy limited corruption to quid pro quo arrangements.[160] In fact, Justice Kennedy explicitly noted in *Evans* that the rationale behind the requirement for a quid pro quo in campaign contribution cases and in Hobbs Act prosecution cases is the same.[161] Thus, *Evans* does not stand for a broad view of corruption. The strongest evidence in support of this proposition is the fact that the Justices heralding a narrow view of criminal corruption in *Evans*—Antonin Scalia, Thomas, and Kennedy—later advocated for a narrow view of campaign finance corruption.[162]

Thereafter, Justice Kennedy's definition of criminal corruption became mainstream, with a unanimous Court holding that bribery requires "a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act."[163] The Court limited criminal corruption to quid pro quo arrangements, noting that prosecution had to prove more than that money was paid for goodwill.[164] The Supreme Court then de-

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158 *See* Brown, *Applying* Citizens United, *supra* note 106, at 179.

159 *See* Gold, *supra* note 106, at 288 (noting that the U.S. Court of Appeals for the Eleventh Circuit requires explicit agreement to be shown in all cases, while other circuits require this only in the campaign contribution context).

160 *Compare Evans*, 504 U.S. at 275 (Kennedy, J., concurring) ("Thus, I agree with the Court, that the *quid pro quo* requirement is not simply made up."), *with* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 703 (1990) (Kennedy, J., dissenting) (noting that to reach their holding the majority had to invent new forms of corruption because quid pro quo corruption was lacking).

161 *See Evans*, 504 U.S. at 278 (Kennedy, J., concurring).

162 *See* McConnell v. FEC, 540 U.S. 93, 273–74 (Thomas, J., concurring in part and dissenting in part) (noting that newly recognized form of corruption "is antithetical to everything for which the First Amendment stands"); *id.* at 248 (Scalia, J., concurring in part and dissenting in part) (noting that the statute "cut[ ] to the heart of what the First Amendment is meant to protect"); *id.* at 292 (Kennedy, J., concurring in part and dissenting in part) ("*Buckley* made clear, by its express language and its context, that the corruption interest only justifies regulating candidates' and officeholders' receipt of what we can call the '*quids*' in the *quid pro quo* formulation."); *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting) (noting that the majority improperly expanded *Buckley*); *id.* at 422 (Thomas, J., dissenting) (noting that the Court had always understood corruption in "the narrow *quid pro quo* sense").

163 United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404–05 (1999).

164 *See id.* at 414.

cided *Skilling v. United States*.[165] The *Skilling* Court did not, however, address corruption, holding no more than that the honest services fraud statute covers kickbacks and bribery.[166] After *Skilling*, Courts of Appeals continue to be divided on whether the definition of corruption in the campaign finance context applies in the criminal corruption context.[167]

D. *McDonnell* Signals the Impending Demise of the Distinction

Professor Brown ends his survey here, concluding that views of corruption still remain separate and that *Citizens United* exercises no force outside the campaign finance context.[168] He asserts that a narrow view of corruption has no place in the criminal law context, where "concepts of equality and neutrality reign."[169] Professor Brown's analysis can be challenged in numerous ways. For one, the Court has consistently held that equality and neutrality have no place in politics.[170] Secondly, Professor Brown's analysis may underestimate the importance of *Citizens United* and *McCutcheon*—decisions that stripped Congress of its once broad power to regulate campaign financing.[171] Potential analytical critiques aside, *McDonnell* cast uncertainty over Professor Brown's conclusion—a fact he admitted, albeit with reservation.[172]

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165 *See* 561 U.S. 358 (2010).

166 *See id.* at 408.

167 *See* Gold, *supra* note 106, at 288.

168 *See* Brown, *Applying* Citizens United, *supra* note 106, at 233.

169 *Id.* at 216.

170 *See* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1667 (2015) ("Politicians are expected to be appropriately responsive to the preferences of their supporters. . . . A judge instead must 'observe the utmost fairness . . . .'" (quoting Address of John Marshall (Dec. 11, 1829), *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–30, at 616 (Richmond, Samuel Shepherd & Co. 1830)). In *Williams-Yulee*, the Court distinguished judges from politicians, reaffirming the longstanding state interest of preserving judicial independence. *See id.*; *see also* United States v. Hatter, 535 U.S. 557, 568–69 (2001) (Address of John Marshall, *supra*, at 619). Moreover, in *Williams-Yulee* the Court again reiterated that Congress can only prevent "appearance of corruption in legislative and executive elections." *Williams-Yulee*, 136 S. Ct. at 1667 ("[A] State's interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections.").

171 *See* TEACHOUT, *supra* note 107, at 244 ("*Citizens United* changed the culture at the same time that it changed the law. It reframed that which was unpatriotic and named it patriotic."); Eisler, *supra* note 107, at 409 ("The cumulative effect of *Citizens United* was to strip federal campaign finance regulation to a competitive core.").

172 *See* Brown, *Criminalization of Politics*, *supra* note 106, at 22, 31 ("The case may be a step [toward 'enshrin[ing] bribery in our politics'], but it is at best a tentative one that does not break new ground." (quoting Dante Ramos, *Va. Ex-*

The *McDonnell* Court espouses the holdings of *Citizen United* and *McCutcheon*. Granted, the Court never squarely addressed McDonnell's *Citizens United* argument.[173] Chief Justice Roberts's public policy justification for the holding, however, closely mirrors the Court's logic in *McCutcheon*—a decision he authored. The first policy reason Chief Justice Roberts offered in support of the *McDonnell* decision is that broad application of bribery statutes could deter officials from "respond[ing] to even the most commonplace requests for assistance," and citizens "from participating in democratic discourse."[174] This formulation raises the question of why broad application of a *bribery* statute, or any other *anti-corruption* statute, would deter citizens from democratic discourse. That is, if the citizen were merely speaking, there would be no grounds for finding corruption—no quid. Chief Justice Roberts's formulation only makes sense if the citizen engages in democratic discourse with money or other consideration, as in *Citizens United*.[175] Similarly, anti-corruption statutes would rarely apply to an official's response to a constituent's request for assistance. For example, no one would suspect corruption if a senator were to advocate a bill to assist victims of a natural disaster. Common sense dictates that official acts that benefit the public in general would make for poor prosecutions. Anti-corruption statutes are only relevant, therefore, when a public official shows undue favor to an individual or a select group of individuals in exchange for some benefit. Thus explained, the Chief Justice appears concerned that broad bribery statutes would deter citizens from contributing funds in exchange for special treatment. In fact, the Chief Justice labels such exchanges as "participat[ion] in democratic discourse" rather than corruption.[176] Accordingly, Chief Justice Roberts's public policy concern is congruent with *Citizens United*'s First Amendment concern.[177] As in *Citizens United*, the *McDonnell* Court

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governor Wins at Supreme Court, but Corruption Is Still Illegal, BOS. GLOBE (June 27, 2016), https://www.bostonglobe.com/opinion/2016/06/27/governor-wins-supreme-court-but-corruption-still-illegal/1UHYwo06otnV9wkXgU0gLJ/story.html [https://perma.cc/3P2K-WJFA]).

173 *See* McDonnell v. United States, 136 S. Ct. 2355, 2372 (2016).

174 *Id.*

175 *See* 558 U.S. 310, 339 (2010) (quoting Buckley v. Valeo, 424 U.S. 1, 19 (1976)).

176 136 S. Ct. at 2372.

177 *See* 558 U.S. at 359 ("The fact that speakers may have influence over . . . officials does not mean that these officials are corrupt," because "[f]avoritism and influence are not . . . avoidable in representative politics." (quoting McConnell v. FEC, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part))).

asserts that "[i]ngratiation and access . . . are not corruption."[178]

The *McDonnell* decision may have profound effect on future anti-corruption efforts. For one, the Court has again proved its commitment to abandoning the anti-corruption values "the framers said they must provide, lest our government will soon be at an end."[179] Additionally, as the *McDonnell* holding seems to adopt campaign financing law, future defendants may elect to challenge their prosecutions on First Amendment grounds. Thus, lower tribunals may soon be asked to decide the constitutionality of existing anti-corruption statutes. The next Part will address the potential merit of such challenges.

III
A LINE DRAWN TOO FAR: A FIRST AMENDMENT RIGHT TO CORRUPT YOUR POLITICIAN

The Constitution cannot be used as a shield against charges of "bribery," so long as the term is limited to quid pro quo arrangements as the Supreme Court understands it. But outside the Court, bribery is not defined so narrowly. Dictionaries, for example, define it as money paid "to influence the judgment or conduct"[180] of a politician, or to "persuade (a person, etc.) to act improperly in one's favor."[181] Similarly, the typical student understands bribery as the giving of something of value in exchange for an "unfair advantage."[182] Even legal dictionaries offer a definition broader than the Court's: "[a] price, reward, gift or favor bestowed or promised with a view to pervert the judgment of or influence the action of a person in a position of trust."[183] These definitions surely encompass the selling of influence, favor, and access at issue in *McDonnell*. Does the First Amendment guarantee the right to bribery, defined as payments made to "pervert the judgment of or influ-

178 *Id.* at 360.

179 TEACHOUT, *supra* note 107, at 245 (internal quotations omitted) (citation omitted); *see also* Joseph P. Tomain, *Gridlock, Lobbying, and Democracy*, 7 WAKE FOREST J.L. & POL'Y 87, 107–08 (2017) ("The Supreme Court does not have a particularly realistic view of the democratic process and the ease with which private money flows to public servants who are receptive to their particular interests.").

180 *Bribe*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

181 *Bribe*, THE OXFORD AMERICAN DICTIONARY AND THESAURUS WITH LANGUAGE GUIDE (2003).

182 *See* Harvey S. James Jr., *When Is a Bribe a Bribe? Teaching a Workable Definition of Bribery*, 6 TEACHING BUS. ETHICS 199, 205–06 (2002) (noting that students most frequently define bribery as "unfair advantage").

183 *Bribe*, BLACK'S LAW DICTIONARY 217 (9th ed. 2009).

ence the action of a person in a position of trust"? Perhaps inadvertently,[184] *McDonnell* signals the existence of such First Amendment guarantee.

The First Amendment often bars prosecutions and limits the regulatory framework of the Federal Government and that of the states. But the Supreme Court in *Roth v. United States* recognized that federal and state governments need to regulate some speech, holding:

> The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes.[185]

On the other hand, "ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests."[186] Thus, a letter arguably containing threats could not be used to convict an individual if that letter primarily addressed issues of public concern.[187] Moreover, this protection is not limited to verbal speech but extends to expressive speech, such as contributions to political officials.[188] Contributions to political officials, in fact, receive the highest degree of protection because

> [I]f it be conceded that the First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," . . . then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.[189]

The First Amendment, thus, protects political association inasmuch as it protects pure speech.[190]

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184 Justice Stephen Breyer dismissed the defense's attempt to frame the argument as relating to campaign contribution cases. *See* Transcript of Oral Argument at 31, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474).

185 354 U.S. 476, 482 (1957) (footnotes omitted).

186 *Id.* at 484.

187 *See* Commonwealth v. Bigelow, 59 N.E.3d 1105, 1112 (Mass. 2016).

188 *See Roth*, 354 U.S. at 484 (citing United States v. Harriss, 347 U.S. 612, 625 (1954) (discussing a campaign financing regulation that requires individuals to register prior to donating to public officials)).

189 Monitor Patriot Co. v. Roy, 401 U.S. 265, 271–72 (1971) (citation omitted) (quoting *Roth*, 354 U.S. at 484).

190 *See* Thompson v. Dauphinais, 217 F. Supp. 3d 1023, 1027 (D. Alaska 2016).

That the First Amendment protects political association does not mean that it prohibits any regulation of political speech. Congress and the state governments may impose restrictions on political speech so long as a sufficiently important interest is advanced.[191] After *McCutcheon*, however, "the only interests that can support contribution restrictions" are prevention of "quid pro quo corruption[ ] or its appearance."[192] Now, per *McDonnell*, gifts to public officials solely in exchange for gratuity or influence do not constitute quid pro quo corruption or its appearance.[193] As gifts in return for gratuity and influence do not constitute corruption, and certainly have "the slightest redeeming social importance,"[194] such contributions are likely to enjoy "the full protection of the guaranties" of the First Amendment.[195] In any event, Congress and state governments lack a sufficiently important interest in regulating this type of political speech.[196] Accordingly, the First Amendment could protect the exchange of bribes for influence, favor, and advocacy.

Prior to *McDonnell*, such a defense never resulted in an acquittal. In *United States v. Menendez*, for example, the defendants sought to dismiss the charges, citing *Citizens United* and *McCutcheon* for the proposition that "the Constitution protects all 'efforts to influence and obtain access to elected officials.'"[197] The New Jersey District Court agreed, but held that such a defense is inapplicable on the given facts.[198] The *Me-*

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191 *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1444 (2014)

192 Lair v. Bullock, 798 F.3d 736, 746–47 & n.7 (9th Cir. 2015).

193 *See supra* notes 173–79 and accompanying text.

194 One argument advanced by amici in *McDonnell* was that influence peddling encourages public officials to "collaborat[e] with local business leaders to encourage business development in their districts and provid[e] support to charitable organizations." Brief for Members of the Va. Gen. Assembly as Amici Curiae in Support of Petitioner at 8, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474), 2016 WL 946983.

195 Roth v. United States, 354 U.S. 476, 484 (1957).

196 At least one anti-corruption statute has been held unconstitutional on such First Amendment grounds, in the Kentucky case *Shickel v. Dilger*. No. 2:15-cv-155 (WOB-JGW), 2017 WL 2464998, at *7–11 (E.D. Ky. June 6, 2017). In granting a summary judgment motion against the State of Kentucky, Judge William Bertelsman held that a statute prohibiting a legislator from receiving "anything of value from a legislative agent or an employer," KY. REV. STAT. ANN. § 6.751(2) (West 2010), "would deter people from engaging in activities which are protected by . . . the liberty guaranteed by the Constitution of the United States." *Shickel*, 2017 WL 2464998, at *9.

197 132 F. Supp. 3d 635, 638 (D.N.J. 2015).

198 *Id.* at 639 ("Defendants are correct that attempts to influence a public official through speech alone are protected. But the Constitution does not protect an attempt to influence a *public official's acts* through improper means, such as the bribery scheme that has been alleged in this case." (emphasis added)).

nendez prosecution alleged "a *quid pro quo* bribery scheme," whereby the defendants "conspired to offer . . . 'things of value to influence official acts benefitting [their] personal and business interests.'"[199] Similarly, in *United States v. Halloran*, the defendant attempted to argue that *Citizens United* created "a 'brave new world . . . in which the institutionalized bribery of campaign finance . . . is constitutionally protected,' thus 'blurring . . . the distinction between protected speech and bribery.'"[200] The U.S. Court of Appeals for the Second Circuit rejected such use of the First Amendment, holding that the prosecution properly alleged quid pro quo corruption.[201] There, the jury found that Halloran paid money in exchange for an authorization to seek the nomination of a party the defendant was not a member of—a "Wilson-Pakula."[202] The First Amendment defense came closest to acquittal in *United States v. Dimora*.[203] Therein the defendant was convicted for, *inter alia*, giving an individual "influence at Cuyahoga County and . . . protection for [his] businesses," in exchange for the individual "fund[ing] a trip to Las Vegas for Dimora, covering the costs of gambling chips, luxury hotel suites and a $2,219 dinner."[204] On appeal over admissibility of certain documents that would prove the transaction to be merely an exchange of favors, the U.S. Court of Appeals for the Sixth Circuit held any error harmless, because the mere trading of "'public influence' . . . in exchange for" a quid constituted criminal corruption.[205] Nonetheless, a member of the panel, Judge Gilbert Merritt, dissented, arguing that Dimora could not be prosecuted if his conduct amounted to no more than ingratiation and access protected by the First Amendment.[206] According to Judge Merritt, Dimora could have established that his relationships were "of 'ingratiation and access' that may have been deplorable but [were] arguably legal."[207] Thus, prior to *McDonnell*, the First Amendment defense existed only in theory.[208]

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199 *Id.* at 638.

200 821 F.3d 321, 340 (2d Cir. 2016).

201 *Id.*

202 *See id.* at 328–29.

203 750 F.3d 619, 623–24 (6th Cir. 2014).

204 *Id.* at 624.

205 *Id.* at 626.

206 *See id.* at 632–33 (Merritt, J., dissenting) (citing McCutcheon v. FEC, 134 S. Ct. 1434 (2014)).

207 *Id.* at 633 (Merritt, J., dissenting).

208 *See also* Trevor Potter, Wednesday Luncheon Session at the American Law Institute 9 (May 23, 2012), http://2012am.ali.org/transcripts/Potter%20-%208-3-12-(8)-WedLunch-Potter.pdf [http://perma.cc/97D7-NG97] (noting that "sys-

McDonnell changed things. On July 13, 2017, the Court of Appeals for the Second Circuit overturned the conviction of New York State Assembly Speaker Sheldon Silver, citing *McDonnell v. United States*.[209] The prosecution charged Silver with many corrupt schemes. For example, Silver allegedly funneled $500,000 in taxpayer-funded research grants to a doctor in exchange for the doctor steering his patients to Silver's law firm.[210] Silver also met with lobbyists, hosted parties and voted for legislation that benefited real estate developers, allegedly in exchange for the developers' use of a law firm that paid Silver referral fees.[211] Despite finding ample evidence, the Court of Appeals reversed Silver's conviction and remanded for a new trial, holding that the jury instruction "captured lawful conduct, such as arranging meetings or hosting events with constituents."[212] The jury instructions were overbroad because, post *McDonnell*, the instructions captured examples of lawful influence peddling. Does the reversal of Silver's conviction spell immediate doom for all anti-corruption efforts? Most likely not. For one, Courts of Appeals appear reluctant to reverse convictions on facts different from *McDonnell v. United States*.[213] More importantly, the stream of benefits doctrine complicates any First Amendment defense. This doctrine loosens the quid pro quo requirement, allowing conviction "so long as the evidence shows a 'course of conduct of favors and gifts flowing to a public official *in exchange for* a pattern of official actions favorable to the donor.'"[214] In *United States v. Kemp*, this doctrine allowed the government to convict executives of a bank for extending loans to a city treasurer in exchange for

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temic corruption," which includes the "sale of special access to large donors, . . . is all protected by the First Amendment").

209 *See* United States v. Silver, 864 F.3d 102, 119, 124 (2d Cir. 2017). This is only one example of how defense counsel has been using *McDonnell* to challenge convictions. "The McDonnell ruling has had a broad ripple effect, with defense lawyers raising it in corruption cases around the country." Benjamin Weiser, *Sheldon Silver's 2015 Corruption Conviction is Overturned*, N.Y. TIMES (July 13, 2017), https://www.nytimes.com/2017/07/13/nyregion/sheldon-silvers-conviction-is-overturned.html [https://perma.cc/C77A-KFRZ].

210 *Silver*, 864 F.3d at 106–09.

211 *Id.* at 109–10.

212 *Id.* at 118.

213 *See, e.g.*, United States v. Boyland, 862 F.3d 279, 290–92 (2d Cir. 2017) (holding that although the jury instructions were erroneous under *McDonnell*, the alleged schemes necessarily involved exercise of governmental power and, therefore, reversal was inappropriate); United States v. Malkus, No. 12-56499, 2017 WL 3531422 (9th Cir. Aug. 17, 2017) (summarily finding evidence of an official act).

214 United States v. Kemp, 500 F.3d 257, 282 (3d Cir. 2007) (quoting United States v. Jennings, 160 F.3d 1006, 1014 (4th Cir. 1998)).

"get[ting] special treatment."[215] Although the evidence against these executives showed only that they extended loans and received the treasurer's gratitude in return, the U.S. Court of Appeals for the Third Circuit affirmed the executives' conviction under the stream of benefits doctrine.[216] How is the special treatment the *Kemp* executives received different from the special treatment Governor McDonnell gave to Williams?[217] The *Kemp* executives could very well have sought to curry favor and purchase access, which is not illegal. The stream of benefits doctrine can thus turn gifts in exchange for gratitude into quid pro quo corruption.[218]

The stream of benefits doctrine is frequently challenged as incompatible with other Supreme Court holdings. Prior to *McDonnell*, some individuals have unsuccessfully argued that the Supreme Court in *Skilling v. United States* rejects this doctrine.[219] Although *Skilling* has failed to undermine the stream of benefits doctrine, *McDonnell* may succeed in doing so:

> The first hint that the stream of benefits theory may no longer be viable is the [*McDonnell*] Court's requirement of specificity: an "official act" must "be something specific and focused that is 'pending' or 'may by law be brought' before a public official." The next clue is that while *Skilling* favorably cited cases that endorsed a stream of benefits theory . . . those citations are conspicuously absent from *McDonnell*. Instead, . . . the Court in *McDonnell* qualified the *quid pro quo* requirement as follows: it "need not be explicit, and the public official need not specify *the means* that he will use to perform his end of the bargain." . . . Thus, although "the means" need not be specified, it appears that "an" official act must be specified.[220]

Unfortunately, "*McDonnell* did not squarely address this issue," and considering "the broad acceptance of the stream of benefits formulation," some Courts of Appeals may not abandon the doctrine despite *McDonnell*.[221] Thus, while the First Amend-

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215 *Id.* at 268.

216 *Id.* at 266–69, 282.

217 *Compare Kemp*, 500 F.3d at 266–69, *with* McDonnell v. United States, 136 S. Ct. 2355, 2362–64 (2016).

218 *See, e.g.*, United States v. Ganim, 510 F.3d 134, 147 (2d Cir. 2007) (noting that the opposite reading "would legalize some of the most pervasive and entrenched corruption, and cannot be what Congress intended").

219 *See* Brown, *Applying* Citizens United, *supra* note 106, at 221.

220 Silverglate & Quinn-Judge, *supra* note 80, at 207–08 (footnotes omitted).

221 *Id.* at 207, 208. Although no court has yet to address the issue, the District Court of the Eastern District of Pennsylvania continues to cite *Kemp* for the stream of benefits doctrine. *See* United States v. Williams, Crim. No. 17-137, 2017 WL 2713404, at *2 (E.D. Pa. June 13, 2017).

ment may prove to be a viable shield against certain prosecutions, that shield may be shattered easily in courts that choose to endorse the stream of benefits doctrine even beyond *McDonnell*.

CONCLUSION

On the reading advocated above, *McDonnell* signals the existence of a First Amendment right to engage in a corrupt "pay to play" culture.[222] This First Amendment right has the potential to challenge nearly every U.S. law that addresses corruption. Consider, for example, a prosecution for receiving an illegal gratuity under 18 U.S.C. § 201(c). Could the defendant in such a trial not assert that she simply received gifts in return for ingratiation and access? Similarly, the First Amendment challenge could apply to other anti-corruption statutes, such as those proscribing compensations to members of Congress,[223] offers of loans or gratuity to financial institution examiners,[224] bribery of sporting contests,[225] and bribery of port security.[226] Interpreted pessimistically, *McDonnell* might be the key to dismantling the United States's anti-corruption framework.[227]

What is to be done about the possible First Amendment right to corruption? We can elect to do nothing, betting on a narrow interpretation of *McDonnell*. For example, some assert that the Court in *McDonnell* simply meant to send federal prosecutors a clear message to "stop overreaching in public corruption cases."[228] Alternatively, we may assert that lower tribunals will be reluctant to interpret *McDonnell* as expansively; they are generally far harsher on corruption than the

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222 *See supra* subpart II.D.

223 *See* 18 U.S.C. § 203 (2012).

224 *See* 18 U.S.C. § 212 (2012).

225 *See* 18 U.S.C. § 224 (2012).

226 *See* 18 U.S.C. § 226 (2012).

227 *Cf.* Adam F. Minchew, Note, *Who Put the* Quo *in Quid Pro Quo?: Why Courts Should Apply* McDonnell*'s "Official Act" Definition Narrowly*, 85 FORDHAM L. REV. 1793, 1818–20 (2017) (discussing how *McDonnell* could limit prosecutions for federal funds bribery under 18 U.S.C. § 666 (2012)); *see also* Brown, *Criminalization of Politics*, *supra* note 106, at 37 ("McDonnell leads to uncertainty about the future of federal anticorruption law."). *But see* United States v. Ferriero, 866 F.3d 107, 124–25 (3d Cir. 2017) (holding that, despite *McDonnell*, the New Jersey bribery statute was not unconstitutional).

228 Mario Meeks, *Once Again, SCOTUS Scolds DOJ for Overreaching*, 40 CHAMPION 53, 53 (2016); *see also* Brown, *Criminalization of Politics*, *supra* note 106, at 25–32 (arguing that *McDonnell* can be read narrowly so as to have little effect on criminal law).

Supreme Court.[229] District Courts and Courts of Appeals tend to honor broad judicial discretion Congress bestows, interpreting it as a license to prosecute a broad range of corrupt conduct.[230] Thus, although the Supreme Court in *McDonnell* appeared to condemn prosecutorial and judicial overreach,[231] lower tribunals may continue to resist the narrow definition of corruption—some courts have already distinguished *McDonnell* on its facts.[232] On the other hand, some lower tribunals may honor the Supreme Court's holdings, thus weakening law enforcement's ability to combat corruption.[233]

If, however, we choose to abolish the First Amendment right to corruption, then we must reform our entire anti-corruption framework. Comprehensive reform is necessary for numerous reasons. First, no statute can reverse *McDonnell*'s holding—Congress cannot criminalize the giving of something of value in exchange for influence, favor, and advocacy—because such statute would likely infringe on the First Amendment.[234] Similarly, passing another broad anti-corruption statute would be futile, as the Supreme Court is bound to limit it.[235] Second, a functioning anti-corruption regime requires the government to "operate in an accountable and transparent manner" as well as enforce a comprehensive criminal code.[236] Finally, the origin of the First Amendment right to sell influence, favor, and advocacy lies in *Citizens United* and *McCutcheon*. To eliminate this right, it may be necessary "to overturn the Supreme Court's troubling narrow quid pro quo definition of corruption" in the campaign finance setting.[237] This could

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229 *See* Brown, *Applying* Citizens United, *supra* note 106, at 221 (noting that lower tribunals have before resisted attempts at weakening the anti-corruption framework set up by *Kemp*).

230 *See id.* at 222.

231 *See* Meeks, *supra* note 228.

232 *See* United States v. Boyland, 862 F.3d 279, 290–92 (2d Cir. 2017); United States v. Jones, 207 F. Supp. 3d 576, 582 (E.D.N.C. 2016).

233 *See* Silverglate & Quinn-Judge, *supra* note 80, at 207–08.

234 *See, e.g.*, S.M., *Can Congress Over-ride a Supreme Court Decision?*, ECONOMIST (July 28, 2015), http://www.economist.com/blogs/democracyinamerica/2015/07/rights-and-legislation [https://perma.cc/YD3W-LKUH] (quoting MSNBC host Rachel Maddow).

235 *See* Brown, *Applying* Citizens United, *supra* note 106, at 222.

236 SUSAN ROSE-ACKERMAN & BONNIE J. PALIFKA, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 228 (2d ed. 2016).

237 *See, e.g.*, Mikala Noe, Note, McCutcheon v. Federal Election Commission *and the Supreme Court's Narrowed Definition of Corruption*, 67 ME. L. REV. 163, 166 (2014).

be achieved if the Constitution were amended[238] or if the Supreme Court were to overturn *Citizens United*.[239]

For nearly a decade, the Court has protected speech at the expense of political integrity, which commentators recognized as hazardous to our democracy.[240] Other than scholarly debates, however, action to restore the anti-corruption principles in campaign financing has stalled.[241] Now, the Court threatens Congress's efforts to criminalize corruption, permitting those like Governor McDonnell to receive extravagant gifts in return for zealous advocacy and special treatment.[242] While it remains to be seen whether *McDonnell* will facilitate the spread of corruption and sale of public office, one thing is clear: the Court's definition of corruption is incompatible with our anti-corruption laws and principles. Either the Court must reverse course or our anti-corruption laws will disappear.

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238 *See, e.g.*, S.J. Res. 5, 114th Cong. (2015).

239 *See* David Cole, *How to Reverse* Citizens United, ATLANTIC, Apr. 2016, at 13–15.

240 *See, e.g.*, David Gans, *Supreme Court Undermining US Constitution*, COURIER-J. (Apr. 4, 2014, 4:21 PM), http://www.courier-journal.com/story/opinion/contributors/2014/04/04/supreme-court-undermining-us-constitution/7315863/ [https://perma.cc/QQW2-EHXX].

241 *See* David Edward Burke, *The Fight to Overturn* Citizens United*: What Happens Now?*, HUFFINGTON POST (Nov. 22, 2016, 11:50 AM), http://www.huffingtonpost.com/entry/the-fight-to-overturn-citizens-united-what-happens_us_58346bfde4b08c963e3444fa [http://perma.cc/6MGY-77LU] (discussing the effect of President Trump's election).

242 *See supra* notes 31–44, 209–12 and accompanying text; *see also* Brown, *Criminalization of Politics*, *supra* note 106, at 37.