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The Gratuities Debate and Campaign Reform – How Strong is the Link?

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**THE GRATUITIES DEBATE AND CAMPAIGN REFORM:
HOW STRONG IS THE LINK?**

GEORGE D. BROWN[†]

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I. INTRODUCTION

The federal gratuities statute¹ has been the source of confusion and contention. The confusion stems largely from draftsmanship as well as the relationship between the gratuities offense and bribery. The federal statute in which these two crimes are found does not draw a sharp distinction between the two offenses. The Supreme Court has construed the statute in a way that further blurs the line.² The contention, on the other hand, is reflected in the debate over how far the gratuities offense *should* reach. It is possible, perhaps natural, to view the concept of gratuities as reaching well beyond bribery to cover a wide range of attempts to influence the governmental process. Thus, gratuities is, in part, a prophylactic offense—one that can reach “appearances of impropriety.”³ It is this very breadth that generates the other issues of the gratuities debate, such as concerns about vagueness, prosecutorial discretion, the criminalization of ethics issues, and the criminalization of innocent conduct.

In this Article, I will examine the current status of the gratuities debate. The Article takes as its starting point three recent judicial decisions, from all three levels of the federal court system.⁴ In my view, these decisions reflect strong reservations, even hostility, towards the gratuities offense. Not surprisingly, the approach to the statute drives a court’s construction of it. My analysis focuses on the three courts’ approaches, drawing on the results, but also drawing on general language in the opinions. The strong reservations that I discern are consistent with many themes of anti-corruption law as well as broader themes within the legal system. Obviously, the reservations have considerable force because one of the courts in which I find them is the Supreme Court.⁵

On the other hand, I think there are strong arguments for a more hospitable approach to the statute and broader constructions of it. One can view the main point of creating a gratuities offense as making available a prosecutorial tool to reach examples of improper attempts to influence

1. 18 U.S.C. § 201(c) (1994).

2. *See generally* United States v. Sun-Diamond Growers, 526 U.S. 398 (1999).

3. George D. Brown, *Putting Watergate Behind Us—Salinas, Sun-Diamond, and Two Views of the Anticorruption Model*, 74 TUL. L. REV. 747, 758 (2000).

4. *Sun-Diamond*, 526 U.S. at 398; United States v. Valdes, 437 F.3d 1276 (D.C. Cir. 2006); *aff’d* sub nom. Valdes v. United States, 475 F.3d 1319 (D.C. Cir. 2007) (en banc); United States v. Evans, 149 F. Supp. 2d 1331 (D. Fla. 2001).

5. *Sun-Diamond*, 526 U.S. at 398.

government that bribery cannot reach. However, most of the Supreme Court's pronouncements about the nature of corruption, and the strength of the government's interest in combating it, are found in the related field of campaign finance jurisprudence. Thus, I draw heavily on the campaign finance cases, from *Buckley v. Valeo*⁶ to the present.⁷ Within these cases, I focus on a debate that mirrors the gratuities debate. Should the governmental interest that justifies limits on campaign-related financial activities be viewed as a narrow interest, tied directly to quid pro quo corruption?⁸ Or, should the governmental interest be viewed as one that reaches gratuity-like attempts to influence elected officials?⁹ Despite the presence of strong objections to it within the Court,¹⁰ the latter approach has prevailed, at least until now.¹¹ This Article contends that it is helpful to extrapolate from the campaign finance context to the gratuities context. The *Buckley* line of decisions can be seen as support for a hospitable view of the gratuities statute. The gratuities cases do not cite the campaign finance cases, but perhaps they should.

Part II of the Article begins the analysis by examining the statute's language and purpose. Part III focuses on the three gratuities decisions in question. Particular results are analyzed where relevant, but the emphasis is on identifying the courts' general attitude toward the statute. This Article discusses a pattern of strong reservations, even hostility, with regard to the statute. Part IV attempts to put this pattern in context by discussing themes within anti-corruption law and the legal system, which point toward a restrictive attitude. At the same time, I discuss other themes within anti-corruption law that support a hospitable approach to the statute. Part V discusses the Supreme Court's campaign finance jurisprudence from *Buckley* to the present. It is in this line of cases that one finds explicit discussion and debate over the nature of corruption and the government's interest in dealing with it. As of now, the thrust of these cases runs counter to the hostility shown toward the gratuities statute.

II. THE STATUTE

6. *Buckley v. Valeo*, 424 U.S. 1 (1976).

7. *Randall v. Sorrell*, 126 S.Ct. 2479 (2006).

8. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 410 (2000) (Thomas, J., dissenting).

9. *See id.* at 404 (Breyer, J., concurring).

10. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 291 (2003) (Kennedy, J., dissenting).

11. *McConnell* represents the last extensive treatment of the issue. The various opinions in *Sorrell* devote little, if any, consideration to it.

Because of the importance of the statutory language creating the gratuities offense, an extensive excerpt from 18 U.S.C. § 201¹² is set forth below:

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section—

(1) the term “public official” means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term “person who has been selected to be a public official” means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and

(3) the term “official act” means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.

(b) Whoever—

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

(A) to influence any official act; or

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

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

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts,

12. 18 U.S.C.A. § 201 (1994).

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; . . . shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(c) Whoever—

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

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

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person; . . . shall be fined under this title or imprisoned for not more than two years, or both.¹³

On initial examination, one might question whether there is a separate gratuities offense. The only offense referred to in the title is bribery. The language of subsection (b) contains the familiar elements of bribery, on the part of both bribers and public officials.¹⁴ It is in subsection (c) that one finds the crime of gratuities, even though the term is not used. The close relationship of gratuities to bribery is clear. The offense is set forth in a statute entitled “Bribery,” and its operative language uses many of the same terms, based on the same definitions. In addition, courts often treat gratuities as a lesser included offense under bribery.¹⁵

13. 18 U.S.C. § 201 (1994).

14. *See* 18 U.S.C. § 201(b) (1994).

15. *See generally Valdes*, 437 F.3d at 1276 (defendant indicted for bribery; convicted

Nonetheless, there are clear differences, suggesting the existence of a separate and distinct offense. Bribery must be done “corruptly,”¹⁶ whereas that term is absent from the gratuities subsection. Bribes involve the giving of things of value to “influence” government action.¹⁷ Gratuities, in contrast, involve the giving of things of value “for or because of” official acts.¹⁸ Bribes are forward looking; they involve attempts to influence both current and future action. Gratuities can be backward-looking as well as forward-looking. They can be an attempt to reward, or to be rewarded for, “any official act *performed* or to be performed”¹⁹ Finally, one should note the difference in penalties. Bribery can lead to imprisonment for up to fifteen years, disqualification from office, and a fine.²⁰ A gratuities violation can lead to a maximum imprisonment of only two years plus a fine.²¹

Whether these differences are more apparent than real is not an easy question. As Professor Daniel Lowenstein puts it:

Where, as under federal law, there is . . . a separate gratuities offense, the definitional difficulties are compounded. Rather than having to define one difficult boundary (between a bribe and a lawful act) it is necessary to define two such boundaries (between a bribe and an unlawful gratuity and between an unlawful gratuity and a lawful act).²²

One approach is to view the gratuity and bribery as “synonymous.”²³ Giving or receiving a gratuity is a bribe, but it is a bribe that is sufficiently removed from hard core bribery that it should be treated less severely. The notion of gratuities as a lesser included offense within bribery supports this reading.²⁴ Further support can be found in the fact that giving a thing of value in order to influence an official’s action is related to giving the thing of value “for or because of”²⁵ that same action. Of course, to constitute a

of gratuities).

16. 18 U.S.C. § 201(b)(1) (1994).

17. 18 U.S.C. § 201(b)(1)(A)-(B) (1994).

18. 18 U.S.C. § 201(c)(1)(A)-(B) (1994).

19. *Id.*

20. 18 U.S.C. § 201(b)(2)(C) (1994).

21. 18 U.S.C. § 201(c)(1)(B) (1994).

22. Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 797 (1985).

23. Steven M. Levin, *Notes and Comments: Illegal Gratuities in American Politics: Learning Lessons From the Sun-Diamond Case*, 33 LOY. L.A. L. REV. 1813, 1820 (2000).

24. See Lowenstein, *supra* note 21, at 789.

25. See 18 U.S.C. § 201(c)(1)(A)-(B) (1994).

lesser included offense, gratuities must be missing an element of bribery. That element might be the requirement that bribery be done “corruptly,”²⁶ although it is not clear that this extra requirement adds anything, given the other elements of bribery.²⁷

A different approach views the gratuities offense as almost unrelated to bribery.²⁸ It is the latter crime that deals with attempts to influence official action, while the gratuities statute covers “mere rewards for particular official acts.”²⁹ This approach can explain gifts for past acts or future ones the official will take.³⁰ Even in the case of backward-looking gratuities, however, the giver is likely to be attempting to build up future influence. Gifts to high level officials are not like contributions to the Salvation Army. The giver may even have matters before the official on which no decision has been made. Here, the gift looks a lot like a bribe.³¹

A third approach is to view gratuities as having a broader sweep than bribery, aimed more at generalized attempts to purchase influence.³² The offense can be viewed as prophylactic, aimed in part at appearances of influence seeking or peddling, even, in the words of one federal court, a prohibition of “non-corrupt conduct.”³³ This approach is perhaps reflected in the treatment of gratuities as a lesser included form of bribery. It has the advantage of permitting the prosecution to obtain convictions in cases that look like bribery, but where the jury is reluctant to trigger the harsh penalties that go with it.

Thus, the gratuities offense is broader than bribery, but it is aimed at the same evil. Namely, the gratuities offense prohibits the use of private resources to influence the government to act in a manner which produces different outcomes than normal processes would reach. The gratuities offense can be seen as closely related to the “honest services” doctrine that has evolved under the mail and wire fraud statutes.³⁴ There are problems with this reading, however. The honest services doctrine has the direct approval of Congress. The broad influence-seeking construction of § 201(c) can be attacked as running counter to the statute’s specific requirement that

26. 18 U.S.C. § 201(b)(1) (1994).

27. *See* 18 U.S.C. § 201(b) (1994).

28. Charles B. Klein, *What Exactly is an Unlawful Gratuity After United States v. Sun-Diamond Growers?* 68 GEO. WASH. L. REV. 116, 130 (1999).

29. *Id.*

30. *See id.* at 120.

31. *See id.* at 132.

32. *See Evans*, 149 F. Supp.2d at 1337.

33. *Id.*

34. *See* NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 131-52 (3d ed. 2000).

a gratuity be given “for or because of” any official act. Moreover, the influence seeking construction may not fit well with a focus on backward-looking gratuities. In any event, there is obviously substantial play in the line when a court is called on to apply the statute. The next section analyzes three cases in which courts expressed reservations, even hostility, about the scope of the statute. The section explores the extent to which this attitude can, and does, affect a choice among possible constructions.

III. JUDICIAL RESERVATIONS ABOUT THE GRATUITIES STATUTE—THREE CASES

A. *Sun-Diamond—The Supreme Court Speaks*

The most important case is the Supreme Court’s decision in *United States v. Sun-Diamond Growers of California*.³⁵ Sun-Diamond is a trade association of agricultural cooperatives.³⁶ The case arose out of a number of gifts it made to Secretary of Agriculture Michael Espy.³⁷ The cooperative had an interest in two matters on which the Secretary might act.³⁸ However, the prosecution’s theory was not that the gifts were given to influence these potential acts. Instead, the government, through the Office of Independent Counsel,³⁹ argued that the gratuities statute was violated if the defendant cooperative gave the gifts because of the Secretary’s official position.⁴⁰ The district court upheld this view of the statute despite the requirement that gratuities be given or offered “for or because of any official act”⁴¹ It ruled as follows:

To sustain a charge under the gratuity statute, it is not necessary for the indictment to allege a direct nexus between the value conferred to Secretary Espy by Sun-Diamond and an official act performed or to be performed by Secretary Espy. It is sufficient for the indictment to allege that Sun-Diamond provided things of value to Secretary Espy because of his position.”⁴²

Its charge to the jury stated, in part, that “[t]he gratuity statute makes it a

35. 526 U.S. 398 (1999).

36. *Id.* at 400.

37. *Id.* at 401.

38. *Id.*

39. *Id.*

40. *Id.* at 403.

41. *Sun-Diamond*, 526 U.S. at 403.

42. *United States v. Sun-Diamond Growers*, 941 F. Supp. 1262, 1265 (D. D.C. 1996).

crime for a person or company to knowingly and willingly give a public official a thing of value *because of his official position* whether or not the giver or receiver intended that particular official's acts be influenced."⁴³

The district court's interpretation of the statute was in accord with several appellate decisions adopting the "official position" approach.⁴⁴ The Court of Appeals for the District of Columbia Circuit, however, reversed the conviction and rejected the "official position" approach.⁴⁵ It emphasized the "official act" requirement, reasoning that the district court had, essentially, read this language out of the statute.⁴⁶ This formulation of the applicable test seemed to stop short of a link between a gift and official acts, at least in the case of a forward looking gratuity. "That an official has an abundance of relevant matters on his plate should not insulate him or his benefactors from the gratuity statute—as long as the jury is required to find the requisite intent to reward past favorable acts or to make future ones more likely."⁴⁷ Yet, the court had stated earlier that "a gift looking to future acts can be an unlawful gratuity where the giver is motivated simply by the desire to increase the likelihood of one or more *specific, favorable* acts."⁴⁸ There is obviously a considerable difference between these two formulations. It is the difference between gratuities given to acquire greater influence or "access," and those given in relation to a specific act. The first approach is a mid-point between the "official position" concept of gratuities and a bribery-like view of the offense. The bribery-like view is represented by the second approach. The Supreme Court found that the D.C. Circuit followed the second approach.⁴⁹

In a unanimous decision, the Court affirmed the D.C. Circuit,⁵⁰ including its rejection of the official position test.⁵¹ Its analysis, however, appears to require a link to an official act in all cases, regardless of whether the gratuity is forward-looking or backward-looking. Justice Scalia wrote the opinion. Not surprisingly, he focused on the statute's text, in particular what he described as the prohibition "only [of] gratuities given or received 'for or because of *any official act* performed or to be performed.'"⁵²

Justice Scalia expressed concern that gifts might be given to officials

43. *United States v. Sun-Diamond Growers*, 138 F.3d 961, 965 (D.C. Cir. 1998).

44. *See Sun-Diamond*, 941 F. Supp. at 1268.

45. *See Sun-Diamond*, 138 F.3d at 977.

46. *Id.* at 968.

47. *Id.* at 969.

48. *Id.* at 966.

49. *Sun-Diamond*, 526 U.S. at 414.

50. *Id.*

51. *Id.* at 406.

52. *Id.* (emphasis added).

in purely innocent contexts.⁵³ He cited replica jerseys given to the President by visiting sports teams, and a gift of a school baseball cap to the Secretary of Education during a visit by him to the school.⁵⁴ The way to eliminate such “absurdities”⁵⁵ is to require a connection between the gift and an official act as defined in the statute. “[I]t seems to us most implausible that Congress intended the language of the gratuity statute—“for or because of any official act performed or to be performed”—to pertain to the office rather than (as the language more naturally suggests) to *particular* official acts.”⁵⁶

In *Sun-Diamond*, the Court held that “in order to establish a violation of 18 U.S.C. § 201(c)(1)(A), the government must prove a link between a thing of value conferred upon a public official and a specific ‘official act’ for or because of which it was given.”⁵⁷ *Sun-Diamond* is a controversial decision.⁵⁸ The analysis focuses, in part, on gratuities given as rewards.⁵⁹ With respect to forward-looking gratuities, Justice Scalia conjures up a hypothetical of a large computer company which wants to merge with another large computer company, and the former company wants to make a gift to the incoming head of the Antitrust Division of the Department of Justice, who has already stated his approval of the merger.⁶⁰ Wouldn’t the gift be more troubling if the recipient had *not* indicated his position? Defenders of *Sun-Diamond* will no doubt argue that we have the crime of bribery to take care of such situations.⁶¹ But bribery may not be available if the merger is still in the early planning stage, and the future official’s role is uncertain. After *Sun-Diamond*, the gratuities offense is not available, but it ought to reach such situations and attempts to build “a reservoir of goodwill.”⁶²

Thus, *Sun-Diamond* eliminates from the statute’s ambit those cases in which the statute performs its most valuable function. Perhaps the “official position” interpretation did strain the language. Perhaps the answer lies in a middle ground approach, such as the D.C. Circuit’s requirement that “the jury . . . find the requisite intent to reward past favorable acts *or to make*

53. *Id.* at 408.

54. *Id.*

55. *Sun-Diamond*, 526 U.S. at 408.

56. *Id.* at 409.

57. *Id.* at 414.

58. *See, e.g.*, Klein, *supra* note 27, at 124 (supporting *Sun-Diamond* decision). *But see* Levin, *supra* note 22, at 1830 (criticizing *Sun-Diamond* decision).

59. *See Sun-Diamond*, 526 U.S. at 408.

60. *Id.*

61. *See, e.g.*, Klein, *supra* note 27, at 124.

62. *Sun-Diamond*, 526 U.S. at 404.

*future ones more likely.*⁶³ This approach leaves the gratuities statute with considerable bite, it and does not further the questionable notion that gifts, from affluent citizens and corporations to public officials whose decisions may affect the gift-givers, are a positive social good.

I do not suggest that Justice Scalia was motivated by any such notion, or that he finds in giving gratuities the same constitutional interests he finds in making campaign contributions.⁶⁴ I do mean to suggest, however, that his construction of the statute is motivated in part by deep reservations about it. Take the “absurdities” such as the sports jerseys and the baseball caps.⁶⁵ These are not the cases that are prosecuted. Rather, the cases prosecuted involve efforts by gift-givers to increase the chance of favorable regulation, to avoid unfavorable action, or to secure a governmental benefit.⁶⁶ Even so, the “official position” interpretation would leave the door open to absurd prosecutions, and Justice Scalia was not willing to rely on prosecutorial discretion in order to prevent such baseless prosecutions.⁶⁷

Justice Scalia also expressed considerable sympathy for public officials, and those who deal with them, who must confront a complex set of criminal,⁶⁸ civil,⁶⁹ and regulatory⁷⁰ provisions dealing with gift-giving. He described § 201(c) as “merely one strand of an intricate web of regulations,”⁷¹ and “merely the tip of a regulatory iceberg.”⁷² Warning to the subject, he evoked a “regulatory puzzle,”⁷³ consisting of “numerous . . . regulations and statutes littering this field.”⁷⁴ The result of this maze could be “snares for the unwary.”⁷⁵ Underlying this concern may be the fact that adoption of the “official position” approach would turn the gratuities statute into a “broadly prophylactic criminal prohibition upon gift giving . . .”⁷⁶ Such a statute, like a statute aimed at “appearances” of ethical wrongdoing, clearly raises red flags for Justice Scalia.

63. *Sun-Diamond*, 138 F.3d at 969 (emphasis added).

64. *See, e.g.*, *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting).

65. *Sun-Diamond*, 526 U.S. at 407.

66. This may have been the situation in *Sun-Diamond* itself.

67. *Sun-Diamond*, 526 U.S. at 408.

68. *Id.* at 409.

69. *Id.* at 410.

70. *Id.*

71. *Id.* at 409.

72. *Id.* at 410.

73. *Sun-Diamond*, 526 U.S. at 412.

74. *Id.*

75. *Id.* at 411.

76. *Id.* at 408.

B. Valdes—Getting the Message

Whatever its basis, *Sun-Diamond* is aimed, in part, at sending the lower courts a message about applying the gratuities statute. In *United States v. Valdes*,⁷⁷ a majority panel of the D.C. Circuit applied that message with a vengeance. *Valdes* involved payments by an undercover FBI informant to a D.C. Metropolitan Police detective.⁷⁸ In return for the payments, the detective searched the Metropolitan Police database to obtain information about fictitious motorists, including names and addresses, and, in one case, whether warrants were outstanding.⁷⁹ The payments appear to have taken place both before and after the receipt of the requested information. The detective was indicted for bribery, and the jury convicted him of “the lesser-included offense of receipt of an illegal gratuity”⁸⁰

The conviction would appear to be a classic application of the gratuities statute, as construed in *Sun-Diamond*. There was transfer of a thing of value to a public official, with an obvious link to official acts “performed or to be performed” by him.⁸¹ This result is clearly in line with Justice Scalia’s view of the statute: “[t]he insistence upon an ‘official act,’ carefully defined, seems pregnant with the requirement that some particular official act be identified and proved.”⁸² A majority panel of the D.C. Circuit, however, reversed the conviction on the ground that the database queries were not “official acts.”⁸³

Focusing on the definition subsection of § 201,⁸⁴ the majority noted that there must be a “decision or action,” and that it must be 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.”⁸⁵ The majority reasoned that a decision or an action is not enough, and that the modifying terms “question, matter, cause, etc. . . . suggest at least a rudimentary degree of formality”⁸⁶ The court cited adjudication, actions with respect to a license, investigation, procurement, policy decisions, approval of benefits, and ignoring violations of laws the official

77. 437 F.3d 1276 (D.C. Cir. 2006), *aff’d* sub nom. *Valdes v. United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc).

78. *See id.* at 1277.

79. *Id.*

80. *Id.* at 1278.

81. *Id.*

82. *Sun-Diamond*, 526 U.S. at 406.

83. *Valdes*, 437 F.3d at 1278.

84. 18 U.S.C. § 201(a)(3) (1994).

85. *Valdes*, 437 F.3d at 1278.

86. *Id.* at 1279.

was charged with enforcing as actions that would fit within the modifying terms.⁸⁷ The majority criticized the prosecution for focusing solely on the term “matter,” perhaps in an unstated reliance on the maxim of *noscitur a sociis*.⁸⁸

The court’s main authority is *Sun-Diamond*, primarily for the Supreme Court’s discussion of “official acts.”⁸⁹ The Supreme Court had cited the “absurdities,” such as the sports jersey and baseball cap, as gifts that would be reached under the “official position” reading of the statute, which it rejected.⁹⁰ However, the *Sun-Diamond* Court went on to note that although the acts of officials accompanying those gifts (*e.g.*, hosting a ceremony or visiting a school) are official acts “in some sense,”⁹¹ they are not “official acts” within the meaning of the statute.⁹² Thus, by requiring a link between a gift and the narrower subset of statutory official acts, the Court precluded the possibility of “absurd” prosecutions.⁹³

This aspect of *Sun-Diamond* cuts against the *Valdes* reasoning. It is true that the Supreme Court made the point that not all actions taken by an official are “official acts” for purposes of § 201.⁹⁴ But the actions the *Sun-Diamond* Court cited, as outside the “official acts” definition, are largely ceremonial actions such as hosting a team or visiting a school.⁹⁵ The actions by the *Valdes* defendant (using a government database to furnish to a gift giver preferential treatment in the dissemination of governmental information)⁹⁶ are far removed from the types of activity the Supreme Court did not want to see prosecuted. There is a line, but it is hard to see how his actions fall on the same side of it as a “ceremony, visit, or speech.” In response to Judge Henderson’s dissent, the majority stated that its own test, “a decision or action” that directly affects “any formal government decision made in fulfillment of government’s public responsibilities,”⁹⁷ would be met

87. *Id.*

88. *Id.* at 1280. *Noscitur a sociis* is a Latin phrase meaning “one is known by his companions.” This term refers to the maxim of statutory construction which states that one can understand the meaning of a word when it is viewed in context. The en banc opinion, discussed immediately below, did rely on this maxim. *Valdes v. United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc).

89. *Id.*

90. *Sun-Diamond*, 526 U.S. at 406.

91. *Id.*

92. *Id.*

93. *Id.* at 408.

94. *Id.* at 406.

95. *Id.*

96. *See Valdes*, 437 F.3d at 1277.

97. *Id.* at 1280.

by ignoring violations of laws he was charged with enforcing.⁹⁸ There is little or no formality in failure to enforce. Investigations, also cited by the majority as meeting the test, will often lack formality as well.⁹⁹ Yet, taking money for failure to enforce, or failure to investigate, is certainly the type of evil at which the gratuities statute was aimed. In *Valdes* itself, as Judge Henderson pointed out, “a law enforcement officer . . . accepted money personally for taking action in his official capacity”¹⁰⁰ Again, this is “precisely the conduct”¹⁰¹ at which the statute was aimed. Perhaps the majority’s test would work better if the word “formal” were omitted.¹⁰²

In attempting to ascertain the meaning of “official act,” one should consider the language “*otherwise than as provided by law for the proper discharge of official duty*,” which appears twice in the gratuities statute.¹⁰³ The *Valdes* court apparently viewed this as limiting language.¹⁰⁴ In the bribery section of the same statute, however, similar language (“any act in violation of the lawful duty of such official or person”)¹⁰⁵ plays a broadening role. Congress seems to have used this language in the bribery section to catch misdeeds that would not fall under the definition of “official act.” Thus, it could be argued that bribery reaches a broader range of official misconduct than does the gratuities offense. If no such language appeared in the gratuities section, a narrow reading of the latter term would be supported by this argument. But, the language does appear in the gratuities section; in fact, it appears twice.¹⁰⁶ The natural reading, as well as the one that harmonizes the treatment of the two offenses, is to view “otherwise than as provided by law . . .” as constituting a liberal directive. The breadth of the matters for which one cannot take bribes is the same as the breadth of the matters for which one cannot accept gratuities. The contrary reading would lead to the anomalous result that the greater offense would not include the lesser in many cases.

Although I find the result questionable, and the dissent’s reasoning more persuasive, I admit that the matter in *Valdes* is not free from doubt. The case seems a strong candidate for en banc review.¹⁰⁷ For purposes of

98. *Id.* at 1279.

99. *Id.*

100. *Id.* at 1287 (Henderson, J., dissenting).

101. *Id.*

102. *Valdes*, 437 F.3d at 1287.

103. See 18 U.S.C. § 201 (c)(1)(A)-(B) (1994) (emphasis added).

104. *Valdes*, 437 F.3d at 1278.

105. 18 U.S.C. § 201 (b)(1)(C) (1994). See also See 18 U.S.C. § 201(b)(2)(C) (1994).

106. See 18 U.S.C. § 201(c)(1)(A)-(B) (1994).

107. In February 2007, the Court of Appeals for the District of Columbia rendered an en banc decision in *Valdes*. *Valdes v. United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en

this Article, the principal question is whether views about the statute, in particular reservations about it, played a role in the court's narrow application. There are several indications that this was the case. For example, the court conceded that "one or more of [the defendant's] disclosures may have been unethical, sanctionable, or even criminal independently of § 201" ¹⁰⁸ This concession suggests strong reservations about using the bribery statute (including the lesser included offense of gratuities) to deal with ethical problems.

The court also expressed hesitation about adopting a construction that would give the statute a broad sweep. ¹⁰⁹ Finally, the majority cited *Sun-Diamond* for the proposition that "anti-corruption law manifested a maze of precisely targeted prohibitions, and exceptions from more general prohibitions," so that statutes in the field should be narrowly construed. ¹¹⁰ In sum, it is far from clear that the majority panel decision in *Valdes* correctly interpreted *Sun-Diamond's* reasoning on "for or because of," thereby answering the quite different question of the meaning of "official acts." Still, the decision seems faithful to the spirit of *Sun-Diamond's* narrow approach to the gratuities statute, and the case is noteworthy for the expression of reservations about the statute.

C. *Evans*—A Dangerous Statute that Must be Amended

Finally, it is important to note the views expressed in the 2001 district court opinion in *United States v. Evans*. ¹¹¹ Neither the facts (a routine example of local corruption) ¹¹² nor the result (a series of rulings generally upholding guilty verdicts under several federal statutes) ¹¹³ are remarkable. What is remarkable is the candor, or perhaps even hostility, with which the court discussed its reservation regarding the gratuities statute. The court's

banc). A majority of the en banc court essentially agreed with the panel majority in reversing the conviction and adopting a narrow construction of the statute. Drawing heavily on *Sun-Diamond*, the court held that the statutory language "official acts" focuses on "decisions that the government actually makes." *Id.* at 1325. Rejecting the analysis offered here, the court held that the concept of "official duty" in the bribery context makes the bribery offense broader than its gratuity component. *Id.* at 1327. The court also invoked the rule of lenity. *Id.* at 1323.

108. *Valdes*, 437 F.3d at 1280.

109. *Id.*

110. *Id.* at 1281.

111. 149 F. Supp. 2d 1331 (M.D. Fla. 2001).

112. *Id.*

113. *Id.*

analysis was guided by a reading of the statute as different from bribery: a prohibition of “non-corrupt conduct that gives an appearance of impropriety.”¹¹⁴ At the end of its opinion, the court offered the following assessment:

The gratuity statute, charged against all three Defendants in this case, is a cause of great concern to this [c]ourt. The potential breadth of the statute constitutes considerable danger to both public officials and unwitting citizens who deal with those officials. When read broadly, as the government urges, all the government must show to send a case to the jury is that something of value was given or transferred to a public official by one who had a business transaction with that official’s agency either in the past or future. The government argues that once this low threshold is met, the jury is free to find that a criminal violation occurred, even with no evidence of wrongdoing, inflated contract prices or other suspect dealings. The dangers of this interpretation are obvious: it would ensnare many individuals who had made innocent gifts or loans or had legitimate business transactions with officials. That is, under the Government’s interpretation, once evidence of a transfer has been adduced, the defendant must prove the legitimacy of the transaction or suffer a possible guilty verdict. The presumption of innocence appears to have disappeared.¹¹⁵

Immediately visible is a principal *Sun-Diamond* theme—gratuities as a potential trap for the unwary.¹¹⁶ However, for the *Evans* court, the Supreme Court’s narrowing construction was not enough. Those who deal with public officials (and presumably the officials themselves) face the risk of “criminal prosecutions for innocent acts.”¹¹⁷ Apparently, the court viewed the *Sun-Diamond* link as easily satisfied, rather than the heavy burden prosecutors might have feared after that decision. The combination of a transfer to an official and action, actual or potential, by that official involving the transferor may trigger a prosecution.¹¹⁸ Questions of amount, timing, and form of the transfer may make a difference, but the result is still a strong risk of unfairness.¹¹⁹ The court apparently felt that judicial remedies

114. *Id.* at 1337.

115. *Id.* at 1343-44.

116. *Id.* at 1345.

117. *Evans*, 149 F. Supp. 2d at 1345.

118. *Id.* at 1344.

119. *Id.*

had been tried and had failed. Its recommended solution was for “Congress to rewrite the gratuity statute to provide a well-defined harbor for those dealing with public officials.”¹²⁰

Taken together, *Sun-Diamond*, *Valdes*, and *Evans* constitute a powerful critique of the gratuities statute, as well as judicial responses to the problems courts have seen in its operation. The next section examines both the extent to which these developments reflect particular aspects of the statute, and the extent to which they represent broader judicial responses to the problems of anti-corruption law.

IV. THE STATUTORY CRITIQUES IN CONTEXT AND A DEFENSE OF THE GRATUITIES CONCEPT

A. A Badly Drafted Statute

It is possible that the courts find the gratuities statute hard to work with, and are sending signals to Congress that it needs to be redrafted. In *Sun-Diamond*, for example, the Supreme Court rejected the “official position” reading as “a broadly prophylactic criminal prohibition upon gift giving.”¹²¹ The *Sun-Diamond* Court did not say Congress could not enact such a statute, but noted that when Congress wanted to impose such restrictions, it had drafted “clearly framed and easily administrable provisions . . . imposing gift-giving and gift-receiving prohibitions specifically based upon the holding of office.”¹²² The Supreme Court cited narrow prohibitions, such as that upon a bank employee giving a loan or gratuity to a bank examiner.¹²³ The *Sun-Diamond* Court also cited, with apparent approval, a civil ethics statute prohibiting federal employees from accepting anything of value from a person “whose interests may be substantially affected by the performance or non-performance of the individual’s official duties.”¹²⁴ This statute utilizes the “prohibited source” approach.¹²⁵ Some gift-givers and gift-receivers are barred because of the official’s position and its relation to the donor’s interests.¹²⁶ This approach responds directly to the sort of problem present in *Sun-Diamond*.¹²⁷ However, as the Supreme Court noted, this variant of the official position approach is accompanied by both the

120. *Id.* at 1345.

121. *Sun-Diamond*, 526 U.S. at 399.

122. *Id.* at 409.

123. *Id.*

124. *Id.* at 410.

125. *See generally id.*

126. *See generally id.*

127. *See generally Sun-Diamond*, 526 U.S. at 410.

authorization and promulgation of rules to accompany it.¹²⁸

In *Sun-Diamond*, the prosecution's proposed reading of § 201(c) would have considerable breadth but none of the protections provided by the extensive rules. Thus, the *Sun-Diamond* Court could point to ways of drafting a statute that would achieve the prosecution's goal without entering the thicket of "for or because of." Given that § 201(c) does contain the "for or because of" requirement, the Supreme Court required "a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given."¹²⁹ This result creates an overlap between gratuities and bribery, as well as a narrowing of gratuities prohibitions.¹³⁰ If Congress does indeed wish to create a broad prophylactic criminal provision, it must do as the Supreme Court suggests and spell out the conduct it wishes to cover.

In *Valdes*, the D.C. Circuit sent a similar message to Congress.¹³¹ It viewed the language defining official act (in particular the reference to "any question, matter, cause, suit, proceeding or controversy . . .")¹³² as *limited* to a subset of official acts. The limit the court found in this language was "at least a rudimentary degree of formality."¹³³ If Congress had wanted to go further, it could have utilized "some all-encompassing phrase such as 'act or conduct related to the official's work or in any way using government resources.'"¹³⁴

Each case can be seen as a refusal by the judiciary to do Congress' work for it, thereby forcing the legislature to redraft the gratuities statute if it really wants to create a broad prohibition. The focus of the *Evans* court was not on particular language, but on what the court saw as the statute's unduly broad sweep even after *Sun-Diamond*.¹³⁵ The court called on Congress to cut back a statute that "constitutes considerable danger to both public officials and unwitting citizens who deal with those officials."¹³⁶ Congress should provide a safe-haven, a "bright line test" that defines "the forbidden territory in dealing with public officials so as to avoid criminal prosecutions for innocent acts."¹³⁷

128. *Id.*

129. *Id.* at 414.

130. *Id.*

131. *See Valdes*, 437 F.3d at 1279.

132. *See generally* 18 U.S.C. § 201 (1994).

133. *Valdes*, 437 F.3d at 1279.

134. *Id.* at 1280.

135. *Evans*, 149 F. Supp. 2d at 1343.

136. *Id.*

137. *Id.* at 1345.

B. The Rule of Lenity

Perhaps the courts, at least in *Sun-Diamond* and *Valdes*, are applying the rule of lenity. “The [Supreme] Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.”¹³⁸ The rule is not referred to in either opinion. Yet, in reference to anti-corruption statutes, Justice Scalia did offer the following graphic observation: “[a] statute in this field that can *linguistically be interpreted* to be either a meat axe or a scalpel should reasonably be taken to be the latter.”¹³⁹ The notion that a broad reading of § 201(c) was tantamount to using a “meat axe” was obviously troubling to the Supreme Court.¹⁴⁰ A harsh reading of an ambiguous statute would give it a heavy hand that would generate criminal sanctions in cases where there should not be a heavy penalty.¹⁴¹ The *Valdes* court was also concerned with an unduly broad “sweep.”¹⁴²

The rule of lenity emphasizes the role of the legislature, as opposed to the courts, in defining illegal conduct. Avoiding broad readings (a theme of the three cases discussed here) confines prosecutions to the core of the offense. The notion of a core gratuities offense, however, is somewhat counterintuitive.¹⁴³ Bribery is the core problem at which the statute is aimed.¹⁴⁴ Bribery is defined as the use of private resources to influence official conduct, and it is defined in separate language, and it is accompanied by far harsher penalties.¹⁴⁵ The key to bribery is attempts to influence specific official acts.¹⁴⁶ The separate gratuities offense is aimed at more generalized attempts to influence.¹⁴⁷

138. *McNally v. United States*, 483 U.S. 350, 359 (1987). *But see McNally*, 483 U.S. at 375 (Stevens, J., dissenting) (arguing that some criminal statutes can be viewed as delegations of authority to courts to fill in the gaps). *See generally* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345 (1994).

139. *Sun-Diamond*, 526 U.S. at 411.

140. *Id.*

141. *Id.*

142. *See Valdes*, 437 F.3d at 1280.

143. Paul S. Edwards, *Defining Political Corruption: The Supreme Court's Role*, 10 BYU J. PUB. L. 1, 6 N. 22 (1996)

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* (questioning the distinction “between quid pro quo corruption and monetary influence corruption”). This article contains a particularly helpful discussion of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

C. Vagueness

The “for or because of” language does not do a good job of defining a separate gratuities offense. *Sun-Diamond* can be seen, in part, as an attempt to make the problem go away by conflating gratuities with bribery.¹⁴⁸ Perhaps the judicial reservations about the statute expressed there, and in the other cases under discussion, also reflect the view that the statute runs afoul of the vagueness doctrine. Vagueness concerns are closely related to those underlying the rule of lenity.¹⁴⁹ Each doctrine reflects judicial concern for providing fair warning to citizens, making sure that crimes are defined by the legislature, not the courts, and providing clear guidance to those who enforce the law.¹⁵⁰

One can find all three concerns in *Sun-Diamond*.¹⁵¹ As for fair notice to citizens, the Court showed a general concern for those confronted by a “regulatory iceberg,”¹⁵² and a particular concern that a broad reading of 201c) coupled with other statutes and regulations could lead to “snares for the unwary.”¹⁵³ As for the judicial role, the “official position” construction was a departure from Congress’ practice of drafting “broadly prophylactic criminal prohibitions upon gift giving. . .”¹⁵⁴ in a narrow manner “specifically based upon the holding of office.”¹⁵⁵ Finally, the Court dealt with guidance to enforcement officials by invoking the “absurd” prosecutions that the “official position reading would permit.”¹⁵⁶ It expressed its unwillingness to rely on prosecutorial discretion to present this.¹⁵⁷ The reservations about the statute expressed in *Evans* rest substantially on fair warning, as well as the risk of “criminal prosecutions for innocent acts.”¹⁵⁸

The gratuities statute is not vague in the sense of using terms that an ordinary person cannot understand.¹⁵⁹ The uncertainty as to its reach stems from a tension between the potential breadth of the offense—transfer of

148. See *Sun-Diamond*, 526 U.S. 398.

149. See generally Kahan, *supra* note 137.

150. See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (holding a vagrancy law void due to vagueness).

151. See *Sun-Diamond*, 526 U.S. 398.

152. See *id.*, at 410.

153. See *id.* at 411.

154. *Id.* at 408.

155. *Id.* at 409.

156. *Id.* at 408.

157. See *Sun-Diamond*, 526 U.S. at 408.

158. See *Evans*, 149 F. Supp. 2d at 1345.

159. An example of such a term is “prowling by auto” from the vagrancy law in *Papachristou*.

things of value to acquire influence in general as well as to reward specific acts—and the apparent narrowness of the “for or because of” language. (Indeed, the *Valdes* court narrowed the statute even further through its construction of “official acts.”)¹⁶⁰ The Supreme Court in *Sun-Diamond* resolved the tension through its link requirement.¹⁶¹ One of the Court’s goals was to limit prosecutorial discretion.¹⁶² Perhaps the most interesting aspect of the *Evans* opinion is the district court’s insistence that the Supreme Court did not limit it enough. Both courts expressed concern about the prosecution of “absurd” cases and “innocent” acts.¹⁶³ One should read these cases, in part, as reflecting a strand of anti-corruption law that draws upon the official guidance rationale of vagueness but gives it a special role in the corruption context: the danger of prosecutorial abuse.

D. Prosecutorial Abuse

A recurring theme in anti-corruption law is the risk of prosecutorial abuse. I will quote at length from the most well known expression of it—Judge Winter’s dissent in *United States v. Margiotta*¹⁶⁴ concerning the reach of the “honest services” doctrine under the mail and wire fraud statutes:

The limitless expansion of the mail fraud statute subjects virtually every active participant in the political process to potential criminal investigation and prosecution. It may be a disagreeable fact but it is nevertheless a fact that political opponents not infrequently exchange charges of “corruption,” “bias,” “dishonesty,” or deviation from “accepted standards of . . . fair play and right dealing.” Every such accusation is now potentially translatable into a federal indictment. I am not predicting the imminent arrival of the totalitarian night or the wholesale indictment of candidates, public officials and party leaders. To the contrary, what profoundly troubles me is the potential for abuse through selective prosecution and the degree of raw political power the freewinging club of mail fraud affords

160. *See Valdes*, 437 F.3d at 1281.

161. *Sun-Diamond*, 526 U.S. at 408.

162. *Id.* at 408-10.

163. *See Id.*, at 408; *Evans*, 149 F. Supp. 2d at 1345.

164. *See* 688 F.2d 108 (2nd Cir. 1982).

federal prosecutors.¹⁶⁵

Justice Thomas has expressed similar views in the context of the Hobbs Act.¹⁶⁶ This concern rests on two principal bases. The first is the importance of a clean reputation to public officials, especially elected ones.¹⁶⁷ The second basis is that the charge is sometimes made that United States Attorneys use political corruption prosecutions to advance their careers, including running for office.¹⁶⁸

One can perhaps see concern about the role of selective prosecution in *Sun-Diamond's* treatment of the "absurdities" and *Evans'* invocation of the "danger" of a broad construction of the statute. Each court was troubled by the possibility of prosecution for innocent acts. Certainly the sports jersey cases could be dealt with by something like the D.C. Circuit's test in *Sun-Diamond*: gifts showing an "intent to reward past favorable acts or to make future ones more likely."¹⁶⁹ This test might not, however, satisfy the *Evans* court, which saw dangers of unfair prosecutions even under the Supreme Court's *Sun-Diamond* test.¹⁷⁰ One's approach to the issue may depend on one's assessment of the desirability of the gifts at issue in the cases that are brought, or are likely to be brought. *Sun-Diamond* involved lavish gifts to the Secretary of Agriculture from a regulated entity.¹⁷¹ *Valdes* involved cash payments to a police detective, from a man he met in a nightclub, for the provision of information from a government database.¹⁷² It is hard to see how such transfers have the social utility or expressive values of campaign contribution.¹⁷³ To say that they are or are not "legal" is to pre-determine the question at issue. Plausible constructions of the gratuities statutes are available to point in either direction. It may be that the underlying judicial concern is not over selective prosecution but over any prosecution. Perhaps the judicial concern about prosecution for gratuities matters reflects an underlying judgement that they may be wrongful but should not be treated as criminal.

165. *Id.* at 143 (Winter, J., dissenting).

166. *Evans v. United States*, 504 U.S. 255 (1992) (Thomas, J., dissenting), *see infra* note 203.

167. A corruption indictment can be the end of a career.

168. *See, e.g., ABRAMS & BEALE, supra* note 33, at 147.

169. *See Sun-Diamond*, 138 F.3d at 969.

170. *Evans*, 149 F. Supp. 2d at 1343-44.

171. *Sun-Diamond*, 526 U.S. at 398.

172. *Valdes*, 437 F.3d at 1277.

173. *See generally* Daniel H. Lowenstein, *When Is a Campaign Contribution a Bribe?* *In PRIVATE AND PUBLIC CORRUPTION* 134-135 (William C. Heffernan & John Kleinig eds., 2004) (discussing the value of campaign contributions).

E. Criminalizing Ethics

Let us assume that public officials can engage in forms of misuse of their position that society would view as wrongful acts that should be punished as violations of ethical norms but do not rise to the seriousness of corruption, which should be treated as a crime. All three of the judicial decisions under consideration here suggest that receipt of gratuities, as opposed to bribery, falls more on the ethics side of the line. The *Evans* court referred to the gratuities offense as a prohibition of “*non-corrupt conduct* that gives an appearance of impropriety.”¹⁷⁴ The D.C. Circuit in *Valdes* stated the detective’s acts may have been “*unethical*, sanctionable, or even criminal independently of [section] 201. . . .”¹⁷⁵

The Supreme Court’s opinion in *Sun-Diamond* focused on the wide range of “*ethical rules*”¹⁷⁶ governing gratuities. The Court may have stopped short of endorsing such rules as the preferred method of dealing with gratuities, but it certainly invoked their existence as a reason for construing the criminal gratuities statute narrowly.¹⁷⁷ The Court’s construction—moving the statute closer to bribery—can be seen as a way of reserving the criminal sanction for cases of true corruption.

Drawing the line between ethics violations and true corruption is not easy. One way to look at the problem is that ethics focuses on the official,¹⁷⁸ and aims to deter personal enrichment through office holding as well as unfair personal advancement of oneself or favored persons. A government official’s pulling strings to get an unqualified relative hired for a government post would strike many people as unethical; few would consider it criminal. Professor Kathleen Clark finds it helpful to analyze government ethical responsibilities as a fiduciary obligation broken into four components: a conflict of interest component; an influence component that subjects transactions with certain beneficiaries to heightened scrutiny; a partiality component that requires fair and equal treatment of beneficiaries; and, an avoidance component that presents fiduciaries from putting themselves in positions of conflict.¹⁷⁹ Professor Clark emphasizes the importance within ethical standards of prophylactic rules.¹⁸⁰

174. 149 F. Supp. 2d at 1337 (emphasis added).

175. 437 F.3d at 1280 (emphasis added).

176. *See* 526 U.S. at 410 (emphasis added).

177. *See id.*

178. *See* Brown, *supra* note 3, at 753.

179. *See* Kathleen Clark, *Do We Have Enough Ethics In Government Yet?: An Answer From Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 71.

180. *See id.*

“Appearances” concerns are also important.¹⁸¹

Corruption, typified by the crime of bribery, focuses on what Professor Susan Rose-Ackerman analyzes as the unwarranted intrusion of the private marketplace into the “democratic political system that grants a formal equality to each citizen’s vote.”¹⁸² Resources amassed in the private sector are used to change public sector outcomes. The opinions analyzed here may see receipt of gratuities as primarily an ethics problem in that it represents improper self-enrichment by the officeholder, and creates possibilities (and appearances) of conflict, improper influence, and partiality. A prophylactic rule responds to these risks. It works particularly well in the case of a backward-looking gratuity: payment from an outside source for having done one’s job. However, gratuities analysis is seriously incomplete if it ignores the giver. Thus a forward-looking gratuity seems closer to the line, if not, in fact, on the corruption side. It may well represent a general attempt to build up influence over future decisions.

F. The Decisions as Examples of the Counterrevolutionary Critique

The judicial decisions analyzed in this Article may reflect reservations about 18 U.S.C. section 201 (c), both as to its draftsmanship and its implications, particularly if construed broadly. Alternatively (and simultaneously), it is possible that they reflect deeper doubts about the entire concept of gratuities as a criminal offense. These doubts are perhaps not limited to the gratuities statute. Rather, they can be seen as judicial agreement with a broader movement within the political and legal culture. This movement asserts that our society has reached the point of dealing too harshly with perceived corruption and ethical lapses in the public sector. In an earlier article, I labeled this movement the “counterrevolutionary critique” of the post-Watergate consensus.¹⁸³

In terms of attitudes towards corruption and ethics in government, Watergate was a defining moment. The scandal led to new institutions such as the independent counsel,¹⁸⁴ new laws such as campaign finance reform,¹⁸⁵ and an increased crackdown on political corruption at all levels.¹⁸⁶ The phenomenon that I have referred to as the “post-Watergate consensus”¹⁸⁷

181. *See id.* at 97-98.

182. *See* SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 1 (Academic Press 1978).

183. *See* Brown, *supra* note 3, at 749.

184. *See id.* at 804.

185. *See id.* at 800.

186. *See id.* at 752.

187. *See id.* at 749.

goes beyond institutions and prosecutions. Professor John C. Coffee, Jr. has referred to “a broad social and political consensus, which preceded but was later intensified by, the Watergate conspiracy, concerning the gravity of offenses involving institutional corruption.”¹⁸⁸ The consensus involves not only a general “hard line” on these issues, but an emphasis on curbing the power of special interest groups and on deterring the appearance of improper behavior.¹⁸⁹

The post-Watergate consensus is no longer dominant, however. Of equal, if not greater, weight is the counterrevolutionary critique. This critique rests on the view that post-Watergate zeal to root out corruption ended up harming the political system and the workings of government.¹⁹⁰ For example, the independent counsel (special prosecutor) mechanism, once viewed as part of the constitutional landscape,¹⁹¹ was allowed by Congress to expire. Prosecutorial abuses, by independent counsels and others, were viewed as the inevitable product of what Suzanne Garment called “a self-reinforcing scandal machine. . . .”¹⁹² The counterrevolutionary critique depicts public officials as trapped in an ethics morass, constantly threatened by criminal prosecution, and forced to be more concerned with the appearance of honest government than the fact of effective government. Rather than an evil, interest groups are seen as a major driving force in a democratic system that relies heavily on bargain and trade, on give and take between contending forces to produce the compromises that make government possible.¹⁹³ It is hardly remarkable that interest groups will seek access to public officials in order to express their view and, ultimately, influence those officials.

At the moment, the counterrevolutionary critique seems in the ascendancy.¹⁹⁴ However, the ongoing debate over campaign finance regulation, and current concerns with the role of lobbyists¹⁹⁵ show that the

188. John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 163 n.201 (1981).

189. See Brown, *supra* note 3, at 751.

190. See *id.* at 753.

191. See LAWRENCE E. WALSH, *FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP 528* (W.W. Norton & Co. 1997) (stating “I believe that the independent counsel system has been integrated successfully into our constitutional framework.”).

192. See SUZANNE GARMENT, *SCANDAL: THE CULTURE OF MISTRUST IN AMERICAN POLITICS 9* (N.Y. Times Books 1991) (criticizing the “self-reinforcing scandal machine”).

193. See Brown, *supra* note 3, at 791.

194. See *id.* at 810.

195. Susan Milligan and Rick Flein, *Loophole Weakens Lobbying Reform Bill*, BOSTON GLOBE, Apr. 2, 2006, at A1 (discussing lobby reform bill proposed in response to Abramoff scandal).

battle is far from over. For purposes of the present Article, the decisions on the gratuities statute can be analyzed in the context of the debate and seen as falling on the counterrevolutionary side of the line. The Supreme Court constricted the gratuities statute in *Sun-Diamond*, yet it has taken a hard line in bribery and extortion cases.¹⁹⁶ This is not a departure from the counterrevolutionary position. Bribery is bad under any view of the political system.¹⁹⁷ However, as I pointed out in my earlier work:

Under the counterrevolutionary critique, gifts like those in *Sun-Diamond* may require a far more nuanced response than the harshness of a criminal prosecution, particularly one brought by an independent counsel. Once one leaves the domain of bribery, one encounters the fundamental nature of a pluralistic system in which it is assumed that a large number of interests will attempt to secure influence by a variety of means. Gifts are common in the private sector and may represent nothing more than an attempt by lobbyists to secure a healthy working relationship with policy makers. Even if they raise ethical questions, these might be better dealt with through civil and administrative processes than the criminal law. The latter presents the danger, particularly in the political corruption context, of prosecutorial abuse and may, depending upon the wording of any given statute, present “snares for the unwary.”¹⁹⁸

It is possible to agree with *Sun-Diamond*'s construction of the gratuities statute, without endorsing judicial reservations about the gratuities concept. In the next section I will offer a defense of broad criminal prohibitions on the giving and receiving of gratuities in the governmental context. The analysis will draw in part on what I have referred to, somewhat loosely, as anti-corruption law. It will also draw on the Supreme Court's decisions concerning regulations of political campaign finance. Much of the analysis in the campaign finance cases deals with the prevention of corruption or the appearance of corruption as a governmental interest sufficiently strong to permit the curtailment of First Amendment rights. Thus the Court has been drawn, deeply at times, into discussions of what corruption is.

V. GRATUITIES AND ANTI-CORRUPTION LAW: FROM BRIBERY TO CAMPAIGN FINANCE REFORM

196. *E.g.*, *Salinas v. United States*, 522 U.S. 52 (1997).

197. *See* Lowenstein, *supra* note 21, at 806.

198. *See* Brown, *supra* note 3, at 770.

A. *Gratuities and Anti-Corruption Law*

It is possible to view the giving and receipt of gratuities in the public sector as one of the manifestations of corruption that merit criminal sanctions. The classic example of such a crime is bribery. As Professor Lowenstein puts it:

Bribery is “worse” than other crimes. It is a “crime akin to treason,” a “despicable act.” Those who, having voluntarily assumed public office, set aside the public trust for private advantage (and those who tempt public officials to do so) engage in morally reprehensible conduct by striking at the roots of fairness and democracy. We want a special crime, with a special stigma, for such conduct.¹⁹⁹

Bribery, however, does not have clear boundaries.²⁰⁰ The gratuities offense, at least in its forward-looking form, may be viewed as a form of bribery. Many gratuities convictions start out as bribery prosecutions but do not end up that way. The government may not be able to prove the core element of intent to influence a specific act, or the jury may not view the conduct in question as meriting harsh penalties. In this respect, the *Sun-Diamond* result—keeping the gratuities offense close to bribery—makes sense. Even generalized attempts to gain influence over an official’s acts, at least those that can be identified, fit within Professor Rose-Ackerman’s concept of corruption as an intrusion of the private marketplace into the democratically-based public sector method of allocating governmental goods and services.²⁰¹

On the other hand, it may be more accurate to regard gratuities as different from bribes. The relationship between the transfer of value and governmental action is just too indirect. This does not mean that gratuities should not be criminal. Even a diffuse, generalized form of influence based on the giving of gifts²⁰² can threaten democratic values. Lavish gifts to key officials can lead to advantages, such as access and agenda setting, that members of the general public do not enjoy. There are obvious issues of improper appearances, divided loyalties, preferential treatment, and inefficient government. The latter concerns may sound more like the

199. Lowenstein, *supra* note 21, at 806.

200. *See id.*

201. *See generally* Rose-Ackerman, *supra* note 181.

202. In this respect it may be important to distinguish gratuities from campaign contributions.

domain of ethics than the criminal law and its concern with punishment, incapacitation and rehabilitation. But deterrence is important as well, particularly if we are dealing with serious misuse of office or attempts to induce it. Certainly a fundamental question is whether a pluralistic society in which many forms of rent-seeking are inevitable should view the gratuities phenomenon as a serious evil which should be deterred. It is here that questions of appearance and prophylactic measures play a key role, and argue for criminal treatment of gratutites.

Appearances are what people see; they may be the most immediate reference point by which citizens can judge their government, indeed, whether it is theirs. Important public values are served by ethics objectives such as “integrity, appearances and equal access.”²⁰³ In a democracy, citizens need to know whether these values are respected. As for deterrence through prophylactic measures, it may be particularly important in the context of transfers of value for influence. Specific agreements are not written down; they may not exist at all. Rather, we are in the land of “winks and nods.”²⁰⁴ Gratuities may be less serious than bribes, but the federal criminal code recognizes this difference by punishing them less severely.²⁰⁵ It also criminalizes other seeming ethics violations such as acting on a matter in which the official or a family member has an interest.²⁰⁶

Over forty years ago, in discussing the then-new federal conflict-of-interest law, Roswell Perkins posited the following principle:

Public officials should not be allowed to accept transfers of economic value from private sources, even though no bribery is involved, if the transfer is at the discretion of the transferor as distinct from being pursuant to an enforceable contract or property right of the public official. The deleterious results of acceptance of such transfers may range all the way from natural gratitude to economic dependence.

The application of the principle is as difficult as its verbalization. Its scope is shadowy and grey unlike the very distinct and clear concept of self-dealing. The situations which are fraught with danger are ones where the flow of economic value can be turned on and off like a faucet. Gifts are the prime example, and

203. See Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57, 71-72 (1992).

204. *Evans v. United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring).

205. *Supra* notes 19 & 20.

206. See 18 U.S.C. § 208 (2007).

under most circumstances should be barred.²⁰⁷

Perkin's words ring true today. His principle, a foundation of the gratuities statute, ought to guide its application. Anti-corruption law, whether or not viewed as separate and distinct from ethics, points toward a hospitable approach to the statute rather than the grudging constructions in *Sun-Diamond* and *Valdes*. In other contexts, courts have construed anti-corruption statutes broadly.²⁰⁸

It is particularly instructive to compare gifts to public officials with campaign contributions to those seeking to become public officials. Campaign contributions implicate important constitutional rights of the giver: the First Amendment rights of speech and association.²⁰⁹ The recipient has important interests as well. Given an electoral system based largely on private financing, receipt of contributions is necessary for most nonwealthy individuals to participate as candidates within that system. Gratuities do not play a similar role. In the case of gifts to appointed officials, they threaten values of neutral administration, as the Perkins quote suggests. In the case of elected officials, we expect citizens and groups to show their support, knowing that with support comes influence, but the mechanism for doing this is the campaign contribution. Gifts may well constitute an effort to bypass limits on contributions and to acquire influence outside the open give-and-take of the political process. Indeed, one can find in the judicial debate over regulation of that process insights about corruption that are relevant to the gratuities debate.

B. Campaign Finance Doctrine and the Gratuities Offense

1. A Helpful Comparison?

The term campaign finance reform covers a multitude of issues ranging from attack ads to public financing of campaigns.²¹⁰ The discussion here will focus on the validity of limits on campaign contributions and campaign spending. In analyzing the constitutionality of limits, the Supreme Court has discussed extensively both the government's interest in deterring corruption or the appearance thereof and the meaning of corruption. In this section, I

207. Roswell B. Perkins, *The New Federal Conflict-of-Interest Law*, 76 HARV. L. REV. 1113, 1119 (1963) (emphasis added).

208. *E.g.* *Dixson v. United States*, 465 U.S. 482 (1984) (holding that a federal bribery statute applies to nonfederal actors with substantial responsibility over federal funds).

209. U.S. CONST. amend. I. *See Buckley*, 424 U.S. at 14.

210. *See, e.g., Buckley*, 424 U.S. at 85.

will argue that the Court's conclusions in both inquiries can be applied to the gratuities issue. Campaign finance reform jurisprudence supports the notion of gratuities as something that government can prevent and thus supports a hospitable construction of the current statute.

One must first consider, however, whether the two areas of law present such different issues that lessons from one cannot be applied to the other. Campaign finance cases do not draw on anti-corruption law, nor does the converse occur. Campaign finance questions involve the electoral process and those who participate in it. Gratuities cases usually arise outside of the campaign context and are more likely to involve appointed rather than elected officials. Although the criminal law can come into play if a campaign finance restriction is violated, the cases are typically pre-enforcement challenges to a law or an administrative interpretation.²¹¹ The gratuities cases, on the other hand, are criminal prosecutions.²¹²

Another potentially significant difference is that the gratuities cases involve statutory construction—the meaning of “for or because of,” for example—while constitutional issues loom large in campaign finance. There is, no doubt, a constitutional subtext in the gratuities cases: concerns rooted in the Due Process Clause²¹³ about fair warning to citizens and even whether the underlying conduct should be criminal. The First Amendment²¹⁴ dominates the constitutional discussion of campaign finance regulation.²¹⁵ What links the two lines of cases is a concern over what constitutes corruption that government can prevent. In each area the question of improper influence within the political/governmental process is central. The campaign finance cases are more explicit in identifying and weighing the governmental interest in preventing corruption. Their conclusions can be applied to the gratuities issue, despite the contextual differences.

2. Buckley and the Foundational Concepts: Preventing Corruption and its Appearance as a Governmental Interest

Current campaign finance doctrine is based on the seminal 1976 decision in *Buckley v. Valeo*.²¹⁶ The decision addressed the broad range of

211. *Buckley*, for example, was a pre-enforcement challenge authorized by Congress.

212. For example, *Sun-Diamond* and *Valdes* were decided in the context of appeals from verdicts of guilty.

213. U.S. CONST. amend. V, amend. XIV.

214. U.S. CONST. amend. I.

215. *E.g.*, *Buckley*, 424 U.S. at 25-29 (discussing First Amendment aspects).

216. 424 U.S. 1 (1976).

regulations contained in the Federal Election Campaign Act of 1971,²¹⁷ but the analysis here will be limited to contribution and expenditure limitations. The Court first reasoned that important First Amendment interests were at stake.²¹⁸ Both forms of restriction infringed on political discourse: the realm where the constitutional “guarantee has its fullest and most urgent application.”²¹⁹ Moreover, the restrictions affected rights of speech and rights of association. The Court, however, drew a distinction between contribution limitations and expenditure limitations.²²⁰ The former constituted, in the Court’s view, less of a restriction on speech since the contribution itself, rather than the amount, is the key expressive act.²²¹

The Court’s analysis then turned to a weighing of competing interests similar, but not identical, to the process of applying “strict scrutiny.”²²² With respect to contribution limits, the Court held that the government’s interest in preventing corruption or its appearance justified the restriction of First Amendment rights:

To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.

Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.²²³

Despite the references to the concept of quid pro quo, the Court rejected the argument that bribery and disclosure laws could deal with the problem in the campaign context.²²⁴ When it came to expenditure limitations, however, the Court’s scrutiny of the government interest yielded a different result.²²⁵ In particular, the Court rejected a limit on “independent

217. 2 U.S.C.A. § 437h (1971).

218. *Buckley*, 424 U.S. at 25-29.

219. *Id.* at 15 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

220. *See id.* at 21.

221. *See id.*

222. *See id.* at 29.

223. *Id.* at 26-27.

224. *Buckley*, 424 U.S. at 27-28.

225. *See id.* at 39.

expenditures”—those made by third parties to help candidates without coordination—on the ground that these expenditures did not “pose the same dangers of real or apparent quid pro quo arrangements as do large contributions.”²²⁶ The Court did not see a risk of “improper commitments” from a candidate in return for expenditures.²²⁷

For purposes of the argument advanced here—that campaign finance jurisprudence supports a hospitable approach to the concept of gratuities and to the statute prohibiting them—three aspects of *Buckley* are key. The first is the Court’s view that something more than bribery laws alone is needed to satisfy the anti-corruption interest. In the election context, the something more is the prophylactic limit on contributions. In the broader governmental context, it is the prophylactic ban on gratuities, whether outright as advocated by Perkins or in delineated circumstances. A second important point is the *Buckley* Court’s emphasis on appearances and “the opportunities for abuse.”²²⁸ The concept of appearances is controversial,²²⁹ particularly the notion of a link between campaign finance and public confidence.²³⁰ However, the Court relied heavily upon it as a separate, and distinct (and “almost equal”) ground for upholding restrictions on constitutional rights.²³¹ If appearances concerns can support this governmental action, they are certainly relevant to the nature and scope of the gratuities offense.

Finally, there is the question of what the *Buckley* Court meant by corruption.²³² Attempts have been made to treat its view of corruption as essentially limited to bribery-like quid pro quo arrangements.²³³ There is some support for this narrow reading in the treatment of expenditure limits.²³⁴ Such a reading would support narrow approaches to the federal gratuities statute such as that in *Sun-Diamond*.²³⁵ However, the discussion of contribution limits indicates a broader view of what constitutes

226. *Id.* at 45.

227. *Id.* at 47.

228. *See id.* at 27.

229. *See generally* PETER W. MORGAN & GLENN H. REYNOLDS, *THE APPEARANCE OF IMPROPRIETY: HOW THE ETHICS WARS HAVE UNDERMINED AMERICAN GOVERNMENT, BUSINESS, AND SOCIETY* (The Free Press 1997).

230. *See* E-mail from David Primo, Assistant Professor of Political Science, University of Rochester to George D. Brown, (Sept. 3, 2003, 09:18:00 EST) (on file with author) (“In the statistical work I have done, there is virtually zero evidence that campaign finance laws or campaign spending have an influence on confidence in government.”).

231. *See Buckley*, 424 U.S. at 27.

232. *Id.* at 25.

233. *See Shrink*, 528 U.S. at 422 (Thomas, J., dissenting).

234. *See Buckley*, 424 U.S. at 46-48.

235. *See Sun-Diamond*, 529 U.S. at 406-12.

corruption²³⁶. The Court in *Buckley* rejected bribery laws as sufficient to support the anti-corruption interest because those laws “deal with only the most blatant and specific attempts of those with money to influence governmental action.”²³⁷ Gratuities laws are a principal means of dealing with such attempts and of addressing the problem of improper influence. Moreover, the concept of an “appearance of *quid pro quo* corruption,” if not a contradiction in terms, is not easily limited. It suggests a relationship of influence, which is improper because it was generated by the contribution. But, as Professor Lowenstein has pointed out, securing influence is a major reason why people make—supposedly permissible—campaign contributions.²³⁸ Under the Court’s view, the *size* of the contribution becomes the proxy for its improper nature.²³⁹ This is a frank acknowledgment of the importance of prophylactic legislation in the corruption context. Thus *Buckley* can be read as support for an appearance-based offense like gratuities, and as reflecting a broad view of corruption that supports efforts to deal with it that sweep broadly.

C. From *Buckley* to *Shrink*—Elaborating on the Meaning of Corruption

Ever since it was handed down in 1976, *Buckley* and its analytical framework have dominated the debate over campaign finance regulation. This thirty-year dominance has persisted despite sharp divisions within the Court over *Buckley* and intense criticism by many commentators.²⁴⁰ For present purposes, the most important issue developed by the Court is the meaning of “corruption.” Under the *Buckley* framework, the prevention of corruption or its appearance is the only governmental interest strong enough to outweigh the substantial First Amendment interests at stake in campaign finance regulation.²⁴¹ In the 1985 decision in *Federal Election Commission v. National Conservative Political Action Committee*,²⁴² Chief Justice Rehnquist’s opinion emphasized a narrow concept of corruption, focusing

236. *Buckley*, 424 U.S. at 55-56.

237. *See id.* at 28.

238. *See generally* Lowenstein, *supra* note 21 at 804-12.

239. *See Buckley*, 424 U.S. at 21-29.

240. *See* Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. 1729, 1730 (2001) (“*Buckley v. Valeo* has also been ‘one of the most vilified Supreme Court decisions of the post-World War II era.’” (quoting Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1394 (1994))).

241. *Buckley*, 424 U.S. at 59.

242. 470 U.S. 480 (1985).

on “the financial *quid pro quo*: dollars for political favors.”²⁴³ Perhaps the meaning of corruption can thus be narrowed, although I have already noted the inherent push toward breadth that comes with introduction of the concept of the “appearance of corruption.” In any event, other post-*Buckley* decisions appeared to significantly broaden corruption to include more general notions of improper influence.²⁴⁴ In *Austin v. Michigan Chamber of Commerce*²⁴⁵ a majority of the Court viewed corporate expenditures to influence a campaign as a form of “corruption.”²⁴⁶ Justice Marshall, writing for the majority, focused on the special problem of resources amassed through the corporate form.²⁴⁷ However, it would be a mistake to limit *Austin* to the category of just a “corporations” case.²⁴⁸ Professor Briffault has argued that the decision points in the direction of an equality rationale for campaign finance regulation, despite the fact that *Buckley* itself had cast doubt on any such rationale.²⁴⁹ In terms of comparing campaign finance theory with the gratuities debate, the important point about *Austin* is the Court’s willingness to take a broad view of the meaning of corruption.

The general question of how far *Buckley*’s concept of corruption might stretch came to a head in *Nixon v. Shrink Missouri Government PAC*,²⁵⁰ a case involving the validity of state contribution limits. Justice Souter, for the majority, offered a sweeping definition. Drawing on *Buckley*, he stated the Court’s position as follows:

In speaking of “improper influence” and “opportunities for abuse” in addition to “*quid pro quo* arrangements,” we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money “to influence governmental action” in ways less “blatant and specific” than bribery.²⁵¹

This broad approach to corruption in the campaign finance context builds on the notion of “improper influence” in much the same way as the

243. *Id.* at 497.

244. *E.g.*, *Shrink*, 528 U.S. at 377.

245. 494 U.S. 652 (1990).

246. *See id.* at 659.

247. *Id.* at 654-69.

248. *See* Briffault, *supra* note 239, at 1743.

249. *See id.* at 1734.

250. *Shrink*, 528 U.S. at 377.

251. *Id.* at 389 (citing *Buckley*, 424 U.S. at 28).

approach to the gratuities offense advocated here. Indeed, Justice Souter asserted that the interests invoked to justify the contribution limits were the well-recognized interests that “underline bribery and anti-gratuity statutes.”²⁵² In reaching this position he relied heavily on the concept of appearances.²⁵³

The majority’s view of corruption did not go unchallenged. In dissent, Justice Thomas echoed Chief Justice Rehnquist in reading *Buckley* as limited to quid pro quo corruption or its appearance.²⁵⁴ He chastised the Court for “significantly extending” *Buckley*,²⁵⁵ and giving corruption a “new, far reaching . . . definition.”²⁵⁶ He then attempted to use *Buckley* against itself, so to speak, by arguing that since its core view of corruption is so closely related to bribery, bribery statutes can be used to attack corruption without sacrificing the First Amendment interests present in the campaign context.²⁵⁷ *Buckley* had rejected this argument, relying in part on the concept of appearances.²⁵⁸

One can find in Justice Thomas’ reliance on bribery statutes echoes of some of the arguments against gratuities statutes. For example, he criticized the majority for relying on “vague and unenumerated harms”²⁵⁹ to justify the restrictions at issue in *Shrink*. He also suggested that campaign contribution restrictions could impede the interaction between citizens and those who represent them.²⁶⁰ Both points resemble the critiques that anti-gratuity statutes sweep too broadly and can embrace innocent, even desirable activity. Indeed, one might view the insistence on a quid pro quo as reflecting the same concerns as *Sun-Diamond*’s insistence on a link between a gratuity and a specific official act. Corruption must be tied to an identifiable purchase or attempt to purchase governmental favor. In a striking parallel to the counterrevolutionary critique, Justice Thomas even warned against a definition of corruption that seeks to achieve a “state of purity.”²⁶¹

Any discussion of *Shrink* should touch, at least briefly, on the aspect of the case that has attracted the most attention: the divisions within the Court over the continuing viability of *Buckley*. One leading scholar viewed *Shrink*

252. *Id.* at 378 (emphasis added).

253. *Id.*

254. *Id.* at 410 (Thomas, J., dissenting).

255. *Id.* at 422.

256. *Shrink*, 582 U.S. at 423.

257. *See id.* at 428.

258. *See Buckley*, 424 U.S. at 28.

259. *Shrink*, 528 U.S. at 424 (Thomas, J., dissenting).

260. *Id.* at 416.

261. *Id.* at 423.

as possibly representing “the beginning of the end of the *Buckley* era.”²⁶² It is not hard to see why. Justices Thomas and Scalia, dissenting, called for overruling *Buckley*.²⁶³ Justices Breyer and Ginsburg, concurring, said they might also come to that position.²⁶⁴ Justice Kennedy appeared to agree with the views expressed in both of these opinions,²⁶⁵ while Justice Stevens asserted that the campaign finance regulation problem should not be viewed as a First Amendment issue at all.²⁶⁶ Even Justice Souter seemed a bit tentative in his defense of *Buckley*. He noted that the plaintiffs had not requested that it be overruled, and responded somewhat testily to questions raised by other justices that “the answer is that we are supposed to decide this case.”²⁶⁷

Reports of *Buckley*'s death may be premature, however. Justices Thomas and Scalia wanted to overrule it because it permitted too much regulation²⁶⁸. Justices Breyer and Ginsburg worried that *Buckley* stood in the way of sound regulation.²⁶⁹ Justice Kennedy's position is uncertain, especially after his dissent in *McConnell v. Federal Elections Commission*,²⁷⁰ discussed below. One must also factor in the addition of Chief Justice Roberts and Justice Alito to the Court. More fundamentally, *Buckley*'s weakness may also be its strength. It was a compromise from the outset, a “half-way house”²⁷¹ that gives proponents of regulation something by permitting some regulation, and gives opponents something by forbidding other forms of regulation. Their effort to narrow the concept of corruption can thus be seen as an effort to confine *Buckley*, if it cannot be overruled.

D. *McConnell*—Intensifying the Debate over Corruption

McConnell is a multi-faceted decision upholding much of the Bipartisan Campaign Reform Act of 2002 (BCRA).²⁷² The discussion here will focus on that part of the decision dealing with “soft money,” i.e. money given to

262. Briffault, *supra* note 239 at 1729.

263. *See Shrink*, 528 U.S. at 410 (Thomas, J., dissenting).

264. *Id.* at 404 (Breyer, J., concurring).

265. *Id.* at 409 (Kennedy, J., dissenting).

266. *Id.* at 398 (Stevens, J., concurring).

267. *See id.* at 397 (majority opinion).

268. *See id.* at 412-30 (Thomas, J., dissenting)

269. *See Shrink*, 528 U.S. at 404-05 (Breyer, J., concurring)

270. *McConnell*, 540 U.S. at 286.

271. *See Shrink*, 528 U.S. at 410 (Kennedy, J., dissenting).

272. Bipartisan Campaign Reform Act of 2002 (BCRA), HR 2356. Pub. L. No. 107-155, 116 Stat. 81, codified at 2 U.S.C. § 441 b.

a political party rather than directly to a candidate for federal office.²⁷³ *McConnell* upheld substantial restrictions on soft money, amounting to what the Court called “tak [ing] national parties out of the soft-money business.”²⁷⁴ I will focus on two key aspects of this part of the decision: the majority’s broadening of the corruption concept into a gratuities mode, and Justice Kennedy’s sharp rejection of this development and his accompanying effort to narrow the concept to quid pro quo roots.

The majority found that contributions to the parties, that often ended up helping candidates, presented the same danger of corruption that *Buckley* had found sufficient to justify limits on direct contributions.²⁷⁵ In doing so, the Court moved beyond *Buckley*, and even beyond *Shrink*. Not surprisingly, it relied on the concept of appearance, in particular the evil of “the appearance of undue influence. . . .”²⁷⁶ Soft money contributions could create an atmosphere of “gratitude,”²⁷⁷ “debt,”²⁷⁸ and an inclination to reciprocate.²⁷⁹ Thus, soft money contributors would be likely to enjoy greater “access to high-level government officials.”²⁸⁰ Congress had a legitimate interest, beyond “preventing simple cash-for-votes corruption”²⁸¹ in curbing “undue influence on an officeholder’s judgment, and the *appearance* of such influence.”²⁸² The combination of undue generalized influence, appearance of influence and the danger of access peddling are core justifications for a gratuities statute that is separate and distinct from bribery.

In a strong dissent, Justice Kennedy first argued for the narrow, quid pro quo reading of *Buckley*.²⁸³ Emphasizing that First Amendment rights were at stake, he reiterated that only one governmental interest justifies curtailing them in the campaign finance context: “eliminating, or preventing, actual corruption or the appearance of corruption.”²⁸⁴ If there is no proof of particular corrupt action, general campaign finance regulation is constitutional “only if it regulates conduct posing a demonstrable quid

273. *McConnell*, 540 U.S. at 133.

274. *Id.*

275. *Id.* at 143-45.

276. *Id.* at 144.

277. *Id.* at 145.

278. *Id.* at 146.

279. *McConnell*, 540 U.S. at 147.

280. *Id.* at 150.

281. *Id.*

282. *Id.* (emphasis added) (quoting *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)).

283. *Id.* at 291 (Kennedy, J., dissenting).

284. *Id.*

pro quo danger.”²⁸⁵ The majority had broadened *Buckley* by taking language from prior cases, particularly *Shrink*, out of context. For Justice Kennedy, even those cases required a quid pro quo danger.²⁸⁶ That danger was present there because the contribution went directly to *candidates*. BCRA was unconstitutional because it restricted contributions to *parties*.²⁸⁷ He offered the following rule:

Congress’ interest in preventing corruption provides a basis for regulating federal candidates’ and officeholders’ receipt of *quids*, whether or not the candidate or officeholder corruptly received them. Conversely, the rule requires the Court to strike down campaign finance regulations when they do not add regulation to “actual or apparent *quid pro quo* arrangements.”²⁸⁸

The mere fact that conduct “wins goodwill from or influences a member of Congress”²⁸⁹ does not make it corrupt. The conduct has to constitute “undue influence” because of a quid pro quo or a potential one.²⁹⁰

For Justice Kennedy, the majority had invented a “new definition of corruption”²⁹¹ through improper reliance on the concept of appearance of corruption. He took particular exception to the condemnation of increased access through party donations as corrupt.²⁹² Access by itself is not corruption or its appearance. Favoritism and influence are inevitable in representative politics. Elected officials will respond to those who support them. The only workable way to identify “bad” responsiveness is to look for a quid pro quo. The majority’s broad approach runs counter to theories of democratic representation and does violence to the First Amendment.²⁹³

285. *McConnell*, 540 U.S. at 292.

286. *Id.*

287. *Id.* at 293.

288. *Id.* at 294 (quoting *Buckley*, 424 U.S. at 45).

289. *Id.*

290. *Id.* at 295.

291. *McConnell*, 540 U.S. at 294.

292. *See id.* at 294-96.

293. *Id.* at 296

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

I have highlighted Justice Kennedy's disagreement with the majority for several reasons. His attempt to limit *Buckley*'s view of corruption is analytically difficult as long as that view includes an appearance component. Take Justice Kennedy's reference to a "*quid pro quo* threat."²⁹⁴ Until the candidate is elected, how can such a threat be identified? Who knows what matters will come before a legislator, for example? Much will depend on committee assignments, actions by other committees, actions by the other branch, etc. Are past acts of favoring the contributor relevant? To say that they pose a "*quid pro quo* threat" is to cast doubt on behavior that Justice Kennedy would view as legitimate. As long as the *Buckley* formulation stands, it points towards a broad view of corruption similar to that underlying the gratuities offense. However, supporters of the approach to gratuities advocated here should not put too many eggs in the campaign finance basket. Another reason for emphasizing Justice Kennedy's views is that his doubts about regulation might lead him to advocate a reformulation of *Buckley*'s rationale along narrower lines. There is sharp, and growing, disagreement within the Court over campaign finance. When the Court takes its next step in that area, Justice Kennedy will be a pivotal figure. In *Shrink* he had sounded some pro-regulation notes.²⁹⁵ That is not the tone of his *McConnell* dissent in which he criticized the majority for misapplying *Buckley*.²⁹⁶ In *Shrink* he had advocated overruling it.²⁹⁷

E. Randall v. Sorrell—Spending Limits and the Buckley Framework

The Supreme Court had the opportunity to overrule *Buckley* in *Randall v. Sorrell*.²⁹⁸ *Sorrell* involved challenges to several aspects of a wide-ranging Vermont campaign finance statute.²⁹⁹ Analysis here will focus on the constitutionality of the spending limits imposed by the law. *Buckley* appeared to invalidate spending limits categorically.³⁰⁰ However, there had long been arguments that contribution limits by themselves were not sufficient to achieve true reform, that the Court should and would be open to changed circumstances in the world of campaign finance, and that a legislative scheme limiting both contributions and spending might be hospitably received.³⁰¹

294. *Id.*

295. See *Shrink*, 528 U.S. at 405-40 (Kennedy, J., dissenting).

296. See *McConnell*, 540 U.S. at 286-87 (Kennedy, J., dissenting)

297. *Shrink*, 528 U.S. at 409 (Kennedy, J., dissenting).

298. *Randall v. Sorrell*, 126 S. Ct. 2479 (2006).

299. See *id.* at 2485-87.

300. *Buckley*, 425 U.S. at 55.

301. See *Landell v. Sorrell*, 382 F.3d 91 (2nd Cir. 2004), *rev'd*, 126 S. Ct. 2479 (2006).

A divided panel of the Second Circuit upheld the spending limits.³⁰² Building on *Buckley* and subsequent cases, the majority identified two compelling state interests: the anti-corruption interest³⁰³ and the “time protection” interest.³⁰⁴ The key to the first was demonstrating that “unlimited spending is part of the corruption problem.”³⁰⁵ Not surprisingly, the Court drew on the broader definitions of corruption found in cases such as *Shrink* and *McConnell*. The ability of large contributors to achieve influence, or perceived influence, increased access and agenda-setting power, and their ability to circumvent contribution limits through “bundling” all contributed to what the court viewed as a situation where power was sold and purchased, and where the public perceived this to be the case.³⁰⁶ Contribution limits were not enough because the increasing need to raise large sums of money created a gap between contributors, especially large ones, and other citizens.

The “time protection” interest was presented as closely related to anti-corruption concerns.³⁰⁷ Because candidates’ time is finite, they must focus their energies on fund raising and those who will help it. “Special interests, well placed to take advantage of candidates’ fear of losing [the] fundraising war, dominate candidates’ time and thereby have been able to exercise substantial control over the information that passes to candidates.”³⁰⁸ The court not only joined the two interests it had identified as compelling,³⁰⁹ it linked them to *Buckley* through the notion that candidates’ time and their decision making power were for sale. Thus there was a quid pro quo: “Vermont has shown that, without expenditure limits, its elected officials have been forced to provide privileged access to contributors *in exchange for* campaign money.”³¹⁰

A sharply divided Supreme Court reversed the Second Circuit by a margin of six-to-three.³¹¹ A three-justice plurality held the spending limits invalid, invoking *Buckley* and rejecting the time protection interest.³¹²

302. *Id.* at 135.

303. *Id.* at 115.

304. *Sorrell*, 382 F.3d at 119.

305. *Id.* at 115.

306. *See id.* at 118.

307. *See id.* at 119-24.

308. *Id.* at 122.

309. *See id.* at 124.

310. *Sorrell*, 382 F.3d at 125.

311. *Randall v. Sorrell*, 126 S. Ct. 2479 (2006).

312. The plurality consisted of Chief Justice Roberts, Justice Breyer (who wrote the opinion), and Justice Alito (who concurred in part).

Justice Kennedy concurred separately,³¹³ as did Justices Thomas and Scalia.³¹⁴ Justice Stevens would have overruled *Buckley* on expenditure limits,³¹⁵ but joined Justices Souter and Ginsburg in finding that they might survive a *Buckley* analysis if the time protection interest was considered.³¹⁶ There is little discussion of the nature of corruption.³¹⁷ In sum, *Sorrell* constitutes an anti-regulation decision, but leaves the *Buckley* framework intact.

I have advanced the argument that the Court's decisions in the area of campaign finance reform are support for a broad approach to the area of gratuities. The Court has permitted legislatures to limit First Amendment freedoms on the basis of views of corruption that resemble those that support the concept of a gratuities offense, broadly construed. Would that support disappear if the Court changed its view of corruption to a less broad reading of *Buckley* focusing on the original decision? At this tentative stage, let me offer two responses.

The first is that, even as decided, *Buckley* did not take a narrow view of corruption. It treated the appearance of corruption as an evil almost on a par with quid pro quo arrangements themselves.³¹⁸ Its rejection of the argument that bribery laws can eliminate such arrangements³¹⁹ is an endorsement of prophylactic legislation. The analysis is bolstered by references to "improper influence" and the importance of citizens' confidence in government and the preservation of governmental integrity.³²⁰ All of these concepts lie at the heart of the concept of a broad anti-gratuities prohibition. Like campaign reform, even as narrowly envisioned in *Buckley*, the gratuities offence is a means, other than bribery laws, of furthering these goals through prophylactic legislation. Even if the Court rejected campaign finance regulation in favor of reliance on bribery and disclosure, Justice Thomas appears to advocate a bribery statute that includes gratuities: "a broadly drawn bribery law would cover even subtle and general attempts to influence government officials corruptly. And, an effective bribery law would deter actual *quid pro quos* and would, in all likelihood, eliminate any

313. *Sorrell*, 1265 S. Ct. at 2501 (Kennedy, J., concurring).

314. *Id.* (Thomas, J., concurring).

315. *Id.* at 2506 (Stevens, J., dissenting).

316. *Id.* at 2511 (Souter, J., dissenting).

317. Justice Souter discussed the concept of "access" in the course of disagreeing with the Court's invalidation of the contribution limits. *Id.* at 2513-2514. The plurality applied *Buckley's* "effective advocacy" test. *Id.* at 2491-2500.

318. *See Buckley*, 424 U.S. at 27.

319. *Id.* at 28.

320. *Id.* at 27.

appearance of corruption in the system.”³²¹

Second, suppose that campaign finance law is restricted through a narrower definition of the type of corruption that can form the basis of a compelling governmental interest. That does not mean that post-*Buckley* cases were wrong in espousing a broad approach to what conduct constitutes a subversion of the political process. The Court’s point would be that more diffuse forms of corruption cannot justify limits on First Amendment rights, not that government cannot combat these forms of corruption in other ways. Indeed, a limitation on campaign finance restrictions would highlight the importance of the gratuities offense as an important addition to bribery. It might not be available in the campaign context,³²² but it would be a major criminal tool in combating abuses of the political-governmental process that do not rise to the level of bribery. For improper acts by non-elected officials such as the defendant in *Valdes*, the gratuities offense remains an important safeguard.

V. CONCLUSION

The federal gratuities statute, 18 USC section 201(c), continues to be a source of confusion and contention. The confusion stems largely from problems of draftsmanship within the statute, as well as uncertainty concerning the relationship of the gratuities offense to bribery. Both offenses are contained in the same statute; the former may be a lesser-included offense variety of the latter. Many of the problems that have arisen in this area could be resolved by enactment of an amended statute, perhaps using the prohibited source model. However, the controversy stems also from broader concerns about whether the receipt of gratuities by public officials, even from those they regulate, should be a crime. The argument that such conduct should not be criminalized can be traced to, and is a part of, what I have called the “counter-revolutionary critique” of the hard line on government ethics that grew out of the Watergate scandal. This Article focuses on recent federal court decisions, including the 1999 Supreme Court *Sun-Diamond* case, that appear to show reservations and even hostility toward the statute. These cases express concern about its potential sweep, its possible role as a trap for the unwary, and the power it gives to prosecutors. The recent District of Columbia Circuit decision in *United States v. Valdes* is noteworthy in giving a narrow construction to broad

321. See *McConnell*, 540 U.S. at 267 (emphasis added).

322. See Lowenstein, *supra* note 172, at 135 (“A more intellectually honest approach would be to hold unlawful gratuity statutes violative of the First Amendment as applied to campaign contributions.”).

language, based in part on a negative view of the statute. Nonetheless, this Article contends that the gratuities statute plays an important role as an auxiliary to bribery, serving as a prophylactic statute and permitting the prosecution of “appearances” of unethical behavior. This Article questions whether gifts from regulated entities to their regulators are examples of innocent speech that serves a valuable social function.

Campaign contributions, on the other hand are often examples of such speech. Yet the Court has permitted limiting them, despite serious First Amendment objections to limits on speech and association. The compelling governmental interest that permits this regulation bears a strong resemblance to that underlying anti-gratuity statute: fighting corruption by curbing attempts to acquire influence that cannot be adequately reached through bribery laws. This Article traces the evolution of the anti-corruption interest in the Supreme Court’s decisions beginning with *Buckley v. Valeo*. These decisions give added impetus to the considerations underlying anti-gratuities statutes. *Randall v. Sorrell* reaches an anti-regulatory result, but leaves the *Buckley* framework intact, at least for now. Even if the Court were to cut back on the scope of the anti-corruption interest in the campaign finance context, that interest would still be relevant in the context of the gratuities debate.