

# DIFFERENT QUIDS FOR DIFFERENT QUOS: WHY CONGRESS SHOULD AMEND ANTI-CORRUPTION STANDARDS TO DIFFERENTIATE BETWEEN CAMPAIGN CONTRIBUTIONS AND GRATUITIES AFTER *MCDONNELL*

*Alexander K. Wilson\**

|   |      |
|---|------|
| INTRODUCTION .....  | 1034 |
| I. CRIMINALIZING BRIBERY: HISTORICALLY .....  | 1036 |
| II. CURRENT ANTI-CORRUPTION REGIME .....  | 1038 |
| A. The Courts Have Significantly Limited the Current<br>Statutory Scheme’s Applicability .....  | 1041 |
| 1. Quid Pro Quo Formulation .....   | 1041 |
| 2. Narrowing the “Official Act” Definition .....  | 1042 |
| 3. Current View of the Gratuities Statute .....   | 1043 |
| III. UNDERSTANDING WHY GRATUITIES SHOULD BE<br>LEGALLY LIMITED .....                            | 1046 |
| A. Gratuities Corrupt Because They Are Not of the<br>Political Sphere .....                     | 1047 |
| B. Gratuities Corrupt by Their Effect on the Official .   | 1048 |
| C. Constitutional Concerns Merit Further Restriction<br>of Gratuity-Giving Activity .....       | 1050 |
| D. Campaign Contributions Pose Less Risk of Similar<br>Bribery .....                            | 1051 |
| IV. CONGRESS SHOULD CREATE TWO DISTINCT “OFFICIAL<br>ACT” DEFINITIONS FOR § 201 .....           | 1054 |
| A. The Official Act Standard from <i>McDonnell</i> is<br>Appropriate for Campaign Finance ..... | 1054 |

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|  |      |
|--|------|
| B. Congress Should Reform the Official Act Standard for Gratuities ..... | 1056 |
| 1. Proposed New Definition .....   | 1057 |
| 2. Application of Proposed Modified Definition to <i>McDonnell</i> ..... | 1058 |
| CONCLUSION.....  | 1061 |

## INTRODUCTION

Moral prohibitions on bribery as a form of corruption have existed for centuries.<sup>1</sup> Likewise, “[b]ribes and illegal gratuities have been pervasive features of political systems around the world since antiquity.”<sup>2</sup> Recognizing this, efforts to draw permissible normative lines around certain types of conduct have accompanied political systems for a long, long time; after all, context and social norms surrounding an exchange of acts or things between people determine whether corruption has occurred.<sup>3</sup> Public corruption, also known as political corruption, is a broad concept, often characterized at its core as abuse of public power for private gain,<sup>4</sup> “those acts whereby private gain is made at public expense,”<sup>5</sup> or “private interest excessively overrid[ing] public or group interest in a significant or meaningful exercise of political power.”<sup>6</sup> Yet, while there is a large body of work dedicated to defining and studying corruption, particularly in relation to the broader concepts of private or public corruption, there is hardly

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1. See *Exodus* 23:8 (“You shall not take a bribe, for a bribe blinds the clear-sighted and subverts the cause of the just.”).

2. Steven M. Levin, *Illegal Gratuities in American Politics: Learning Lessons from the Sun-Diamond Case*, 33 *LOY. L.A. L. REV.* 1813, 1813 (2000).

3. See PETER J. HENNING & LEE RADEK, 1 *THE PROSECUTION AND DEFENSE OF PUBLIC CORRUPTION: THE LAW AND LEGAL STRATEGIES* § 1.02[1] LexisAdvance (database updated 2018); Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 *MICH. L. REV.* 1385, 1393 (2013) (“Most theories agree that corruption requires the violation of a normative standard, some benefit (personal or political), and some connection between the two.”); John Gardiner, *Defining Corruption*, in *POLITICAL CORRUPTION: CONCEPTS & CONTEXTS* 25, 25 (2002) (observing that one difficulty in formulating a cogent theory of corruption is the potential divergence between legal definitions of corruption and actual behavior perceived as corrupt by the public).

4. See Jacob Eisler, *McDonnell and Anti-Corruption’s Last Stand*, 50 *U.C. DAVIS L. REV.* 1619, 1665 (2017) (“Official corruption occurs when those privileged *through access to governmental resources* abuse their unique power.”).

5. ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA* 276 (2014) (quoting Bruce E. Gronbeck, *The Rhetoric of Political Corruption*, in *POLITICAL CORRUPTION: A HANDBOOK* 173 (Arnold J. Heidenheimer, Michael Johnston & Victor T. Le Vine eds., 1999)).

6. *Id.*

consensus on how to define the idea in law.<sup>7</sup> Laws criminalizing certain forms of behavior on theories of corruption naturally allow for a number of reciprocal arrangements between government officials and the constituents they serve. The question facing political reform advocates in today's America is whether it is time to reevaluate which reciprocal arrangements should be legally allowed on public policy grounds, and if so, how to create a legal framework that accounts for such judgments.

This Note suggests that when examining the proper boundaries of legal corruption, campaign contributions—which deserve special consideration under the free speech clause of the First Amendment<sup>8</sup>—should be treated differently from gifts, personal favors, and direct monetary transfers (together hereinafter referred to as “gratuities”) to government officials. Currently, campaign contributions and gratuities are subject to very similar legal tests to determine whether a form of criminally punishable conduct has occurred. While a hodgepodge of criminal laws currently addresses different variations on behavior thought to be corrupt, the most basic formulation of the test to determine whether an exchange between a government official and a constituent is illegal involves a quid pro quo interaction.<sup>9</sup> This test asks whether campaign contributions or gratuities are given to a particular government official with the mutually acknowledged understanding that such contributions or gratuities are intended to influence the recipient to take an official act, a narrow class of activity that includes voting on a bill, introducing legislation, and appropriating funds.<sup>10</sup> Because the Supreme Court has recently clarified (and narrowed) the “official act” provision of the impermissible quid pro quo exchange,<sup>11</sup> Congress should act now to amend the anti-bribery laws to enhance the applicability of the gratuities crime. Such an amendment would

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7. See Hellman, *supra* note 3, at 1385.

8. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I. The Supreme Court has held that generally, campaign contributions are political speech and therefore laws that restrict such activity are “subject to strict scrutiny,” requiring the Government to prove that the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.” *Citizens United v. FEC*, 558 U.S. 310, 312 (2010).

9. Core statutes include 18 U.S.C. § 201 (2012) (criminalizing bribery and receipt of certain gratuities); *id.* § 666 (criminalizing bribery involving federal funds); Hobbs Act, *id.* § 1951 (criminalizing extortion in interstate commerce); *id.* § 1341 (the federal “honest services” statute). The federal honest services statute is now essentially an anti-bribery measure. See Eisler, *supra* note 4, at 1627–28 & n.23.

10. See *McDonnell v. United States*, 136 S. Ct. 2355, 2371–72 (2016); see also Eisler, *supra* note 4, at 1627.

11. See *McDonnell*, 136 S. Ct. at 2371–72.

quell the risks of corruption that concerned the Framers by lowering the *quo*—or act—requirement for gratuities exchanges. This system would also retain the First Amendment protections afforded to campaign contributions while formally and functionally setting clearer guidelines for acceptable, or “normal,” political behavior in a republican democracy.

This Note proceeds as follows: Part I briefly outlines the historical formulations and rationales of public corruption law in the United States. Part II then explores the current legal regime controlling corrupt behavior involving public officials and describes foundational Supreme Court cases exemplifying the Court’s understanding of public corruption as influenced by the Constitution and modern notions of the democratic political process. Part III defines and conceptualizes gifts directly given to public officials in order to justify a distinct legal treatment of such gifts and contributions from campaign donations. Finally, Part IV proposes a modified statute, accounting for this Note’s arguments and descriptions, that would split the treatment of gratuities and campaign contributions under 18 U.S.C. § 201. Part IV also applies this reformulated statute to the facts of *McDonnell v. United States*<sup>12</sup> in order to illustrate the benefits of a new “official act” definition in alignment with the rationales set forth in this Note.

## I.

### CRIMINALIZING BRIBERY: HISTORICALLY

Laws attempting to curtail corruption of and by public officials have varied greatly over the course of American history.<sup>13</sup> In the early days of the newly formed nation, states exercised police power over corrupt behavior through a patchwork of criminal laws.<sup>14</sup> These enforcement regimes differed from the current, federal anti-bribery regime in two important respects. First, state law often focused on extortion—behavior of government officials wielding the power of their official position over citizens—over bribery.<sup>15</sup> For example, a common application of state law was the prosecution of state officials who bought votes at the ballot box.<sup>16</sup> In earlier days, the power dynamic between political actors and constituents was viewed as heavily skewed in favor of the former, and so the primary concern was limiting corrupt candidates’ ability to sway relatively powerless citizens for

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12. *Id.*

13. *See, e.g.*, TEACHOUT, *supra* note 5, at 5–9.

14. *Id.* at 108–10.

15. *Id.*

16. *Id.*

the candidates' private benefit. Second, to the extent there were prosecutions under state bribery laws, they focused on the susceptibility of judicial and executive officers to improper citizen influence.<sup>17</sup> That is, early state laws did not contemplate legislative bribery in the same way the federal statutory scheme does today.

In part, early formulations of criminal anti-corruption measures are explained by their intuitive appeal, given how they drew on popular ideas about corruption.<sup>18</sup> In the context of executive officers, corruption is easily spotted as a decision to prosecute an individual (or not) or take other enforcement action against an individual (or not). With respect to judicial officers, corruption may be understood as a party in a proceeding before a tribunal attempting to sway a judicial officer to make favorable decisions towards one party or another. Because these are binary cases in which the norms are clearly established, it is relatively easy to define corruption in each context. Legislative corruption is a harder concept to flesh out by analogy to the former two scenarios for a few reasons. First, legislators exercise a variety of roles under color of their official title, especially when it comes to executing legislation. These functions include drafting legislation, proposing legislation, acting in a committee setting, voting, and giving floor statements as part of the legislative history. Second, legislators' actions often benefit disparate groups of people, across constituent communities. It is difficult, compared to the former cases, to determine whether a measure has direct or indirect benefits aimed at some or costs aimed at others; the tradeoffs are not necessarily zero-sum. Third, rarely does one legislator's vote break the tie necessary for a matter to move forward in the legislative process.

Perhaps for the aforementioned reasons, no state law included legislators in its anti-corruption statutory language until 1816.<sup>19</sup> After 1820, however, most states that criminalized similar behavior when directed at judges or executive officers amended their laws to cover legislative officials as well.<sup>20</sup> These statutes were often broadly written, covering an individual's attempt to give something of value with the intent to influence a government official's act, vote, decision, or

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17. *Id.* at 109–10.

18. See David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 146 (“No one, for example, believes that a judge’s decision in a case, or an administrative official’s quasi-judicial decision (such as an elected attorney general deciding whether to seek an indictment), should be responsive to payments of any kind.”).

19. TEACHOUT, *supra* note 5, at 114.

20. *Id.*

judgment on any matter.<sup>21</sup> The “decision” language was construed relatively broadly, as the popular belief in the corrupting influence of gifts to members of the government still operated in the background of the legislative choice to criminalize a certain class of behavior.<sup>22</sup> Modern federal laws criminalizing corruption extend from this broader concept of inappropriate conduct.

## II.

### CURRENT ANTI-CORRUPTION REGIME

The current federal criminal code retains some features of early state laws criminalizing corrupt bribes. The anti-bribery statute, codified at 18 U.S.C. § 201 (“Bribery of public officials and witnesses”) defines the act of bribery as committed by persons who:

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

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21. *Id.* (also noting that some states had even broader statutes, such as Colorado’s ban on giving or receiving a gift “in exchange for intent to treat one side more favorably than the other” or Kentucky’s ban on taking bribes to “do or omit any act in [the government official’s] official capacity”).

22. *See id.* at 115 (“Legislative bribery was typically described broadly, encompassing far more than simply selling a particular favor. Officials were guilty if they were *found to be partial or to treat one side more favorably*, and bribers were guilty for trying to influence anything, even judgment.” (emphasis added)).

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;<sup>23</sup>

Further in the section, the statute also spells out the criminal elements of an arguably separate crime, that of giving illegal gratuities:

(c) Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person; . . . shall be fined under this title or imprisoned for not more than two years, or both.<sup>24</sup>

Although the only offense referred to in the title of the statute is “bribery,” the language of subsection (c) contains distinct elements arguably making out a separate criminal act.<sup>25</sup> Even though the term “gratuities” is not used in the statute, courts and prosecutors refer to “illegal gratuities” when bringing charges under this subsection (c), and often treat “gratuities” as a lesser included offense under a separate charge of bribery.<sup>26</sup> Both crimes rely on the same definitions set forward in subsection (a) of the statute.<sup>27</sup> There are significant differ-

23. 18 U.S.C. § 201(b)(1) (2012).

24. *Id.* § 201(c)(1).

25. Throughout this Note I will refer to the separate crime under subsection (c) as “gratuities.”

26. *See generally* United States v. Valdes, 437 F.3d 1276 (D.C. Cir. 2006), *aff’d en banc*, 475 F.3d 1319 (D.C. Cir. 2007).

27. *See* 18 U.S.C. § 201(a) (“(1) the term “public official” means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; (2) the term “person who has been selected to be a public official” means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and (3) the term “official act” means any 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

ences between subsections (b) and (c), though, “suggesting the existence of a separate and distinct offense.”<sup>28</sup> A violation of subsection (b) (“bribery”) must be done “corruptly,” whereas there is no intent requirement in subsection (c).<sup>29</sup> Bribes involve the giving of things of value to “influence” government action. Gratuities, in contrast, more broadly involve the giving of things of value “for or because of” official acts. Bribes are only forward-looking in that they must involve attempts to influence future action. Gratuities can be backward-looking as well as forward-looking; as the name implies, gratuities may be thought of as conceptually akin to a “thank you” from a member of the public to a politician, for acts already taken or acts yet to be taken. Finally, violations of the different subsections result in different penalties. Violation of subsection (b) can lead to imprisonment for up to fifteen years, disqualification from office, and a fine, whereas a gratuities violation can lead to a maximum imprisonment of only two years plus a fine.<sup>30</sup>

To summarize, under these current federal anti-corruption statutes, a person commits the offense of bribery if that person:

- gives, offers or promises,
- anything of value,
- to a public official,
- with the intent to influence an official act,
- corruptly.<sup>31</sup>

Bribery is punishable by maximum imprisonment of fifteen years, plus a fine.

An individual commits the offense of giving an illegal gratuity if she:

- directly or indirectly gives, offers, or promises,
- anything of value,
- to one of a variety of public officials (present and former, elected and appointed),
- “for or because of” any official act.

The giving of an illegal gratuity is punishable by maximum imprisonment of two years, plus a fine.

such official’s official capacity, or in such official’s place of trust or profit.”); *see also infra* note 111 (providing “official act” definition).

28. George D. Brown, *The Gratuities Debate and Campaign Reform: How Strong Is the Link?*, 52 WAYNE L. REV. 1371, 1376 (2006).

29. Compare 18 U.S.C. § 201(b)(1) with *id.* § 201(c).

30. Compare *id.* § 201(b)(2)(C) with *id.* § 201(c)(1)(B).

31. Deborah Hellman, *A Theory of Bribery*, 38 CARDOZO L. REV. 1947, 1992 (2017).

A. *The Courts Have Significantly Limited the Current Statutory Scheme's Applicability*

Over time, federal courts have interpreted the provisions of these anti-corruption provisions to limit their applicability.<sup>32</sup> In two specific ways, courts have interpreted these anti-corruption statutes to narrow their focus to only capture specific, relatively uncommon conduct. First, the Supreme Court has read a nexus or quid pro quo relationship into the exchange between a constituent and a public official.<sup>33</sup> Second, the Court has tightened the definition of the statutory term “official act”—the *quo* element of the necessary exchange—to the exclusion of the most likely forms of corruption: less visible yet highly persuasive backchannel acts by government officials.<sup>34</sup>

1. *Quid Pro Quo Formulation*

Though not explicit on the face of the law, the Supreme Court has read in a necessary quid pro quo formulation of bribery into the primary federal statute supporting prosecution of corruption charges against a public official.<sup>35</sup> The provision of the statute criminalizing gratuities does not contain the same “influence” language. Nonetheless, in 1999, in *United States v. Sun-Diamond Growers of California*, the Supreme Court held that “in order to establish a violation of 18 U.S.C. § 201(c)(1)(A) [that criminalizes certain gratuities], the Government must prove a link between a thing of value conferred upon a public official and a specific ‘official act’ for or because of which it was given.”<sup>36</sup>

*Sun-Diamond* presented the question of the scope of the gratuities statute by considering what sort of connection, if any, a gift to a government official must have with the conduct of that official. The case itself involved the prosecution of a number of gifts given by farming cooperatives to then-Secretary of Agriculture, Michael Espy.<sup>37</sup> Justice Scalia, writing for a unanimous Court, framed the question in the case as “whether conviction under the illegal gratuity

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32. See, e.g., Eisler, *supra* note 4, at 1634 (“The Court’s treatment of official corruption narrowed the range of political behavior classified as illicit, though each of the individual holdings has doctrinal foundations that do not directly invoke the substance of corruption.”).

33. See TEACHOUT, *supra* note 5, at 228, 239–41 (explaining how the Supreme Court refashioned the statutory conception of bribery into a more demanding formulation by reading a quid pro quo requirement into the law).

34. See *McDonnell v. United States*, 136 S. Ct. 2355, 2371–72 (2016).

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

36. *Id.* at 414 (emphasis added).

37. *Id.* at 401.

statute requires any showing beyond the fact that a gratuity was given because of the recipient's official position."<sup>38</sup> The government argued that the statute necessitated no more than a showing that the gifts at issue were given *because of* the government official's position.<sup>39</sup> The cooperative argued that the mere fact of the recipient's title was insufficient and that the government had the burden of alleging and proving some relationship between the gifts and specific acts taken by the official in his public capacity.<sup>40</sup> The Court sided with the cooperative, holding that the Government needed to prove a link between the gifts and official acts.<sup>41</sup> Justice Scalia reasoned that it seemed "most implausible that Congress intended the language of the gratuity statute—'for or because of any official act performed or to be performed'—to pertain to the office rather than (as the language more naturally suggests) to *particular* official acts."<sup>42</sup> In so holding, the Supreme Court rejected the Court of Appeals' holding that the statute only required "the jury . . . to find the requisite intent to reward past favorable acts or to make future ones more likely."<sup>43</sup>

## 2. Narrowing the "Official Act" Definition

The Court's holding in *Sun-Diamond* paved the way for the refinement and narrowing of the official act provision within the statute. In 2006, in *United States v. Valdes*, the D.C. Circuit held that, in an impermissible quid pro quo, the *quo* must be a "decision or action" taken by an official on any "question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before [the] official."<sup>44</sup> The majority reasoned that a decision or an action *alone* was not enough, and that the modifying terms "question, matter, cause," etc. "suggest at least a rudimentary degree of formality."<sup>45</sup> Recently, the Court continued the logical trend of previous cases to further limit the "official act" definition under the statute.<sup>46</sup> In *United States v. McDonnell*, the former Governor of Virginia Robert McDonnell was charged with accepting more than

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38. *Id.* at 400.

39. *Id.* at 405–06.

40. *Id.* at 414.

41. *Id.*

42. *Id.* at 409.

43. *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 969 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999).

44. 437 F.3d 1276, 1278 (D.C. Cir. 2006), *aff'd en banc*, 475 F.3d 1319 (D.C. Cir. 2007).

45. *Id.* at 1279.

46. *See McDonnell v. United States*, 136 S. Ct. 2355, 2371–72 (2016).

\$175,000 in loans and gifts in exchange for promises to influence a decision to conduct state-funded research into the efficacy of various health products.<sup>47</sup> At trial, the district court instructed the jury that the term “official act” includes “acts that a public official customarily performs,” including acts “in furtherance of longer-term goals,” or “in a series of steps to exercise influence or achieve an end.”<sup>48</sup> The Supreme Court, in a unanimous decision, rejected the Government’s argument that these instructions were proper and ruled that the trial court’s definitions were too broad, potentially rendering the “official act” element superfluous by capturing “nearly any activity by a public official.”<sup>49</sup>

The Court, through these cases, demonstrates significant concern for the potential problem of prosecutors capturing innocuous conduct under the criminal sanctions against bribery and gratuities. In *McDonnell*, the Court framed its concern that public service would be “chilled” if officials were worried about serving those who gave something of value in return, such as “a campaign contribution” or an invitation to “join [constituent homeowners] on their annual outing to the ballgame.”<sup>50</sup> The *McDonnell* Court therefore carried out the legacy of Justice Scalia in *Sun-Diamond*: It purported to rely on a textual analysis of the statute to reach its conclusion while reiterating the harm of prosecuting innocent conduct as a conclusive policy reason to cut against the Government’s case.<sup>51</sup> Yet, in so doing, the Court has misplaced emphasis on the rare “innocent cases” and has watered down the statute to allow a variety of suspect behaviors to occur legally. By focusing on only one end of the spectrum, where campaign contributions are small-scale and infused with political nostalgia (like outings to ballgames), but declining to account for many other sizes and shapes of exchanges, the Court has rendered the statutes largely ineffective, allowing a great deal of conduct to occur legally under the acts.

### 3. *Current View of the Gratuities Statute*

Lower courts have taken the language from *Sun-Diamond* and *Valdes* as encouragement to further limit the application of the anti-

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47. *Id.* at 2364.

48. *Id.* at 2367.

49. *Id.* at 2368, 2374.

50. *Id.* at 2372.

51. See Rick Hasen, *Influence of Justice Scalia Felt in Unanimous Decision Throwing out Gov. McDonnell Conviction*, ELECTION L. BLOG (June 27, 2016, 7:57 AM), <http://electionlawblog.org/?p=83878>.

corruption statute. In *United States v. Evans*, for example, the district court concluded its opinion by noting, “[t]he gratuity statute, charged against all three Defendants in this case, is a cause of great concern to this Court. The potential breadth of the statute constitutes considerable danger to both public officials and unwitting citizens who deal with those officials.”<sup>52</sup> Here again, the court stepped into the role of policymaker. There was no constitutional vagueness challenge to the statute. There was no ambiguity in the statute that raised the particular question of scope before the *Evans* court. *Evans* has been described as a case with unremarkable facts (a local corruption scheme) resulting in an unremarkable result (“a series of rulings generally upholding guilty verdicts under several federal statutes,”<sup>53</sup> including 18 U.S.C. § 201(c)).<sup>54</sup> Yet, the district court recommended that “Congress . . . rewrite the gratuity statute to provide a well-defined harbor for those dealing with public officials” so that the innocent gift-givers would not be subject to unfair prosecution.<sup>55</sup>

In each of these cases, courts have focused on the potential for broad application of the *quid* element of the bribery formulation to lead to overzealous prosecution. Thus, a major objection to reformulation of the gratuities law to a pre-*Sun-Diamond* world may be the fact that adoption of anything short of a *quid pro quo* formulation of bribery, including a *McDonnell*-level official act limitation, would be overbroad. Justice Scalia, writing for the Court in *Sun-Diamond*, expressed “considerable sympathy” for public officials, and those who deal with them, “who must confront a complex set of criminal, civil, and regulatory provisions dealing with gift-giving.”<sup>56</sup> Justice Scalia viewed section 201(c) (proscribing gratuities) as “merely the tip of the regulatory iceberg,” which, if not navigated with legal precision unavailable to many members of the public, could encompass “snares for the unwary.”<sup>57</sup> In support of his view, Justice Scalia outlines the “absurdities” of reading the statute as a prohibition on gift-giving altogether, citing such gifts as sports jerseys and baseball caps that could support a criminal prosecution.<sup>58</sup>

What *Sun-Diamond* fails to recognize is that these examples—well-meaning constituents giving token gifts usually of inconsequen-

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52. 149 F. Supp. 2d 1331, 1343 (M.D. Fla. 2001), *aff'd in part, vacated in part, and remanded*, 344 F.3d 1131 (11th Cir. 2003).

53. See Brown, *supra* note 28, at 1386.

54. *Evans*, 149 F. Supp. 2d at 1344–45.

55. *Id.* at 1345.

56. Brown, *supra* note 28, at 1381.

57. *Sun-Diamond*, 526 U.S. at 410–11.

58. *Id.* at 406–08.

tial monetary value—are not the type of cases concerning prosecutors. These gifts do not arise as a result of a particular policy agenda intended to be furthered by the gifts. These gifts are therefore impossible or nearly impossible to tie to quid pro quo formulations of bribery. These gifts are not widely perceived by the public as sources of corruption, understood as traded in exchange for particular kickbacks or favors; nor are these gifts sizeable enough in nature to capture the attention and resources of elected officials, who confront a vast universe of potential donors in highly competitive races defined by increasing expenditures. In short, these may well not be the exchanges the statutes meant to criminalize, but in reaching so far to clarify the status of the law to protect the giving of such gifts, the Supreme Court has undermined the utility of the laws at issue in fundamental ways. Justice Scalia's unwillingness to rely on prosecutorial discretion in order to prevent such baseless prosecutions<sup>59</sup> reveals a thin commitment to textualism: The Court should refrain from determining whether a statute ropes in too many people or too few if the text of the statute can be interpreted without reference to the possible scope of prosecution.<sup>60</sup>

Motivated by this concern, the Court has remedied the potential overbreadth of the relevant laws by narrowing the definition of official act, *i.e.*, the *quo*. In so doing, the Court has failed to recognize a consistent, conceptual link between the nature of the *quid* and the nature of the *quo*; it has treated the stakes as simply the same across all types of *quids* and *quos*. However, evaluation of either end of the quid pro quo formula must account for context; the *quids* and *quos* must be evaluated in relation to each other. In other words, the nature of the *quid* should influence the standard to which the *quo* must rise in order to constitute corrupt bribery. Examining the relationship between “official act” as a metric of the *quo* standard and the source of the corrupting funds, the *quid* input can better shape federal bribery laws to serve the dual purposes of protecting legitimate political expenditures and expression while limiting corruption and the appearance of corruption. Therefore, the definition of the *quo*—what type of governmental act is necessary in the impermissible quid pro quo formulation—should not be the same for transactions involving campaign finance as with transactions involving gifts to public officials. Transactions involving campaign finance should be treated under a

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59. *Id.* at 408.

60. See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 28182 (1989) (arguing that, under the “legislative supremacy principle,” courts are subordinated to clear statutory directives, thus precluding judicial policymaking).

narrower quid pro formulation of law. Campaign expenditures enjoy significant First Amendment protections.<sup>61</sup> Campaign contributions, while permissibly restricted, also serve legitimate political functions and are historically, sociologically, and legally distinct in nature from gifts directly to elected officials. The current legal focus on the overall effect of a quid pro quo exchange ignores the fact that campaign expenditures and contributions intended to influence official decisions do not invite moral hazards in the way that personal payments or gifts made directly to elected officials might. As the next Section illustrates, convergence between the statutory requirements of bribery for campaign contributions and for gratuities to government officials is misguided, as the two sources of potential corruption differ in several key regards.

### III.

#### UNDERSTANDING WHY GRATUITIES SHOULD BE LEGALLY LIMITED

The Supreme Court characterized Governor McDonnell's conduct as "distasteful" and "tawdry," while at the same time noting that such conduct is plausibly condoned under society's contemporary view of politics.<sup>62</sup> This rhetoric alone should raise a red flag to Congress about the Court's interpretation of public corruption laws. A consensus-based definition of public corruption might be founded on society's collective moral disapprovals, activities which offend our intuitive senses of fairness, "taste," manners, and equity. Interpretations of public corruption laws which allow for behavior deemed morally distasteful demonstrate how the laws fail to outlaw an important subset of activity. The Court's theory of McDonnell's case relies on a view in which the corrupting potential of making certain campaign expenditures is equal to the corrupting potential of directly giving an elected official cash, Rolexes, Ferrari joyrides, wedding gifts, and island vacations.<sup>63</sup> This false equivalency leads to a legal view in which both campaign financing and gratuities to government officials stand on equal policy footing as examples of a functioning, healthy political

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61. Limits on campaign expenditures violate the First Amendment, but there are still limits on campaign contributions because of their potential to corrupt or lead to the appearance of corruption. *Citizens United v. FEC*, 558 U.S. 310, 345 (2010).

62. *McDonnell v. United States*, 136 S. Ct. 2355, 2371–72 (2016) (characterizing McDonnell's actions as quotidian political practice). See *infra* Part IV for a more detailed factual account of McDonnell's case.

63. These gifts were among some of the gratuities given to Governor McDonnell in a quid pro quo exchange for arranging meetings and exerting pressure on certain decisionmakers. See *McDonnell*, 136 S. Ct. at 2363–65.

process, and leads to the treatment of both under a more lenient, expansive legal framework that should be rejected. It is imperative to outline the practical and conceptual differences between campaign contributions and gifts as potential sources of corrupting influence in order to write laws that align with social and constitutional notions of good governance.

A. *Gratuities Corrupt Because They Are Not  
of the Political Sphere*

The most salient difference between campaign contributions and gratuities to elected officials requires closer examination of the normative and conceptual arguments for anti-corruption laws in the first instance. Asking and answering the intuitive—but vital—question, “What is corruption?” is a fine place to start. Professor Deborah Hellman argues that bribery occurs generally when things of value from one conceptual sphere are exchanged in return for things of value from a second, distinct conceptual sphere.<sup>64</sup> Under this formulation, a vote on one bill in exchange for money from a constituent’s pocket constitutes bribery, but one politician’s vote on a particular bill exchanged for another politician’s vote on a different bill (also known as logrolling) does not constitute bribery.<sup>65</sup>

Hellman also uses this definition to explore the dilemma posed by campaign contributions, noting that in that context, the difficulty characterizing campaign contributions as bribes stems from the fact that they can be of the “money” sphere or the “political” sphere.<sup>66</sup> Hellman’s work is fascinating because it attempts to define bribery by first defining the boundaries of a conceptual sphere and then by analyzing the impermissible quid pro quo in light of that sphere. According to Hellman, “a party leader [who] agrees to give her colleague a spot on a coveted committee or agrees to site a desired project in her district in exchange for a vote on another piece of legislation” is not

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64. Hellman, *supra* note 31, at 1951.

65. This formulation is consistent with the views of corruption expressed in some cases under the Hobbs Act, including that involving former Illinois Governor Rod Blagojevich. See *United States v. Blagojevich*, 794 F.3d 729, 734–35 (7th Cir. 2015) (addressing whether seeking a “favor” from then-Senator Barack Obama (an appointment to the President-Elect’s Cabinet) in exchange for appointing Valerie Jarrett to fill the President-Elect’s seat was prohibited by the Hobbs Act and reasoning that “a proposal to trade one public act for another, a form of logrolling, is fundamentally unlike the swap of an official act for a private payment”).

66. See Hellman *supra* note 31, at 1951, 1971-72 (“Bribery involves a boundary crossing, the exchange of value from one domain or sphere of value into another. Political bribery, then, is the exchange, or agreement to exchange, a political act for something of non-political value.”).

guilty of a bribe because the decision of whom to place on a committee or where to situate a project are political acts, done in return for other political acts.<sup>67</sup> On the other hand, the payment of cash, or the gifting of items of personal enrichment *is* bribery because the thing of value (material enrichment) that is exchanged for the official act is not within the sphere of politics.<sup>68</sup> Of course, “how or whether a society delineates the boundaries between spheres of social life is open to normative critique.”<sup>69</sup> Defining the personal enrichment of politicians, by citizens, as external to the political sphere is consistent with American jurisprudence, and with historical and normative notions of corruption.<sup>70</sup> This is so for the simple fact that “unlike elections, we expect neutrality of administration” when it comes to the law.<sup>71</sup> The parameters of the sphere are different within the electoral context and within the political, post-campaign context.

### B. *Gratuities Corrupt by Their Effect on the Official*

In addition to drawing a conceptual difference between campaign contributions exchanged for political advantages (all occurring within the sphere of public constitutional governance), one can look to ethics guidelines to see the demonstrated understanding among public officials that campaign contributions and gifts should be treated differently. Federal law and Federal Election Commission guidance, in addition to Senate and House Ethics rules, dictate the appropriate uses of funds received by campaign committees in the electoral cycle.<sup>72</sup> Notably, all of these rules establish a clear and impenetrable wall be-

67. *Id.* at 1973.

68. *Id.* at 1972.

69. *Id.* at 1979. Elsewhere in the article, Hellman frames the line-drawing normative questions generally: “First, where should such boundaries between spheres of value be drawn, and second, who decides the answer to this first question?” Specifically, in the wake of *McDonnell*, “[s]hould access be considered an official act and who should make this determination?” *Id.* at 1992.

70. See *supra* Part I for a more detailed discussion of the evolution of corruption laws.

71. 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, 184–85 (2015) (further noting that money as means comes to different ends in different political contexts, specifically, “partiality and a key role for money in most elections, as contrasted with aspirations of neutrality and a deep suspicion of transfers of things of value in the administration of laws”).

72. See 52 U.S.C. § 30114 (2012) (describing permissible “[u]se[s] of contributed amounts for certain purposes”); 11 C.F.R. § 100.153 (2018) (covering “[r]outine [l]iving [e]xpenses”); *id.* § 113.1 (2017) (defining “personal use” of campaign contributions); *id.* § 113.2 (2018) (describing “[p]ermissible non-campaign use of funds”). The Federal Election Commission also issues guidance opinions in response to specific requests regarding appropriate use of campaign contributions pursuant to 52

tween campaign expenditures and personal expenditures. Funds received as campaign contributions may not be used for candidates for virtually any reason beyond those justified by the existence of the campaign.<sup>73</sup> The rules err on the stricter side: for example, candidates may not spend campaign contributions on non-commercial aircrafts, even if the purpose of the trip is primarily to campaign.<sup>74</sup> Needless to say, candidates may not use campaign contributions to go to the spa, shop for dresses, joyride Ferraris, take personal beach vacations, or divert funds from campaign committees and political parties as cash for deposit into personal accounts.<sup>75</sup> Yet, these are the very sorts of activities of which prosecutors introduce as evidence in federal bribery cases.<sup>76</sup> This division between appropriate and inappropriate uses of campaign funding implicitly recognizes the difference in propriety between using funds for professional, campaign-related expenses and discretionary ends that enhance the personal well-being of government officials. This division is also consistent with the Framers' and states' earliest stated views on corruption, which assumed that gifts to government officials were highly suspicious, implicitly or explicitly attached to requests for personal favors or kickbacks.<sup>77</sup> Historically, gifts to public officials were to be constitutionally and legally treated

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U.S.C. § 30108 (Supp. II 2012). The archive of all advisory opinions issued to date is searchable at <https://www.fec.gov/data/legal/advisory-opinions/>.

73. See generally FED. ELECTION COMM'N, CAMPAIGN GUIDE FOR CONGRESSIONAL CANDIDATES AND COMMITTEES (2014), <https://www.fec.gov/resources/cms-content/documents/candgui.pdf>. According to the Federal Election Commission's interpretation of campaign finance law, published and made available for prospective federal House and Senate candidates, "[u]sing campaign funds for personal use is prohibited. Commission regulations provide a test, called the 'irrespective test,' to differentiate legitimate campaign and officeholder expenses from personal expenses. Under the 'irrespective test,' personal use is any use of funds in a campaign account of a candidate (or former candidate) to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or responsibilities as a federal officeholder. More simply, if the expense would exist even in the absence of the candidacy or even if the officeholder were not in office, then the personal use ban applies." *Id.* at 53 (citing 52 U.S.C. § 30114(b)(1); 11 C.F.R. § 113.1(g)).

74. See *Code of Official Conduct*, HOUSE COMMITTEE ON ETHICS, R. XXIII, <https://ethics.house.gov/publication/code-official-conduct> (last visited Mar. 25, 2019).

75. See S. SELECT COMM. ON ETHICS, 114TH CONG., THE SENATE CODE OF OFFICIAL CONDUCT, R. XXXVIII (2015) (banning "personal use" of campaign funds); *Code of Official Conduct*, HOUSE COMMITTEE ON ETHICS, R. XXIII, cl.6(b), <https://ethics.house.gov/publication/code-official-conduct> (last visited Mar. 25, 2019) (providing that a Member "may not convert campaign funds to personal use in excess of an amount representing reimbursement for legitimate and verifiable campaign expenditures").

76. See, e.g., *McDonnell v. United States*, 136 S. Ct. 2355, 2362–65 (2016); *United States v. Pomrenke*, 198 F. Supp. 3d 648, 653 (W.D. Va. 2016).

77. See TEACHOUT, *supra* note 5, at 26–28.

as nothing more than potential causes of impermissible corruption in the political system.<sup>78</sup>

Beyond notions of ethics and propriety, gratuities have a unique capacity to corrupt public officials because they can be leveraged to address matters of personal importance to public officials. Unlike campaign contributions, which arise in a very narrow personal or professional context, gifts can suit the particular needs of an elected official in a way to psychologically or literally indebted that official to private donors. For example, in *McDonnell*, Governor McDonnell and his wife faced serious financial trouble due to personal mismanagement of debt.<sup>79</sup> Campaign contributions would not remedy those problems, but personal loans could. The immediacy, urgency, and personal bonds attached to such intimate and useful gifts like instant cash loans renders \$50,000 in that context much more powerful and influential than \$50,000 directed to specific purposes and held in a campaign war chest, and may persuade public officials to bend further from their public or “true” values in order to secure gifts.

Additionally, unlike campaign contributions, gifts to officials are received through pre-existing contact channels and are usually shielded from public scrutiny. That means that gifts are more likely to come from people with whom politicians already have some relation. In this way, too, the identity of the giver (a friend, a colleague, or an acquaintance) increases the effectiveness of gifts as possible bribes. And, because these channels are usually secret (they are not usually subject to public disclosure or can be given in ways to skirt necessary disclosure rules), the corrupting influence can be very difficult to trace.

### C. *Constitutional Concerns Merit Further Restriction of Gratuity-Giving Activity*

Treating the use of campaign contributions and direct gifts to government officials as identical for the purposes of regulation means that the constitutional limitations placed on campaign contribution regulations would also apply to regulations placed on gifts to government officials, for the two are intertwined in the statute as written.

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78. *Id.*

79. See *McDonnell*, 136 S. Ct. at 2362 (“Mrs. McDonnell described the family’s financial problems, including their struggling rental properties in Virginia Beach and their daughter’s wedding expenses.”); Joanie Vasiliadis & Peggy Fox, *FBI Agent: McDonnells’ Credit Card Debt Topped \$90K*, USA TODAY, <https://www.usatoday.com/story/news/politics/2014/08/13/bob-mcdonnell-corruption-trial/14000857/> (last updated Aug. 13, 2014, 8:51 PM).

Yet, there are important goals serviced by anti-bribery law that cannot constitutionally be the sole basis for campaign finance regulations. For example, the Supreme Court has squarely rejected an essential conceptual underpinning of the current anti-bribery regime, equal access, in constitutionally analyzing campaign finance regulations.<sup>80</sup> Equality values are an indispensable foundation of corruption law: “[T]he Supreme Court, in upholding anticorruption legislation, has invoked ‘this great end of Government—the impartial execution of the laws.’”<sup>81</sup> In other words, “[t]he right to equal access to governmental services can be seen as a corollary of the right to participate equally in the governmental process.”<sup>82</sup> Access to the relevant officials is skewed in favor of those with the resources to obtain it, and the outcomes of such limited engagements are usually policy measures or allocation of resources designed to specifically benefit a very small number of constituents.

Furthermore, gratuities may be seen as efforts by constituents to bypass constitutionally allowable limits on campaign contributions in order to “acquire influence outside the open give-and-take of the political process.”<sup>83</sup> This means that there is a secondary interest in limiting the gratuities constituents can give to government officials that reinforces the constitutional protections legitimized by *Buckley v. Valeo* and its successors.<sup>84</sup> Under *Buckley*, “the prevention of corruption or its appearance is the only governmental interest strong enough to outweigh the substantial First Amendment interests at stake in campaign finance regulation.”<sup>85</sup> Legislation to regulate gratuities is rooted squarely within *Buckley*’s rationale to minimize corruption or the appearance thereof.

#### D. Campaign Contributions Pose Less Risk of Similar Bribery

Conceptually, there is a great deal of difficulty in ascertaining a proper exchange from an improper exchange in the context of campaign finance, both legally and ethically. This is because of a historical formulation of politics in representative democracy whereby

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80. See *Citizens United*, 558 U.S. at 380–82 (Roberts, C.J., concurring) (criticizing the Court’s and academics’ treatment of the “equalizing” principle of *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)).

81. *Brown*, *supra* note 71, at 190 (quoting *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 493 (1995) (Rehnquist, C.J., dissenting)).

82. *Id.* (additionally noting that, almost by definition, “[c]orrupt governments do not serve citizens on an equal basis”).

83. *Brown*, *supra* note 28, at 1399.

84. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

85. *Brown*, *supra* note 28, at 1404.

elections are “competitive contests among advocates of differing views of the public interest” that “produce winners and losers.”<sup>86</sup> Besides voting, citizens exercise power over the electoral process by attempting to influence the ability of different candidates to promote their messages and mobilize voters. One source of influence is money given directly to campaign committees and to political parties. It follows from such a system that those who win will almost inevitably acknowledge this financial influence. Campaign contributions are often—if not usually—given “for or because of” the candidate’s potential exercise of authority; indeed, many candidates solicit contributions with the promise they will take official acts on specific issues when they ascend to office.<sup>87</sup> Thus, candidates who advance the preferred policies of the people who helped them ascend to office often act in alignment with a generally accepted view of politics. On Professor Hellman’s view, campaign contributions are not necessarily corrupt because campaign contributions and government officials’ actions occur within the same political sphere.<sup>88</sup> Recent Supreme Court cases support this view by strongly suggesting that campaign contributions are political, not financial, in nature.<sup>89</sup> Nonetheless, even if these cases illuminate the difficulty in sorting campaign contributions into a financial or political sphere, they reaffirm the proper placement of gratuities to politicians in the former.

And yet, there are still formulations under which campaign contributions serve as the foundation of an unlawful bribe. Defining such formulations is a thorny issue. This is due to the fact that “[t]he difficulty of trying to ‘tell one from the other’—bribe or gratuity from lawful contribution—arises in many common and generally accepted campaign financing situations.”<sup>90</sup> In order to deal with this difficult area of law, the legislative and judicial branches zeroed in on the na-

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86. Brown, *supra* note 71, at 184.

87. See, e.g., PETER J. HENNING & LEE RADEK, *THE PROSECUTION AND DEFENSE OF POLITICAL CORRUPTION: THE LAW AND LEGAL STRATEGIES* 42–43 (1st ed. 2011).

88. See Hellman, *supra* note 31, at 1972 (discussing how the analogous cases of campaign promises, logrolling, and advocacy organization endorsements are not bribes according to the external account).

89. For example, in *McCutcheon v. FEC*, Chief Justice Roberts characterizes giving money to a political campaign as a form of political participation analogous to voting. 134 S. Ct. 1434, 1440–41 (2014) (plurality opinion) (“There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate’s campaign.”).

90. See Note, *Campaign Contributions and Federal Bribery Law*, 92 HARV. L. REV. 451, 452 (1978).

ture of the communication between the official and the constituent—much more so than in other, non-campaign contributions bribery cases—and have required a showing of a quid pro quo exchange involving an official act in order to delineate a proper from an improper reading of the scenario.<sup>91</sup> For this reason, exchanges of political promises for campaign contributions (and votes) are usually not the sort of corruption targeted by federal bribery laws. However, such prosecutions do occur.<sup>92</sup> The earliest cases prosecuting campaign contributions as bribes approached the act of donating to a candidate's campaign the same as other acts associated with bribes.<sup>93</sup> It is relatively uncommon “for the Government to prosecute campaign donations or expenditures as the only *quid* in an exchange agreement.”<sup>94</sup>

Besides the conceptual difficulty in ascertaining whether campaign contributions are bribes, the question of how to treat campaign contributions under criminal bribery law also has a constitutional dimension, as political speech is often framed in terms of the protections it receives under the First Amendment.<sup>95</sup> In other words, the generally accepted reciprocal relationship between campaign contributions to candidates for office and political action on the part of recipient candidates if they win and become officeholders deserves protection from government curtailment.<sup>96</sup> The First Amendment's application to campaign contributions has expanded greatly over the course of American history, culminating in *Citizens United v. Federal Election Commission*.<sup>97</sup>

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91. See *McCutcheon*, 134 S. Ct. at 1450 (2014) (plurality opinion) (“Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption.”).

92. See, e.g., Senate Select Comm. on Ethics v. Packwood, 845 F. Supp. 17, 19, 21 (D.D.C. 1994) (prosecuting Senator who recorded amounts of contributions and favors requested in a diary).

93. See TEACHOUT, *supra* note 5, at 218.

94. See Christopher Robertson et al., *The Appearance and the Reality of Quid Pro Quo Corruption: An Empirical Investigation*, 8 J. LEGAL ANALYSIS 375, 387 (2016) (citing *United States v. Terry*, 707 F.3d 607, 615 (6th Cir. 2013)).

95. See Brown, *supra* note 71, at 197 (“The goal of the [First] Amendment's protection of speech is to ensure that the public can speak to the government, and that that speech will be heard and acted upon.”); see also *id.* at 181 (“Ordinary corruption cases are simply matters of statutory interpretation. The campaign finance cases, on the other hand, require an in-depth examination of the nature of corruption because preventing it (or its appearance) is a government interest that justifies restrictions on activities otherwise protected by the First Amendment.”).

96. See *Citizens United*, 558 U.S. at 359.

97. *Id.* at 356 (discussing the relationship between the First Amendment protections of campaign speech and corruption).

Despite conceptual differences and distinct historical and legal developments around their understanding in law, both campaign contributions and gratuities to government officials have been treated similarly in the current bribery regulation scheme. The same rationales have animated the interpretation and application of the key terms and provisions of the laws. The specific political reform advocated by this Note stems from the recently established fact that the “official act” definition under the statute’s subsections (b) and (c) is essentially the same, telling law enforcement and courts to treat the same words in the same statute with the same meaning. Beginning with *Sun-Diamond* and ending most recently in *McDonnell*, the Supreme Court has made it clear that its preference is to read precedent to interpret the “official act” provision in light of its own notions of good public policy and democratic governance. Further, it will examine the law in its most restrictive sense only as it applies to campaign contributions, which deserve constitutional considerations that have never extended to gratuities to government officials. In other words, the Court views the entire § 201 provision as written suspiciously, so it has responded by cutting back the statute’s applicability and limiting opportunities for prosecutorial discretion where it can, in large part because the statute covers campaign contributions. Therefore, the legislature should clarify that campaign contributions and other gratuities should not be treated identically under the statute. Treating campaign contributions and gratuities identically was not necessarily the intention of the statute, nor is it sound public policy. The legislature should amend § 201 in order to distinguish the act requirements for the crime of giving illegal gratuities by removing the official act requirement for subsection (c) (*i.e.*, gratuities offenses).

#### IV.

##### CONGRESS SHOULD CREATE TWO DISTINCT “OFFICIAL ACT” DEFINITIONS FOR § 201

###### A. *The Official Act Standard from McDonnell is Appropriate for Campaign Finance*

A would-be legislator must, as is part of our democratic design, appeal to members of the public for financial contributions to get elected and fulfill certain policy and political promises. Realizing this, the creation of laws that deter bribery but do not deter democratic organizing has been one of the most vexing problems facing our representative democracy, because the threat (corruption) is directly related

to the promise (responsiveness).<sup>98</sup> Campaign finance law has struggled through a variety of iterations of regulated behavior in order to strike a balance between permissible and impermissible contributions, which have varied by source, size, timing, and end use.

In the wake of the Supreme Court's decision in *McDonnell* (narrowing the definition of "official act" under federal bribery law),<sup>99</sup> scholars and advocates have focused analysis on what *McDonnell* means<sup>100</sup> and what ought to be sufficient for the *quo* element of the necessary quid pro quo act under 18 U.S.C. § 201—*i.e.*, what action taken by the government official should be properly subjected to prosecution under federal anti-bribery law.<sup>101</sup> These useful works have focused attention on how cases like *McDonnell*'s, which the public has tended to judge to be one of corruption,<sup>102</sup> will not be subject to prosecution under the current law, and how that is bad from a public policy standpoint. The corollary of this conclusion is that there is only a narrow band of cases involving campaign contributions where prosecution will be possible after *McDonnell*: those campaign contributions which, in addition to a quid pro quo exchange, are tied to a small, specific set of official acts. This law is proper: it presumes innocence by incorporating high standards to show that campaign contributions, which are constitutionally protected, were bribes. While *McDonnell*'s rendering of the law led to the appropriate treatment of campaign contributions, the shift towards a narrower view of "official act" has the wrong impact on gratuities.

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98. TEACHOUT, *supra* note 5, at 216.

99. See *McDonnell* 136 S. Ct. at 2355.

100. See Leading Case, *Federal Corruption Statutes—Bribery—Definition of "Official Act"*—*McDonnell v. United States*, 130 HARV. L. REV. 467, 467 (2016) (defining bribery in light of the Court's decision in *McDonnell*); Christopher Murphy, *McDonnell v. United States: Defining "Official Action" in Public Corruption Law*, 12 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 269 (2017) (outlining the facts and procedural posture of *McDonnell*, including a summary of the way each party wanted the Court to define "official act" and the arguments offered by each party in support of their favored interpretation, and concluding with predictions for how *McDonnell* holding will affect public corruption law).

101. See Jennifer Ahearn, *A Way Forward for Congress on Bribery After McDonnell*, 121 PENN ST. L. REV. 1013, 1021 (2017) (proposing an amendment to the definition of "official act" in the federal anti-bribery statute based on the language from the "neighboring federal conflict of interest statute," in order to clarify the Act's reach and to make it more effective from a public policy deterrence standpoint).

102. See Michael Johnston, *The Supreme Court's New Definition of Corruption Is Out of Step with What Americans Think*, WASH. POST (July 20, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/20/defining-corruption-is-inherently-political-why-do-we-think-the-supreme-court-will-solve-it/>.

*B. Congress Should Reform the Official Act Standard  
for Gratuities*

*Sun-Diamond*, *Evans*, and *McDonnell* can all be read as the Court's refusal to do Congress's bidding to criminalize corrupt conduct. Courts at each level of the federal judiciary have invoked policy justifications for limiting the statute's scope in cases of statutory interpretation. In multiple instances, the courts have called on the legislature directly to redraft the gratuities statute to create the presumption of a broad prohibition on gratuities. Specifically, after these cases, Congress must determine which type of gratuities should be prohibited, what type of connection (if any) between a gratuity and an act must exist, and what types of conduct on the part of the government official are covered by the federal anti-corruption statutes.

The most recent, and perhaps the most powerful, example of the Court's unwillingness to stay out of the policy-making business when interpreting anti-corruption statutes is, of course, *McDonnell*. The Court signaled in *McDonnell* an unwillingness to treat campaign contributions and political gratuities differently given the value of each to the political process. *McDonnell*, more than merely limiting the "official act" definition under the Hobbs Act statute, indicates the Court's fundamental ideological commitment to expansively legalizing the type of conduct at issue in the case.<sup>103</sup> In *McDonnell*, the Court "surpasses the narrow statutory and procedural findings necessary to remand the case and offers a full-fledged theory of representative accountability,"<sup>104</sup> which bears on the legislature's ability to define the boundaries of corruption under federal law.

The Court's interpretive analysis of the statute provides an opportunity for Congress to revisit the language at issue and amend the law to clarify the scope of its application. The well-established principle of legislative supremacy provides that courts are subordinate to legislatures in nonconstitutional areas of policymaking.<sup>105</sup> The rule, derived from the constitutionally enshrined doctrine of separation of powers, constrains courts from imposing their own policy preferences on stat-

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103. See Eisler, *supra* note 4, at 1624 ("[T]he Court holds an especially minimalist view of the rules of political competition. . . . The substantive theory of *McDonnell* indicates that the series of holdings unfavorable for federal anti-corruption efforts is a function of the Court's political ideology, rather than incidental to its application of blackletter doctrine.").

104. *Id.* at 1635.

105. See Farber, *supra* note 60, at 281–82 ("It is a commonplace that, apart from constitutional issues, judges are subordinate to legislatures in the making of public policy. If this subordinate role means anything at all, it must somehow constrain judges who interpret statutes from implementing their own notions of public policy.").

utes.<sup>106</sup> Specifically, the doctrine describes how Congress is the branch of government authorized by the Constitution to act as the primary maker of laws and policy, and thus where Congress has resolved a legal or policy question, courts are “obligated to respect the legislature’s decision” so long as that decision is constitutional.<sup>107</sup> Under a commonly accepted understanding of the doctrine, judges should be permitted to consider policy factors only where legislative directives are ambiguous.<sup>108</sup> Even more bounded views of legislative supremacy limit judicial policymaking to situations where “genuine doubt” exists about the meaning of the legislative command.<sup>109</sup>

### 1. *Proposed New Definition*

Congress should amend the anti-corruption statute § 201 to include a separate definition of “official act” to apply to subsection (c) (dealing with gratuities). The language should be broad in scope to leave no doubt as to the difference between an “official act” for the purposes of prosecution under subsection (b) of the statute or for purposes of prosecution under the Hobbs Act (at issue in *McDonnell*). New language defining the necessary official act under 18 U.S.C. § 201 subsection (c) might therefore read:

The term ‘official act’ means any personal and substantial decision or action on, or participation, disapproval, recommendation, or rendering of advice in any investigation of, 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.<sup>110</sup>

This modified statute meaningfully broadens the nature of the acts captured by the statute.<sup>111</sup> This language expands the list of proscribed behavior from “any decision or action” to include “participation, disapproval, recommendation, or rendering of advice in any investigation.” However, the modified language also adds a qualifier of its own—“personal and substantial”—to assuage claims of over-

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106. *Id.*

107. See Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 241 (2015).

108. Farber, *supra* note 60, at 287.

109. *Id.* at 291.

110. See also Ahearn, *supra* note 101.

111. The current statutory language defines an “official act” for *both* sections 201(b) (bribery) and 201(c) (gratuities) as “any 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.” See 18 U.S.C. § 201(a)(3).

breadth. For example, nominal or token official acts would not be subject to prosecution under the modified language.

## 2. *Application of Proposed Modified Definition to McDonnell*

In the case of former Governor McDonnell, the use of this proposed modified statutory language would have likely led to a conviction upheld on appeal. In other words, a jury could have found McDonnell guilty based on the district court's jury instructions and the evidence offered at McDonnell's trial.<sup>112</sup> To illustrate, a brief recollection of the facts of McDonnell's case and application of the modified language is helpful.<sup>113</sup>

An arrangement between then-Governor of Virginia, Bob McDonnell, and an individual McDonnell met on the campaign trail, Jonnie Williams, began in October 2010. Williams offered McDonnell the use of his private jet to attend a political event in California. Williams accompanied McDonnell on the flight, during which time he explained what he wanted from McDonnell: extensive medical testing at Virginia state universities of "Anatabloc"—a substance for which Williams' business sought FDA approval as a pharmaceutical.<sup>114</sup> Between October, 2010, and the end of 2012, Williams gave more than \$175,000 in cash and luxury goods to McDonnell and his family in order to secure such testing.<sup>115</sup> In return, McDonnell took several ac-

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112. See *McDonnell v. United States*, 136 S. Ct. 2355, 2366 (2016) ("Following closing arguments, the District Court instructed the jury that to convict Governor McDonnell it must find that he agreed 'to accept a thing of value in exchange for official action.' The court described the five alleged 'official acts' set forth in the indictment, which involved arranging meetings, hosting events, and contacting other government officials. The court then quoted the statutory definition of 'official act,' and—as the Government had requested—advised the jury that the term encompassed 'acts that a public official customarily performs,' including acts 'in furtherance of longer-term goals' or 'in a series of steps to exercise influence or achieve an end.'").

113. Facts are drawn from the Fourth Circuit's opinion, *United States v. McDonnell*, 792 F.3d 478 (2015), *vacated and remanded*, 136 S. Ct. 2355 (2016), and Brief for the United States in Opposition, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474), 2016 WL 1358962 (hereinafter "Gov't Br.").

114. See *McDonnell*, 792 F.3d at 487; Gov't Br. at 2–3.

115. This satisfies the *quid* side of the general formulation for bribery under the statute. See *McDonnell*, 792 F.3d at 518–19. Williams' expenditures included: two \$50,000 "loans" in response to a request to assist the McDonnells with their financial troubles; a \$25,000 to pay for catering and gifts at both of McDonnell's daughters' weddings; \$5,000 for golf outings for the McDonnell family; multiple vacations at Williams' property in Smith Mountain Lake, Virginia, and at a luxury resort in Cape Cod, Massachusetts; a \$20,000 shopping spree for McDonnell's wife; and a \$6,000 Rolex for McDonnell. *Id.*; see also Brief of the Brennan Center for Justice at N.Y.U. School of Law as Amicus Curiae Supporting Respondent at 7–8, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474), 2016 WL 1388255, at \*7–8. Williams himself also testified that he continued providing the McDonnells gifts and

tions to advance the possibility of medical trials at Virginia universities.

First, McDonnell arranged a meeting between Williams and Dr. William Hazel, Virginia's Secretary of Health and Human Resources.<sup>116</sup> On a separate occasion, McDonnell solicited a letter from Williams spelling out in detail his wishes for medical testing of the product, then forwarded that letter himself to Dr. Hazel.<sup>117</sup> McDonnell also arranged a second meeting, directing Dr. Hazel to have a deputy meet with Williams and Mrs. McDonnell to discuss the Anatabloc "clinic trials at the University of Virginia ("UVA") and Virginia Commonwealth University ("VCU"), home of the Medical College of Virginia ("MCV")."<sup>118</sup> In August 2011, McDonnell agreed to host the Anatabloc product launch at the Virginia Governor's Mansion.<sup>119</sup> Williams set the guest list for the event, including the UVA and VCU officials he was lobbying to conduct the studies, as well as doctors who he hoped would promote Anatabloc.<sup>120</sup> Mrs. McDonnell told Mansion staff the purpose of the event was to "encourag[e] [the] universities to do research on [Anatabloc]."<sup>121</sup> During the event luncheon, which featured samples of Anatabloc at each place setting, Williams also distributed \$25,000 checks to the state researchers to "help them apply for Tobacco Commission grants to fund the studies."<sup>122</sup>

After a lag between the product launch and the commencement of any medical studies at either UVA or VCU, McDonnell personally sent emails to key personnel to follow up on the status of grants and research.<sup>123</sup> McDonnell arranged a second Governor's Mansion event to which he invited Williams and his employees, as well as influential VCU and UVA directors.<sup>124</sup> Finally, in March 2012 (a few weeks af-

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luxury goods throughout 2011 and 2012 because he expected that, consistent with "what had already happened," McDonnell "would continue to help [Williams] move this product forward in Virginia. . . [w]hether it was assisting with the universities, with the testing, or help with government employees, or publicly supporting the product." Gov't Br. at 10. Williams also claimed at one point that he was "100 percent sure" that Governor McDonnell "agreed to help. . . because of the loans and gifts that [Williams] gave [McDonnell and his family]." *Id.*

116. Gov't Br. at 3.

117. *Id.* at 6.

118. *McDonnell*, 792 F.3d at 490; Gov't Br. at 7.

119. *McDonnell*, 792 F.3d at 490; Gov't Br. at 7.

120. Gov't Br. at 7–8.

121. *McDonnell*, 792 F.3d at 517 (quoting Joint Appendix at 3608, *United States v. McDonnell*, 792 F.3d 478 (2015) (No. 15-4019)); Gov't Br. at 7.

122. Gov't Br. at 8.

123. *See McDonnell*, 792 F.3d at 492; Gov't Br. at 9.

124. *McDonnell*, 792 F.3d at 491–92; Gov't Br. at 9–10.

ter securing a second \$50,000 “loan”—not repaid by the time of trial), McDonnell met with the Virginia Secretary of Administration, who oversaw the state employee health plan.<sup>125</sup> During the meeting, McDonnell “reached into his pocket, retrieving a bottle of Anatabloc” and told the Secretary that Anatabloc was “working well for him, and that he thought it would be good for . . . state employees.”<sup>126</sup> McDonnell also asked the Secretary to meet with Williams’ company.<sup>127</sup>

Under the language of the modified proposed statute, McDonnell’s conduct likely falls within the definition of “official act.” Williams’ desire to have state medical facilities test his product is a “question,” “matter,” or “cause,” a discrete subject to which state resources could be directed.<sup>128</sup> McDonnell was personally involved, as he himself initiated meetings, planned events at the Governor’s Mansion, and made a policy suggestion to a cabinet member (recommending the Secretary of Administration supply state employees with Anatabloc, apart from testing). These acts could be seen as substantial by virtue of the fact that they: (1) occurred numerous times over the course of two years; (2) demonstrated unprecedented support by a sitting Governor for a single private product; (3) were uncharacteristic within the usual relationship between the Governor and the state university medical directors; and (4) involved making an in-person state policy suggestion to a state cabinet member. Further, Williams’ cause—funding or a directive to engage in the specified research—could have been brought before McDonnell as a public official, in his official capacity, by law either by state legislative resolution or bill or, more likely, by executive agency action.

This alternate application and outcome exemplifies the case for reform as outlined in this Note: It demonstrates the corrupting influence of certain gratuities and deters and penalizes quid pro quo arrangements involving them. Public opinion of the *McDonnell* case reinforces the outcome. While public opinion is not always an appropriate benchmark of a law’s policy successes or failures, public opinion in the context of public corruption laws can be used to generally gauge a statute’s effectiveness. After all, a central concern of anti-corruption laws is the public’s perception and trust in their elected and representative officials. In the case of former Governor McDonnell, a

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125. *McDonnell*, 792 F.3d at 492; Gov’t Br. at 10.

126. *McDonnell*, 792 F.3d at 492; Gov’t Br. at 10.

127. *McDonnell*, 792 F.3d at 492; Gov’t Br. at 10.

128. Note that the Supreme Court in *McDonnell* held that the district court’s decision not to give jury instructions as to how to define “question,” “matter,” “cause,” “suit,” or “proceeding” was not harmless error. *McDonnell v. United States*, 136 S. Ct. 2355, 2373–74 (2016).

plurality of voting-age Virginians disagreed with the Supreme Court's decision to overturn McDonnell's conviction.<sup>129</sup> Political Scientist Bob Holsworth concluded that the widely held opinion disagreeing with the Court's decision "didn't change the basic sense that something was wrong here, whether or not it was illegal," and therefore was not surprising.<sup>130</sup> In part, this echoes the prosecution's strategy at the district court level and the rhetoric and attitudes of the jurors in the trial.<sup>131</sup> Further, in the wake of *McDonnell*, the Virginia Legislature passed a measure limiting state lawmakers and candidates from receiving gifts of \$100 or more from lobbyists.<sup>132</sup> Virginians endorsed this measure by a ratio of nearly two to one,<sup>133</sup> demonstrating public support for the enforcement of public corruption laws in a way untied to the facts or partisan considerations possibly influencing public opinion on McDonnell's case.

Of course, the modified statute is subject to critique as well. For one, the definition may not go far enough to support the Government's position in *McDonnell* that even *access* to elected officials should not be "for sale."<sup>134</sup> Yet, whatever critiques arise, they do not outweigh the underlying need for reform. Observations about improvements to the statutory language offered here as a starting point should seek to render the statute more effective, not to derail the project for improvement.

#### CONCLUSION

*"A gift can be a bribe. A bribe can be a gift. Whether a present counts as corrupt or simply generous depends entirely upon our cultural or political frame."*<sup>135</sup>

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129. See Gregory S. Schneider & Emily Guskin, *Post Poll: McDonnell Should Stay on the Sidelines and out of Office*, WASH. POST (Aug. 17, 2017), [https://www.washingtonpost.com/local/virginia-politics/post-poll-mcdonnell-should-stay-on-the-sidelines-and-out-of-office/2016/08/17/de003114-6494-11e6-8b27-bb8ba39497a2\\_story.html](https://www.washingtonpost.com/local/virginia-politics/post-poll-mcdonnell-should-stay-on-the-sidelines-and-out-of-office/2016/08/17/de003114-6494-11e6-8b27-bb8ba39497a2_story.html).

130. *Id.*

131. See Josh Gerstein, *Why Edwards Won, McDonnell Lost*, POLITICO, <https://www.politico.com/story/2014/09/bob-mcdonnell-john-edwards-110654> (last updated Sep. 6, 2014, 10:35 AM) ("One [McDonnell] juror said in a post-trial interview that it was clear the gifts McDonnell and his family took were directly linked to his public office. Kathleen Carmody told the Washington Post that jurors asked themselves: 'Would the McDonnells have received these gifts if Bob McDonnell weren't governor? . . . [The] facts speak for themselves.'")

132. Schneider & Guskin, *supra* note 129.

133. *Id.*

134. See Ahearn, *supra* note 101, at 1024.

135. TEACHOUT, *supra* note 5, at 17.

Campaigns and elections, media and technology, political divisions in the U.S.—these evolving phenomena change the way public officials interact with their constituents. Our understanding of corruption therefore evolves in tandem, as we develop opinions about ideal governance in light of these social and political changes. Changes in public understanding of corruption do not happen in a vacuum: significant law enforcement resources are directed to prosecute public corruption,<sup>136</sup> demonstrating the necessity of laws that are practically and theoretically sound. For these reasons, the responsibility of an engaged citizenry in a representative democracy must include debate over how to constrain public officials and why. The emergent discussion should encourage specific research and arguments about anti-corruption laws and how those laws ought to be interpreted and applied.

The Supreme Court has recently taken incremental steps to curtail the effectiveness of the legal regime criminalizing bribery in American politics. This trend is not consistent with conceptual or historical understandings of corruption. Congress therefore should amend the relevant statutes to capture a broader set of official conduct—*i.e.*, the *quo* side of the keystone quid pro quo arrangement—to correct gaps and inconsistencies in the law. This recommendation is justified by a detailed understanding of how corruption operates and with special considerations to legal and political differences between gratuities and campaign contributions. This Note hopefully serves as a starting point for further discussion as to how large and small-scale edits to the statutory scheme or language can make this needed transformation a reality.

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136. The FBI lists public corruption as its “top criminal investigative priority.” See *What We Investigate: Public Corruption*, FBI, <https://www.fbi.gov/investigate/public-corruption> (last visited Mar. 25, 2019) (“Public corruption, the FBI’s top criminal investigative priority, poses a fundamental threat to our national security and way of life. It can affect everything from how well our borders are secured and our neighborhoods protected to how verdicts are handed down in courts to how public infrastructure such as roads and schools are built. It also takes a significant toll on the public’s pocketbooks by siphoning off tax dollars—it is estimated that public corruption costs the U.S. government and the public billions of dollars each year. The FBI is uniquely situated to combat corruption, with the skills and capabilities to run complex undercover operations and surveillance.”).