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Tawdry Tales: The Psychological Underpinnings of Corruption and Gifts to Public Officials

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Note

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MICHAEL J. PACIOREK

Corruption today often involves the sale of access, positioning the buyer in a prime position to influence governmental decision making. The prosecution of Robert McDonnell, who admitted facilitating the sale of such access for gifts and loans from Jonnie Williams, depended on the definition of “official action.” Emphasizing the “quo” of a quid pro quo exchange, the Supreme Court vacated McDonnell’s conviction because he did not take an “official action” even though he arranged meetings, encouraged subordinates to act, and hosted a party for the launch of Williams’s product at the Governor’s mansion. This Note identifies the Court’s dramatic shift towards narrowing bribery to explicit quid pro quo transactions and argues that soft, or implicit, quid pro quo arrangements are equally corrupting. The reciprocity norm operates like an unspoken social contract, obligating recipients of gifts and favors to reciprocate, even without an agreed-upon exchange. Furthermore, politicians are socialized by their political environment towards reciprocating behavior. The Court erred by not acknowledging the psychological realities associated with the flow of gifts from Williams to McDonnell. This Note proposes a broader definition of “official action” and the framework surrounding it to better protect against subtle corruption by erecting structural barriers.
NOTE CONTENTS

INTRODUCTION ........................................................................................................ 1301

I. BACKGROUND ....................................................................................................... 1304
   A. CASE SUMMARY ............................................................................................... 1304
   B. HISTORICAL DEVELOPMENT OF “OFFICIAL ACTION” ............................. 1308
   C. THE EXPANSIVE INTERPRETATION OF “OFFICIAL ACTION” UNDER
      UNITED STATES V. BIRDSALL ................................................................. 1310
   D. “OFFICIAL ACTION” NARROWING UNDER UNITED STATES V.
      SUN-DIAMOND GROWERS ...................................................................... 1311

II. DEFICIENCIES WITH THE MCDONNELL COURT’S DEFINITION
    OF “OFFICIAL ACTS” .................................................................................... 1313
   A. PUBLIC OFFICIALS SHOULD NOT BE PERMITTED TO ACCEPT
      MONETARY GIFTS DUE TO THEIR CORRUPTING INFLUENCE
      BECAUSE OF PSYCHOLOGICAL TENDENCIES TO RECIPROCATE .... 1314
   B. MCDONNELL’S ABILITY TO INFLUENCE DECISIONS OUTSIDE
      OFFICIAL ACTION IS ENHANCED BY HIS ROLE AS GOVERNOR ......... 1316

III. COMPARING IN-OFFICE CONTRIBUTIONS TO CAMPAIGN
     FINANCE EXPENDITURES ............................................................................. 1317
   A. CAMPAIGN FINANCE CONTRIBUTIONS ARE MORE TRANSPARENT
      TO THE CONSTITUENCY ........................................................................ 1317
   B. REGULATION OF CAMPAIGN FINANCE CREATES STRUCTURAL
      BARRIERS TO CORRUPTION .................................................................... 1319
   C. POLITICAL GIFT GIVING IS MORE CORRUPTING THAN CAMPAIGN
      CONTRIBUTIONS BECAUSE ELECTED OFFICIALS ARE MORE
      SUSCEPTIBLE TO THE RECIPROCITY NORM ..................................... 1321

IV. SUGGESTIONS FOR FURTHER DEVELOPMENT ............................................. 1324
   A. PROPOSED CONSTRUCTION OF “OFFICIAL ACTION” ............................. 1324
   B. SENTENCING REFORMS .......................................................................... 1325

CONCLUSION ........................................................................................................... 1327
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MICHAEL J. PACIOREK*

INTRODUCTION

Politicians face numerous statutory and regulatory burdens, often aimed at increasing transparency and trust among the electorate. Ultimately, these statutes aim to curb corruption of public officials, which includes more than the traditional image of quid pro quo bribery. Most bribery statutes include the same five elements or variations of them: “(1) giving a thing of value or a benefit (2) to a public official or candidate (3) corruptly (4) with intent to influence (5) an official action.” The conviction of former Virginia Governor Robert McDonnell hinged on the definition of “official action.” McDonnell believed that his conviction would “be the only one in which a public official has ever been found guilty of bribery not for promising to himself influence the exercise of governmental power, but for merely facilitating access so that a third party could attempt to do so.” This explanation should at least raise concern because he was essentially acting as a paid lobbyist.

* University of Connecticut School of Law, J.D. Candidate 2018; University of Connecticut, B.A. 2015. I would like to thank Professor Douglas Spencer for his insightful feedback and guidance; the members of the Connecticut Law Review for their comments and meticulous editing; and Lara Reynolds for her support and encouragement. I would also like to thank Mark Wasielewski, Peter Lewandowski, and Brian O’Dowd at the Connecticut Office of State Ethics for providing the inspiration for this Note. Finally, I thank my parents, Peter and Jill Paciorek, for their love and support.

1 See Zephyr Teachout, Corruption in America: From Benjamin Franklin’s Snuff Box to Citizens United 3 (2014) (“Americans started their experiment in self-government committed to expanding the scope of the actions that were called corrupt . . . . Americans felt the need to constitute a political society with civic virtues and a deep commitment to representative responsiveness at the core. They enlisted law to help them do it . . . .”).

2 See id. at 276 (defining corruption to include “excessive private interest in the exercise of public power” and “a range of self-serving behaviors”).

3 Id. at 217.


5 See Teachout, supra note 1, at 145 (“[Lobbyists] then determine what their clients want: sometimes stopping a law or regulation, sometimes changing tax laws, sometimes receiving a subsidy. They then figure out how to enable a series of actions that do not operate like quid pro quo exchanges but allow for the flow from client to candidate, and from politician to client, while taking a fee for enabling the flow, and obscuring the transaction-like elements by submerging them in other, nontransactional elements.”).
In *McDonnell v. United States*, the Supreme Court ensured that politicians will not need to worry about accepting lavish gifts of cash and Rolex watches so long as they adhere to the new definition of “official action.” The opinion has rightfully drawn the ire of some citizens who view the Court’s opinion as an acceptance of Robert McDonnell’s behavior as the new political norm. In addition, critics believe the Court is limiting the political safeguards one by one with assurances that another statute is better suited to handle the case before it. Furthermore, after the Fourth Circuit upheld the convictions of Robert and his wife, Maureen McDonnell, the noted anticorruption scholar Zephyr Teachout wrote, “[t]o overturn the McDonnells’ convictions, however, would also overturn more than 700 years of history, make bad law and leave citizens facing a crisis of political corruption with even fewer tools to fight it.” The foundational concept is that politicians should not be compensated by private citizens, in addition to their salary, to perform the duties of their civil-service positions. Permitting public officials to receive additional compensation from private citizens incentivizes the public official to place the needs of the paying constituent before those of the constituents who cannot afford to purchase the official’s service. It also corrupts the public official who instead of acting in the best interests of his or her constituents as a group will prioritize the interests of those few who are willing to bribe for

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6 136 S. Ct. 2355 (2016).
7 See id. at 2368 (“[T]he two requirements for an ‘official act’: First, the Government must identify a ‘question, matter, cause, suit, proceeding or controversy’ that ‘may at any time be pending’ or ‘may by law be brought’ before a public official. Second, the Government must prove that the public official made a decision or took an action ‘on’ that question, matter, cause, suit, proceeding, or controversy, or agreed to do so.”). The Court interpreted the first requirement’s language to “connote a formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination.”
8 See e.g., Zephyr Teachout, *There’s No Such Thing as a Free Rolex*, N.Y. TIMES (Apr. 29, 2016), https://www.nytimes.com/2016/04/29/opinion/theres-no-such-thing-as-a-free-rolex.html (criticizing the Court’s fear of criminalizing “what they perceived as normal, day-to-day political behavior” instead of curtailing corruption).
9 See id. (stating that the *Citizens United* decision was prefaced with an understanding that federal bribery statutes were the correct avenue to remove money from politics).
10 Id.
11 See Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Geo. L.J. 1171, 1179 (1977) (“A comparable offense appeared in England as early as 1275. Chapter 26 of the Statute of Westminster I, entitled ‘Extortion by the King’s Officers,’ provided in part that ‘no Sheriff, nor other the King’s Officer, take any reward to do his Office, but shall be paid of that which they take of the King; and he that so doth, shall yield twice as much, and shall be punished at the King’s Pleasure.’”) (quoting The Statute of Westminster, the First, 1275, 3 Edw. 1, c. 26 (Eng.) (repealed 1968)); see also TEACHOUT, supra note 1, at 60–62 (discussing Benjamin Franklin’s radical proposal that public officials not receive any compensation for their service).
priority service.\textsuperscript{12} In a narrow reading of what constitutes “official action,” the Supreme Court hamstrung the ability of federal prosecutors to rid political offices of quid pro quo corruption.\textsuperscript{13} The most egregious corruption, such as the outright exchange of government contracts for cash, is still sufficiently protected by the \textit{McDonnell v. United States} interpretation of “official action.”\textsuperscript{14} The Court was concerned that, without some constraint, “official action” would expand to encompass almost any action of a public official, which would result in “absurdities of convicting individuals on corruption charges.”\textsuperscript{15} One such absurd example would be prosecuting the President or a governor for hosting the NCAA championship basketball team at the White House, which is part a longstanding tradition dating back to 1865.\textsuperscript{16}

This Note aims find a balance between the evils envisioned by those on either side of the question: permitting the sale of political access and holding politicians at the mercy of prosecutors. Such balance requires creating a bright-line definition of “official action” that incorporates the psychological realities of relationships that revolve around exchanges. The Court erred in drawing a distinction between a public official offering to vote one way for money and lobbying within the government to support the donor’s position. Robert McDonnell may not have performed an “official act” in the Court’s opinion, but he was lobbying for pay without the sort of prophylactic measures applicable to lobbyists or campaign finance.

Section I will explore the factual background and briefly track the prosecution of Robert and Maureen McDonnell to demonstrate how the Court has approved a pay-to-play approach. Additionally, this Note will trace the modern definition of “official action” through several Supreme Court iterations. This Note will apply the contemporary definition of “official action” to older precedent to illustrate the shortcomings in application of the \textit{McDonnell} iteration.

Section II will discuss in depth the deficiency of the \textit{McDonnell} opinion’s narrow definition of “official action.” One of the key

\begin{itemize}
\item \textsuperscript{12} See \textit{TEACHOUT}, supra note 1, at 2–3 (discussing how gifts can encourage diplomats to put the private interest of the gift-giver above the public interest their position represents).
\item \textsuperscript{13} See McDonnell v. United States, 136 S. Ct. 2355, 2372 (2016) (curtailing the definition of “official action” to situations involving the formal exercise of government authority over a specific question).
\item \textsuperscript{14} See id. at 2370 (describing situations where there would be an official act such as narrowing down a list of candidates for a research grant).
\item \textsuperscript{15} See id. (refusing to include “setting up a meeting, hosting an event, or calling another official” within the definition of official action).
\end{itemize}
shortcomings of the Court’s approach is that it fails to appreciate the psychology undergirding the relationship between the briber, Jonnie Williams, and Robert McDonnell. The reciprocity norm theorizes that it is a fundamental aspect of human nature to desire to reciprocate when receiving gifts and favors.

Section III will compare campaign finance laws to bribery laws to demonstrate the greater risks associated with in-office contributions and valuable aspects of campaign finance laws that should be applied to in-office corruption. Campaign finance is more regulated and transparent than unreported gifts, vacations, and money flowing through private channels to elected officials. In addition, incumbent public officials are more susceptible to gift-giving unduly influencing their decision-making process because of clientelism. Lastly, the emphasis of campaign finance regulation on structural barriers to prevent corruption is more effective than reactive anticorruption laws.

Section IV will attempt to lay out a standard that the Court could have adopted in McDonnell that would have more accurately reflected the underlying psychology, and corrupting influence, of public officials receiving gifts. Additionally, this Note suggests that maximum sentences be graduated with the amount corruptly received by the public official. This, in tandem with a more inclusive definition of “official action,” would create a structural barrier to dissuade corruption by reducing the incentive towards corrupt practices.

I. BACKGROUND

A. Case Summary

In the wake of the 2008 financial crisis, Robert McDonnell placed economic development at the forefront of his campaign for Governor of Virginia. The McDonnell campaign emphasized that “Bob’s for jobs” and received widespread support from businesses. During the election,

17 See Alvin W. Gouldner, The Norm of Reciprocity: A Preliminary Statement, 25 AM. SOC. REV. 161, 171 (1960) (suggesting that the norm of reciprocity requires individuals to “help those who have helped them” and “not injure those who have helped them”).

18 See id. (stating that reciprocity is “no less universal and important an element of culture than the incest taboo”).

19 See infra Section III.B.


the McDonnell family was in the midst of a financial crisis. McDonnell was hemorrhaging money from his failing rental properties, the loan payments on which totaled $11,000 per month. In addition, Robert and Maureen McDonnell's credit card debt was growing at an unsustainable rate. As a result, McDonnell and his wife were arguably more susceptible to less scrupulous financial donors. Jonnie Williams, the CEO of Star Scientific Inc., was the donor willing and able to provide desperately-needed financial support to the McDonnell family. This financial assistance came in several forms: direct personal loans, lavish shopping trips on Fifth Avenue in New York City, and even the McDonnells's use of Williams's Ferrari at Williams's vacation home. These were ongoing financial subsidies that Williams provided to the McDonnell family which allowed them to continue enjoying a luxurious lifestyle.

All of this came to light only after the McDonnells accused their executive chef of stealing groceries from the pantry to use in his private catering business. In response to the allegations, the chef turned over

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23 See McDonnell, 792 F.3d at 486 ("Mobo Real Estate . . . a business operated by [McDonnell] and his sister, was losing money on a pair of beachfront rental properties . . . . When [McDonnell] became Governor, he and his sister were losing more than $40,000 each year.").
24 Id.
25 See id. (noting that at the time of his inauguration, their credit card debt was $74,000 which would balloon to over $90,000 within the first year of holding office).
27 McDonnell, 792 F.3d at 488 ("Then, according to Williams, Mrs. McDonnell said, ‘I have a background in nutritional supplements and I can be helpful to you with this project, with your company. The Governor says it’s okay for me to help you and—but I need you to help me. I need you to help me with this financial situation . . . . Williams called [Robert McDonnell] . . . . ‘I called him and said that, you know, ‘I met with Maureen. I understand the financial problems and I’m willing to help.’") (internal citations omitted); see McDonnell v. United States, 136 S. Ct. 2355, 2361 (2016) (stating that the McDonnells received $175,000 from Jonnie Williams in the form of loans, gifts, and other compensation).
28 See McDonnell, 792 F.3d at 488 ("Mrs. McDonnell asked to borrow $50,000.").
29 See id. ("Williams spent approximately $20,000 on Mrs. McDonnell during [their New York City] shopping spree.").
30 See id. at 489 ("[McDonnell] and his family vacationed at Williams's multi-million-dollar vacation home at Smith Mountain Lake in Virginia. Williams allowed the McDonnells to stay there free of charge. . . . [Williams] paid more than $600 to have his Ferrari delivered to the home for [Robert McDonnell's] use.").
31 See McDonnell, 136 S. Ct at 2364 (stating that the total of gifts and loans exceeded $175,000); see also McDonnell, 792 F.3d at 492 (quoting an email from Maureen McDonnell to Robert McDonnell's chief counsel: "Gov wants to know why nothing has developed w studies after Jonnie gave $200,000") (internal citations omitted).
information revealing the financial relationship between Williams and the McDonnell family. Robert McDonnell’s indictment consisted of fourteen counts, including honest-services wire fraud and Hobbs Act extortion. Under the Hobbs Act, the prosecutor had to show that the “defendant’s extortion ‘obstruct[ed], delay[ed], or affect[ed] commerce or the movement of any article or commodity in commerce.’” The federal mail and wire fraud statutes criminalize the deprivation of the citizens’ “intangible right of honest services.”

The prosecution alleged that five official acts had taken place: An August 1, 2011 meeting arranged by Robert McDonnell between Jonnie Williams, Maureen McDonnell, and Molly Huffstetler, a senior policy advisor to the Virginia Secretary of Health to discuss research and available research grants to study Anatabloc, a supplement derived from tobacco and manufactured by Williams’s company, at the University of Virginia and the Virginia Commonwealth University Medical Center. An August 30, 2011 party hosted by Robert and Maureen McDonnell at the Governor’s Mansion. Each of the tables at the party contained samples of the Anatabloc product and the guest list was approved by Jonnie Williams. The guests included officials from the University of Virginia and Virginia Medical School. At this event, Robert McDonnell pitched further studies regarding Anatabloc while Jonnie Williams provided $25,000 grant checks to interested
researchers.\textsuperscript{43}

Jason Eige, Robert McDonnell's Counselor and Senior Policy Advisor, received an email from McDonnell on February 17, 2012 asking him to see him about the status of research studies of Anatabloc at the University of Virginia and Virginia Commonwealth University Medical Center.\textsuperscript{44} Prior to Robert McDonnell’s email, Maureen McDonnell was pressuring Jason Eige to contact Jonnie Williams, emailing that “[Governor McDonnell] wants to know why nothing has developed w[ith] studies after [Williams] gave $200,000.”\textsuperscript{45}

On February 29, 2012, the McDonnells hosted a reception for healthcare leaders at the Governor’s Mansion.\textsuperscript{46} Jonnie Williams and other Star Scientific representatives attended the reception.\textsuperscript{47}

On March 21, 2012 Robert McDonnell met with the Secretary of Administration Lisa Hicks-Thomas and her staff member Sara Wilson about Virginia’s state employee health plan.\textsuperscript{48} One of the topics discussed was how to curb healthcare costs.\textsuperscript{49} At one point, McDonnell “pulled some Anatabloc out of his pocket and told [Lisa Hicks-Thomas] and [Sara Wilson] that Anatabloc had beneficial health effects . . . .”\textsuperscript{50} McDonnell then asked them to “reach out to the ‘Anatabloc people’ and meet with them . . . .”\textsuperscript{51}

At trial, the jury linked these actions to an implicit quid pro quo based on the testimony of Williams and McDonnell.\textsuperscript{52} “Official action” has been interpreted as including activities outside the duties of a public official to reach customary functions.\textsuperscript{53} Testimony of McDonnell’s staff revealed that “McDonnell would customarily take action on questions, matters, and causes of Virginia business and economic development, including hosting

\textsuperscript{43} Id. at 18.
\textsuperscript{44} Id. at 24.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 25.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 26.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{53} McDonnell v. United States, 136 S. Ct. 2355, 2371 (2016).
events and meetings.”

In his appeal to the Fourth Circuit, McDonnell’s primary contention regarding the verdict was that the instructions to the jury resulted in an application of the law that was impermissibly broad. The jury instructions drew language from the federal bribery statute prohibiting public officials from “receiv[ing] anything of value ‘in return for . . . being influenced in the performance of any official act.’” The appellate court approved the jury instructions, particularly the far-reaching provisions including customary actions outside the scope of official duties, so long as the purpose of the action was to influence matters before the government. Furthermore, the official act need not be a singular action nor directly within the public official’s control to satisfy the statute.

B. Historical Development of “Official Action”

Before turning to the contemporary conception of official action, it is worthwhile to explore the historical underpinnings of modern corruption laws. Anticorruption efforts are deeply rooted in United States history, dating all the way back to the Articles of Confederation, which banned officials from receiving any gifts from foreign powers. This absolute prohibition on gratuities was an effort to curtail potential corrupting influences because the then dominant international powers, France and Britain, were perceived as failed and corrupt states. In fact, a modified version of that same provision would appear in the Constitution as the
Emoluments Clause: “[N]o Person holding any Office of Profit or Trust under . . . [the United States], shall, without the consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” The anticorruption sentiment at the constitutional convention was so strong that delegates lobbied to have the provision carried forward, albeit modified to include congressional approval, to be ratified as part of the Constitution. The strong sentiment against gift-giving at that time is in stark contrast to the modern political and legal environment where political gifts and corporate campaign contributions are now viewed as protected speech.

Through the twentieth century, two federal statutes, the Hobbs Act and the mail and wire fraud statutes, were employed by federal prosecutors to crack down on state level corruption. Neither of these statutes were written with combatting public corruption in mind, especially at the state level. The mail and wire fraud statutes were interpreted to provide citizens with an intangible right to the honest services of their public officials. This intangible right could be described as the right of citizens to a good government, free from corruption. Those critical of it would decry it as the quintessential definition of vagueness due to the subjective nature of terms like “corruption” and “good government.” However, the creative interpretations made by zealous federal prosecutors

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62 Id. at 27 (emphasis added) (quoting U.S. CONST. art. I, § 9, cl. 8).
63 See id. (discussing how delegate Charles Pinkney moved to have the gift prohibition reinserted).
64 Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 349–50 (2010) (overturning federal statute prohibiting electioneering communications of corporate immediately before an election and stating, “[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech” because “political speech cannot be limited based on a speaker’s wealth [as] a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity”).
65 18 U.S.C. § 1951(b)(2) (2012) (defining extortion as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right”).
66 Id. § 1346 (expanding the definition of fraud in 18 U.S.C. § 1341 to “a scheme or artifice to deprive another of the intangible right of honest services”).
67 The federal “hook” allowing the prosecution of state public officials under the Hobbs Act is the effect, even potential or de minimis, on interstate commerce, whereas the mail and wire fraud relies on the use of U.S. Postal Service or private interstate carriers. PETER HENNING & LEE RADEK, THE PROSECUTION AND DEFENSE OF PUBLIC CORRUPTION 7–9, 128–31, 143, 145–56 (2011) (providing an overview of the constitutionality and history of mail fraud and wire fraud statutes and the Hobbs Act).
68 See id. at 107, 143–44 (stating that the Hobbs Act was passed in response to the Supreme Court’s decision in United States v. Teamsters Local 807, 315 U.S. 521 (1942), which refused to extend the Anti-Racketeering Act to actions of unionized truckers whereas the mail fraud statute was created to prevent the post office from being used to facilitate interstate lotteries).
69 TEACHOUT, supra note 1, at 197.
70 See id. at 199 (“Defendants repeatedly objected to the uncertainty at the margins of [mail fraud charges]. If there was no actual impact on the public, how could there be a crime? They objected to the idea that there was something lost when the loyalty of a public servant was lost.”).
were blessed by the federal courts. The Court would ultimately begin to curb its expansive reading of the mail and wire fraud statutes to alleviate the vague and subjective nature of its application.

In *McNally v. United States*, the Court limited the application of the mail fraud statutes to situations where individual property rights are infringed. The Court invited Congress to clarify the statutes, criticizing the statutes' vagueness. In response, Congress amended 18 U.S.C § 1341 to specifically include the "intangible right of honest services," effectively reverting the statute to its construction before *McNally*.

C. The Expansive Interpretation of "Official Action" Under *United States v. Birdsall*

In *United States v. Birdsall*, a unanimous Court promulgated a sweeping definition of "official action" that reached beyond statutory duties of a public official to include customary actions and recommendations to government officials regarding their exercise of official authority. While the framework surrounding the definition in *Birdsall* is slightly different because of evolving statutes, it does provide insight into how the Court's rationale has progressed. With greater emphasis on intent, the exact boundaries of "official action," formerly referred to as "official duty," did not have to be so narrowly defined. The scope of the "official action" was less important, so long as the individual sought to influence the "official action." Therefore, "[e]very action that is within the range of official duty comes within the purview of these

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71 Id. at 197–200 (discussing how federal prosecutors employed the mail fraud statute to convict two New Orleans Levee Board members who utilized their positions for private financial gain in *Sushan v. United States*, 117 F.2d 110 (5th Cir. 1941)).
73 Id. at 360 ("Rather than 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, we read § 1341 as limited in scope to the protection of property rights.").
74 Id.
75 Skilling v. United States, 561 U.S. 358, 402 (2010) (internal citations omitted) ("Congress responded swiftly. The following year [after *McNally v. United States* was decided], it enacted a new statute 'specifically to cover one of the "intangible rights" that the lower courts had protected ... prior to *McNally* ... '").
76 233 U.S. 223 (1914).
77 See id. at 230–31, 235–36.
78 See id. at 230 (citation omitted) (reciting the bribery statute which includes "with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending").
79 See id. at 230–31 (discussing how the intent to influence "official action" is more important than whether the statute circumscribed the action).
80 See id. at 230 (citation omitted) ("[W]hoever ... in any official capacity ... accepts money ... 'with intent to have his decision or action ... influenced thereby' shall be punished ... '").
sections.”

In addition to the statutory definition of “official action” and the official duties of a public official, the Court included activities that were performed by custom and tradition by an elected official.

Contrasting the definition of “official action” under Birdsall with the recent McDonnell opinion reveals that the emphasis of the Court as well as Congress has shifted away from the intent of the gift giver towards what action the gift recipient takes. In the McDonnell case, there was no question that Williams sought to influence Robert McDonnell—Williams testified that the gifts were given to secure McDonnell’s support of Anatabloc. The Court did not appear interested in establishing what Governor McDonnell’s intent was when receiving gifts even though inferences of misconduct were readily available. Under Birdsall, this case would almost certainly have resulted in a conviction because of the more expansive definition of “official action” and the focus on the intent of the public official.


The Birdsall definition of “official action” would remain unchanged until the Court revisited it in United States v. Sun-Diamond Growers. In another unanimous decision, the Court refused to adopt an expansive interpretation of the federal bribery statute’s definition of “official act,” fearing that it would criminalize gift-giving without an official act. Therefore, under the new definition, the prosecutor had to show more than

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81 Id.
82 See id. at 231 (“[Official action] might also be found in an established usage which constituted the common law of the department and fixed the duties of those engaged in its activities.”).
83 Compare id. at 231 (“In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery.”), with McDonnell v. United States, 136 S. Ct. 2355, 2371–72 (2016) (“In sum, an ‘official act’ is a decision or action on a ‘question, matter, cause, suit, proceeding or controversy.’ The ‘question, matter, cause, suit, proceeding or controversy’ must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee.”).
84 McDonnell, 136 S. Ct. at 2366 (“Williams testified that he had given the gifts and loans to the McDonnells to obtain the Governor’s ‘help with the testing’ of Anatabloc at Virginia’s medical schools.”).
85 See id. at 2364 (“On February 16, Governor McDonnell e-mailed Williams to check on the status of documents related to the $50,000 loan. A few minutes later, Governor McDonnell e-mailed his counsel stating, ‘[p]lease see me about Anatabloc issues at VCU and UVA.’”).
86 See supra Section I.C.
89 See Sun-Diamond Growers, 526 U.S. at 405–06 (specifying that differentiating factor between bribery and mere gratuity is the connection between the donor’s contribution and his or her intent to influence a specific future official action).
just the intent to stockpile goodwill for some future matter in order to prove there was an "official action." The Court in Sun-Diamond accompanied its adoption of a more narrow standard with dicta stating "it would be quite possible for a jury to find that the gift was made "for or because of" the person's anticipated decision." This further clarified the Court's holding that bare gift-giving is insufficient to support a bribery conviction unless the gifts were given in anticipation of a specific future official act. However, it still must be noted that bare gift-giving will have a corrupting influence. This influence should be appreciated and factored into the statutory definition of "official action."

Zephyr Teachout criticized the Court's interpretation, stating "[t]he opinion shows a lack of understanding of the corrosive power of gifts and subtle influence, and no appreciation for the need for clear rules, because of the difficulty of proving connections between gifts and acts." Sun-Diamond Growers laid the groundwork for McDonnell by the Court's wholesale rejection of a bright-line test and reliance on 18 U.S.C. § 209. The Court reasoned that Congress's intent not to broadly define official action "as a prohibition of gifts given by reason of the donee's office is supported by the fact that when Congress has wanted to adopt such a broadly prophylactic criminal prohibition upon gift-giving, it has done so in a more precise and administrable fashion." The deficiency of that argument, however, is that the bribery statute is not aimed at preventing unilateral gratuities, it is aimed at preventing gifts given in exchange for

90 See id. ("[T]he prosecution's construction of official action] would be satisfied, according to the instructions, merely by a showing that respondent gave Secretary Espy a gratuity because of his official position—perhaps, for example, to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future ... In our view, this interpretation does not fit comfortably with the statutory text ... ").

91 See id. at 408 (providing the example of an individual pending appointment to the Antitrust Division of the Department of Justice receiving an impermissible gift from a large software corporation whose merger relies on that individual's later approval as a gift made in anticipation of a decision).

92 Id. at 406 ("The insistence upon an 'official act,' carefully defined, seems pregnant with the requirement that some particular official act be identified and proved.").

93 See Alix Spiegel, Give and Take: How the Rule of Reciprocation Binds Us, NPR (Nov. 26, 2012, 4:49 AM), http://www.npr.org/sections/health-shots/2012/11/26/165570502/give-and-take-how-the-rule-of-reciprocation-binds-us [https://perma.cc/ZAD7-E6ZW] (identifying the effects of the rule of reciprocation as obligating individuals to return favors, even when unsolicited and providing the example of restaurant servers who place a mint with the check receiving 3.3% higher tips).

94 TEACHOUT, supra note 1, at 228.

95 See 18 U.S.C. § 209(a) (2012) (prohibiting government employees from collecting any salary in addition to that provided by the U.S. government).

96 See United States v. Sun-Diamond Growers, 526 U.S. 398, 408-09 (1999) (internal citations omitted) ("For example, another provision of Chapter 11 of Title 18, the chapter entitled 'Bribery, Graft, and Conflicts of Interest,' criminalizes the giving or receiving of any 'supplementation of an Executive official's salary, without regard to the purpose of the payment.'").
II. DEFICIENCIES WITH THE MCDONNELL COURT’S DEFINITION OF “OFFICIAL ACTS”

The Supreme Court recently recognized that its opinion in McDonnell is unlikely to sit well with the electorate. However, instead of expanding its reading of the federal anticorruption statutes to capture political corruption, the Court interpreted the language narrowly to hedge against unrealized fears. During oral argument in McDonnell, Justice Breyer offered a hypothetical in which Mrs. Smith, a constituent facing eviction, petitions her representative for assistance. In this hypothetical, the representative, in response to the constituent’s letter, reaches out to the Department of Housing and Urban Development or Department of Health and Human Services asking what can be done to help Mrs. Smith.

Situations like Justice Breyer’s hypothetical occur every day throughout the country—it is a fundamental tenet of representative democracy that constituents may petition their representatives for redress. The issue with characterizing McDonnell’s actions as similar to those of Mrs. Smith is that Mrs. Smith did not pay her representative to hear her claims. By not capturing this key distinction, the Court failed to account for the realities of human nature. Through the unilateral exchange of money, from Williams to the McDonnell family, a pervasive bias and indebtedness would take root, tainting the decision-making process of McDonnell with respect to matters relating to Williams. After such point, McDonnell would be unable to act in a completely impartial manner. Furthermore, McDonnell is not merely helping a concerned constituent, but rather he is engaging in an implicit quid pro quo exchange in which he received loans and lavish gifts from a wealthy businessman who believed that some official act, therefore clearly defining the requisite quid pro quo.97

97 See 18 U.S.C. § 201(c)(1)(a) (2012) (emphasis added) (defining the prohibited conduct as “[whoever] 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”).

98 See McDonnell v. United States, 136 S. Ct. 2355, 2375 (2016) (concluding the opinion with “[t]here is no doubt that this case is distasteful; it may be worse than that”).


100 Id. at 15–16.

101 Id. at 15–17.

102 U.S. CONST. amend I; see McDonnell, 136 S. Ct. at 2373 (emphasis in original) (“The basic compact underlying representative government assumes that public officials will hear from their constituents and act appropriately on their concerns. . . .”).

103 See TEACHOUT, supra note 1, at 54 (explaining how structural dependency, where one party relies on monetary support from the other, causes the recipient to “align himself with the desires of the person who had power over him”).
McDonnell would help ensure Anatabloc research.104

A. Public Officials Should Not Be Permitted to Accept Monetary Gifts Due to Their Corrupting Influence Because of Psychological Tendencies to Reciprocate

Simply put, the norm of reciprocity states that individuals will seek to complete a quid pro quo transaction when provided the quid half of the transaction.105 The norm of reciprocity is deeply ingrained in individuals, with its effects registering as early as three to four years old.106 This effect has been studied in numerous situations, but perhaps nowhere more well-known than in the “Christmas Card Studies.” Originally performed in 1974,107 researchers mailed 578 Christmas cards to a random sample of individuals without any request for a response or prior notice.108 Out of that sample, approximately 20% of recipients responded by sending a Christmas card of their own.109 Some individuals responded with detailed handwritten letters or long-distance telephone calls.110 Research has failed to replicate this effect in recent years, but that decline has been attributed to modern computer communications and individuals becoming increasingly skeptical of unsolicited mailings.111 One aspect of the Christmas card study that is particularly telling is that there is no pressure for one to reciprocate—one can easily throw away the piece of mail without opening it. Even if they do open it, the card does not compel a

104 See McDonnell v. United States, 136 S. Ct. 2355, 2361, 2366 (2016) (showing that Williams approached McDonnell seeking his assistance starting Anatabloc research at Virginia’s medical schools).
105 See Gouldner, supra note 17, at 175 (describing that the reciprocity norm is a “flexible moral sanction” that can be applied to “countless ad hoc transactions” and even likening it to an “all-purpose moral cement”).
106 See Kristina R. Olson & Elizabeth S. Spelke, Foundations of Cooperation in Young Children, 108 COGNITION 222, 223, 229 (2008) (observing that children are inclined to share resources with friends and family more than with strangers, indicating that the reciprocity norm is applied by toddlers as young as three).
108 Id. at 270 tbl.1.
109 Id. at 272 tbl.2 (showing the distribution of response proportions which when averaged yield approximately 20% response rate with higher quality cards eliciting a 30.2% response rate compared to moderate card’s 10.8% response rate).
110 See id. at 270–71 (transcribing responses from the anonymous recipient, one who described his efforts to identify the sender: “Your last name did not register at first, so I had my niece stop on her way to California to call you and ask if you were Dr. Ralph’s daughter. . . Please forgive me for being so stupid for not knowing your last name. We are fine and hope you are well”).
111 See Brian P. Meier, Bah Humbug: Unexpected Christmas Cards and the Reciprocity Norm, 156 J. SOC. PSYCHOL. 449, 451 (2015), http://dx.doi.org/10.1080/00224545.2015.1129306 [https://perma.cc/L2CK-UPWS] (finding that only 2% of individuals reciprocated by sending a card in return but self-reporting of participants stated that individuals were suspicious of unsolicited mail and preferred to use e-mail).
response.112 This is significant because Williams was much more aggressive in seeking McDonnell’s reciprocal behavior of supporting Anatabloc research—including one on your Christmas card mailing list is a far cry from permitting one to use your Ferrari and vacation home.113 Directly asking an individual to reciprocate, especially by identifying the value sought,114 amplifies the norm of reciprocity by obligating the receiving party to aid in some future situation.115

As private interest groups and lobbying has grown more prevalent, there has been greater interest in researching the potential effects of lobbying.116 Research that aimed to reconcile the numerous studies exploring the effects of lobbying and donation identified several situations where the decision making of an elected official is more susceptible to influence.117 Many of these factors are present in the relationship between Williams and McDonnell regarding the studies of Anatabloc.118 Williams lobbied McDonnell to assist in obtaining research from the University of Virginia.119 Politically speaking, the research of Anatabloc is a technical, low visibility, non-partisan, and apolitical research initiative.120 Therefore, it presents a situation where McDonnell would have been particularly susceptible to the influence of lobbying, even without factoring in the McDonnells’ precarious financial situation.121

One overarching aspect of the relationship between Williams and the McDonnells was the near constant flow of money or expensive luxury goods from Williams to the McDonnells. With the McDonnells’ rental properties in Virginia Beach failing, they needed influxes of cash to pay the rental-property mortgages, for which Robert McDonnell turned to Williams.122 For example, one text message from Robert McDonnell to

112 Id. at 449.
114 See Gouldner, supra note 17, at 171–72 (describing two distinct measurements of equivalence: heteromorphic reciprocity, which involves the exchange of different goods of similar value, and homeomorphic reciprocity, where like goods are exchanged).
115 See id. at 174 (mentioning how conformity to each other’s expectations rises when one half performs their obligation).
117 Id. at 94–95.
118 Id.
119 McDonnell v. United States, 136 S. Ct. 2355, 2361, 2366 (2016) (“Williams testified that she had given the gifts and loans to the McDonnells to obtain the Governor’s ‘help with the testing’ of Anatabloc at Virginia’s medical schools.”).
120 Smith, supra note 116, at 94.
121 See supra footnotes 20–31 and accompanying text.
Williams read, “[p]er voicemail would like to see if you could extend another 20K loan for this year. Call if possible and I’ll ask [my brother-in-law] to send instructions.”

Furthermore, while arranging the first loan, Maureen McDonnell explained the financial difficulties they were facing and offered to help Star Scientific. From exchanges such as this, it would have been apparent to Williams that the McDonnells were dependent on his financial assistance. According to Teachout, “[o]ne of the most dangerous structures, one that was likely to lead to corruption, was the dependent one.”

B. McDonnell’s Ability to Influence Decisions Outside of Official Action is Enhanced by his Role as Governor

One typical role of governors is to serve as the state leader by spearheading policy initiatives and serving as the chief executive of a state’s various agencies and departments. As Governor, Robert McDonnell was in a greater position to influence the policy decisions of the executive branch because of his supervisory role. Psychologists have revealed that individuals are susceptible to authority figures’ influence with a recent study reaffirming the conclusions of Stanley Milgram’s obedience study. That psychological study found that 70% of

123 Id. at 27.
124 Id. at 8–9.
125 TEACHOUT, supra note 1, at 53.
127 McDonnell v. United States, 136 S. Ct. 2355, 2364 (2016) (“Hicks-Thomas recalled Governor McDonnell asking them to meet with a representative from Star Scientific.”); see Jerry M. Burger, Replicating Milgram: Would People Still Obey Today?, 64 AM. PSYCHOL. 1, 8 tbl.2 (reaffirming classic Milgram obedience study by showing that 70% of participants would continue administering electrical shocks to punish students after hearing the person cry out in pain if instructed to do so thus demonstrating the increased influence authority figures have over subordinates).
128 Stanley Milgram, The Perils of Obedience, HARPER’S MAG., Dec. 1973, at 62, 62–63 (“In the basic experimental design, two people come to a psychology laboratory to take part in a study of memory and learning. One of them is designated as a ‘teacher’ and the other a ‘learner.’ The experimenter explains that the study is concerned with the effects of punishment on learning. The learner is conducted into a room, seated in a kind of miniature electric chair; his arms are strapped to prevent excessive movement, and an electrode is attached to his wrist. He is told that he will be read lists of simple word pairs, and that he will then be tested on his ability to remember the second word of a pair when he hears the first one again. Whenever he makes an error, he will receive electric shocks of increasing intensity. . . . The teacher is a genuinely naïve subject who has come to the laboratory for the experiment. The learner, or victim, is actually an actor who receives no shock at all. The point of the experiment is to see how far a person will proceed in a concrete and measureable situation in which he is ordered to inflict increasing pain on a protesting victim. . . . The manifest suffering of the learner presses [the teacher] to quit; but each time he hesitates to administer a shock, the experimenter orders
participants would continue shocking an individual who was in pain so long as the person administering the experiment called for it.\textsuperscript{129} An even stronger indication of obedience stems from the 63.3\% of participants who chose to continue administering electrical shocks after an actor who had assisted them in administering the electrical shocks backed out, at which point they would be encouraged to continue by another assistant in the experiment.\textsuperscript{130} Even though, as the Court held in \textit{McDonnell}, Robert McDonnell did not take official action, his role as Governor can be analogized to that of the experimenter in Milgram's experiment instructing subordinates to administer electrical shocks.\textsuperscript{131}

Even without exercising his authority through an "official action," McDonnell's influence surely would have been felt by subordinates through his actions. For example, McDonnell directed subordinate public officials to investigate and question researchers about Anatabloc.\textsuperscript{132} At times, McDonnell conspicuously advocated for the Anatabloc supplement, occasionally going so far as to recommend that other public officials meet with Star Scientific representatives.\textsuperscript{133} This cash-for-influence is impermissible and its corrupting effect cannot be ignored because the influence did not travel through an "official action."

\section*{III. Comparing In-Office Contributions to Campaign Finance Expenditures}

\subsection*{A. Campaign Finance Contributions are More Transparent to the Constituency}

Technology has ushered in a new era of transparency; whether it be a WikiLeaks document released on the Internet or footage from police-officer body cameras, there is a higher expectation of transparency among citizens. For example, one of the benefits touted by supporters of implementing body cameras is the increased level of transparency by

\begin{itemize}
\item[\textsuperscript{129}]Burger, \textit{supra} note 127, at 8 tbl.2 (showing that 70\% of the control group, with no pressures to continue or stop, continued after believing they had administered a 150-volt shock to the learner).
\item[\textsuperscript{130}]\textit{Id.} at 7–8, tbl.2.
\item[\textsuperscript{131}]Milgram, \textit{supra} note 128, at 62–63.
\item[\textsuperscript{132}]See \textit{McDonnell}, 136 S. Ct. at 2363–64 (noting that at times Governor McDonnell asked researchers "whether or not there was any reason to explore [Anatabloc] further" and after receiving Williams's complaint of slow progress asked his counsel to "[p]lease see me about Anatabloc issues at [Virginia Commonwealth University] and [University of Virginia]").
\item[\textsuperscript{133}]See \textit{id.} at 2364, 2366 ("The purpose of the meeting was to discuss Virginia's health plan for state employees. At that time, Governor McDonnell was taking Anatabloc several times a day. He took a pill during the meeting, and told Hicks-Thomas and Wilson that the pills 'were working well for him' and 'would be good for state employees'.")
\end{itemize}
allowing the public to review police encounters. Transparency provides the information that leads to accountability, which is crucial for an effective democracy. One of the distinctions between campaign finance contributions and in-office contributions to elected officials is the level of transparency.

Campaign finance reporting laws have three main requirements: contribution limits per donor, restrictions on who may be a donor, and mandated campaign finance disclosures. This enables the constituency to make an informed decision at the ballot box. Applying the reporting requirements of campaign finance laws would serve a similar function by providing the constituents with information about gifts. Another benefit of channeling gifts made to public officials through a structure similar to campaign finances is that it would provide a permissive channel for politicians to receive the money. In addition to the reporting requirement, states should strive to create an oversight agency to collect and enforce it. For example, the Connecticut Office of State Ethics fosters transparency by providing enforcement of disclosure requirements and by collecting a “Statement of Financial Interests” from public officials.

Critics of expansion of federal prosecution of corruption worry that doing so will usurp the ability of states to administer their own criminal corruption statutes. However, anticorruption values are deeply rooted in the Constitution and cannot be so easily laid aside. Professor Peter J. Henning writes, “[v]iewing federal prosecution of state and local officials for corruption as an invasion of state authority would turn the values advanced by federalism on their head.”

134 See LINDSAY MILLER & JESSICA TOLIVER & POLICE EXECUTIVE RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 5 (2014) (“The police executives whom PERF consulted cited many ways in which body-worn cameras have helped their agencies strengthen accountability and transparency.”).

135 See Letter from James Madison to W.T. Barry (Aug. 4, 1822), reprinted in 9 THE WRITINGS OF JAMES MADISON 103, 103 (Gaillard Hunt ed., 1910) (“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy . . . . Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”).

136 See HENNING & RADEK, supra note 67, at 316 (listing common requirements of campaign finance laws).


139 See supra Section I.B.

140 Peter J. Henning, Federalism and the Federal Prosecution of State and Local Corruption, 92 KY. L.J. 75, 86 (2003) (arguing that federalism protects states from infringement by the federal government but does not limit the application of federal criminal law to state public officials).
elected officials vary state by state. In the wake of McDonnell's indictment, Virginia lawmakers enacted much-needed ethics reform laws. However, prior to enacting this legislation Virginia did not cap the amount of money a public official could receive as a gift nor did it have an official ethics commission. Furthermore, the state ethics laws only required reporting of gifts greater than fifty dollars given directly to the public official, allowing friends and family to accept gifts without any reporting requirements whatsoever.

Due to the loose ethics laws in Virginia, McDonnell was not indicted on any state law violations and, in light of his successful appeal, will not face any federal charges. The situation in Virginia, up until its recent ethics reform, signifies that there needs to be a minimum standard to ensure transparency. Federal bribery statutes are well situated to police corruption at the highest levels of state government because they set minimum standards and are separate from local politics. Minimum standards would have no effect on states that already have robust ethics statutes but would have been valuable for pre-McDonnell Virginia where Robert McDonnell's corruption did not actually violate any state laws.

B. Regulation of Campaign Finance Creates Structural Barriers to Corruption

One crucial distinction between campaign finance laws and anticorruption statutes is that the former create structural barriers while the

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141 See TEACHOUT, supra note 1, at 108–18 (2014) (providing an overview and critique of states' patchwork of legislative attempts at curbing corruption).

142 Davis C. Rennolds, Let's Get Ethical, A Look at the New Ethics Reform in the Commonwealth of Virginia, 19 RICH. J. L. & PUB. INT. 1, 2 (2015) (discussing how the Virginia General Assembly recently passed ethics reform legislation).

143 Id. at 8.

144 Id.


146 See Rennolds, supra note 142, at 8 (“Prior to the 2015 reforms, Virginia was one of only ten states that allowed elected officials to accept personal gifts of unlimited value.”).

147 See TEACHOUT, supra note 1, at 121 (explaining that it can be difficult to indict local politicians with state anticorruption statutes because state-level prosecutors' careers may be tangled up with local politics); Michael W. Carey, Larry R. Ellis & Joseph F. Savage Jr., Federal Prosecution of State and Local Public Officials: The Obstacles to Punishing Breaches of the Public Trust and a Proposal for Reform, Part One, 94 W. VA. L. REV 301, 354–55 (1991) (arguing that there is a need for Federal prosecution in state-level corruption because of the number of cases brought by federal prosecutors).

148 See Ehley, supra note 145 (reporting that the Justice Department would not reopen its corruption case following the McDonnell decision).
latter seek to punish corrupt intent. By way of an historical example, the transition from the public ballot, where politicians, political parties, and sometimes even landlords would provide a ballot to citizens eligible to vote, to a private ballot is an example of a structural change. The public ballots would be conspicuously colored so enforcers could monitor the voting area and be able to identify which candidates individuals voted for in order to ensure bought votes were actually cast. Adoption of the private ballot system, where ballots are uniform and printed by the government, is an example of a structural change because it criminalizes behavior deemed likely to corrupt and provides little guidance for politicians.

Conversely, the statutes at play in McDonnell, the mail and wire fraud statutes and the Hobbs Act, require a showing of corrupt intent. Furthermore, the Court in McDonnell stated that "[a] jury could, for example, conclude that an agreement was reached if the evidence shows that the public official received a thing of value knowing that it was given with the expectation that the official would perform an 'official act' in return." The issue with corrupt-intent laws is their subjective nature, which leaves individuals to decide what is corrupt. This is further complicated because not all individuals view every instance of corruption as being per se wrong—especially with increasingly complex bureaucratic structures, public officials may be tempted to cut corners.

[Notes]

149 See Teachout, supra note 1, at 183–84 (comparing structural- and corrupt-intent laws).
150 See id. at 178–79 (describing the transition from public to private balloting).
151 See id. (noting that in Massachusetts in 1878 the Republican Party printed ballots on bright pink paper to enable enforcers to see the ballots from great distances).
152 Id. at 178–80, 184.
153 McDonnell v. United States, 136 S. Ct. 2355, 2365; see also 18 U.S.C. § 1951(b)(2) (2012) ("The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right."); 18 U.S.C. § 1341 ("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do . . .").
154 McDonnell, 136 S. Ct. at 2371.
155 See Colin Leys, What Is the Problem About Corruption?, in Political Corruption: Readings in Comparative Analysis 31, 33–35 (Arnold J. Heidenheimer ed., 1970) (criticizing corruption definitions for being subjective, often with the political insiders feeling their actions were justified on one side and "ethical absolutism" on the other).
156 See id. at 34–35 (identifying "honest graft" and "petty bribery" as cases where individuals might be inclined to view conduct, though technically corrupt, as innocuous). A hypothetical assists in identifying this distinction. For example, assume that a citizen, who wants the bridge he commutes over every day to be repaired because it is riddled with potholes, gives a public official cash asking if this project can be prioritized. In response, the public official makes sure the highway repair crews are dispatched the next morning to fix the issue. Many would view this behavior as corrupt, but others may justify it on the grounds that the public official's actions benefit the constituents at large. Furthermore, even fewer people would likely view this behavior as corrupt if the public official did not do anything
Due to the subjective nature of the Hobbs Act and mail and wire fraud statutes requiring corrupt intent the McDonnell court should have interpreted “official action” expansively to encompass all official and customary duties public officials perform, thus reverting the definition to its status under Birdsall.\(^\text{157}\) Doing so would broaden liability for bribery and extortion to capture the subtlest exercises of a public official’s power such as influencing other public officials or setting up meetings. In doing so, the application of the law would shift closer to the structural nature of campaign finance laws by creating barriers to dissuade public officials from acting corruptly.\(^\text{158}\) Instead of requiring an “official act,” almost any action of public officials could be captured with a broader definition because the corrupting nature of money is the root issue.\(^\text{159}\) Without the personal loans and gifts, Robert McDonnell was attempting to help a constituent and could be looked at as a successful example of a public official responding to and assisting a constituent.\(^\text{160}\) Furthermore, the risks of excluding this behavior from the definition of “official action” are even greater where the public official holds a high ranking position. The corrupting influence of money in McDonnell is amplified because Robert McDonnell’s position as Governor enhances his influence over subordinates because individuals are more likely to acquiesce to authority figures.\(^\text{161}\)

C. Political Gift Giving is More Corrupting than Campaign Contributions Because Elected Officials Are More Susceptible to the Reciprocity Norm

At first blush, a gift of money to a public official may appear to have the same net effect—$1,000 donated to the personal political campaign is

\(^{157}\) See United States v. Birdsall, 233 U.S. 223, 230–31 (1914) (defining a broad range of official duties that are subject to the anti-fraud statutes at issue in the case).

\(^{158}\) See e.g., Henning & Radek, supra note 67, at 316 (describing how campaign finance laws create barriers in order to dissuade corrupt practices such as contribution limits, donor restrictions, and disclosure requirements).

\(^{159}\) Samuel Issacharoff, On Political Corruption, in Money, Politics, and the Constitution: Beyond Citizens United 119, 122 (Monica Youn ed., 2011) (noting the alternative view of the Court on corruption was that large sums of money in politics has a distortive effect on the political marketplace allowing those with the financial means to outcompete those unable to heavily contribute financially).

\(^{160}\) See U.S. Const. amend I (“Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”); McDonnell v. United States, 136 S. Ct. 2355, 2372 (2016) (“The basic compact underlying representative government assumes that public officials will hear from their constituents and act appropriately on their concerns . . . .”).

\(^{161}\) See supra Section III.B (arguing that empirical research suggests that Robert McDonnell’s subordinates may have felt obligated to acquiesce to his directions concerning Anatabloc).
no different than $1,000 given as a gift. The two contributions, however, cannot be equated. On the one hand, in a political campaign, money allows the candidate’s speech to reach more people who may or may not agree with the message. On the other hand, direct contributions to incumbent public officials bear the risk of “clientelism.” Broadly defined, clientelism occurs when an individual or entity exerts its influence both within and outside the political system, resulting in disproportionate political capital. Samuel Issacharoff suggests that clientelism is more damaging than corrupt campaign contributions and isolated quid pro quo arrangements because it siphons public resources towards private interests. The risk associated with clientelism stems from the political culture which rewards reciprocity. In other words, after taking public office, the individual is socialized by his or her environment to more often engage in reciprocal behavior, thus amplifying the risks associated with gift-giving.

In addition to the risks of clientelism, the psychological effects associated with in-office gifts to public officials dictate a greater reciprocity rate. This is because of the temporal relationship between the gift and the ability to reciprocate. In an experiment specifically designed to test this relationship, researchers discovered that reciprocity rates

See Bradley A. Smith, Campaign Finance Regulation: Faulty Assumptions and Undemocratic Consequences, CATO INSTITUTE, POLICY ANALYSIS NO. 238 (Sept. 13, 1995), https://object.cato.org/sites/cato.org/files/pubs/pdf/pa238.pdf [https://perma.cc/DR3U-S5Q3] (identifying the issue with measuring the effects of political spending because well-funded and successful campaigns may be a result of broad public support or donor belief that the candidate is more likely to win); see also Stephen J. Dubner, How Much Does Campaign Spending Influence the Election? A Freakonomics Quorum, FREAKONOMICS (Jan. 17, 2012, 9:40 AM), http://freakonomics.com/2012/01/17/how-much-does-campaign-spending-influence-the-election-a-freakonomics-quorum/ [https://perma.cc/S92Y-F27Q] (illustrating that there is a minimum amount of campaign spending necessary to reach the electorate even though individuals do not change their political views based on campaign advertisements).

See Issacharoff, supra note 159, at 124–26 (discussing clientelism).

Id. at 127.

Id. at 124–26 (discussing how the patron-client relationships of clientelism result in a distorted use of public resources, resulting in private entities reaping the benefits, whereas quid pro quo consists of a public official receiving unjust private benefits).

Daniel Enemark et al., Effect of Holding Office on the Behavior of Politicians, 113 PNAS 13690, 13693 (2016) (“More specifically, our findings show that office-holding politicians exhibit more reciprocity than those who ran for office but lost the election. This finding and the null findings for trust and generosity align with the political science literature that claims that adherence to the norm of reciprocity is critical for success in politics and that the failure to reciprocate trust is a greater transgression than the failure to trust.”).

Id.

See Jerry M. Burger et al., Effects of Time on the Norm of Reciprocity, 19 BASIC & APPLIED SOC. PSYCH. 91, 91 (1997) (exploring the temporal relationship between the reciprocity norm and the ability to reciprocate).

In the experiment, a student would enter a room with a confederate and an experimenter. The confederate was disguised as another student participating in the survey. Id. at 94–95. The experimenter
between the immediate and one-week delayed conditions decreased from 93.8% to 75.8%.\textsuperscript{170} Other simulated iterations with scenarios involving more significant favors\textsuperscript{171} and with reciprocal requests delayed up to one year yielded a similar relationship between the reciprocity norm and time.\textsuperscript{172} This reflects that “the norm of reciprocity does not commit the recipient to an indefinite obligation to return a favor . . . [and] that if favors are to be returned they should be returned within a reasonable period of time.”\textsuperscript{173} Building off these psychological effects, campaign contributions and in-office gifts can be distinguished based on the temporal differences. Presumably, public officials have the ability to act on behalf of the gift-giver with greater immediacy than the political campaign donor.\textsuperscript{174}

Furthermore, campaign contributions involve reciprocity in the abstract, contingent on the success of the campaign. Broadening the definition of “official action” is only the first step toward reducing quid pro quo corruption. A comprehensive solution would involve filtering gifts through a more stringent campaign finance framework. Parts of this framework should include cooling off periods,\textsuperscript{175} restricted donor lists,\textsuperscript{176} and contribution limits.\textsuperscript{177}

would provide both with a personality questionnaire and exit the room. \textit{Id.} While the experimenter was out of the room, the confederate would excuse him or herself to use the restroom. \textit{Id.} The confederate would then return with two cans of Coca-Cola and offer one to the student participant. \textit{Id.} Then, the experimenter would return and collect the completed questionnaire before once again leaving to get survey credit participation forms. \textit{Id.} At this point, the confederate would ask the student participant if he/she would deliver a manila envelope to a nearby university office. \textit{Id.} In a modified iteration of the experiment, the confederate’s soda offer and delivery request was separated by a week. \textit{Id.} at 94–95.

\textsuperscript{170} \textit{Id.} at 95 tbl.1 (delaying the request for a reciprocal favor for one week).

\textsuperscript{171} See \textit{id.} at 97 (“Briefly, Scenario A describes an encounter in which a student named Doug spends about 10 minutes helping the participant load several heavy pieces of furniture onto a truck. Later Doug asks for a ride to his job about 30 minutes away . . . . In Scenario B a student named Trisha lends the participant a few dollars so he or she can join friends for pizza, a loan that is paid back the next day. Later Trish asks if she can borrow $20 to buy a book for class. Finally, in Scenario C a student named Martin spends about 15 minutes going over class notes after the participant misses class because of illness. Later Martin asks if the participant will go to the library to look up and photocopy eight journal articles for him.”).

\textsuperscript{172} \textit{Id.} at 99 (“Consistent with our findings from the first experiment, the longer the delay between the favor and the request, the less likely participants were to say they would return the favor.”).

\textsuperscript{173} \textit{Id.} at 93.

\textsuperscript{174} This is not to say that there are less risks of corruption stemming from quid pro quo bribery when the public official is an incumbent seeking reelection. In these situations, the politician’s incumbent status takes precedence over the reelection effort.

\textsuperscript{175} See \textit{e.g.}, \textit{MUN. SEC. RULE BOOK r. G-37(b)(i)(A)} (\textit{MUN. SEC. RULEMAKING BD. 2017}) (“No dealer shall engage in municipal securities business with a municipal entity within two years after a contribution to an official of such municipal entity with dealer selection influence . . . . made by the dealer; a municipal finance professional of the dealer; or a political action committee controlled by either the dealer or a municipal finance professional of the dealer.”).

\textsuperscript{176} See \textit{e.g.}, \textit{HENNING & RADEK, supra} note 67, at 330 (describing states’ restrictions on donors where an entire class of donors may be banned from giving money to public officials).

\textsuperscript{177} See, \textit{e.g.}, \textit{id.} at 318 (describing the Bipartisan Campaign Reform Act’s two-tier violation structure of campaign contribution limits over $2,000 and $25,000).
IV. SUGGESTIONS FOR FURTHER DEVELOPMENT

Section I of this Note shows that the conception of corruption has remained relatively constant from the founding of the United States until recently, rooted in concepts of morality and curtailed with structural limitations. Section II of this Note identified and described some of the psychological realities that exist in soft, or implicit, quid pro quo relationships where there is not "official action" in exchange for money, but rather the sale of influence and access. Access to this dual political structure invites clientelism, which amplifies an individual or entity's political power. The Supreme Court in McDonnell was limited to interpreting "official action" and in response to vagueness concerns construed "official action" narrowly. Any comprehensive solution aimed at restricting quid pro quo corruption of public officials will require legislative action to shift the criminal bribery statutes, with long maximum sentences, towards a framework of prophylactic measures with fines and shorter sentences.

A. Proposed Construction of "Official Action"

The Court's narrow definition of "official acts" creates a large loophole for corruption to go unpunished so long as the public official did not plan or take action within the bounds of "official action." The hypothetical proposed by Justice Breyer at oral argument serves as a good example to expose the flawed concept of "official action." In Justice Breyer's hypothetical, Mrs. Smith, a constituent facing an eviction notice, contacts her representative asking if there is any help he/she can provide her. In response, the representative writes a letter to the secretary of the Department of Housing and Urban Development asking for action to be taken in Mrs. Smith's matter. This is not a crime because there was no...
money offered in exchange for that service. 187 What Justice Breyer’s example displays is not corruption but a properly functioning representative government. 188 The government has long argued that, in quid pro quo bribery cases, the mantra “in for a penny, in for a pound” applies. 189 In defense of the narrow reading of “official action,” the Court is worried about the “[g]overnment’s boundless interpretation” and the use of a criminal statute to curtail corruption. 190 However, a law that has bright lines, where “official action” encompasses all action taken in government service, has value in its prophylactic nature by drawing clear lines where conduct becomes criminal. 191 Even if potentially innocent activities were captured by this broad definition, its anticorruption function would be well served by “changing the incentives before the fact instead of punishing activity after the fact[]” to dissuade public officials from even accepting items of value in exchange for government service. 192 Alongside this much broader construction, the penalties associated with bribery would need to be reduced in order to avoid the potential due process violation associated with a sweeping, vague definition. 193

B. Sentencing Reforms

Ideally, any broadening of the definition of “official act” should be accompanied by reforms to sentencing under the bribery statute. The Court is concerned with the potentially limitless application of anticorruption laws. 194 Hobbs Act extortion and the mail and wire fraud statutes each carry a maximum statutory penalty of up to twenty years’ imprisonment or a fine or both. 195 The hefty maximum sentences may explain some of the Court’s reluctance in affirming in anticorruption cases. Maximum sentencing guidelines should be reduced to eliminate some of the Supreme

187 See TEACHOUT, supra note 1, at 217 (listing the first element of bribery as “giving a thing of value or a benefit”).
188 See id. ("A constant flow between the public and a candidate is supposed to exist in a representative democracy, because that ensures that the representative will be thinking of the best interests of her constituency.").
190 McDonnell v. United States, 136 S. Ct. 2355, 2372, 2375 (2016); see also Transcript of Oral Argument at 31–32, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474) ("And it’s not because I’m in favor of dishonest behavior. I’m against it. And we have just listed some that is dishonest. My problem is the criminal law as the weapon to cure it.").
191 See TEACHOUT, supra note 1, at 4–5 (describing structural anti-corruption measures).
192 Id. at 4.
193 See McDonnell, 136 S. Ct. at 2373 (discussing the Court’s concern with sentences up to fifteen years when the statutory language does not provide clear bright lines).
194 See id. at 2375 (expressing concern with the "broader legal implications of the Government's boundless interpretation of the federal bribery statute["]").
Court’s reluctance. This change would enable courts to identify corruption as corruption instead of just being “distasteful.” Therefore, maximum sentences should be reduced or graduated with the value of the goods accepted to remove the Court’s hesitation towards upholding convictions.

Coupled with an expansive definition of “official action,” reducing maximum sentences based on value would incentivize public officials to avoid accepting anything of value. The criminalized behavior would shift from accepting a thing of value in exchange for a narrowly defined “official action” towards criminalizing the acceptance of a thing of value for any action within a public official’s purview. Exceptions for de minimis gifts would prevent the absurdities of public officials facing corruption charges for “the President to host a championship sports team at the White House, the Secretary of Education to visit a high school, or the Secretary of Agriculture to deliver a speech to ‘farmers concerning various matters of USDA policy.’” Additionally, an ethics oversight agency could provide case by case guidance to public officials.

Lastly, public officials receiving gifts in kind could be protected by a safe harbor allowing them to accept the gift but requiring that perishable gifts are placed in a common area of the office. When the gift’s value exceeds the de minimis exception, the public official would then have the option of refusing the gift or accepting it on behalf of their organization and later purchasing it for the gift’s fair market value if they desire to personally keep it.

197 See McDonnell, 136 S. Ct. at 2375 (discussing the ambiguity in “official action” with the maximum sentences as a potential due process violation).
198 See id. at 2373 (internal citations omitted) (“Invoking so shapeless a provision to condemn someone to prison’ for up to 15 years raises the serious concern that the provision does not comport with the Constitution’s guarantee of due process.”).
199 Id. at 2370 (internal citations omitted).
200 Legal Opinions, Rulings and Enforcement Actions, CONN. OFFICE OF STATE ETHICS, http://www.ct.gov/ethics/cwp/view.asp?a=3488&Q=414904&ethicsNav=-44061 (last visited Mar. 9, 2017) (“Any person subject to the Code of Ethics for Public Officials or the Code of Ethics for Lobbyists has the right to request an advisory opinion. Until amended or revoked, the opinions are binding and, if relied upon in good faith by the requestor, constitute an absolute defense to a criminal allegation of a Code violation.”).
201 See e.g., 930 MASS. CODE REGS. 5.08(11) (2017) (“A public employee is not prohibited from accepting unsolicited gifts of items that are perishable or otherwise impractical to return (such as flowers, plants, floral arrangements, and fruit baskets, or boxes of candy) if such item is made generally accessible to other persons in the employee’s agency and to the general public to the extent possible, or given to charity.”).
CONCLUSION

Robert McDonnell’s trial revealed that corruption is alive and well in state-level politics. Corruption is and will always be a constant temptation facing public officials and steps will need to be taken in order to limit the incentives for corrupt behavior. Before McDonnell, for example, the railroad barons of the nineteenth century engaged in quid pro quo corruption with state officials who accepted shares of the company in exchange for the wholesaling of state land for pennies on the dollar to the railway. Steps need to be taken in order to limit the incentives for this corrupt quid pro quo behavior. One such avenue is the criminalization of quid pro quo corruption; however, the narrowed definition of “official action” fails to appreciate the psychology underpinning the relationship. As this Note lays out, the nature of humans and the risk of quid pro quo corruption does not support an explicit definition of the transaction. Furthermore, if one understands corruption as the supplanting of the public interest with a private interest, then psychologically, the gifts provided by Williams to the McDonnell family are inherently corrupting. Therefore, the Court should have appreciated that effect by defining “official acts” to broadly include the actions in civil service that may fall outside “official action.”