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McDonnell's Misapprehension of the Role of Access in Politics and Public Corruption

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MCDONNELL'S MISAPPREHENSION OF THE ROLE OF ACCESS IN POLITICS AND PUBLIC CORRUPTION*

INTRODUCTION

Economists often say "there is no such thing as a free lunch."[1] In other words, although the recipient may not have to immediately pay cash for a "free" item or service, the donor gives the item with the expectation of some future benefit. Whether the service is a husband washing his wife's dishes in order to choose that night's movie or one ignoring his boss kicking her golf ball out of the rough to avoid risking one's potential promotion, seemingly benign intentions often have strings attached. And, while these motives do not implicate a public legal interest when they occur within a marriage or workplace relationship, they are alarming in the context of private actors interacting with public officials. Public officials are delegates whom the electorate trusts to carry out the public's will—not the will of the favored few. When private citizens show up in public officials' offices with free lunches—or something much more valuable—the public's interest is compromised.

All eight then-sitting United States Supreme Court Justices ignored this maxim, however, when they overturned former Virginia Governor Bob McDonnell's bribery conviction in *McDonnell v. United States*.[2] In its decision, the Court narrowly construed the definition of official act,[3] which is an element under most criminal public corruption statutes. The Court did so because it feared limiting gift-giving constituents' access to public officials would limit *all* constituents' access, thus inhibiting the political process.[4] However, in doing so, the Court did not give adequate consideration to the countervailing policy arguments surrounding access in politics and misconstrued how federal corruption laws function. The Court acted as if only the definition of an official act separated ordinary

1. *See, e.g.*, MILTON FRIEDMAN, THERE'S NO SUCH THING AS A FREE LUNCH (1977) (outlining how all transactions have some bargain attached).

2. 136 S. Ct. 2355, 2375 (2016).

3. *See id.* at 2369–71.

4. *Id.* at 2372.

constituent services from public corruption, but federal corruption laws have *multiple* elements. Included amongst those elements is a mens rea element, which the Court could have used to differentiate situations where public officials provide ordinary constituents public services and where they corruptly provide special favors to parties only because they gave the official a gift. Instead of protecting the political process as it hoped, the Court actually weakened representative democracy by widening the opportunity for preferential access.

Further, the *McDonnell* decision incorrectly narrowed the focus on which of a public official's actions constitutes an "official act." Federal public corruption crimes have several elements, and an official act is only one of them.[5] The Court, however, did not analyze how these elements already constrain which "official actions" constitute violations, especially the mens rea component. Had the Court done so, it would have seen that providing ordinary constituent services is illegal only when officials act with some malevolent intent—ultimately deviating from their responsibility as a delegate of the people. Instead, the Court unnecessarily challenged itself to draw a line using only one element instead of all elements.[6] In doing so, it developed a standard that still may be broad enough for lower courts to apply it in good faith but nonetheless make seemingly contradictory decisions based on the lower court's differing policy conclusions.[7] Consequently, the cramped viewpoint in *McDonnell* creates an impractical distinction when it could have simply relied on a public official's corrupt intent as the way to best protect ordinary constituents.

The analysis proceeds in four parts. Part I provides *McDonnell*'s background and the Court's analysis and policy arguments surrounding "official acts." Part II disputes the Court's policy arguments and explains why it should have been more concerned about the role preferential access plays in a public official's day-to-day decisions. Part III posits that the mens rea element, not the "official act" element, in federal public corruption crimes is the correct way to distinguish political access for a concerned constituent and a wrongly motivated donor. Finally, Part IV analyzes how federal courts have applied *McDonnell*'s definition of "official act" thus far

5. 18 U.S.C. § 201(b) (2012) (defining the elements of bribery for public officials); § 1951(a) (delineating the elements of Hobbs Act extortion).

6. *See McDonnell*, 136 S. Ct. at 2365–73 (providing multiple elements of bribery and Hobbs Act extortion but only addressing the "official act" element in the offenses).

7. *See id.* at 2371–72 (detailing the new official act standard).

and considers how this seemingly narrow definition may still give courts room to follow this precedent while using contrary policy arguments to reach their holdings.

I. *MCDONNELL*'S FACTS AND OUTCOME

McDonnell centers around a relationship between a company's CEO, a state's governor, and the state's first lady. From April 2011 to January 2012, Johnnie Williams, then the CEO of the Virginia-based company, Star Scientific, gave then Virginia governor Bob McDonnell and his wife over $175,000 in gifts and other benefits.[8] Although the McDonnells initially rejected Williams's offers, including his offering to buy Mrs. McDonnell's inauguration dress, they later relented, coincidentally when Williams sought their help more regularly.[9] The gifts included: a Rolex; a $20,000 shopping spree; access to Williams's private plane, Ferrari, and vacation home; and loans when the McDonnells encountered financial difficulty.[10] Although these gifts may seem suspicious, Virginia law, at the time, permitted constituents to give public officials unlimited gifts as long as the gifts did not improperly influence the official.[11]

Unsurprisingly, Williams's generosity did not go unnoticed by Governor McDonnell.[12] When Williams approached Governor McDonnell about Anatabloc, a nutritional supplement created by Williams's company, McDonnell listened.[13] Williams hoped to have Virginia universities study Anatabloc so the product would receive the United States Food and Drug Administration's approval.[14] Governor McDonnell took several steps to help Williams accomplish this goal.[15] First, he arranged a meeting between Williams and the Virginia Secretary of Health and Human Resources, who could have helped Williams convince a Virginia university to perform needed research studies for Anatabloc.[16] Second, after the Secretary declined

8. *See id.* at 2361–64.
9. *See id.* at 2362–64.
10. *See id*.
11. Laura Vozzella, *Virginia Legislature Adopts Stricter Gift Standards for Public Officials*, WASH. POST (Apr. 17, 2015), https://www.washingtonpost.com/local/virginia-politics/virginia-legislature-adopts-stricter-gift-standards/2015/04/17/b400b6a0-e456-11e4-905f-cc896d379a32_story.html?utm_term=.0fe2e768e7f2 [https://perma.cc/9P2D-8GQH (staff-uploaded archive)]. In the wake of the McDonnell scandal, Virginia has since added gift-giving limitations. *See id.*; *see also* VA. CODE ANN. § 2.2-3103.1 (2017).
12. *See McDonnell,* 136 S. Ct. at 2363.
13. *See id.* at 2362–64.
14. *Id.* at 2362.
15. *See id.* at 2362–64.
16. *Id.* at 2362.

to help Williams, McDonnell forwarded even more information to the Secretary and requested another meeting, this time with Mrs. McDonnell.[17] Third, McDonnell hosted Anatabloc's launch event at the governor's mansion, where he invited university researchers who were given $25,000 checks by Williams's company to create grant proposals to study Anatabloc.[18] Fourth, McDonnell later hosted a healthcare industry reception, which included several guests recommended by Williams.[19] Fifth, the Governor met with state employee healthcare administrators to recommend Anatabloc for state employees' use as a nutritional supplement.[20]

After learning of this relationship, federal prosecutors indicted Governor McDonnell.[21] They charged McDonnell with violating several criminal statutes that punish government officials' corrupt behavior, including honest services fraud and Hobbs Act extortion, on the theory that Williams's gifts and McDonnell's acceptance constituted bribery.[22] Although the statutes McDonnell allegedly violated do not explicitly define bribery, the parties stipulated to using the federal bribery statute's definition.[23] Thus, to convict McDonnell for honest services fraud on a theory of bribery, the government had to prove that he "directly or indirectly, corruptly" demanded, sought, received, accepted, or agreed "'to receive or accept anything of value' in return for being 'influenced in the

17. *Id.* at 2363.
18. *Id.*
19. *Id.* at 2364.
20. *Id.*
21. *Id.* at 2364–65.
22. *Id.* at 2365; *see also* 18 U.S.C. § 1951(a) (2012) (making a person who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose" guilty of extortion under the Hobbs Act); Skilling v. United States, 561 U.S. 358, 404 (2010) (defining honest services fraud, as found in § 1346, as "fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived").
23. *McDonnell*, 136 S. Ct. at 2365. The parties chose the definition of bribery found in § 201. *Id*. The statutes criminalizing Hobbs Act extortion and honest services fraud, which the government used to charge McDonnell, do not define bribery or official acts. *See* §§ 1346; 1952. However, courts regularly reference § 201's definition when prosecutors bringing honest services fraud or Hobbs Act extortion charges against public officials. *See* Martin Flumenbaum & Brad S. Karp, *Defining the Scope Of 'McDonnell v. United States'*, N.Y. L.J. (2017), https://www.paulweiss.com/media/3977457/25oct2017nylj.pdf [https://perma.cc/2SAQ-57QA] ("The law governing these statutes has largely converged, with courts defining Hobbs Act bribery and honest services fraud by reference to the federal bribery statute and treating their precedents as interchangeable.").

performance of any official act.'"[24] For the Hobbs Act extortion charge, the government needed to prove that McDonnell obtained these benefits "knowing that the thing of value was given in return for official action."[25] Notably, both charges required an official act, and the parties agreed to use the bribery statute's definition of official act for the charges.[26] After a jury trial in the Eastern District of Virginia, the jury found McDonnell guilty of honest services fraud and Hobbs Act extortion based on the prosecution's bribery theory.[27] The Fourth Circuit later affirmed the convictions.[28]

Arguing before the Supreme Court, McDonnell contended that the district court judge erroneously instructed the jury about the meaning of "official act" within the definition of bribery.[29] At trial, McDonnell had requested that the jury be instructed that "merely arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, 'official acts,'" and "that an 'official act' must intend to or 'in fact influence a specific official decision the government actually makes.'"[30] However, the trial court rejected these instructions.[31] Without these limiting instructions, McDonnell argued that the jury could have impermissibly found that any action an official takes would constitute an "official act."[32]

The Supreme Court unanimously agreed with McDonnell.[33] The Court narrowly construed the two elements of an official act necessary for bribery: (1) that some "'question, matter, cause, suit, proceeding or controversy' [was] . . . 'pending' or . . . 'brought' before a public official"; and (2) "that the public official made a decision or took an action 'on' that question, matter, cause, suit, proceeding, or controversy, or agreed to do so."[34]

First, it held that the first element requires that the question or matter before the official necessitate "a formal exercise of

24. *McDonnell*, 136 S. Ct. at 2365 (quoting § 201).

25. *Id.* (quoting McDonnell v. United States, 792 F.3d 478, 505 (4th Cir. 2015), *rev'd*, 136 S. Ct. 2355 (2016)).

26. *Id.*; *see* § 201(a)(3).

27. *McDonnell*, 136 S. Ct. at 2366.

28. *Id.* at 2367.

29. *Id.*

30. *Id.* at 2366.

31. *Id.* The trial court instead gave the jury the prosecution's preferred instruction: that an official act "encompassed 'acts that a public official customarily performs,' including acts 'in furtherance of longer-term goals' or 'in a series of steps to exercise influence or achieve an end.'" *Id.* (citation omitted).

32. *Id.* at 2367.

33. *See id.* at 2367–68.

34. *Id*. at 2368 (quoting 18 U.S.C. § 201(a)(3) (2012)).

governmental power" in order to resolve it.[35] Accordingly, the Court found that McDonnell's act of arranging "typical" meetings outside the context of formal proceedings did not satisfy the first element.[36]

Second, although it found that three of the governor's actions did meet the first official act element,[37] the Court held that arranging a meeting, hosting an event, or contacting another government official does not sufficiently constitute making a decision or taking action, which is necessary for the second element.[38] It explained that the purpose of these actions was only to discuss a study or to gather additional information about Williams's product, not to "make a decision."[39] The Court held that those actions can be "*evidence* of an agreement to take an official act," but, standing alone, do not constitute an official act.[40]

The idea of McDonnell's actions constituting a crime troubled the Court. The justices feared that treating his actions as official actions would be a slippery slope, such that a public official could face criminal charges for helping *any* constituent with her troubles if that constituent had given the official some donation or benefit.[41] This slippery slope could make public officials less responsive to their electorate and citizens less willing to engage with their representatives, which would warp "the basic compact underlying representative government."[42] In the end, the Court decided its "concern [was] not with tawdry tales of Ferraris, Rolexes, and ball gowns," but rather the harmful impact that may occur from upholding the convictions.[43]

35. *Id.* at 2372.

36. *Id.* at 2368.

37. *Id.* at 2369–70. The three "questions or matters" which satisfied the first element were:

> (1) 'whether researchers at any of Virginia's state universities would initiate a study of Anatabloc'; (2) 'whether the state-created Tobacco Indemnification and Community Revitalization Commission' would 'allocate grant money for the study of anatabine'; and (3) 'whether the health insurance plan for state employees in Virginia would include Anatabloc as a covered drug.'

Id. at 2370 (quoting McDonnell v. United States, 792 F.3d 478, 515–16 (4th Cir. 2015), *rev'd*, 136 S. Ct. 2355 (2016)).

38. *See id.* at 2371.

39. *Id.*

40. *Id.* at 2371–72 (emphasis added).

41. *Id.* at 2372 ("The Government's position could cast a pall of potential prosecution over these relationships if the union had given a campaign contribution in the past or the homeowners invited the official to join them on their annual outing to the ballgame.").

42. *Id.*

43. *Id.* at 2375.

II. THE PROBLEM WITH THE "FERRARIS, ROLEXES, AND BALL GOWNS"

In *McDonnell*, the Court sought to protect representative democracy and the public's confidence that its government will be responsive to the public interest.[44] However, the Court's decision actually harms what it aimed to protect. Most Americans already question their government's honesty and true intentions behind its decisions, and this ruling will only further undermine the public's trust in its government. Further, *McDonnell* hinders representative democracy. It protects an activity—influencing public officials, at least subconsciously, by giving them lavish gifts—that is unnecessary and inappropriate in the American political process.

A. The Court's Incorrect Perception of Public Opinion

By saying its "concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns,"[45] the Court demonstrated its disconnect from the public's opinion. This statement follows a pattern of Supreme Court Justices believing that public officials accepting lavish gifts and large campaign contributions will not affect their decision making or the public's trust.[46] As the Court notoriously stated in *Citizens United v. FEC*,[47] "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy."[48] However, this belief is misguided. Four in five Americans already do not trust the government, and roughly three in four Americans believe that public officials "put [their] own interests ahead of [the] country's."[49] Further, this degree of distrust is not new—Americans have felt this way for the past ten years.[50] These troubling beliefs and patterns may be rooted in the fact that most people believe the

44. *See id.* at 2372.

45. *Id.* at 2375.

46. *See* Jacob Eisler, McDonnell *and Anti-Corruption's Last Stand*, 50 U.C. DAVIS L. REV. 1619, 1634 (2017) ("The [*McDonnell*] Court's treatment of [public] official corruption narrowed the range of political behavior classified as illicit.").

47. 558 U.S. 310 (2010).

48. *Id.* at 360. Justice Kennedy, writing for the Court in *Citizens United*, repeated his previous stance that this type of "[f]avoritism and influence are not . . . avoidable in representative politics." *Id.* at 359 (quoting McConnell v. FEC, 540 U.S. 93, 297 (2003)).

49. *See* PEW RESEARCH CTR., BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT 4 (2015), http://www.people-press.org/files/2015/11/11-23-2015-Governance-release.pdf [https://perma.cc/FY9K-S6WP].

50. *See* Samantha Smith, *6 Key Takeaways About How Americans View Their Government*, PEW RES. CTR. (Nov. 23, 2015), http://www.pewresearch.org/fact-tank/2015/11/23/6-key-takeaways-about-how-americans-view-their-government/ [https://perma.cc/VXC2-D37Q].

biggest problem with elected federal officials is that they are "[i]nfluenced by special interest money" or are "[c]orrupt."[51] Almost seventy-five percent of Americans believe that these officials do not care what their constituents think anymore, almost a twenty percent increase since 2000.[52] The United States has not experienced a ten-year stretch of this level of skepticism in fifty years.[53]

McDonnell's facts and holding reinforce why most Americans view the federal government as corrupt and not responsive to the public will. Consider the relationship in *McDonnell*—a drug company's CEO gained access to a governor through a steady stream of extravagant gifts, and the governor subsequently strongly advocated for the CEO's product.[54] No honest version of those facts can conceal the perception of impropriety that the relationship raises. Even the Supreme Court acknowledged "[t]here is no doubt that this case is distasteful; it may be worse than that."[55] The public is likely to view *McDonnell* as the Supreme Court unanimously permitting—and implicitly supporting—a state's highest public officer maintaining distasteful and tawdry relationships like this. In fact, Virginia officials went as far to say that "the public's confidence was shaken in the wake of [McDonnell's] conviction in federal court."[56]

Virginia's government attempted to restore the public's confidence by imposing new gift restrictions for its public officials,[57] but the federal government has taken no such step for federal officials. Its inaction suggests that the federal government is relying on *McDonnell*'s argument, that upholding McDonnell's convictions would somehow lessen the public's faith in the government.[58] However, the data show this belief is a fallacy.[59] Given the

51. *See* PEW RESEARCH CTR., *supra* note 49, at 194.

52. *See* Smith, *supra* note 50.

53. *See id.*; PEW RESEARCH CTR., GOVERNMENT GETS LOWER RATINGS FOR HANDLING HEALTH CARE, ENVIRONMENT, DISASTER RESPONSE 1 (2017), http://assets.pewresearch.org/wp-content/uploads/sites/5/2017/12/14104805/12-14-17-Government-release.pdf [https://perma.cc/7DB8-59B3] ("Public trust in government . . . remains close to a historic low. Just 18% say they trust the federal government to do the right thing 'just about always' or 'most of the time' – a figure that has changed very little for more than a decade.").

54. McDonnell v. United States, 136 S. Ct. 2355, 2362–64 (2016).

55. *Id.* at 2375.

56. Patrick Wilson, *Virginia Lawmakers Approve New Gift Limit Rules*, VIRGINIAN-PILOT (Apr. 18, 2015), http://pilotonline.com/news/government/politics/virginia/virginia-lawmakers-approve-new-gift-limit-rules/article_3bf297a7-ac6b-5501-884b-20cc62733a51.html [https://perma.cc/78UK-85DW] (quoting Del. Todd Gilbert (R-Shenandoah County)).

57. *See id.*

58. *See McDonnell*, 136 S. Ct. at 2372.

59. *See supra* notes 49–53 and accompanying text.

aforementioned public belief that the government acts only in the special interests of large benefactors, the tawdry tales and outcome of *McDonnell* will only exacerbate the public's distrust in government.

B. Distinguishing Preferential Access to Public Officials from Elections

Critics of *McDonnell* argue that wealthy individuals may now permissibly give gifts to public officials in order to gain access or potentially guide their political decisions.[60] *McDonnell* supporters respond to this criticism by arguing that this type of access to public officials is indistinguishable from campaign contributions.[61] However,

60. *See* Arlo Devlin-Brown & Stephen Dee, *Introduction: The Shifting Sands of Public Corruption*, 121 PENN ST. L. REV. 979, 987 (2017) ("Read alongside the Court's campaign finance decisions, a picture is presented of a political reality in which money for access is normal and even an essential feature of a political system in which donations to political campaigns are protected speech."); Eisler, *supra* note 46, at 1641 ("By describing McDonnell's conduct as prospectively constituent service rather than unequivocally an instance of bribery, the Court implies a characterization of politicians as the pawns of whichever constituent can offer the strongest incentives to take a particular course of action."); Randall D. Eliason, McDonnell v. United States: *A Cramped Vision of Public Corruption*, GEO. WASH. L. REV.: ON THE DOCKET (July 2, 2016), http://www.gwlr.org/mcdonnell-v-united-states-a-cramped-vision-of-public-corruption/ [https://perma.cc/E5KY-6MX8] ("As a result [of *McDonnell*], those with the means to make substantial personal gifts to a politician may now legally obtain access to the corridors of power that is unavailable to everyday citizens.").

This negative perception is tempered by the presence of gift restrictions. In addition to prohibitions on bribery, the federal government, and many state governments, have gift restrictions. *See, e.g.*, H.R. DOC. NO. 114-192, at 973–1001 (2017) (describing gift restrictions covering members of the House); S. DOC. NO. 113-18, at 46–56 (2013) (setting out gift restrictions covering members of the Senate); 5 C.F.R. §§ 2635.201–.206 (2017) (detailing gift restrictions covering employees of the federal executive branch); *Legislator Gift Restrictions Overview*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/ethics/50-state-table-gift-laws.aspx (last updated Nov. 7, 2017) [https://perma.cc/3X2L-9RB3] (outlining each state's gift restrictions, if applicable, for state legislators). However, these rules have many exceptions. *See, e.g.*, BRYAN KAPPE & PRATEEK REDDY, PUB. CITIZEN, GIFT RULES FOR THE EXECUTIVE BRANCH 1–3 (2011), https://www.citizen.org/documents/Gift-Rules-Executive-Branch.pdf [https://perma.cc/8PFE-BJQS]; PUB. CITIZEN, GIFT RULES FOR CONGRESS 3–6 (2007), https://www.citizen.org/documents/Gift-Rules-for-Congress.pdf [https://perma.cc/LAR5-XCW7]. Consequently, unsightly gifts may still be legally permissible. Further, the public would have to be generally aware of these gift restrictions, and their exceptions, to fully dispel this negative perception, which is unlikely.

61. George D. Brown, *The Federal Anti-Corruption Enterprise After McDonnell—Lessons from the Symposium*, 121 PENN ST. L. REV. 989, 993–98 (2017) (evaluating amicus briefs supporting McDonnell and finding some arguing the gifts provided to McDonnell were permissible campaign contributions or political speech); David Debold, *Symposium: An Important Victory for Representative Democracy*, SCOTUSBLOG (June 27, 2016, 2:50 PM), http://www.scotusblog.com/2016/06/symposium-an-important-victory-for-representative-democracy/ [https://perma.cc/FG44-68YW] ("The danger of [including access in the definition of official act] . . . starts with the fact that the 'quid' in a quid pro

campaign contributions are easily distinguishable from gifts to public officials. Campaign contributions are more regulated, more limited in value, and more common than gifts given directly to public officials. Consequently, campaign contributions' ability to influence a public official's decision making pales in comparison to unregulated gifts given outside of the campaign context.

There are some reasonable comparisons between campaign contributions and gifts to public officials. Both often give the donor special access to the public official. During political campaigns, candidates host fundraisers where donors typically contribute a certain amount according to the event's donation hierarchy.[62] Accordingly, the higher a donor is in the hierarchy, the more access she has to the candidate during the event, such as a special cocktail reception or personal one-on-one time with the candidate.[63] In addition to access at these events, the candidate's largest contributors could have other ways to share their thoughts and ideas, such as by regularly scheduled meetings or telephone calls. Ultimately, one could argue these campaign events and special perks for prominent donors are equivalent to paying for additional access. Thus, if access related to significant campaign contributions is already permitted, then individuals seeking a meeting with a public official during his or her busy schedule should be given the same ability to get access.[64]

However, access related to campaign contributions is different in nature and effect than access related to gifts given to public officials. Unlike gifts, campaign contributions are heavily regulated. Persons can only give $2,700 per election to candidates for federal office and only $5,000 each calendar year to political action committees

quo prosecution can be a perfectly lawful thing of value, ranging from campaign contributions to something as mundane as a meal reimbursement at the local diner."); Pete Patterson & John Ohlendorf, *Symposium: Federal Prosecutors and the Power to Pick Defendants*, SCOTUSblog (June 28, 2016, 10:37 AM), http://www.scotusblog.com/2016/06/symposium-federal-prosecutors-and-the-power-to-pick-defendants/ [https://perma.cc/L372-QFLK] (arguing that a narrower definition of official act is needed because "it is relatively easy for the government to prove that an official accepted something of value" like a campaign contribution or access).

62. *See, e.g.*, EMILY'S LIST, MAKING THE DOUGH RISE: A MANUAL FOR CAMPAIGN FUNDRAISERS 36, 38 (2004), https://www.ndi.org/sites/default/files/Making%20the%20Dough%20Rise.pdf [https://perma.cc/8RUH-TNDR]. For example, a campaign fundraiser may have donor levels like sponsors, hosts, and co-hosts. *See id.* at 39.

63. *See id.* at 20, 39.

64. *See* Brown, *supra* note 61, at 993–98 (evaluating amicus briefs supporting McDonnell and finding some arguing the gifts provided to McDonnell were permissible campaign contributions or political speech).

("PACs"), which may directly support the candidate.[65] In addition, all significant campaign contributions are publicly reported, such that interested parties can follow the money flowing to candidates.[66] Gifts, on the other hand, are effectively uncapped because of the numerous gift exceptions.[67] Further, public officials do not always have to report gifts they have received, especially if they were not from lobbyists.[68] Thus, while these two paths to access may appear similar on the surface, in reality, our laws treat campaign contributions and gifts to public officials quite differently.

These regulatory distinctions between campaign contributions and gifts to public officials are meaningful. First, the $7,700 federal campaign contribution ceiling is a much lower total than the $175,000 in benefits that Williams gave Governor McDonnell.[69] Although not

65. *Citizens' Guide*, FED. ELECTION COMM'N http://www.fec.gov/pages/brochures/citizens.shtml# [https://perma.cc/6QDY-ZDGX]. Although individuals may donate an unlimited amount of money to a "Super PAC," those groups likely cannot provide the donor the same level of special access because "Super PACs are required to operate independently of the candidates they support." COVINGTON & BURLING LLP, FORMING AND OPERATING SUPER PACS: A PRACTICAL GUIDE FOR POLITICAL CONSULTANTS IN 2016, at 4 (2016), https://www.cov.com/-/media/files/corporate/publications/2016/05/forming_and_operating_super_pacs_a_practical_guide_for_political_consultants_in_2016.pdf [https://perma.cc/ZNW5-FCD9]. Most states—but not all—also cap campaign and PAC contributions. NAT'L CONF. OF ST. LEGISLATURES, STATE LIMITS ON CONTRIBUTIONS TO CANDIDATES: 2017-2018 ELECTION CYCLE (2017), http://www.ncsl.org/Portals/1/Documents/Elections/Contribution_Limits%20_to_Candidates_%202017-2018_16465.pdf [https://perma.cc/2SS8-24NS] (noting eleven states, including Virginia, who do not cap campaign and PAC contributions).

66. *See Citizens' Guide*, *supra* note 65. All contributions to candidates' campaigns are publicly available, and all political committees must report donations which exceed $200. *See id.* This is especially important in states, like McDonnell's home state of Virginia, that do not limit campaign contributions. *See* NAT'L CONF. OF ST. LEGISLATURES, *supra* note 65.

67. *See, e.g.*, N.C. GEN. STAT. § 163A-212(f) (2017); H.R. Doc. No. 114-192, at 982–87 (2017); H.R. Doc. No. 113-18, at 47–50 (2013); 5 C.F.R. § 2635.204 (2017). For further discussion of gift restrictions, see *supra* note 60.

68. *See* NAT'L CONF. ST. LEGISLATURES, *supra* note 60 ("Many states place the greatest restrictions on gifts from lobbyists to legislators."); *Personal Financial Disclosure: Gift and Honorarium Requirements*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/ethics/personal-financial-disclosure-gift-and-honoraria.aspx [https://perma.cc/49TZ-EKDS] (last updated June 1, 2014) (outlining the varied disclosure requirements states have adopted and finding such requirements in only 36 states).

69. *See* McDonnell v. United States, 136 S. Ct. 2355, 2363–64 (2016) (describing the gifts McDonnell received). Although Williams could have legally donated an equivalent amount of cash to McDonnell's campaign because Virginia does not cap campaign contributions, most states have campaign contribution limits similar to the federal one. *See* NAT'L CONF. OF ST. LEGISLATURES, *supra* note 65; *see also* 52 U.S.C. § 30116(a) (2016); Price Index Adjustments for Contributions and Expenditure Limitations, 82 Fed. Reg. 10904, 10905–06 (Feb. 16, 2017). In addition, the other arguments below for why campaign contributions are different than gifts apply to *McDonnell*'s facts. *See infra* notes 71–82 and

all Americans can afford to donate $7,700 to a candidate, many more can give that amount versus Williams's giving. If more people donate the maximum contribution amount—and many do[70]—the value of the access to the candidate during elections is diluted.

Second, the limited, or sometimes non-existent, gift-reporting requirements make it more difficult for the public to evaluate how their government representatives may be being influenced.[71] Perhaps even more importantly, this lack of information prevents state ethics commissions and prosecutors from monitoring public officials and holding them accountable for potential corruption.[72] This distinction is especially important in states that do not limit campaign contributions.[73] Although individuals in these states can attempt to influence public officials through both lavish campaign contributions and gifts, the public can find out about the lavish campaign contributions because of their reporting requirements.[74] The same is not true for gifts because of their more lax reporting requirements.[75]

Third, public officials may implicitly attribute different meanings to campaign contributions and personal gifts. During a campaign, officials are constantly attending fundraisers and are receiving numerous donations. Each donation may not feel as special or important. Conversely, once the official is in office, and the steady stream of generosity diminishes, their judgment and ability to remain impartial could be more tested by gifts. These varying perceptions are further bolstered by the fact that public officials use campaign

accompanying text. Further, the dilution argument, *see infra* note 70 and accompanying text, also applies to states that allow unlimited campaign contributions since multiple high-dollar donors are competing for access to their donees.

70. According to the FEC, roughly 482,000 individual contributors gave at least $2,700 to political candidates or organizations during the 2015-2016 election cycle—and that's just for federal elections. *Individual Contributions*, FED. ELECTION COMM'N, https://www.fec.gov/data/receipts/individual-contributions/ (filter for 2015–16 under "Transaction Time Period" and more than $2,700 under "Contribution Amount"). About 72,000 gave at least $7,700 or more. *Individual Contributions*, FED. ELECTION COMM'N, https://www.fec.gov/data/receipts/individual-contributions/ (filter for 2015–16 under "Transaction Time Period" and more than $7,700 under "Contribution Amount").

71. *See supra* note 68 and accompanying text.

72. *See supra* note 68 and accompanying text. Campaign contributions have more stringent reporting requirements, *see Citizens' Guide*, *supra* note 65, so ethics commissions and prosecutors are better able to use those reports to identify and address corrupt behavior.

73. *See generally* NAT'L CONF. ST. LEGISLATURES, *supra* note 65 (listing the states that do not have campaign contribution limits).

74. *See supra* note 66 and accompanying text. For a discussion of why almost every campaign contribution can be identified, despite efforts to obfuscate a donor's identity and donation amount, see *infra* note 81.

75. *See supra* note 68 and accompanying text.

donations and gifts differently. Donations to politician's campaign go directly to the campaign and can only be used for limited purposes, like advertising and travel.[76] The politician cannot convert these donations to personal use.[77] Gifts, on the other hand, go directly to the official and are fully at the official's disposal for personal enjoyment. As a result, these differences mean that gifts likely have a greater effect than campaign contributions, so they should not be perceived as the same.

Lastly, the final flaw in the argument that all preferential access is the same is the difference in donors' intent. Campaign contributors may have mixed motivations for their donations. A campaign contributor, even if he gives with the intent to bribe the official, can at least say his donation went toward a legitimate purpose, such as helping elect leaders who share their values.[78] However, as one scholar points out, "secret gifts to a politician have no legitimate or legally recognized purpose and automatically have the whiff of corruption about them."[79] In fact, the true similarity between campaign contributions and gifts is how the law treats a donor's bad intentions. Even in *Citizens United*, when the Court notoriously opened the door for more money to enter politics, the majority opinion stated that campaign contributions can lead to bribery convictions, based on the donor's corrupt intentions.[80] Although identifying a campaign contributor's intent may be difficult, at least the contributor's identity and donation amount are most likely public information.[81] The same cannot be said for gifts.[82] Consequently, gifts

76. *See* 52 U.S.C. § 30114(a) (2016) (describing "permitted uses" of campaign contributions); *Personal Use,* FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/making-disbursements/personal-use/ [https://perma.cc/H8HM-97E4] (offering examples of permissible uses of campaign contributions).

77. *See* § 30114(b) (prohibiting "personal use" of campaign contributions); *Personal Use*, *supra* note 76 (distinguishing between and providing examples of prohibited personal and permissible non-personal uses of campaign contributions).

78. *See* Randall D. Eliason, *Selling Access: Trump and the Legacy of Bob McDonnell*, LAW360 (Jan. 26, 2016, 1:17 PM), https://www.law360.com/articles/885088/selling-access-trump-and-the-legacy-of-bob-mcdonnell/ [https://perma.cc/X72L-7W36 (staff-uploaded archive)]; *see also* Michael Barber, *Donation Motivations: Testing Theories of Access and Ideology*, 69 POL. RES. Q. 148, 154 (2016) (detailing the various reasons people donate to political campaigns).

79. *See* Eliason, *supra* note 78.

80. *Citizen's United v. FEC*, 558 U.S. 310, 356 (2010).

81. *See supra* note 66 and accompanying text. A campaign contributor could avoid her identity being attached to the donation by donating to a candidate through a company's PAC. However, these types of contributions are unlikely to be intended, or at least unlikely to be effective, as bribes. First, for an individual to make a successful bribe, she needs to show the official the commitment she made in order for the official to act in a certain way. If her name is not attached to a specific donation, it would be difficult for the

do not share the same importance or impact in the political process, so the Court should treat them differently.

III. WHERE THE COURT SHOULD HAVE DRAWN THE LINE

The Court's constrained view of bribery led it to insert unwarranted policy concerns into its opinion. Instead of evaluating the confluence of all bribery elements, the Court made it seem as if a conviction solely rested on the "official act" element.[83] If that were actually the case, its policy concerns may have been warranted. An "official act," however, is just one of five elements of bribery.[84] Instead of focusing so much on the "official act" element, the Court should have focused on bribery's mens rea element to ensure ordinary political participation does not constitute bribery. As a result, the Court in *McDonnell* misconstrued these public corruption statutes and created troubling precedent.

A. Improper Use of the Constitutional Avoidance Doctrine

The *McDonnell* decision's concern with a broader definition of an official act resembled the Court avoiding a constitutional question.

public official to know that the briber has upheld her end of the bargain. Second, even if someone created a shell corporation to funnel donations to a candidate as a way to keep the donor's identity out of the campaign contribution disclosures, this effort would most likely not prevent the public from still identifying the donor. Someone looking to identify the people behind a corporation or LLC's large political donation could simply identify the registered organization's home state and then view that registered organization's public documents to ascertain the people behind the donation. Thus, the donor would still risk her bribe being identified. Third, even if the donor attempted to bribe a politician by donating to a related nonprofit organization usually not required to disclose their donor's identities, 26 C.F.R. § 301.6104(b)(1) (2017), the donor nonetheless faces significant challenges. Those groups' activity face even greater restrictions than Super PACs—they cannot coordinate their efforts with the candidates they support, and political activity cannot be the majority of the organization's expenditures nor its primary purpose. *See Citizens United*, 558 U.S. at 360 ("By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate."). *See generally* B. HOLLY SCHADLER, BOLDER ADVOCACY, THE CONNECTION: STRATEGIES FOR CREATING AND OPERATING 501(C)(3)S, 501(C)(4)S AND POLITICAL ORGANIZATIONS (3d ed. 2012), https://www.bolderadvocacy.org/wp-content/uploads/2012/10/The_Connection_paywall.pdf [https://perma.cc/X26B-SMGK] (detailing federal requirements for and restrictions on political activity by 501(c)(4) and similar groups). As a result, these significant challenges mitigate the risk that a donor could successfully bribe a public official and go undetected by the public, and law enforcement, by using the above methods.

82. *See supra* note 68 and accompanying text.

83. *See* McDonnell v. United States, 136 S. Ct. 2325, 2367 (providing multiple elements of bribery and Hobbs Act extortion but only addressing the 'official act' element in the offenses).

84. 18 U.S.C. § 201(b) (2012) (defining the crime of bribery).

As a general practice, the Court makes every effort to determine a case on statutory grounds without ever reaching the constitutional issue.[85] The Court seemingly invoked this doctrine when it questioned how the government's broader definition of official act would affect the political process.[86] When doing so, the Court noted "significant constitutional concerns" with a broader definition, but it never explicitly explained what those concerns were.[87] Justice Roberts, writing for the unanimous Court, said "that public officials will hear from their constituents and act appropriately on their concerns," and "conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time."[88] He argued that the government's construction could make officials "wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse."[89] Doing so would undermine "[t]he basic compact underlying representative government."[90]

However, the Court was misguided in believing that the type of preferential access is part of "[t]he basic compact" of our democracy.[91] The Court rightfully should want to protect common constituent services, but the relationship between Johnnie Williams and Governor McDonnell was not a typical constituent-public official relationship. The benefits Williams gave Governor McDonnell go far beyond some *de minimis* item a constituent may give a public official as a way of thanking her for her service, like a hot dog at a Memorial Day cookout. Even if the law does not prohibit the public official from accepting the gift, it begins to price access to one's representative. That practice is a slippery slope.[92] Thus, the Court

85. *E.g.*, Crowell v. Benson, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

86. *See McDonnell*, 136 S. Ct. at 2372.

87. *Id.*; *see* Brown, *supra* note 61, at 1001 (noting that the *McDonnell* Court did not explain what its constitutional concerns were but explains the "likely candidates are federalism and political process concerns").

88. *McDonnell*, 136 S. Ct. at 2372.

89. *Id.*

90. *Id.*

91. *Id.*

92. *See* Fred Wertheimer, *Symposium:* McDonnell *Decision Substantially Weakens the Government's Ability to Prevent Corruption and Protect Citizens*, SCOTUSBLOG (June 28, 2016, 12:38 PM), http://www.scotusblog.com/2016/06/symposium-mcdonnell-decision-substantially-weakens-the-governments-bbility-to-prevent-corruption-and-protect-citizens/ [https://perma.cc/A7G7-TSHY].

needlessly invoked the constitutional avoidance doctrine when addressing the issues and should not continue to feel constrained for these reasons when deciding public corruption issues. Instead, only its statutory analysis should hold precedential value.[93]

B. Using the Mens Rea Element to Protect Constituent Services

The Court could have avoided any apprehension about undermining the political process by considering the mens rea element of bribery and other public corruption criminal statutes. To establish an honest services fraud, Hobbs Act extortion, and/or bribery charge against a public official, the government must "establish three legs of a stool: a 'quid' (the thing of value provided to the public official), a 'quo' (an official action), and a 'pro' (that the one thing was in exchange for the other)."[94] So, for each of these statutes, including those used to prosecute McDonnell, the government must prove some intent—that the public official accepted the benefit knowing he or she would need to do some specific act to return the favor.[95] Analyzing the definition of bribery shows this. To successfully prosecute a public official for bribery, the government must prove each of five elements: "(1) a public official (2) with corrupt intent (3) receives a benefit (4) given with the intent to

93. *See* Brown, *supra* note 61, at 1001–03 (noting additional reasons for why "[r]eading *McDonnell* as primarily a constitutional case would be a stretch").

94. Arlo Devlin-Brown & Erin Monju, *Public Corruption Prosecutions and Defenses Post-'McDonnell'*, N.Y. L.J. (Jan. 30, 2017), https://www.law.com/newyorklawjournal/almID/1202777763569/public-corruption-prosecutions-and-defenses-postmcdonnell/ [https://perma.cc/2546-DYP4 (staff-uploaded archive)]; *see* 18 U.S.C. § 201(b) (2012) ("Whoever . . . being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for: (A) being influenced in the performance of any official act; (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (C) being induced to do or omit to do any act in violation of the official duty of such official or person"); *see also* Devlin-Brown & Dee, *supra* note 60, at 986 (applying the "stool" concept to hypothetical examples).

95. In *McDonnell*, the Court specifically viewed the Hobbs Act as requiring the public official to "*know*[] that the thing of value was given in return for official action." *McDonnell*, 136 S. Ct. at 2365 (emphasis added) (quoting United States v. McDonnell, 792 F.3d 478, 505 (4th Cir. 2015), *rev'd,* 136 S. Ct. 2325 (2017)). Honest services fraud requires proving fraud, so the public official must have had some bad intent when accepting the money or property. *See* § 1343; Skilling v. United States, 561 U.S. 358, 368 (2010). Moreover, parties often agree to define honest services fraud with reference to the federal bribery statute, which is codified at § 201. *See, e.g.*, *McDonnell*, 136 S. Ct. at 2365. This makes sense in light of the *Skilling* Court's decision to interpret honest services fraud as "encompass[ing] only bribery and kickback schemes." *Skilling*, 561 U.S. at 412.

influence (5) an official act."[96] This "corrupt intent" element is the mens rea element, as a public official is not guilty of bribery unless she "*corruptly* demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity."[97]

These public corruption statutory schemes, exemplified by bribery, show that only public officials with malevolent intentions will be punished. By using these requirements, Congress demonstrated that it only sought to punish public officials who actively choose to follow one individual's or group's interests, instead of their electorate's interests, because of some benefit the person or group provided.[98] *Ordinary* constituent services, which the *McDonnell* Court feared would be encompassed by a broader definition of official act,[99] will not constitute corruption because ordinary services, by their very nature, are performed without the requisite corrupt intent. If ordinary constituent services are such an important part of a public official's job, as the Court argued,[100] a public official providing these services alone would not satisfy the mens rea element.

In addition, because these constituent services are so important, it does not make sense to effectively exempt them from corruption

96. *The Supreme Court, 2015 Term–Leading Cases*, 130 HARV. L. REV. 467, 473 (2016) (delineating 18 U.S.C. § 201's definition of bribery into five elements).

97. § 201(b)(2) (emphasis added).

98. This argument does not suggest that public officials should always follow the will of the majority of the electorate. American history demonstrates the danger of following only the will of the majority, especially as it relates to minority groups' rights. *See* Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1164 (1977) (stating that the concern that the majority will disregard minority interests when exercising power is as old as the nation and democracy itself). *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Eduardo Nolla ed., James T. Schleifer trans., 2010) (1835) (outlining how American majoritarian rule could compromise the fundamental rights of minorities); Diarmuid F. O'Scannlain, *The Rule of Law and the Judicial Function in the World Today*, 89 NOTRE DAME L. REV. 1383 (2014) (noting a study showing that America, compared to other countries, "'lag[s] behind' for failing to provide disadvantaged persons access to the legal system" and explaining that the American political process "has a way of becoming tyrannical, reflecting little more than the arbitrary will of a simple majority, perfectly willing to run roughshod over the desires—and, indeed, the rights—of the unfavored minority"). Also, a minority argument can be more persuasive to a public official without the minority party providing the official some benefit. Rather, the mens rea element targets situations where public officials take a certain action or position because of a personal gain which stems from taking that position.

99. *McDonnell*, 136 S. Ct. at 2372.

100. *See id.*

laws. Yet that is exactly what the Court seems to suggest.[101] If constituent services are indeed part of "[t]he basic compact underlying representative government,"[102] the law should ensure that constituents can get these services without having to give the public official some benefit. If corruption laws are not applied to ordinary constituent services, public officials could require a payment or service in exchange for assisting with a constituent's passport request, disability insurance case, or Veterans Affairs claim for life-changing medical care. That scenario would put a price on representation, which does not seem to comport with American representative democracy. Consequently, focusing on public officials' intent when they act in exchange for some benefit would better ensure a more responsive democracy as opposed to narrowing the definition of official act. It also would more directly address the public's overwhelming concern that their public officials do not act in the electorate's interest.[103] Instead of using a head-scratching, highly fact-specific definition of an official act, courts can protect the political process by faithfully applying the mens rea element of public corruption statutes.[104]

Utilizing the mens rea element in this gatekeeper fashion does raise some challenges. Although Congress demonstrated that it only wanted to punish public officials who acted "corruptly," it did not define "corruptly" within the bribery statute.[105] Without this statutory definition, social norms may weigh most heavily in a factfinder's determination of when an official "corruptly" acted.[106] As a result,

101. *See id.* (rejecting the Government's argument that ordinary constituent services—such as connecting constituents with other public officials—are included in the meaning of "official act" under § 201).

102. *Id.*

103. *See supra* notes 50–53 and accompanying text.

104. Had the *McDonnell* court relied more on the statute's mens rea element instead of the official act element, it may have upheld McDonnell's conviction. *See* Eliason, *supra* note 60 ("The nature of the gifts themselves was substantial evidence of a corrupt agreement. . . . By focusing exclusively on the particular trees of McDonnell's actions rather than the entire *quid pro quo* agreement, the Court missed the corrupt forest that was the relationship between McDonnell and Williams.").

105. 18 U.S.C. § 201(b)(2) (2012); *see* Samuel W. Buell, *Culpability and Modern Crime,* 103 GEO. L.J. 547, 567 (2015). Even in instances where Congress has defined "corruptly," the definition uses terms courts have struggled to precisely define, especially as to whether the official had to consciously disregard the law. Buell, *supra*, at 566–67 (highlighting courts' treatment of corrupt intent under the Foreign Corrupt Practices Act).

106. *See* Buell, *supra* note 105, at 551–54, 570 ("[B]ribery is based on the idea of corruption, which is legally useful not as a formal concept in the air but as a structure for contextual inquiry into social norms."). Buell suggests that bribery should be redefined as "making an offer to give something of value to another for the purpose of influencing that

different factfinders may understand this term differently, potentially creating ambiguity in precedent and, subsequently, some unpredictability.[107]

Even with these risks, relying more on bribery's mens rea element is the better approach for protecting public officials' ability to respond to constituents. First, individuals are unlikely to construe the term "corruptly" so many different ways. At its root, the term connotes some bad intention. Based on *McDonnell*, the Court believes public officials effectively responding to constituents' concerns is a very good thing,[108] so doing so would be far from acting with bad intentions. This baseline understanding, combined with bribery's other four elements, prevents courts from using the mens rea element as a blank check to convict public officials. Second, the "official act" element, and especially the *McDonnell* opinion's interpretation of it, creates ambiguity in its own right.[109] Although the Court provide some examples of the new definition—"a decision or action on a 'question, matter, cause, suit, proceeding or controversy' . . . involv[ing] a formal exercise of governmental power"[110]—each of the three major parts of this definition is susceptible to different interpretations. Instead of giving juries one potentially ambiguous term—corrupt intent—to construe, the *McDonnell* approach instead asks juries to interpret *three* potentially ambiguous parts of just one of the five elements of bribery. Thus, the *McDonnell* approach likely creates even more unpredictability. As a result, greater reliance on bribery's mens rea element is a better way to protect the country's political process and representative democracy.

IV. COURTS MOVING FORWARD FROM *MCDONNELL*

McDonnell's impact will be difficult to measure. It will likely affect prosecutors' decision to move forward with public corruption

person's performance of an official or fiduciary function in a manner known to be wrongfully influenced." *Id.* at 596.

107. Commentators frequently attack this sort of statutory vagueness especially in the criminal context, arguing that it gives the government too much discretion. *See, e.g.*, Harvey A. Silverglate & Emma Quinn-Judge, *Tawdry or Corrupt?* McDonnell *Fails to Draw a Clear Line for Federal Prosecution of State Officials*, 2015–2016 CATO SUP. CT. REV. 189, 218–19 (2016) (arguing that the Supreme Court should invalidate honest services fraud because it is unconstitutionally vague).

108. *See* McDonnell v. United States, 136 S. Ct. 2355, 2372 (2016); *see supra* notes 88–90 and accompanying text.

109. Silverglate & Quinn-Judge, *supra* note 107, at 204–05 ("[T]he Court's application of this standard immediately muddies the waters.").

110. *McDonnell*, 136 S. Ct. at 2371–72 (quoting § 201(a)(3)).

investigations, but prosecutorial calculus is not usually broadcast publicly.[111] As a result, the only reliable way to measure the decision's impact will be to evaluate how courts apply *McDonnell* to different sets of facts. Only minimal takeaways can be reasonably gleaned from recent lower court decisions, so future cases are necessary to develop the scope of *McDonnell*. Even then, *McDonnell*'s fact-specific limitations may blur any takeaways from courts' treatment of the case.[112]

A. Courts' Application of McDonnell

The Court's decision in *McDonnell* led many defendants to appeal their prior convictions or to move to dismiss their indictment, hoping that they may receive a new trial with updated jury instructions.[113] Several commentators predicted that *McDonnell* would not have a significant impact on corruption charges and convictions,[114] and district courts' rulings on cases pending when

111. When prosecutors choose to not pursue a conviction because of *McDonnell*'s official act requirements, it will be up to journalists to uncover "tawdry tales" and then analyze those facts, which may be without the full context of the situation. However, one measurable impact on prosecutors could be heightened pleading standards. A district judge is currently deciding whether *McDonnell* requires prosecutors to identify specific official acts in a defendant's indictment, or whether *McDonnell* only affects jury instructions. *See* William Gorta, *Feds Say UN Bribery Suspect Started 'Interrogation'*, LAW360 (Feb. 28, 2017, 9:05 PM), https://www.law360.com/articles/896674/feds-say-un-bribery-suspect-started-interrogation [https://perma.cc/Y7NE-6LBW (staff-uploaded archive)].

One former federal prosecutor, writing as a co-author, does not think *McDonnell* will greatly affect prosecutors when they decide whether to charge a public official with corruption crimes. *See* Devlin-Brown & Dee, *supra* note 60, at 985–86 ("The reality is that *McDonnell* only precludes prosecutions where the government's theory is that the public official agreed to provide preferential access rather than an actual exercise of governmental power. However, prosecutors do not usually bring cases alleging that mere official access was the only goal of the corrupt scheme. Instead, prosecutors allege that the corrupt scheme involved at least the *intended* exercise of governmental power to benefit the briber payer, regardless of whether the scheme was ultimately successful.").

112. *See supra* notes 37–40 and accompanying text (describing how the Court applied its new narrow definition of official act only to meetings between McDonnell and other public officials).

113. *See, e.g.*, United States v. Lee, No. 17-3868, 2017 U.S. App. LEXIS 25061, at *1–3 (6th Cir. Dec. 12, 2017); United States v. Skelos, 707 Fed. App'x 733, 736 (2d Cir. 2017); United States v. Tavares, 844 F.3d 46, 56–57 (1st Cir. 2016); United States v. Chapman, No. 16-199-01, 02, 2017 U.S. Dist. LEXIS 8483, at *9 n.24 (E.D. Pa. Jan. 20, 2017); United States v. Vederman, 225 F. Supp. 3d 308, 310–11 (E.D. Pa. 2016); United States v. Reed, No. 15-100, 2016 WL 6946983, at *3 (E.D. La. Nov. 28, 2016).

114. *See* Devlin-Brown & Monju, *supra* note 94 (explaining that "McDonnell is of limited significance" and would only bar "the weakest of public corruption cases"); *The Supreme Court, 2015 Term Leading Cases*, *supra* note 96, at 467 (listing a number of "qualifications" that "reduce the likelihood that the decision will hamper future

McDonnell was decided have generally supported those predictions.[115]

However, appellate courts, and district courts on motions for release pending appeal, have been more generous when considering appeals on these grounds. Several have decided that the *McDonnell*-based appeals raised a substantial question.[116] For example, in *United States v. Tavares*,[117] the First Circuit used *McDonnell*'s official act construction to reverse the defendant's Racketeer Influenced and Corrupt Organizations Act ("RICO") conviction, which was based on nine violations of a Massachusetts gratuities statute.[118] The Massachusetts statute at issue requires an "official act," so the court applied the *McDonnell* interpretation.[119] The First Circuit then relied on the second element of *McDonnell*'s official act standard, which requires acting on a *specific* question.[120] Although the evidence may have shown that the defendant appointed individuals to jobs because a legislator told him to do so, the court did not find that the legislator returned the favor—taking some official act based on the defendant's request.[121] The First Circuit reasoned that the defendant's acts looked more like "building up 'a reservoir of goodwill,'" and that alone "is not sufficient to show a specific public act" under *McDonnell*.[122]

prosecutions"). *But see* Wertheimer, *supra* note 92 (expressing concerns that the Court's decision "substantially weakened the legal protections that currently exist against government corruption").

115. *See, e.g.*, *Chapman*, 2017 U.S. Dist. LEXIS 8483, at *9 n.24 (rejecting the defendant's motion to dismiss the honest services fraud charge but noting that *McDonnell*'s construction of "official act" would be used); United States v. Lee, No. 1:15CR445, 2016 U.S. Dist. LEXIS 174984, at *6 (N.D. Ohio Dec. 19, 2016) (denying defendant's motion to dismiss charges on theory that the alleged acts were not official acts); *Reed*, 2016 U.S. Dist. LEXIS 163275, at *19 (denying *McDonnell*'s application to the defendant's case because statutes for which the defendant allegedly violated—wire fraud and money laundering—did not contain the words "official act").

116. *Tavares*, 844 F.3d at 54; *Vederman*, 225 F. Supp. 3d at 311 (finding *McDonnell*'s changes raised enough of a substantial question in conviction over scheme where defendants tried to get one an ambassadorship and hire another's girlfriend to congressional staff). In *Vederman*, defendant's motion for release pending appeal was granted. *Vederman*, 225 F. Supp. 3d at 311. This court clearly valued the issue, too, as it did not grant a co-defendant's motion because he failed to raise this issue. *See* United States v. Fattah, 224 F. Supp. 3d 443, 449 (E.D. Pa. 2016).

117. 844 F.3d 46 (1st Cir. 2016).

118. *Id.* at 54.

119. *See id.* at 56–57.

120. *See id.* at 57–58.

121. *Id.* at 58.

122. *Id.* (quoting United States v. Sun–Diamond Growers of Cal., 526 U.S. 398, 405 (1999)).

The Second Circuit has been the most active circuit court in adjudicating *McDonnell*-based appeals, serving as a guidepost for *McDonnell*'s impact on public corruption law.[123] In 2017, the court issued three decisions in federal cases involving corruption convictions of state public officials.[124] Each of these cases was decided before *McDonnell*, so the defendants, on appeal, argued that the jury which convicted them may have relied on jury instructions or facts that did not satisfy *McDonnell*'s narrower definition of official act.[125] The Second Circuit upheld one corruption conviction[126] but vacated and remanded the other two convictions.[127] In each case, the appeals court closely examined the trial court's jury instructions.[128] In *United States v. Boyland*,[129] the court—and the prosecution—acknowledged that some of the jury instructions "were erroneous in light of *McDonnell*," but the court nonetheless upheld the conviction.[130] It pointed out that the defendant did not object to these jury instructions during trial,[131] and the court reasoned that these errors did not "affect[] Boyland's substantial rights" because the official's actions—getting approval from city and state governments for permits, licenses, grants, and other favors—clearly satisfied

123. Some practitioners expect *McDonnell* to have the biggest impact in the Second Circuit because of how active the U.S. Attorney's Office for the Southern District of New York has been in bringing corruption cases. *See The Second Circuit Clarifies Corruption Standards Following Supreme Court's McDonnell Decision*, ALERT MEMORANDUM (Cleary Gottlieb, New York, N.Y.), July 20, 2017, at 2, https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/2017/publications/alert-memos/second-circuit-clarifies-corruption-standards-7-21-17.pdf [https://perma.cc/4B6R-WJ2X] ("The *McDonnell* decision potentially stands to have its largest impact in the Second Circuit, which had previously taken a broad view of official acts, and has seen numerous federal public corruption prosecutions in the last several years—including the convictions of 14 New York State legislators in the past 10 years alone.").

124. United States v. Boyland, 862 F.3d 279, 282 (2d Cir. 2017); United States v. Silver, 864 F.3d 102, 105 (2d Cir. 2017); United States v. Skelos, 707 F. App'x 733, 735–36 (2d Cir. 2017); *see* Elkan Abramowitz & Jonathan Sack, *Limits on the Scope of Honest Services Fraud*, N.Y. L.J. (Nov. 7, 2017), https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/11/06/limits-on-the-scope-of-honest-services-fraud/ [https://perma.cc/C3DG-X6M8 (staff-uploaded archive)] (analyzing the impact of *McDonnell* and *McDonnell*-based appeals in the Second Circuit on honest services fraud law).

125. *Boyland*, 862 F.3d at 281–82; *Silver*, 864 F.3d at 105–06; *Skelos*, 707 F. App'x at 736.

126. *Boyland*, 862 F.3d at 282.

127. *Silver*, 864 F.3d at 106; *Skelos*, 707 F. App'x at 736.

128. *Boyland*, 862 F.3d at 287; *Silver*, 864 F.3d at 112; *Skelos*, 707 F. App'x at 736.

129. 862 F.3d 279 (2d Cir. 2017).

130. *Id.* at 288.

131. *Id.*

McDonnell's definition of official act.[132] Conversely, in *United States v. Silver*[133] and *United States v. Skelos*,[134] the Second Circuit found the opposite to be true.[135] In both cases, the defendants objected to the jury instructions at trial, and the court found that jury instructions, now erroneous because of *McDonnell*'s new definition of official act, could have led the jury to convict the defendants for conduct that is lawful under *McDonnell*.[136] However, the court in both cases rejected the defendants' arguments that the prosecution lacked sufficient evidence to garner a conviction, resulting in the court only vacating the convictions as opposed to reversing them.[137] As a result, it opened the door for the government to retry the cases, and the United States Attorney's Office is currently in the process of doing just that.[138]

More decisions like *Tavares* and these Second Circuit cases are needed to draw proper conclusions about how courts will treat *McDonnell.*[139] Circuit courts are now hearing *McDonnell*-based

132. *Id.* at 291–92 ("In sum, all of Boyland's dealings . . . involved concrete matters that, in order to proceed, needed to be brought before public officials or agencies that would have to make formal and focused administrative decisions. . . . Although the jury was not instructed as to its need to find that the matters were concrete, that they required focused governmental decisions, and that Boyland took action on these matters, we see no reasonable possibility, in light of the record as a whole, that that flaw affected the outcome of the case.").

133. 864 F.3d 102 (2d Cir. 2017).

134. 707 F. App'x 733 (2d Cir. 2017).

135. *Silver*, 864 F.3d at 106; *Skelos*, 707 F. App'x at 736.

136. *Silver*, 864 F.3d at 119 ("[W]e cannot conclude, beyond a reasonable doubt, that a rational jury would have found Silver guilty if it had been properly instructed on the definition of an official act. While the Government presented evidence of acts that remain "official" under *McDonnell*, the jury may have convicted Silver for conduct that is not unlawful, and a properly instructed jury might have reached a different conclusion."); *Skelos*, 707 F. App'x at 737 ("When we consider the defective jury charge together with these arguments and the lack of instruction cautioning the jury that a meeting is *not* official action, we cannot conclude beyond a reasonable doubt 'that a rational jury would have found the defendant[s] guilty absent the error.'" (quoting *Silver*, 864 F.3d at 119)).

137. *Silver*, 864 F.3d at 106; *Skelos*, 707 F. App'x at 736.

138. *See* Elizabeth Rosner & Kaja Whitehouse, *Dean Skelos and His Son Get New Trial Date in Corruption Case*, N.Y. POST (Oct. 31, 2017, 4:02 PM), https://nypost.com/2017/10/31/dean-skelos-and-his-son-get-new-trial-date-in-corruption-case/ [https://perma.cc/MQ9R-456X].

139. All interested parties lost a great opportunity to clarify this standard when the government decided to not retry McDonnell's case. Amy Howe, *Prosecutors Move to Dismiss Charges Against McDonnells*, SCOTUSBLOG (Sep. 8, 2016, 4:31 PM), http://www.scotusblog.com/2016/09/prosecutors-move-to-dismiss-charges-against-mcdonnells/ [https://perma.cc/CZC4-2YKA]. To do so, the prosecution's theory would be that by meeting with the officials, McDonnell was trying to pressure them into researching the supplement, and that pressuring is sufficient. McDonnell v. United States, 136 S. Ct. 2355, 2371 (2016). Even the *McDonnell* opinion noted that the jury could have reasonably found McDonnell guilty under the new jury instructions. *See id.* at 2374–75.

appeals more frequently.[140] However, *McDonnell*'s impact will be best learned by reviewing the decisions of district courts applying *McDonnell*'s new standard at trial. Appellate review is deferential—appellate courts must only decide whether the trial court's decision met a certain standard of review, such as the plain error rule and sufficiency of the evidence standards. As a result, appellate courts do not often actually apply the law to a case's facts to determine whether a person is guilty of the charged crimes.[141] In *Silver* and *Skelos*, the Second Circuit vacated convictions because of procedural deficiencies, which did not require the court to find that the defendants were innocent.[142] As a result, the best way to measure *McDonnell*'s impact is to analyze subsequent corruption trials and examine how the new definition of official act—which the jury likely will hear verbatim in the court's jury instructions—may have affected the outcome.

No major corruption trials have reached a decision since the Supreme Court issued the *McDonnell* decision. The trial of Robert Menendez, a United States Senator from New Jersey facing

140. Although circuit courts are beginning to hear more of these cases, the Supreme Court is not. Jack Newsham, *Supreme Court Won't Review NYC Lawmaker's Bribery Case*, LAW360 (Feb. 21, 2017, 3:16 PM), https://www.law360.com/articles/893944/supreme-court-won-t-review-nyc-lawmaker-s-bribery-case [https://perma.cc/D29C-AFJC (staff-uploaded archive)] (reporting that the Supreme Court declined to grant certiorari for a *McDonnell*-based appeal).

141. *See* United States v. Boyland, 862 F.3d 279, 288–89 (2d Cir. 2017) ("[A]n appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" (citations omitted)); *Silver*, 864 F.3d at 113 ("We review *de novo* challenges to the sufficiency of evidence, but must uphold the conviction if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (internal quotation marks omitted) (quoting United States v. Vernace, 811 F.3d 609, 615 (2d Cir. 2016))).

142. *Silver*, 864 F.3d at 106; *Skelos*, 707 F. App'x at 736. In *Silver*, the Court suggested the opposite and openly acknowledged their limitations when reaching its decision:

> We recognize that many would view the facts adduced at Silver's trial with distaste. The question presented to us, however, is not how a jury would likely view the evidence presented by the Government. Rather, it is whether it is clear, beyond a reasonable doubt, that a rational jury, properly instructed, would have found Silver guilty. Given the teachings of the Supreme Court in *McDonnell*, and the particular circumstances of this case, we simply cannot reach that conclusion. Accordingly, we are required to vacate the honest services fraud and extortion counts against Silver, as well as the money laundering count.

Silver, 864 F.3d at 124.

corruption charges, was the first major opportunity to evaluate *McDonnell*'s impact on these types of crimes.[143] The *McDonnell* decision loomed large over the proceedings: the judge declared that this trial was the first time a trial court had been required to craft jury instructions reflecting *McDonnell*'s official act standard.[144] The judge quoted *McDonnell* when instructing the jury on the definition of official act,[145] and the attorneys for both parties focused on this definition in their closing arguments.[146] However, the jury could not reach a unanimous verdict, causing the judge to declare a mistrial.[147] Consequently, *McDonnell*'s impact on corruption trials remains unclear.[148] Once more courts consider *McDonnell*-based claims and identify its application to different potential official acts, the decision's true impact may be properly measured.[149]

143. *See* Nick Corasaniti, *Menendez Trial Judge Rejects Motion to Dismiss the Case*, N.Y. TIMES (Oct. 16, 2017), https://www.nytimes.com/2017/10/16/nyregion/menendez-corruption-trial-dismissal-denied.html?_r=0 [https://perma.cc/2KSZ-3D9U (dark archive)] (reporting on the decision by the court to reject a motion to dismiss and send the case to a jury); Bill Wichert, *Menendez Jury Instructions Crafted With Eye On McDonnell*, LAW360 (Oct. 31, 2017, 10:09 PM), https://www.law360.com/articles/980047/menendez-jury-instructions-crafted-with-eye-on-mcdonnell [https://perma.cc/WL7J-SWLT (staff-uploaded archive)] (explaining that the New Jersey federal judge would be the first trial court to apply *McDonnell* to jury instructions).

144. Wichert, *supra* note 143.

145. *See id.*

146. *See* Charles Toutant, *Jury Begins Deliberations in Menendez Trial After Being Told of Narrower Standard for Bribery*, N.J. L.J. (Nov. 06, 2017, 6:00 PM), https://www.law.com/njlawjournal/sites/njlawjournal/2017/11/06/jury-begins-deliberations-in-menendez-trial-after-being-told-of-narrower-standard-for-bribery/ [https://perma.cc/F3GS-HJJJ (staff-uploaded archive)].

147. Nick Corasaniti & Nate Schweber, *Corruption Case Against Senator Menendez Ends in Mistrial*, N.Y. TIMES (Nov. 16, 2017), https://www.nytimes.com/2017/11/16/nyregion/senator-robert-menendez-corruption.html [https://perma.cc/34GY-P5NU (dark archive)]. One former prosecutor predicted this outcome because he thought "the government had a fairly unusual theory of prosecution, the stream of benefits theory, with the constraints imposed by *McDonnell*." Charles Toutant, *Amid Deadlock and Juror Remarks, Is Menendez Trial Foundering?*, N.J. L.J. (Nov. 13, 2017, 7:07 PM), https://www.law.com/njlawjournal/sites/njlawjournal/2017/11/13/amid-deadlock-and-juror-remarks-is-menendez-trial-foundering/ [https://perma.cc/G2NJ-88E6].

148. A Menendez retrial could have helped clarify *McDonnell*'s impact, but the U.S. Attorney's Office decided against retrying Menendez after the trial judge dismissed some of Menendez's charges. Nick Corasaniti, *Justice Department Dismisses Corruption Case Against Menendez*, N.Y. TIMES (Jan. 31, 2018), https://www.nytimes.com/2018/01/31/nyregion/justice-department-moves-to-dismiss-corruption-case-against-menendez.html [https://perma.cc/B7HA-MG5H (dark archive)].

149. The 2018 calendar year may provide that opportunity with the scheduled Silver and Skelos retrials and other upcoming corruption trials. *See* Devlin-Brown & Dee, *supra* note 60, at 985 (explaining that "prosecutors have continued to bring aggressive public corruption cases" and providing examples of such cases which may soon be resolved);

B. Additional Limitations When Measuring McDonnell's Impact

Even as more courts begin to apply *McDonnell*, the opinion's circumstances and novelty means that *several* fact-specific interpretations of the precedent are needed to fully understand its impact. The Supreme Court adopted a pretty narrow definition of "official act" to hold McDonnell's meeting with government officials to promote Williams' product—his most suspect action—as a non-official act.[150] As a result, this holding does not lend itself to a rule of general applicability. Further, the Court provided only a few examples of official acts[151] and a few related examples of what constitutes acting on a specific question, the second element of an official act.[152] Having only a few examples illustrating a narrow holding does not help draw the line much, either. In addition, the Court only offered a general description for what actions amount to a formal exercise of government power—the first element of the definition of official act.[153] The Court explained that it means something "*similar* in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee."[154] Although observers and future litigants know that a formal exercise of government power is one of the above three examples, public officials act in many more ways. As a result, it is difficult to pinpoint what actions satisfy the elements of an official act.

Rosner & Whitehouse, *supra* note 138 (noting the upcoming dates of the Silver and Skelos retrials).

150. *See* McDonnell v. United States, 136 S. Ct. 2355, 2370 (2016); *see* Silverglate & Quinn-Judge, *supra* note 107, at 205.

151. *McDonnell*, 136 S. Ct. at 2370 (stating that "a decision or action to initiate a research study," "a decision or action on a qualifying step, such as narrowing down the list of potential research topics," "[a] public official . . . using his official position to exert pressure on another official to perform an 'official act,'" and "a public official us[ing] his official position to provide advice to another official, knowing or intending that such advice will form the basis for an 'official act' by another official . . . can [all] qualify as a decision or action for purposes of § 201(a)(3).").

152. *Id.* at 2370–71; *see supra* notes 34, 37–40 and accompanying text (stating the second element of an official act and discussing its application in *McDonnell*). Examples of the second element, making a decision or acting on some question, include public officials, acting in their official capacity: (1) initiating research studies, or at least taking a "qualifying step, such as narrowing down the list of potential research topics"; (2) pressuring "another official to perform an 'official act'"; (3) "provid[ing] advice to another official, knowing or intending that such advice will form the basis for an 'official act' by another official"; (4) agreeing to "make a decision or take an action on a 'question, matter, cause, suit, proceeding or controversy.'" *Id.* at 2370–72.

153. *See McDonnell*, 136 S. Ct. at 2368–69.

154. *Id.* at 2372 (emphasis added).

These vague descriptions offer courts considerable flexibility when they apply the *McDonnell* precedent. Taken together, the examples and definitions that the Court provided will only mandate a clear outcome in just a few types of cases. Thus—despite the Court's attempt to narrow the definition of official act and its narrow holding[155]—in most corruption cases, lower courts will be applying a broad framework. Even those who support the spirit of the holding in *McDonnell* think future courts have considerable flexibility to determine that an official's action is an official act under corruption laws.[156] Given this uncertainty, courts could choose to focus more on other elements of public corruption statutes, such as the charged official's mens rea.[157] Doing so would allow courts to interject their own policy conclusions about the political process into the *McDonnell* official act definition, resulting in case law that bases corruption convictions on certain acts which the *McDonnell* Court may have intended to exclude.[158] Ultimately, more cases are needed to flesh out this opaque precedent.

CONCLUSION

Even though *McDonnell* resulted from a unanimous Court, this decision should be read narrowly because of its questionable analysis of corruption laws and policy concerns. In adopting a narrow definition of official act, the Court relied on policy arguments that, on their face, seem persuasive. However, closer examination of the Court's policy and legal arguments reveals that the Court did not understand the broader picture. It failed to consider how people

155. *See supra* notes 33–43 and accompanying text.

156. *See* Devlin-Brown & Monju, *supra* note 94 ("[T]he further any one of the legs of the quid pro quo is from the heartland of political corruption, and the closer it is to the typical functioning of representative government, the less likely a jury will be to convict and the less likely a court will be to uphold a conviction. [Only] [w]hen the prosecution has little evidence of official acts beyond mere access, a McDonnell defense may be the most attractive."); Silverglate & Quinn-Judge, *supra* note 107, at 204 (arguing that this definition, though purportedly narrow, will likely prove to be broad and subject to "substantial expansion").

157. For discussion on why courts should do so, see *supra* III.B. Also, *McDonnell*'s unanimity on the issue of access in politics departs from a usual split among justices on this issue. In the most recent cases that disregarded preferential access's potential impact—*Citizens United* and *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014)—the majority only had five justices. As a result, lower courts could be more skeptical of *McDonnell*'s true value.

158. Lower courts have historically applied more expansive readings of corruption crimes, which increases the likelihood of this happening. Silverglate & Quinn-Judge, *supra* note 107, at 208 ("The other possibility, of course, given the history of expansive readings of public corruption statutes, is that the courts of appeals will undercut any specificity requirement . . . .").

already distrust their government and mistook a benefactor's improper preferential access as a core element of democracy. It also viewed the official act element of bribery in a vacuum, not explaining how the other four elements of bribery might quell their concern for protecting constituent services. Instead of protecting the political process as it hoped, this decision will only make the American public more skeptical of its representatives and potentially reduce their willingness to participate in the political process. Lower courts have not yet fleshed out this new fact-intensive standard. However, those future opinions could very well find sufficient facts to broaden *McDonnell*'s narrow, but still ambiguous, standard and focus instead on the defendants' mens rea. Future courts choosing to rely on the mens rea element will assuage the *McDonnell* Court's concerns about undercutting representative democracy and instead result in decisions that protect representative democracy—those which punish public officials responsive only to special interests.

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