

## McDONNELL AND ANTI-CORRUPTION'S LAST STAND

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*In McDonnell v. United States, the Supreme Court constrained the reach of federal anti-corruption law, declared the inevitability and even desirability of representatives aggrandizing favored constituents, and asserted patronage to be a hallmark of democracy. The unanimous decision is the latest and clearest indication that the Court will frustrate regulations that require officials to discharge their roles with disinterested neutrality.*

*This article demonstrates the impact of the Court's minimalist view of integrity through political philosophy and game theory. Given the Court's hostility to regulatory prohibition of self-interested political behavior, the final bulwark of public-minded governance is the electorate, which must use the ballot box to reject corrupt representatives. Additionally, the Court's position erects significant obstacles for campaign finance progressives and advocates for institutional political reform. The article concludes that implementing civic anti-corruption requires either jurisprudential innovation or novel approaches to enforcement.*

*This article thereby integrates the history of modern anti-corruption law with the latest leading decision on the topic, weaves together the Court's blackletter doctrine with its substantive politics, describes the impact of the law on democratic governance, and points the way forward for both scholarship and policy.*

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## INTRODUCTION

The substantive regulation of politics typically provides the Supreme Court with occasion for fierce partisan dispute.<sup>1</sup> Yet on topic of official corruption<sup>2</sup> – the type of malfeasance that occurs when officeholders receive bribes or abuse their office for personal benefit – the Court has reached a consensus which has been subject of curiously little legal scholarship<sup>3</sup> or popular attention,<sup>4</sup> even though official corruption has a blatantly political character. In a series of holdings, the Court has demonstrated surprising tolerance for sleazy political behavior and consistently overturned convictions of public servants charged with abusing their offices. The

<sup>1</sup> The most visible standalone instance of such partisanship may be *Bush v. Gore*, 531 U.S. 98 (2000). For an analysis of the degree to which partisanship shapes judicial outcomes, see generally Michael S. Kang & Joanna Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 69 STAN. L. REV. 1411-16 (2016) (summarizing the literature on partisan affiliation and judicial outcomes, and observing partisan loyalty has an impact even where issues do not have a clear ideological bent); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008) (finding partisan impact at the federal appellate level on the far more clearly partisan issue of the interpretation of Section 2 of the Voting Rights Act). See Section III.A.1 for a discussion of the partisan nature of the debate over campaign finance regulation.

<sup>2</sup> Except as otherwise indicated, in this article the word ‘corruption’ denotes official corruption, except where it is being treated comparatively (official corruption as compared to campaign finance or institutional corruption), where the full term is used.

<sup>3</sup> Dan Lowenstein and George Brown, whose works are discussed *passim*, have been the most dedicated scholars of the law of official corruption. In the legal scholarship corruption has received much greater attention in the campaign finance arena (perhaps corresponding to the proportion of cases). See, e.g., Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 118 (2010) (discussing the trouble of “leaders of state groveling for money” but focusing solely on campaign finance law). Other social science disciplines, conversely, have extensively explored corruption. See, e.g., JAMES C. SCOTT, *COMPARATIVE POLITICAL CORRUPTION* 4 (1972) (offering the seminal modern definition of corruption as “behaviour which deviates from the formal duties of a public role...because of private-regarding...wealth or status gains”) (quoting J. S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419 (1967)); SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT* (1999) (considering corruption from economic, social, and political perspectives); MICHAEL JOHNSTON, *SYNDROMES OF CORRUPTION* (2005) (offering a comprehensive cross-cultural typology). Where legal scholars give official corruption a comprehensive treatment, their analysis often evolve into treatments that are difficult to operationalize. See, e.g., LAURA UNDERKUFFLER, *CAPTURED BY EVIL: THE IDEA OF CORRUPTION IN LAW* 4; 248 (2013) (characterizing corruption as “capture by evil” and observing it is a “raw moral idea” with which law might struggle).

<sup>4</sup> Though it is early days for *McDonnell*, it might yet be an exception in terms of the attention it generates. For some initial thoughts on the decision and a review of the responses that have been generated in the blogosphere, see Matthew Stephenson, *The Supreme Court's McDonnell Opinion: A Post-Mortem*, THE GLOBAL ANTICORRUPTION BLOG, (last visited 22 July 2016) available at <https://globalanticorruptionblog.com/2016/07/19/the-supreme-courts-mcdonnell-opinion-a-post-mortem/>.

Court has thus revealed it expects little in terms of disinterested commitment to the public good from democratic representatives.

The Court's tolerance for self-interested representative behavior reached a high-water mark this past term in the unanimous decision of *McDonnell v. United States*.<sup>5</sup> After former Virginia governor Bob McDonnell repeatedly advocated, in his role as governor, for the cause of a constituent from whom he had received \$175,000 in gifts and other private benefits, he was convicted at a jury trial of violating federal anti-bribery statutes. After his conviction was affirmed by district and appellate courts,<sup>6</sup> the Supreme Court overturned his conviction and remanded the case on the ground that the jury instruction was insufficiently precise. Doctrinally, the Court read the relevant statute to conclude the trial court did not adequately instruct the jury as to what official acts can qualify as an application of government power so as to support a bribery charge. Such a narrowing interpretive move is consistent with the Court's modern treatment of anti-corruption law.<sup>7</sup>

Substantively, the Court broke new ground by articulating its theory of representative governance. The Court declared that reciprocal representative-constituent relations that approach, but do not quite cross, the threshold of transactional sale of government action, are tolerable, even quotidian, political practice. Thus, while McDonnell's conduct may have been "distasteful" or "tawdry" in the Court's eyes,<sup>8</sup> it was plausibly a type of condoned politicking. The Court supported this view by stating that the engine of democracy is biased or partial relationships between various actors, in particular between citizens and the representatives they elect.

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<sup>5</sup> 579 U.S. \_\_\_, 136 S.Ct. 2355 (2016). This essay uses the word 'representative' to denote any official who is elected to office, rather in the narrower sense of 'legislator'.

<sup>6</sup> *U.S. v. McDonnell*, 64 F.Supp.3d 783 (E.D. Va. 2014); *U.S. v. McDonnell*, 792 F.3d 478 (3d Cir. 2015).

<sup>7</sup> See Section I.B.

<sup>8</sup> 136 S.Ct. at 2375.

*McDonnell* thus offers a stark declaration on democratic governance, representative responsibility, and how these principles shape anti-corruption jurisprudence. The ramifications of the Court's substantive view of politics, as well as the Court's long-running hostility to federal anti-corruption efforts, are legion: they touch on issues of federalism;<sup>9</sup> of balancing defendants' rights with crimes that have intrinsically slippery boundaries;<sup>10</sup> and of the peculiarity of the Court having such a staunch commitment to defendants' rights in a context where defendants are typically elite political insiders.<sup>11</sup> This article, however, focuses on the political and structural consequences of the judicial evisceration of federal anti-corruption. To do so, it applies democratic and constitutional theory to contextualize the Court's political norms, and game theory to demonstrate the impact of the Court's position on the dynamic of governance.

The article first unpacks the Court's rejection of the claim that representatives are obligated to discharge their roles in a public-minded manner. The Court has explicitly declared it will defend the ability of officials to aggrandize constituents towards whom they feel affection or gratitude. This position commits to a vision of politics as reciprocal power relationships between representatives and the citizens who support them, with government disproportionately favoring constituents who have ingratiated themselves with political leaders. This approach is championed in the social sciences by agonist treatment of democracy, which characterizes political life as conflict between actors to achieve instrumental control of government decision-making and

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<sup>9</sup> See Section III.B.2 for an analysis of the tense relationship between federal anti-corruption efforts and autonomy of local governance.

<sup>10</sup> See *infra* note 18.

<sup>11</sup> The late Justice Scalia led an attack on the slipperiness of anti-corruption crimes. See, e.g., *Sorich v. U.S.*, 555 U.S. 1204, 129 S.Ct. 1308, 1310 (2009) (Scalia, dissenting from denial of certiorari) (arguing that 18 U.S.C. §1346, the federal honest services statute which was, inter alia, used to prosecute McDonnell, "invites 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 conduct."). Concerns such as these are discussed in, e.g., HARVEY SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* 3 (2009).

resource allocation.<sup>12</sup> *McDonnell* reveals that the Court is committed to such a conception of agonist politics (at least in the anti-corruption domain). The opinion further demonstrates that the Court holds an especially minimalist view of the rules of political competition. It thus tolerates self-interested and reciprocal conduct except where it is so egregious that it becomes bribery akin to theft from the public. The substantive theory of *McDonnell* indicates that the series of holdings unfavorable for federal anti-corruption efforts is a function of the Court's political ideology, rather than incidental to its application of blackletter doctrine. This observation unifies the Court's long-established official anti-corruption doctrine and the Court's novel articulation of its view of representation in *McDonnell*.

The Court's commitment to agonism challenges alternative theories that assert representatives have a firm obligation to serve the collective public interest. Such public-minded theories – which have various permutations in law and social science,<sup>13</sup> but which this article

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<sup>12</sup> Classic tracts arguing for agonist understandings of democracy include JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 269 (1987) (“the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote”); ROBERT DAHL, *PREFACE TO DEMOCRATIC THEORY* 67-71 (2006) (defining democracy as a competitive preference-realizing infrastructure); and IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 51 (2003). Dahl is arguably the most prominent champion of interest group pluralism in American democracy, whereas Schumpeter and Shapiro offer more generic conceptions of democracy through agonism, though Schumpeter offers a more cynical theory of elite control of the process and Shapiro a more hopeful assessment of agonism as the basis of genuinely equal democracy. There are fewer staunch advocates for the agonist approach in legal scholarship. *See, e.g.*, Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111 (1995) (critiquing the “moralist/idealist” approach to politics for betraying the realities of political competition). More typical is the approach exemplified by Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998), operating on the assumption that a goal of electoral design should be to ensure adequate competition. Likewise, some treatments of the First Amendment presume the goal of speech rights in the realm of politics is to allow unfettered citizen access to information, thus resulting in competition for voter approval. *See generally* Kathleen Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 177 (2010) (concluding that the libertarian treatment of free speech presmied on “the more speech the better” may be a “congenial vision”).

<sup>13</sup> Perhaps the most prominent modern advocacy for such a civic understanding in law is civic republicanism, seminally championed by Frank Michelman in *Law’s Republic*, 97 YALE L. J. 1493, 1495 (1988) (“republicanism...enhances everyone’s political freedom...It involves the ongoing revision of the normative histories that make political communities sources of contestable value and self-direction for their members”), Cass Sunstein in *Beyond the Republican Revival*, 97 YALE L. J. 1539, 1541 (1988) (identifying deliberation, equality, citizenship, and universalism “exemplified by the notion of a common good” as the characteristics of civic republicanism), and RONALD DWORKIN, *SOVEREIGN VIRTUE* 233 (2000) (the “fusion of political morality and critical self-interest seems to me to be the true nerve of civic republicanism, the important way in which individual

collectively denotes as ‘civic’ – conceive of governance as a shared enterprise between the entire polity; hold that appropriate rule serves collective welfare rather than the interests of discrete constituents or coalitions; and suggest that representatives should orient their conduct towards the benefit of the entire public rather than propitiating themselves or their favored constituents. Civic approaches thus prize cooperation over conflict and substantive neutrality over patronage or favoritism. While the Court has not explicitly condemned a civic approach, the article shows that the dynamics of governance produced by the Court’s holdings impair realization of a civic politics.

This judicial hostility to civic-minded anti-corruption has one universal political consequence: it throws the onus of advancing civic integrity upon the electorate, which remains the sole instrument for denying office to self-aggrandizing representatives. Yet there are tremendous challenges to advancing a civic-minded approach to politics through the electoral system alone. A system that lacks internal mechanisms for ensuring disinterested conduct will be systemically unstable,<sup>14</sup> as it has no apparatus for encouraging cooperation directed towards the mutual good, and thus participants in the political system have an incentive to ‘defect’ and exploit politics to maximize their own resource extraction. Moreover, the increasingly fractious

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citizens should merge their interests and personality into a political community”). For a critique of civic republicanism, including an observation (that there is a tension between collectivist foundations of civic republicans and protection of individual civil liberties) that may explain the liberal justices’ odd silence in the official corruption jurisprudence, see Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 803 (1993). The more recent and oblique expression of this civic impulse in the legal academy may be the institutional corruption reformers, discussed in Section III.A.2 *infra*. In the social sciences, prominent advocates of civic approaches to politics include AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY* AT 4 (2004) (justifiability through reason-giving to other members of communities is “meant both to produce a justifiable decision and to express the value of mutual respect”); PHILIP PETIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 110 (2002) (republicanism as non-domination draws together the ideals of egalitarianism and communitarianism); G.A. COHEN, *RESCUING JUSTICE AND EQUALITY* (2008) (arguing that the ability of members of a polity to provide reasons cognizable to one another in the context of common institutions is necessary to maintain “ties of civic friendship”) (quoting JOHN RAWLS, *A THEORY OF JUSTICE* 536 (1980)).

<sup>14</sup> See Sections II.B & C on how unregulated agonism excludes civic governance.

and divided character of the electorate in modern liberal democracies suggests that it may be difficult to achieve the unity necessary to advance civic-minded governance through elections.

The judicial treatment of anti-corruption and its view of democracy revealed therein also have significant implications for attempts to reform related domains of law. Firstly, while a civic view of corruption in the campaign finance domain has its apparent champions on the Court,<sup>15</sup> the unanimity of *McDonnell* suggests there may be obstacles to formulating a satisfactory progressive theory of political integrity. While the doctrinal questions may differ, the shared issue of representative obligation means a failure to reconcile the treatment of governance between campaign finance law and official corruption law will inevitably create tensions. The unanimity of the bench regarding official corruption further suggests that advocates for more responsive, public-regarding governance such as Lawrence Lessig and Zephyr Teachout may face a stalwart foe in the Court.

The article concludes by considering both jurisprudential and policy innovations that could facilitate civic anti-corruption. Reinterpreting the doctrinal context of the official corruption jurisprudence to reflect the allocation of power between citizens and officials could reconcile the bench with civic anti-corruption. An immediate policy solution to enable civic anti-corruption enforcement is state-led enforcement with federal cooperation, which would address federalism concerns and distance such prosecutions from federal judicial review.

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<sup>15</sup> On the bench, Justice Breyer may have dedicated the greatest energy to advancing such a position. *See, e.g., McCutcheon v. FEC*, 572 U.S. \_\_\_, 134 S.Ct. 1434, 1468 (2014) (Breyer, dissenting) (arguing that active campaign finance regulation can strengthen rather than weaken the First Amendment, but observing that such positive and traditional negative mandates will remain in tension); *see also* Stephen G. Breyer, *Our Democratic Constitution*, 77 NYU L. REV. 245 (2002) (articulating the grounds for a participatory view of democracy that will provide positive support for the First Amendment). Yet Breyer was also necessarily part of the *McDonnell* consensus.

## I. MCDONNELL AND ANTI-CORRUPTION DOCTRINE

The law of corruption delineates appropriate boundaries when discharging the duties of public office. Among the opinions that address substantive federal corruption doctrine, *McDonnell* uniquely enumerates an explicit theory of representative conduct. This Section first provides background on the jurisprudence of official corruption, contextualizes *McDonnell*, and then unpacks the novel theory of representation set forth in the opinion.

A. *Official Corruption and Public Office*

The law of corruption identifies when public officials betray their office for the sake of self-enrichment.<sup>16</sup> Though the ontology of corruption has been the subject of contentious academic debate, certain general features are uncontroversial. In generic terms, corruption refers to misuse of public office (including, potentially, citizenship)<sup>17</sup> motivated by some desire for private gain by the misuser. Corruption is thus intimately related to positive duties of government. Corruption can be understood as deviation from political integrity (itself informed by deep concepts such as sovereign legitimacy and the right to use the collective power of the state), and a particular corrupt act can be understood as the violation of a political duty.<sup>18</sup>

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<sup>16</sup> Such a definition has its archetypal expression in Nye, *supra* note 3.

<sup>17</sup> See, e.g., Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323 (2000); Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV. 1455 (1994).

<sup>18</sup> Ultimately the question of when conduct is substantively corrupt comes devolves upon questions of legitimacy of reason-giving, which itself depends upon norms of the polity, and it is unclear if law can exhaust this question. See, e.g., Mark Philp, *Conceptualizing Political Corruption*, in POLITICAL CORRUPTION: CONCEPTS & CONTEXTS 46 (Arnold J. Heidenheimer & Michael Johnston eds., 2002) (observing that rules cannot capture the sense of inappropriateness of behavior that underlies that underlies an accusation of corruption); Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 786-788 (1985) (observing that corruption traces back to a theoretical question of legitimacy, but in as an intermediary entity is not sharply delineated in practice). Given that the boundary of corruption is inevitably interwoven with a polity's 'deep' norms, it may be there is a virtue to anti-corruption laws which have a level of indeterminacy, insofar as that indeterminacy will induce reflection upon such norms. See generally Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010).



In legal enforcement, corrupt acts are often characterized as *quid pro quo* bribery,<sup>19</sup> wherein the public official trades power of her office in exchange for private enrichment. When a government official selects a defense contractor for a state project, or decides whether or not to pursue a prosecution based not on the appropriate considerations of public duty, but in exchange for an envelope full of cash from a private party, he engages in classic *quid pro quo*. Classic *quid pro quo* can be understood as a procedural failure that displaces norms of service with unrestricted market logic: the appropriate reasoning process that should guide use of public power is replaced by a covert 'black market' wherein public service is traded for the private benefit that accrues to the official.<sup>20</sup> Classic *quid pro quo* can also be understood as a type of sophisticated theft.<sup>21</sup> When a public official has been entrusted with power to use in accordance with the duties of office (the delineation of such duties determining when behavior is corrupt), and illicitly trades this power for private gain, it has the same effect as theft from the public.

*Quid pro quo* neither exhausts nor fully informs the conceptualization of corrupt conduct; a public official who, knowing (or, more invidiously yet, having decided) that the government

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<sup>19</sup> Though the law on official corruption is not especially consolidated, see Peter Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ. J. INT'L & COMP. L. 793, 798-99 (2001) (federal anti-corruption law is a "hodgepodge"), federal anti-corruption statutes now generally operate in a *quid pro quo* mold. Core statutes include 18 U.S.C. §201 (criminalizing bribery and illegal receipt of gratuities); 18 U.S.C. §666 (criminalizing bribery involving federal funds); 18 U.S.C. §1951 (the Hobbs Act, criminalizing extortion in interstate commerce); and 18 U.S.C. §§1341, 1346 (the federal honest services statute, post-*Skilling*, now limited to an anti-bribery measures). These statutes are discussed as they present in the case law *infra*. Interestingly enough, the idea that corruption is only *quid pro quo* bribery has had no more stalwart advocate than Justice Kennedy, who has aggressively championed *quid pro quo* as the *sine qua non* of corruption in the campaign finance context, and firmly argued this is the legacy of *Buckley v. Valeo*, 424 U.S. 1 (1976). *Citizens United v. FEC*, 558 U.S. 310, 357-59 (2010). This approach, however, has resulted in a number of tensions within campaign finance doctrine. See, e.g., Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 585 (2011); Jacob Eisler, *Judicial Perceptions of Electoral Psychology and the Deep Patterns of Campaign Finance Law*, 49 CONN. L. REV. \_\_ (2016) (observing the puzzles remaining in the doctrine and their role in the partisan dispute).

<sup>20</sup> For a description and critique of such market-oriented views of corruption, see Philp, *supra* note 18, at 49; for a more extended game-theoretical analysis of corruption as a type of market, see Susan Rose-Ackerman, *When is Corruption Harmful?*, in Heidenheimer & Johnston, *supra* note 18, at 357. For a descriptive analysis of how corruption interacts with market structures, see Benjamin A. Olken and Patrick Barron, *The Simple Economics of Extortion: Evidence from Trucking in Aceh*, 117 J. POL. EC. 417 (2009).

<sup>21</sup> John Gardiner, *Defining Corruption*, in Heidenheimer & Johnston, *supra* note 18, at 28 differentiates theft from corruption in that corruption must have the additional elements of deception and misuse of public resources.

will make use of a publicly traded company's services and thus that the company's stock will rise in value, trades his private wealth on the knowledge of that transaction, arguably misuses the privileges of office through corrupt self-dealing.<sup>22</sup> However, even where *quid pro quo* is taken as the seminal form of corruption, significant conceptual challenges remain. Each element of *quid pro quo* – the *quid* the public official receives, the *quo* he performs for the private party, and the *pro* connecting them – can be variously parsed, producing shifting levels of obligation.<sup>23</sup> An envelope of cash surreptitiously given almost certainly qualifies as a *quid*; but what of a favorable reference given to an official's relative, or more vaguely yet, a promise that an official will be seen 'gratefully' in his future dealings with the private party (perhaps culminating in a post after the official has left public service)? When a representative receives a payoff and then issues an order directly expending massive state resources, it will almost certainly count as a *quo*, but what of discussions with other governmental officials that speak favorably of the private party,<sup>24</sup> or even an intangible sense of gratitude that results in an imperceptible thumb on the scale of political decision-making that benefits the private party? Manipulating the breadth of the relevant terms can operationalize *quid pro quo* to fit vastly diverse expectations of public duty. For example, particularly expansive expectations of duty may expand the definition of a *quid* so as to criminalize *any* receipt of gifts by a public figure, even in the absence of a corresponding public act; conversely such a broad concept of duty may also prohibit public decisions that seem inexplicably favorable to a private party (ie, a *quo* may be illicit even where there is no *quid*). Conversely a narrow conception of duty may identify *quid pro quo* only where each of the bribe,

<sup>22</sup> However, the Court has recently pruned penalization of this facet of corruption. See discussion of *Skilling* *infra*.

<sup>23</sup> Lowenstein, *supra* note 18, at 796-97, offers a detailed parsing of these questions. George Brown, *The Gratuities Debate and Campaign Reform: How Strong is the Link?*, 52 WAYNE L. REV. 1371, 1375-76 (2007), observes the manner in which one of the core anti-corruption statutes (and the one used to define the crime of corruption in *McDonnell*), 18 U.S.C. § 201, sets forth distinct crimes of bribery in subsection (b) and illegal receipt of gratuities in subsection (c), but that the doctrinal relationship between them appears unclear, though it seems as though the gratuity offenses has a less demanding *pro* component to support the offense.

<sup>24</sup> *McDonnell*'s key holding is that such conduct does not qualify as a *quo*.

the payoff, and the causal connection between them is distinctly present and inexplicable except as part of an exchange.

The breadth of *quid pro quo* and its relationships to other obligations dictated by public office is the subject of extensive scholarly and jurisprudential analysis and ultimately devolves upon public expectations for reason-giving and justifiability.<sup>25</sup> One complication is that deficits of public integrity in a political system may not necessarily be easily correlated with particular acts, or even failures of particular public office. In the campaign finance domain, a major concern of anti-corruption activists is the ability of private actors to influence elections, and thereby induce public officials to take account of private interests, even where none of the elements of *quid pro quo* are apparent.<sup>26</sup> Campaign finance corruption blurs into what has been termed ‘institutional’ corruption by Dennis Thompson.<sup>27</sup> Institutional corruption occurs where the duties of public offices are abused not for explicitly private gain, but in order to yield political benefit (which does not accrue to the official’s personal welfare). The line between politics-as-usual and institutional corruption can be difficult to define, and, typically even more so than classically public-private *quid pro quo* corruption, shifts with reference to institutional norms. Practices such as pork barrel spending and logrolling may either be deemed a failure to

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<sup>25</sup> See *supra* note 18. Ackerman, *supra* note 3, provides a unified structural description of the relationship between democratic structures and the tendency towards corruption, and observes how campaign finance as a mechanism for exchanging political power can create an ambiguous bridge between patronage as part of democratic practice and corruption.

<sup>26</sup> See *supra* note 19; *Citizens United*, 558 U.S. at 450 (Stevens, dissenting) (arguing that rich donors have the excessive ability to influence political outcomes given the current state of campaign finance regulation). Some scholars have offered arguments that distinguish campaign finance corruption from official corruption on the grounds that the *quid* of campaign finance is purely political, the sole impact is in the electoral realm and ultimately upon voters, and thus it cannot be analogized in terms of its privately aggrandizing effect to classic official corruption. See David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1373 (1994); Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 903 (1998). The ability of campaign finance money to corrupt political life despite this difference drives some typologies, see Johnston, *supra* note 3, as well as institutional corruption scholars, see LAWRENCE LESSIG, *REPUBLIC, LOST* 92 (2011).

<sup>27</sup> DENNIS THOMPSON, *ETHICS IN CONGRESS* (1995) provides the seminal statement. Thompson’s basic point, *id.* at 8, might be that the complexities of legislative action create opportunities for misuse of public office more complex (both structurally and morally) than mere bribery.

appropriately discharge commitment to the public good, or as an acceptable, even (where it advances the causes of constituents) commendable, expression of political realities;<sup>28</sup> yet such political behavior may have the traits of *quid pro quo*, with the sole differences being representatives trade political favors rather than trading public power for private gain. The judgment of if such practices are illicit ultimately depends upon normative assertions regarding the political process as a whole as well as the duties of public office.<sup>29</sup>

By taking as its subject the law on ‘official corruption,’ this article targets a lineage of Supreme Court opinions on federal statutes that prohibit trades of public decision-making for private gain. This domain of law does not take as a core question if purely political exchanges are tolerable, nor does it generally inquire into institutional dynamics. The immediate question raised by these cases, rather, is if particular acts that involves public-private exchanges fulfill the (typically) *quid pro quo* formula of anti-corruption statutes. Official corruption law has not evolved into the vibrant forum for debating the appropriate nature of democratic governance as has the campaign finance jurisprudence.<sup>30</sup> Rather (at least until *McDonnell*) it has retained a

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<sup>28</sup> Lowenstein, *supra* note 18, at 846, observes that the “tendency of logrolling and state-bribery to serve parochial interests has caused considerable scorn to be placed on these practices. Nevertheless, it generally is recognized that these practices may lend some flexibility to the overall political system, and for better or worse, they are tolerated.” Some have gone so far as to argue that such practices like at the heart of effective democracy, and thereby challenge civic critiques of such an approach. See JONATHAN RAUCH, *POLITICAL REALISM: HOW HACKS, MACHINES, BIG MONEY, AND BACK-ROOM DEALS CAN STRENGTHEN AMERICAN DEMOCRACY* (2015).

<sup>29</sup> Of course, the line between institutional and private corruption may blur as well. One prominent real-world form that scholars have identified is the ‘revolving door’ nature of K Street; when Congresspeople wish to monetize their public service, they leave office and assume high-paying jobs where they serve the interests of their (well-heeled) former constituents. See Lessig, *supra* note 26, at 123. Because such positions occur after leaving office, they may not be connected to a particular public act; and because they comprise an entire form of employment it is awkward to characterize them as a traditional *quid*. Yet is difficult to deny that such practice results in the over-representation of special interests who are capable of offering ‘compensation’ through such positions. Yet, given the current *quid pro quo* oriented nature of contemporary treatments of corruption, stigmatizing, let alone prohibiting, such behavior may be difficult.

<sup>30</sup> For some of the exceptions, see generally Brown, *supra* note 23, at 1399-1400 (observing both the similarities and distinctions between the two areas of law); George D. Brown, *Applying Citizens United to Ordinary Corruption: With a Note on Blagojevich, McDonnell, and the Criminalization of Politics*, 91 N.D. L. Rev. 177, 182-183 (2016) (observing the bifurcation between the two zones of law, and the need to unify them); Daniel Lowenstein, *When is a Campaign Contribution a Bribe?*, in *PRIVATE AND PUBLIC CORRUPTION* 127 (William C. Heffernan & John Kleinig eds., 2004) (enquiring as to how campaign finance and official corruption law intersect at a technical level).

narrow blackletter emphasis on if specific instances of public malfeasance fulfill each element of the classic *quid pro quo* formula,<sup>31</sup> and if types of self-interested conduct other than bribery are likewise illicit.<sup>32</sup> However, as this Section has demonstrated, even where the type of corrupt conduct is limited to *quid pro quo*, there remains an enormous amount of indeterminacy in the functional boundaries of corruption, as the norms that define *where* conduct becomes illicit can be so diversely construed. The more expansively the various elements of *quid pro quo* are interpreted, the greater the array of prohibited conduct, and the stronger the onus on public officials to consider the public good. If the law is coherent, such specific considerations should have a knock-on effect on corruption in broader institutional settings (such as campaign finance), as Section III.A describes.

*McDonnell*'s weight comes from its implications for this relationship between anti-corruption law and the level of public-mindedness expected of officials. More demanding expectations in terms of public integrity will obligate officials to act in the general interests of polity and disregard their own interest as well as the interests of particular constituents, resulting in procedural neutrality with regards to use of political power. By narrowing the breadth of a central concept in the corruption formula (the *quo* element of official conduct), and arguing that this narrowness springs from the very nature of democratic representation, the Court stakes out a minimalist position on the expectations for public integrity, and reduces the breadth of representative behavior identified as corrupt.

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<sup>31</sup> This was the subject of *Sun-Diamond, Evans*, and *McCormick*.

<sup>32</sup> This has been the subject of the honest services jurisprudence addressed in *McNally* and *Skilling*.

### B. The Doctrinal Pruning of Anti-Corruption

As a doctrinal holding, *McDonnell* is merely the predictable culmination of the Court's blackletter treatment of corruption.<sup>33</sup> With one modern exception<sup>34</sup> in the official corruption context, the Court's substantive interpretation of anti-corruption statutes by public figures has favored defendants.<sup>35</sup> This exacting treatment of corruption prosecutions has operated through interpretive mechanisms, specifically canons of statutory interpretation and review of criminal procedure,<sup>36</sup> particularly jury instructions. The Court has thus adopted a demanding posture towards the drafting of anti-corruption legislation and the actual prosecution of corrupt officials.

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<sup>33</sup> The Court's persistent attitude towards corruption can be understood as a reaction to longitudinal political circumstances, George D. Brown, *Putting Watergate Behind Us - Salinas, Sun-Diamond, and Two Views of the Anticorruption Model*, 74 TUL. L. REV. 747 (2000), or as reflective of perhaps deeper normative commitments of the judiciary, Jacob Eisler, *The Unspoken Institutional Battle over Anti-Corruption: Citizens United, Honest Services, and the Legislative-Judicial Divide*, 9 FIRST AMEND. L. REV. 363 (2011).

<sup>34</sup> In *Evans v. United States*, 504 U.S. 255 (1992), a Court, split along typical partisan lines, affirmed a Hobbs Act conviction, 18 U.S.C. § 1951 (prohibiting extortion, the flip side of bribery and often seen as an analogous crime, see James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695 (1993)), could be satisfied without 'active' acceptance where an official 'passively' accepted a *quid pro quo*. Justice Kennedy's concurrence, *id.* at 274, seems to reflect the functional rationale – the offense of bribery could be 'winked' and 'nodded' out of existence if bribes needed to be accepted by something akin to a contract. The case, however, has caused some jurisprudential confusion, particularly as it came on the heels of another Hobbs Act case, *McCormick v. United States*, 500 U.S. 257 (1991), which echoed *McDonnell* in overturning a conviction for a jury instruction failure on very similar facts to *Evans*. Ultimately scholars seem puzzled by the coexistence of the two cases. See Lowenstein, *supra* note 30, at 130. Brown, *supra* note 30, at 207-8; 216-21, observes *Evans* is a 'difficult' and 'remarkable' case, while perspicaciously observing that lower federal courts have adopted *Evans* as a standard and distinguished *McCormick* and *Sun-Diamond* for official corruption prosecutions. However, *McDonnell* seems to reaffirm the status of *Evans* as an outlier at the Supreme Court level, and perhaps suggests a divergence between lower federal courts and the Supreme Court. Thus Brown's striking observation can perhaps be traced to the fact that lower appellate courts have a more granular and immediate sense of local politics, whereas the Supreme Court, insulated from local politics, is able to maintain the abstract, idealized view of politics.

<sup>35</sup> 'Substantive interpretation' here is differentiated from, e.g., questions of jurisdiction and standing that do not bear on the actual definition of when conduct is corrupt. Cf. George Brown, *Carte Blanche: Federal Prosecutions of State and Local Officials after Sabri*, 54 CATH. U. L. REV. 403, 404-05 (2005) (arguing that *Sabri v. United States*, 541 U.S. 600 (2004) reveals the Court's intention to permit broad federal enforcement of anti-corruption). However, cases such as *Sabri* do not go to the nature of corruption or expectations of public integrity, just the reach of federal power, and the lineage of cases discussed in this article demonstrate that the Court has developed a very constrained notion of the *substance* of corruption. While there may be unspoken interactions between federalism concerns and corruption prosecutions, had the Court wished to exonerate *McDonnell* on explicit terms of federalism, it could have done so.

<sup>36</sup> It is an interesting question – though one beyond the ken of this essay – why the Court has shown rising lenience in the procedural domain to corrupt politicians, even as it has deconstructed the robustness of criminal procedure protections in other contexts, such as the 4<sup>th</sup> Amendment. See, e.g., *Utah v. Stieff*, 579 U.S. \_\_\_, 136 S.Ct. 2056, 2061 (2016) (further weakening the doctrine that prevents use of "fruit of the poisonous tree" from unconstitutional searches and seizures).

The Court's treatment of official corruption narrowed the range of political behavior classified as illicit, though the individual holdings each has doctrinal foundations that do not directly invoke the substance of corruption. *McDonnell* itself is a seminal example. McDonnell had accepted \$175,000 in personal gifts and benefits from a private constituent who owned a nutritional supplement company.<sup>37</sup> In exchange, McDonnell had undertaken certain conduct, such as encouraging his subordinates to meet with representatives of the company and advocating for policies that would propitiate the company; at times these acts occurred within minutes of receiving emolument from the patron constituent.<sup>38</sup> McDonnell was in effect acting as an undisclosed 'insider' lobbyist for the company. After a federal investigation and prosecution, McDonnell was convicted at a jury trial of violating two federal anti-bribery statutes (honest services fraud and the Hobbs Act) and related offenses,<sup>39</sup> but the Supreme Court vacated and remanded his conviction because the jury instruction did not define what comprised a corrupt 'act' (the *quo* component of a *quid pro quo* formula) with the narrow clarity necessary to support a bribery conviction.

The blackletter reasoning of *McDonnell* applied statutory interpretation to review of jury instructions. Relying on the "familiar interpretive canon *noscitur a sociis*,"<sup>40</sup> the Court parsed the federal anti-bribery statute 18 U.S.C. §201(a)(3)<sup>41</sup> to conclude that a "formal exercise of

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<sup>37</sup> 136 S. Ct. at 2361.

<sup>38</sup> *Id.* at 2364.

<sup>39</sup> *Id.* at 2366.

<sup>40</sup> The Court deemed that because the words "question" and "matter" were adjacent to the words "cause, suit, proceeding, and controversy", for the latter four words to retain meaning, "question" and "matter" needed to be interpreted narrowly. *Id.* at 2368-69.

<sup>41</sup> The statute, 18 U.S.C. §201(b) states, in relevant part "being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

- (A) being influenced in the performance of any official act;
- (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
- (C) being induced to do or omit to do any act in violation of the official duty of such official or person..."

government power”<sup>42</sup> is necessary to qualify as the *quo* in an illicit *quid pro quo* exchange. It thus deemed the jury instruction deficient as it “did not adequately explain how to identify a ‘question, matter, cause, suit, proceeding or controversy’” and thereby failed to properly guide the jury’s assessment of if McDonnell had offered formal use of government power as his *quo* in exchange for the private benefits.<sup>43</sup> The Court rejected the argument that the jury argument was harmless,<sup>44</sup> implying it is at least plausible that the jury, if properly instructed, would have deemed McDonnell’s conduct to be licit.

As described in Section I.C, the *McDonnell* Court surpasses the narrow statutory and procedural findings necessary to remand the case and offers a full-fledged theory of representative accountability, the first time the Court has so articulated its view in the official corruption context. Doctrinally, however, the holding is the latest in a series in which the Supreme Court has hobbled anti-corruption legislation and prosecution. In the latest prior case that impacted the substantive contours of federal anti-corruption law, *Skilling v. United States*,<sup>45</sup> the Court engaged in an extensive reading of legal history to determine that the federal honest services doctrine prohibits only bribes and kickbacks, but does not prohibit undisclosed self-dealing. The court thus constricted the intangible right to honest services – revived after *McNally v. U.S.*<sup>46</sup> by 18 U.S.C. §1346 through explicit statutory invocation of the pre-*McNally* case law<sup>47</sup> – to bribery-like conduct. The opinion relied on the principle that where there is uncertainty

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shall be found guilty of bribery. The statute, 18 U.S.C. §201(a)(3), further defines “official act” to mean “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.” See *supra* note 23 for scholarly technical dissections of the bribery offense.

<sup>42</sup> *McDonnell*, 136 S. Ct. at 2368.

<sup>43</sup> *Id.* at 2374.

<sup>44</sup> *Id.* at 2375.

<sup>45</sup> 561 U.S. 358 (2010).

<sup>46</sup> 483 U.S. 350 (1987) (relying on the rule of lenity to strike down the doctrine of the intangible right to honest services that had evolved in federal Courts, and become a potent anti-corruption weapon for federal prosecutors).

<sup>47</sup> §1346 comprised the explicit rejection of the Court’s holding in *McNally*, thus comprising the classic form of legislative response to a disfavored judicial ruling; Congress took seriously the Court’s invitation to “speak more clearly”.



surrounding a statute's meaning, it should be subject to "limiting construction",<sup>48</sup> and deemed that the case law prior to *McNally* only clearly prohibited bribery, but no other misuse of public office. The effect was to turn §1346 into a simple anti-bribery statute, even though §1346 had become an (admittedly controversial)<sup>49</sup> tool for prosecuting a wider array of behavior that exploited public office.<sup>50</sup> *Skilling*, as did *McDonnell*, thus relied upon procedural concerns and the interpretive canon to limit the reach of conduct touched by anti-corruption law.<sup>51</sup>

A similar relationship between legal reasoning and corruption is apparent in the unanimous decision *United States v. Sun-Diamond*, the case that most directly prefigures *McDonnell*.<sup>52</sup> As did *McDonnell*, *Sun-Diamond* enquired into the level of precision dictated by a federal anti-corruption statute,<sup>53</sup> and how such breadth impacts jury instructions. The Court deemed there to be material error in the trial court's instruction to the jury that an emolument might be given to a public official on account of his *position*, rather than in relation to a specific public *act* performed by the official. Again, the doctrinal tool employed by the Court is that of statutory interpretation – underlying the differentiation between 'positions' and 'acts' is the interpretative principle that a statute which criminalizes conduct in a domain of extensive

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<sup>48</sup> A concurring minority of the Court would have struck down §1346 altogether as impermissibly vague, rather than tried to inappropriately rescue it via a limiting construction. 561 U.S. at 415 (Scalia, concurring in part).

<sup>49</sup> Prior to its nullification by *McNally*, the honest services doctrine enabled by 18 U.S.C. §1341 had been described as prosecutors' "true love" for its breadth, power, and flexibility. Jed Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980); see also Sara Sun Beale, *An Honest Services Debate*, 8 OH. ST. J. CRIM. L. 251, 251 (2010) (citing Rakoff's description and discussing the complexities regarding federal-state relationships and normative question raised thereby).

<sup>50</sup> While Supreme Court conceded that the federal appellate courts had variously identified conduct beyond bribes and kickbacks as illicit under §1346 (for example, "schemes of non-disclosure and concealment of material information," *Skilling*, 561 U.S. at 410 (citation omitted)), the Court determined that lenity and due process mandated that the lack of clarity surrounding the identification of such conduct excluded them from the ambit of §1346.

<sup>51</sup> The Court thus reveals a preference to only permit prosecution of conduct that falls into the "black" area of the "bribery core" rather than permit possible consideration of "grey" areas of arguably improper conduct. Lowenstein, *supra* note 18, at 786.

<sup>52</sup> 526 U.S. 398 (1999). The facts of the case are in some respects similar to *McDonnell*, though the dollar value of the goods received is significantly lower.

<sup>53</sup> In *Sun-Diamond*, at issue was the anti-gratuity statute 18 U.S.C. §201(c)(1)(A).

regulation ought to be read narrowly and treated as a “scalpel” rather than a “meat axe”.<sup>54</sup> Yet the opinion has the same effect on substantive anti-corruption legislation as *McDonnell* and *Skilling* – restricting prosecution of officials for conduct that might sacrifice public good for private gain.

This pattern has earlier antecedents in modern official corruption jurisprudence.<sup>55</sup> The Court consistently sets forth judgments that narrow the scope of anti-corruption legislation and raises standard for corruption prosecutions. This imposes a high bar upon the legislature in drafting anti-corruption legislation and upon prosecutors when bringing anti-corruption suits. The Court thus expects both the legislature and the executive to implement anti-corruption with scrupulous exactitude, and seems unwilling to accommodate either a legislative intent to sweep broadly with anti-corruption legislation (a particularly confounding move given the seemingly intentionally broad drafting of §1346),<sup>56</sup> or permit prosecutors leeway in the application of such legislation. By interdicting and complicating penalization of self-interested behavior, the Court reduces incentives for officials to behave in a public-minded manner, promotes an agonist political dynamic, and impairs opportunities for civic governance.

While it can be argued that this pattern present in the official corruption case law is a byproduct of the consistent application of unrelated and politically neutral doctrine, the contrast with the treatment of corruption in two other domains suggests the Court has treated official anti-corruption law especially stringently. Comparison to campaign finance corruption reveals a different tune. In the foundational campaign finance case, *Buckley v. Valeo*, the Court went so far

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<sup>54</sup> 526 U.S. at 412. Paradoxically, in *McConnell v. FEC*, 540 U.S. 93, 267 (2003), Scalia challenges prophylactic campaign finance regulation by advocating for “broadly drawn bribery law...[that] would, in all likelihood, eliminate any appearance of corruption in the system”.

<sup>55</sup> See the discussion of *McCormick* in *supra* note 34. See also *McNally*. See generally Eisler, *supra* note 33 (describing the longitudinal pattern of the Court preferring a narrow conception of corruption); cf. Brown, *supra* note 30 (analyzing and critiquing Eisler’s argument, and suggesting that the narrow view of corruption may only apply in the campaign finance context).

<sup>56</sup> Eisler, *supra* note 33, at 419 n.172.

as to *innovate* an idea of corruption that could balance First Amendment rights.<sup>57</sup> The extent and interpretation of campaign finance corruption has been the source of bitter partisan dispute (unlike official corruption, which has produced little internal dispute on the bench).<sup>58</sup> Strikingly, some justices have offered a far more vibrantly wide-ranging theory of campaign finance corruption than they have countenanced in the official corruption context, a paradox discussed in greater detail in Section III.A.1. Likewise telling is the Court's distinctly less lenient treatment of undue private influence upon judges. In two recent cases,<sup>59</sup> the Court has indicated that judges must carefully avoid either the appearance or reality of making decisions in light of undue influence, and has contrasted the judicial role with the role of representatives.<sup>60</sup>

### C. McDonnell's *Minimalist Theory of Representative Integrity*

The prospective explanations for the Supreme Court's long-running disapprobation of civic anti-corruption are legion: the Court's mandate to protect individual procedural rights may conflict with the prioritization of the public good that underlies civic anti-corruption;<sup>61</sup> strong personalities on the bench may hold a minimalist concept of corruption,<sup>62</sup> and (unlike in the

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<sup>57</sup> 424 U.S. at 26-27. Issacharoff, *supra* note 3 at 119, has characterized the campaign finance regime springing from *Buckley* as "in fact a regulatory structure created by the Court."

<sup>58</sup> See generally Kang and Shepherd, *supra* note 1; Eisler, *supra* note 19. Breyer's own confused remarks during the *McDonnell* transcript reveal the disjunction between the campaign finance and official corruption jurisprudence. See Transcript of Record at 47, *McDonnell* (No. 15-474).

<sup>59</sup> *Caperton v. Massey*, 556 U.S. 868 (2009); *Williams-Yulee v. Florida Bar*, 575 U.S. \_\_\_, 135 S. Ct. 1656 (2015).

<sup>60</sup> *Williams-Yulee*, 135 S.Ct. at 1674 (Ginsburg, concurring). The Court's perception of the distinction between judges and other public servants runs deep. See, e.g., *Vieth v. Jubelirer*, 541 U.S. at 267, 278 (2004) ("Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.").

<sup>61</sup> Cf. *Skilling*, 561 U.S. at 409 (observing that if the right to honest services vivified by were deemed to include "a wider range of offensive conduct [the statute] would raise due process concerns underlying the vagueness doctrine."), with, e.g., Philp, *supra* note 18 and Underkuffler, *supra* note 3. It is precisely the challenge of successfully identifying corrupt conduct in a manner adaptable to the adaptive and deceitful nature of corruption while also satisfying due process concerns that generates such a tension. See Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 156 (1994) ("The perplexing problem is whether political corruption can be prevented and punished without denigrating constitutional protections and individual civil rights. A Hobson's choice is seen to exist between enacting a specific statute that may be circumvented or a vague statute that is subject to selective enforcement").

<sup>62</sup> It is perhaps worth nothing that while *Sun-Diamond* and *McDonnell* were unanimous decisions, they were penned by Scalia and Roberts respectively.

campaign finance context) other members of the Court may have little interest in pushing back; the role differentiation between judges and representatives apparent in *Caperton* and *Williams-Yulee* may incline judges (aware of their own distinct obligations) to treat representatives with lenience. Yet *McDonnell* goes beyond merely articulating the doctrinal rationale for its circumscribed view of corruption, and delineates the Court's theory of representative service. By illuminating the Court's view of politics, *McDonnell* suggests that judicial hostility towards civic anti-corruption is an expression of the Court's substantive commitments rather than merely an incidental by-product of neutral application of doctrinal principles. The Court has a view of politics sympathetic to reciprocal, patronage-driven representative-constituent relations and thus hostile to a civic anti-corruption, and these substantive views shape the Court's holdings. The doctrinal basis (statutory interpretation and procedural concerns), of course, *may* independently tend to impair civic anti-corruption, but the Court has a bias for applying these tools in manner that advances its agonist view.

The Court's substantive theory of acceptable political conduct is set forth most explicitly in section II(B) of the opinion, where the Court observes that

conscientious 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...The Government's position could cast a pall of potential prosecution over these relationships...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.<sup>63</sup>

The innocuous tone of the assertion is belied by its practical bite: the Court deemed that McDonnell's conduct – accepting nearly two hundred thousand dollars in various benefits from an interested constituent, and reciprocating with favorable action – to be *plausibly* acceptable (in understated language, the Court laconically observes that it may not “typify normal political

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<sup>63</sup> *McDonnell*, 136 S.Ct. at 2355.

interaction between public officials and their constituents”<sup>64</sup>). While couched in the doctrinal holding that the trial court did not properly guide jurors in assessing if McDonnell’s undertakings in exchange for these *quids* were “official acts”, the substantive implication is striking: it is at least *possible* that McDonnell’s conduct was sufficiently permissible (even if incontrovertibly “tawdry”)<sup>65</sup> that with proper instruction a jury might have reached a different conclusion. More succinctly stated, the Court sees it as at least feasible that McDonnell’s conduct was an instance of acceptable political practice.

The Court’s view determines the outer boundaries of *quid pro quo* bribery. As described in Section I.A, the *quid pro quo* form of corruption does not have default breadth: its constituent parts can be extended or contracted to set expectations regarding political behavior. The Court establishes that only the most explicit and inappropriate uses of official power satisfy a corruption charge. As the Court’s parsing of ‘official act’ (the *quo* component) reveals, only acts that unequivocally deploy governmental apparatus are explicit enough to be a *quo*; merely instructing a subordinate to meet with a donor, or speaking of a donor favorably, do not commit government resources with sufficient definitiveness. Moreover, the Court’s theory of constituent service suggests that only a high level of impropriety (speaking to the relational *pro*) will be corrupt; representatives are expected to take action that benefits their constituents, and realism dictates that representatives will likely be more amenable to taking such action when the constituent has curried favor. Presumably there is *some* point at which currying of favor becomes illicit, but the Court leaves it unclear where this might be. The compound effect of the Court’s reasoning is to tightly constrain bribery offenses.

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<sup>64</sup> *Id.* at 2372.

<sup>65</sup> *Id.* at 2375.

This view of bribery suggests a remarkably liberated view of the boundaries of acceptable governance, and correspondingly minimal norms of duty. By describing McDonnell's conduct as prospectively constituent service rather than unequivocally an instance of bribery, the Court implies a characterization of politicians as the pawns of whichever constituent can offer the strongest incentives to take a particular course of action.<sup>66</sup> The Court rejects the attempt to deploy anti-corruption law in a manner that obligates officials to behave in a manner that can be characterized as remotely public-minded. There is no obligation – at least not one that can be made legally operational – for representatives to act with neutrality or disinterest in the discharge of their office.

*McDonnell* thus has a unique status among the Court's anti-corruption jurisprudence: it does not merely delimit a particular blackletter facet of the anti-corruption regime (as did its predecessor opinions), but expresses a substantive view of political integrity. Corruption, in the Court's view, should not be identified with any political behavior beyond misuse of public power so blatant it is theft. The Court therefore abjures anti-corruption laws that seek to advance broadly public-minded conduct through aggressive means such as criminalization, because such measures may condemn behavior that the Court deems tolerable political practice. The Court thereby disowns the advancement of civic governance, specifically by asserting that officials have no obligation to act with neutrality or disinterest.

## II. NORMATIVE AND STRUCTURAL CONSEQUENCES OF MINIMALIST ANTI-CORRUPTION

This Section works through the Court's distinctive view of representation, long implied in the case law and now given substantive expression in *McDonnell*. The Court has committed to a particular theory of democracy which opposes diverse efforts to imbue politics with

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<sup>66</sup> In the discussion of federalism concerned relating to the application of federal law to state officials, the Court further emphasizes that McDonnell's might fall within "the permissible scope of interactions between state officials and their constituents." *Id.* at 2373.

expectations of public-regardingness. By impairing attempts to obligate officials to behave in a public-regarding way, the Court facilitates a political system oriented around self-interested conduct by representatives. This Section concludes by extrapolating the ultimate effect on regulation of corruption: the electorate becomes the last and only bulwark of civic integrity.

### A. *The Supreme Court's Agonist Politics*

*McDonnell* condones partiality in treatment of constituents and permits self-interested allegiances to be the engine of democracy. This view entails deeper normative commitments: the Court advances an approach to representative-constituent relations based in delegate theory, and an agonist approach to democracy most prominently expressed in the contemporary literature by interest group pluralism. These political views exclude the position that representatives are obligated to disinterestedly select policies that will best benefit the entire polity,<sup>67</sup> and more generally challenge a civic approach that conceives of governance as a collective project.

#### 1. Democracy as structured conflict: delegate theory and agonist politics

The conflict between these paired approaches to representation specifically and governance generally has been the subject of extensive scholarly analysis, but need only be briefly reviewed here.<sup>68</sup> Delegate theory asserts that representatives advance the views of those

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<sup>67</sup> The distinction between representatives as delegate and representatives as trustees explored below is a normative distinction. The descriptive equivalent is the distinction between a delegate who is loyal in terms of policy preferences and one who is competent, another axis on which voters might have various preferences (some voters might prefer predictable, loyal representatives, while others might prefer competent ones). See, e.g., Justin Fox and Kenneth W. Shotts, *Delegates or Trustees? A Theory of Political Accountability*, 71 J. POL. 1225, 1225 (considering popular reaction when a politician “shares the public’s policy preferences, yet, at the same time...has poor judgment”, and comparing voter reaction to “policies” as opposed to “outcomes”). This is distinct from the delegate/trustee dichotomy. The delegate/trustee distinction offers two principled and opposed approaches to how representatives should act, while the policy/competence distinction addresses two features which voters, presumably, both want to be maximized (loyalty and competence).

<sup>68</sup> The delegate/trustee distinction has long and complex historical roots. James Madison is one of the first champions of a nuanced version of delegate theory, wherein representatives simultaneously represent particular interests while attempting to achieve a higher degree of enlightenment than those they represent; Edmund Burke, conversely, advances the proposition that representatives should be pure trustees, and solely advance the collective good. See HANNAH PITKIN, *THE CONCEPT OF REPRESENTATION*, 191-193 (1967) (comparing and contrasting the Madisonian and Burkean approaches, and observing in particular that Madison speaks of interests of factions while

whom they are partial, or feel a sense of obligation. In a democracy this is most typically the block of voters who are responsible for a representative's electoral victory, though as discussed *infra* the Court adopts such a minimalist view so as to include as legitimate delegators any party towards whom a delegatee representative feels gratitude. The subsequent political dynamic orients around power, as citizens vie to obtain sway over their representatives in order to realize favored policies and preferable allocation of state resources.<sup>69</sup> Democracy becomes a confrontational game of striving to obtain leverage over representatives – be it through votes, private benefits that do not qualify as bribery, or any other action that generates gratitude – and converting this leverage into favorable governmental action.

Such an approach to democracy can be characterized as agonist. Democracy is a framework that structures political competition over resources and a mechanism for expressing the polity's preferences. In contemporary scholarship, the most prominent conceptualization of agonist democracy has been interest group pluralism, which characterizes democracy as a power struggle between various factions.<sup>70</sup> Interest group pluralism extends the self-interested character

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Burke generally identifies interests as being of the polity as a whole); BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT*, 185-186 (1997) (comparing and contrasting Burke and Madison).

<sup>69</sup> Schumpeter, *supra* note 12, is the most prominent advocate of this approach. Dahl, *supra* note 12, at 68, offers a rather waggish description when he states “the essence of all competitive politics is the bribery of the electorate by politicians.” See also Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in *DEMOCRACY'S VALUE* 23, 31 (Ian Shapiro & Casiano Hacker-Cordon eds., Cambridge Univ. Press 1999) (endorsing the competitive understanding of democracy). Such an understanding of democracy has an interpretive ally in public choice theory, which characterizes politics as the interaction of separate individuals to allocate resources despite conflicting interests. See generally JAMES M. BUCHANAN AND GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962) (presuming politics serves as a coordinating mechanism for gratifying individualistic though not necessarily selfish desires). Broadly speaking, in legal scholarship these various ideas have found their most vocal expression in those who critique progressive approaches to campaign finance and republicanism more generally. See Cain, *supra* note 12; Gey, *supra* note 13.

<sup>70</sup> Dahl, *supra* note 12, at 84 offers a precis of the assumptions that underlie pluralism. The appropriate impact of interest group pluralism upon judicial review has been much debated, with the core question being if a Court may look more harshly upon legislation that can be explained as the result of a ‘pluralist’ capture of government resources. See, e.g., Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (arguing that reasonableness requirements should limit explicit expressions of private power through the government); Cass R. Sunstein, *Interest Groups in America Public Law*, 38 STAN. L. REV. 29 (1985); cf. Einer Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L. J. 31 (1991)



of delegate relationships between trustees and constituents to the totality of democratic practice. The unfolding of democracy is merely the expression of competing preferences held by citizens, and their ability to successfully have their preferences realized through the vehicle of representation. The normative foundation of the approach is the unmitigated pursuit of self-interest, as citizens form blocks based on preferences, and those blocks attempt to advance their particular goals. The actual unfolding of politics does not presume public-minded thinking on behalf of participants in the system (other than basic penalty-enforced rule obedience), nor does it have particular normative space for such a concept. In such a system, the only reason that needs to be given to exonerate from a charge of corruption is that formal procedures were obeyed.

The *McDonnell* Court has not merely aligned with the delegate/agonist theories; it has adopted an aggressively minimalist forms of them. Even a delegate theory of representation can impose standards for how one may attempt to influence a representative (a process typically attempted by voting and perhaps lobbying); indeed, the definition of bribery sets the line as to where such influence becomes unequivocally unacceptable. *McDonnell* suggests, however, that even the transfer of significant amounts of private benefit may qualify as (marginally) acceptable, so long as the acts can be vindicated as constituent service<sup>71</sup> or are not the direct expenditure of governmental resources. By imposing so few limitations upon how constituents may attempt to influence representatives, the Court's approach exacerbates the ferocity of the agonist competition and minimizes expectations of representative integrity.<sup>72</sup>

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(challenging the proposition that interest group pluralism should result in enhanced judicial review of seemingly private-regarding state conduct).

<sup>71</sup> *McDonnell*, 136 S.Ct. at 2372. Stephenson, *supra* note 4, has observed that the Court "places undue weight on concerns about chilling (allegedly desirable conduct)". Cf. Thompson, *supra* note 27, at 84-88 (describing some of the hazards that can come from the ostensibly innocent activities associated with constituent services).

<sup>72</sup> See Section II.B for a game theoretic explanation of this pattern.

## 2. Good governance as commitment to the public good: trustee theory and civic politics

The agonist approach to democracy has been challenged by theories that claim that representatives should disinterestedly advance the public good in their decision-making. The trustee approach to representation asserts that representatives should advance the broader interests of the polity, rather than directly implement the desires of constituents towards whom they are partial.<sup>73</sup> As the term suggests, the trustee relationship emphasizes trust rather than influence or reciprocity. Constituents trust their representatives to behave with integrity and prudence in political conduct, and representatives trust their constituents to elect them for their general probity and ability, not because they serve as effective mechanisms for achieving constituents' specific wants. Trustee theory has its corollary in civic theories of governance that take as their overriding principle that political actors should seek to advance the collective good.<sup>74</sup>

Civic governance disavows mercenary reciprocity as the driver of political decision-making. In prizing neutrality in process and disinterest from particular allegiances, the civic approach condemns public decisions undertaken because a constituent desires a particular outcome, or because a representative feels beholden to a particular constituent (or faction). A decision made in accordance with civic principles should be hypothetically justifiable to all members of a polity by reference to shared values.<sup>75</sup> This does not mean, of course, that in a

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<sup>73</sup> See Pitkin, *supra* note 68, at 127 (both describing and critiquing the role of representative as a trustee). Manin, *supra* note 68, at 236 offers a summary of different approaches, and notes a change even in trustee understandings of representation, where the relationship has shifted (along with the scale of democracy) from personal and based in faith in the representative character to image-based, with a stronger component of each representative making an 'offer.' He thus implies that the character of even the trustee theory has weakened somewhat.

<sup>74</sup> James A. Gardner, *Madison's Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 126 (2000) ("Republicanism typically relies on what is sometimes called the 'trustee' model of political representation"). See generally note 11 *supra*.

<sup>75</sup> See, e.g., Sunstein, *supra* note 13, at 1544 ("Under republican approaches to politics, laws must be supported by argument and reasons; they cannot simply be fought for or be the product of self-interested 'deals.' Private-regarding reasons are an insufficient basis for legislation. Political actors must justify their choices by appealing to a

civic framework a representative may not take action that benefits a constituent, but only that such action should be legitimate in terms of the collective good and as a reasonable action in the context of the cooperative political project.<sup>76</sup>

The high-level normative distinction between agonist and civic politics does not, in itself, fully determine the blackletter law of corruption. A polity committed to an agonist approach may conclude that anti-corruption requires restrictive anti-bribery laws to prevent theft-like misuse of state resources; a civic approach may deem that the collective good is well-served by a model of political conduct that aggressively facilitates constituent services and that shared reason-giving is satisfied as long as minimal anti-bribery regulations are obeyed.<sup>77</sup> Yet generally speaking the commitment of civic politics to mutual regard and collective welfare will tend to reject the 'marketization' of decisions and thereby condemn purely self-interested reciprocal decisions as corrupt. Conversely an agonist approach will treat reciprocal self-interest as business as usual, so long as that self-interested bargaining does not become so explicitly transactional as to immediately disrupt the basic terms of democratic accountability. Consequently, in their

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broader public good."); cf. Jürgen Habermas, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1, 4-5 (1994) (contrasting the liberal treatment of political process as comprised of market-style conflict with the republican commitment to serving the public good)).

<sup>76</sup> Thompson, *supra* note 27, discusses the challenge of mixed motives and legislative action. Habermas, *supra* note 75, at 5 observes the limits of the ideals of republican theory given that political life seems ineluctably oriented around compromise, in large part because "politically relevant goals are often selected by interests and value orientations that are by no means constitutive for the identity of the community at large." In a republican system, however, the "legitimate kind of bargaining certainly depends on a prior regulation of fair terms for achieving results, which are acceptable for all parties on the basis of their differing preferences." This shows a point of convergence between the agonist and republican views – both need some space for conflict resolution based on fair terms – but substantively the 'rich' view of republicanism (which seems conflict resolution as second-best and still located in quite substantive norms) from the minimalist view of agonism. Cf. Shapiro, *supra* note 12, at 45-46, 50 (observing the need for legitimate procedures that allow agonist competition while ensuring such procedures do not result in domination).

<sup>77</sup> Moreover the theories may interact in subtle ways: a civic theorist could conclude that *operationalizing* politics may be best achieved by formalizing modes of reciprocity. This conceptual fluidity and complexity can be traced to the fact that these issues can be traced to the initial assumptions regarding sovereignty and legitimacy, and how they are expressed. It is possible (through various conceptual contortions) to begin with an agonist worldview (politics-as-market) and end up with restrictive corruption laws, on the grounds that such rules are necessary to make the market work; conversely one can begin with a civic worldview (politics-as-collective-project) and (through like contortions) reach that the mid-level realization of this collective project is through reciprocal relations with minimal external intervention.

respective realizations of laws that define political integrity – such *quid pro quo* anti-bribery laws discussed Section I.A – a civic approach will tend to parse particular terms more broadly than an agonist approach, thereby capturing a greater array of behavior as illicit.

These granular features of anti-corruption ultimately devolve upon the normative divergence of the two approaches, and their differing assumptions regarding the translation of popular sovereignty into legitimate political practice. An agonist might see the exchange of favors as political practice constitutive of democratic interaction because the system only serves to the structure self-interested allocation of goods. Conversely a civic thinker would likely classify the same conduct as violating the obligation to serve the public good that lies at the heart of the shared socio-political project.

This relationship between high-level norms and the implementation of anti-corruption law reveals the doctrinal and substantive unity in the Court's approach. *McDonnell* is the first opinion to make this link explicit. While the lineage of official corruption cases prior to *McDonnell* indicated an inclination towards narrow sweep in the technical treatment of bribery, it the Court's discussion of constituent relationships *McDonnell* that demonstrates this emerges from the Court's agonist norms.

#### *B. The Systemic Effects of Agonist Anti-Corruption Jurisprudence*

It would be an unwarranted extrapolation to conclude that the Court deems civic approaches to be invalid. *McDonnell* merely indicates that the Court identifies the reciprocal practices of delegate theory agonism to be a legitimate political behavior and will protect it from being infringed by regulation.<sup>78</sup> Yet the Court's commitment to protecting agonist political

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<sup>78</sup> In this regards the Court's decision might have scholarly allies who have embraced neutrality among conceptions of politics as the appropriate judicial posture. See Elhauge, *supra* note 64, at 48 (observing that striking down governmental decisions that are the result of interest group pluralism itself inappropriately imposes a particular view of legitimate democratic procedure through the judicial process); see also Kathleen Sullivan, *Political Money and*

practice has the systemic effect of impairing the viability of civic approaches to politics. In the absence of conditions that temper its practice, agonism will crowd out alternatives due to the systemic effects of its competitive character. If a sufficient number of representatives and constituents adopt agonist approaches, they will out-compete (in terms of resource procurement) any remainder that tries to adopt a civic approach. Agonist participants will secure as many resources as they can through political competition, whereas practitioners of a civic approach will seek to take conduct oriented towards the benefit of the entire polity and fail to protectively undertake self-aggrandizing<sup>79</sup> behavior.

Consequently, if the practice of politics is not generally civic in character, civic representatives (unwilling to engage in practices such as logrolling or transactional exchanges of political favors) will receive disproportionately small allocations for their constituents. This can be understood as a corollary of their respective norms. Agonists do not need to justify the legitimacy of their conduct (beyond minimum obedience to procedure), whereas civic democrats would seek to undertake action that could be justified by a more reflective consideration of the public good.<sup>80</sup> Civic participants thus suffer a competitive disadvantage in the realization of political goals; civic representatives will enjoy fewer partisan victories, and their constituents be

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*Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 680 (1997) (arguing that campaign finance restrictions inappropriately impose a specific view of governance upon the political process).

<sup>79</sup> By 'self-aggrandizing' behaviour, this analysis presumes that a given constituency wishes to maximize its benefit, and thus a representative who wishes to maximize her own benefit must ensure maximize returns for the constituency. This permits the interests of representatives and constituents to coincide in the first instance. This analysis, however, does not make assumptions about the type of benefits that representative wants. Typically a representative desires re-election and thus seeks to please a majority of her constituency. Conversely a representative such as McDonnell presumably wishes for private self-aggrandizement through office; yet this will not occur if constituents are not also likewise aggrandized. The difference is the election-seeking representative will seek to appease a different (and presumably) much broader demographic, whereas McDonnell need only aggrandize those constituents willing to provide private benefits.

<sup>80</sup> ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY 77, 164 (1982) relates this problem to the prisoner's dilemma. After observing that pluralist approaches to politics face the prisoner's dilemma, he later asserts that what might be called a civic approach attempts to resolve it "by exhorting them to be nicer to one another". Thus while agonism results in the costs of regulating political conflict, civic approaches attempt to wave away a basic feature of politics through baseless idealism.

allocated fewer resources. This can be understood as a multi-player repeat-variation of the prisoner's dilemma<sup>81</sup> – a collectively minded, fundamentally cooperative civic approach *may*<sup>82</sup> offer greater benefits for all if universally adopted (or, more precisely, if enough participants adopt a civic approach such that it dominates in political practice), but once enough participants realize they can obtain greater benefits by 'defecting' and procuring interest group pluralist type outcomes even at the cost of public welfare, those who fail to adopt such an agonist approach

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<sup>81</sup> The literature on this topic is vast. Significantly, the dilemma presented here does *not* result in a devolution to the state of nature, it merely results in a stable form of agonist politics. See, e.g., Robert Axelrod, *The Emergence of Cooperation among Egoists*, 75 APSR 306, 307 (1981) (observing how reciprocity can result in stable systems among self-interested actors such as legislators). See also Robert Boyd & Jeffrey P. Loberbaum, *No pure strategy is evolutionarily stable in the repeated Prisoner's Dilemma game*, 327 NATURE 58; Theodore C. Bergstrom, *Evolution of Social Behavior: Individual and Group Selection*, 16 J. ECON. PERSP. 67, 70 (2002). Comparing agonist and civic approaches to representative politics is better modelled as a prisoner's dilemma than a stag hunt, because defection (that is, agonist behavior) will produce better outcomes regardless of whether players defect or cooperate. If everyone defects, the result is a stable agonist game; **if one (a small number) of representatives defect**, the result is that they can extract greater resources from the political process than cooperators; and if a large number of representatives defect, the result is a stable agonist equilibrium. In short, at least in a one-shot situation, defection is *never* a bad strategy in representation. The result in multi-shot scenarios is more complex, as representatives may realize a civic approach *could* produce greater goods for all over time. However, difficulties with detecting defection, especially given masking of agonist conduct through political rhetoric, means costs must be high to deter defection. See generally Dimitri Landa and Adam Meirowitz, *Game Theory, Information, and Deliberative Democracy*, 53 AM. J. POL. SCI. 427, 434-435 (2009) (observing that deception might become a common strategy even where deliberation occurs, in order to send signals of cooperation; participation in deliberation is a classic marker of civic thinking, and deceptive deliberation would allow a representative to send a false signal of civic rather than agonist behaviour). If defection costs are low and detection probability is low, it is likely the only stable equilibrium is mutual agonism.

<sup>82</sup> This article does *not* postulate that civic approaches are superior in terms of collective welfare (that is, in a prisoners' dilemma the payoff for the civic approach is 'R' in, eg, Axelrod, *supra* note 81, at 306). Rather it merely observes that the Court's approach works to curtail civic approaches, which *may* be beneficial. Thinkers such as Gey, *supra* note 13, Shapiro, *supra* note 12, and Habermas, *supra* note 75, observe the various deficiencies of the civic approach: it may drown out marginal voices; it may reduce the range of options available to a polity by reducing conflict; and it may not be realistic in light of diversity and the range of human commitments within a single polity.

will be disadvantaged.<sup>83</sup> The systemic effect will be to produce a vicious spiral whereby all participants are induced to adopt an agonist approach.<sup>84</sup>

*McDonnell* has a profound effect on this dynamic.<sup>85</sup> The Court indicates that it has a substantive commitment to protecting agonist political practice and that it will nullify certain efforts to use anti-corruption law to punish 'defectors' from civic-minded politics. It thereby deprives the government of at least some tools to advance civic-minded governance. This impairs punishment of non-cooperators from civic practice, thereby incentivizing agonist conduct.<sup>86</sup> As discussed above, those who continue to civically 'cooperate' in a context dominated by agonist practice ('non-cooperation') will be particularly poorly off. Where agonist political practice is the protected dominant model, representatives are 'safest' behaving as partial representatives towards those whom propitiate them, and that constituents are 'safest' when their approach to representatives is to try to 'buy' them (using means just short of bribery) in order to secure governmental support.

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<sup>83</sup> An alternate way of conceiving of agonist practice is as 'self-entrenching' in the absence of direct mechanism for discouraging the practice. See Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 215 YALE L. J. 400, 426 (2015). Agonist political conduct by one representative will encourage such conduct by others; thus without some sort of external mechanism that limits such agonist behaviour, it will ultimately embed itself into the political process. This property of agonism occurs at a higher level of abstraction (process rather than substance) compared to types of policies described by Levinson and Sachs. Representatives do not set out to advance an agonist agenda; rather they behave as agonists because it is instrumentally beneficial for their final goals (achievement of certain policies or retaining office).

<sup>84</sup> A critical mechanism by which this spiral occurs will be that representatives will be harshly disciplined by voters if they fail to provide goods to constituents, and they will be unable to do so if they engage in a civic approach in a generally agonist environment (they will be seen as at best incompetent). Subsequently representatives will be encouraged to adopt at least a very conservative 'suspicious' strategy (at best STFT, to use the terminology of Boyd and Lorberbaum, *supra* note 81), making it difficult for civic approaches to become stable.

<sup>85</sup> Of course, *McDonnell* and its predecessors do not solely determine the character of US politics; a vast variety of federal laws influence the political realities and expound upon the behavior of the legislative and executive branches. (Point to campaign finance law as an arena that while closely related, cuts in a different direction; for other broad examples think of the voting rights revolution and the renewed use of the commerce clause to enforce civil rights.)

<sup>86</sup> Removal of criminal anti-corruption tools both reduces the cost of detection for marginally legitimate agonist behaviour, and reduces the penalties for such behaviour. Using the classic TRPS outcomes present in Axelrod, *supra* note 81, and Boyd and Lorberbaum, *supra* note 81, it increases the value of T in particular, as defection in a civic dynamic is less likely to be caught or punished. The result of increasing the benefits of defection is to reduce the likelihood of cooperation, and thus eliminate a civic approach.

*McDonnell* also establishes that the Court's commitment to this approach operates through at least two mechanisms. The Court is committed to defending agonist politics as a matter of substantive principle, as *McDonnell* is the first to firmly articulate.<sup>87</sup> Thus inducing the Court to tolerate civic anti-corruption jurisprudence at the risk of impairing reciprocal agonist political practices would require overcoming a unanimous bench, and there is little to suggest countervailing momentum in the official anti-corruption jurisprudence.<sup>88</sup>

As Section I.B describes, the Court's holdings have been long-founded in technical blackletter holdings that do not have formal political connotations. Thus, even were the Court to retreat from its substantive political commitment to protecting reciprocal constituent-representative relationships, its common law holdings would still cut against the civic view of corruption. This entails that reversing the direction of official corruption law would require unwinding an established line of precedent. Moreover, these doctrinal commitments have support from across the political spectrum (perhaps explaining the surprising unanimity of the official corruption jurisprudence): conservatives attack anti-corruption law as federal intrusion and the offensive expansion of government power, whereas liberals have cause to be wary of holdings that might be unfriendly to defendants in the realms of statutory interpretation and criminal procedure.

### *C. Voters as Civic Integrity's Last Stand*

In *McDonnell*'s wake, penalization of reciprocal or self-serving conduct by representatives and, more generally, advancement of civic governance must come from the political process. Thus the knock-on effect of the Court's anti-corruption jurisprudence is to

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<sup>87</sup> This view may have been intimated in *Sun-Diamond*, though the underlying theory was not developed as clearly. See 526 U.S. at 407 (arguing that a broad anti-corruption statute that generally criminalized gifts would become over-expansive in part because officials are likely always dealing with matters relevant to their constituents).

<sup>88</sup> Though some rumblings in the campaign finance domain suggest some of the bench might accept an alternate approach, as described in Section III.B.2 this faces its own obstacles.



throw policing of political behavior on to the electorate.<sup>89</sup> If the electorate wishes its representatives to behave in a civic-minded manner, it must enforce that view of politics directly.

The electorate could advance a civic anti-corruption in two forms. Firstly, they could elect representatives who prioritize passing and enforcing civic anti-corruption legislation in a manner that satisfies the Court's scrupulous demands.<sup>90</sup> Yet this approaches faces overwhelming challenges. As described above, the Court has shown animus to broad-sweeping anti-corruption laws such that it is unclear if any level of punctiliousness by the legislature and executive will be satisfactory.<sup>91</sup> It is also difficult to define an 'anti-corruption' candidacy, given the level of abstraction entailed in the concepts of civic integrity and corruption. This feature presents in politics by the oft-ironic fact that running on a platform of reform or anti-corruption is a commonplace of politicians (including those who are later roundly criticized for or convicted of corrupt conduct),<sup>92</sup> such that selecting a representative for having such a platform appears an

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<sup>89</sup> In effect, the Court has denied the protection of civic integrity a right (that is, one that can be enforced through litigation). See Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286 (2012). In Levinson's analysis, some of the reasons for electing votes over rights might support the curtailing of rights-style enforcement of civic anti-corruption. For example, rights are less flexible than votes, and given the possible oppressive effects of civic integrity, the use of a rights-style approach to enforce them could prove dangerous. However, rights are also more durable, and given the fragility of civic integrity described herein, this might support rights as a possible mechanism for enforcing civic integrity. See *id.* at 1324-32.

<sup>90</sup> For example, with regards to the intangible right to honest services, Congress could have drafted §1346 to explicitly include self-dealing or otherwise identify the nature and requirements of the fiduciary duty to sweep more broadly, thus making clear the statute's "core" included more than just bribery and kickbacks. *Skilling*, 561 U.S. at 408; see also *id.* at 416-23 (Scalia, concurring) (observing the various questions that §1346 leaves unanswered about the character of the honest services doctrine). Of course, had Congress done so, and in particular had it done so unartfully, it might have risked increasing the likelihood that the statute would run afoul of federalism concerns, or that the Court would perform a similar maneuver as it did in *McDonnell* and interpret the statutory language extremely narrowly.

<sup>91</sup> Indeed, that *McDonnell* shows a substantive commitment to delegate representation and protection of constituent services reveals that advancing civic politics may encounter horns of a dilemma. If drafting attempts to explicitly enumerate prohibited conduct, it creates opportunities for both circumvention by crafty politicians, see *supra* Section I.A and Philp *supra* note 18, and narrow construal of the language by the Courts (as the Court interpreted the language of 'official act' in *McDonnell*). Conversely, if drafting does not define offenses crisply, it runs the fate of narrow judicial construal, as befell §1346 in *Skilling*, or, as Justices Scalia advocated in *Skilling* and *Sorich*, being outright ruled void for vagueness.

<sup>92</sup> Johnston, *supra* note 3, at 200-214 sketches some of the general forms this may take; for example in advanced democracies where corruption takes the primary form of electoral influence buying, "corruption issues are a tempting way to criticize a regime without directly challenging its power or claims to rule", at 203, because the corruption reflects a basic wealth-and-power compromise has been legitimized in the political structure. In politics

uncertain gamble. Finally, given that candidates appeal to voters across an array of issues, and that voters wish to have many interests satisfied, it seems unlikely that having a clear and precise plan to draft laws that will substantively advance civic-minded conduct while carefully obeying the Court's mandates would emerge as a decisive wedge issue. The only way a candidate could concretely adopt such a posture would be through a guarantee to respond to or challenge the impact of the Court's official corruption rulings, an unlikely candidate to rally voters or satisfy constituent demand.

In the alternate, voters could advance a civic governance directly by abjuring agonist practice, including their elections of candidates. In the simplest form, this would require that citizens vote not based on self-interest or personal allegiances, but rather a commitment to the civic good.<sup>93</sup> This approach offers the immediate benefit of transforming politics without the risk of running afoul of the Court (which has neither means nor apparent inclination to *mandate* agonist representation). This solution would effect a tectonic shift in American politics – it would require, for example, that voters expel representatives who engaged in typical practices such as logrolling or pork barrel funding (including of voters' own districts), or favoritism in constituent services that is far from as egregious as McDonnell's.

Such an approach is unrealistic, in that it would require voters to vote *against their self-interest* in selecting representatives who would neither favor their particular supporters nor favor their districts' own constituents. Given the current configuration of American democracy and the

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defined by oligarchic kinship (more akin to machine politics), reforms may merely result in the mutation of the character of corruption, *id.* at 211. Examples of such reformers-becoming-corrupt include former Chicago governor Rod Blagojevich, *see* Joanna Lin, *he campaigned as a reformer*, L. A. TIMES, Dec 10, 2008, <http://articles.latimes.com/2008/dec/10/nation/na-gov-profile10> (observing how Blagojevich campaigned as a reformer prior to his arrest on corruption charges); and cycles of reform and corruption in developing countries. *See, e.g.,* Uki Goni, *The Corrupt Zigzag, an Argentine Dance*, N.Y. TIMES, June 13, 2016, <http://www.nytimes.com/2016/06/14/opinion/the-corrupt-zigzag-an-argentine-dance.html> (characterizing the 'cyclical' nature of reformers becoming corrupt).

<sup>93</sup> Indeed, such a commitment must underlie many of the civic approaches to politics. *See supra* note 13.

generally patronage-oriented nature,<sup>94</sup> any group of voters who selected a representative who implemented such a principled approach would face serious disadvantages. This is an instantiation of the tendency of politics to drift towards agonism where it is a protected form of political behavior, as described in Section II.B.

Moreover, even if there were enough momentum to implement a civic approach across the political environment, it would be a fragile and likely unstable condition. Once any representatives began to operate as interest group pluralists (which, if implemented effectively, would likely produce benefits for their favored constituents), representatives and constituents who retained a 'civic' approach would be disadvantaged in the allocation of goods. While those who remained civic-minded might attempt to 'punish' defectors from civic-mindedness, this would itself create an agonist political dynamic,<sup>95</sup> as politics evolved into a battle between those approaching politics as self-interested agonists and those advocating a civic approach. Implementing civic politics through democratic process itself would also face difficulties of detection – defectors would likely mask their self-interested or constituent-serving behavior in rhetoric justifying it as publicly minded and legitimate.<sup>96</sup> Ironically, this is precisely how McDonnell defended this conduct in principle. He claimed his conduct was normatively legitimate because it would aid Virginia's economy (as well as benefit a constituent who just happened to be a patron).<sup>97</sup> Likewise representatives who wished to cloak their interest group pluralist conduct as civic-minded could simply insist their preferred policies were in the public interest. While such claims might at times be met with skepticism, a civic environment

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<sup>94</sup> For a general description of such practices, see Thompson, *supra* note 27.

<sup>95</sup> See Bergstrom, *supra* note 81.

<sup>96</sup> See *supra* note 81.

<sup>97</sup> 136 S.Ct. at 2366.

characterized by constant suspicion of other participants' motives will quickly lose its civic (and perhaps civil) character.

Thus, establishing civic politics through elections alone would face tremendous obstacles; only a polity with a unified vision of the collective good could possibly hope to implement a civic political dynamic. In a society with the diversity of geography and identity groups as the US, such an approach seems idealistic at best.

### III. THE FRUSTRATION OF BROAD REFORM AND THE NARROWER PATHS FORWARD

The Court's view of substantive politics, and its narrower blackletter impact on anti-corruption enforcement,<sup>98</sup> is at odds with many popular legal and political movements. This Section considers how the Court's substantive view of politics complicates topical agitation for reform, and then considers strategies for resuscitating civic anti-corruption in the light of the bench's solidarity.

#### A. *Judicial Agonism as a Barrier to Political Reform*

The Court's view of political representation expressed in its official corruption jurisprudence has especially salient ramifications for two topical domains of law: campaign finance regulation and efforts to address 'institutional' corruption.

##### 1. The liberal whipsaw: campaign finance jurisprudence and official anti-corruption

The contours of corruption have been the fulcrum of campaign finance jurisprudence ever since *Buckley* (rather contentiously) established anti-corruption as the rationale that can vindicate infringement of rights at issue in campaign finance regulation.<sup>99</sup> Unlike the law of official corruption, corruption in the campaign finance context has been a source of fierce partisan

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<sup>98</sup> Some early analysts of *McDonnell* have suggested the first-order doctrinal implications may be quite narrow. See Stephenson *supra* note 4.

<sup>99</sup> 424 U.S. at 27-28. For a discussion of the challenges to the corruption rationale, see Strauss, *supra* note 26.

dispute on the bench.<sup>100</sup> The more staunchly conservative justices have argued that, as in official corruption, only campaign finance contributions akin to *quid pro quo* bribes should be prohibited.<sup>101</sup> Conversely, the liberals have argued for a conception of corruption that sweeps more broadly and thus permit regulation of a broader range of contributions, including those that are only ambivalently contributions (such as issue advertisements).<sup>102</sup> The liberals support this more expansive concept of corruption by claiming excessive campaign finance funding – regardless of if it assumes a *quid pro quo* form -- threatens the public interest.<sup>103</sup> The liberals wish to ensure representatives do not become excessively beholden to overweening private interest and make political decisions through a neutral process oriented that considers citizen interest fairly, as well as prevent broader pollution of the electoral atmosphere.<sup>104</sup> In conceptualizing of this argument in terms of corruption and suggesting that general public-mindedness so qualifies, the liberals effectively advance civic anti-corruption in the campaign finance domain.<sup>105</sup>

However, while the campaign finance conservatives have advanced a crisply minimalist theory of corruption – they argue that voters are able to police representatives adequately such that only bribery needs to be criminalized, a claim that echoes the consensus official corruption

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<sup>100</sup> See, e.g., Eisler, *supra* note 19.

<sup>101</sup> *Citizens United*, 558 U.S. at 359 (corruption is *quid pro quo* only) (citing *McConnell*, 540 U.S. at 296-298 (Kennedy, dissenting)); *McCutcheon*, 134 S.Ct. at 1444-45 (observing the resilience of *quid pro quo* prevention as a valid rationale for surviving judicial scrutiny).

<sup>102</sup> *McConnell*, 540 U.S. at 143 (identifying a broader corrupting threat from “compliance with the wishes of large contributors”); *Citizens United*, 558 U.S. at 464 (Stevens, dissenting) (advocating the broader antidistortion rationale originally offered as a liberal touchstone in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)); *McCutcheon*, 134 S.Ct. at 1466-67 (Breyer, dissenting) (“the anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in maintaining the integrity of our public governmental institutions.”).

<sup>103</sup> See, e.g., *McCutcheon*, 134 S.Ct. at 1468 (observing the need to “limit payments in order to help maintain the integrity of the electoral process.”)

<sup>104</sup> The liberals have vociferously rejected the idea that their broader concept of corruption is just an equality rationale. See, e.g., *Citizens United*, 558 U.S. at 464 (Stevens, dissenting), but see Strauss, *supra* note 26.

<sup>105</sup> The liberal wing also has civic impulses in that it has a concern with the broader nature of political discourse, in particular protecting the democratic quality of the type of discourse that shapes electoral outcomes. See, e.g., *Citizens United*, 558 U.S. at 469-72 (Stevens, dissenting); *McCutcheon*, 134 S.Ct. at 1467 (Breyer, dissenting).

jurisprudence – the liberals have struggled to articulate the precise substance and boundaries of their concept of corruption.<sup>106</sup> While the Court has done little to unify the doctrines of official corruption and campaign finance,<sup>107</sup> it is tempting to impute effects of this parallelism. Whereas the conservative justices can maintain a consistently agonist view of politics and minimalist view of corruption across domains of law, the liberals struggle to reconcile the narrow view of official corruption with an expansive, civically-minded view of campaign finance corruption.<sup>108</sup> This may contribute to the liberal failure to forcefully articulate a unified civic view of politics in the campaign finance space, as the liberals have no foundation upon which to build their alternative theory. Even if this is not a *causal* relationship, it does suggest a deficit of imagination that impacts the liberal innovation regarding the law of corruption.

This sharp contestation regarding political integrity in elections – and the impact campaign finance can have upon voter choice – is particularly salient given that elections remains the last mechanism for realizing of civic integrity. If campaign financing threatens political integrity, electoral choice may be a fragile vehicle for regulating politics, and the tools constrained by the official corruption jurisprudence may be especially critical for realize civic integrity. More specifically, if successful candidacy requires substantial campaign donations and thus representatives enter politics preemptively beholden to certain constituents and interests, civic public-mindedness is sabotaged before officials even assume office.<sup>109</sup> The liberal wing has

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<sup>106</sup> See Eisler, *supra* note 19, at \_\_ (observing the failure of the liberal wing to coherently advance a theory of politics that supports their broad view of corruption and support of regulatory intervention in the political sphere).

<sup>107</sup> See Brown, *supra* note 30.

<sup>108</sup> It is worth noting that conservative justices have penned both *Sun-Diamond* and *McDonnell*. Yet nothing prevented a liberal justice from concurring and thereby carving out a space wherein to create consistency with the campaign finance realm. It would be easy to see how *McDonnell* might be used as a club by conservatives in the campaign finance space.

<sup>109</sup> See Lawrence Lessig, *What Everybody Knows and Too Few Accept*, 123 HARV. L. REV. 104 (2009) (arguing that the current campaign finance regime already destroy the civic character of politics); Samuel Issacharoff and Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1706 (1999) (observing that the current campaign finance regime creates a perverse system by allowing unlimited consumption (expenditure) while

expressed its own doubts regarding the ability of voters to adequately police this process in raising concerns regarding the impact of campaign finance upon voters.<sup>110</sup> The need for forceful and creative government regulation to realize political integrity for both representatives and citizens is present in the debate over campaign finance, yet curiously it has made no inroads in the official corruption context.<sup>111</sup>

## 2. Agonist representation and institutional corruption

The idea of corruption has also been adapted by contemporary reformers to challenge broader political dynamics. This movement characterizes American political culture as pervasively malformed, such that inappropriate partiality and corrosive self-interest drives official conduct in the general discharge of public office. Most prominent among these activists has been Larry Lessig who, drawing on work by Dennis Thompson, has sought both academic and political means of reforming the ‘institutional corruption’ that afflicts the contemporary political system. Lessig identifies bad ‘dependence’ as the defining feature of institutional corruption: representatives, and the systems which they constitute, do not base decisions upon the appropriate consideration of popular will or public interest, but rather upon elite private interests that have managed to infiltrate the political decision-making structure.<sup>112</sup> These failures need not occur in a deliberate or even conscious manner (as in the typical case of *quid pro quo* bribery), but rather distort the background processes of political decision-making.<sup>113</sup>

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artificially constraining the vessel of consumption (contributions), thus creating candidates who are obsessed with discrete opportunities for consumption. Yet if the analogy is continued, removing the artificial constraint would just result in politicians who are pure gluttons for campaign finance wealth).

<sup>110</sup> See *Citizens United*, 558 U.S. at 469-72 (describing the impact of corporate domination of media upon voter morale).

<sup>111</sup> Some scholars have argued the two should not be used to inform one another. See Brown, *supra* note 30, at 233.

<sup>112</sup> Lessig, *supra* note 26, at 231; see also Lawrence Lessig, *What an Originalist Would Understand “Corruption” to Mean*, 102 CAL. L. REV. 1 (2014) (arbitrary powerholding as a marker of dependence corruption).

<sup>113</sup> Lessig, *supra* note 26, at 246.

The efforts to reform institutional corruption are civic in character, insofar as they wish to shift political decision-making from dependence that enables unbridled patronage to dependence oriented towards the collective will of the polity. Institutional corruption is distinct in that it observes consistent patterns of reciprocity woven into the political structure rather than isolated instances of malfeasance, necessitating systemic change. Lessig's target is not classic agonism that identifies conflict between equal citizens as the lifeblood of politics, but rather the infiltration of reciprocal patterns that have displaced the legitimate bases for political decision-making.<sup>114</sup> The characteristic marker of institutional corruption is the pervasive and subterranean presence of partiality disconnected from popular rule in political decision-making. Institutional corruption, in effect, identifies a crisis of democratic legitimacy due to a disjunction between citizen sovereignty and the realities of governance. If institutional corruption were eliminated, there still might be agonist competition for political goods, but it would occur on terms that recognize it is the welfare of equally respected citizens, not furtively influential elites, that should guide public decisions.

The official corruption cases suggest, however, that the Court will disfavor the spirit of institutional corruption reform.<sup>115</sup> In offering a robust defense of partiality in representative-constituent relations, the Court rejects precisely the demand for disinterested dependence upon popular will that inspires institutional corruption activists. The Court's extensive protection of constituent services (founded in its minimalist agonism) excludes changes that would eliminate

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<sup>114</sup> *Id.* at 235 (observing Congress suffers from the presence of a lobbyist-fed 'gift economy'). See also Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 373-75 (2009) (describing an originalist understanding of corruption that is "self-serving use of public power for private ends"). Teachout's analysis has a more explicitly civic streak, as she identifies an interest in promoting "civic virtue" characterized by "orientation towards the public interest." *Id.* However, it may be queried if the founders intended this to characterize the entire polity, or merely manifest in Congress as they performed their role as those who process and refine interests, and more broadly engage in the teleological advancement of the political process. See Pitkin, *supra* note 68.

<sup>115</sup> Teachout, *supra* note 114, at 387-397 argues this divergence of the Court is also a divergence from the thought of the Framers.



institutional corruption, because the Court identifies partiality – evidently, even prolonged, system-infiltrating partiality – as a critical aspect of political life. Indeed, the type of political conduct undertaken by McDonnell himself is precisely the type of deviation from commitment to fair public process that reformers would identify as a particularly egregious manifestation of institutional corruption; that McDonnell (and prospectively, as discussed *infra*, the Court) evidently conceives of it as legitimate political behavior reveals a view of politics that could be called institutionally corrupt.

Institutional corruption scholars have advanced various reforms, all of which might face challenges from the Court. Some, such as Zephyr Teachout's progressively originalist claim that a broader set of self-aggrandizing behavior should be classified as corrupt,<sup>116</sup> appeal to the bench directly. However, *McDonnell* – whose facts are precisely the type that Teachout's reading condemns<sup>117</sup> – suggests there has been little incorporation of this idea. Other reforms sought by institutional corruption scholars have been systemic in character – Lessig has agitated for a constitutional amendment that would address the current 'bad' dependencies, and sought the presidency with the intention of implementing parallel political reforms.<sup>118</sup> While these mechanisms would be less initially vulnerable to judicial review, the normative commitments of the Court suggest that any such efforts before the current bench should expect harsh treatment. In practice, if Lessig is able to achieve such reforms, it would be prudent to ensure precision and

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<sup>116</sup> See Teachout, *supra* note 114. See also ZEPHYR TEACHOUT, BENJAMIN FRANKLIN'S SNUFFBOX (2014).

<sup>117</sup> Teachout, *supra* note 114, at 359 ("The concern was that members of Congress would use their position to enrich themselves and their friends.").

<sup>118</sup> Lessig, *supra* note 26, at 290. For the reformist character of Lessig's presidential campaign, see <https://lessig2016.us/>.

diligence in the implementation of broader anti-corruption in order to minimize judicial opportunities to prune his anti-corruption efforts.<sup>119</sup>

### 3. Agonism and the unfortunate realities of American political life

The Court's disinclination towards civic governance in the official corruption jurisprudence, liberals' muddled efforts to generate a broader concept of corruption in the campaign finance arena, and the Court's presumptive hostility towards institutional anti-corruption reforms are particularly alarming given the realities of contemporary American politics. The fractures dividing the electorate appear as stark as in any time during the past century, splitting along racial, economic, geographical, and ideological lines.<sup>120</sup> Yet the Court's official corruption jurisprudence exacerbates the practical effects of such fragmentation, as it condones political practices wherein representatives implement highly partisan views to aggrandize wedge constituencies. Subsequently, the hope that the electorate alone that may advance a civic view of integrity rings particularly hollow.

The Court's unwillingness to permit robust advancement of civic politics in official anti-corruption, and its broader approbation of agonist democracy, comes at an inopportune time. Conceiving of democracy in agonist terms, and constituent-representative relations as essentially acts of reciprocity, conveys certain benefits: it may encourage efficient representation of

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<sup>119</sup> Notes 82 and 83 *supra* describe the types of strategies by which a Court might emasculate Lessig's proposal in the same way they might emasculate legislation, deploying the type of discretion judges always have available. See generally KARL N. LLEWELLYN, *THE BRAMBLE BUSH* (1930); RONALD DWORKIN, *LAW'S EMPIRE* (1986).

<sup>120</sup> See generally Carroll Dougherty, *7 things to know about polarization in America*, Pew Research Center, June 12, 2014, available at <http://www.pewresearch.org/fact-tank/2014/06/12/7-things-to-know-about-polarization-in-america/> (describing heightened levels of partisan polarization among the American populace); Brian Newman & Emerson Siegle, *The Polarized Presidency: Depth and Breadth of Public Partisanship*, 40 PRES. STUD. Q. 342 (2010) (observing growing levels of partisan identification over time); Clifton B. Parker, *but see* Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L.REV. 1689, 1716 (2015) (interpreting the Pew survey results and literature to conclude that polarization is worse among activists than among the actual population, and that polarization of the electorate is likely not the cause of growing Congressional polarization). The rise in partisanship has been cited as a cause of the surprising, and to many, alarming rise of Donald Trump's political career. See, e.g., Clifton B. Parker, *The tumultuous 2016 Republican campaign is a phenomenon long in the making, Stanford researcher says*, STANFORD NEWS SERVICE, 16 March 2016, available at <http://news.stanford.edu/press-releases/2016/03/16/pr-polarized-voters-konitzer-051616>.

interests; it prevents subsumption of wedge group views into a collective framework; and its realist expectations are unlikely to be disappointed even as it provides a framework that sustains adequate governance.<sup>121</sup> Yet it also exacerbates divisions between groups and shatters any perception that the polity has a unified identity or shared values. A civic approach to politics, conversely, precisely is founded upon expectations of cooperation and mutual regard among both public officials and citizens. By rejecting anti-corruption law as a vehicle for civic politics, the Court advances a divisive vision of politics and eliminates one mechanism for requiring public officials to emphasize collective regard during a time when divisions within the polity are especially ominous.

*B. Braving Agonism, Jurisprudential Innovation, or Circumvention by Federalism*

Implementing anti-corruption measures that enable civic politics in light of the Court's position will prove challenging. As discussed *supra*, civic politics realized through elections alone would tend to prove unstable or difficult to implement, but seems to be the primary mechanism left available by the Court. This Section considers three alternative responses. It is possible to accept the Court's championing of agonist politics; to adapt the blackletter doctrine that underlies the Court's holdings such that it advances civic norms; or to adopt anti-corruption practices that may not be as vulnerable to nullification by the Supreme Court.

1. Braving agonism: wanting what you have

The agonist status quo has its virtues, and has a level of stability as a political practice. The Court's limitation of federal deployment of criminal sanctions is a defensible facet of the judicial mandate to ensure that governmental power does not become overreaching or

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<sup>121</sup> Shapiro, *supra* note 12, is a particular champion of this, and Dahl, *supra* note 80, characterizes it as a veritable reality.

oppressive.<sup>122</sup> Criminalization of corruption that advances civic values will sweep more broadly and likely require a higher level of fluidity or adaptability than crisply defined *quid pro quo* laws that only set the rules of agonist practice. The very attributes that would allow for civic anti-corruption law tend to raise vagueness concerns and produce opportunities for prosecutorial misuse.<sup>123</sup> Given that (relatively speaking, at least)<sup>124</sup> the US does not suffer from high levels of official corruption, it may be that the current state of affairs is a reasonable equilibrium. Indeed, the record suggests that McDonnell's conduct was not more egregious in part because he was concerned about violating anti-corruption laws,<sup>125</sup> and his actions, while distastefully self-serving deviation from the ideal discharge of public office, did not comprise the sort of grand corruption or grossly wasteful misuse of government resources that can debilitate a functional state.

In sum, while the narrow bounds left to criminal anti-corruption by the Court may prevent such law from facilitating civic politics, it arguably neither debilitating for the state nor fatal to civic anti-corruption. Civic politics can operate through direct political action; despite the challenges, such an organic approach may be the most appropriate given the deep normative commitments of such a shift. Moreover, even if the effect of the Court's holdings is to perpetuate an agonist political culture in the US, this does not necessarily alone justify a shift in the law. A

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<sup>122</sup> For a champion of this view, see Silverglate, *supra* note 11. As *Sorich* reveals, Silverglate had an evident ally on the Court in Scalia.

<sup>123</sup> Such laws could face criticisms similar to those raised by the concurring justices in *Skilling*, whose hostility to "indeterminacy" in the statute lead to the suggestion that §1346 should be struck down rather than merely narrowly construed. 561 U.S. at 415 (Scalia, concurring). Effective civic anti-corruption laws may require such an element of indeterminacy to maintain responsiveness to the civic norms that ultimately inform them. See *supra* note 55. The broader explanation for this paradox – that because the norms of integrity derive from political an irreducible political reality that is also foundational to law, and trace to first-order legitimacy rather than second-order expressions of the processes such legitimacy sustains – lies beyond the ken of this article. A straightforward legal positivist view will trace both to power; a refinement of the view may trace both to the character of judgment. See generally J. L. AUSTIN, *THE PHILOSOPHY OF POSITIVE LAW* (1879); cf. HLA HART, *THE CONCEPT OF LAW* (1994).

<sup>124</sup> See TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX 2016, <http://www.transparency.org/research/cpi/overview> (ranking the US 16th of 167 nations); see also Johnston, *supra* note 3 (classifying the US as an 'influence market', where corruption occurs primarily through campaign finance, and thus has less profoundly destructive effects than types of corruption that comprise direct grand theft).

<sup>125</sup> 136 S. Ct. at 2364 (McDonnell, in conversation with legal counsel, acknowledging this limitation and observing he needs to be careful).

narrow view of corruption prevents types of prosecutorial abuse and vindicates the rights of defendants, as discussed *infra*. Moreover, while US politics may not be characterized by public-minded virtue, American governance remains generally functional.

However, this apology for agonism concedes too much. Merely because the US does not suffer from crippling levels of official corruption does not entail that American politics enjoys optimal integrity.<sup>126</sup> If the institutional corruption and campaign finance reformers are correct, a shift toward civic public-mindedness in political culture would be of great benefit to American governance. While criminal sanctions that enforce civic politics may not be sufficient to transform the political culture, they may be a necessary component, to signal the weight of civic values will be rigorously enforced, and to deter gross defection from public-mindedness. Reformers such as Lessig may be correct that a broader mechanisms are necessary to implement change; but an important tool in shifting such culture is the availability of sanction that deter such behavior. The inability to demand public-regardingness through anti-bribery laws may also inflect the political culture more generally: McDonnell's conduct may be a particularly egregious example of the type of reciprocity that results in misallocation of government resources, yet it was deemed prospectively tolerable.

## 2. Jurisprudential innovation: updating doctrinal context for modern corruption

If the Court is to be reconciled to civic anti-corruption, it will require jurisprudential creativity. Such innovation has already begun in a related space, as some scholars and justices have argued for a reinterpretation of the First Amendment that would, *inter alia*, support a more

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<sup>126</sup> As one study laconically concluded, "Although corruption is not endemic in America as it is in several other countries, it does exist." Oguzhan Dincer & Michael Johnston, *Measuring Illegal and Legal Corruption in American States: Some Results from the Corruption in America Survey*, Edmond J. Safra Center Journal for Ethics (Dec. 1, 2014), available at <http://ethics.harvard.edu/blog/measuring-illegal-and-legal-corruption-american-states-some-results-safra> (observing that there have been 20,000 corruption convictions in the past two decades in America, and that 5,000 corruption trials are currently ongoing).

holistic conception of corruption and thereby permit more extensive campaign finance regulation.<sup>127</sup> The parallel point in the official corruption space would be reconsideration, in light of the possible validity of civic governance, of the canons of statutory interpretation and due process concerns that underlie the Court's holdings. The Court's pruning of the official corruption doctrine seems motivated at least in part to protect defendants from the tremendous power of the government.<sup>128</sup> This is a particular form of the general principle that one role of the judiciary is to prevent the entrenchment of particular power inequities in political structures;<sup>129</sup> one incarnation is the need to protect those accused of crimes from railroading at the hands of the prosecutorial apparatus.

Yet a charge of corruption has unique characteristics. Official corruption occurs when those privileged *through access to governmental resources* abuse their unique power. Corrupt conduct circumvents the normal procedures that ensure fairness in citizen access to government, as individuals with unique access to political power abuse it. This justifies reconceptualization of how the canons of interpretation and due process rights apply. Traditionally such mechanisms protect defendants from governmental power, but where the offense itself is predicated upon access to governmental power, their uncritical application may perversely reinforce power inequities. Corruption ultimately harms citizens who do *not* have unique power or access to governmental decision-making process. Thus the typical role of the Court as the equalizer of power is reversed in some respects vis-à-vis corruption prosecutions.<sup>130</sup> It is the average citizen –

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<sup>127</sup> OWEN FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1996); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1995). Breyer, *supra* note 15, offers a less concrete but related claim.

<sup>128</sup> See EINER ELHAUGE, *STATUTORY DEFAULT RULES* 168-178 (2008) (describing how the rule of lenity favors defendants in order to correct for the greater power of government and lack of political clout of most defendants.)

<sup>129</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) provides perhaps the most seminal form of this in the concept of representation reinforcement.

<sup>130</sup> The most salient context wherein corruption prosecutions perpetuate power imbalances may be that of federalism; federal anti-corruption prosecutions give the federal executive a tool for intervening in state and local

lacking special access to the machinery of governmental decision-making – who requires additional procedural protection from the judiciary. Therefore anti-corruption statutes could be legitimately interpreted in a manner that permits broad sweep in order to encourage public-mindedness in representative behavior.<sup>131</sup> In *McDonnell*, this would permit reading 18 U.S.C. §201(a)(3) to include the conduct at issue as official action.

Civic conceptions of governance can guide such a jurisprudential shift. If governance is a collective enterprise and public officials are those given unique capacity to deploy the shared powers of this collective enterprise,<sup>132</sup> they should be expected to adhere to higher standards regarding public-mindedness in the discharge of their duties. This stands in opposition to the agonist approach, which conceives of officials as just another type of self-interested actor participating in the competitive game in order to extract maximal resources.<sup>133</sup> In a civic view, public servants have a distinct role as holders of the distilled decision-making power of the electorate – and can legitimately be expected to adjust their conduct to reflect their structurally privileged status.

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governance, and, on such terms, there is no countervailing pressure state and local officials can apply to the federal government. This potential has been the subject of some criticism, including by the *McDonnell* opinion, *id.* at 2373. See also Sara Sun Beale, *Comparing the Scope of the Federal Governments' Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 669, 700 (2000) (honest services law is harsher on local and state than on federal officials); Brown, *supra* note 35 (arguing that following *Sabri*, the Court will permit federal prosecutions to police state and local conduct).

<sup>131</sup> Cf. Elhauge, *supra* note 128, at 176-78 (observing that the rule of lenity is often not applied to business crimes). Federalism concerns aside, such an argument could also be applied to prosecutions of corrupt public officials, but does not seem to be. In terms of the factors by which Elhauge explains selective application of the rule of lenity, politicians are not the 'politically powerless' that the rule of lenity typically protects; conversely however, whether anti-corruption laws are *malum prohibitum* or *malum in se* comes down to the difficult question of how political norms ought to be enforced.

<sup>132</sup> Such a distinctly civic role for representatives as opposed to the electorate might, in some interpretations, be called Madisonian. See *supra* notes 68. Such an interpretation complicates the classification of Madison as an agonist.

<sup>133</sup> Such a view of politicians is expressed in the views of Schumpeter and Dahl, *supra* note 12. The arguments of Lessig and Teachout are premised on the idea that this view is inappropriate, and Teachout in particular argues that the Framers held such a view.

The analogous reconceptualization of the First Amendment jurisprudence offers a parallel model.<sup>134</sup> That a traditionally negative constitutional right might, given the nature of the modern state, expand rather than circumscribe the ambit of state activity could likewise be applied in the official corruption context. The power held by public officials, and the need to ensure they govern with integrity for the sake of the entire polity, might mean that due process and traditional interpretation of statutory reach expands, rather than restricts, the standards by which corruption is judged. This would protect the most vulnerable in politics – those citizens who are governed and have voice only through their representatives.

Of course, such a radical transformation of these rights would need to be undertaken with delicacy and circumspection. To do so recklessly could remove critical barriers to excessive state power and prosecutorial discretion.<sup>135</sup> A concept as fluid as corruption could readily be abused, particularly given the breadth of federal prosecutorial discretion.<sup>136</sup> One particular blackletter accommodation of this reality might be to adjust relevant statutes to impose higher standards upon officials (who would be expected to have knowledge of their unique status) alone (that is to say, recipients of bribes) but not upon others (that is to say, those who attempt to bribe).<sup>137</sup> In light of the dysfunctional political dynamics in American political representation (a dysfunction that renders unrealistic the Court's currently preferred mode of civic anti-corruption as realized

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<sup>134</sup> Sunstein, *supra* note 127, likely advances the fullest form of this. The claim can be succinctly expressed as the idea that the First Amendment – traditionally interpreted as restricting government action – should, in the modern era of complex networks and sophisticated non-state actors, also mandates positive government conduct. That is, full realization of the ends of the First Amendment – access to formation, facilitating political and intellectual engagement, sustaining social development – requires the state at times to take action.

<sup>135</sup> See Silverglate, *supra* note 11. See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533-546 (2001) (observing the benefit to prosecutors of broadly defined criminal statutes, and in particular the discretion that federal legislation gives prosecutors, their lack of accountability to local communities, and their distinctly careerist prosecution of prominent defendants).

<sup>136</sup> See generally Andrew T. Baxter, *Federal Discretion in the Prosecution of Local Political Corruption*, 10 PEPP. L. REV. 321 (1983) (the federal anti-corruption regime exists largely without constraint in its application to local corruption). See also Brown, *supra* note 35.

<sup>137</sup> It would, in principle, be easy enough to modify the statutes discussed *supra* note 19 to establish different standards for officials, though it would require care in the drafting process.



through elections), and the crisis of national identity, using a civic mold to demand higher standards from the powerholders in government appears worthy of at least serious consideration.

### 3. Practical solutions: state-federal cooperation

If the Court is as firmly committed to defending agonist democracy as *McDonnell* suggests, alternatives that do not require a change in the law are worthy of consideration. State (and local) anti-corruption law designed along civic lines may offer a more promising possibility.<sup>138</sup> Such laws could adopt the broad drafting and flexible enforcement necessary to robustly encourage public-mindedness, with the additional benefit of greater intimacy between state government and their smaller, geographically compact constituencies. While there would be variance between state laws, this would reflect local norms and enable ‘laboratories of democracy.’<sup>139</sup> As the Court’s suspicion of a robust federal anti-corruption regime is motivated in part by federalism concerns, state-led enforcement of a broad, civic-minded anti-corruption regime might receive more sympathetic treatment.

Such a solution has its own challenges, many of which are political rather than doctrinal. State governments may lack the political will to police their own affairs, especially if corruption occurs at high level in the state government. Prosecutors may fear political repercussions bringing prosecutions against high-ranking officials, particularly where the legality of conduct is ambiguous, and the smaller scale of state politics may make it harder for momentum to develop in marginal test-the-law cases. Likewise, an outsized political personality or powerful clique in a state executive may be more capable of controlling the enforcement apparatus, thereby

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<sup>138</sup> Cf. George Brown, *Should Federalism Shield Corruption? -- Mail Fraud, State Law and Post-Lopez Analysis*, 82 CORNELL L. REV. 225, 299 (1997) (arguing state anti-corruption laws should be used to inform federal anti-corruption enforcement).

<sup>139</sup> For a succinct review of this, and other benefits of state independence, see generally Jessica Bulman-Posen and Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L. J. 1256, 1261 (2016).

preventing or derailing anti-corruption prosecutions. More generally, monitoring corruption can be a costly endeavor which state agencies may not have the resources to undertake.<sup>140</sup>

State-federal cooperation might provide a partial solution.<sup>141</sup> Federal resources could defray the costs of anti-corruption enforcement by state agencies, either by cooperation or by allowing the federal government to perform certain aspects of anti-corruption monitoring, but prosecutions could be left to the state. Such an approach would pose its own challenges – in particular it would not firmly alleviate questions regarding lack of political will of states to self-police<sup>142</sup> – but it offers greater respect for federalism. Thus such an approach has a higher likelihood of surviving judicial scrutiny, allows for the expression of local political norms, and creates conditions that might encourage public-minded anti-corruption. In particular, if the form of the federal intervention included an element that publicized questionable conduct, it could both facilitate populist action (likely through elections), and provide political stimulus for state enforcement. Of course, such a regime would involve significant logistical challenges and require novel forms of cooperation between state and federal entities, but it may offer the firmest mechanism for implementing civic-minded anti-corruption while accommodating the Court's view of federal anti-corruption. Moreover, by emphasizing federal resources in the first instance as a mechanism for disclosure (both to state agencies, and to the public if necessary), such an

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<sup>140</sup> See generally James E. Alt & David Dreyer Lassen, *Enforcement and Public Corruption: Evidence from the American States*, 30 J. LAW, ECON. & ORG. 306 (2014) (describing systemic factors that may prevent anti-corruption enforcement).

<sup>141</sup> For some sympathetic proposals, see generally Renee M. Landers, *Federalization of State Law: Enhancing Opportunities for Three-Branch and Federal-State Cooperation*, 44 DEPAUL L. REV. 811 (1995); for a discussion of the benefits risks of such an approach, see Lisa L. Miller and James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239 (2005).

<sup>142</sup> Some might see this allocation of responsibility to the states as a virtue. See generally Jessica Pulman-Bozen, *Partisan Federalism*, 127 HARV. L. REV. 1078 (2014) (arguing there are benefits to states pushing back against federal domination of governance).

approach would potentially accord with the sympathy most justices have expressed to disclosure as an anti-corruption mechanism.<sup>143</sup>

### CONCLUSION

*McDonnell* rules on only a single point of anti-corruption blackletter doctrine,<sup>144</sup> and the Court's underlying normative theory of politics comprises only rather casually advanced dicta. Yet these dicta provide a foundation for organizing the modern official corruption jurisprudence, and, as a signpost of the Court's posture on appropriate political behavior, provides a seminal perspective the law of substantive politics. As with the infamous footnote 4 of *Carolene Products*,<sup>145</sup> *McDonnell*'s discussion of representation is most noteworthy as a signal of how the Court might be expected to intervene in politics more generally. The opinion's approbation of reciprocity and patronage reveals the Court's underlying democratic theory, and conceptually organizes the official corruption jurisprudence. As the official corruption jurisprudence has of late produced consensus opinions (unlike most law on substantive politics, which is the subject of fierce partisan dispute), it is an especially useful indicator of the judicial perception of politics.

This article has primarily addressed the structural implications of the Court's position, demonstrating that the Court's substantive politics will place a great onus on voters to assess political behavior, while simultaneously discouraging cooperative political practice. The marginalization of civic politics may be the weightiest implication of the Court's view. While a

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<sup>143</sup> Albeit, this has occurred in the campaign finance context. See, e.g., *Citizens United*, 558 U.S. at 371 (celebrating disclosure measures as enhancing citizen autonomy, particularly in comparison to direct regulation of use of money).

<sup>144</sup> See Stephenson, *supra* note 4.

<sup>145</sup> *U.S. v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). For a discussion of its outsized significance, see Jack M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1988).

civic approach to politics is not intrinsically superior to an agonist approach,<sup>146</sup> it does confer benefits<sup>147</sup> such that the Court's disapprobation of it is worthy of critical scrutiny.

The solidarity of the bench in the official corruption jurisprudence might raise doubts regarding the efficacy of novel legal arguments to advance a civic approach to politics, at least insofar as the goal is success in federal litigation at the highest levels. This unified stance is particularly salient in contrast to the various movements in law and cognate social science disciplines that have championed civic approaches to politics – expecting or encouraging citizens and leaders to, with some level of depth, commit to a form of political life that prioritizes the public good.<sup>148</sup> The Court's skepticism towards these movements may have been apparent in prior cases, but it is *McDonnell* that makes explicit the Court's normative commitment to preserving agonist political practices, even if such a posture condones grossly self-interested behavior.

Much of the agitation for broader political reform in American law – whether in the campaign finance arena or institutional practices more broadly – is directly touched by the Court's protectiveness of agonist politics. The tension may be most apparent in the campaign finance domain, given the civic tone adopted by the liberal justices regarding electoral corruption.<sup>149</sup> However, *McDonnell* also reveals the gulf between the bench's view of politics as expressed in the official corruption context, and the perceptions of politics advanced by many contemporary reformers.

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<sup>146</sup> See note 75 *supra*.

<sup>147</sup> For a summary of such benefits, see the discussions of Sunstein and Habermas, note 75 *supra*.

<sup>148</sup> See note 13 *supra* for the theoretical developments, such as civic republicanism and deliberative democracy, that have advanced this view; see Section III.A.2 *supra* for its more recent and political manifestation as the critique of institutional corruption.

<sup>149</sup> See Section III.A.1.

The Court's posture on anti-corruption might be revised through reinterpreting the relevant blackletter principles to accommodate the uniquely privileged status of officials. However, such an approach would require unwinding a significant amount of precedent and require attentiveness in the impact upon countervailing defendants' rights. As the law stands, public-minded politics will only be realized by concerted citizen voting to ensure offices are held by politicians committed to civic practice. It may be possible to take ancillary legislative efforts to facilitate this – for example, imposing more rigorous limitations on revolving-door movement to the private sector,<sup>150</sup> and creative anti-corruption enforcement such as state-federal cooperation<sup>151</sup> – but any general cultural change must first occur in the electorate and only then 'pass up' to officeholders. In short, the Court's approach makes it difficult to lead from above. Such an approach may be unrealistically idealistic, difficult to operationalize, and face the collective action difficulties described above, but it is the sole alternative available.

*McDonnell* should not be taken as an indication that civic anti-corruption efforts, or more general theories of civic politics, should be abandoned. Rather the case should be taken as an indication of the need to discipline and adapt such efforts to contemporary law. Such a project should reinvigorate civic theory, by requiring rigor and detail to overcome a robustly championed alternative view. Likewise, practical efforts to ensure that political leaders are first and foremost dedicated to the public good must operate through channels that will survive judicial scrutiny. Advancement of a civic approach to politics must either work through the electorate itself (a project where at least some on the Court are sympathetic to the civic

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<sup>150</sup> See Thompson, *supra* note 27, and Lessig, discussed section III.A.2, for a description of such practices.

<sup>151</sup> See Section III.B.3 *supra*.

approach)<sup>152</sup>, or through creative means that can at least alleviate the Court's first-order doctrinal concerns.

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<sup>152</sup> See *supra* notes 15 and 102 (describing the affinity of liberal justices, in particular Justice Breyer, for a treatment of corruption in the campaign finance context that look essentially civic).