NOTE

A FIRST AMENDMENT RIGHT TO CORRUPT YOUR POLITICIAN

Eugene Temchenko†

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

INTRODUCTION ............................................. 466

I. MCDONNELL V. UNITED STATES: SUPREME COURT DEFINES THE BRIbery STATUTE'S "OFFICIAL ACT" REQUIREMENT ............................................. 470

† Boston University, B.A. Political Science & Philosophy, 2012; Cornell Law School, J.D. candidate, 2018; Executive Editor, Cornell Law Review, Volume 103. I am deeply grateful to Adoree Kim for inspiring my interest in white collar offenses. I would also like to thank Professor Michael Dorf and Professor Stephen Garvey for their guidance and thoughtful comments during the writing of this Note and the members of the Cornell Law Review, namely: Rachel Bachtel, J. Xander Saide, Jesse Sherman, Grant Giel, John Ready, Nicholas Halliburton, Peter Kahnert, Scott Cohen, Sue Pado, and the Volume 103 Associates. Finally, utmost gratitude to my parents for their support of my academic pursuits.
A. The Governor of Virginia Sells Special Treatment for a Rolex .................... 471
B. The Jury Believes the Sale Is Corrupt and Criminal ................................ 472
C. The Supreme Court Disagrees ......................... 474
D. No Mens Rea, No Corruption ..................... 476

II. DRAWING A LINE BETWEEN CORRUPTION AND POLITICAL SPEECH .................. 480
A. Originally, Corruption Was Viewed as the Bane of Society, a Moral Evil, and an Act Entirely Separate from Political Activity .................... 481
B. To Protect Campaign Financing, the Court Diverged Corruption into Campaign Finance Corruption and Criminal Corruption .......... 483
C. Recently, the Court Began to Reunify Corruption, Conforming Criminal Corruption to Campaign Finance Corruption .............. 486
D. McDonnell Signals the Impending Demise of the Distinction ......................... 489

III. A LINE DRAWN TOO FAR: A FIRST AMENDMENT RIGHT TO CORRUPT YOUR POLITICIAN .................... 491
CONCLUSION ............................................ 497

INTRODUCTION

To protect speech, the Court forsakes integrity in government. This has been the trend in campaign finance cases, beginning with Buckley v. Valeo1 and becoming notorious in Citizens United2: laws that shield us from corruption concede to the First Amendment right of political association.3 Can an incumbent demand that her constituents pay tribute in return for having their concerns heard? Can a company purchase the advocacy of an incumbent? Thus far, scholars have asserted that Citizens United applies only in the campaign context, such that the First Amendment protects campaign financing but not bribery or extortion.4 After McDonnell v. United States,5 how-

---

1 424 U.S. 1 (1976).
3 For discussion of case law on campaign financing, see Jon Ellingson, How the Court Got It Wrong and Jeopardized Our Democracy, MONT. LAW., May 2016, at 10, 22–23.
4 See, e.g., Nicholas Almendares & Catherine Hafer, Beyond Citizens United, 84 FORDHAM L. REV. 2755, 2777 (2016) (arguing that "Citizens United's use of 'corruption' is very much a term of art" that is applicable only in campaign finance cases).
5 136 S. Ct. 2355 (2016).
ever, *Citizens United* may have force outside the campaign-financing context—there may be a constitutional right to corrupt your politician.

In *McDonnell*, the Supreme Court attempted to draw the line between criminal corruption and permissible constituent service.⁶ The case involved the Governor of Virginia who, in exchange for hundreds of thousands of dollars' worth of gifts and loans, used his position as the governor to champion a dietary supplement.⁷ The jury found the Governor guilty of taking a bribe⁸ under the Hobbs Act, 18 U.S.C. § 1951, but the Supreme Court reversed the conviction, holding that sale of influence alone was not punishable.⁹

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

---


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


¹² See Malloy, supra note 6.
As a preliminary matter, however, one ought to consider whether we should be concerned about the selling of influence, favor, and advocacy at all. Most would characterize such sales as corruption. Yet some empirical studies suggest corruption is neither prevalent in, nor harmful to, the United States. One ought to reject this conclusion for two reasons. First, political scientists have long cautioned that corruption can transform a representative democracy into a tyranny. Congress appreciated this threat and so enacted statutes to prevent corruption of public office. In fact, a number of studies substantiate these fears, finding significant and detrimental effect of money on politics. Second, corruption harms public trust in government. As of 2015, 75% of Americans perceived corruption as widespread on Capitol Hill. This distrust in the U.S. political system was also evident in the 2016 election.

---

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


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

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

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

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


cordingly, we must not delay in addressing corruption—its problems are present and immediate.\textsuperscript{21}

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

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


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

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


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

\textsuperscript{25} Cf. JOHN ADAMS, A DISSERTATION ON THE CANON AND FEUDAL LAW (1765), reprinted in 3 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS 447, 457 (Charles C. Little & James Brown eds., 1851) (extolling the virtues of the press and discourse as shields against “the ambition or avarice of any great man” and “the jaws of power”).
In Part II, the Note explores the question of whether the Governor engaged in any corruption at all. Here, the Note finds that the McDonnell Court adopted a definition of corruption identical to that established in Citizens United and McCutcheon. Under this definition, the Governor was not corrupt. The Note contends that this definition may extend First Amendment protection to the sale of political influence and favor, "rules-free policymaking and electioneering."26

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

I

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

Prosecutors often charge officials with violations of the Hobbs Act, 18 U.S.C. § 1951, or with honest services fraud, 18 U.S.C. § 1346, by establishing bribery, as defined in 18 U.S.C. § 201.27 To establish bribery, the government must prove that (i) something of value was offered to or received by (ii) an incumbent official or a candidate for office, with the (iii) intent to either "influence any official act" or "be[ ] influenced in the performance of any official act."28 Yet the Supreme Court's guidance on this statute is somewhat lacking. The Court has not addressed the bribery statute since 1999, when in United States v. Sun-DiamondGrowers of California the Court required

---


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

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

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

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

---

31 See United States v. McDonnell, 792 F.3d 478, 486–90 (4th Cir. 2015).
32 See id. at 487.
33 See id.
34 Id.
35 See id.
36 See id. at 487–88.
37 See id. at 488–89.
ing a vacation at Williams’s multimillion-dollar home, a boat rental, use of Williams’s Ferrari and Range Rover, a Rolex watch, and new golf clubs and bags.38

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

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

B. The Jury Believes the Sale Is Corrupt and Criminal

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

38 See id. at 489–90.
39 See id.
40 See id. at 490.
41 See id.
43 McDonnell, 792 F.3d at 491.
45 Id. at 11.
46 See McDonnell v. United States, 136 S. Ct. 2355, 2365 (2016) (“The theory underlying both the honest services fraud and Hobbs Act extortion charges was that Governor McDonnell had accepted bribes from Williams.”).
parties agreed to define pursuant to the Federal Bribery Statute, 18 U.S.C. § 201 as:

[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.47]

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

McDonnell appealed to the U.S. Court of Appeals for the Fourth Circuit, arguing that the following jury instruction on the meaning of "official act" was erroneous50:

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

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

48 See McDonnell, 792 F.3d at 486.
50 See McDonnell, 792 F.3d at 494. The Governor also raised several procedural and substantive arguments, which the Court of Appeals dismissed. Id. at 486. This Note will not address these challenges.
51 Id. at 505–06.
52 See id. at 506–08 (citing United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999); United States v. Birdsall, 233 U.S. 223 (1914)) (noting that the district court's instructions were not overbroad and conformed to Supreme Court precedent).
Appeals also upheld the district court's decision to reject McDonnell's proposed instructions.53

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

C. The Supreme Court Disagrees

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

53 See id. at 513 (noting the Governor's proposed instructions that "[m]any settled practices of government officials are not official acts' . . . [w]as not a statement of law . . . [b]ut a thinly veiled attempt to argue the defense's case").
54 Id. at 517.
55 Id. at 516.
56 Id.
57 See id. at 518–20.
58 Id. at 520.
61 Id. at 2367.
an 'official act.'" In reaching this conclusion, the Supreme Court developed a two-part test to determine whether a public official acted officially. First, did the public official's conduct constitute a "formal exercise of governmental power"? Second, did the public official decide a matter that by law is the official's duty to decide, or intentionally influence another official to decide such a matter?

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

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

---

62 Id. at 2368.
63 Id. at 2369.
64 See id. at 2372; see also United States v. Jones, 207 F. Supp. 3d 576, 580–81 (E.D.N.C. 2016) (summarizing the two-part test).
65 McDonnell, 136 S. Ct. at 2368 (citing Crimes Act of 1790, 1 Stat. 117 (for use of these terms in judicial proceeding context); BLACK'S LAW DICTIONARY 278–79, 400, 1602–03 (4th ed. 1951) (for definition of these terms); 18 U.S.C. § 201(b)(3) (for use of these terms within the same statute)). The Chief Justice also noted that while "question" and "matter" could be defined broadly, "the familiar interpretive canon noscitur a sociis, 'a word is known by the company it keeps,'" urged a narrow reading. Id. Moreover, interpreting "question" and "matter" broadly would render the other terms impermissibly superfluous. See id. at 2369 (citing Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy, 548 U.S. 291, 299 n.1 (2006)).
66 Id. (quoting 18 U.S.C. § 201(a)(3)).
67 Id.
68 See id. ("Economic development is not naturally described as a matter 'pending' before a public official—or something that may be brought 'by law' before him—any more than 'justice' is pending or may be brought by law before a judge, or 'national security' is pending or may be brought by law before an officer of the Armed Forces.").
69 See id. at 2370.
sion or take an action on" an official matter or question, not merely act in a manner "related to a pending question or matter." An official could also be prosecuted for agreeing to perform the official act, even if the official never intended to perform. Nonetheless, "meeting with other officials, or speaking with interested parties is not, standing alone, a 'decision or action.'" That being said, such meetings and parties could "serve as evidence of an agreement to take an official act," if the "official was attempting to pressure or advise another official on a pending matter." What the prosecution must show is that "the public official . . . intend[ed] to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an 'official act.'"

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

D. No Mens Rea, No Corruption

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

---

70 Id.
71 Id. at 2371.
72 Id. at 2370 (citing United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 407 (1999)).
73 Id. at 2371.
74 Id.
75 Id. at 2374–75.
76 See id.
77 Id. at 2375.
views of McDonnell—Harvey Silverglate and Emma Quinn-Judge assert that the Court's definition of official action is still too ambiguous and "poses grave risks of prosecution without fair notice." According to their article, too fine of a line exists between, for example, "narrowing down the list of potential research topics"—an official act, and "gathering additional information"—not an official act. Silverglate and Quinn-Judge claim that "this very fine distinction . . . disappears completely when the question shifts to performance of an official act," because the jury is permitted to conclude that "the official was attempting to pressure or advise another official on a pending matter." Accordingly, they conclude that the prosecution could hold any official liable "so long as it can find some connection to an official act—be it a 'qualifying step' on the road to a decision or an attempt to exert pressure or offer advice to another official who is performing an official act."

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

---

81 Id. at 205 (quoting McDonnell, 136 S. Ct. at 2370) (internal quotations omitted).
82 Id. at 205.
83 Id. at 206 (quoting McDonnell, 136 S. Ct. at 2371) (internal quotations omitted).
84 Id. (quoting McDonnell, 136 S. Ct. at 2370).
85 Id. (quoting McDonnell, 136 S. Ct. at 2371) (internal quotations omitted).
86 See McDonnell, 136 S. Ct at 2372 ("[T]he public official must make a decision or take an action on [a] question . . . or . . . use[e] his official position to exert pressure on another official . . . or . . . advise another official." (internal quotations omitted)).
"agreed to perform . . . at the time of the alleged quid pro quo."\(^{87}\) Second, when an official "us[es] his official position to exert pressure on another official to perform an 'official act,'" the prosecution must show that the official intended to exert pressure.\(^{88}\) Third, the official act requirement is established if an official "advise[s] another official, knowing or intending that such advice will form the basis for an 'official act' by another official."\(^{89}\) In other words, the Court added mens rea requirements for prosecutions arising out of bribes received in exchange for advice or influence, whereas bribes in exchange for an act lack such a requirement.

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

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

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

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

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


that a defendant "honestly believed in a set of facts that would prevent him from forming the requisite mens rea."93 Thus, the Court established additional hurdles the prosecutions would have to overcome in addition to traditional defenses—e.g., entrapment, due process, duress, or coercion94—and the defendants' claim that extensive media coverage of their case—corruption cases make front-page headlines95—unduly influenced the jurors.96

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

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

94 For a summary of these defenses and citation to cases where such defenses have been raised, see Lapidus & Mogilevich, supra note 27, at 926-29.
95 See In re Providence Journal Co., Inc., 293 F.3d 1, 14 (1st Cir. 2002).
97 Hager, supra note 78; see also Wertheimer, supra note 10 ("[T]he Court has substantially weakened the legal protections that currently exist against government corruption.").
99 See, e.g., United States v. Rohn, 964 F.2d 310, 313 (4th Cir. 1992) ("Because intent is 'rarely capable of direct proof,' . . . 'a defendant's intent can be inferred from his conduct and all the surrounding circumstances.'" [alteration in original] (first quoting United States v. Johnson, 767 F.2d 673, 676 (10th Cir. 1985); then quoting United States v. Vigil-Montanel, 753 F.2d 996, 999 (11th Cir. 1985)); United States v. Reeves, 730 F.2d 1189, 1195 (8th Cir. 1984) ("[T]he jury must determine the issue of intent from all the circumstances of the case '[b]ecause the element of knowledge is rarely capable of direct proof.'" [alteration in original] (citation omitted)).
duct is not criminal. 100 McDonnell will necessarily result in convictions overturned and charges dismissed. 101 After all, the McDonnell decision resulted in the Department of Justice dismissing the charges against Governor McDonnell. 102

II
DRAWING A LINE BETWEEN CORRUPTION AND POLITICAL SPEECH

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

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

101 See Daniel Richman & Jennifer Rodgers, Rewarding Subtlety: McDonnell v. United States, COMPLIANCE & ENFORCEMENT [Jul. 5, 2016], https://wp.nyu.edu/compliance_enforcement/2016/07/05/rewarding-subtlety-mcdonnell-v-united-states/ [http://perma.cc/D9MU-WWXG] (noting that McDonnell may affect a "small number of cases" where "it is not entirely clear that governmental power was exercise[d] or promised").
104 See McDonnell, 136 S. Ct. at 2372–73 (2016) (noting that the government asserted that receipt of anything "from a campaign contribution to lunch . . . counts as a quid," but that such an interpretation would prevent officials from meeting with a "union [that] had given a campaign contribution in the past").
105 See also Malloy, supra note 6 (noting that the Court's reading of "official acts" reflected "[t]he vision of politics articulated in Citizens United and McCutcheon").
Other scholars, like Professor Zephyr Teachout in *Corruption in America*, suggest that the Supreme Court may be adopting a uniform and narrow definition of corruption in campaign finance cases and criminal prosecutions. This Note agrees with Professor Teachout's observation. As the following discussion shows, the Supreme Court traditionally held a single definition of corruption applicable in both campaign finance and criminal law settings, and although the Court later distinguished criminal corruption from campaign finance corruption, the Court is moving to unify the definitions again.

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

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

---

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

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


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

110 See, e.g., 5 Annals of Cong. 166–70 (1795) (discussing the case of Randall and Whitney).
mitted corruption to be prosecuted as a common law offense. Throughout this ardent war on corruption, Congress and the Court believed corruption could undo governments. Senators believed themselves to be enacting statutes, for example, to preserve the proper "character of the Government" and the honor of public office. Likewise, the Supreme Court harshly decried attempts to influence politicians with gifts and bribes, believing that such conduct would cause "corruption [to] become the normal condition of the body politic." The Court sought to prevent nations to speak "of us as of Rome—'omne Romæ venale.'" Similarly, in the campaign finance setting, the Court condemned lobbying as corruption and concluded that its proscription was necessary to maintain public morals.

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

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

111 See, e.g., United States v. Coolidge, 25 F. Cas. 619, 620 (C.C.D. Mass. 1813), rev'd 14 U.S. (1 Wheat.) 415 (1816) (noting that federal courts have jurisdiction over bribery crimes committed against the United States under common law); Bedinger v. Commonwealth, 7 Va. (3 Call) 461, 463 (1803) ("An attempt to bribe is criminal, at common law.").
112 Cong. Globe, 32d Cong., 2d Sess. 242 (1853) (explaining the purpose behind the Act to Prevent Frauds upon the Treasury of the United States, 10 Stat 170).
114 Id.
118 See Newberry v. United States, 256 U.S. 232, 247-49 (1921) (holding that Congress had no power to criminalize solicitation of campaign contributions or restricting "the maximum sum which a candidate [for office] . . . may spend").
ence a public official. In 1914, the Court held that the bribery statute encompassed "[e]very action that is within the range of official dut[ies]," including those "established by settled practice."\(^{119}\) Just as it did in the campaign finance context, the Court recognized attempts to unduly influence a public official as corruption and a moral evil. The Court in *United States v. Hood*, for example, upheld a statute criminalizing sale of public office on the grounds that it "attack[ed] that evil" of "the operation of purchased ... influence in determining the occupants of federal office."\(^{120}\) Similarly in *United States v. Shirey*, the Court permitted Congress "to proscribe payments to political parties in return for influence."\(^{121}\) Again, the Court's view on criminal corruption did not differ from campaign finance corruption.

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

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

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


\(^{120}\) See 343 U.S. 148, 150–51 (1952).


\(^{123}\) See id. at 506–07.

\(^{124}\) Id. at 526.
Brennan argued that the Speech and Debate clause barred Brewster's prosecution, and that 18 U.S.C. § 201 impermissibly "adjust[ed] . . . [the Congressman's] rights to due process and free expression."\textsuperscript{125} A majority of the Supreme Court echoed Justice Brennan's concern in \textit{Buckley v. Valeo}\textsuperscript{126}—the origin of the contemporary campaign finance law.\textsuperscript{127} There, the Supreme Court examined whether Congress could impose limits on contributions and expenditures.\textsuperscript{128} Though it upheld contribution limits,\textsuperscript{129} the Court declared expenditure limits as burdening "core First Amendment expression."\textsuperscript{130} Most relevantly, the Court argued that, unlike direct contributions, expenditures lack "prearrangement and coordination . . . with the candidate or his agent," and this "alleviates the danger that expenditures will be given as a \textit{quid pro quo} for improper commitments from the candidate."\textsuperscript{131} The distinguishing factor between contribution limitations and expenditure limitations was, therefore, whether the Court believed that the limitation adequately prevented corruption. Here, however, corruption carried a definition unique to the campaign contribution setting.\textsuperscript{132}

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

\textsuperscript{125} Id. at 544 (Brennan, J., dissenting).
\textsuperscript{126} 424 U.S. 1, 13 (1976) (per curiam).
\textsuperscript{127} See, e.g., Jordan May, Note, "Are We Corrupt Enough Yet?" The Ambiguous \textit{Quid Pro Quo} Corruption Requirement in Campaign Finance Restrictions, 54 Washburn L.J. 357, 361 (2015) (discussing how the Court's jurisprudence evolved when defining how compelling government interests must be to justify campaign finance restrictions).
\textsuperscript{128} See \textit{Buckley}, 424 U.S. at 13-14.
\textsuperscript{129} See id. at 29-30, 35-38.
\textsuperscript{130} Id. at 48.
\textsuperscript{131} Id. at 47.
\textsuperscript{132} See Almendares & Hafer, supra note 4, at 2777 ("[W]hen the Supreme Court's majority and plurality opinions in . . . [campaign finance] cases use the term 'corruption,' they are best understood as saying 'corruption as defined by \textit{Buckley}'").
tion.'"\(^{134}\) The Court thus recognized that "in addition to 'quid pro quo arrangements,'" Congress had to address the problems of "'improper influence' and 'opportunities for abuse.'"\(^{135}\) Based on this broader understanding of corruption, the government had broad power to regulate campaign financing. This language culminated in *McConnell v. Federal Election Commission*, where the Court upheld limitations on campaign contributions and expenditures, stating that Congress had the power to limit "undue influence on an officeholder's judgment, and the appearance of such influence."\(^{136}\)

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

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

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

\(^{134}\) 528 U.S. 377, 389 (2000).
\(^{135}\) Id.
\(^{138}\) Id. at 272.
\(^{139}\) Id.
the differences outlined above, it suffices to say that the Supreme Court has treated corruption in the campaign finance setting differently than in the criminal setting.

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

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

141 See Eisler, supra note 107, at 401, 425 (noting that both Austin and McConnell advance a competitive approach to politics).
142 See Brown, Applying Citizens United, supra note 106, at 182, 209.
143 494 U.S. at 703 (Kennedy, J., dissenting) ("Since the specter of corruption . . . is missing in this case, the majority invents a new interest . . . [which] [t]he majority styles . . . as simply a different kind of corruption . . . .").
145 See 548 U.S. 230, 261 (2006) ("[T]he Act burdens First Amendment interests by threatening to inhibit effective advocacy by those who seek election, particularly challengers; its contribution limits mute the voice of political parties; they hamper participation in campaigns through volunteer activities; and they are not indexed for inflation.").
147 Id. at 359.
hibit campaign contributions that resulted in ingratiation and access because "[i]ngratiation and access . . . are not corruption." Regulation was unconstitutional if it did not target the Court's definition of corruption. This is true even if the regulation was in response to actual corruption.

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

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

---

148 Id. at 360.
150 See id. (Breyer, J., dissenting) ("[I]ndependent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana.").
151 134 S. Ct. 1434, 1450 (2014) ("Congress may target only a specific type of corruption—'quid pro quo' corruption.").
153 Id. at 1451 (citing *Citizens United*, 558 U.S. at 360).
154 See id. at 1451.
156 See id. at 274–75
157 Id. at 274.
a broad view of corruption, inconsistent with the narrow view advanced in campaign finance cases.\textsuperscript{158} While it is true that Justice Kennedy’s opinion allowed the prosecution greater latitude in proving its case—at least in non-campaign contribution cases\textsuperscript{159}—his definition of corruption did not change from his dissent in \textit{Austin}. In the concurring opinion in \textit{Evans} and the dissent in \textit{Austin}, Justice Kennedy limited corruption to quid pro quo arrangements.\textsuperscript{160} In fact, Justice Kennedy explicitly noted in \textit{Evans} that the rationale behind the requirement for a quid pro quo in campaign contribution cases and in Hobbs Act prosecution cases is the same.\textsuperscript{161} Thus, \textit{Evans} does not stand for a broad view of corruption. The strongest evidence in support of this proposition is the fact that the Justices heralding a narrow view of criminal corruption in \textit{Evans}—Antonin Scalia, Thomas, and Kennedy—later advocated for a narrow view of campaign finance corruption.\textsuperscript{162}

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

\begin{itemize}
  \item\textsuperscript{158} See Brown, \textit{Applying Citizens United}, \textit{supra} note 106, at 179.
  \item\textsuperscript{159} See Gold, \textit{supra} note 106, at 288 (noting that the U.S. Court of Appeals for the Eleventh Circuit requires explicit agreement to be shown in all cases, while other circuits require this only in the campaign contribution context).
  \item\textsuperscript{160} \textit{Compare Evans}, 504 U.S. at 275 (Kennedy, J., concurring) (“Thus, I agree with the Court, that the \textit{quid pro quo} requirement is not simply made up.”), with \textit{Austin v. Mich. Chamber of Commerce}, 494 U.S. 652, 703 (1990) (Kennedy, J., dissenting) (noting that to reach their holding the majority had to invent new forms of corruption because quid pro quo corruption was lacking).
  \item\textsuperscript{161} See \textit{Evans}, 504 U.S. at 278 (Kennedy, J., concurring).
  \item\textsuperscript{162} See McConnell v. FEC, 540 U.S. 93, 273–74 (Thomas, J., concurring in part and dissenting in part) (noting that newly recognized form of corruption is “antithetical to everything for which the First Amendment stands”); \textit{id.} at 248 (Scalia, J., concurring in part and dissenting in part) (noting that the statute “cut[] to the heart of what the First Amendment is meant to protect”); \textit{id.} at 292 (Kennedy, J., concurring in part and dissenting in part) (“\textit{Buckley} made clear, by its express language and its context, that the corruption interest only justifies regulating candidates’ and officeholders’ receipt of what we can call the ‘quids’ in the \textit{quid pro quo} formulation.”); see also \textit{Nixon v. Shrink Mo. Gov’t PAC}, 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting) (noting that the majority improperly expanded \textit{Buckley}); \textit{id.} at 422 (Thomas, J., dissenting) (noting that the Court had always understood corruption in “the narrow \textit{quid pro quo} sense”).
  \item\textsuperscript{163} United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404–05 (1999).
  \item\textsuperscript{164} See \textit{id.} at 414.
\end{itemize}
decided Skilling v. United States.165 The Skilling Court did not, however, address corruption, holding no more than that the honest services fraud statute covers kickbacks and bribery.166 After Skilling, Courts of Appeals continue to be divided on whether the definition of corruption in the campaign finance context applies in the criminal corruption context.167

D. McDonnell Signals the Impending Demise of the Distinction

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

165 See 561 U.S. 358 (2010).
166 See id. at 408.
167 See Gold, supra note 106, at 288.
168 See Brown, Applying Citizens United, supra note 106, at 233.
169 Id. at 216.
171 See Teachout, supra note 107, at 244 (“Citizens United changed the culture at the same time that it changed the law. It reframed that which was unpatriotic and named it patriotic.”); Eisler, supra note 107, at 409 (“The cumulative effect of Citizens United was to strip federal campaign finance regulation to a competitive core.”).
172 See Brown, Criminalization of Politics, supra note 106, at 22, 31 (“The case may be a step [toward ‘enshrining] bribery in our politics’, but it is at best a tentative one that does not break new ground.” (quoting Dante Ramos, Va. Ex-
The McDonnell Court espouses the holdings of Citizen United and McCutcheon. Granted, the Court never squarely addressed McDonnell’s Citizens United argument. Chief Justice Roberts’s public policy justification for the holding, however, closely mirrors the Court’s logic in McCutcheon—a decision he authored. The first policy reason Chief Justice Roberts offered in support of the McDonnell decision is that broad application of bribery statutes could deter officials from “respond[ing] to even the most commonplace requests for assistance,” and citizens “from participating in democratic discourse.” This formulation raises the question of why broad application of a bribery statute, or any other anti-corruption statute, would deter citizens from democratic discourse. That is, if the citizen were merely speaking, there would be no grounds for finding corruption—no quid. Chief Justice Roberts’s formulation only makes sense if the citizen engages in democratic discourse with money or other consideration, as in Citizens United. Similarly, anti-corruption statutes would rarely apply to an official’s response to a constituent’s request for assistance. For example, no one would suspect corruption if a senator were to advocate a bill to assist victims of a natural disaster. Common sense dictates that official acts that benefit the public in general would make for poor prosecutions. Anti-corruption statutes are only relevant, therefore, when a public official shows undue favor to an individual or a select group of individuals in exchange for some benefit. Thus explained, the Chief Justice appears concerned that broad bribery statutes would deter citizens from contributing funds in exchange for special treatment. In fact, the Chief Justice labels such exchanges as “participation in democratic discourse” rather than corruption. Accordingly, Chief Justice Roberts’s public policy concern is congruent with Citizens United’s First Amendment concern.

174 Id.
176 136 S. Ct. at 2372.
177 See 558 U.S. at 359 ("The fact that speakers may have influence over ... officials does not mean that these officials are corrupt," because "[f]lavortism and influence are not ... avoidable in representative politics." (quoting McConnell v. FEC, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in part and dissenting in part)).
asserts that "[i]ngratiation and access . . . are not corruption." 178

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

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

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

178 Id. at 360.
179 Teachout, supra note 107, at 245 (internal quotations omitted) (citation omitted); see also Joseph P. Tomain, Gridlock, Lobbying, and Democracy, 7 Wake Forest J.L. & Pol'y 87, 107–08 (2017) (“The Supreme Court does not have a particularly realistic view of the democratic process and the ease with which private money flows to public servants who are receptive to their particular interests.”).
ence the action of a person in a position of trust”? Perhaps inadvertently,\textsuperscript{184} \textit{McDonnell} signals the existence of such First Amendment guarantee.

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

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

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

\begin{quote}
[If it be conceded that the First Amendment was “fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,” . . . then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.\textsuperscript{189}
\end{quote}

The First Amendment, thus, protects political association inasmuch as it protects pure speech.\textsuperscript{190}

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

\textsuperscript{185} 354 U.S. 476, 482 (1957) (footnotes omitted).

\textsuperscript{186} Id. at 484.


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


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

Prior to \textit{McDonnell}, such a defense never resulted in an acquittal. In \textit{United States v. Menendez}, for example, the defendants sought to dismiss the charges, citing \textit{Citizens United} and \textit{McCutcheon} for the proposition that "the Constitution protects all 'efforts to influence and obtain access to elected officials.'"\textsuperscript{197} The New Jersey District Court agreed, but held that such a defense is inapplicable on the given facts.\textsuperscript{198} The \textit{Me-
nandez prosecution alleged "a quid pro quo bribery scheme," whereby the defendants "conspired to offer . . . 'things of value to influence official acts benefitting [their] personal and business interests.'" Similarly, in United States v. Halloran, the defendant attempted to argue that Citizens United created "a 'brave new world . . . in which the institutionalized bribery of campaign finance . . . is constitutionally protected,' thus 'blurring . . . the distinction between protected speech and bribery.'" The U.S. Court of Appeals for the Second Circuit rejected such use of the First Amendment, holding that the prosecution properly alleged quid pro quo corruption.

There, the jury found that Halloran paid money in exchange for an authorization to seek the nomination of a party the defendant was not a member of—a "Wilson-Pakula." The First Amendment defense came closest to acquittal in United States v. Dimora. Therein the defendant was convicted for, inter alia, giving an individual "influence at Cuyahoga County and . . . protection for [his] businesses," in exchange for the individual "fund[ing] a trip to Las Vegas for Dimora, covering the costs of gambling chips, luxury hotel suites and a $2,219 dinner." On appeal over admissibility of certain documents that would prove the transaction to be merely an exchange of favors, the U.S. Court of Appeals for the Sixth Circuit held any error harmless, because the mere trading of "'public influence' . . . in exchange for" a quid constituted criminal corruption. Nonetheless, a member of the panel, Judge Gilbert Merritt, dissented, arguing that Dimora could not be prosecuted if his conduct amounted to no more than ingratiation and access protected by the First Amendment. According to Judge Merritt, Dimora could have established that his relationships were "of 'ingratiation and access' that may have been deplorable but [were] arguably legal." Thus, prior to McDonnell, the First Amendment defense existed only in theory.

---

199 Id. at 638.
200 821 F.3d 321, 340 (2d Cir. 2016).
201 Id.
202 See id. at 328–29.
203 750 F.3d 619, 623–24 (6th Cir. 2014).
204 Id. at 624.
205 Id. at 626.
206 See id. at 632–33 (Merritt, J., dissenting) (citing McCutcheon v. FEC, 134 S. Ct. 1434 (2014)).
207 Id. at 633 (Merritt, J., dissenting).
208 See also Trevor Potter, Wednesday Luncheon Session at the American Law Institute 9 (May 23, 2012), http://2012am.ali.org/transcripts/Potter%20-%203-12-(8)-WedLunch-Potter.pdf [http://perma.cc/97D7-NG97] (noting that "sys-
McDonnell changed things. On July 13, 2017, the Court of Appeals for the Second Circuit overturned the conviction of New York State Assembly Speaker Sheldon Silver, citing McDonnell v. United States. The prosecution charged Silver with many corrupt schemes. For example, Silver allegedly funneled $500,000 in taxpayer-funded research grants to a doctor in exchange for the doctor steering his patients to Silver’s law firm. Silver also met with lobbyists, hosted parties and voted for legislation that benefited real estate developers, allegedly in exchange for the developers' use of a law firm that paid Silver referral fees. Despite finding ample evidence, the Court of Appeals reversed Silver's conviction and remanded for a new trial, holding that the jury instruction “captured lawful conduct, such as arranging meetings or hosting events with constituents.” The jury instructions were overbroad because, post McDonnell, the instructions captured examples of lawful influence peddling. Does the reversal of Silver's conviction spell immediate doom for all anti-corruption efforts? Most likely not. For one, Courts of Appeals appear reluctant to reverse convictions on facts different from McDonnell v. United States. More importantly, the stream of benefits doctrine complicates any First Amendment defense. This doctrine loosens the quid pro quo requirement, allowing conviction “so long as the evidence shows a ‘course of conduct of favors and gifts flowing to a public official in exchange for a pattern of official actions favorable to the donor.’” In United States v. Kemp, this doctrine allowed the government to convict executives of a bank for extending loans to a city treasurer in exchange for...
“get[ting] special treatment.”215 Although the evidence against these executives showed only that they extended loans and received the treasurer’s gratitude in return, the U.S. Court of Appeals for the Third Circuit affirmed the executives’ conviction under the stream of benefits doctrine.216 How is the special treatment the Kemp executives received different from the special treatment Governor McDonnell gave to Williams?217 The Kemp executives could very well have sought to curry favor and purchase access, which is not illegal. The stream of benefits doctrine can thus turn gifts in exchange for gratitude into quid pro quo corruption.218

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

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

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

215 Id. at 268.
216 Id. at 266–69, 282.
218 See, e.g., United States v. Ganim, 510 F.3d 134, 147 (2d Cir. 2007) (noting that the opposite reading “would legalize some of the most pervasive and entrenched corruption, and cannot be what Congress intended”).
219 See Brown, Applying Citizens United, supra note 106, at 221.
220 Silverglate & Quinn-Judge, supra note 80, at 207–08 (footnotes omitted).
221 Id. at 207, 208. Although no court has yet to address the issue, the District Court of the Eastern District of Pennsylvania continues to cite Kemp for the stream of benefits doctrine. See United States v. Williams, Crim. No. 17-137, 2017 WL 2713404, at *2 (E.D. Pa. June 13, 2017).
ment may prove to be a viable shield against certain prosecutions, that shield may be shattered easily in courts that choose to endorse the stream of benefits doctrine even beyond McDonnell.

CONCLUSION

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

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

---

222 See supra subpart II.D.
228 Mario Meeks, Once Again, SCOTUS Scolds DOJ for Overreaching, 40 CHAMPION 53, 53 (2016); see also Brown, Criminalization of Politics, supra note 106, at 25–32 (arguing that McDonnell can be read narrowly so as to have little effect on criminal law).
Supreme Court. District Courts and Courts of Appeals tend to honor broad judicial discretion Congress bestows, interpreting it as a license to prosecute a broad range of corrupt conduct. Thus, although the Supreme Court in *McDonnell* appeared to condemn prosecutorial and judicial overreach, lower tribunals may continue to resist the narrow definition of corruption—some courts have already distinguished *McDonnell* on its facts. On the other hand, some lower tribunals may honor the Supreme Court's holdings, thus weakening law enforcement's ability to combat corruption.

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

---

229 See Brown, *Applying Citizens United*, supra note 106, at 221 (noting that lower tribunals have before resisted attempts at weakening the anti-corruption framework set up by *Kemp*).
230 See id. at 222.
231 See Meeks, supra note 228.
233 See Silverglate & Quinn-Judge, supra note 80, at 207–08.
be achieved if the Constitution were amended238 or if the Supreme Court were to overturn Citizens United.239

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

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

THE RIGHTS OF MARRIAGE: Obergefell, Din, and the Future of Constitutional Family Law ...................... Kerry Abrams

INTERNATIONAL CYBERTORTS: Expanding State Accountability in Cyberspace .................... Rebecca Crootof

THE CENTRAL CLAIMING RENAISSANCE .............. Andres Sawicki

NOTES

USING DAUBERT TO EVALUATE EVIDENCE-BASED SENTENCING .............. Charlotte Hopkinson

THE PARTIALITY NORM: SYSTEMATIC DEFERENCE IN THE OFFICE OF LEGAL COUNSEL .................... Adoree Kim
The *Cornell International Law Journal* provides a continuing forum in which practitioners, scholars, and students can air their views and the fruits of their research in problems of international law. Three times a year, the *Journal* publishes scholarship that reflects the sweeping changes that are taking place in public and private international law.

**Submissions:** The *Cornell International Law Journal* welcomes the submission of articles, essays, and book reviews with an international focus from academics, practitioners, and government officials.

**Subscriptions:** Yearly subscriptions are available for $25.00 for domestic subscribers, $28.00 for foreign subscribers, and $15.00 for alumni. Renewal is automatic unless notification to the contrary is received.

**Back Issues:** Prior volumes may be obtained from William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, NY 14068-1296, 1-800-828-7571.

**Contact Information:**

*Cornell International Law Journal*
Cornell Law School
2L39 Hughes Hall
Ithaca, NY 14853-4901
(607) 255-3387
cilj@cornell.edu
http://organizations.lawschool.cornell.edu/ilj/
The Cornell Journal of Law and Public Policy is an excellent source of scholarship from across the political spectrum, publishing articles and student notes on a variety of legal issues affecting the public. The Journal publishes three issues (Fall, Spring, and Summer) each academic year. Papers from the Journal's annual symposium are published in the Summer issue.

Subscriptions: Subscriptions are $27.00 per volume. Back issues are available from William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, New York 14068-1296, 1-800-828-7571.

Manuscripts: The Journal invites the submission of articles, studies, and commentaries with a public policy focus.

Cornell Journal of Law and Public Policy
2L39 Hughes Hall
Ithaca, New York 14853-4901
(607) 255-3387
www.law.cornell.edu/cjlp
THE CORNELL LAW SCHOOL
MYRON TAYLOR HALL

Officers of Administration
Eduardo M. Peñalver, B.A., M.A., J.D., Allan R. Tessler Dean and Professor of Law
Jens David Ohlin, B.A., M.A., M.Phil., Ph.D., Vice Dean and Professor of Law
Femi Cadmus, LL.B., B.L., LL.M., M.L.I.S., Edward Cornell Law Librarian, Associate Dean for Library Services, and Professor of the Practice
John R. DeRosa, B.S., J.D., Associate Dean for Career Services & Employer Relations
Martha F. Fitzgerald, B.A., Associate Dean for Communications
Shawn Gavain, B.S., M.B.A., Associate Dean, Alumni Affairs and Development
Monica K. Ingram, B.A., J.D., Associate Dean of Admissions and Financial Aid
Ofer Leshed, B.A., M.B.A., Associate Dean for Administration & Finance
Maxine R. J. Miner, B.A., J.D., Dean of Students
Richard F. Robinson, B.S., M.B.A., M.P.H., Associate Dean for Capital Projects
Laura M. Spitz, B.A., LL.B., J.S.D., Vice Provost, Associate Dean for International Affairs, and Senior Lecturer of Law
W. Bradley Wendel, B.A., J.D., LL.M., J.S.D., Associate Dean for Academic Affairs and Professor of Law
Akua Akyea, B.A., J.D., Assistant Dean for Public Service
Elizabeth Brundige, B.A., M.Phil., J.D., Assistant Dean for International Programs, Associate Clinical Professor of Law, and Jack G. Clarke Executive Director of International and Comparative Legal Studies
Annie Houghton, B.A., J.D., Assistant Dean for Graduate Legal Studies
Elizabeth K. Peck, B.A., J.D., Assistant Dean for Professional Development and Clerkships

Faculty
Gregory S. Alexander, B.A., J.D., A. Robert Noll Professor of Law
Joel Atlas, B.A., J.D., Director, Lawyering Program and Clinical Professor of Law
Sandrea L. Babcock, B.A., J.D., Clinical Professor of Law
Marten J. Bausch, B.A., M.A., J.D., Adjunct Professor of Law (Fall 2017)
John J. Barcel6 III, B.A., J.D., S.J.D., William Nelson Cromwell Professor of International and Comparative Law
Andrew Berger, B.A., J.D., Adjunct Professor of Law (Fall 2017)
Natalia A. Bernardo, B.B.A., J.D., Adjunct Professor of Law (Fall 2017)
Celia W. Bigoness, A.B., J.D., Assistant Clinical Professor of Law (Lawyering Program)
Fuort J. Blasberg, A.B., J.D., Adjunct Professor of Law (Fall 2017)
John H. Blume, B.A., M.A.R., J.D., Samuel F. Lebowitz Professor of Trial Techniques, Director of Clinical Advocacy and Skills Program, and Director, Cornell Death Penalty Project
Cynthia Grunt Bowman, B.A., Ph.D., J.D., Dorothea S. Clarke Professor of Law
Thomas R Bruce, B.A., M.F.A., Research Associate and Director, Legal Information Institute
Elizabeth Brundige, B.A., M.Phil., J.D., Assistant Dean for International Programs, Associate Clinical Professor of Law, and Jack G. Clarke Executive Director of International and Comparative Legal Studies
Bruce R. Bryan, B.A., J.D., Adjunct Professor of Law (Fall 2017)
Femi Cadmus, LL.B., B.L., LL.M., M.L.I.S., Edward Cornell Law Librarian, Associate Dean for Library Services, and Professor of the Practice
Joseph Callery, B.A., J.D., Adjunct Professor of Law (2017–2018)
Josh Chafetz, B.A., D.Phil., J.D., Professor of Law
Dawn Chutkow, A.B., J.D., Ph.D., Visiting Professor of Law
Kevin M. Clermont, A.B., J.D., Robert D. Ziff Professor of Law
Zachary D. Clapton, B.A., M.Phil., J.D., Assistant Professor of Law
Sherry F. Cob, A.B., J.D., Professor of Law and Charles Evans Hughes Scholar
Angela B. Cornell, B.A., J.D., Clinical Professor of Law and Director, Labor Law Clinic
Sally Fisher Curran, B.A., J.D., Adjunct Professor of Law (2017–2018)
Matthew D'Amore, B.S., J.D., Professor of the Practice, Cornell Tech
James W. Dabney, A.B., J.D., Adjunct Professor of Law (Spring 2018)
Hanoch Dagan, LL.M., J.S.D., LL.B., Visiting Professor of Law (Fall 2017)
Samuel D. Daahan, Ph.D., LL.M., J.S.D., Adjunct Professor of Law (Fall 2017)
Michael C. Dorf, B.A., J.D., Robert S. Stevens Professor of Law
Henry D. Edelman, B.A., M.A., J.D., Adjunct Professor of Law (Spring 2018)
Amy A. Emerson, J.D., M.L.S., Director, Legal Research Clinic, Adjunct Professor of Law
Susan E. Fenennemegger, J.D., LL.M., Ph.D., Dr. Habil., Adjunct Professor of Law (Fall 2017)
Cynthia R. Farina, B.A., J.D., William G. McRoberts Research Professor in Administration of the Law
Jonathan W. Feldman, B.A., J.D., Adjunct Professor of Law (Fall 2017)
Catherine H. Finn, B.A., J.D., Lecturer of Law
Michelle A. Fongee Whelan, B.A., J.D., Clinical Professor of Law (Lawyering Program)
Charles Fox, B.A., J.D., Adjunct Professor (Spring 2018)
Lara Gellawasser Freed, B.S., J.D., Clinical Professor of Law (Lawyering Program)
Jim Fulton, B.S., J.D., Adjunct Professor of Law (Fall 2017)
Maggie Gardner, A.B., J.D., Assistant Professor of Law
Stephen P. Garvey, B.A., M.Phil., J.D., Professor of Law
Neil Getnick, B.A., J.D., Adjunct Professor of Law (Spring 2018)
Sujata Gibson, B.A., J.D., Adjunct Professor of Law (Spring 2018)
Sergio Alberto Granitto Ricci, J.D., Ph.D., Adjunct Professor of Law, Postdoctoral Associate, and Assistant Director, Clarke Program on Corporations & Society
Robert A. Green, B.A., M.S., J.D., Professor of Law
James Grimmelmann, A.B., J.D., Professor of Law, Cornell Tech
Louis H. Guard, B.A., J.D., Adjunct Professor of Law (Fall 2017)
Valerie P. Hans, B.A., M.A., Ph.D., Professor of Law
George A. Hay, B.S., M.A., Ph.D., Charles Frank Reavis Sr. Professor of Law and Professor of Economics
Thomas J. Heiden, B.A., J.D., Adjunct Professor of Law (January 2018 Intersection)
Michael Heise, A.B., J.D., Ph.D., Professor of Law
Robert A. Hillman, A.B., J.D., Edwin H. Woodruff Professor of Law
Robert C. Hockett, B.A., M.A., J.D., LL.M., J.S.D., Edward Cornell Law Professor of Law
David M. Hay-Smith, B.A., J.D., Professor of Law
Arnold S. Jacobs, B.M.E., M.B.A., LL.B., Adjunct Professor of Law (Spring 2018)
William A. Jacobson, B.A., J.D., Clinical Professor of Law and Director, Securities Law Clinic
Richard John, B.A., J.D., Adjunct Professor of Law (2017–2018)
Faculty Emeriti

Claire M. Germain, Licence-és-Lettres, LL.B., M.C.L., M.L.L., Edward Cornell Law Librarian (retired) and Professor of Law, Emerita

Jane L. Hammond, B.A., M.S., J.D., Edward Cornell Law Librarian (retired) and Professor of Law, Emerita

James A. Henderson, Jr., A.B., LL.B., LL.M., Frank B. Ingersoll Professor of Law, Emeritus

David B. Lyons, B.A., M.A., Ph.D., Professor of Law, Emeritus and Susan Linn Sage Professor of Philosophy, Emeritus

Peter W. Martin, B.A., J.D., Jane M.G. Foster Professor of Law, Emeritus

Larry I. Palmer, B.A., LL.B., Professor of Law, Emeritus

E.F. Roberts, Jr., B.A., LL.B., Edwin H. Woodruff Professor of Law, Emeritus

Faust F. Rosat, B.A., J.D., Samuel S. Leibowitz Professor of Trial Techniques, Emeritus

Steven H. Shifrin, B.A., M.A., J.D., Charles Frank Reavis Sr. Professor of Law, Emeritus

Gary J. Simson, B.A., J.D., Professor of Law, Emeritus

Katherine Van Wessel Stone, B.A., J.D., Professor of Law, Emerita and Anne Evans Estabrook Professor in Dispute Resolution, Emerita

Robert S. Summers, B.S., LL.B., LL.D., William G. McRoberts Professor of Research in the Administration of the Law, Emeritus

Winnie F. Taylor, B.A., J.D., LL.M., Professor of Law, Emerita

Charles W. Wolfram, B.A., LL.B., Charles Frank Reavis Sr. Professor of Law, Emeritus

Associate and Elected Members from Other Faculties

Ifeoma Ajunwa, B.A., J.D., M.Phil., Ph.D., Associate Member of the Law Faculty & Assistant Professor, School of Industrial & Labor Relations

Elizabeth S. Anker, B.A., J.D., Ph.D., Associate Professor English and Associate Member of the Law Faculty

Karen Levy, B.A., J.D., M.A., Ph.D., Associate Member of the Law Faculty and Assistant Professor, Department of Information Science

Helen Nissenbaum, B.A., M.A., Ph.D., Associate Member of the Law Faculty and Professor, Cornell Tech

Sid Tarrow, B.A., M.A., Ph.D., Associate Member of the Law Faculty & Maxwell M. Upson Professor Emeritus, Government Department

Martin T. Wells, B.S., M.A., Ph.D., Charles A. Alexander Professor of Social Statistics, NYS School of Industrial and Labor Relations and Elected Member of the Law Faculty
Antidiscrimination Statement

It is the policy of the Cornell Law Review to support equality of opportunity. No person shall be denied membership in the Cornell Law Review or participation in any of its activities, including publication, on the basis of any legally prohibited discrimination involving, but not limited to, such factors including race, color, creed, religion, national or ethnic origin, sex, sexual orientation, age, or disability. To improve the overall quality of its publication, the Cornell Law Review hopes to expand its membership to include persons from traditionally underrepresented groups, as well as persons with diverse viewpoints. Sexual harassment is an act of discrimination and, as such, will not be tolerated.

Permission

The Cornell Law Review hereby grants permission to nonprofit organizations to reproduce and distribute the contents of this journal, in whole or in part, for educational purposes, including distribution to students, provided that the copies are distributed at or below cost and identify the author, the Cornell Law Review, the volume, the number of the first page of the article, and the year of publication.

All other inquiries for permission should be sent to the attention of the Editor-in-Chief.

Publication Information


Subscription Information

Annual subscriptions are $45.00. Single issues are $15.00 for issues in the current volume. Foreign subscribers should add $4.00 for postage fees. The Cornell Alumni Association members who wish to receive a subscription to the Cornell Law Review need to contact the Law Review office directly to arrange the subscription. Your subscription will be automatically renewed unless notification to the contrary is received by the Cornell Law Review.

Please notify the Cornell Law Review of any change of address at least 30 days before the date of the issue from which the change is to take effect. The postal service will not forward your copies unless extra postage is provided by you. Duplicate copies will not be sent free of charge.

Subscribers should report nonreceipt of copies within six months of the expected mailing date. Issues in Volumes 1 through 102 are available through: William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, New York 14068-1296 (http://www.wshein.com/).

Please address correspondence to:

Cornell Law Review
2L39 Hughes Hall
Ithaca, NY 14853-4901

Fax (607) 255-7193
Business Office (607) 255-3387
E-mail sgp6@cornell.edu