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McDonnell and the Criminalization of Politics

George D. Brown

Boston College Law School, browngd@bc.edu

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McDONNELL AND THE CRIMINALIZATION OF POLITICS

George D. Brown*

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* Robert F. Drinan, S.J., Professor of Law, Boston College Law School. A.B., Harvard University, 1961; L.L.B., Harvard Law School, 1965. The author would like to thank Will Kryder for providing both research and editorial assistance, as well as Research Assistants Jason Adams, Shannon Nelson, Ian Gillespie, Jaideep Chawla, and Michelle Rosin. Also thanks to Mary Ann Neary of the Boston College Law School Library for valuable help and Paul Marzagalli for providing technical assistance.
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INTRODUCTION

In January of this year, George Will warned that “[t]he criminalization of normal political interactions is especially ominous when aesthetic considerations expose a person to prosecution for actions inseparable from the quotidian business of representative government.”\(^1\) Will’s admonition was generated by the political corruption conviction of former Virginia Governor Robert McDonnell.\(^2\)

In June, a unanimous Supreme Court expressed similar sentiments when it vacated that conviction.\(^3\) McDonnell had been convicted of bribery offenses for doing political favors for a generous benefactor who had showered him and his family with money and gifts worth over $170,000.\(^4\) According to the Court, the favors McDonnell did were not “official acts” that could be prosecuted under the relevant statutes.\(^5\) The Court noted that “[c]onscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time. The basic compact underlying representative government assumes that public officials will hear from their constituents and act appropriately on their concerns . . . .”\(^6\) This language appears to represent an endorsement of an important theme in current American political discourse: the criminalization of politics critique. The theme can be found in the academic literature,\(^7\) polemical writing,\(^8\) legal briefs,\(^9\) and at least one judicial opinion.\(^10\)

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\(^2\) See id.

\(^3\) McDonnell v. United States, 136 S. Ct. 2355 (2016).

\(^4\) Id. at 2361.

\(^5\) Id. at 2375.

\(^6\) Id. at 2372.

\(^7\) E.g., Jonathan Rauch, *Political Realism: How Hacks, Machines, Big Money, and Back-Room Deals Can Strengthen American Democracy*, THE BROOKINGS INSTITUTION,
The essence of the critique goes something like this. The major role in prosecuting state and local corruption has been assumed by the federal government, and is discharged by United States Attorneys.\footnote{11} They have at their disposal a broad array of broadly worded statutes.\footnote{12} This combination raises such dangers as traps for the unwary,\footnote{13} partisan prosecutions brought by politically motivated prosecutors,\footnote{14} and threats to federalist values.\footnote{15} These themes are not new. What is new about the criminalization critique is that it adds to them the claim that the tools in the federal criminal arsenal are being used against everyday political

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\footnote{10} United States v. Blagojevich, 794 F.3d 729 (7th Cir. 2015).


\footnote{14} See Abrams et al., supra note 12, at 342–44.

\footnote{15} See, e.g., Geraldine Szott Moohr, Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us, 31 Harv. J. on Legis. 153, 155–56 (1994); Will, supra note 1.
practices essential to representative government. Rather than improve government, these prosecutions undermine it.

*McDonnell* is the quintessential example. It is true that he and his family accepted lavish gifts from a pharmaceutical industrialist who wished to do business with the state. However, he was prosecuted, according to the critics, for doing routine favors for the donor, such as making introductions to state officials and arranging meetings with staffers. These are the sorts of things that politicians do for constituents all the time. Thus, to prosecute McDonnell and those like him is to criminalize politics itself. The Court’s opinion may be read as an acceptance of the critique.

The purpose of this article is to analyze the critique and *McDonnell’s* impact on it. As for *McDonnell* itself, I contend that the decision gives proponents of the critique less than they claim. The opinion seems to say that an official whose case is identical to McDonnell’s could, under a proper approach to bribery, be prosecuted for the same crimes, with the same facts used as evidence. Indeed, the Court raised the possibility that McDonnell himself could be successfully prosecuted in a retrial. The article begins with a discussion of the critique in order to put *McDonnell* in context. In particular, I examine what is new in the debate over how the federal government should handle possible corruption, and the extent to which *McDonnell* is part of that shift. Part I explores the critique in depth. Part II analyzes the Supreme Court’s decision in *McDonnell* and its background. As a unanimous

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18 But see Jacob Eisler, *McDonnell and Anti-Corruption’s Last Stand*, 50 U. C. Davis L. Rev. (forthcoming 2017) (manuscript at 51) (available on SSRN) (noting McDonnell’s discussion of representation and significance as a “signal of how the Court might be expected to intervene in politics more generally.”).

decision, *McDonnell* may be of great significance in how the legal system treats the federal government’s role. Part III offers some speculation on the federal anticorruption enterprise going forward.

**I. THE CRIMINALIZATION OF POLITICS CRITIQUE: OLD WINE IN NEW BOTTLES?**

**A. FEDERALISM**

It may seem somewhat surprising that the federal government—through the local United States Attorney—is at the forefront of the battle against corruption in the states. This role appears to be premised on a view of the states as unable to do the job themselves. There certainly are structural problems in expecting one group of state officials to prosecute another group of state (or local) officials. Even so, what part of the federal Constitution authorizes the national government to do it?

Professor Adam Kurland has contended that the Guarantee Clause may be such a source of authority. The idea has merit, but does not seem to have motivated Congress. The principal federal statutes used against corruption are based upon the Postal Power, the Commerce Power, and the Spending Power. The Mail Fraud Statute is the source of the

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21 Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecution of State and Local Officials*, 62 S. CAL. L. REV. 367, 486 (1989). The Guarantee Clause states that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” U.S. CONST. art. IV, § 4.

22 U.S. CONST. art. I, § 8, cl. 7.

23 U.S. CONST. art. I, § 8, cl. 3.

24 U.S. CONST. art. I, § 8, cl. 1.

Honest Services concept.\textsuperscript{26} One cannot use the mail to deprive citizens of the right to honest services. The Hobbs Act—forbidding unlawful receipt of money under color of official right\textsuperscript{27}—is based on interference with commerce.\textsuperscript{28} The Federal Program Bribery Act\textsuperscript{29} is triggered if a jurisdiction receives the requisite number of funds.\textsuperscript{30}

Federalism criticisms abound.\textsuperscript{31} The most basic is that the national government is doing the states’ job to the point of treating them as subordinate units.\textsuperscript{32} Such tutelage prevents them from developing their own capacity.\textsuperscript{33} One might even see a form of commandeering:\textsuperscript{34} the national government is telling the states how to govern.\textsuperscript{35}

Federalism objections are part of the criminalization critique. George Will declares that “federalism has become a casualty” in McDonnell, and cites a brief filed on McDonnell’s behalf that warns against “federaliz[ing] the law of public corruption . . . .”\textsuperscript{36} All states have criminal laws against corruption; many have comprehensive ethics codes

\textsuperscript{26} 18 U.S.C. § 1346 (2012).
\textsuperscript{28} Id. § 1951(a).
\textsuperscript{29} 18 U.S.C. § 666 (2012).
\textsuperscript{30} Id. § 666(b).
\textsuperscript{32} See Federalism, supra note 20, at 241 (discussing state sovereignty).
\textsuperscript{33} E.g., Moohr, supra note 15, at 175–76.
\textsuperscript{34} The anti-commandeering doctrine was developed in New York v. United States, 505 U.S. 144 (1992).
\textsuperscript{35} See Federalism, supra note 20, at 271–72 (discussing commandeering).
\textsuperscript{37} Id. (citing amicus brief of Former State Attorney’s General).
and enforcement mechanisms. 38 One group of Virginia law professors supporting McDonnell went so far as to suggest that such a state system could trump federal law. 39 In sum, the federalism argument plays a role in the critique, but it has been around for some time, even at the level of the Supreme Court. 40

B. VAGUENESS AND PROSECUTORIAL DISCRETION

Vagueness and prosecutorial discretion are often treated together, 41 and I will do so here in elaborating this portion of the criminalization critique. A classic example of vagueness issues is the Mail Fraud Statute. 42 The statute forbids, in part, use of the mails in “any scheme or artifice to defraud . . . .” 43 Beginning in the 1940’s, lower courts read this language to include depriving citizens of the intangible right to honest services. 44 The doctrine has had its ups and downs. After the Supreme Court disapproved of this reading, 45 Congress endorsed it by providing that “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” 46 However, the Court’s 2010 decision in Skilling v. United States limited honest services fraud to bribes and kickbacks. 47

38 E.g., MASS. GEN. LAWS ch. 268A (2016) (setting standards for public officials).
39 Brief for Law Professors, supra note 9, at 3–4.
40 E.g., McNally v. United States, 483 U.S. 350, 360 (1987) (declining to “construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials . . . .”).
43 Id.
44 See, e.g., ABRAMS, supra note 12, at 320–22.
To appreciate the vagueness problem in the mail fraud context, one should note the tortuous path an official must tread. The mail fraud statute\(^\text{48}\) sends us to 18 U.S.C. § 1346, which sets forth the honest services doctrine. *Skilling* tells the official that this only means bribery and kickbacks, neither of which terms is included, or defined, in either statute.\(^\text{49}\) *Skilling* did say that these offenses “draw[] content” from existing federal statutes such as those covering bribery by federal officials.\(^\text{50}\) Further complicating the matter is the fact that a federal court trying the official is likely to utilize the concept of quid pro quo, which appears in none of the statutes referenced above.\(^\text{51}\)

The vagueness critique recently received substantial academic support in Professor Albert Alschuler’s article “Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse.”\(^\text{52}\) Professor Alschuler is particularly critical of the “intent to influence” approach to bribery.\(^\text{53}\) Read broadly, “‘intent to influence’ statutes appear to make a criminal of every lobbyist who buys lunch for a legislator and of every campaign contributor who hopes that his contribution will make its recipient more sympathetic to his interests.”\(^\text{54}\)

Attacks on the vagueness of federal law are closely related to attacks on prosecutorial discretion. In his famous *Sorich* dissent from denial of certiorari, Justice Scalia warned of “abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable


\(^{49}\) *Skilling*, 561 U.S. 358 at 408 (2010).

\(^{50}\) *Id.* at 366.


\(^{52}\) Alschuler, *supra* note 7, at 469.

\(^{53}\) See *id.* at 466–72.

\(^{54}\) *Id.* at 466. Professor Alschuler prefers an “illegal contract” approach to bribery. *Id.* at 472–74.
Professor Alschuler cautions that “[b]road definitions of bribery not only sweep into their net common and widely accepted behavior. They also invite unjustified inferences and empower prosecutors to pick their targets.”

It’s tempting to single out United States Attorneys as the principal actors in the criminalization of politics. They are relatively unaccountable, yet they are major political players within their states or judicial districts. History is replete with examples of United States Attorneys of one party building a reputation as a corruption fighter by prosecuting state and local politicians—frequently of the other party—and riding that reputation to higher office. Apart from his or her political ambitions, a United States Attorney is often accused of partisanship when selecting defendants.

On a loftier level, the United States Attorney may see himself charged with the mission of not just “cleaning up” the state, but of changing its political culture. In the McDonnell oral argument, Justice Breyer cast this phenomenon as a separation of powers issue, stating: “The Department of Justice in the Executive Branch becomes the ultimate arbiter of how public officials are behaving in the United States, State, local, and national.” Whether viewed as primarily an issue of federalism, or as an issue of separation of powers, the active role of United States

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56 Alschuler, supra note 7, at 492.
57 See, e.g., Abrams, supra note 12, at 342.
58 Id. at 342–44.
60 Transcript of Oral Argument at 32, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474) [hereinafter Transcript]. Building on his momentum, Justice Breyer invoked prosecutions for “common” political behavior, and stated that “suddenly, to give that kind of power to a criminal prosecutor, who is virtually uncontrollable, is dangerous in the separation of powers . . . .” Breyer may be right in his discovery of the implications of a unilateral federal role in prosecuting corruption, but it is hardly a new development. Some might see this as more of a federalism problem than a separation of powers one.
Attorneys in this field is well established, as are criticisms of it and the broad statutes that permit it.

C. THE CRITIQUE: ADDING NEW ELEMENTS TO OLD

The criminalization critique is thus not a new phenomenon in American political-legal discourse. It builds upon an extensive body of academic writing and judicial decisions. Developments outside the area of politically related crime are relevant as well. In recent years the Court has been particularly active in showing concern for vagueness in general. Even though not directed solely at politically related crimes, this concern bolsters the critique. However, the critique does sound a new note that goes beyond considerations of federalism, vagueness, and prosecutorial discretion. A central tenet is that current prosecutions of public officials target practices that are inevitably part of representative democracy, and are frequently beneficial.

As Thomas Edsall wrote in his provocative article *The Value of Political Corruption*: “[e]ffective governance is currently running head-on into growing public skepticism about the legitimacy of political maneuvering and compromise.” A good example of the kind of practice

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63 Johnson v. United States, 135 S. Ct. 2551, 2562 (2015); Yates v. United States, 135 S. Ct. 1074, 1088 (2015); *Skilling*, 561 U.S. at 405, 421 (discussing an example of the vagueness concern in the political corruption context); United States v. Bond, 581 F.3d. 128, 138–139 (3d Cir. 2009).
64 Edsall, *supra* note 8. For an example of public skepticism, see Christopher Robertson, et al., *The Appearance and Reality of Quid Pro Quo Corruption: An Empirical Investigation*, 8 J. L. ANALYSIS 375, 413 (discussing example of simulated prosecution for political bargaining in which mock jurors inferred “quid pro quo.”
that yields “effective governance” is logrolling. The Seventh Circuit’s partial reversal of the corruption conviction of former Illinois Governor Rod Blagojevich represents an important judicial endorsement of the practice. Part of Blagojevich’s conviction for multiple offenses was based on the Governor’s attempt to make a deal with President-Elect Obama: the Governor would use his power to fill the vacated Senate seat by appointing a close associate of the President-Elect. In return, the President would name him to a cabinet post. The Seventh Circuit ruled that such horse trading is part and parcel of American politics, “fundamentally unlike the swap of an official act for a private payment.” The court stated that “[g]overnance would hardly be possible without these accommodations,” and declined to find in the relevant federal statutes “a rule making everyday politics criminal.”

The court cited no precedent for this victory for the criminalization critique, but there is an extensive literature extolling the virtues of transactional politics. According to one exponent of this view: “[b]ack-scratching and logrolling are signs of a healthy political system, not a corrupt one.” Such views might be limited to dealings between elected officials from the fact-patterns of seemingly-reciprocal behavior that are ubiquitous in contemporary politics.”)

65 United States v. Blagojevich, 794 F.3d 729, 738 (7th Cir. 2015).
66 See id. at 733 (discussing details of the proposed bargain).
67 Id. at 734.
68 Id. at 735.
69 Id.
70 The Court relied on hypotheticals drawn from daily politics and on an anecdote concerning President Eisenhower and Chief Justice Warren. Id. at 737.
71 See, e.g., Applying Citizens United, supra note 16, at 229.
72 Rauch, supra note 7, at 7. See generally Daniel H. Lowenstein, Political Bribery and the Intermediate Theory of Politics, 32 UCLA L. Rev. 784, 788 (1985). The issue of patronage may be closely related. See, e.g., Rutan v. Republican Party of Ill., 497 U.S. 62, 94 (1990) (Scalia, J., dissenting) (“The choice between patronage and the merit principle—or, to be more realistic about it, the choice between the desirable mix of merit and patronage principles in widely varying federal, state, and local political contexts—is
officials, but I see them as closely related to a broader view of American politics and government as highly reciprocal and marked by interactions of all types. In a seminal article, David Mills and Robert Weisberg noted that “any definition [of corruption] will partake of uncertain notions of how we identify when an ‘outside’ influence so distorts the governmental structures, processes, or economic systems as to merit the term ‘corrupt.’”

Deciding when interactions are corrupt or part of daily political life is particularly hard in the case of elected officials. For constituents, especially supporters, the relationship with “their” elected officials does not end with the campaign. If anything, it begins there. Viewed in this light, the Supreme Court’s emphasis on access and influence in *Citizens United v. Federal Elections Commission* makes some sense. As developed below, the outpouring of support for McDonnell from public officials stems largely from the perception that the favors he did for the person who had given him extensive gifts were typical of what elected officials do and are expected to do for constituents. The outcome in *McDonnell* thus may represent an important victory for the criminalization of politics critique.

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76 *See also* Eisler, supra note 18, at 3 (“The Court has thus revealed it expects little in terms of disinterested commitment to the public good from democratic representatives.”).
77 *See infra* text accompanying notes 126–30.
D. A CRITIQUE OF THE CRITIQUE

The criminalization of politics argument runs into the conventional wisdom that corruption is bad, and that we expect public officials to know their fiduciary obligations and honor them.79 Thus, a federal common law of political corruption that fleshes out these duties by building on statutes should not be viewed as a surprise, and is an institutionally sound way of ensuring that they are enforced.80 The critique’s response is that the resultant system—apart from concerns like federalism and fairness to defendants—sweeps into the net practices that, while perhaps unseemly, are necessary and even beneficial.

The criminalization of politics argument has considerable force. In this subsection, I offer three brief critiques of the critique. The first is that it has a strong element of circularity. Unless one is prepared to deny the possibility of any political crime—for example the proverbial bagful of money delivered to a key legislator before a vote81—it is hard to identify which corruption prosecutions involve the criminalization of politics, and which do not. Assuming the conduct arguably fits within one or more statutes, it becomes necessary to make value judgments in all but the most blatant cases. The result is likely to be a proliferation of accusations of criminalization every time a politician is indicted—a sort of “everybody does it” defense.82

There are signs that this is already happening. The corruption trials of both former New York Assembly Speaker Sheldon Silver and former New York Senate Majority Leader Dean Skelos provoked cries of

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79 Mills & Weisberg, supra note 74, at 1399.
criminalization of politics. So did an investigation of the Mayor of New York’s fundraising practices. Particularly telling was the assertion by Mr. Silver’s lawyer that “it’s virtually impossible for someone to serve in this citizen-legislator model and not have some form of conflict.” The conclusion that this argument leads to is that if some interactions are endemic to the system, and “everybody does it,” then “it” must not be corruption. The very fact that conduct is widespread insulates that conduct from prosecution.

A second response to the critique is that it is hard to know what role it should play in the legal system. Perhaps it is a guideline for prosecutorial discretion. But an attack on prosecutorial discretion is at the heart of the critique to begin with. Perhaps “good” prosecutorial discretion is fine—good being defined as not criminalizing politics. This takes us squarely back to the question of what political conduct is sufficiently criminal to merit prosecution—a question we would still apparently leave to prosecutors. As long as the conduct in question arguably fits within the bounds of some statute, statutory construction becomes key. The critique thus emerges as a possible canon of construction. This is the most plausible explanation of the logrolling holding in Blagojevich. Courts


86 See supra text accompanying notes 67-72. The canon of construction analysis is bolstered by the fact that the court specifically stated that the contrary result could not
would apply statutes aimed at political corruption by utilizing a principle of not criminalizing politics. They would be guided largely by their freestanding notion of what constitutes politics that ought to be treated as criminal. The exercise in statutory construction would not be dominated by the statute itself. The reappearance of vagueness is obvious.

A third criticism is that the criminalization critique extends the *Citizens United* approach beyond the electoral and post-electoral contexts to “ordinary corruption.” The majority opinion in that case is a wholehearted endorsement of a freewheeling approach to reciprocity and interaction in politics. According to Justice Kennedy:

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

I find this approach unduly permissive in the case of appointed officials. It can lead to treating gifts to them as somehow equivalent to campaign contributions to elected officials. Interactions present difficult problems when the officials—such as mayors—perform both executive and legislative functions. There is a real tension between the *Citizens United*

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88 See generally *Applying Citizens United*, supra note 16, at 194–95 (discussing, and rejecting, such an extension).

approach and what the Supreme Court has called the “great end of
government—the impartial execution of the laws.” In both the electoral
and non-electoral contexts, direct transfers of things of value are
particularly suspect. Consider a bribe—private enrichment from public
office derived from outside sources—given to produce unequal
administration in the form of partiality. Such conduct should not benefit
from whatever shield the supporter-candidate relationship provides in the
electoral context. Sometimes politics should be criminalized.

Despite these flaws, one can see the critique as a powerful
restatement of previous arguments against federal prosecution, as well as
new themes, derived in part from Citizens United. It was inevitable that
proponents of the critique would find a prosecution to prove their point.
The one they chose was that of former Governor of Virginia Robert
McDonnell.

II. McDonnell: A Win for the Critique or Prosecution as
Usual?

A. The Saga

McDonnell and his wife had accepted what the Supreme Court
called “$175,000 in loans, gifts, and other benefits” from a Virginia
pharmaceutical businessman who sought assistance from the state,
primarily public university testing of a new product, and its inclusion in

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92 It is, of course, possible for a contribution to be a bribe. See McCormick v. United
States, 500 U.S. 257, 276 (1991). The principal difference between the application of the
law of bribery to the contexts appears to be the need for an explicit quid pro quo in the
electoral context. See Applying Citizens United, supra note 16, at 218.
94 Id. at 2357.
the state employees’ health plan. This dry description hardly does justice to the soap opera quality of the relationship. It included a nearly $20,000 shopping spree for Mrs. McDonnell at Oscar de la Renta, Luis Vuitton, and Bergdorf Goodman. For his part, the Governor got free golf, golf equipment, and a Rolex, in addition to substantial financial benefits. The donor never received the state action he was seeking. However, the governor did arrange meetings and introductions for him with state officials. He also touted the product, and hosted a luncheon at the Governor’s mansion to do so.

B. THE TRIAL AND THE “OFFICIAL ACTS” ISSUE

One prominent observer has said of the case: “There’s no such thing as a free Rolex.” The McDonnells were indicted and convicted, primarily of wire fraud honest services violations and Hobbs Act violations. The Supreme Court’s analysis referred to these charges as “bribery.” This shorthand is possible because the Court has treated the Hobbs Act as equivalent to bribery when dealing with public officials, and has interpreted the honest services component of wire (and mail) fraud

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95 Id. at 2364.
96 United States v. McDonnell, 792 F.3d 478, 488–90 (4th Cir. 2015).
98 See McDonnell, 792 F.3d at 493 (describing proceedings below).
99 Id. at 505.
100 McDonnell, 136 S. Ct. at 2361.
101 See, e.g., Evans v. United States, 504 U.S. 255, 260 (1992) (stating with respect to common law extortion: “[e]xtortion by the public official was the rough equivalent of what we would now describe as ‘taking a bribe.’”); id. at 290 (“Over the past 20 years, the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws—acts of public corruption by state and local officials.”) (Thomas, J., dissenting).
as covering bribery and kickbacks.\textsuperscript{102} The use of the term bribery triggers the operation of 18 U.S.C. § 201, which \textit{Skilling} said would help guide honest services bribery prosecutions.\textsuperscript{103} Under 18 U.S.C. § 201(b)(2)(A), it is a crime if a public official “corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally ... in return for being influenced in the performance of any official act . . . .”\textsuperscript{104} 18 U.S.C. § 201(a)(3) defines official act as “any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.”\textsuperscript{105}

At the trial there was little dispute about what McDonnell had done. The dominant question was a legal one: whether he had performed “official acts,” given the importance of that concept in § 201’s structure.\textsuperscript{106}

\textsuperscript{102} \textit{Skilling} v. United States, 561 U.S. 358, 408 (2010).
\textsuperscript{103} \textit{Ibid.} at 412.
\textsuperscript{105} \textit{Ibid.} § 201(a)(3).
\textsuperscript{106} The mere receipt of money by itself is not illegal. It must have been received in connection with official acts. 18 U.S.C. § 201(b)(2):
His actions on behalf of the donor consisted mainly of introductions to state officials, and a somewhat generalized touting of his product. McDonnell knew that the donor wanted the state universities to test his product, but did not appear to have directly committed to making that happen. A luncheon at the governor’s mansion showed general support.\textsuperscript{107}

In its instructions on honest services bribery, the district court “provided a near-verbatim recitation” of the relevant portions of § 201, particularly the definition of “official acts.”\textsuperscript{108} The same concept guided consideration of the alleged Hobbs Act violations. The instructions were broad, stating, for example, that “official actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description.”\textsuperscript{109} On appeal, the Fourth Circuit upheld the instructions. It noted that the trial court’s explanation of the meaning of official action was “tethered” to the statutory language referring to “decisions or actions on a ‘question, matter, cause, suit, proceeding, or controversy’ that may come before the government.”\textsuperscript{110}

Thus the government got instructions permitting it to argue that a wide range of official actions had occurred. This approach to McDonnell’s conduct had been part of the government’s case since the indictment. A specific reproduction of that document may be helpful. It accused the defendant of:

\begin{quote}
[P]roviding favorable official action on behalf of JW and Star Scientific as opportunities arose, including the official actions set forth below in (i)-(v);
\end{quote}

\begin{itemize}
\item disqualified from holding any office of honor, trust, or profit under the United States.
\end{itemize}

\textsuperscript{107} McDonnell v. United States, 136 S. Ct. 2355, 2363 (2016).
\textsuperscript{108} United States v. McDonnell, 792 F.3d 478, 505 (4th Cir. 2015).
\textsuperscript{109} \textit{Id.} at 506.
\textsuperscript{110} \textit{Id.} at 509.
i. arranging meetings for JW with Virginia government officials, who were subordinates of the Governor, to discuss and promote Anatabloc®;
ii. hosting, and the defendants attending, events at the Governor’s Mansion designed to encourage Virginia university researchers to initiate studies of anatabine and to promote Star Scientific’s products to doctors for referral to their patients;
iii. contacting other government officials in the OGV as part of an effort to encourage Virginia state research universities to initiate studies of anatabine;
iv. promoting Star Scientific’s products and facilitating its relationships with Virginia government officials by allowing JW to invite individuals important to Star Scientific’s business to exclusive events at the Governor’s Mansion; and
v. recommending that senior government officials in the OGV meet with Star Scientific executives to discuss ways that the company’s products could lower healthcare costs.\(^{111}\)

The government got what it wished for in terms of the ability to introduce at trial a broad range of McDonnell’s acts as “official.” The Fourth Circuit upheld this theory of the case, despite McDonnell’s contention that “official” acts must “implicate . . . official power.”\(^{112}\) At the Supreme Court level, however, the old adage about being careful what you wish for proved prophetic. In the next two subsections, this article will offer two alternative interpretations of the unanimous Supreme Court’s decision to vacate the conviction. The prevailing view is that the criminalization

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112 McDonnell, 792 F.3d at 508. The court went to great lengths to detail the lavish payments McDonnell received. Id. at 488.
critique prevailed, and that the decision is a major setback for the federal anticorruption enterprise. My own view is that the government was arguing an untenable view of “official acts,” and that the Court, while correctly rejecting it, laid out a virtual roadmap on how McDonnell or any official in similar circumstances could be tried for the same crimes using the same evidence.

C. MCDONNELL: THE CRITIQUE TRIUMPHANT

Professor Zephyr Teachout has been quoted to the effect that the decision “enshrine[s] bribery in our politics.” The phrase strikes me as a serious overstatement. However, two aspects of the decision support the view that it can be read as an endorsement of the critique.

One is the extremely narrow reading of the statute in which the Court engaged. The Court first considered the terms “question, matter, ...
cause, suit, proceeding or controversy” in 18 U.S.C. § 201, and it found that the last four “connote a formal exercise of governmental power . . . .” The Court construed “questions” or “matters” narrowly to require the same exercise of governmental power. It applied the maxim that a word is “known by the company it keeps.” Applying the approach to McDonnell’s actions, the Court stated, “a typical meeting, call or event is not of the same stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee . . . .”

There were other matters that would have qualified as official acts. Thus the question arose whether the defendant had made a “decision” or taken “action” on them. The Court opted for a narrow reading of these terms in order to avoid the “absurd” result of having anything an official does with respect to a “question,” etc. be treated as a decision or action. Thus, speaking with someone about a matter, or even hosting an event related to it is not enough: “Instead, something more is required: § 201(a)(3) specifies that the public official must make a decision or take an action on that question or matter . . . .” The Court clearly had in mind the exercise of governmental power, or something close to it, such as influence on another official who does have power. Otherwise the definition is circular: a “decision” or “action” is some form of decision or action of virtually any sort.

an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions, a statute that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.”; see also Eisler, supra note 18, at 3 (stating “[s]uch a narrowing interpretative move is consistent with the Court’s modern treatment of anti-corruption law.”).

116 McDonnell, 136 S. Ct. at 2368.
117 Id. (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)). The Latin form of the maxim is noscitur a sociis. Id.
118 Id. at 2369.
119 Id. at 2361.
120 Id. at 2369.
121 Id. at 2370.
122 Here, again, the Court was guided by Sun-Diamond. Id.
There is a second set of reasons to view *McDonnell* as a win for the criminalization critique: the critique’s arguments are found, directly or indirectly, throughout the decision. Most notably, Chief Justice Roberts observed that “[c]onscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time.” Adopting the government’s position could “cast a pall of potential prosecution” over ordinary politics. “Officials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse.”

This is why *McDonnell* became such a lightning rod case for so many public officials. They saw what he did as “routine political activity” that public officials engage in every day on behalf of their supporters. Prosecuting McDonnell for the things he did threatened the highly traditional, reciprocal, and interactive atmosphere that prevails across American government and politics. A veritable who’s who of prominent public officials, supported by an array of academics, filed amicus briefs on his behalf. Chief Justice Roberts noted the phenomenon in the oral argument, and cited two of the briefs in his opinion. Even before the Fourth Circuit decision, Harvey Silverglate—a prominent advocate of the critique—had referred to the amicus briefs filed at that stage as “an

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123 Id. at 2372.
124 Id.
125 Id. Chief Justice Roberts noted in his opinion that “White House counsel who worked in every administration from that of President Reagan to President Obama warn that the Government’s ‘breathtaking expansion of public-corruption law would likely chill federal officials’ interactions with the people they serve and thus damage their ability effectively to perform their duties.’” Id. at 2372–73.
126 Brief of Center for Law and Justice, *supra* note 9, at 20.
127 Among those filing briefs were former Federal Officials, members of the Virginia General Assembly, and Virginia Law Professors.
129 *McDonnell*, 136 S. Ct. at 2372. In addition to the brief by several White House counsel, Chief Justice Roberts cited an amicus brief by seventy-seven Former State Attorneys General. Id.
extraordinary demonstration of concern by numerous sectors of political and civil society. . . .”

Other themes of the broader, traditional criticisms of the federal anticorruption enterprise surfaced as well. The Court found that the government’s position raised “significant federalism concerns.”

Intimations of a narrower federal role might be found in the statement that “[a] state defines itself as a sovereign through ‘the structure of its government, and the character of those who exercise government authority.’” Vagueness concerns were also present. The Court responded to them by saying that it had construed the term “official act” in a way that avoided them, just as it had done earlier in narrowing the term “honest services” itself in *Skilling v. United States*. In sum, it is tempting to conclude that the criminalization of politics critique, with its emphasis on official-constituent interactions, and buttressed by the closely related concerns of vagueness and federalism, won a significant victory in *McDonnell*.

### D. A Narrow Reading

This certainly has been the prevalent reading of the case. Indeed, many observers had predicted the outcome, and its implications, after the

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131 *McDonnell*, 136 S. Ct. at 2373.

132 Id.

133 See, e.g., Brief of Law Professors, *supra* note 9, at 20–25; Brief of Former Attorneys General, *supra* note 9, at 10.

134 *McDonnell*, 136 S. Ct. at 2365 (citing *Skilling v. United States*, 561 U.S. 358, 404 (2010)). See Eisler, *supra* note 18, at 17 (stating *Skilling* and *McDonnell* “relied upon procedural concerns and the interpretive canon to limit the reach of conduct touched by anti-corruption law.”).

135 See, e.g., *supra* note 113.
oral argument.\textsuperscript{136} Still, reactions like Professor Teachout’s assertion that the decision “has enshrined bribery in our politics”\textsuperscript{137} seem seriously off the mark. Indeed, it is possible to read \textit{McDonnell} as a narrow decision,\textsuperscript{138} or at least as one whose implications are yet to be determined. In closing, the Court insisted that the decision “leaves ample room for prosecuting corruption.”\textsuperscript{139} In this subsection, I will argue that this statement is more than a rhetorical flourish.

The starting point of any analysis has to be the realization that the government put itself in a box from the very beginning by framing the indictment as set forth above.\textsuperscript{140} Count iii cited such actions as arranging meetings and hosting events as official actions. By referring to this conduct as “official actions”\textsuperscript{141} the indictment was invoking 18 U.S.C § 201(3). Thus, it was possible for the defense to push the government into the corner of fending off the accusation that virtually anything a governor does is official because he is an official. This difficult position was made more so by the shadow of \textit{Sun-Diamond},\textsuperscript{142} in which a unanimous Supreme Court viewed as “absurd” the application of the gratuities prohibition to gifts at ceremonial occasions.\textsuperscript{143} Justice Scalia’s opinion stated that receipt of a sports team’s replica jersey by an official could not possibly be what Congress meant by “official act.”\textsuperscript{144} Not only was the government in \textit{McDonnell} advancing a difficult argument, but the


\textsuperscript{137} See Ramos, \textit{supra} note 114.

\textsuperscript{138} See \textit{id}.

\textsuperscript{139} \textit{McDonnell}, 136 S. Ct. at 2375.

\textsuperscript{140} See \textit{supra} text at note 111 (citing indictment).

\textsuperscript{141} \textit{id}.


\textsuperscript{143} \textit{id}. at 408.

\textsuperscript{144} \textit{id} at 406–07.
emphasis on "official acts"—which even reached the level of coverage of the trial instructions by the New York Times—diverted attention from the government's strong point: the extraordinary largesse that the McDonnells received.

Still, it is important to remember that the government escaped from the Supreme Court—which vacated the affirmation of his conviction—with the possibility of retrying McDonnell on the same charges and facts. The Court left to the Fourth Circuit the task of deciding the question of retrial, stating, "If the Court below determines that there is sufficient evidence for a jury to convict Governor McDonnell of committing or agreeing to commit an 'official act,' his case may be set for a new trial." The evidentiary issues are not easy. In particular, any retrial would have presented the question of whether the actions for which McDonnell could not be prosecuted could nonetheless be introduced as evidence of an agreement on actions he did not take.

The Court left open an argument for dismissal on the ground of insufficient evidence. The Court has previously held: "The successful appeal of a judgment of conviction, on any ground other than insufficiency of the evidence to support the verdict, poses no double jeopardy ban to further prosecution on the same charge." Thus,

\footnote{Trip Gabriel, Judge Rejects Defense's Criteria for Convicting Ex-Governor as Jury Gets Case, N.Y. TIMES, Sept. 3, 2014, at A16. It seems unusual, to say the least, for the Times to cover jury instructions.}

\footnote{From the beginning of his argument for the Government, Michael Dreeben became enmeshed in the complexities of defining "official act" and attempting to cope with a bewildering range of hypotheticals. Transcript, supra note 60, at 30–31.}

\footnote{McDonnell, 136 S. Ct. at 2375.}

\footnote{Id. ("If the court below determines that there is sufficient evidence for a jury to convict Governor McDonnell of committing or agreeing to commit an 'official act,' his case may be set for new trial.").}

\footnote{United States v. Scott, 437 U.S. 82, 90–91 (1978). Retrials can present double-jeopardy issues, but in general, the courts have endorsed the views of Justice Holmes. See Kepner v. United States, 195 U.S. 100, 134 (1904) (Holmes, J., dissenting) ("[L]ogically and rationally a man cannot be said to be more than once in jeopardy in the same cause,}
assuming that the prosecution could not introduce new evidence at any retrial, there must have been sufficient evidence of the presence of official acts somewhere in the case as tried.

The Supreme Court built upon the Fourth Circuit’s opinion. That court had identified three potential “questions or matters” at issue in the case: (1) whether state researchers would study the donor’s product; (2) whether the state would allocate grant money for a study of its ingredient; and, (3) whether the product would be covered in the state employee health plan. The Supreme Court agreed, stating that “those qualify as questions or matters under § 201(a)(3). Each is focused and concrete, and each involves a formal exercise of governmental power that is similar in nature to a lawsuit, administrative determination, or hearing.”

Thus one element might be satisfied, but where is the crime if McDonnell did not take any actions on those matters, such as exerting influence? It is key to remember the role of 18 U.S.C. § 201 in prosecutions such as McDonnell’s. The underlying offense is mail or wire fraud. The Court in Skilling held that those crimes could include deprivation of honest services, but narrowed that concept to include only bribery and kickbacks. Skilling also stated that honest services bribery would “draw[] content” from federal statutes such as § 201. What has happened is that § 201—applicable to federal officials—has effectively become the offense of conviction, although not of indictment, for state officials accused of honest services fraud or violation of the Hobbs Act (which is treated as the equivalent of bribery).

\[\text{however often he may be tried. The jeopardy is one continuing jeopardy, from its beginning to the end of the cause.}\]

\[150\] See Burks v. United States, 437 U.S. 1, 11 (1978).

\[151\] McDonnell, 792 F.3d at 515–16.

\[152\] McDonnell, 136 S. Ct. at 2370.


Section 201 makes it a crime, in part, when a (federal) public official “corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value . . . in return for: (A) being influenced in the performance of any official act . . . .”\footnote{156} Performance of the act is not necessary. Agreement is enough. Many cases state that “the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the quid pro quo is not an element of the offense [of bribery].”\footnote{157} Moreover, the agreement need not be explicit.\footnote{158} The Court in McDonnell repeated these points of black letter law. It added that the official need not intend to perform the act, as long as the jury concludes that the official “received a thing of value knowing that it was given with the expectation that the official would perform an ‘official act’ in return.”\footnote{159}

In other words, despite all the attention that commentators have paid to whether McDonnell performed any official act, he need not have done so at all.\footnote{160} It is enough that he “agreed” to do so—the opinion is

\footnote{156}{18 U.S.C § 201(b)(2) (2012).}
\footnote{157}{Evans, 504 U.S. at 260, 268.}
\footnote{158}{Ibid. at 274 (Kennedy, J., concurring) (“The official and the payor need not state the quid pro quo in express terms, for otherwise the law’s effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it.”).}
\footnote{159}{McDonnell v. United States, 136 S. Ct. 2355, 2371 (2016).}
\footnote{160}{Justice Sotomayor made the point forcefully during the oral argument:}

I thought that this crime was taking money knowing that it was being paid to influence an “official act.” So aren’t all of these examples of “official acts” whether or they are or they aren’t irrelevant? The question is, what was his intent at the moment he took the money? And why couldn’t . . . a jury infer at that moment that he took it with the intent to commit an “official act” the way Mr. Williams wanted it committed?

Transcript, supra note 60, at 9. Many commentators have assumed that the case turned on whether McDonnell did perform official acts on his benefactor’s behalf. A good example
replete with references to “agree,” “agreement,” etc.\(^{161}\)—even if he didn’t mean to follow through. A possible conclusion is that the same actions that were not “official” enough to create liability could apparently be re-introduced as “evidence of an agreement,”\(^ {162}\) that the jury could consider. The Court stated that “[t]he jury may consider a broad range of pertinent evidence, including the nature of the transaction, to answer that question.”\(^ {163}\) Thus, while the Court is clear that setting up a meeting is not normally an official act, it could apparently be considered by the jury as evidence of an agreement. What is not clear is the probative status of acts taken that did not rise to the level of “pressure” or “advice.”\(^ {164}\) They should certainly be relevant to the question of an agreement. Indeed, if the conduct looked like an attempt to pressure another official, it might constitute a sufficient exercise of governmental power to constitute an official act. The government decided not to retry McDonnell.\(^ {165}\) The scope of a second McDonnell trial, had there been one, is unclear. However, the second trial could have ended up looking a lot like the first.\(^ {166}\)

\(^{161}\) McDonnell, 136 S. Ct. at 2370–71.

\(^{162}\) See id. at 2371.

\(^{163}\) Id.

\(^{164}\) This is true of many of the acts that McDonnell performed.


\(^{166}\) The theory of the second trial, as developed here, would have varied substantially from the language of the original indictment. As noted, double jeopardy considerations might be present. But see United States v. Wittig, 575 F.3d 1085, 1102 (11th Cir. 2009) (“[T]he government is free to pursue any theory of the crime available to it under the indictment so long as that theory is not barred for some other reason (such as collateral estoppel).”).
Overall, it looks like proponents of the critique got something less than a complete victory. The case may be a step in their direction, but it is at best a tentative one that does not break new ground. For example, importance must be attached to the fact that the Court did not cite *Citizens United* as support for its holding. McDonnell and many of his amici cited it as an important component of their argument.\(^{167}\) A major element of the criminalization critique is that the rationale of that case extends to all corruption issues, not just those in the electoral context.\(^{168}\) However, *Citizens United*-like language did find its way into the opinion when the Court said “[t]he basic compact underlying representative government assumes that public officials will hear from their constituents and act appropriately on their concerns.”\(^{169}\) The Court’s decision leads to some uncertainty, both in terms of McDonnell’s own case, and in terms of broader concerns about the federal anti-corruption enterprise.

### III. ANTICORRUPTION LAW POST-MCDONNELL

The Supreme Court’s 2010 decision in *Skilling* was regarded as a “bombshell.”\(^{170}\) The Court curtailed sharply the reach of the honest

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\(^{168}\) See *Applying Citizens United*, *supra* note 16, at 229.


\(^{170}\) ABRAMS, *supra* note 12, at 341.
services concept, restricting it to bribery and kickbacks. The reach of federal anticorruption prosecutions was curtailed, although prosecutors have explored the outer boundaries of *Skilling*. The question arises whether *McDonnell* is a case of similar magnitude—a further sharp restriction—or simply a necessary corrective to an unduly broad construction of a particular statutory term in a particular context. The decision lends itself to both broad and narrow interpretations. The next two subsections explore questions now on the table, both in the context of bribery and in the broader anticorruption context.

A. *McDonnell* and Bribery

Post *McDonnell* bribery cases are likely to raise several important substantive issues. In particular, *McDonnell*’s major result will be to shift the focus of any prosecution away from the act performed to the earlier stages of the interactions between the donor and the donee. The Government is on notice that courts will scrutinize prosecutions for acts performed as part of a quid pro quo. After *McDonnell*, the questions of whether such acts rise to the level of “official” and whether the defendant’s conduct can be viewed as taking action may be difficult.

1. Evidence of an Agreement

At the same time, under the analysis offered earlier, the Government retains the option of reaching further up the chain of conduct and focusing on whether there was an agreement. The Government gains the advantage of being able to emphasize the *quid*, the transfer of value for which the defendant is most vulnerable in the eyes of the jury. However, the issue of implicit agreement is liable to receive more intense scrutiny. The acts taken by *McDonnell* might show an implicit agreement

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172 This is particularly true in a case like *McDonnell* where the large amount is liable to affect the jury.
to help the benefactor. On the other hand, to the extent the acts performed are ordinary political actions—which appears to have been important to the Court in *McDonnell*—the question would arise whether using them as evidence would be tantamount to criminalizing them.

2. **The Official’s State of Mind**

Focus on the agreement would bring to the fore the issue of the official’s state of mind. The *McDonnell* Court repeated standard bribery language to the effect that no action need be taken, and that, indeed, the official need not intend to take any.\(^{173}\) The receipt of the thing of value completes the crime as long as the official knows what is expected of him or her.\(^{174}\) As Professor Alschuler states, “[f]inding an appropriate standard [to describe the bribe-taker’s mental state] has not been easy.”\(^{175}\) He quotes language from the Second Circuit to the effect that “[a] recipient’s knowledge of a donor’s intent to influence is insufficient to support conviction. The recipient must take the proffered thing of value ‘intending to be influenced.’”\(^ {176}\) He quotes *Sun-Diamond*’s statement that “for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act.”\(^{177}\) The issue of the recipient’s intent could well arise in a *McDonnell*-like case. He seems to have gone to great lengths to prove that he never intended to exercise official power to help the benefactor.\(^ {178}\) Thus future cases might shed light

\(^{173}\) *McDonnell*, 136 S. Ct. at 2371. See Robertson, *supra* note 65, at 34 (“Jurors seem to follow the law that the exchange agreement is the criminal act, regardless of whether the bargain is performed. Jurors do not seem to need evidence of performance of the agreement as evidence to prove the agreement occurred.”).

\(^{174}\) Id.

\(^{175}\) Alschuler, *supra* note 7, at 470.

\(^{176}\) Id. (quoting United States v. Ford, 435 F.3d 204, 213 (2d Cir. 2006)).

\(^{177}\) Id. at 474 (quoting United States v. Sun Diamond Growers, 526 U.S. 398, 404–05 (1999)).

\(^{178}\) Robert McCartney, *Fuzzy Federal Law Just Might Let McDonnells off the Hook*, WASH. POST, Jan. 29, 2015, at B1. McCartney states that McDonnell may have been
on the important issue of the recipient’s state of mind, in particular whether intent to be influenced is required, or whether knowing acceptance is sufficient.

3. THE SPECIFICITY OF THE ACTION TO BE TAKEN

As one commentator states, “the precise transactional dynamic sufficient to constitute honest services fraud has been widely interpreted to be an open question.” Many lower courts have accepted the “stream of benefits” theory. This theory encompasses transfers made now in order to bring about action to be taken later. Many courts do not require specific actions to be identified at the time of the initial transfer. Decisions refer to concepts like payments for actions to be taken “as opportunities arose,” or on “as needed” basis. It is possible to question whether this lack of specificity dilutes the crime of bribery to what Professor Alschuler calls a “one hand washes the other” approach. In construing the gratuities component of 18 U.S.C. § 201, the Supreme Court refused to read it as reaching payments made to build up a “reservoir of goodwill.”

“shrewd enough to stay barely on the right side of the law by avoiding doing too much to help the businessman who gave him the Rolex watch, Ferrari ride and other goodies.”

179 Connor, supra note 51, at 336.
181 Id. at 220–21.
182 See id. at 218, n.359.
183 Id. at 218, n.360.
184 Alschuler, supra note 7, at 481.
185 United States v. Sun-Diamond Growers of California, 526 U.S. 398, 405 (1999). Professor Teachout is critical of Sun-Diamond, stating that “[i]f you read the case as political theory, instead of statutory interpretation, the Court suggests that using money to influence power through gifts is both inevitable and not troubling. In so doing, it set the table for the Court’s major corruption decision in Citizens United.” Zephyr Teachout, Corruption in America: From Benjamin Franklin’s Snuff Box to Citizens United 229 (2014).
The Court read specificity into the statutory term “any.” It could take the same approach to 18 U.S.C. § 201’s definition of bribery as including intent “to influence any official act.” It is true that the Court in McDonnell identified specific official acts that would presumably be the focal point of a retrial. On the other hand, the original indictment paraphrased classic stream of benefits language. Again, McDonnell might lead to a narrowing of the law of honest services bribery.

B. McDonnell and the Critique

After an in-depth consideration of McDonnell, it is possible to consider its relationship to the criminalization of politics critique explored at the beginning of the article. Proponents of the critique were among McDonnell’s amici. Indeed, the briefs are replete with references to aspects of it. The unanimous decision was seen as a major victory by supporters of McDonnell and of the critique. The New York Times reported that defense attorneys in other corruption prosecutions saw the decision as giving possible new hope to their clients’ cases. Indeed,

186 San-Diamond Growers of California, 526 U.S. at 406.
189 This is certainly the case with respect to The National Association of Criminal Defense Attorneys.
191 See supra note 113.
McDonnell was invoked as relevant to a labor extortion case allegedly involving a mayor’s office.\(^{193}\)

Is McDonnell another Skilling, particularly if read as an endorsement of the critique? Perhaps, but I am reluctant to read it this broadly. The Court did not reverse the conviction, but vacated it, invoking the possibility of a retrial for what McDonnell did. The government’s big mistake was not the fact of prosecuting him, but its central theory that virtually all routine political acts are “official acts.” I see the Court’s treatment of this problem of statutory construction as limiting official acts to a subset that involves enough governmental power so that officials performing or agreeing to perform them can be prosecuted for corruption. The point is not that everybody does it (perform official acts) all the time, but that they cannot receive outside payment for doing it or agreeing to.

It is also far from clear that McDonnell is an endorsement of the Citizens United approach to corruption issues outside the electoral context. By the Citizens United approach, I mean a view of electoral politics and government in general as a floating bazaar of responsiveness, reciprocity, transactions, and interactions that never stops. This view does not adequately consider the difference between the pre- and post-electoral context. Once the election is over, executives take on (at least partially) the mantle of administrators, guided by the ideal of equal administration of the laws. Non-elected officials are subject to such duties all the time. Even legislators are expected to represent all their constituents.

McDonnell, and his amici’s heavy reliance on Citizens United, at times seemed to equate the benefactor’s largesse with campaign contributions, and indeed, to treat the benefactor as just another donor.\(^{194}\) The Court’s opinion is not based on any such analogy, but on a common sense construction of a statutory term.


\(^{194}\) Brief of Former Federal Officials, supra note 78, at 12; Brief of Center for Law and Justice, supra note 9, at 3–5.
CONCLUSION

McDonnell leads to uncertainty about the future of federal anti-corruption law. Its importance is undeniable, even though it fails to match the magnitude of Skilling. Like Skilling, McDonnell involves the honest services concept. It may well represent a further reduction in the utility of that concept to prosecutors. McDonnell’s impact, however, is substantially lessened by the prosecution’s position in the case that virtually anything a government official does is an official action. The Supreme Court’s decision understandably rejects this reading of the relevant statute. Ultimately the case’s main impact may not be so much in the context of any particular statute. Rather—echoing the critique of the criminalization of politics—it sends a message to federal prosecutors not to push the envelope, by stretching statutory terms beyond their commonsense meaning. The critique thus emerges, not as a paradigm shift in anticorruption law, but essentially as a canon of statutory construction. It is ironic that this result came in a case where there was a straightforward approach and the conduct was so egregious. Perhaps there is such a thing as a free Rolex, but only when the government mishandles the case against taking it.