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# Applying *Citizens United* to Ordinary Corruption: With a Note on *Blagojevich*, *McDonnell*, and the Criminalization of Politics

George D. Brown  
*Boston College Law School*

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APPLYING *CITIZENS UNITED* TO  
ORDINARY CORRUPTION: WITH A NOTE ON  
*BLAGOJEVICH, MCDONNELL, AND THE*  
CRIMINALIZATION OF POLITICS

George D. Brown\*

*The [Citizens United] opinion comprehensively redefined corruption, and in so doing, redefined the rules governing political life in the United States.*

—Zephyr Teachout<sup>1</sup>

ABSTRACT

*Federal criminal law frequently deals with the problem of corruption in the form of purchased political influence. There appear to be two distinct bodies of federal anticorruption law: one concerning constitutional issues in the prevention of corruption through campaign finance regulation, and one addressing corruption in the form of such crimes as bribery, extortion by public officials, and gratuities to them. The latter body of law primarily presents issues of statutory construction, but it may be desirable for courts approaching these issues to have an animating theory of what corruption is and how to deal with it. At the moment, the two bodies of law look like two ships passing in the night.*

*The Supreme Court has rendered important decisions in both areas. However, it is only in the campaign finance cases that the Court has articulated a vision of corruption. A well-known recent example is the 2010 decision in *Citizens United v. Federal Election Commission*.<sup>2</sup> There the Court stated that “influence” and “access” brought about through campaign support,*

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\* Robert F. Drinan, S.J., Professor of Law, Boston College Law School. A.B., Harvard University, 1961; L.L.B., Harvard Law School, 1965. The author would like to thank Research Assistants Cadesby Cooper, Sarah Gordon, Jeremy Henowitz, Yara Kass-Gergi, Nicholas Rausa, and Brian Reilly, as well as Mary Ann Neary of the Boston College Law School Library for their valuable help. Paul Marzagalli provided technical assistance. An early version of this paper was presented at a Boston College Law School faculty colloquium. Henry Monaghan was kind enough to read a preliminary draft.

1 ZEPHYR TEACHOUT, CORRUPTION IN AMERICA 232 (2014).

2 558 U.S. 310 (2010).

including contributions, are not corruption.<sup>3</sup> The Court appeared to embrace a narrow view of what corruption is, tied closely to the concept of *quid pro quo*.<sup>4</sup>

This Article raises the question whether cases such as *Citizens United* and other campaign finance decisions should have generative force outside the electoral context. I contend that they should not—that preventing purchased political influence, whether generalized or particularized, is central to the federal anticorruption enterprise. The matter is presented both on a theoretical level and through examination of Supreme Court cases in what might be called the field of “ordinary corruption.” This examination yields an unclear picture. Some cases appear to be in harmony with the campaign finance decisions, raising the possibility that the Court does hold a unified view of corruption. However, the decision in *Evans v. United States* embraces a broad view of corruption in construing a key federal statute: the *Hobbs Act*.<sup>5</sup> *Evans* has had extraordinary generative force in the lower federal courts. In particular, they have diluted any requirement of specificity in the concept of *quid pro quo* by emphasizing the presence of a “stream of benefits” as a means of securing somewhat generalized influence with public officials. The lower courts have thus developed a body of law that furthers broad anticorruption goals while ignoring intimations of a narrow view in the campaign finance cases. It is possible, however, that a form of convergence might take place. The possibility of convergence is enhanced by the renewed strength of the “criminalization of politics” critique: the view that the *Citizens United* concept of politics, or something like it, extends across the political spectrum. If the Supreme Court extended the narrow view expressed in the campaign finance cases to ordinary corruption, the result could, as it has in the past, be a major ruling reining in the lower courts. The two ships would, in effect, collide.

#### INTRODUCTION

This Article considers two important questions in federal anticorruption law. The first is whether the Supreme Court’s decision in *Citizens United* may have generative force outside the area of campaign finance. The second question is whether analysis developed in the electoral context should extend to what I call “ordinary corruption”: abuse of public office for personal gain derived from the infusion of outside resources into the governmental process.<sup>6</sup> The thesis of the Article is that the concept of corruption found in the campaign finance cases should be limited to those cases. Extending the analysis of *Citizens United* to “ordinary corruption”—in particular, the extensive federal prosecutorial efforts aimed at it outside the electoral context—would rest on faulty premises, and would have serious negative consequences for the federal anticorruption enterprise. The fact that the Supreme Court views certain forms of questionable conduct as constitutionally shielded from treatment in the electoral context does not mean that analogous forms of conduct outside that area cannot be treated as criminal. Indeed, differences in

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3 *Id.* at 359.

4 *See id.* (discussing *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part by Citizens United*, 558 U.S. at 365–66).

5 504 U.S. 255, 260–62 (1992).

6 TEACHOUT, *supra* note 1, at 38 (“By corruption, the early generations meant excessive private interests influencing the exercise of public power.”); *see also, e.g.*, Cheol Liu & John L. Mikesell, *The Impact of Public Officials’ Corruption on the Size and Allocation of U.S. State Spending*, 74 PUB. ADMIN. REV. 346, 346 (May–June 2014) (using the definition of corruption as the “misuse of public office for private gain”).

context call for differences in analysis of what corruption is. Examination of Supreme Court decisions on ordinary corruption shows that the Court has sometimes appeared to hold a unified, narrow view. However, the decision in *Evans v. United States*<sup>7</sup> embraces a broad view of corruption in construing a key federal statute: the Hobbs Act.<sup>8</sup>

Apart from theoretical issues and Supreme Court cases, the Article addresses at length the development of a broad approach to anticorruption statutes that has emerged in the lower courts. For these courts, *Evans* has emerged as the Supreme Court's major decision on ordinary corruption. They have developed the theory of a "stream of benefits" to a public official as satisfying quid pro quo requirements, even though the official's future conduct (the "quo") is uncertain, perhaps even unknown, at the time of agreement.<sup>9</sup>

*Citizens United* treated election-related "independent" expenditures by corporations and unions as protected by the First Amendment.<sup>10</sup> This highly controversial decision was denounced by the President in his State of the Union Address,<sup>11</sup> and is the subject of a proposed constitutional amendment to overturn it.<sup>12</sup> Yet it stands as reflecting the views of a current majority of the Court on campaign finance regulation. The same majority reaffirmed those views in 2014 in *McCutcheon v. FEC*.<sup>13</sup> At the core of these decisions is a conception of what does and does not constitute corruption within the electoral context. In *Citizens United*, Justice Kennedy declared that "[f]avoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies."<sup>14</sup> Thus, "[i]ngratiation and access . . . are not corruption."<sup>15</sup> For the majority, Congress's ability to criminalize conduct in the area of campaign finance is limited to reaching quid pro quo corruption, narrowly defined, or its appearance.<sup>16</sup>

7 504 U.S. 255 (1992).

8 18 U.S.C. § 1951 (2012).

9 See *infra* Part III.

10 *Citizens United v. FEC*, 558 U.S. 310, 339–42 (2010).

11 President Barack Obama, *Remarks by the President in State of the Union Address* (Jan. 27, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

12 See Editorial, *An Amendment to Cut Political Cash*, N.Y. TIMES (Sept. 10, 2014), [http://www.nytimes.com/2014/09/11/opinion/an-amendment-to-cut-political-cash.html?\\_r=0](http://www.nytimes.com/2014/09/11/opinion/an-amendment-to-cut-political-cash.html?_r=0).

For the text of the bill most recently rejected in the Senate, see S.J. Res. 19, 113th Cong. (2013), <https://beta.congress.gov/113/bills/sjres19/BILLS-113sjres19rs.pdf>.

13 134 S. Ct. 1434 (2014).

14 *Citizens United*, 558 U.S. at 359 (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part)).

15 *Id.* at 360.

16 *Id.* at 359 (citing *McConnell*, 540 U.S. at 296–98 (Kennedy, J., concurring in the judgment in part and dissenting in part)). This view was recently repeated in *McCutcheon*. See 134 S. Ct. at 1441 (plurality opinion) ("Any regulation must instead target what we have called 'quid pro quo' corruption or its appearance." (citing *Citizens United*, 558 U.S. at 359)).

Might, or should, the case have generative force *outside* the electoral context? This is an important question. There exists outside of the electoral context a substantial body of federal anticorruption law, based on a group of interrelated statutes and decisions interpreting them.<sup>17</sup> Prosecuting political corruption is a significant part of the Department of Justice's role. A recent study in the *Public Administration Review* states that between 1976 and 2008, "[m]ore than 25,000 public officials were convicted of corruption charges."<sup>18</sup> Those accused of ordinary corruption can include administrators,<sup>19</sup> elected executive officials,<sup>20</sup> and even legislators when acting outside the protection of political campaigns.<sup>21</sup>

These cases (and the statutes upon which they rest) are the cornerstone of federal anticorruption law. Some aspects of this body of law seem to reach conduct that *Citizens United* endorses: seeking, for example, access, ingratiating, and influence.<sup>22</sup> One can discern in the statutes an underlying theme of biased decisionmaking as the essence of corruption.<sup>23</sup> Yet the cases rarely contain any discussion of what corruption is.<sup>24</sup> Thus ordinary anticorruption law seems bereft of an animating concept of the nature of corruption, while the campaign finance cases consider the issue in depth, frequently featuring extensive debates among Supreme Court Justices.<sup>25</sup> It is almost as if the legal system contained two distinct bodies of federal anticorruption law: one dealing with the electoral system, and one dealing with what I refer to as ordinary corruption.<sup>26</sup> Not only do we see two different approaches, we also see an

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17 See generally NORMAN ABRAMS ET AL., FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 167–171, 280–90 (6th ed. 2015) (discussing federal crimes dealing with political corruption).

18 Liu & Mikesell, *supra* note 6, at 349; see also U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2013 18–24 (2013) (providing statistics of federal, state, local, and private corruption prosecutions for 2013).

19 See, e.g., *United States v. Agostino*, 132 F.3d 1183, 1189–90 (7th Cir. 1997) (administrative toll-manager).

20 See, e.g., *United States v. Ganim*, 510 F.3d 134, 137 (2d Cir. 2007) (mayor).

21 See, e.g., *United States v. Jefferson*, 674 F.3d 332, 335 (4th Cir. 2012) (congressman).

22 A classic example is the prohibition of gratuities. See 18 U.S.C. § 201(c) (2012).

23 See Sarah N. Welling, *Reviving the Federal Crime of Gratuities*, 55 ARIZ. L. REV. 417, 419 (2013) (discussing dangers of gifts to public officials and stating that "when a donor transfers value to a donee, the injury to society is sufficient in terms of biased officials to warrant treating the conduct as criminal"); see also Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 788 (1985) (characterizing inquiry into bribery as "one aspect of the question of what pressures brought to bear on officeholders are regarded as improper"). Personal gain, an equally key element of the nature of corruption generally, results from the transfer.

24 There are exceptions. See, e.g., *Ganim*, 510 F.3d at 147 (discussing Hobbs Act jury instructions).

25 Compare *Citizens United v. FEC*, 558 U.S. 310, 357–61 (2010) (treating favoritism and influence as part of democratic politics), with *id.* at 446–60 (Stevens, J., concurring in part and dissenting in part) (discussing negative aspects of influence and access).

26 See *infra* subsection II.B.3.c (discussing academic suggestions of a possible unified approach).

extensive consideration of the nature of corruption alongside an apparent lack of concern with what is wrong with the conduct that has been criminalized. The two bodies of law exist in near-total ignorance of each other, like two ships passing in the night. Both deal with “corruption,” but neither looks to the other for guidance as to the meaning of that elusive term.

A quick response to any analytical problems with this difference is that the two bodies of law present questions that are quite different. 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. This has been the law since the fundamental case of *Buckley v. Valeo*.<sup>27</sup> Yet the response seems too facile. An inquiry into a particular problem of corruption can often be helped by looking at the body of law that regulates the subject in general. For example, the Court in *Buckley* did look briefly at general anticorruption law, but only to dismiss it as insufficient to deal with the dangers of corruption in the electoral context.<sup>28</sup>

As for statutory interpretation, it is often more than a mechanical exercise. Legislative purpose, the legislative framework, and background understandings play a role as well.<sup>29</sup> A statute forbidding “‘extortion’ . . . under color of official right”<sup>30</sup> is obviously an attempt by Congress to deal with corruption. Since the statute is open to a range of interpretations,<sup>31</sup> why not look at what the Supreme Court has said corruption is?

*Citizens United*—as reaffirmed in *McCutcheon*—represents the Court’s most recent in-depth treatment of corruption and might suggest a narrow approach to such questions.<sup>32</sup> At the same time, the lower courts, in ordinary corruption cases, are grappling with how far to *extend* the concepts of bribery and extortion. I will argue that the case and its approach should play no role in the equally important area of ordinary corruption. Indeed, I will contend that as long as *Citizens United* represents the Court’s view of corruption, the two bodies of anticorruption law should remain essentially bifurcated. One must recognize, however, that it is possible to find in academic

27 424 U.S. 1 (1976) (per curiam).

28 *Id.* at 27–28 (rejecting appellant’s argument that “contribution limitations must be invalidated because bribery laws and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with ‘proven and suspected *quid pro quo* arrangements’”).

29 See Lisa Kern Griffin, *The Federal Common Law Crime of Corruption*, 89 N.C. L. REV. 1815, 1826–29 (2011) (discussing the possibility of congressional delegation of criminal lawmaking power and stating that “courts necessarily add meaning to criminal statutes”). Professor Griffin draws in part on the work of Professor Dan Kahan. *E.g., id.* at 1827 nn.56–58 (citing Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 471 (1996); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347).

30 18 U.S.C. § 1951(b)(2) (2012).

31 See *Evans v. United States*, 504 U.S. 255, 278 (1992) (Thomas, J., dissenting).

32 See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (plurality opinion); *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

writing suggestions of convergence.<sup>33</sup> Indeed, arguments of convergence have surfaced in anticorruption litigation.<sup>34</sup>

Part I of the Article examines the general issue of bifurcation and attempts to establish a theoretical baseline that justifies it. Part II analyzes the current state of Supreme Court precedents on federal anticorruption law in both the electoral and ordinary contexts. It also considers analyses of possible convergence. Examination of the cases yields a mixed picture. In the electoral context, the current majority firmly endorses a narrow concept of corruption.<sup>35</sup> Earlier cases which took a broader view are disfavored and overruled.<sup>36</sup> As for ordinary corruption, the body of law is smaller, and the pattern less clear. One can find both broad and narrow approaches. Recent cases may tilt in the latter direction. However, the precedent with the most generative force is the 1992 decision in *Evans v. United States*. It takes a broad approach.

Part III focuses on a current area of considerable activity within the lower federal courts: the development of a concept of a “stream of benefits” to public officials as a means of satisfying quid pro quo requirements of bribery and extortion offenses. This analysis reveals a striking willingness to embrace a broad view of ordinary corruption in the form of purchased influence on public officials. This approach seems in tension with both the approach articulated in the electoral cases such as *Citizens United* and some of the Court’s ordinary corruption decisions. One might view the stream-of-benefits cases as bifurcation in action. If the Court sees a need for a unified approach, the question is whether it would step in to halt or limit this development. In this context, the Article considers the “criminalization-of-politics” critique and its apparently tolerant view of transfers of value to public officials. The Article expresses reservations of this critique in general. In the specific context of the stream of benefits, it concludes that any such step by the Court would be theoretically unsound and would seriously hinder the fight against corruption.

## I. THE VALIDITY OF HAVING TWO SEPARATE BODIES OF FEDERAL ANTICORRUPTION LAW

### A. *The Case for a Bifurcated Approach*

#### 1. The Problem in General

To state the obvious, the ordinary corruption cases deal with conduct generally viewed as corrupt. They are criminal prosecutions for the violation of statutes that forbid such activities as bribery of public officials (and their

<sup>33</sup> See generally *infra* subsection II.B.3.c.

<sup>34</sup> See generally *infra* text accompanying notes 402–07.

<sup>35</sup> E.g., *McCutcheon*, 134 S. Ct. at 1450–53 (plurality opinion).

<sup>36</sup> See *Citizens United*, 558 U.S. at 365–66 (overruling *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), and partially overruling *McConnell v. FEC*, 540 U.S. 93 (2003)).

solicitation of bribes),<sup>37</sup> extortion by public officials “under color of official right,”<sup>38</sup> and giving gratuities to public officials in certain circumstances (and their acceptance of the gratuities).<sup>39</sup> A common element of all these offenses is a transfer (or a potential transfer) of something of value from an outside source directly to a public official to influence governmental action. Virtually no one would have a problem in describing this constellation of issues, at least the first two, as “corruption.”

Viewing campaign finance regulations—primarily restrictions on contributions, limitations on expenditures, and disclosure requirements—as an anticorruption endeavor is perhaps not so obvious. Such measures deal not only with political speech, but also with the amount of information available to voters, and problems such as leveling the playing field in a system that depends primarily on private funding of campaigns. Corruption of the electoral system might be best addressed only by bribery statutes<sup>40</sup> and statutes preventing voter fraud or vote buying.

Yet broader anticorruption analysis plays a dominant role in the Court’s extensive campaign finance jurisprudence. The reason for this phenomenon is the presence of political speech. The extensive body of campaign finance jurisprudence begins with *Buckley v. Valeo*, in which the Court held that the governmental interest in limiting “the actuality and appearance of corruption” could justify contribution limits despite the First Amendment protection accorded to forms of political speech and association.<sup>41</sup> In an apparent endorsement of a prophylactic approach to the problem of “improper influence,” the Court rejected the notion that bribery laws and disclosure requirements could adequately reach “*quid pro quo* arrangements.”<sup>42</sup> At the same time, the Court refused to extend this rationale to independent expenditures.<sup>43</sup> Thus at the outset of its soon-to-be-extensive involvement in reviewing campaign finance legislation, the Court treated the issue as one that heavily involves anticorruption considerations. In particular, its analysis considered at length the problem of “improper” or “coercive” influence.<sup>44</sup> Why, then, aren’t the campaign finance cases sufficiently related to ordinary corruption that it makes sense to view the two bodies of law as one—two sides of the same coin, so to speak?<sup>45</sup>

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37 18 U.S.C. § 201(b) (2012).

38 *Id.* § 1951(b)(2).

39 *Id.* § 201(c).

40 See *Buckley v. Valeo*, 424 U.S. 1, 27–28 (1976) (per curiam).

41 *Id.* at 25–29.

42 *Id.* at 27–28.

43 *Id.* at 58.

44 *E.g., id.* at 27 (referring to “improper” influence).

45 In *Buckley*, Chief Justice Burger referred to contributions and expenditures as “two sides of the same First Amendment coin.” *Id.* at 241 (Burger, C.J., concurring in part and dissenting in part).



## 2. Contextual Differences

The answer should begin by focusing on the substantially different contexts in which campaign finance cases and ordinary corruption prosecutions arise. By definition the former arise in the electoral context. In our pluralistic democracy, elections are often highly competitive contests among advocates of differing views of the public interest. They produce winners and losers. Those who win will almost inevitably advance the policies and persons that got them there. In other words, they will not be neutral. It would hardly be viewed as corruption if an elected Republican favored business interests while an elected Democrat favored labor.

Moreover, money is always present, except in the rare cases of public financing systems. It takes the form not of direct transfers to the candidate, but of, for example, contributions to campaigns, contributions to parties, and independent expenditures. Since money is at the heart of campaigns, deciding when a particular infusion of money into the process is undesirable—by leading to “improper” influence, for example—is exceedingly difficult. The task is made infinitely more difficult by the fact that the Supreme Court has endowed election-related expenditures with First Amendment protection.<sup>46</sup>

Outside the electoral context, the analysis is sharply different. At issue are transfers, direct or indirect, to the officials themselves.<sup>47</sup> There is a strong argument that all such transfers should be barred, at least if potentially related to public business.<sup>48</sup> The point is strongest in the case of those who administer the law. Unlike elections, we expect neutrality of administration. In upholding the Hatch Act—which limits political activities by federal employees—the Supreme Court referred to the “great end of government—the impartial execution of the laws.”<sup>49</sup> In the administrative context, basic anticorruption laws are supplemented by ethics provisions such as those regulating “revolving door” problems<sup>50</sup> and self-dealing by public officials. As the American Bar Association Commission on Government Standards put it in a report surveying the regulation of government ethics,

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46 *Citizens United v. FEC*, 558 U.S. 310, 362 (2010); *Buckley*, 424 U.S. at 58.

47 Campaign contributions are, in theory, not given directly to the candidate.

48 See George D. Brown, *Putting Watergate Behind Us—Salinas, Sun-Diamond, and Two Views of the Anticorruption Model*, 74 TUL. L. REV. 747, 769 (2000) (quoting Roswell B. Perkins, *The New Federal Conflict-of-Interest Law*, 76 HARV. L. REV. 1113, 1119 (1963)).

49 *Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973); see Griffin, *supra* note 29, at 1817 (noting difficulty of defining corruption, but emphasizing “the harm that it causes to the political process—leverage over public officials that precludes neutral decisionmaking”); Welling, *supra* note 23, at 423–24 (discussing rationales behind gratuities offenses including “the risk of preferential treatment for donors and undermin[ing] equality of access to government services” (citing George D. Brown, *The Gratuities Offense and the RICO Approach to Independent Counsel Jurisdiction*, 86 GEO. L.J. 2045, 2054 (1998); Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57, 79 n.81, 80 & n.89 (1992)).

50 E.g., 18 U.S.C. § 207(a) (2012).

We the People entrust public power to elected and appointed officials for the purpose of furthering the public interest. To accept that power is to undertake a commitment that it will be used only for this purpose, and not to advance the narrow interest of self or of any other person or group.<sup>51</sup>

Thus the two contexts present sharply different points of departure: partiality and a key role for money in most elections,<sup>52</sup> as contrasted with aspirations of neutrality and a deep suspicion of transfers of things of value in the administration of laws. These aspirations and suspicions are not, however, limited to purely administrative officials. Elected officials such as mayors and governors largely lose their electoral shield when they enter into the domain of governing. Concepts such as abuse or sale of office prevent, for example, a mayor from taking bribes to favor contributors with city contacts.<sup>53</sup> Ordinary corruption law seeks to prevent biased decisionmaking.<sup>54</sup> Indeed, legislators are not immune from these general precepts of fairness. They may well be expected to side with those who helped get them there. But once in office, they cannot, for example, sell votes or other official acts.<sup>55</sup> As with elected executives, the law's condemnation of sale or abuse of office trumps the electoral shield.

At the heart of *Citizens United* is a discussion of corruption.<sup>56</sup> *McCutcheon* elaborates on this analysis<sup>57</sup> and represents the Court's most recent discussion of the concept. The Court seems to be defining all corruption as limited to quid pro quo arrangements.<sup>58</sup> The current majority makes this clear by treating corruption as not extending to campaign expenditures that yield influence and access.<sup>59</sup> The Court has stated that Congress may target only a specific type of corruption—quid pro quo corruption.<sup>60</sup> Taken literally, this statement would cast doubt on the validity of some anticorruption statutes—those forbidding gratuities, for example—and call for extremely narrow construction of others.

The Court's language appears to cover corruption in general, without limiting the analysis to the electoral context. Opinions refer to "conception[s] of corruption," and "views of corruption."<sup>61</sup> Yet the legal system faces

51 ABA Comm. on Gov't Standards, *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 ADMIN. L. REV. 287, 292 (1993).

52 This analysis ignores the possibility of publicly financed elections.

53 See *United States v. Ganim*, 510 F.3d 134, 136–40 (2d Cir. 2007).

54 See *Welling*, *supra* note 23, at 423 (citing *Brown*, *supra* note 49, at 2054; *Nolan*, *supra* note 49, at 79 n.81, 80 & n.89).

55 See *United States v. Brewster*, 408 U.S. 501, 527–29 (1972).

56 See *Citizens United v. FEC*, 558 U.S. 310, 356 (2010).

57 See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450–53 (2014) (plurality opinion).

58 *Id.* at 1462.

59 *Citizens United*, 558 U.S. at 357.

60 *McCutcheon*, 134 S. Ct. at 1441 (holding that Congress may only regulate quid pro quo corruption or its appearance).

61 See, e.g., *Citizens United*, 558 U.S. at 391 (Scalia, J., concurring) (referencing the Court's "conception of corruption"); *id.* at 447 (Stevens, J., concurring in part and dissenting in part) (referring to Justice Kennedy's "crabbed view of corruption").

a serious dilemma if much of the federal anticorruption enterprise is directed at conduct the Supreme Court does not regard as corrupt.

The way out of this dilemma is to recognize the unique role that the First Amendment plays in campaign finance jurisprudence. The Court should be understood as saying not that the Amendment protects influence and access, but that it protects the campaign-related activities, for example, independent expenditures that yield influence and access. The cases are replete with references to the Amendment and its jurisprudence,<sup>62</sup> and to the special protections accorded to political speech.<sup>63</sup> Down-the-road consequences such as influence and access are inevitable, and may even be desirable as components of candidate responsiveness.<sup>64</sup> If the First Amendment shield is removed, however, at some point such relationships come closer to looking like ordinary corruption.<sup>65</sup> Corruption is difficult to define,<sup>66</sup> but outside the electoral context, it almost certainly includes efforts to use resources accumulated in the private sector to influence public-sector mechanisms for allocating public goods and services, and the resulting private gain to public officials.<sup>67</sup>

### B. *Rejecting Bifurcation in Favor of Convergence*

#### 1. General Considerations

Even granting the special role of the First Amendment in elections, the two contexts are not always easy to separate. Thus, one must acknowledge a strong conceptual pull against bifurcation and in favor of a unified approach. The campaign finance *statutes* are clearly aimed at corruption.<sup>68</sup> The campaign finance *cases* contain the Court's fullest, perhaps its only, discussion of

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62 See, e.g., *McCutcheon*, 134 S. Ct. at 1441 (“Indeed, as we have emphasized, the First Amendment ‘has its fullest and most urgent application precisely to the conduct of campaigns for political office.’” (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))); *Citizens United*, 558 U.S. at 339 (describing speech as an “essential mechanism of democracy”).

63 See, e.g., *McCutcheon*, 134 S. Ct. at 1444, 1446, 1449 (discussing statutory, regulatory, and case law developments); *Citizens United*, 558 U.S. at 329, 340–42 (addressing protections afforded political speech and application to corporations).

64 See *McCutcheon*, 134 S. Ct. at 1462 (“Constituents have the right to support candidates who share their views and concerns. Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials.”).

65 Cf. Brief of *Amici Curiae* Business Leaders and Public Policy Advocates in Support of Appellant Robert F. McDonnell and Reversal at 24, *United States v. McDonnell*, 792 F.3d 478 (4th Cir. 2015) (No. 15-4019) (citing risk of “an impermissible chilling effect on individual and collective interaction with government officials”).

66 See TEACHOUT, *supra* note 1, at 294–95.

67 The classic example is bribery statutes. See generally SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 1–3 (1978).

68 See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976) (per curiam) (discussing anticorruption: goals of campaign finance statutes).

what corruption is.<sup>69</sup> These discussions might well be pertinent to ordinary corruption cases grappling with the same general problem. Both present, for example, the problem of the infusion of outside resources into the governmental sector. The campaign finance cases do not stand for “anything goes.” The current majority is aware of the problem of “improper influence.”<sup>70</sup> It faces the quandary of identifying it in a context where some monetary-based influence is proper and inevitable.

## 2. The Anticorruption Imperative

It may be helpful to step back and view the questions facing the courts at a higher level of generality. Both sides of the coin can be seen as efforts to apply what Professor Peter Henning refers to as “the Anti-Corruption Legacy of the Constitution.”<sup>71</sup> He contends that “[t]he Constitution reflects a significant concern with preventing corruption in all levels of the government. There is a powerful Anti-Corruption Legacy in the Constitution that prevents misuse of federal office for personal gain and, importantly, furnishes protections to limit the effects of corruption occurring in the states.”<sup>72</sup> More recently, Professor Zephyr Teachout has written that “[t]he Constitution carries within it an anti-corruption principle, much like the separation-of-powers principle, or federalism.”<sup>73</sup> Professor Henning focuses on ordinary corruption, while Professor Teachout primarily addresses the electoral context. However, if there is a constitutional or sub-constitutional value bearing directly on the matter, it ought to play a role in both contexts.

## 3. Other Constitutional Values in Play—The Unifying Concept of Equality

At first blush, ordinary corruption presents constitutional issues that are either not present or play only a peripheral role in the electoral context. The bulk of the federal anticorruption enterprise is aimed at state and local

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69 One would expect at least some discussion in the ordinary-corruption cases presenting difficult questions of statutory interpretation.

70 *Citizens United v. FEC*, 558 U.S. 310, 361 (2010) (recognizing problem of “improper influences”).

71 Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 Ky. L.J. 75, 83–86 (2003).

72 *Id.* at 83.

73 Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342 (2009). As Teachout’s book, *Corruption in America*, did not appear until 2014, I cite her article here because it was available to the Supreme Court when it made its recent campaign finance decisions. See *Citizens United*, 558 U.S. at 391 (Scalia, J., concurring) (addressing an argument regarding the framers’ understanding of corruption); *id.* at 452 (Stevens, J., concurring in part and dissenting in part) (same). Professor Teachout’s book is discussed in this Article. See *infra* notes 321–40 and accompanying text. See also LAWRENCE LESSIG, *REPUBLIC, LOST* 128–30 (2011) (expressing agreement with Teachout).

officials.<sup>74</sup> These prosecutions present obvious issues of federalism, which are worth noting briefly to demonstrate how different the issues that arise in ordinary corruption cases are from those that arise in the electoral context. Some critics have taken the view that this form of federal oversight impinges on the states' ability to govern themselves.<sup>75</sup> Part of any general government body's role is policing itself. Constantly relying on the federal sheriff to ride in and save the day weakens the states' ability to perform that task.<sup>76</sup> Indeed, this form of intervention is in serious tension with cases such as *United States v. Lopez*,<sup>77</sup> which emphasized the importance of the federal balance,<sup>78</sup> and the anti-commandeering principle developed in *New York v. United States*<sup>79</sup> and *Printz v. United States*.<sup>80</sup> Promulgating standards that control state and local governments seems close to treating them as part of the federal apparatus.<sup>81</sup> There are, however, substantial arguments in favor of the federal presence. Professor Adam Kurland has analyzed the Guarantee Clause as justifying federal anticorruption prosecutions that preserve republican government within the states.<sup>82</sup> He treats the anticorruption principle as animating government at all levels and justifying a strong federal presence to vindicate it.<sup>83</sup>

In addition to federalism, one might cite due process-based vagueness concerns as a constitutional value present in ordinary corruption—with its emphasis on statutory construction<sup>84</sup>—as evidence that the electoral and

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74 See ABRAMS ET AL., *supra* note 17, at 289–90, 303–05 (generally discussing federal prosecution of corruption of state and local officials).

75 See, e.g., Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch over Us*, 31 HARV. J. ON LEGIS. 153, 155–56 (1994) (arguing that federal mail fraud prosecutions raise federalism concerns); see generally George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-Lopez Analysis*, 82 CORNELL L. REV. 225, 239–44 (1997) (discussing competing state and federal interests).

76 See Brown, *supra* note 75 at 274–75 (applying a balancing test to federal anticorruption statutes).

77 514 U.S. 549 (1995).

78 *Id.* at 578, 580 (Kennedy, J., concurring).

79 505 U.S. 144 (1992).

80 521 U.S. 898, 925, 929–30 (1997).

81 See Brown, *supra* note 75, at 274–75 (discussing downsides to federal prosecution).

82 Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 375, 426–27 (1989).

83 *Id.* at 375.

84 *Evans* is a classic example of widely different possible constructions of an ordinary corruption statute. See *Evans v. United States*, 504 U.S. 255, 278–290 (1992) (Thomas, J., dissenting) (exploring the definition of extortion). Vagueness issues were central to the discussion of the honest services doctrine in *Skilling v. United States*, 561 U.S. 358, 368, 402–06 (2010) (holding that 18 U.S.C. § 1346 is not unconstitutionally vague). For further discussion on the inevitable uncertainty of defining corruption, see David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1377 (2008).

ordinary corruption contexts present different constitutional frameworks.<sup>85</sup> However, there is one overriding constitutional value present, or potentially present, in both contexts that argues for treating them similarly: equality. The role of equality in campaign finance reform has been hotly debated ever since *Buckley v. Valeo*.<sup>86</sup> The Court rejected out of hand the “interest in equalizing the financial resources of candidates competing for federal office.”<sup>87</sup> This interest was an example of the more general issue of “equalizing the relative ability of individuals and groups to influence the outcome of elections.”<sup>88</sup> In what is perhaps the opinion’s most famous passage, the Court declared that

the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed “to secure ‘the widest possible dissemination of information from diverse and antagonistic sources,’” and “‘to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”<sup>89</sup>

Yet the notion of equality of influence in political campaigns will not go away, especially in a system anchored on the principle of one person, one vote.<sup>90</sup> Justice Marshall dissented in *Buckley*, arguing for upholding legislation that furthered “the interest in promoting the reality and appearance of equal access to the political arena.”<sup>91</sup> He prevailed in *Austin v. Michigan State Chamber of Commerce*, in which a majority upheld a state ban on corporate political expenditures.<sup>92</sup> Professor Issacharoff views *Austin* as “the only case to adopt squarely the distortion of electoral outcomes view of corruption.”<sup>93</sup> He describes the Justices as divided between those who emphasize the liberty protections of the First Amendment and those who emphasize “equality protections of democracy.”<sup>94</sup> The former will only permit restrictions on electoral speech aimed at real or apparent quid pro quo arrangements that “undermine electoral accountability.”<sup>95</sup> In *McConnell v. FEC*,<sup>96</sup> the propo-

85 Vagueness issues have at times surfaced in campaign finance cases. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976) (per curiam) (preserving contribution and expenditure limitations against invalidation on vagueness grounds).

86 *Buckley* was a per curiam decision with several separate opinions. E.g., *id.* at 286 (Marshall, J., concurring in part and dissenting in part); *id.* at 290 (Rehnquist, J., concurring in part and dissenting in part).

87 *Id.* at 56.

88 *Id.* at 48–49.

89 *Id.* at 48–49 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964)).

90 This principle is central to the reapportionment decisions that are the progeny of *Baker v. Carr*. See generally 369 U.S. 186 (1962) (deeming legislative redistricting a justiciable issue).

91 *Buckley*, 424 U.S. at 287 (Marshall, J., concurring in part and dissenting in part).

92 494 U.S. 652, 660 (1990), *overruled by* *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

93 Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 122 (2010).

94 *Id.* at 122–23.

95 *Id.* at 123.

nents of equality drew on *Austin* to uphold federal restrictions on corporate and labor electioneering.<sup>97</sup> However, they mixed equality concerns with a more direct emphasis on corruption in upholding a ban on “soft money” contributions to political parties.<sup>98</sup> Here, the evil was presented as “*undue* influence,”<sup>99</sup> and the peddling of “access”<sup>100</sup> to those who could afford to purchase it. This attempt to blend equality with classic anticorruption concerns was rejected in *Citizens United*,<sup>101</sup> as discussed below.<sup>102</sup> The equality proponents are in the minority, at least for now.<sup>103</sup> However, for present purposes, the important point is that equality concerns still play a role in the Court’s ongoing efforts to grapple with identifying corruption (“improper influence”)<sup>104</sup> in the electoral context.

What is less recognized is that equality values are an important underpinning of ordinary corruption laws as well. The problem is frequently presented as preventing private gain from public office<sup>105</sup> or as curbing outside influence on government.<sup>106</sup> However, as noted, the Supreme Court, in upholding anticorruption legislation, has invoked “this great end of Government—the impartial execution of the laws.”<sup>107</sup> The right to equal access to governmental services can be seen as a corollary of the right to participate equally in the governmental process. Corrupt governments do not serve citizens on an equal basis. Access to the relevant officials is skewed in favor of those with the resources to obtain it.<sup>108</sup>

96 540 U.S. 93 (2003), *overruled in part by Citizens United*, 558 U.S. at 365–66.

97 *Id.* at 205, 208, 211.

98 *Id.* at 187–88.

99 *Id.* at 153, 156 (emphasis added).

100 *Id.* at 150.

101 *See Citizens United*, 558 U.S. at 360–61 (striking down limits on independent expenditures).

102 *See infra* text accompanying notes 169–75, 179–83.

103 *See Citizens United*, 558 U.S. at 393, 424–25, 447–50 (Stevens, J., dissenting in part and concurring in part).

104 *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam).

105 *See Liu & Mikesell, supra* note 6, at 346 (utilizing definition of corruption as “misuse of public office for private gain”).

106 *See Welling, supra* note 23, at 423 (discussing rationales for the crime of gratuities).

107 *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 493 (1995) (Rehnquist, C.J., dissenting) (quoting *Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

108 There are other similarities between the two contexts, although not of a constitutional dimension. Preventing corruption is closely related to concerns of government ethics, manifested, for example, in conflict-of-interest laws. Ensuring public confidence in government is a goal of these laws just as it is a goal of campaign finance regulation. *See Buckley*, 424 U.S. at 27 (emphasizing the importance of avoiding “the appearance of improper influence”); Brown, *supra* note 75, at 242 (“[D]emocracy is effective only if the people have faith in those who govern . . . .” (quoting *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1961))).

There is a close relationship between this view of corruption and basic principles of equal protection of the laws.<sup>109</sup> Indeed, in the famous case of *Hawkins v. Town of Shaw*,<sup>110</sup> the Fifth Circuit held that unequal provision of municipal services based on the racial composition of neighborhoods is a violation of the Equal Protection Clause.<sup>111</sup> The civil rights analogy is useful because it helps explain and justify the federal role in preventing corruption.<sup>112</sup> Those protected may not always be “discrete and insular minorities,”<sup>113</sup> but they are citizens who suffer from unequal ability to influence the operation of government.

It is not clear how far one should push the civil rights analogy. Principles of federalism foreclose the notion that the national government has a constitutional justification for intervening whenever state or local government is somehow unfair. Although there are echoes of the Equal Protection Clause in the federal government’s anticorruption efforts, the relationship does not seem close enough that Section 5 of the Fourteenth Amendment<sup>114</sup> could provide a basis for the laws underlying that enterprise. Overall, one should recognize that broad goals of “good” government are definitely present in both the electoral and ordinary corruption contexts.<sup>115</sup> This aspirational dimension extends beyond particular misdeeds and their consequences to include considerations of equality.

Thus, there are conceptual links between the fields of campaign finance regulation and prosecution of ordinary corruption. However, I do not think the arguments for a unified approach are strong enough to prevail. The differences between the two contexts call for different modes of analysis of what constitutes corruption. In particular, elections are not neutral—one group prevails over another—and private financing, by definition, means the infusion of outside resources. These differences call for not giving significant weight to what the Supreme Court has said about corruption in the electoral

109 See Brown, *supra* note 75, at 235.

110 437 F.2d 1286, 1287 (5th Cir. 1971).

111 *Id.* at 1290, 1292; see also *id.* at 1295 (“This approach is in the highest tradition of Federalism whereunder local governments are to carry out their function and responsibilities in a system where every level of government, federal, state and local, is subject to the federal Constitution.”).

112 See, e.g., Brown, *supra* note 75, at 233 (discussing possible criteria for federal criminal jurisdiction).

113 *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Equality has its limits as a restraint on preferential treatment of different constituencies. See *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 720 (1996) (noting possibility of “a constituency that must take its chance of being favored or ignored in the larger political process”).

114 U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

115 See, e.g., *United States v. Irwin*, 354 F.2d 192, 196 (2d Cir. 1965), *quoted in* Welling, *supra* note 23, at 423 n.37 (referring to “iniquity of the procuring of public officials” as “fatally destructive to good government”).



context when issues of how far to take the concept arise in ordinary corruption cases.

With these theoretical considerations as a baseline, Part II briefly examines some key Supreme Court decisions in the two contexts. It also examines the thesis advanced by some scholars that the Court has, *sub silentio*, blended the two analyses. According to this thesis, there are major ordinary corruption decisions that reflect the views of the current majority on campaign finance. Analysis of the cases suggests some support for this thesis but also casts doubt on its general validity. As Part III of the Article will show, the lower courts are moving firmly in the other direction. Increasingly, one finds on the front lines of anticorruption prosecutions a view of corruption that is both sharply different from and broader than that expressed in *Citizens United*.

## II. THE COURT'S JURISPRUDENCE IN THE TWO CONTEXTS AND THE THESIS THAT THEY REST ON SIMILAR PREMISES

### A. *The Campaign Finance Cases and Their Competing Views of Corruption*

The Court's campaign finance cases have been addressed extensively in the academic literature.<sup>116</sup> I will not repeat that discussion here, but will focus on the two competing views of corruption that dominate the cases.<sup>117</sup> At the core is the undisputed notion that campaign finance regulation can aim at quid pro quo corruption or its appearance. The source of this notion is *Buckley's* upholding of a one-thousand-dollar limit on federal campaign contributions.<sup>118</sup> The Court reasoned that large contributions might be "given to secure a political *quid pro quo* from current and potential office holders."<sup>119</sup> The Court admitted that direct evidence of such arrangements might be hard to find.<sup>120</sup> However, it reasoned that banning large contributions would obviate the danger, and, equally importantly, would address the "appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."<sup>121</sup> Though *Buckley* is sometimes presented as narrowly focused on

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116 See generally Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010) (arguing for the adoption of decisional rules that align shareholder interests with corporate political donation decisions); Issacharoff, *supra* note 93 (discussing possibilities for reform in the wake of *Citizens United*); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010) (presenting equality and liberty as the two visions of free speech); Comment, *Citizens United v. FEC: Corporate Political Speech*, 124 HARV. L. REV. 75 (2010).

117 Compare *Citizens United v. FEC*, 558 U.S. 310, 359–61 (2010) (focusing on quid pro quo corruption), with *id.* at 447–48 (Stevens, J., concurring in part and dissenting in part) (arguing for a broader conception of corruption).

118 *Buckley v. Valeo*, 424 U.S. 1, 58 (1976) (per curiam).

119 *Id.* at 26.

120 *Id.* at 27.

121 *Id.*

quid pro corruption (or its appearance) only,<sup>122</sup> this characterization seems inaccurate. The opinion is strongly supportive of what amounts to a prophylactic approach to the problem.<sup>123</sup> The Court reasoned that bribery and disclosure laws will only catch “the most blatant and specific attempts of those with money to influence governmental action.”<sup>124</sup> Thus several aspects of the opinion lend themselves to a broad reading. It endorses a prophylactic approach, accepts the concept of “improper influence”<sup>125</sup> and accepts the concept of appearances of corruption.<sup>126</sup>

Post-*Buckley*, the Court has been divided into two camps: those who read it to support reaching improper influence beyond quid pro quo arrangements, and those who read it as limited to them.<sup>127</sup> This division parallels the equality-against-liberty divisions in First Amendment analysis generally.<sup>128</sup> Professor Issacharoff views the latter as having prevailed in the campaign finance context. For him, under “the core analytic structure of *Buckley*,” “only the risk of explicit quid pro quo corruption appears to survive as a basis for regulating campaign finance.”<sup>129</sup> The broader reading achieved some traction, but was handicapped by its close linkage of “improper” influence to inequalities of wealth.<sup>130</sup> The problem for the broad-reading camp has been that *Buckley* struck down expenditure limitations on First Amendment grounds,<sup>131</sup> even though expenditures represent outlays from those who can afford them, thus presenting an equality issue.<sup>132</sup> The Court found in part that “the independent advocacy restricted by the provision does not presently

122 See, e.g., *Citizens United*, 558 U.S. at 359–60.

123 See *Buckley*, 424 U.S. at 28–29 (upholding Congress’s authority to enact contribution limits “to deal with the reality or appearance of corruption . . .”).

124 *Id.* at 28.

125 See *id.* at 27 (holding that avoiding the appearance of improper influence constitutes a legitimate interest).

126 See *id.* at 58 (holding that contribution limits ameliorate the appearance of corruption); Brown, *supra* note 48, at 758 (discussing concept of appearances).

127 See, e.g., *McCutcheon v. FEC*, 134 S. Ct. 1434, 1468–69 (2014) (Breyer, J., dissenting) (advocating a broad reading of *Buckley*).

128 Sullivan, *supra* note 116, at 143–45.

129 Issacharoff, *supra* note 93, at 125.

130 See *id.* at 126 (“So far, the debates at the Supreme Court have asked only whether the candidates are corrupted through illicit quid pro quo arrangements, or per the dissents, whether electoral outcomes are distorted as a result of concentrated corporate and private wealth.”).

131 *Buckley*, 424 U.S. at 51, 54, 58.

132 This point illustrates a tension that is present throughout the campaign finance reform jurisprudence. On the one hand, all participants have equal rights under the First Amendment to speak. On the other hand, expensive “issue advertisements” on television, for example, are only a possibility for persons or entities with substantial resources. See Nicholas Confessore, *Outside Groups with Deep Pockets Lift G.O.P.*, N.Y. TIMES (Nov. 5, 2014), [http://www.nytimes.com/2014/11/06/us/politics/koch-brothers-republican-super-pac-pending-pays-off.html?\\_r=0](http://www.nytimes.com/2014/11/06/us/politics/koch-brothers-republican-super-pac-pending-pays-off.html?_r=0).

appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.”<sup>133</sup>

I think that any dismissal of those who read *Buckley* broadly does not give adequate consideration to the fact that they have come up with an alternative reason, besides equality in the campaign itself, for going beyond quid pro quo: the dangers of “undue influence”<sup>134</sup> and greater “access.”<sup>135</sup> The effect of unequal resources extends beyond the campaign. It is not just that these Justices “allowed disproportionate influence on officeholders’ judgment to stand in for corruption.”<sup>136</sup> For them, disproportionate influence *is* corruption. At the very least, the emphasis shifts from the equality rationale that the wealthy are participating more effectively than others to get their candidates elected. The focus now is on what happens after the election—the donors and independent spenders corrupt the governmental process by leveraging their political activities into access and influence.<sup>137</sup> Those who adopt this position, of course, recognize that wealth makes this corruption possible. Thus they favor prophylactic measures to prevent wealth from having down-the-line influence. Despite its appeal, this approach may seem somewhat naïve. A major reason for participating in the first place is to have down-the-line influence. First Amendment rights permit people to participate to the fullest extent, except for quid pro quos. The protection of these rights extends to what happens later. Exerting influence after the election can be seen as an extension of the campaign, not corruption.

A comparison of the different views that prevailed in *McConnell* and *Citizens United* illustrates the division within the Court over the nature and presence of corruption. *McConnell* involved campaign finance reform legislation that, among other things, restricted “soft money” contributions to political parties.<sup>138</sup> The legislation—known as the Bipartisan Campaign Reform Act (BCRA)<sup>139</sup>—also restricted corporate and union funding of “electioneering communications.”<sup>140</sup> The majority upheld both sets of restrictions. Its analysis drew heavily on equality considerations. *Austin* was cited as establishing the validity of legislation aimed at “the corrosive and distorting effects of

133 *Buckley*, 424 U.S. at 46.

134 See *Citizens United v. FEC*, 558 U.S. 310, 447–48 (2010) (Stevens, J., concurring in part and dissenting in part).

135 See *id.* at 454–55.

136 Issacharoff, *supra* note 93, at 124 (emphasis added).

137 See generally LESSIG, *supra* note 73 (exploring corruption in United States politics). Lessig refers to this phenomenon as “dependence corruption.” *Id.* at 233. Lessig contrasts this phenomenon with “the corruption regulated by bribery statutes.” *Id.* at 107. His excellent analysis is devoted almost exclusively to corruption in the electoral system. There is, for example, the obligatory criticism of *Citizens United*. *Id.* at 238–45.

138 *McConnell v. FEC*, 540 U.S. 93, 101–02, 105 (2003), *overruled in part by Citizens United*, 558 U.S. at 365–66.

139 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91 (2002) (codified as amended at 52 U.S.C. § 30101 (2012)).

140 *Id.* § 201(f)(3)(A), 116 Stat. at 89.

immense aggregations of wealth.”<sup>141</sup> However, the Court dealt extensively with corruption. It drew on *Buckley* for the proposition that the anticorruption interest is “not limited . . . to the elimination of cash-for-votes exchanges.”<sup>142</sup> In treating influence and access as corruption, a crucial building block was the earlier statement in *Nixon v. Shrink Missouri Government PAC*<sup>143</sup> referring to “‘improper influence’ and ‘opportunities for abuse’ in addition to ‘quid pro quo arrangements.’”<sup>144</sup> The *McConnell* majority thus engaged in a logical extension of defining corruption from *Buckley*’s endorsement of prophylactic measures to reach quid pro quo agreements. Corruption is seen as reaching beyond quid pro quos to “improper influence” on (elected) government officials that can be regulated through limits on both contributions and expenditures.

Justice Kennedy’s dissent offered a quite different concept of corruption, one that the majority derided as a “crabbed view of corruption.”<sup>145</sup> He saw that the majority was attempting to extend *Buckley* beyond quid pro quo, and insisted that that case was focused on “an exchange featuring *quid pro quo* potential—contributions directly to a candidate.”<sup>146</sup> He accepted the possibility of “undue influence,” but insisted that it could only come from “actual or apparent *quid pro quo* arrangements.”<sup>147</sup> For him, the countervailing consideration is that in a representative democracy, those elected will respond more favorably to those who supported them, including by allowing influence and access. Access is corruption only if it is purchased.

Access in itself, however, shows only that in a general sense an officeholder favors someone or that someone has influence on the officeholder. There is no basis, in law or in fact, to say favoritism or influence in general is the same as corrupt favoritism or influence in particular. By equating vague and generic claims of favoritism or influence with actual or apparent corruption, the Court adopts a definition of corruption that dismantles basic First Amendment rules, permits Congress to suppress speech in the absence of a *quid pro quo* threat, and moves beyond the rationale that is *Buckley*’s very foundation.<sup>148</sup>

The problem for Justice Kennedy was identifying “the bad form of responsiveness.”<sup>149</sup> The only way to do so is to demonstrate enough danger

141 *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990), *overruled by Citizens United*, 558 U.S. at 365.

142 *McConnell*, 540 U.S. at 143.

143 528 U.S. 377 (2000).

144 *Id.* at 389 (emphasis added) (quoting *Buckley v. Valeo*, 424 U.S. 1, 28 (1976) (per curiam)).

145 *McConnell*, 540 U.S. at 152; *see also Citizens United*, 558 U.S. at 447 (Stevens, J., concurring in part and dissenting in part) (referring to Justice Kennedy’s “crabbed view” of corruption).

146 *McConnell*, 540 U.S. at 293 (Kennedy, J., concurring in the judgment and dissenting in part).

147 *Id.* at 294 (citing *Buckley*, 424 U.S. at 45).

148 *Id.* at 296.

149 *Id.* at 297.

of a quid pro quo that regulation, including prophylactic regulation, is warranted. But if one has to rely on prophylactic legislation that targets conduct with “inherent corruption potential,” deference to Congress’s ability to discern that potential might support the majority. The magical nature of the quid pro quo line evaporates when one recognizes that *Buckley* was not limited to actual ones.

*Citizens United* is essentially the flip side of *McConnell* with Justice Kennedy writing the majority opinion.<sup>150</sup> At issue was BCRA’s prohibition on corporate electioneering communications. His opinion repeated the themes of his *McConnell* dissent. Justice Kennedy recognized that the governmental interest in preventing corruption or its appearance could justify restrictions on activity otherwise protected by the First Amendment. However, he insisted “that interest [is] limited to *quid pro quo* corruption.”<sup>151</sup> Beyond that point, the very nature of democracy will generate influence and access that do not constitute corruption.

Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.<sup>152</sup>

The current majority seems firmly ensconced in its view. The two wings of the Court reiterated their divergent visions of corruption in *McCutcheon v. FEC* in 2014.<sup>153</sup> The applicable law restricted “how much money a donor may contribute in total to all candidates or committees.”<sup>154</sup> The plaintiff wished to exceed that aggregate with respect to both the number of candidates and the number of committees to which he could contribute. Much of the analysis focused on whether his proposed conduct would permit “circumvention”<sup>155</sup> of contribution limits whose validity has remained unquestioned since *Buckley*. Circumvention would permit multiple contributions to different candidates ending up as excessive amounts going to one candidate, thus violating the statute. The majority saw little risk of circumvention; the dissent presented examples purporting to show how it could occur.<sup>156</sup>

One might think that this was the central, if not the only, issue in the case, given the accepted validity on amounts of contributions flowing from a

150 *Citizens United*, 558 U.S. at 318.

151 *Id.* at 359.

152 *Id.* at 359 (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in the judgment and dissenting in part)).

153 134 S. Ct. 1434 (2014).

154 *Id.* at 1442 (plurality opinion).

155 *Id.*

156 *See id.* at 1475–78 (Breyer, J., dissenting) (discussing impact of lifting aggregate limits on campaign contributions).

donor to a single candidate. However, the *McConnell-Citizens United* dispute flared up again. The current majority prevailed in an opinion that added little to the analysis of the problem, but demonstrated a hardening of its approach. The opinion began with a recapitulation of general principles of campaign finance law. Citizens possess a First Amendment right “to participate in democracy through political contributions.”<sup>157</sup> That right can be restricted to prevent corruption or its appearance but not to “reduce the amount of money in politics,”<sup>158</sup> or to “level the playing field.”<sup>159</sup> Central to democracy is a reciprocity of support from constituents and a responsiveness to that support. “Ingratiation and access . . . are not corruption.”<sup>160</sup> Campaign finance regulations that target quid pro quo corruption—“direct exchange of an official act for money”<sup>161</sup>—or its appearance can satisfy the First Amendment.<sup>162</sup> The aggregate limits did not satisfy this basic test.<sup>163</sup> Spending a lot of money on a lot of candidates does not represent an effort to “control the exercise of [any particular] officeholder’s official duties.”<sup>164</sup> None of this seems particularly new.

What is new is Justice Breyer’s reformulation in dissent of the foundations for a broad anticorruption rationale.<sup>165</sup> He began by noting the narrowness of the majority’s formulation of quid pro quo—one that would require “an act akin to bribery”<sup>166</sup>—and its defense of “efforts to obtain “influence over or access to” elected officials or political parties.”<sup>167</sup> The novelty of Justice Breyer’s critique is that he grounds it squarely in the First Amendment rights of citizens.<sup>168</sup> The goal of the 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.<sup>169</sup> Thus “corruption cuts the link between political thought and political action, [and] a free marketplace of political ideas loses its point.”<sup>170</sup> The First Amendment adds a fresh perspective, but its invocation sounds a lot like *Austin*’s distortion rationale and more general insistences on equality in the political process—including the attacks

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157 *Id.* at 1441.

158 *Id.*

159 *Id.* at 1450.

160 *Id.* at 1441 (quoting *Citizens United v. FEC*, 558 U.S. 310, 360 (2010)).

161 *Id.*

162 *Id.*

163 *Id.* at 1442.

164 *Id.* at 1450.

165 *Id.* at 1465 (Breyer, J., dissenting).

166 *Id.* at 1466.

167 *Id.* (quoting *id.* at 1450–51 (plurality opinion)).

168 *See id.* at 1466–68.

169 *See id.* at 1467 (“Accordingly, the First Amendment advances not only the individual’s right to engage in political speech, but also the public’s interest in preserving a democratic order in which collective speech *matters*.”).

170 *Id.*

on access and influence—that the majority had already rejected. Not surprisingly, it rejected the First Amendment critique of its position as well.<sup>171</sup>

In the end, *McCutcheon* may not break new ground. The disagreement over circumvention seems more important than rehashing the *Citizens United* debate.<sup>172</sup> I am inclined to agree with the majority that there are substantial anticircumvention measures in place, although Justice Breyer argues persuasively that they might not work. Either way, *McCutcheon* adds little to corruption analysis. Still, it represents the latest round in the ongoing debate over corruption in the electoral context.

Before turning to the Court's decisions on ordinary corruption, there are three aspects of the campaign finance decisions that should be emphasized in considering a possible analytical kinship between the two contexts. The first is that one should be hesitant to ascribe to the Court a position on campaign finance regulation. There is a solid, seemingly unbridgeable division between the *Citizens United* (and *McCutcheon*) majority and dissenters. However, the present positions have not always been those of the Court. *Austin* and *McConnell* are 5-4 decisions that espouse the views of the current dissenters. Moreover, one can find statements supporting their views in other cases. The tables have turned. *Citizens United* overruled *Austin* and a portion of *McConnell*.<sup>173</sup> The cases have been presented as “an almost unbroken streak” of “losses for reform.”<sup>174</sup> However, a 180-degree change is only a vote away. All members of the Court agree that quid pro quo arrangements constitute corruption. For some that is the beginning of the analysis, and for others it is the end of the analysis. Thus, deriving the Court's position on corruption from these cases may be a difficult enterprise.

A second important point is the dominant role that the First Amendment plays in the debate. Professor Sullivan argues that “both sides in *Citizens United* are committed to free speech, but to two very different visions of free speech.”<sup>175</sup> The dissenters see “the value of equality [as] prior to the value of speech.”<sup>176</sup> The current majority, on the other hand, sees a close connection between free speech and political liberty. It “treats with skepticism all government efforts at speech suppression that might skew the private ordering of ideas.”<sup>177</sup> This is an important debate. Indeed, one can view Justice Breyer's *McCutcheon* dissent as an attempt to reframe its terms.<sup>178</sup> It is not, however, particularly relevant to the task of applying statutes aimed at

171 *Id.* at 1449–50.

172 The plurality showed little interest in revisiting precedent. *See, e.g., id.* at 1445 (plurality opinion) (“[W]e see no need in this case to revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review.”).

173 *Citizens United v. FEC*, 558 U.S. 310, 312 (2010).

174 Issacharoff, *supra* note 93, at 119.

175 Sullivan, *supra* note 116, at 144.

176 *Id.* at 145.

177 *Id.*

178 *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1465 (2014) (Breyer, J., dissenting) (providing a First Amendment defense of campaign finance laws).

ordinary corruption. A final point is that the division between the two camps also rests on different views of the electoral process. As Professor Issacharoff aptly puts it, “The logic of Justice Kennedy’s majority opinion in *Citizens United* was ultimately that any undue pressures on the body politic will be cleansed by the competitive wash of the electoral process.”<sup>179</sup> The process works best with minimal governmental intervention, especially given the presence of speech interests. For the majority, there will inevitably be winners and losers. An inescapable part of the process is responsiveness by the winners to those who got them there.

The debate is important and ongoing. It has engendered considerable discussion of “corruption” within and without the Court.<sup>180</sup> However, it is far from clear that the extensive discussion of corruption in the campaign finance context should have much, if any, bearing on the key questions with respect to ordinary corruption. The next Section explores four major Supreme Court decisions in this context, including a brief consideration of whether any particular view of corruption can be discerned in them. It then examines the thesis that both bodies of law do, in fact, show analytical similarities; what the Court has said about corruption in the campaign finance context carries over to its view on ordinary corruption to the extent of a convergence between the two.

### B. *The Supreme Court and Ordinary Corruption—Four Key Cases*

#### 1. *Sun-Diamond*

This Section begins with a discussion of *United States v. Sun-Diamond Growers of California*.<sup>181</sup> The case involves what Professor Welling refers to as “[t]he little-known federal crime called gratuities.”<sup>182</sup> But the facts are a mirror image of what the campaign finance cases refer to as attempting to secure “influence” and “access.” Moreover, Justice Scalia’s analysis for a unanimous Court—although sometimes viewed as straightforward statutory construction<sup>183</sup>—seems to contain elements of the same concept of corruption, as found in *Citizens United*.

*Sun-Diamond* is a trade association of agricultural cooperatives. It was charged with giving the Secretary of Agriculture over \$10,000 in gifts, including sports tickets, luggage, and meals.<sup>184</sup> It was convicted of violating the

179 Issacharoff, *supra* note 93, at 133.

180 See, e.g., David Cole, *How Corrupt Are Our Politics?*, N.Y. REV. BOOKS (Sept. 25, 2014), <http://www.nybooks.com/articles/archives/2014/sep/25/how-corrupt-are-our-politics/> (reviewing TEACHOUT, *supra* note 1, and presenting general observations on the Court’s view of corruption).

181 526 U.S. 398 (1999). The author was on the brief for the government.

182 Welling, *supra* note 23, at 419.

183 See, e.g., Jacob Eisler, *The Unspoken Institutional Battle over Anticorruption: Citizens United, Honest Services, and the Legislative-Judicial Divide*, 9 FIRST AMEND. L. REV. 363, 428 (2011) (“*Sun-Diamond* offered a convincing reading of the illegal gratuities statute . . .”).

184 *Sun-Diamond*, 526 U.S. at 401.



federal gratuity statute. The relevant portion of the statute, as quoted by the Supreme Court, provides that anyone who:

[O]therwise than as provided by law for the proper discharge of official duty . . . 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 . . . shall be fined under this title or imprisoned for not more than two years, or both.<sup>185</sup>

On review of the (affirmed) conviction, Justice Scalia concluded that the gifts from the agricultural trade association to the Secretary of Agriculture did not violate the gratuities statute. He appeared to concede that the gifts might have been given “to build a reservoir of goodwill”<sup>186</sup> but reasoned that such an act would not satisfy the explicit text.<sup>187</sup> The core of Justice Scalia’s analysis was that gifts motivated by an official’s *position*, and the resultant ability to help the donor, are not enough to satisfy the statute. A link to a particular act is required.<sup>188</sup> The statute prohibits “only gratuities given or received ‘for or because of *any official act* performed or to be performed.’”<sup>189</sup> “Official act” did not suggest a broad reading because Congress could have referred to “such official’s ability to favor the donor in executing the functions of his office.”<sup>190</sup> Indeed, Justice Scalia was able to find official-position statutes such as those prohibiting payments from a bank employee to a bank examiner.<sup>191</sup> The term “any” proved a bit more problematic. Justice Scalia resorted to a hypothetical in the interrogative voice to demonstrate that it referred to a particular act rather than to any act of a currently unspecified nature that the official might perform in the future.<sup>192</sup> Gifts for future acts might seem like more of a problem, but Justice Scalia finessed it. He read it as referring to known future acts at the time of the gift.<sup>193</sup> Finally, Justice Scalia expressed sympathy for government employees facing “an intricate web of regulations, both administrative and criminal”<sup>194</sup> that could prove to be “snares for the unwary.”<sup>195</sup>

Although presented as straightforward textualism, the result in *Sun-Diamond* is deeply troubling.<sup>196</sup> As for construction, it is noteworthy that all

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185 *Id.* (alterations in original) (quoting 18 U.S.C. § 201(c)(1)(A) (1994)).

186 *Id.* at 405.

187 *Id.* at 406.

188 *Id.*

189 *Id.* (quoting 18 U.S.C. § 201(c)(1)(A)).

190 *Id.*; *see also id.* at 406–07.

191 *Id.* at 409 (citing 18 U.S.C. §§ 212–13).

192 *See id.* at 406.

193 *See id.* at 408.

194 *Id.* at 409.

195 *Id.* at 411.

196 I believe that this is Professor Welling’s position. She views the interpretive conclusion as defensible as the statute is currently written. *See* Welling, *supra* note 23, at 419. However, Professor Welling’s subsequent analysis, drawing in part on social science

three courts that decided the case read the statute differently.<sup>197</sup> As for the result, the gifts in question present the archetypal example of what Congress was aiming at: conduct short of bribery that transfers things of value to a public official precisely in order to “build a reservoir of goodwill.”<sup>198</sup> The irony of *Sun-Diamond* is that regulated interests cannot reward public officials for past favorable action, and apparently cannot reward them for future action that they have announced. These are classic examples of the infusion of outside resources, and the resultant private gain by the official, to influence government. An outsider might say, for instance, “Here is an example of what we can do for you when you do, or commit to do, something for us.” Yet, the most egregious form of this corruption goes unpunished—the use of outside resources to attempt to *bring about* favorable action because the donor cannot yet identify the favorable action. The requirement of the specific link wipes out the most important aspect of the gratuities offense and creates a situation where the kind of conduct at issue in *Sun-Diamond* is either bribery<sup>199</sup> or legal.

One can find in *Sun-Diamond* three possible parallels to the campaign finance cases.<sup>200</sup> The first is a somewhat tolerant view of influence seeking. The second is the strong note of sympathy for those who must deal with complicated federal measures aimed at preventing corruption. This theme was also sounded in *Citizens United*.<sup>201</sup> As I have noted elsewhere, anticorruption measures flowered in the post-Watergate era.<sup>202</sup> The passage of time has exposed possible flaws.<sup>203</sup> Finally, *Sun-Diamond*’s emphasis on a link—which

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research on influence, demonstrates convincingly that position-based gifts are “dangerous.” *Id.* at 431–36.

197 The district court adopted a straightforward official position analysis. The court of appeals essentially modified this approach, requiring “intent to reward past favorable acts or to make future ones more likely.” *See Sun-Diamond*, 526 U.S. at 403–04.

198 *Id.* at 405. Justice Scalia felt that the district court took this approach to the statute. It might fit within the circuit court’s approach as well. However, he rejected it based on the text. *Id.* at 405–06.

199 The Court’s requirement of a link essentially turns the statute into a form of prohibition on the sort of quid pro quo conduct reached by bribery statutes. Congress dealt with both crimes in the same statute. *See* 18 U.S.C. § 201(b) (2012) (bribery); *id.* § 201(c) (gratuities). The fact of different treatment argues for viewing the two subsections as creating two separate crimes.

200 *See* TEACHOUT, *supra* note 1, at 229.

201 *See* *Citizens United v. FEC*, 558 U.S. 310, 334–35 (2010) (discussing a possible regulatory chilling effect on political speech); *cf.* *McCutcheon v. FEC*, 134 S. Ct. 1434, 1447 (2014) (plurality opinion) (referring to FEC’s “intricate regulatory scheme”). In *Sun-Diamond*, Justice Scalia referred variously to “an intricate web of regulations,” a “regulatory iceberg,” possible “snares for the unwary,” and “regulations and statutes littering” the field of government ethics. 526 U.S. at 409–12. Overall, he viewed the situation facing federal employees as a “regulatory puzzle.” *Id.* at 412.

202 *See* Brown, *supra* note 48, at 751–56 (discussing post-Watergate consensus regarding the need to ensure that government officials act in the public interest).

203 *See id.* at 756–64 (discussing the post-Watergate approach to fostering honesty in government); *see also* FRANK ANECHARICO & JAMES B. JACOBS, *THE PURSUIT OF ABSOLUTE*

is present in the “reward” situations—may be indicative of a preference for quid pro quo situations, or something like them, as presenting the strongest case for criminalizing possibly corrupt conduct. Specificity, not generalized efforts, is the key to criminalization.<sup>204</sup>

## 2. *Skilling* and the Restriction of Honest Services

In the same term it decided *Citizens United*, the Court also handed down *Skilling v. United States*,<sup>205</sup> a case that narrowed the scope of ordinary corruption law. The actual case involved a private fiduciary, not a public official, but presented the question of the scope of the “honest-services” doctrine.<sup>206</sup> This doctrine has frequently arisen in public corruption cases.<sup>207</sup> Its history is complicated. The mail-fraud statute prohibits use of the mails to further “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.”<sup>208</sup> Reading the statute in the disjunctive, the lower federal courts developed the concept that fraud could cover intangible rights, and that among these was the intangible right to honest services.<sup>209</sup> The concept was extended from the public sphere to private fiduciaries.<sup>210</sup> In 1987, the Court’s decision in *McNally v. United States*<sup>211</sup> put a stop to this judicial development. It rejected the disjunctive argument, presented the statute as limited to property rights, and invoked considerations of ambiguity and federalism.<sup>212</sup> Congress responded quickly through the enactment of 18 U.S.C. § 1346, which provides that for purposes of the mail- and wire-fraud statutes, “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right to honest services.”<sup>213</sup> The doctrine had long been controversial. It was viewed as an important prosecutorial tool,<sup>214</sup> but also as a

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INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE xiii (1996) (describing how “the mainstream anticorruption project imposes serious costs on public administration while failing to control corruption”).

204 See Mills & Weisberg, *supra* note 84, at 1384–87. The authors discuss both Justice Scalia’s views on corruption in the campaign finance context and his opinion in *Sun-Diamond*. *Id.* They note a preference for the quid pro quo requirement in both contexts. *Id.*

205 561 U.S. 358 (2010).

206 *Id.* at 367.

207 See generally ABRAMS ET AL., *supra* note 17, at 309–20 (discussing the scope of the mail fraud statute).

208 18 U.S.C. § 1341 (2012).

209 *E.g.*, *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941); see generally Moohr, *supra* note 75 (tracing the development of the intangible rights doctrine).

210 See generally ABRAMS ET AL., *supra* note 17, at 324–61.

211 483 U.S. 350 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified as amended at 18 U.S.C. § 1346 (2012)).

212 *Id.* at 359–60.

213 18 U.S.C. § 1346.

214 ABRAMS ET AL., *supra* note 17, at 324–25.

highly ambiguous, subjective standard and an invitation to prosecutorial overreach.<sup>215</sup>

In 2009, in *Sorich v. United States*, Justice Scalia expressed forcefully the concerns about the statute's operation in dissenting from a denial of certiorari to review an honest services conviction for patronage hiring.<sup>216</sup> The Court revisited the issue the following year in *Skilling*, and held that the statute did indeed present serious vagueness problems.<sup>217</sup> Rather than invalidate it, however, the Court "narrowed" the statute to encompass only bribes and kickbacks.<sup>218</sup> It reasoned that this conduct represented the "core" of the improprieties Congress wanted to reach. The doctrine in its broad, judicially created form, had presented the two classic vagueness problems: inadequate notice to citizens of what conduct is prohibited and the encouragement to officials of arbitrary enforcement.<sup>219</sup> As narrowed, however, the statutory form did not present these problems. Bribes and kickbacks had always been viewed as classic honest services fraud, and were recognized as crimes under other federal statutes. Thus, clarity was ensured, and arbitrary prosecution discouraged.<sup>220</sup>

Justice Scalia, who seemed to have won a major victory, concurred only in the result, insisting that the entire statute should have been invalidated as vague.<sup>221</sup> In his *Sorich* dissent from the denial of certiorari, he noted the broad range of conduct covered by the doctrine:

Courts have upheld convictions of a local housing official who failed to disclose a conflict of interest, a businessman who attempted to pay a state legislator to exercise "informal and behind-the-scenes influence on legislation," students who schemed with their professors to turn in plagiarized work, lawyers who made side payments to insurance adjusters in exchange for the expedited processing of their clients' pending claims, and, in the decision we are asked to review here, city employees who engaged in political-patronage hiring for local civil-service jobs.<sup>222</sup>

In *Skilling*, he focused on the various standards courts had found to underlie the concept. Courts had invoked "public policy and . . . standards of moral uprightness, fundamental honesty, fair play and right dealing,"<sup>223</sup> as

215 See, e.g., *United States v. Margiotta*, 688 F.2d 108, 143 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part).

216 555 U.S. 1204, 1204–08 (2009) (Scalia, J., dissenting from denial of certiorari).

217 *Skilling v. United States*, 561 U.S. 358, 402–06 (2010).

218 *Id.* at 408–09 ("To preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.")

219 *Id.* at 412 (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

220 *Id.*

221 *Id.* at 415 (Scalia, J., concurring in part and concurring in the judgment).

222 *Sorich v. United States*, 555 U.S. 1204, 1205 (2009) (Scalia, J., dissenting from denial of certiorari) (internal citations omitted).

223 *Skilling*, 561 U.S. at 418 (Scalia, J., concurring in part and concurring in the judgment) (quoting *United States v. Mandel*, 591 F.2d 1347, 1361 (4th Cir. 1979), *overruled as recognized* in *United States v. Thomas*, 953 F.2d 107, 110 n.3 (4th Cir. 1991)).

well as a right to “honest and impartial government.”<sup>224</sup> All of this, for Justice Scalia, made § 1346 a delegation to the federal courts to create common law crimes, a power they lack and which cannot be given them.<sup>225</sup>

There was thus a sharp disagreement within the Court, but it was not over the nature of corruption. The Justices were unanimous in finding a vagueness defect in § 1346 but disagreed over whether to narrow the statute to a possible core or to invalidate it.<sup>226</sup> The disagreement presented a serious question about the proper interaction between the Court and Congress in such situations. Justice Scalia emphasized that apparently “no court” either pre- or post-*McNally* had identified bribery and kickbacks as the core of honest services.<sup>227</sup> The majority seemed heavily influenced by Professor Albert Alschuler’s statement in an amicus brief setting forth the goal of “establish[ing] a uniform national standard, defin[ing] honest services with clarity, reach[ing] only seriously culpable conduct, and accomplish[ing] Congress’s goal of ‘overruling’ *McNally*.”<sup>228</sup>

*Skilling* has been described as a “bombshell.”<sup>229</sup> It supposedly “gutted and eviscerated one of federal prosecutors’ favorite weapons.”<sup>230</sup> However, this perspective may be more true at the analytical level than in practice.<sup>231</sup> The kinds of cases Justice Scalia described in his *Sorich* dissent,<sup>232</sup> with the possible exception of conflicts of interest cases,<sup>233</sup> lie more at the outer boundary of the federal anticorruption enterprise than at its core. Like *Sun-Diamond*, *Skilling* narrowed an anticorruption statute. However, the analysis was not based on a parsing of the statute but on constitutional concerns of vagueness applicable to all statutes.<sup>234</sup>

Still, the importance of *Skilling* should not be underestimated. It changed the anticorruption landscape. Its emphasis on bribery and kickbacks is an emphasis on quid pro quo transactions with a strong element of

224 *Id.* at 417 (citing *McNally v. United States*, 483 U.S. 350, 355 (1987)).

225 *Id.* at 415. *But see* Griffin, *supra* note 29, at 1826–29 (defending, in the corruption context, lawmaking under broad congressional delegations).

226 *See Skilling*, 561 U.S. at 418 (majority opinion).

227 *Id.* at 423 (Scalia, J., concurring in part and concurring in the judgment).

228 *Id.* at 411 (majority opinion) (quoting Brief of Albert W. Alschuler as *Amicus Curiae* in Support of Neither Party at 28–29, *Weyhrauch v. United States*, 557 U.S. 934 (2009) (No. 08-1196)).

229 ABRAMS ET AL., *supra* note 17, at 341.

230 J.B. Perrine & Patricia M. Kipnis, *Navigating the Honest Services Fraud Statute After Skilling v. United States*, 72 ALA. LAW. 295, 298 (2011).

231 *See* Griffin, *supra* note 29, at 1838–42 (exploring post-*Skilling* grounds for prosecution).

232 *Sorich v. United States*, 555 U.S. 1204, 1205 (2009) (Scalia, J., dissenting from denial of certiorari).

233 *See* ABRAMS ET AL., *supra* note 17, at 341–42 (discussing implications of *Skilling* on conflicts of interest prosecutions); *see also id.*, at 352–55 (discussing possible legislative overruling of *Skilling*).

234 *Skilling v. United States*, 561 U.S. 358, 412 (2010). For a helpful discussion of the issues resolved, and not resolved, in *Skilling*, see Sara Sun Beale, *An Honest Services Debate*, 8 OHIO ST. J. CRIM. L. 251 (2010).

specificity. Justice Scalia’s concurring opinion manifests an obvious contempt for attempting to translate aspirations for “good government” into criminal law. The case may reflect uncertainty about how far to push anticorruption law, as well as a recognition that an array of interactions between citizens and public officials takes place outside the electoral context.<sup>235</sup> Even so, an examination of two of the Court’s Hobbs Act decisions helps us focus on the difference that context makes.

### 3. The Hobbs Act Extortion Decisions and the Crucial Distinction Between the Electoral and Ordinary Corruption Contexts

#### a. *McCormick*

The Hobbs Act prohibits—in part—extortion, defined as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”<sup>236</sup> Once courts concluded that extortion “under color of official right” was a separate form of extortion, unrelated to force or fear, the Hobbs Act became a major tool in the federal anticorruption arsenal.<sup>237</sup> In *McCormick v. United States*, the electoral and ordinary corruption contexts came together when a state legislator was accused of extorting a campaign contribution.<sup>238</sup> McCormick had supported, and continued to support, legislation benefiting unlicensed foreign doctors. During his reelection campaign he had an “unfriendly”<sup>239</sup> conversation with the doctors’ lobbyist informing him that he (McCormick) “had not heard anything from the foreign doctors.”<sup>240</sup> Shortly thereafter, he received cash payments from the doctors.<sup>241</sup> McCormick was convicted of Hobbs Act extortion under color of official right.<sup>242</sup>

The principal issue on appeal was whether, under the Hobbs Act, receipt of campaign contributions from an interest group under such circumstances requires a quid pro quo—“a promise of official action or inaction in exchange for any payment or property received”<sup>243</sup>—and how far the outer boundaries of the concept extend. McCormick’s conviction was reversed. Justice White’s opinion for the Court contains language that sounds like a direct precursor of *Citizens United*. He noted that legislators often support legislation that will benefit groups in their district. Moreover, they must raise

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235 Cf. Mills & Weisberg, *supra* note 84, at 1388 (discussing the “inherent vagueness and subtlety of the continuum of public/private relations”).

236 18 U.S.C. § 1951(b)(2) (2012).

237 See *Evans v. United States*, 504 U.S. 255, 290 (1992) (Thomas, J., dissenting) (“Over the past 20 years, the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws—acts of public corruption by state and local officials.”).

238 500 U.S. 257 (1991).

239 *Id.* at 281–82 (Stevens, J., dissenting).

240 *Id.* at 260 (majority opinion).

241 *Id.*

242 *Id.* at 261, 265.

243 *Id.* at 266.

money to be elected and will “claim support on the basis of their views and what they intend to do or have done.”<sup>244</sup> I will quote at length from the core of his analysis:

Whatever ethical considerations and appearances may indicate, to 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, with his consent, “under color of official right.” To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.<sup>245</sup>

This analysis rests on the nature of representative democracy, and sounds a lot like the majority opinion of *Citizens United*. The First Amendment was not explicitly invoked. However, since *Buckley*, political contributions enjoy a form of constitutional protection.<sup>246</sup> The *McCormick* majority conceded that they lose that protection if there is a promise “by the official to perform or not to perform an official act.”<sup>247</sup> But the promise must be “explicit.”<sup>248</sup> Campaign contributions from those who might benefit from the legislator’s actions are normal and presumptively valid. Again foreshadowing *Citizens United*, Justice Stevens dissented. He agreed on the need for a quid pro quo, but disagreed on the need for explicitness. “Subtle extortion is just as wrongful—and probably much more common—than the kind of express understanding that the Court’s opinion seems to require.”<sup>249</sup>

The facts and circumstances of campaign contributions will vary widely. They are, in the words of the Seventh Circuit Court of Appeals, “clothed with [a] degree of respectability.”<sup>250</sup> How far that cloak extends was the subject of disagreement in *McCormick*. The majority wanted to protect the system of contributions, even when a substantial element of reciprocity was present. Justice Stevens might be seen as espousing more of a real-world view. Anyone who looks at the facts knows why the doctors contributed and what prompted it. For him, there was a “mutual understanding” and sufficient knowledge on the part of both donor and recipient to satisfy any quid pro quo requirement.<sup>251</sup>

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244 *Id.* at 272.

245 *Id.*

246 *See Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976) (per curiam). Also, treating political contributions as “one aspect of the contributor’s freedom of political association.” *See id.* at 24–25.

247 *McCormick*, 500 U.S. at 273.

248 *Id.* (emphasis added).

249 *Id.* at 282 (Stevens, J., dissenting).

250 *United States v. Giles*, 246 F.3d 966, 972 (7th Cir. 2001).

251 *McCormick*, 500 U.S. at 283 (Stevens, J., dissenting).

*McCormick* fits within the *Buckley* framework. Each requires a quid pro quo involving official action before a campaign contribution can be invalidated. *Buckley* found it in the size of a contribution; *McCormick* focused on the circumstances under which it is made, specifically whether there is an explicit agreement tying it to future official action. The element of explicitness extends not just to the fact of agreement, but to the action that is the subject of the agreement. An obvious problem—which *McCormick* raises—is how to apply it to payments made to public officials that are not elected, or to elected officials outside the campaign context. At least when the Hobbs Act is applied to such payments, a broad reading of *McCormick* could require an explicit quid pro quo in all cases. The alternative would be a perhaps unwieldy system of varying standards for finding one. On the other hand, what the Seventh Circuit referred to as “[o]ther payments to officials”<sup>252</sup> cannot be justified as integral components of the nation’s system of representative democracy.<sup>253</sup> *McCormick* specifically left the question open.<sup>254</sup>

b. *Evans*

*Evans v. United States*,<sup>255</sup> decided one year after *McCormick*, is a difficult case. It appears to establish that the quid pro quo requirement applies to all Hobbs Act “under color of official right” prosecutions, regardless of the official’s position, but it suggests that the requirement is less stringent if the payment is not a campaign contribution. *Evans*’s difficulty stems in part from the fact that the defendant was an elected official and that the payment took two forms: a direct cash transfer and a check payable to his campaign.<sup>256</sup> The Court did not analyze the case as representing solely a contribution. Instead, it treated the facts as representative of the general problem of improper payments to “public official[s]” brought about by the official’s ability to favor the donor.<sup>257</sup>

Justice Stevens’s opinion first had to deal with the statutory requirement that the payment be “induced” by the official.<sup>258</sup> He did not read this requirement as the equivalent of initiation by the recipient; instead, he read it as satisfied by the “wrongful acceptance of a bribe,”<sup>259</sup> with “the coercive element . . . provided by the public office itself.”<sup>260</sup> More serious problems were posed by the defendant’s argument that the conviction rested on passive acceptance without a quid pro quo.

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252 *Giles*, 246 F.3d at 972.

253 See *United States v. Irwin*, 354 F.2d 192, 196 (2d Cir. 1965) cited in *Welling*, *supra* note 23, at 423 n.37.

254 See *McCormick*, 500 U.S. at 268 n.6.

255 504 U.S. 255 (1992).

256 *Id.* at 257.

257 *Id.* at 260.

258 *Id.* at 265.

259 *Id.* at 266.

260 *Id.*



The portion of the opinion rejecting this argument is not a model of clarity. Justice Stevens stated that *McCormick*'s quid pro quo requirement was satisfied.<sup>261</sup> He suggested this includes an "agreement to perform *specific* official acts"<sup>262</sup> but stated the holding in the following, more general terms: "[T]he Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."<sup>263</sup> The case apparently stands for the proposition that the quid pro quo requirement established by *McCormick* applies in all contexts, at least in some form.<sup>264</sup> However, it is not clear whether the requirement has been watered down to knowing passive acceptance, or whether *McCormick*'s explicitness test still applies beyond campaign contributions.

Justice Kennedy, concurring, stated that *Evans* should be read as establishing the quid pro quo element across the board.<sup>265</sup> However, he appears to have abandoned explicitness. The quid pro quo is generated by the official's invocation of his authority "to induce payment of money or to otherwise obtain property."<sup>266</sup> The key factor is what the official intends the payor to believe:

The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it.<sup>267</sup>

Coming on the heels of *McCormick*, *Evans* is a remarkable decision. Six members of the Court—including Justice Kennedy, the author of *Citizens United*—read the Hobbs Act broadly to reach a form of bribery.<sup>268</sup> The requirement that a payment be "induc[ed] . . . under color of official right" was deemed met by knowing acceptance, and with the justification that any "coercive element is provided by the public office itself."<sup>269</sup> The Court did import the concept of quid pro quo—a term not found in the statute<sup>270</sup>—from *McCormick*. However, it treated that requirement as easily met. The majority refers to "a payment in return for [an] *agreement* to perform specific official acts."<sup>271</sup> However, Justice Kennedy seems correct in his gloss that the

261 *Id.* at 268.

262 *Id.* (emphasis added).

263 *Id.*

264 *Id.* at 268–69.

265 *Id.* at 272–73 (Kennedy, J., concurring in part).

266 *Id.* at 273.

267 *Id.* at 274. In the dissent, Justice Thomas focused on the meaning of "induced," *id.* at 288–89 (Thomas, J., dissenting), and also invoked considerations of federalism, *id.* at 290–94.

268 *Id.* at 257 (majority opinion).

269 *Id.* at 266.

270 *See id.* at 286 (Thomas, J., dissenting) ("This *quid pro quo* requirement is simply made up.").

271 *Id.* at 268 (majority opinion) (emphasis added).

agreement need not be express although the reference to “specific” acts seems to preserve a degree of explicitness. Yet the Court’s statement of the holding omits any reference to specificity.<sup>272</sup>

Overall, the Court gave a broad construction to an anticorruption statute. Justice Thomas, in dissent, stated that “[b]y stretching the bounds of extortion to make it encompass bribery, the Court today blurs the traditional distinction between the crimes.”<sup>273</sup> The Court also rejected a plausible argument advanced by the dissent that the “rule of lenity compels adoption of the narrower interpretation.”<sup>274</sup> The broad definition of extortion seems to reflect an underlying view of what constitutes corrupt payments to public officials generally.<sup>275</sup> *Evans* leaves unresolved the precise operation of the quid pro quo requirement in campaign contribution cases as opposed to ordinary corruption. The payments at issue were, in part, “a campaign contribution.”<sup>276</sup> It seems unlikely that the Court had retreated from the explicit quid pro quo requirement of *McCormick* in that context.<sup>277</sup> That case had left open the treatment of “payments made to nonelected officials or . . . payments made to elected officials that are properly determined not to be campaign contributions.”<sup>278</sup> *Evans* raises the possibility that these contexts still require a quid pro quo, but that it is more easily met.<sup>279</sup> This approach protects the electoral process, but it is problematic to have two separate standards for what is already a difficult concept.

### c. A Recapitulation and a Consideration of the Convergence Thesis

Part II’s examination of the cases appears to offer mixed empirical support for the thesis developed in Part I, that there are two separate bodies of federal anticorruption law, neither drawn from the other nor conceptually unrelated. The campaign finance cases—even though they hang by a 5-4 thread—represent a constitutionally based, wide-open view of the political process in which participants use the resources at their disposal and expect to

272 *Id.* at 256.

273 *Id.* at 284 (Thomas, J., dissenting).

274 *Id.* at 289.

275 *Id.* at 268 (majority opinion) (“[T]he offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts . . .”).

276 *Id.* at 258.

277 *McCormick v. United States*, 500 U.S. 257, 273 (1991).

278 *Id.* at 268.

279 See ABRAMS ET AL., *supra* note 17, at 282–83 (discussing whether there are two quid pro quo standards); see also *United States v. Ganim*, 510 F.3d 134, 143 (2d Cir. 2007) (stating that *Evans* modified the *McCormick* standard (citing *United States v. Garcia*, 992 F.2d 409, 414 (2d Cir. 1993))); 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) (“The majority of circuits have accepted this important distinction between the campaign and non-campaign contexts.”). Gold states that “this rule strikes an appropriate balance between prosecuting corruption without unduly burdening legitimate political activity.” *Id.* at 284.

be rewarded by policies favorable to their interests. Everyone knows there will be winners and losers. The result is a narrow view of corruption that reaches only egregious cases where contributions “buy” or “control” elected representatives.<sup>280</sup>

This notion does not translate well to attempts to subvert the regular processes of government. Admittedly, the ordinary corruption cases discussed above do not present as neat a picture as the campaign finance ones. *Sun-Diamond* aligns closely with the campaign finance cases. It suggests a narrow approach to corruption, rejecting the “reservoir of goodwill” concept and emphasizing the importance of specificity of official action when attempts to influence are criminalized.<sup>281</sup> *McCormick* is a form of campaign finance case. Its explicitness requirement reflects the post-*Buckley* emphases on the quid pro quo and on protecting the political process, as well as the recognition that it will involve a multiplicity of interactions.<sup>282</sup> *Skilling’s* impact and significance are uncertain.<sup>283</sup> *Evans* emerges as the key ordinary corruption case. It has the potential to introduce great breadth to the closely related areas of extortion and bribery.<sup>284</sup> Overall, the ordinary corruption cases demonstrate some analytical kinship with the campaign finance cases, although they do not cite them. The harder question is whether, with the exception of *Evans*, they support the notion of a possible unified judicial approach to corruption.

Academic writing on corruption varies widely in its approach to this issue. Some commentators acknowledge the existence of the two fields and choose to deal with only one.<sup>285</sup> Some treat one field as exemplifying the concept of corruption while seemingly oblivious to the existence of the other.<sup>286</sup> Others suggest possible relationships between the two.<sup>287</sup> I wish to discuss two contributions to the last group, those of Jacob Eisler and Zephyr Teachout. Both see the relationship between the two fields clearly and suggest a degree of convergence.

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280 See, e.g., *McCutcheon v. FEC*, 134 S. Ct. 1434, 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.”).

281 *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 405 (1999).

282 See *McCormick*, 500 U.S. at 258 (“[P]roperty is extorted in violation of the Hobbs Act only when an official asserts that his official conduct will be controlled by the terms of the promise or undertaking.”); see also *id.* at 273 (explaining the quid pro nature of the Hobbs Act’s “forbidden zone of conduct”).

283 See Griffin, *supra* note 29, at 1838–42 (addressing implications of *Skilling*).

284 Prior to *Evans*, Professor Lowenstein had noted the flexibility inherent in the crime of bribery. See Lowenstein, *supra* note 23, at 819–24 (analyzing whether an agreement is required for a bribe to occur).

285 See, e.g., Welling, *supra* note 23, at 421 n.15 (foregoing discussion of campaign contributions).

286 See Issacharoff, *supra* note 93 (analyzing campaign finance law).

287 See, e.g., George D. Brown, *The Gratuities Debate and Campaign Reform: How Strong Is the Link?*, 52 WAYNE L. REV. 1371, 1401 (2006).

Eisler's *The Unspoken Institutional Battle over Anticorruption: Citizens United, Honest Services, and the Legislative-Judicial Divide*<sup>288</sup> is a thorough inquiry into post-*Buckley* developments in both fields. Although one may disagree with his analysis of ordinary corruption, the article is a comprehensive and significant contribution. Eisler begins by noting a "striking pattern"<sup>289</sup> of parallel analysis in *Citizens United* and *Skilling*, which "can be framed as a clash between differing schools of anticorruption."<sup>290</sup> He divides the schools between "competitive and deliberative" approaches to corruption.<sup>291</sup> The Court is clearly in the competitive camp—its "rulings have established a consistently and uncompromisingly competitive regime."<sup>292</sup> Congress apparently wavers between the two.<sup>293</sup> The competitive approach presumes a democracy that is "self-interested and adversarial."<sup>294</sup> "Deliberative democracy emphasizes discourse and cooperation, rather than formal selection processes . . ."<sup>295</sup> Eisler presents the difference as resulting from "a lively debate in democratic theory."<sup>296</sup> It is clear that this debate reflects differing views of the *electoral* process. Whether it can be translated into analyzing methods of dealing with ordinary corruption is far from clear.

Eisler views deliberative anticorruption measures as focused on motive, while competitive anticorruption seeks bright-line rules rather than "subtle normative assessments."<sup>297</sup> The framework bogs down a bit at the start because Eisler admits that each approach has "ultimately normative roots."<sup>298</sup> He also admits that either can lead to prophylactic statutes and that "[m]any corruption laws integrate attributes of deliberative and competitive anticorruption."<sup>299</sup> It is also hard to follow the thesis that deliberative anticorruption measures, which follow the rigid constraints of the criminal law, can lead to "collective discourse,"<sup>300</sup> or "subtle normative assessments of leaders' motives or probing the relationship between ethics and public service."<sup>301</sup> Nonetheless, Eisler makes an important point in arguing that the competitive approach leads to a preference for bright-line rules that avoid the possibility of any such inquiry.<sup>302</sup>

For purposes of simplification, let us label the two approaches as "broad" and "narrow." As Eisler demonstrates, they prove useful in examining the

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288 Eisler, *supra* note 183, at 366.

289 *Id.* at 365.

290 *Id.* at 367.

291 *Id.*

292 *Id.*

293 *Id.*

294 *Id.*

295 *Id.*

296 *Id.* at 368.

297 *Id.* at 381.

298 *Id.*

299 *Id.* at 384.

300 *Id.* at 380.

301 *Id.* at 381.

302 *Id.* at 381–82.

two bodies of case law—campaign finance and ordinary corruption—discussed in this Article. He views the campaign reform cases as generally reflecting a narrow (competitive) approach through emphasis on a relatively specific concept of quid pro quo corruption.<sup>303</sup> *McConnell* was a brief turn toward a broad (deliberative) approach, “specifically approving of measures that promoted public-minded behavior and purity of the campaign atmosphere.”<sup>304</sup> *Citizens United* was a return to form: “The Court . . . articulated its most narrowly imagined theory of competitive corruption.”<sup>305</sup>

This is a helpful way of looking at the campaign finance cases. Eisler then turns to what this Article terms ordinary corruption: “[O]fficial action by a governmental figure taken on account of an illicitly private benefit.”<sup>306</sup> Although he suggests there is a less cohesive narrative in this field,<sup>307</sup> he ends up positing a “consistently competitive nature of the Court’s underlying theory.”<sup>308</sup> He begins by focusing on honest services. As noted, the doctrine had first developed in the lower federal courts, based on the concept of fraud, a development that the Court reversed in *McNally v. United States*.<sup>309</sup> Congress overturned *McNally*, thus ensuring that “honest services would remain a fruitful deliberative forum for norm-assessment and promotion of public-regardingness.”<sup>310</sup> *Skilling*, of course, narrowed § 1346, the legislation that had overturned *McNally*.<sup>311</sup> Eisler presents *Skilling* as a victory for the competitive view of anticorruption but admits that it rests largely on due process concerns.<sup>312</sup> *McCormick*, *Evans*, and *Sun-Diamond* are presented as examples of “fairly narrow black-letter questions,”<sup>313</sup> which nonetheless mirror the Court’s position on “politics” as “openly expressed in *Citizens United*.”<sup>314</sup>

There are several general objections that must be considered before addressing the individual cases. The first is whether, except for issues of campaign contributions, they do address “politics” despite the presence of numerous interactions between citizens and officials. The term belongs in the electoral context, the source of Eisler’s framework. But the field of ordinary corruption embraces different concerns. The administration of the laws is guided by different norms than the making of them. Also, it is important

303 *Id.* at 397.

304 *Id.* at 404.

305 *Id.* at 408.

306 *Id.* at 410.

307 *Id.* at 429–30. Eisler indicates that it is difficult to make generalizations but seems to read the ordinary corruption cases as tilting toward the competitive view. He does note that “*Evans*’s contrary holding in the context of such a similar fact pattern complicates any conclusion drawn from *McCormick*.” *Id.* at 429. My analysis leads to the conclusion that *Evans* is the most important of the ordinary corruption cases.

308 *Id.* at 412.

309 483 U.S. 350, 359–60 (1987); see *supra* text accompanying notes 210–24.

310 Eisler, *supra* note 183, at 419–20.

311 *Skilling v. United States*, 561 U.S. 358, 412 (2010).

312 Eisler, *supra* note 183, at 420.

313 *Id.* at 423–24.

314 *Id.*

to remember the divisions within the Court when analyzing cases and drawing lessons from them. The campaign finance cases reflect a deep 5-4 division. It was reflected in *McCutcheon*, and is the flip side of *McConnell*. If one vote changes, the Court's position will be radically different from what it is today. Suggestions of a monolithic approach might need this qualification. Finally, it is important to consider developments in the lower courts, particularly the extensive growth of a broad approach to bribery and extortion based on *Evans*.

As for the individual decisions, *McCormick* can be limited to a dispute over how to treat campaign contributions. It belongs on the electoral side of the ledger. *Skilling* did reduce the scope of honest service prosecutions, but it kept the honest services statute in place, over strong disagreement by Justice Scalia, whom Eisler presents as an advocate of the competitive view.<sup>315</sup> Justice Ginsburg, who wrote the majority opinion in *Skilling* and dissented in *Citizens United*, almost certainly is not. Thus one could just as easily conclude that the deliberative side won, even if only a partial victory.

That leaves *Sun-Diamond* and *Evans*. I concede that the former is an example of the narrow approach to corruption. *Sun-Diamond* might fit under the competitive label, drawn to encompass appointed officials. However, it involved a little-known statute, and, as the next Section demonstrates,<sup>316</sup> has had little generative force. Moreover, it was a unanimous decision. Surely, the group of "deliberative" Justices would not have let Justice Scalia slip by them a major shift in the Court's approach to anticorruption laws. Eisler devotes scant space to *Evans* and regards it as insignificant—"a narrow reconstruction of a particular term in the context of a single statute."<sup>317</sup> However, it may be the most significant of the ordinary corruption cases. It is certainly the broadest. To the extent the Court has shown support for a strict application of the concept of quid pro quo, the result in *Evans* cuts the other way.

Eisler stops short of propounding a grand unifying theory, describing the article as "a modest descriptive claim."<sup>318</sup> But it is replete with assertions that the Court has espoused a "competitive anticorruption regime."<sup>319</sup> He is ambivalent about whether this regime is derivative of an underlying preference for competitive politics, or whether "competitive anticorruption"<sup>320</sup> is a concept of equal hierarchical rank. I find the article enormously provocative and helpful. At the same time, I think it demonstrates the questionable utility of convergence in drawing on one body of anticorruption laws to explain the other.

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315 *Id.* at 420–23.

316 *See infra* text accompanying notes 373–80.

317 Eisler, *supra* note 183, at 429.

318 *Id.* at 447.

319 *Id.* at 365, 398, 429, 430.

320 *Id.* at 380–81.

Zephyr Teachout's recent book, *Corruption in America*,<sup>321</sup> also provides support for looking at corruption as a unified concept in both the electoral and non-electoral contexts. She presents the "anticorruption principle" as an important underlying principle in American public law, of almost constitutional importance.<sup>322</sup> Teachout traces the principle's manifestation throughout American history both in prosecuting what I refer to as ordinary corruption and in measures to preserve the integrity of the electoral system. Although she sees the distinction between the two,<sup>323</sup> her references to "the law of corruption"<sup>324</sup> and "corruption law"<sup>325</sup> suggest that she views them as closely related at a conceptual level. Moreover, they are aimed at the same evil, although she clearly views the electoral context as more important.<sup>326</sup>

Her discussion of Supreme Court cases also indicates the possibility of a unified view. Teachout presents *Sun-Diamond* as a "little-noticed case that foreshadowed the Supreme Court's political theory in *Citizens United*."<sup>327</sup> Justice Scalia's decision in a case where gratuities appeared to have been given in order to build a reservoir of goodwill reflects a "deep logic of politics."<sup>328</sup> Professor Teachout strongly rejects this logic, finding it totally at odds with the anticorruption principle and with the framers' strong suspicion of gifts.<sup>329</sup> She finds the decision symptomatic of a general approach. "If you read the case as political theory, instead of statutory interpretation, the Court suggests that using money to influence power through gifts is both inevitable and not troubling. In so doing, it set the table for the Court's major corruption decision in *Citizens United*."<sup>330</sup>

Professor Teachout's treatment of the honest services doctrine is somewhat puzzling. She views corruption as a grand-scale concept that should not be reduced solely to criminal laws.<sup>331</sup> At the same time, she recognizes that these laws have played an important role in combating it, working hand in hand with laws regulating elections.<sup>332</sup> She devotes several pages to the pre-

321 TEACHOUT, *supra* note 1. Professor Teachout's work has generated considerable interest. See, e.g., Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. COLLOQUY 180 (2013) (debating constitutionality of campaign finance law). For a response by Professor Teachout, see Zephyr Teachout, *Constitutional Purpose and the Anti-Corruption Principle*, 108 NW. U. L. REV. ONLINE 200 (2014) (same).

322 TEACHOUT, *supra* note 1, at 204, 211.

323 See, e.g., *id.* at 183–94 (describing criminal prosecutions and campaign finance law as "two kinds of sticks").

324 *Id.* at 130.

325 *Id.* at 175.

326 See Cole *supra* note 180 ("Teachout's principal target is the Supreme Court, and in particular the unduly narrow understanding of corruption that has come to dominate its campaign finance jurisprudence.").

327 TEACHOUT, *supra* note 1, at 227.

328 *Id.* at 228.

329 *Id.* at 228–29.

330 *Id.* at 229.

331 *Id.* at 183–94.

332 *Id.*

*McNally* honest services cases and obviously views them as an important step in the fight against corruption.<sup>333</sup> However, Teachout does not discuss the fact that *McNally* overruled these cases and that Congress, in turn, overruled *McNally*. Most puzzling is the absence of any reference to *Skilling* in her analysis.<sup>334</sup> A discussion of honest services without *Skilling* is a lot like Hamlet without the Prince. As Eisler emphasizes, that case can be read as a parallel to *Citizens United*.<sup>335</sup>

Teachout is not unaware of recent lower federal court developments, as indicated by two footnote references to the broad approach to quid pro quo discussed in the next Part.<sup>336</sup> *McCormick* is analyzed at some length. Professor Teachout sees it as reflecting the same views of the political process as *Citizens United*.<sup>337</sup> However, it is possible that she does not appreciate the significance of *Evans* and the role it has played in ordinary corruption. She gives the case a paragraph and ends up dismissing it as “confusing.”<sup>338</sup> Despite its drawbacks, Teachout’s analysis of the anticorruption principle, particularly its historical dimensions, provides helpful background for understanding current developments. She presents *Citizens United* as a fundamental departure from that history.<sup>339</sup> She states that the majority opinion “comprehensively redefined corruption, and in so doing, redefined the rules governing political life in the United States.”<sup>340</sup> This language suggests convergence. Like Eisler’s work, however, I think the book leaves unresolved the question of the relationship between *Citizens United* and ordinary corruption, as well as the broader question of whether it is useful to treat the two contexts as a unified whole.

### III. THE ANTITHESIS OF *CITIZENS UNITED*: ORDINARY CORRUPTION AND THE STREAM-OF-BENEFITS THEORY

This Article began with the question whether *Citizens United* would have generative force outside the electoral context.<sup>341</sup> The case appears to endorse a free-wheeling political system in which contributions and support

333 *Id.* at 195–99.

334 Professor Teachout’s discussion of the honest services cases conveys the impression that this line of jurisprudence is still in existence, without reference to the *Skilling* decision. The last federal case cited in this discussion was decided in 1975.

335 Eisler, *supra* note 183, at 423.

336 TEACHOUT, *supra* note 1, at 344 nn.18–19 (citing *United States v. Abbey*, 560 F.3d 513 (6th Cir. 2009); *United States v. Rosen*, 716 F.3d. 691 (2d Cir. 2013)).

337 *Id.* at 225–26.

338 *Id.* at 225.

339 *Id.* at 229–45.

340 *Id.* at 232. To her, a fundamental flaw in the majority’s approach is “the replacement of corruption with a quid pro quo formulation.” *Id.* at 237. However, as this Article contends, the quid pro quo requirement need not lead to a permissive approach to corruption.

341 See *supra* text accompanying notes 9–21.



yield influence and access.<sup>342</sup> Each side marshals its forces, and the result is a battle that produces winners and losers. In terms of what one gets from elected representatives, it helps to have been with the winners. One may label this approach “competitive,”<sup>343</sup> the counterrevolution in government ethics,<sup>344</sup> “a triumph of the libertarian over the egalitarian vision of free speech,”<sup>345</sup> or simply a “crabbed view,” in Justice Stevens’ words,<sup>346</sup> of corruption. A narrow view of corruption may make sense in the electoral context—“politics ain’t beanbag,” in the words of Mr. Dooley<sup>347</sup>—but it seems seriously out of place in the context of application of the laws. Here, concepts of equality and neutrality reign, calling for a broad view of corruption.

For at least the last decade,<sup>348</sup> the enforcement of ordinary anticorruption laws has included the development of a theory of criminal liability totally at odds with the *Citizens United* vision: the “stream-of-benefits” theory at the heart of numerous anticorruption prosecutions. These prosecutions are primarily based on the Hobbs Act,<sup>349</sup> the federal program bribery act,<sup>350</sup> and mail<sup>351</sup> and wire<sup>352</sup> fraud statutes. The latter two statutes incorporate the concept of honest services fraud at issue in *Skilling*.<sup>353</sup> An example of the concept is *United States v. McDonough*.<sup>354</sup> Payments were made that benefited an influential legislator. He used his influence to assist the payors. The First Circuit stated that “[a] reasonable jury could have concluded that the [payments] constituted a stream of payments intended for [the legislator] in exchange for [his] providing benefits to [the payors].”<sup>355</sup> Many courts have

342 *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring), *overruled by id.* at 365–66).

343 Eisler, *supra* note 183, at 367–72.

344 Brown, *supra* note 48, at 811.

345 Sullivan, *supra* note 116, at 145.

346 *Citizens United*, 558 U.S. at 447 (Stevens, J., concurring in part and dissenting in part).

347 WILLIAM SAFIRE, SAFIRE’S POLITICAL DICTIONARY 45–46 (Oxford Univ. Press 2008) (1968).

348 The current line of cases can be traced back to *United States v. Ganim*, which the Second Circuit decided in 2007. See 510 F.3d 134 (2d Cir. 2007). However, the concept can be found as early as 1998 in *United States v. Jennings*. See 160 F.3d 1006, 1014 (4th Cir. 1998) (“The quid pro quo requirement is satisfied 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.” (quoting *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976))).

349 18 U.S.C. § 1951 (2012).

350 *Id.* § 666.

351 *Id.* § 1341.

352 *Id.* § 1343.

353 See *id.* § 1346 (including “honest services” in the definition of “scheme or artifice” for mail and wire fraud).

354 727 F.3d 143 (1st Cir. 2013).

355 *Id.* at 153.

adopted the stream-of-benefits analysis, either explicitly or implicitly.<sup>356</sup>

356 See, e.g., *United States v. Ciavarella*, 716 F.3d 705, 730 (3d Cir. 2013) (“[A] bribe may come in the form of a ‘stream of benefits.’” (quoting *United States v. Wright*, 665 F.3d 560, 568 (3d Cir. 2012))); *Ryan v. United States*, 688 F.3d 845, 852 (7th Cir. 2012) (“[T]he Government presented a valid ‘stream of benefits,’ ‘retainer,’ or ‘course of conduct’ bribery theory.”); *United States v. Andrews*, 681 F.3d 509, 527 (3d Cir. 2012) (“A bribery theory under § 1346 ‘requires a *quid quo pro*.’” (quoting *Wright*, 665 F.3d at 567)); *Wright*, 665 F.3d at 568 (“The bribery theory does not require that each *quid*, or item of value, be linked to a specific *quo*, or official act. Rather, a bribe may come in the form of a ‘stream of benefits.’” (quoting *United States v. Bryant*, 655 F.3d 232, 240–41 (3d Cir. 2011))), *remanded* to 936 F. Supp. 2d 538 (E.D. Pa. 2013); *Bryant*, 655 F.3d at 241–42, 244 (“[A] *quid pro quo* may come in the form of a ‘stream of benefits.’”); *United States v. Donna*, 366 F. App’x 441, 450 (3d Cir. 2010) (“[T]he official does not have to promise to perform a specific action in exchange for a specific gift; instead, the official can accept a ‘stream of benefits’ in exchange for one or more official acts as though the official is on a retainer.” (quoting *United States v. Kemp*, 500 F.3d 257, 282 (3d Cir. 2007))); *United States v. Chartock*, 283 F. App’x 948, 956 (3d Cir. 2008) (holding no error in district court’s stream-of-benefits instruction of bribery where “a person gave an official a stream of benefits in implicit exchange for one or more official acts”); *United States v. Mariano*, 316 F. App’x 99, 102 (3d Cir. 2008) (“[B]ribery . . . extends to agreements to provide a ‘stream of benefits . . . .” (quoting *Kemp*, 500 F.3d at 281)); *Kemp*, 500 F.3d at 282 (“[C]onvict[ion] upon finding a ‘stream of benefits’ was legally correct.”); *United States v. Willis*, No. 2014-28, 2015 WL 3747112, at \*9 (D.V.I. June 15, 2015) (holding that the statute is satisfied when “the official . . . accept[s] a ‘stream of benefits’” (quoting *Donna*, 366 F. App’x at 450)); *United States v. Mosberg*, 866 F. Supp. 2d 275, 290, 313 (D.N.J. 2011) (holding an indictment “sufficiently alleges a *quid pro quo* bribery” when it includes allegations that the defendant gave a “stream of benefits ‘to influence and reward’”).

Other courts have clearly adopted the stream-of-benefits concept without using the explicit phrase. See, e.g., *United States v. Mays*, 558 F. App’x 583, 587 (6th Cir. 2014) (“It is sufficient if the public official understood that he or she was expected to exercise some influence on the payor’s behalf as opportunities arose.” (quoting *United States v. Terry*, 707 F.3d 607, 612 (6th Cir. 2013))); *McDonough*, 727 F.3d at 152–54 (same (quoting *Terry*, 707 F.3d at 612; *United States v. Ganim*, 510 F.3d 134, 148 (2d Cir. 2007))); *United States v. Rosen*, 716 F.3d 691, 701 (2d Cir. 2013) (accepting an “as opportunities arise” quid pro quo agreement); *Terry*, 707 F.3d at 612 (“[I]t is sufficient if the public official understood that he or she was expected to exercise some influence on the payor’s behalf as opportunities arose.” (quoting *United States v. Abbey*, 560 F.3d 513, 518 (6th Cir. 2009))); *United States v. Jefferson*, 674 F.3d 332, 359 (4th Cir. 2012) (finding it unnecessary “to link every dollar paid . . . to a specific meeting, letter, trip, or other action by Jefferson to fulfill his end of a corrupt bargain” and that the court did not “read the bribery statute or *Sun-Diamond* to compel any such link”); *United States v. Redzic*, 627 F.3d 683, 692 (8th Cir. 2010) (“It was not necessary . . . to link any particular payment to any particular action undertaken . . . .”); *United States v. McNair*, 605 F.3d 1152, 1186 (11th Cir. 2010) (citing *Ganim*, 510 F.3d at 141–47) (“[Section] 666 does not require a specific *quid pro quo* . . . .”); *Abbey*, 560 F.3d at 520–21 (“[Section 666] does not require the government to prove that Abbey contemplated a specific act when he received the bribe . . . .”); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 943, 945–46 (9th Cir. 2009) (“Nor need the implicit *quid pro quo* concern a specific official act.”), *abrogated on other grounds by* *Skilling v. United States*, 561 U.S. 358 (2010); *United States v. Harvey*, 532 F.3d 326, 335 (4th Cir. 2008) (quoting *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976)); *Ganim*, 510 F.3d at 145, 148–49 (“[T]o establish the quid pro quo essential to proving bribery, ‘the government need not show that the defendant intended for his payments to be tied to specific

Obviously, cases differ. The identity and interests of the donor are known. There may even be an explicit official action. However, the approach clearly dilutes the quid pro quo requirement.<sup>357</sup> Cases that use terms like “retainer,”<sup>358</sup> “as opportunities arose,”<sup>359</sup> or “as needed”<sup>360</sup> are the strongest examples of moving away from explicitness. Indeed, the approach frequently looks a lot like a gratuity given for the purpose of building a reservoir of good will, with an implied commitment that the reservoir will lead to actions that

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official acts . . . .” (quoting *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998)); *United States v. Quinn*, 359 F.3d 666, 673 (4th Cir. 2004) (citing *Jennings*, 160 F.3d at 1014); *Jennings*, 160 F.3d at 1014 (“Bribery requires the intent to effect an exchange of money (or gifts) for specific official action (or inaction), but each payment need not be correlated with a specific official act. Rather, it is sufficient to show that the payor intended for each payment to induce the official to adopt a specific course of action. . . . The quid pro quo requirement is satisfied 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.’ . . . [A]ll that must be shown is that payments were made with the intent of securing a specific *type* of official action or favor in return.” (citations omitted) (citing *Arthur*, 544 F.2d at 734)).

357 Professor Alschuler, a critic of the concept, states that “[a]lthough the ‘stream of benefits’ metaphor can be compatible with the *quid pro quo* requirement, it invites slippage from this requirement to a ‘one hand washes the other’ or ‘favoritism’ standard.” Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse* 18 (Chi. Pub. Law & Legal Theory Working Paper No. 502, 2015).

358 *Ryan*, 688 F.3d at 852; *Kincaid-Chauncey*, 556 F.3d at 943 n.15 (“It is sufficient, for example, if the evidence establishes that the government official has been put on ‘retainer’—that is, that the government official has received payments or other items of value with the understanding that when the payor comes calling, the government official will do whatever is asked.”).

359 *McDonough*, 727 F.3d at 153, 160 (quoting *Terry*, 707 F.3d at 612); *Rosen*, 716 F.3d at 700 (“The illegality of an ‘as opportunities arise’ quid pro quo agreement has been established in this Circuit for more than two decades.”); *Terry*, 707 F.3d at 612 (quoting *Abbey*, 560 F.3d at 518) (finding “as opportunities arose” to be a clear principle); *Bryant*, 655 F.3d at 241 (stating that an official’s services may be provided “whenever the opportunity presents itself, the official will take specific action on the payor’s behalf”); *McNair*, 605 F.3d at 1189 (quoting *Ganim*, 510 F.3d at 142); *Abbey*, 560 F.3d at 518 (“[I]t is sufficient if the public official understood that he or she was expected to exercise some influence on the payor’s behalf as opportunities arose.”); *Ganim*, 510 F.3d at 142, 144 (“[T]he requisite quid pro quo . . . may be satisfied upon a showing that a government official received a benefit in exchange for his promise to perform official acts or to perform such acts as the opportunities arise.”); *United States v. McDonnell*, 64 F. Supp. 3d 783, 787 (E.D. Va. 2014) (alleging defendants accepted things of value “in exchange for . . . performing official actions on an as-needed basis, as opportunities arose”).

360 *Mays*, 558 F. App’x at 587 (quoting *United States v. Whitfield*, 590 F.3d 325, 350 (5th Cir. 2009)); *Jefferson*, 674 F.3d at 358 (4th Cir. 2012) (upholding “performing official acts on an as-needed basis” jury instruction); *Bryant*, 655 F.3d at 241 (upholding jury instruction that “payments may be made with the intent to retain the official’s services on an ‘as needed’ basis”); *Whitfield*, 590 F.3d at 350 (quoting *Jennings*, 160 F.3d at 1014); *Jennings*, 160 F.3d at 1014 (“[P]ayments may be made with the intent to retain the official’s services on an ‘as needed’ basis.”).

benefit the giver.<sup>361</sup> A form of dependency can develop similar to that identified by Professor Lessig in the electoral context.<sup>362</sup>

The stream-of-benefits concept helps focus on the uncertainty of the “quo” requirement. The tripartite formulation “quid pro quo” suggests three things: a transfer (the quid); an agreement, explicit or implicit (the pro); and an act (the quo). However, the federal bribery statute indicates that the crime is complete when the official has corruptly accepted something of value for “being influenced in the performance of any official act.”<sup>363</sup> The quo is subsumed in the agreement. Cases are replete with statements to the effect that it has long been established that the crime of bribery is complete upon the acceptance of a bribe, regardless of whether or not improper action is thereafter taken.<sup>364</sup> Thus the lack of specificity of the quo in the stream-of-benefits analyses fits comfortably within traditional bribery law. Prosecutors may well introduce evidence of official acts taken. This might be done to show a particularly strong case, or to show the existence or scope of the agreement. The key point is that the defendant is not being prosecuted for the acts taken.<sup>365</sup>

Application of the stream-of-benefits analysis has to be measured against one of the three narrow ordinary corruption cases discussed above: *McCormick*, *Sun-Diamond*, or *Skilling*. *McCormick* is often cited for the proposition that a quid pro quo must be explicit in the campaign contribution context.<sup>366</sup> In most circuits, a two-tiered definition of quid pro quo has

361 *But see* United States v. O’Brien, 994 F. Supp. 2d 167, 187 (D. Mass. 2014). The court cited several stream-of-benefits cases for the proposition that “[t]he quid pro quo requirement is satisfied 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.’” *Id.* (quoting *Jennings*, 160 F.3d at 1014). The court noted, however, that “it appears clear that an exchange must be contemplated, and that mere proof of an intent to cultivate a political relationship, or to express gratitude, without more, is insufficient.” *Id.* at 188 (citing *McDonough*, 727 F.3d at 157). Not surprisingly, defense attorneys have criticized the stream-of-benefits theory for its deviation from the quid pro quo requirement. *See, e.g.*, Jared B. Cohen, Note, *The Commonwealth’s Right to “Honest Services”*: Prosecuting Public Corruption in Massachusetts, 93 B.U. L. REV. 201, 229 (2013).

362 *See, e.g.*, LESSIG, *supra* note 73, at 233 (describing “dependence corruption”).

363 18 U.S.C. § 201(b)(ii)(A) (2012).

364 *E.g.* Howard v. United States, 345 F.2d 126 (1st Cir. 1965). In *Evans*, a Hobbs Act case, the Supreme Court stated that performance of an “official act” is “not an element of the offense.” 504 U.S. at 268.

365 As the court stated in *Ganim*, “so long as the jury finds that an official accepted gifts in exchange for a promise to perform official acts for the giver, it need not find that the specific act to be performed was identified at the time of the promise, nor need it link each specific benefit to a single official act.” 510 F.3d at 147. Courts may nevertheless focus on the official nature of the acts, even though it would seem that focus is not necessary.

366 *E.g.*, United States v. Ellis, No. 94-6690, 1996 WL 394032, at \*5 (4th Cir. July 16, 1996) (unpublished table decision); United States v. Blandford, 33 F.3d 685, 696 (6th Cir. 1994); United States v. Taylor, 993 F.2d 382, 385 (4th Cir. 1993) (citing *McCormick v. United States*, 500 U.S. 257, 273 (1991)).

evolved.<sup>367</sup> The key development is the virtual elimination outside of the electoral context of any requirement of specificity as to the official act.

Given that it arose outside the electoral context, *Sun-Diamond* might be most on point. Its facts represent a classic attempt to use transfers of things of value to “build a reservoir of goodwill.”<sup>368</sup> More importantly, its analysis emphasizes the importance of a link between the transfer and a specific official act.<sup>369</sup> Defendants have repeatedly invoked *Sun-Diamond* for the proposition that the quid pro quo element of the extortion and bribery offenses should be applied the same way, regardless of statutory language.<sup>370</sup> Courts have not been receptive to these arguments. One approach is to focus on the fact that *Sun-Diamond* involved a different statute. The Second Circuit has stated flatly that “[w]e do not agree that *Sun-Diamond* requires us to define the crime of bribery narrowly. . . . *Sun-Diamond* . . . says nothing about bribery . . . .”<sup>371</sup> Other courts have reasoned that any general limiting principle that might be extrapolated from *Sun-Diamond* is satisfied by the concept of quid pro quo even if the future act is unspecified.<sup>372</sup>

An extensive discussion of the issue is found in the Second Circuit’s decision in *United States v. Ganim*.<sup>373</sup> The defendant made the “common sense” argument that it would be unreasonable to permit conviction of the more serious crimes of bribery and extortion upon a “less exacting nexus” than for gratuities.<sup>374</sup> The court responded that *Sun-Diamond* arose under a different statute, and found that the more serious bribery-related crimes were based

367 See, e.g., *United States v. Garcia*, 992 F.2d 409, 414 (2d Cir. 1993) (“Although the *McCormick* Court had ruled that extortion under color of official right in circumstances involving campaign contributions occurs ‘only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act,’ *Evans* modified this standard in non-campaign contribution cases by requiring that the government show only ‘that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.’” (citation omitted)); see generally *supra* note 279 (cases indicating a two-tiered definition of quid pro quo).

368 *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 405 (1999).

369 *Id.* at 404–10.

370 See, e.g., *United States v. Ring*, 706 F.3d 460, 466 (D.C. Cir. 2013); *United States v. Jefferson*, 674 F.3d 332, 353 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 648 (2012); *United States v. Boender*, 649 F.3d 650, 654–55 (7th Cir. 2011); *United States v. McNair*, 605 F.3d 1152, 1190–92 (11th Cir. 2010); *United States v. O’Brien*, 994 F. Supp. 2d 167, 186 (D. Mass. 2014). Defendants have often attempted to use *Sun-Diamond* to contest convictions using a stream-of-benefits theory. A number of circuits have rejected arguments by defendants to extend *Sun-Diamond* beyond 18 U.S.C. § 201 and require a direct link between the quid and the quo under other anticorruption statutes. See, e.g., *United States v. Garrido*, 713 F.3d 985, 1000–01 (9th Cir. 2013); *Jefferson*, 674 F.3d at 358; *Boender*, 649 F.3d at 654–55; *McNair*, 605 F.3d at 1190–91; *United States v. Abbey*, 560 F.3d 513, 520–21 (6th Cir. 2009); *Ganim*, 510 F.3d at 145.

371 *United States v. Alfisi*, 308 F.3d 144, 151 n.4 (2d Cir. 2002).

372 See *United States v. Whitfield*, 590 F.3d 325, 351–53 (5th Cir. 2009).

373 See *Ganim*, 510 F.3d at 141–49.

374 *Id.* at 146.

on intent to influence official action, whether specifically identified or not.<sup>375</sup> Thus, these offenses do not require *Sun-Diamond's* “limiting principle.”<sup>376</sup> Moreover, the court was emphatic in rejecting any requirement of linkage between payments and specific acts in Hobbs Act cases.<sup>377</sup>

Attempts to invoke *Skilling* as somehow undermining the stream of benefits theory have been equally unsuccessful.<sup>378</sup> Courts of appeals have held that the theory survived *Skilling*.<sup>379</sup> This is hardly surprising, since *Skilling* retained bribery offenses as part of honest services, and the stream-of-benefits theory is applied to bribery and the related offense of extortion. As the Third Circuit put it, “*Skilling* did not eliminate from the definition of honest services fraud any particular type of bribery.”<sup>380</sup> Legislation to overturn *Skilling* was once considered,<sup>381</sup> but may be unnecessary outside the area of undisclosed conflicts of interest,<sup>382</sup> given the vigor with which courts apply what is left of the statute.

The stream-of-benefits cases show a particularly aggressive attitude toward corruption on the part of the lower courts. They have taken *Evans* and run with it while distinguishing the *McCormick-Sun-Diamond* line of cases.<sup>383</sup> The Second Circuit’s language in *Ganim* is particularly instructive. Not to reach ongoing schemes could, in the court’s view, “subvert the ends of justice.”<sup>384</sup> For the court, “a reading of the statute that excluded such schemes would legalize some of the most pervasive and entrenched corruption, and cannot be what Congress intended.”<sup>385</sup> In effect, the courts have developed an approach that treats campaign contributions in the electoral

375 *Id.* at 146–47. Some courts have stated that the Supreme Court in *Sun-Diamond* was motivated in part by “a need to distinguish legal gratuities (given to curry favor because of an official’s position) from illegal gratuities (given because of a specific act).” *Id.* at 146, quoted in *United States v. Abbey*, 560 F.3d 513, 521 (6th Cir. 2009).

376 *Id.* at 146.

377 *Id.* at 146–147.

378 See Griffin, *supra* note 29, at 1838–42 (discussing “[p]oints of [e]ntry [p]ost-*Skilling*”). As Professor Griffin points out, *Skilling* cited two streams-of-benefits cases. *Id.* at 1840 & n.122.

379 See, e.g., *United States v. Bahel*, 662 F.3d 610, 631–32 (2d Cir. 2011); *United States v. Bryant*, 655 F.3d 232, 245 (3d Cir. 2011); *United States v. Urciuoli*, 613 F.3d 11, 17 (1st Cir. 2010).

380 *Bryant*, 655 F.3d. at 245; see Cohen, *supra* note 361, at 224–29 (suggesting that *Skilling* provides for a liberal interpretation of bribes and kickbacks).

381 See Honest Services Restoration Act, S. 3854, 111th Cong. § 1346A(a) (2010) (prohibiting undisclosed public and private self-dealing).

382 See Cohen, *supra* note 361, at 230–33 (questioning the need for legislation); Griffin, *supra* note 29, at 1833.

383 See, e.g., *United States v. Salahuddin*, 765 F.3d 329, 343–44, 343 n.9 (3d Cir. 2014).

384 *United States v. Ganim*, 510 F.3d 134, 147 (2d Cir. 2007).

385 *Id.* In *Urciuoli*, the First Circuit compared a bribe for a legislator’s potential use of influence over legislation in committee to “paying outright for legislative votes.” *United States v. Urciuoli*, 613 F.3d 11, 16–17 (1st Cir. 2010). For the court, “both involve the misuse of office.” *Id.* at 17.

context as presumptively valid, while direct transfers are presumptively invalid outside of it.

If one sees the Supreme Court and Congress as sharply divided over how to deal with corruption,<sup>386</sup> one can hypothesize the likelihood of another *Skilling* or *McNally*, prompted by the dilution of the quid pro quo concept. In both cases, the lower courts had been quite aggressive in stretching federal criminal legislation to reach a wide range of corrupt behavior. Pre-*McNally*, the impetus came from the lower courts themselves, while pre-*Skilling*, broad judicial discretion had the direct blessing of Congress through § 1346.<sup>387</sup> In both cases, the Supreme Court stepped in forcefully to restrict the lower courts. In the present context, the Hobbs Act, for example, might be attacked as a potentially vague statute whose unduly broad construction post-*Evans* needs correction.<sup>388</sup> A stream-of-benefits case might theoretically arise from the lower courts in a situation in which nobody had done much of anything, the corrupt scheme consisted of unspecified future benefits in return for unspecified future action, and extremely broad jury instructions were upheld on appeal.

Such a development is possible but highly unlikely. In the cases that have been decided to date, there has been action on both sides in terms of the quid, the pro, and the quo. A good example is the recent Third Circuit case of *United States v. Bencivengo*.<sup>389</sup> It involved payment to a mayor to use his influence over a school board member, even though he lacked actual power.<sup>390</sup> There was certainly a quid (a payment of \$5,000), a pro, and a quo (an agreement and an attempt to influence the member).<sup>391</sup> The Third Circuit held that lack of power did not prevent the agreement from being illegal, and joined other circuits that had “explicitly held that the mere agreement to exercise influence is sufficient to sustain a conviction for extortion under the Hobbs Act.”<sup>392</sup> In *United States v. McDonough*, the First Circuit not only endorsed the notion of implicit agreements but upheld a jury instruction that the government’s burden with respect to an honest services charge is met by showing “a scheme to make a series of payments in exchange for [the official] performing official actions benefiting [the payors] as opportunities arose or when [the official] was called upon to do

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386 See Eisler, *supra* note 183, at 365–68 (characterizing apparent differences between Congress’s and the Supreme Court’s views on corruption as a “clash between differing schools of anticorruption”).

387 See 18 U.S.C. § 1346 (2012).

388 See *United States v. Rosen*, 716 F.3d 691, 699–700 (2d Cir. 2013) (rejecting vagueness attack on an “as opportunities arise” theory of bribery prosecution); see also *Bond v. United States*, 134 S. Ct. 2077, 2093 (2014) (construing a federal criminal statute narrowly to avoid vagueness issues).

389 749 F.3d 205 (3d Cir. 2014).

390 *Id.* at 207–09.

391 *Id.*

392 *Id.* at 212.

so.”<sup>393</sup> However, payments had been made, and the official had taken action.<sup>394</sup> The same is true in other cases, partly because showing an implicit agreement would still, under the Hobbs Act, require acceptance of something by the official. Moreover, prosecutors may prefer to bring a case based on specific acts because less jury speculation about the agreement and what it covered would be necessary.

Would the Supreme Court reverse a stream-of-benefits case that permitted a nonspecific quo at the agreement stage, requiring instead a specific quo at that stage and jury instructions that reflect this requirement? There are reasons to think the Court might do so, especially in the case of a broad statute like the Hobbs Act. It would not be necessary to overrule *Evans*. That case focused on the degree of explicitness of the agreement, not the act, although there was a specific official act in the factual background. The Court might even accept the two-tier quid pro quo appearance that has grown up in the wake of that case and *McCormick*. Outside the campaign context, explicitness as to the agreement is not crucial to protect interactions between voters and candidates. Even so, the Court might find that a requirement of specificity as to the quo is not a separable part of *McCormick*'s formulation and is applicable across the board. Retaining it would ensure that quid pro quo still has teeth in saving key anticorruption statutes from vagueness challenges and would be in line with the Court's general emphasis on quid pro quo agreements as a core aspect of corruption. What the Court would be doing would constitute a rejection of the lower courts' extremely flexible approach to the concept.<sup>395</sup> As in *Skilling*, the vagueness issue has to be taken seriously, given the inherent difficulties of formulating a precise definition of corruption.<sup>396</sup>

Federalism-based precepts of statutory construction might also play a key role. The Court's recent decision in *Bond v. United States*,<sup>397</sup> is particularly relevant. Central to the Court's holding was the view “that it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute.”<sup>398</sup> Broad construction of anticorruption

393 727 F.3d 143, 160 (1st Cir. 2013), *cert. denied*, 134 S. Ct. 1041 (2014); *see also id.* at 158–60.

394 *Id.* at 155 & n.3.

395 *See* Alschuler, *supra* note 357, at 24–25. Professor Alschuler states that “[a]lthough the Supreme Court has reined in the lower federal courts as best it can, these courts have construed anti-corruption measures expansively.” *Id.* at 24–25.

396 *See, e.g.,* Mills & Weisberg, *supra* note 84, at 1388–89 (discussing the challenges of defining corruption). Professor Griffin recognizes the difficulties of defining corruption broadly but concludes that the combination of broad statutes and interstitial judicial law-making is necessary in this context. *See* Griffin, *supra* note 29, at 1826–38 (detailing criminal and common law approaches to the meaning of corruption). The rule of lenity might also be available as a means of curtailing the lower courts' broad constructions of the relevant statutes. The considerations in play seem similar to those that would arise in a vagueness analysis.

397 134 S. Ct. 2077 (2014).

398 *Id.* at 2090.



tion statutes “intrudes on the police power of the States”<sup>399</sup> both by broadening federal criminal law and in dictating how states and localities shall be governed. The latter point is not new,<sup>400</sup> but it is worth noting that Justice Scalia reiterated it in his *Sorich* opinion.<sup>401</sup> Closely related to this critique is the theme of the criminalization of politics, discussed below.<sup>402</sup> Advocates of this view have pointed to the conviction of former Virginia Governor Robert McDonnell for violation of the Hobbs Act and for honest services wire fraud, based on his extensive acceptance of a stream of gifts for alleged helpful treatment of a businessman who wished to promote his products with the state government.<sup>403</sup> The governor made clear to numerous persons, including state officials, his high regard for the donor and his products. However, McDonnell may have stopped just short of bringing to bear any pressure to advance the donor’s cause.<sup>404</sup> The Fourth Circuit sustained the conviction despite the defendant’s contentions that there was no official act on his part and that the judge’s instructions were unduly broad in permitting the jury to find official action.<sup>405</sup> The court reasoned that the instructions were “tethered” to the federal statutory definition of official action.<sup>406</sup>

The problem that courts face in honest services and Hobbs Act prosecutions is that neither statute contains the term “official act,” but courts use it in both instances in establishing a quo. In *Skilling*, the Supreme Court said that the concept of honest services bribery would “draw[ ] content” from the federal bribery statute, including its definitional section, 18 U.S.C. § 201(a).<sup>407</sup>

399 *Id.* This language in *Bond* was not directed at anticorruption statutes, but at federal criminal law generally.

400 See generally Brown, *supra* note 75, at 277–80 (addressing the intrusive effect of mail fraud prosecutions).

401 *Sorich v. United States*, 555 U.S. 1204, 1207 (2009) (Scalia, J., dissenting from denial of certiorari); see generally *Evans v. United States*, 504 U.S. 255, 290–94 (1992) (Thomas, J., dissenting) (invoking federalism concerns to argue against broad federal prosecution of corruption).

402 See Harvey Silverglate, Opinion, *Politics as Usual Often Isn’t a Crime*, BOS. GLOBE (May 6, 2015), <https://www.bostonglobe.com/opinion/2015/05/06/politics-usual-often-isn-crime/o2NyNsC0Fq5ZCq6H6pG51K/story.html>. Silverglate references recent cases involving bribery convictions of politicians, including former Illinois Governor Rod Blagojevich’s pending appeal in the Seventh Circuit. *Id.*

403 *United States v. McDonnell*, 792 F.3d 478 (4th Cir. 2015).

404 Robert McCartney, *Fuzzy Federal Law Just Might Let McDonnells off the Hook*, WASH. POST, Jan. 29, 2015, at B1 McCartney states that McDonnell may have been “shrewd enough to stay barely on the right side of the law by avoiding doing too much to help the businessman who gave him the Rolex watch, Ferrari ride and other goodies.” *Id.*

405 Principal Brief of Defendant-Appellant Robert F. McDonnell at 24–59, *McDonnell*, 792 F.3d 478 (No. 15-4019).

406 *McDonnell*, 792 F.3d at 509.

407 *Skilling v. United States*, 561 U.S. 358, 412 (2010). The Hobbs Act is slightly more helpful, referring to obtaining property “under color of official right.” 18 U.S.C. § 1951 (2012). Section 201(a)(3) provides that 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 such official’s official capacity, or in such official’s place of trust or profit.” *Id.* § 201(a)(3).

As argued above, the key question should be whether the *agreement*, implicit in the acceptance of the stream of benefits, covered future performance or official acts. It is thus commonplace for courts to use the § 201 definition in both contexts as part of a broader instruction.<sup>408</sup> In *McDonnell*, the defendant argued that the judge's instructions stretched § 201(a) to include commonplace actions by public officials that, while "official acts" in some sense, did not meet the technical requirements of § 201(a).<sup>409</sup> While the nature of the quo was the central issue in McDonnell's challenge to the instructions, he apparently accepted the notion of somewhat generalized benefits that the stream-of-benefits theory incorporates.<sup>410</sup> It would seem then that the important question is whether McDonnell, in accepting the gifts, agreed to perform official acts at some point. An ultimate reversal by the Supreme Court could have serious negative implications for the stream-of-benefits theory and its broad approach to quid pro quo.

Furthermore, one can find in McDonnell's arguments an adumbration of the convergence arguments discussed in this Article. For example, he relies heavily on the Supreme Court's decision in *Sun-Diamond*, even though that case involved a different offense and payments to a federal, as opposed to state, official.<sup>411</sup> Perhaps most surprising is his reliance on *Citizens United* for the proposition that "[i]ngratiation and access . . . are not corruption."<sup>412</sup> Campaign contributions were not involved in *McDonnell*, although he was an elected official.

The amicus brief in *McDonnell* filed by a group of law professors is particularly striking. It comes close to adopting a theory of convergence. It cites *Citizens United* frequently, discusses it at length, and states that "[i]f dicta in *Citizens United* and *McCutcheon* define what *is not* corruption, then *Skilling v. United States*, decided several months after *Citizens United*, defined what *is*."<sup>413</sup> While they plant the seed of convergence, however, the professors also pull back by noting that *McDonnell* involved "gifts outside of an election."<sup>414</sup> The case is a possible candidate for certiorari and reversal. In addition to the question of official acts and its relevance, the case is rife with issues of federalism, the rule of lenity, vagueness, and possible prosecutorial overreach.<sup>415</sup>

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408 See, e.g., Brief of the United States at 64–65, 65 n.11, *McDonnell*, 792 F.3d 478 (No. 15-4019).

409 Reply Brief of Defendant-Appellant Robert F. McDonnell at 16–18, *McDonnell*, 792 F.3d 478 (No. 15-4019).

410 See *id.* at 33–34 (addressing the trial court's jury instructions). But see Brief of the United States at 66, *McDonnell*, 792 F.3d 478 (No. 15-4019) (same).

411 Reply Brief of Defendant-Appellant Robert F. McDonnell at 21, 30–31, 37, *McDonnell*, 792 F.3d 478 (No. 15-4019).

412 *Id.* at 1 (alteration in original) (citing *Citizens United v. FEC*, 558 U.S. 310, 360 (2010)).

413 Brief of *Amici Curiae* Law Professors in Support of Defendant-Appellant at 11, *McDonnell*, 792 F.3d 478 (No. 15-4019).

414 *Id.* at 10.

415 See, e.g., *id.* at 14–16 (discussing due process, notice, and prosecutorial discretion). There are also issues concerning the conduct of the trial, particularly the possibility of

The case is perhaps closer to a gratuity situation that might lead to official action, rather than an instance that can be reached by honest services bribery and the Hobbs Act. Still, it is hard to ignore the central fact of acceptance of lavish transfers of value to an official from a donor with a potential interest in state assistance and the implicit agreement in the acceptance. One way of looking at the case is to ask whether, if the acts actually taken do not rise to the level of “official,” that fact limits the scope of the agreement and places it outside of bribery. Alternatively, a jury might find that they show an intent to perform official acts in the future.

What the Supreme Court would do if it heard *McDonnell* is unpredictable. Any outcome that could be read as raising serious questions about this stream-of-benefits approach would be unfortunate. The concept of bribery, as explained, for example, in *Sun-Diamond*, points toward the broader quo. Justice Scalia focused on the intent element of bribery<sup>416</sup> and on the concept of quid pro quo as capturing “a specific intent to give or receive something of value *in exchange* for an official act.”<sup>417</sup> It is this concept of sale of office that makes bribery a crime. The First Circuit has stated that paying for influence and paying for votes are similar, as “both involve the misuse of office.”<sup>418</sup> Whether the sale involves a specific future act or some undetermined act seems secondary. If anything, as the Second Circuit said in *Ganim*, the prospect of multiple future acts increases the wrongfulness of the sale.<sup>419</sup> The sale of the office, not the form it takes, is key. As the Sixth Circuit said in an analogous situation, an elected judge does not have the “First Amendment right to sell a case so long as the buyer has not picked out *which* case at the time of sale.”<sup>420</sup>

As for *Citizens United*, I think it does not negate what the lower courts are doing in ordinary corruption cases. Quid pro quo corruption is possible in the electoral context, but competing values of an open electoral process perhaps justify a strict inquiry to protect that process. Once one leaves the electoral context, however, a broader view of corruption is more in accord with

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juror prejudice. The Fourth Circuit dealt briefly with these questions. Moreover, it largely ignored the criminalization-of-politics cluster of issues. Obviously, the Fourth Circuit considered at length the question of official act. *McDonnell*, 792 F.3d at 505–13. In a somewhat unusual approach for an appellate court, the first part of the opinion is devoted to an extensive recitation of the numerous gifts to McDonnell and his apparent efforts to help the donor. *Id.* at 486–93. The court stated that the donor “lavished [McDonnell] with shopping sprees, money, loans, golf outings, and vacations.” *Id.* at 519. The case could also be seen as an example of federal overcriminalization. *See, e.g.,* *Yates v. United States*, 135 S. Ct. 1074, 1100 (2015) (Kagan, J., dissenting) (citing dangers of “overcriminalization and excessive punishment in the U.S. Code”). In the context of a critique of overcriminalization, Silverglate has articulated a general, critical appraisal of the federal anticorruption role. *See* HARVEY A. SILVERGLATE, *THREE FELONIES A DAY* xvi–xix, 3–44 (2d ed. 2011).

416 *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 403–07 (1999).

417 *Id.* at 404–05.

418 *United States v. Urciuoli*, 613 F.3d 11, 17 (1st Cir. 2010).

419 *United States v. Ganim*, 510 F.3d 134, 147 (2d Cir. 2007).

420 *United States v. Terry*, 707 F.3d 607, 614 (6th Cir. 2013).

the values of democratic governance. Admittedly, the lower courts are stretching the concept of *quid pro quo*—particularly the *quo*—to make that broader view a reality. I view this as sound public policy. A theory of convergence, as opposed to the existence of two bodies of federal anticorruption law—one in and one outside the electoral context—makes less sense.

#### IV. A BRIEF NOTE ON THE CRIMINALIZATION-OF-POLITICS CRITIQUE

Closely related to convergence theory is the “criminalization-of-politics” critique. A good example of this critique in operation is the extensive controversy generated by *McDonnell*. The case has become a lightning rod for those who oppose, on various grounds, the current extensive federal role in prosecuting state and local officials. According to noted defense attorney Harvey Silverglate:

In an extraordinary demonstration of concern by numerous sectors of political and civil society, friend-of-the-court briefs were filed in McDonnell’s support by former and current members of the Virginia General Assembly, former Virginia attorneys general, law professors, and the National Association of Criminal Defense Lawyers, which has been working with liberal and conservative partners to rein in federal prosecutorial overreach. McDonnell’s supporters span the spectrum, from former US Attorney General John Ashcroft to former president of the NAACP Benjamin Jealous.<sup>421</sup>

In addition to *McDonnell*, Silverglate cites current prosecutions involving patronage by a Massachusetts official and attempted logrolling by former Governor Rod Blagojevich of Illinois.<sup>422</sup> To these cases might be added the prosecution of former associates of Governor Chris Christie of New Jersey for the political retaliation known as Bridgegate.<sup>423</sup> For Silverglate, all such cases present the question whether “the officials’ conduct constitutes [a federal crime] or merely common (even if sometimes tawdry) state politics.”<sup>424</sup>

*McDonnell* seems like a strange case in which to take a stand against the “criminalization of politics.” The Governor and his family received extraordinary largesse from a donor who wanted to do business with the state. However, McDonnell’s amici supporters are quite firm in advancing the criminalization argument. His actions are described as “part and parcel of the political process,”<sup>425</sup> “routine political activity that public officials engage in every day on behalf of their supporters,”<sup>426</sup> “innocent conduct that occurs on a routine basis,”<sup>427</sup> and “actions that, in the main, are indistinguishable

421 SILVERGLATE, *supra* note 415.

422 *Id.*

423 See Indictment, United States v. Baroni, No. 15-193 (D.N.J. Apr. 23, 2015).

424 SILVERGLATE, *supra* note 415.

425 Brief of *Amici Curiae* Law Professors in Support of Defendant-Appellant, *supra* note 413, at 3.

426 Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Appellant and Urging Reversal at 2, *McDonnell*, 792 F.3d 478 (No. 15-4019).

427 Brief of Former Federal Officials as *Amici Curiae* in Support of Defendant-Appellant Robert F. McDonnell at 2–3, *McDonnell*, 792 F.3d 478 (No. 15-4019).

from actions that nearly every elected official in the United States takes nearly every day.”<sup>428</sup> As Silverglate suggests, critiques of this nature are not limited to *McDonnell*.<sup>429</sup> They are representative of what might be called the critique of the criminalization of politics.

A provocative introduction to the subject is the Brookings Institution’s study by Jonathan Rauch titled *Political Realism: How Hacks, Machines, Big Money, and Back-Room Deals can Strengthen American Democracy*.<sup>430</sup> Rauch sees “a growing number of scholars and practitioners”<sup>431</sup> embracing a form of “political realism,” which “while coming in many flavors, is emerging as a coherent school of analysis and offers new directions for a reform conversation which has run aground on outdated and unrealistic assumptions.”<sup>432</sup> Central to Rauch’s concept of political realism is the view that the system cannot produce effective governance without extensive interaction, dealmaking, and compromise among public officials.<sup>433</sup> For him, “[b]ack-scratching and logrolling are signs of a healthy political system, not a corrupt one.”<sup>434</sup> Rauch accepts the inevitability of a “war” on corruption.<sup>435</sup> However, for him, it is a “Tasmanian Devil of entrenched assumptions, the tail-chasing, tree-munching, all-consuming, ever expanding, and by now entirely counterproductive war on corruption.”<sup>436</sup>

The criminalization critique is not new. Most of its elements have long been part of the American debate about what constitutes corruption and how to deal with it. One can find ample academic and judicial discussions of such aspects of the problem as federalism,<sup>437</sup> overly broad statutes,<sup>438</sup> and the resultant prosecutorial discretion.<sup>439</sup> Indeed, the general critique of anticorruption initiatives has been around for some time.<sup>440</sup>

What, if anything, has changed to give the criminalization critique more credibility than it had before? I do not think it is a newfound aggressiveness on the part of federal prosecutors. They certainly pushed the envelope in

428 Amicus Curiae Brief of the Republican Governors Public Policy Committee in Support of Appellant and Reversal at 6, *McDonnell*, 792 F.3d 478 (No. 15-4019). It is hard to believe that acceptance of tens of thousands of dollars in gifts ranging from loans and transfers to shopping sprees and golf outings are the core of American politics.

429 SILVERGLATE, *supra* note 415.

430 JONATHAN RAUCH, BROOKINGS INST., *POLITICAL REALISM: HOW HACKS, MACHINES, BIG MONEY, AND BACK-ROOM DEALS CAN STRENGTHEN AMERICAN DEMOCRACY* (2015).

431 *Id.* at 2.

432 *Id.*

433 *Id.*

434 *Id.* at 7.

435 *Id.* at 30.

436 *Id.*

437 See, e.g., Moohr, *supra* note 75 (arguing that federal mail fraud prosecutions of state and local officials under the intangible rights doctrine implicates federalism concerns).

438 *Skilling v. United States*, 561 U.S. 358, 415–24 (2010) (Scalia, J., concurring in part and concurring in the judgment).

439 *Id.*

440 See generally Brown, *supra* note 48, at 756–64 (discussing critiques to post-Watergate anticorruption initiatives).

the old days of “honest services.”<sup>441</sup> Elite opinion seems dominated by books emphasizing the evils of corruption. The works of Jay Cost, Lawrence Lessig, and Zephyr Teachout come quickly to mind.<sup>442</sup>

An important possible source of impetus for the critique is the judiciary.<sup>443</sup> *Citizens United* has obviously played a role. Apart from its First Amendment dimensions, it is a case about politics. The criminalization critics build on *Citizens United* to present politics as a continuum. Politics does not stop with the election, as candidate supporters seek influence and access once the candidate is in office. One could also find a variant of what Rauch calls “transactional politics.”<sup>444</sup> Elected officials will respond to their supporters in order to keep getting elected. The result is a kind of bargain. Obviously, I think that it is important to confine this view as much as possible to the electoral context, just as Rauch’s transactional politics are confined to dealings between public officials. McDonnell’s champions either don’t see or don’t care that the slippery slope leads to viewing direct transfers of value—whether to elected officials such as governors or to nonelected officials—as just another attempt to influence the political process. McDonnell’s defense takes convergence theory to its ultimate conclusion: the equation of campaign contributors with those who give gifts once the candidate is in office. Thus campaign contributions and gifts stand on equal constitutional footing as examples of the political process.

A possible significant victory for the criminalization critique is the Seventh Circuit’s recent reversal of some of the convictions of former Illinois Governor Rod Blagojevich.<sup>445</sup> The election of Senator Barack Obama to the presidency gave the Governor the power to appoint a successor. He saw in this opportunity great potential for private gain. The Governor allegedly promised, through intermediaries, to appoint a close associate of the President-elect. In return, he sought one of three things: a cabinet job, presidential intervention to get a foundation to hire him after his term ended, or intervention to create a new “social-welfare” organization that he would control.<sup>446</sup> For this and other questionable conduct,<sup>447</sup> he was prosecuted under several federal statutes, including the wire fraud statute’s provision on honest services bribery.<sup>448</sup>

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441 See generally *Sorich v. United States*, 555 U.S. 1204 (2009) (Scalia, J., dissenting from denial of certiorari) (arguing that the absence of a limiting principle to honest services invites prosecutorial abuse).

442 See generally JAY COST, *A REPUBLIC NO MORE* (2015); see also Lessig, *supra* note 73; TEACHOUT, *supra* note 1.

443 Cf. SILVERGLATE, *supra* note 415 (noting early signals from courts of appeals in current cases).

444 RAUCH, *supra* note 430, at 7.

445 *United States v. Blagojevich*, 794 F.3d 729 (7th Cir. 2015).

446 *Id.* at 733.

447 *Id.* at 733–34.

448 *Id.* at 735–36. As noted, the wire fraud statute works in tandem with the honest services statute, which *Skilling* restricted mainly to bribery.

Although it upheld most of the guilty verdicts, the Seventh Circuit reversed the convictions based on the dealings with the President-elect. The court found that the jury might have reasoned that Blagojevich attempted to deal the Senate appointment for any one of three things, including his cabinet appointment.<sup>449</sup> It reasoned 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.”<sup>450</sup> In an apparent endorsement of transactional politics, the court singled out logrolling and stated that “[g]overnance would hardly be possible without these accommodations.”<sup>451</sup> It declined to find in the statutes “a rule making *everyday politics criminal*.”<sup>452</sup>

Adherents of the criminalization critique will seize on *Blagojevich* as a victory,<sup>453</sup> just as they draw support from *Citizens United*. But each case contains clear limitations. The Seventh Circuit was careful to draw a distinction between “private benefit[s]”<sup>454</sup> and interactions between officials. *Citizens United* was about limits on contributions to elections. It also does not extend to direct private transfers of value to public officials, even elected ones. McDonnell and his defenders engage in a form of sleight of hand when they attempt to equate private benefactors with campaign contributors by lumping both under the heading of “supporters.”<sup>455</sup> McDonnell may ultimately prevail.<sup>456</sup> However, the central issue is likely to be whether official acts were needed, and properly defined in the instructions, as opposed to an endorsement of private transfers of value as an essential part of “transactional politics.”

*Blagojevich* is a particularly important case. Since it represents the first judicial victory for the current criminalization-of-politics critique, it will

449 *Id.* at 735–35.

450 *Id.* at 734.

451 *Id.* at 735.

452 *Id.* (emphasis added). The court also reasoned that the Hobbs Act was inapplicable because no “property” was obtained. *Id.* at 735–36. In his brief, Blagojevich argued that he was convicted “for the non-existent crime of attempted political horse-trading.” Brief and Short Appendix for Defendant-Appellant Rod Blagojevich at 36, *Blagojevich*, 794 F.3d 729 (No. 11-3853).

453 See SILVERGLATE, *supra* note 415 (treating *Blagojevich* as an important criminalization case).

454 *Blagojevich*, 794 F.3d at 737.

455 Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Appellant and Urging Reversal, *supra* note 426, at 2; see also Defendant-Appellant’s Motion to Clarify Order Granting Release at 16, *United States v. McDonnell*, 792 F.3d 478 (4th Cir. 2015) (No. 15-4019) (equating gifts and campaign donations). In his petition for certiorari, McDonnell makes the following argument: “[P]aying for ‘access’—the ability to get a call answered or a meeting scheduled—is constitutionally protected and an intrinsic part of our political system.” Petition for Writ of Certiorari at 14, *McDonnell*, 792 F.3d 478 (citing *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450–51 (2014)). “Yet Gov. McDonnell was convicted for, at worst, providing just that.” *Id.*

456 See, e.g., McCartney, *supra* note 404 (discussing possibility that the McDonnells could “eventually be fully cleared on appeal”). The current Court’s emphasis on narrow statutory construction certainly works in his favor.

receive an unusual amount of attention. The case presents an issue first visited by Professor Daniel Hays Lowenstein thirty years ago: can transactions between elected officials ever be treated as bribery, even if the result of such transactions is personal gain?<sup>457</sup> The Seventh Circuit appears to hold categorically that “political logrolling” is not a form of bribery.<sup>458</sup> The court felt that the private gain from a job was not distinguishable from the political gain that a politician would receive from a successful deal.<sup>459</sup> The political gain would ultimately result in private gain in this situation also.<sup>460</sup> Still, a political deal that involves a direct payment, albeit from the public fisc, presents the twin dangers of skewed decisionmaking and public action for private benefit.

The Seventh Circuit suggests a line that mitigates these dangers: logrolling between *elected* officials. The examples it uses all involve such officials.<sup>461</sup> It is likely that such deals usually do not involve direct personal gain. The few that involve it represent the price we pay for (necessary) logrolling.

What about deals between elected officials and nonelected ones? These, too, will be common in our system of transactional politics. Thus, State Senator A may push for an increased state education budget in return for a commitment from the Commissioner of Education to place the next community college in the Senator’s district. So far so good, but how does the law handle the situation where the Senator supports the increase in return for a commitment to hire the Senator’s spouse as a lecturer at the college?<sup>462</sup> Perhaps there are good reasons to confirm the *Blagojevich* result to elected officials, each one of whom has a potential degree of influence over the other. The hypothetical looks more like an attempt to use public office for private gain than an example of “transactional politics.”

A final question about *Blagojevich* is whether the decision will have ramifications beyond cases of transfers of value. The most obvious candidate is patronage, an area that is the subject of the criminalization critique.<sup>463</sup> Patronage as a means of party building can be defended as integral to a system that relies on parties. Patronage certainly has been defended along these lines by observers ranging from city councilors<sup>464</sup> to Justice Scalia.<sup>465</sup> It

457 See Lowenstein, *supra* note 23.

458 *Blagojevich*, 794 F.3d at 736.

459 *Id.* at 736–37.

460 *Id.* at 733. See Lowenstein, *supra* note 23, at 828 (distinguishing between personal and political benefits).

461 *Blagojevich*, 794 F.3d at 735. The court employed hypotheticals using the President, a senator, and congressmen. *Id.*

462 See *United States v. Bryant*, 655 F.3d 232, 237 (3d Cir. 2011) (in which a state senator increased funding for a state college, and a dean at the college hired the senator in a “low show” job as a “Program Support Coordinator”).

463 See Silverglate, *supra* note 415 (including patronage prosecutions as evidence of the criminalization of routine politics).

464 Tom Keane, Opinion, *Indictments, Then Politics as Usual*, BOS. GLOBE (Apr. 7, 2012), <https://www.bostonglobe.com/opinion/2012/04/06/indictments-then-politics-usual/QjXfszQF52Tr9nV1zqJnqL/story.html>. Mr. Keane is a former Boston city councilor.



comes in different forms, but usually involves a deal: support for the party, or a particular politician, in return for a government job. Even though private gain is involved (the job), patronage schemes may look more like the logrolling in *Blagojevich* than the deal in the state senator hypo. It will be interesting to see how far *Blagojevich* stretches in patronage litigation. A current high-profile patronage case is working its way through the First Circuit. The Massachusetts Commissioner of Probation was found guilty of giving jobs to legislators in return for their support of his department.<sup>466</sup> This is clearly logrolling. Under *Blagojevich*, he might make a logrolling defense to any bribery charges. However, he was not an elected official. Thus, under the interpretation of *Blagojevich* discussed above, he should not be able to invoke it.

As for the Bridgegate trial, it is early in the game, but the form of political retaliation there looks like the reverse of logrolling: here's what one gets for not supporting the governor. Although the logrolling defense of *Blagojevich* is probably not available, the prosecution may have a hard time fitting the retaliatory acts under federal criminal statutes.<sup>467</sup> The New Jersey political processes may already have come into play in the form of damage to the Governor, apart from any national damage.<sup>468</sup>

In sum, I am inclined to see the criminalization-of-politics argument as the latest round in an ongoing debate. The strength of the critique—and its various components—waxes and wanes over time. For example, there is an obvious concern on the part of the current Court over unduly broad construction of federal criminal statutes, a principal component of the debate. Overall, I think the criminalization critique is unlikely to prevail to a significant degree, but it serves the important checking function of reminding federal prosecutors and judges of the need for outer boundaries to the federal anticorruption enterprise. As for *Citizens United*, its impact on the electoral system is controversial.<sup>469</sup> Its impact on ordinary corruption should be minimal.

## CONCLUSION

In *Citizens United v. FEC*, a majority of the Supreme Court articulated a vision of corruption that accepts as desirable the gaining of influence and

465 *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting).

466 *See United States v. O'Brien*, 994 F. Supp. 2d 167 (D. Mass. 2014) (denying motion to dismiss indictment).

467 *See, e.g.*, Dave Neese, Opinion, *Prosecution Takes a Bridge Scandal Too Far*, THE TRENTONIAN (May 10, 2015), <http://www.trentonian.com/opinion/20150510/opinion-prosecution-takes-a-bridge-scandal-too-far>.

468 *See, e.g.*, Kate Zernike & Nick Corasaniti, *New Jersey Could Be a Tough State for Chris Christie*, N.Y. TIMES (June 30, 2015), [http://www.nytimes.com/2015/07/01/us/politics/a-tough-state-for-chris-christie-to-win-could-be-new-jersey.html?\\_r=0](http://www.nytimes.com/2015/07/01/us/politics/a-tough-state-for-chris-christie-to-win-could-be-new-jersey.html?_r=0).

469 *See* Nicholas Confessore et al., *Small Pool of Rich Donors Dominates Election Giving*, N.Y. TIMES (Aug. 1, 2015), <http://www.nytimes.com/2015/08/02/us/small-pool-of-rich-donors-dominates-election-giving.html>.

access through participation in the electoral process, including independent expenditures that aid a candidate. *McCutcheon* reaffirmed that vision, particularly the importance of safeguarding “[t]he line between *quid pro quo* corruption and general influence.”<sup>470</sup> Outside of the electoral context, however, much of the federal government’s anticorruption enterprise is aimed at efforts to secure, or provide, special treatment in government action. Statutes prohibiting bribery, extortion, and gratuities are at the core of this enterprise. This Article has raised the specific question of whether *Citizen United*’s version of corruption should provide guidance to these efforts outside the electoral context in what I have referred to as the context of “ordinary corruption.” It has also raised the questions of whether there should be a relatively unified set of principles to guide Congress and the federal courts in both areas, whether as a matter of constitutional law or statutory interpretation, and whether such a unification is already underway.

This Article offers essentially negative answers to all these questions. Influence acquired by expenditures in the rough-and-tumble of elections should not be viewed in the same way as influence acquired through direct payments to officials. Admittedly, the two contexts deal with the problem of attempts to purchase access, ingratiation, and influence. However, they are sufficiently different that having two approaches makes sense. When one leaves the realm of theory to examine the Court’s decisions outside the electoral context, the picture is, I admit, less clear. Cases such as *Skilling* and *Sun-Diamond* point in the same direction as *Citizens United*: toward a narrow view of what constitutes corruption. I contend these cases have not had the impact that some contend and that they do not represent a significant step toward a unified view of corruption. Rather, *Evans* has been the case with generative force. The lower courts have built upon it to construct the stream-of-benefits theory, an approach that permits criminalization of wide ranges of influence-seeking behavior. Of course, this approach is potentially vulnerable until the Supreme Court approves it. Twice before, the Court has stepped in to halt such developments, one of which had the direct approval of Congress. Another *Skilling* or *McNally* is surely possible. The newfound strength of the criminalization-of-politics critique—particularly its tolerant approach to transfers of value—may serve as an additional impetus towards this result. Such an effort to rein in the lower courts’ search for the outer limits of unlawful purchased influence would be a mistake. It would severely undermine the important principles of democratic government that propel and justify the federal anticorruption enterprise. As for the criminalization critique, it does serve as a reminder of the need to be conscious of potential limits to that enterprise. It should not, however, lead to a “politics as usual” approach that brings the enterprise to a halt.

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470 *McCutcheon v. FEC*, 134 S. Ct. 1434, 1451 (2014) (plurality opinion).

