Deregulating Corruption

*Ciara Torres-Spelliscy**

The Roberts Supreme Court has, or to be more precise the five most conservative members of the Roberts Court have, spent the last twelve years branding and rebranding the meaning of the word "corruption" both in campaign finance cases and in certain white-collar criminal cases. Not only are the Roberts Court conservatives doing this over the strenuous objections of their more liberal colleagues, they are also breaking with the Rehnquist Court's more expansive definition of corruption. The actions of the Roberts Court in defining corruption to mean less and less have been a welcome development among dishonest politicians. In criminal prosecutions, politicians convicted of honest services fraud and other crimes are all too eager to argue to courts that their convictions should be overturned in light of the Supreme Court's lax definition of corruption. In some cases, jury convictions have been set aside for politicians who cite the Supreme Court's latest campaign finance and white-collar crime cases, especially Citizens United v. FEC *and* McDonnell v. United States. *This Article explores what the Supreme Court has done to rebrand corruption, as well as how this impacts the criminal prosecutions of corrupt elected officials. This Article is the basis of a chapter of Professor Torres-Spelliscy's second book,* Political Brands, *which will be published by Edward Elgar Publishing in late 2019.*

INTRODUCTION 471
I. HOW AVERAGE VOTERS VIEW CORRUPTION 474
II. HOW THE SUPREME COURT HAS CHANGED THE MEANING OF CORRUPTION IN CAMPAIGN FINANCE JURISPRUDENCE ... 479
A. A Reasonable Take on Campaign Finance Reform from the Rehnquist Court 479
B. The Hostility to Campaign Finance Reforms by the Roberts Court 481
III. EVER-SHRINKING ANTI-CORRUPTION CRIMINAL LAW 496
IV. WHAT DOES A CROOKED POLITICIAN HEAR FROM THE SUPREME COURT? 499
CONCLUSION 504

INTRODUCTION

The Book of Ecclesiastes states "there is no new thing under the sun."[1] Likewise, political corruption did not start in 2017, but there has certainly been a bumper crop from the Trump Administration.[2] Indeed, in August

* Ciara Torres-Spelliscy, A.B. Harvard; J.D. Columbia. Professor Torres-Spelliscy teaches at Stetson University College of Law and is a fellow at the Brennan Center for Justice at NYU School of Law. Professor Torres-Spelliscy would like to thank Stetson University College of Law for the Leroy Highbaugh Sr. Chair which allowed her to write this piece. She would like to thank her research assistants Felicia L. Kitzmiller, Michael Davids, Christina Purcell Jimenez, Guillermo De Guzman Serrano and Clinton Simmons and Stetson Librarians Kristen Moore and Sally Waters for their assistance in researching this piece. This piece will become a chapter in Professor Torres-Spelliscy's forthcoming book, "Political Brands."

[1] *Ecclesiastes* 1:9.

[2] *See, e.g.*, Mark Joseph Stern, *Donald Trump Is Now Facing Three Emoluments Lawsuits. Will Any of Them Succeed?*, SLATE (June 14, 2017, 6:48 PM), http://www.slate.com/articles/

2018, President Trump's longtime personal lawyer pled guilty to violating two aspects of campaign finance law and told the presiding judge that he had broken the law at President Trump's direction when he was a candidate.[3] Why would people with this much to lose violate laws that are meant to prevent conflicts of interest and corruption? This Article argues that character flaws in this group of individuals are not the sole cause. The legal landscape has become particularly permissive of corrupt acts by government officials. The standard for what counts as corruption is set at the top by the U.S. Supreme Court.[4] The Supreme Court has spent the last decade and a half deregulating corruption. Thus, there could be a rational belief among those at the top of the executive branch that corruption laws are not being prosecuted in the same rigorous way that they once were and that the risk is worth it.

In a spate of recent decisions, the Supreme Court has constricted its definition of corruption in both campaign finance and criminal cases.[5] The combined impact of these decisions is evident in the difficulty prosecutors have had bringing dishonest politicians to justice. In several high-profile cases, prosecutors had to try a particular politician twice, or resentence a politician, because of the Supreme Court's increasingly narrow conception of corruption.[6]

---

news_and_politics/jurisprudence/2017/06/trump_is_facing_three_emoluments_lawsuits_will_any_of_them_succeed.html [https://perma.cc/5REV-G45G]; Dan Mangan, *Trump's Cabinet has been rocked by a number of ethics scandals—here's a complete guide*, CNBC (Feb. 16, 2018, 6:00 AM), https://www.cnbc.com/2018/02/15/trump-cabinet-officials-in-ethics-scandals.html [https://perma.cc/5S7F-GJPP] ("Trump administration saw its first Cabinet member — Health and Human Services Secretary Tom Price — resign after questions were raised about his conduct in office."); *see* Denise Lu & Karen Yourish, *You're Hired! You're Fired! Yes, the Turnover at the Top of the Trump Administration Is . . . "Unprecedented."*, N.Y. TIMES (Oct. 9, 2018), https://www.nytimes.com/interactive/2018/03/16/us/politics/all-the-major-firings-and-resignations-in-trump-administration.html [https://perma.cc/2GCM-RQQB] ("[E.P.A. administrator Scott] Pruitt had been hailed as a hero among conservatives for his zealous deregulation, but he could not overcome the stain of numerous ethics questions about his alleged spending abuses, first-class travel and cozy relationships with lobbyists."); Jan Diehm & Sam Petulla, *Who has left Trump's administration and orbit?*, CNN (July 6, 2018), https://www.cnn.com/interactive/2017/08/politics/trump-admin-departures-trnd/ [https://perma.cc/HQ5Q-BHRB] (Michael Flynn "[f]orced to resign amid claims he misled the administration over his communications with Russia during the transition. In early December 2017, Flynn pleaded guilty to lying to the FBI. He is cooperating with Robert Mueller's Russia investigation"); TRANSPARENCY INT'L, CORRUPTION IN THE USA: THE DIFFERENCE A YEAR MAKES (Dec. 2017), https://www.transparency.org/news/feature/corruption_in_the_usa_the_difference_a_year_makes [https://perma.cc/AQN4-94UJ] ("The current US president [Trump] was elected on a promise of cleaning up American politics. . . . Yet, rather than feeling better about progress in the fight against corruption over the past year, a clear majority of people in America now say that things have become worse. Nearly six in ten people now say that the level of corruption has risen in the past twelve months, up from around a third who said the same in January 2016.").

[3] *See* Nicole Hong et al., *Michael Cohen Pleads Guilty, Says Trump Told Him to Pay Off Women*, WALL ST. J. (Aug. 21, 2018, 11:25 PM), https://www.wsj.com/articles/michael-cohen-to-plead-guilty-to-criminal-charges-1534875978 [https://perma.cc/5P8Z-CXE8].

[4] *See infra* Parts II and III.

[5] *See infra* Part II (campaign finance) and Part III (criminal cases).

[6] *See infra* Part III.

In this piece, "campaign finance reform" means the constellation of laws that address money in politics in the following ways: disclosure of where money in politics came from and where it was spent; contribution limits; source bans (like bans on corporations, unions, and foreigners); and public financing. And "criminal anti-corruption laws" means honest services fraud[7] and bribery.[8] A significant portion of the American electorate cares deeply about political corruption,[9] and the Supreme Court is drifting farther and farther away from this basic intuition.

Here is how this Article will proceed. First, I will canvass briefly how average Americans perceive corruption as evidenced by public opinion polling and studies by political scientists. Second, I will explain the decisions where the Supreme Court has modified the definition of corruption in campaign finance cases. Third, I will explain how the Court has done the same in two criminal cases. I include discussions of dissenting opinions because often dissents are more explicit about the damage the majority engendered. Finally, I will show how this is having a real-world impact on criminal prosecutions of actual corruption.[10]

---

[7] Honest services fraud refers to a "scheme or artifice" to deprive another of the intangible right of honest services. *See* 18 U.S.C. § 1346 (1988).

[8] *See* 18 U.S.C. § 201 (1994) (prohibiting bribery of public officials and witnesses).

[9] *See* Ashley Kirzinger et al., *Kaiser Health Tracking Poll—Late Summer 2018: The Election, Pre-Existing Conditions, and Surprises on Medical Bills*, KAISER FAMILY FOUND. (Sept. 5, 2018), https://www.kff.org/health-costs/poll-finding/kaiser-health-tracking-poll-late-summer-2018-the-election-pre-existing-conditions-and-surprises-on-medical-bills/ [https://perma.cc/X9C6-5KYY] ("Three in ten voters (33 percent of independent voters, 32 percent - of Democratic voters, and 25 percent of Republican voters) say corruption in Washington is the 'most important' topic for 2018 candidates to discuss.").

[10] This piece discusses how the Supreme Court has narrowed corruption and the practical impact that it has had. For those wishing for more information about my views on campaign finance more generally, I have written the following other pieces: *See* Ciara Torres-Spelliscy, CORPORATE CITIZEN? AN ARGUMENT FOR THE SEPARATION OF CORPORATION AND STATE (2016); Ciara Torres-Spelliscy, *Corporate Political Spending & Shareholders' Rights: Why the US Should Adopt the British Approach*, in RISK MANAGEMENT AND CORPORATE GOVERNANCE 391 (Jalilvand & Malliaris, eds., 2011); Ciara Torres-Spelliscy, *Time Suck: How the Fundraising Treadmill Diminishes Effective Governance*, 42 SETON HALL LEGIS. J. 271 (2018); Ciara Torres-Spelliscy, *Campaign Finance, Free Speech, and Boycotts*, 41 HARV. J.L. & PUB. POL'Y 153 (2018); Ciara Torres-Spelliscy, *Dark Money as a Political Sovereignty Problem*, 28(2) KING'S L.J. 239 (2017); Ciara Torres-Spelliscy, *Shooting Your Brand in the Foot: What* Citizens United *Invites*, 68 RUTGERS U.L. REV. 1297 (2016); Ciara Torres-Spelliscy, *Electoral Silver Linings after* Shelby, Citizens United *and* Bennett, 17 BERKELEY J. AFR.-AM. L. & POL'Y 103 (2015); Ciara Torres-Spelliscy, *The Democracy We Left Behind in* Greece *and* McCutcheon, 89 N.Y.U. L. REV. ONLINE 112 (2014); Ciara Torres-Spelliscy, *Safeguarding Markets from Pernicious Pay to Play: A Model Explaining Why the SEC Regulates Money in Politics*, 12 CONN. PUB. INT. L.J. 361 (2013); Ciara Torres-Spelliscy, *How Much Is an Ambassadorship? And the Tale of How Watergate Led to a Strong Foreign Corrupt Practices Act and a Weak Federal Election Campaign Act*, 16 CHAP. L. REV. 71 (Spring 2012); Ciara Torres-Spelliscy, *The $500 Million Question: Are the Democratic and Republican Governors Associations Really State PACs Under* Buckley*'s Major Purpose Test?*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 485 (2012); Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After* Citizens United *and* Doe v. Reed, 27 GA. ST. U.L. REV. 1057 (2011); Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS: CHAP. J.L. & POL'Y 59 (2011); Ciara Torres-Spelliscy & Ari Weisbard, *What Albany Could Learn from New York City:*

I. How Average Voters View Corruption

Before I delve into how the Supreme Court is smashing corruption into a fine powder, let me canvass how average citizens view corruption. Since the United States doesn't ask the entire populace on the U.S. Census what they think of corruption, one must rely on surveys of Americans captured in polls and focus groups to determine what average Americans think about the topic. Reliance on polling also presents difficulties because different polls ask different questions, often in ways that confound attempts to discern subtleties of opinion. Nevertheless, polling data can illuminate how many Americans perceive political corruption.

If the polling is accurate, then the average American citizen is not in sync with the conservative majority on the Supreme Court when it comes to political corruption. Claiming that many Americans (and perhaps even a majority or supermajority of them) are deeply troubled about political corruption is not hyperbole. In the period from 2006–2018 covered in this piece, polling revealed that deep worries about corruption are at the front of many citizens' minds. In a survey by Gallup, three-quarters of respondents answered "yes" to the question, "[i]s corruption widespread in the government in this country or not?"[11] A Chapman University survey of American fears found the top fear was of corrupt government officials.[12] A 2018 survey found, "[i]n an open-ended question that asked voters to describe Congress, 'corrupt' is the defining word."[13] And a *USA Today* poll of unlikely voters

---

A Model of Meaningful Campaign Finance Reform in Action, 1 Alb. Gov't L. Rev. 194 (2008); Ciara Torres-Spelliscy, Am. Constitution Soc'y, Dark Money, Black Hole Money, and How to Solve It (Oct. 2016); Ciara Torres-Spelliscy, *How the U.S. Securities and Exchange Commission Could Require Transparency for Corporate Political Expenditures*, Scholars Strategy Network (May 14, 2015), https://scholars.org/brief/how-us-securities-and-exchange-commission-could-require-transparency-corporate-political [https://perma.cc/DE4M-XCU7]; Ciara Torres-Spelliscy, Corp. Reform Coalition, The SEC and Dark Political Money: An Historical Argument for Requiring Disclosure (June 2013), https://www.citizen.org/sites/default/files/sec-dark-political-money-history-report.pdf [https://perma.cc/F3DC-VCKP]; Ciara Torres-Spelliscy, Brennan Ctr. for Just., Transparent Elections after *Citizens United* (2011), https://www.brennancenter.org/sites/default/files/legacy/Disclosure%20in%20the%20States.pdf [https://perma.cc/3WH6-JZAX]; Brennan Ctr. for Just., Writing Reform: A Guide to Drafting State & Local Campaign Finance Laws (Ciara Torres-Spelliscy ed., revised ed. 2010).

[11] *75% in United States. See Widespread Government Corruption*, Gallup (Sept. 19, 2015), https://news.gallup.com/poll/185759/widespread-government-corruption.aspx [https://perma.cc/MJK7-VPDG].

[12] *America's Top Fears 2017: Chapman University Survey of American Fears*, Chap. Univ., Wilkinson Coll. of Arts, Human., & Soc. Scis. (Oct. 11, 2017), https://blogs.chapman.edu/wilkinson/2017/10/11/americas-top-fears-2017/ [https://perma.cc/TY9T-QTGA] ("Below is a list of the 10 fears for which the highest percentage of Americans reported being 'Afraid,' or 'Very Afraid.' [Fear of] Corrupt Government Officials [was] 74.5[%.]").

[13] *What Americans Think About Corruption in Congress and the Battle for the Court Americans Concerned By Influence of Special Interests, Threats to Health Care, and the Supreme Court Vacancy*, Navigator Res. (Sept. 18, 2018), https://navigatorresearch.org/what-americans-

found that more than fifty percent of respondents reported they thought American politics were corrupt.[14]

Again, the polls about corruption are often worded differently. In some polls, the question is about political dysfunction. For example, the Harvard Kennedy School conducted a poll of young voters in 2018 and asked them how they assigned responsibility for existing problems in American politics, and found that sixty-eight percent of respondents believed money in politics was very or somewhat responsible for existing problems in American society.[15] According to an article from Pew, "Americans of different political persuasions may not agree on much, but one thing they do agree on is that money has a greater—and mostly negative—influence on politics than ever before. Among liberals and conservatives, Republicans and Democrats, large majorities favor limits on campaign spending and say the high cost of campaigning discourages many good candidates from running for president."[16] A *Washington Post* poll found that six in ten respondents thought that money in politics was a source of political dysfunction.[17] Additionally, in 2015, a *New York Times/CBS* poll found that eighty-four percent of respondents thought that money has too much influence on politics.[18]

Election advocates and, as will be explored below in Part II, several Supreme Court Justices, have worried that the public's concerns about the role of money in politics could lead to or exacerbate political apathy. One way to measure voter apathy is lackluster voter turnout. According to Pew, the United States has some of the lowest voter turnout among Western de-

think-about-corruption-in-congress-and-the-battle-for-the-court/ [https://perma.cc/P7TW-E7BX].

[14] *See* Susan Page, *Does every vote count? Why some Americans don't think so*, USA TODAY (Aug. 15, 2012, 6:15 AM), http://usatoday30.usatoday.com/news/politics/story/2012-08-15/non-voters-obama-romney/57055184/1 [https://perma.cc/BX4E-7P95] ("Many of these unlikely voters are suspicious of and disconnected from politics. In the survey, six in 10 say they don't pay attention to politics because 'nothing ever gets done'; 54% call politics 'corrupt.'").

[15] *See* HARV. KENNEDY SCH., INST. OF POLS., SURVEY OF YOUNG AMERICANS' ATTITUDES TOWARD POLITICS AND PUBLIC SERVICE 35TH EDITION (Mar. 8–25, 2018), http://iop.harvard.edu/sites/default/files/content/Release%202%20Toplines.pdf [https://perma.cc/WL4C-84HB].

[16] Drew DeSilver & Patrick van Kessel, *As more money flows into campaigns, Americans worry about its influence*, PEW RES. CTR. (Dec. 7, 2015), http://www.pewresearch.org/fact-tank/2015/12/07/as-more-money-flows-into-campaigns-americans-worry-about-its-influence/ [https://perma.cc/CY6P-GWB7].

[17] *See* John Wagner & Scott Clement, *'It's just messed up': Most think political divisions as bad as Vietnam era, new poll shows*, WASH. POST (Oct. 28, 2017), https://www.washingtonpost.com/politics/its-just-messed-up-most-say-political-divisions-are-as-bad-as-in-vietnam-era-poll-shows/2017/10/27/ad304f1a-b9b6-11e7-9e58-e6288544af98_story.html?utm_term=.0b95e199962c [https://perma.cc/BF33-NRQ5] ("Democrats and Republicans do agree on many of the causes of political dysfunction in the U.S. political system. At least 6 in 10 Democrats, Republicans and independents say 'money in politics' deserves a lot of blame . . . . A majority of Americans overall say wealthy political donors deserve a lot of blame . . . .").

[18] *See* N.Y. TIMES & CBS NEWS, POLL (May 28–31, 2015) https://assets.documentcloud.org/documents/2091162/poll-may-28-31.pdf [https://perma.cc/SS9Z-AD3H].

mocracies.[19] One commentator even saw political apathy as contagious—as more American voters express their dismay with politics, others around them lose faith in the political process as well.[20]

Some of the polling on political corruption has focused specifically on *Citizens United v. Federal Election Commission*, a 2010 Supreme Court case that allowed corporations to spend unlimited money in elections.[21] This was a radical change from how the law had been interpreted previously, and the public largely reacted negatively to the outcome of *Citizens United*. For example, a Greenberg Quinlan Rosner poll found opposition to the *Citizens United* decision by a margin of greater than two to one.[22] Other polling at the time of the *Citizens United* decision in 2010 showed that roughly eight in ten Americans were opposed to it.[23] Public opinion hasn't changed much in the intervening years. For example, in 2018, polling from the University of Maryland found that three-quarters of Americans wanted to overturn *Citizens United*.[24] A *National Journal* poll found sixty-two percent of voters opposed *Citizens United* and fifty-five percent thought corporations shouldn't have the same rights as humans.[25] Polling from 2015 showed seventy-eight percent wanted *Citizens United* overturned.[26] A poll of Salt Lake City in

[19] Drew DeSilver, *U.S. Trails Most Developed Countries in Voter Turnout*, PEW RESEARCH CTR. (May 21, 2018), http://www.pewresearch.org/fact-tank/2018/05/21/u-s-voter-turnout-trails-most-developed-countries/ [https://perma.cc/8TYQ-9J3Y] ("The 55.7% [voting-age population] turnout in 2016 puts the U.S. behind most of its peers in the Organization for Economic Cooperation and Development (OECD), most of whose members are highly developed, democratic states. Looking at the most recent nationwide election in each OECD nation, the U.S. placed 26th out of 32 . . . .").

[20] *See* David DiSalvo, *The Contagious Reason Why Millions Don't Vote*, FORBES (Nov. 14, 2016, 9:54 AM), https://www.forbes.com/sites/daviddisalvo/2016/11/14/the-contagious-reason-why-millions-dont-vote/#22b3d2594119 [https://perma.cc/K6UY-P8NA].

[21] 558 U.S. 310 (2010). For more discussion of *Citizens United*, *see infra* Part 2.

[22] *See* Stan Greenberg et al., *Strong Campaign Finance Reform: Good Policy, Good Politics*, GREENBERG QUINLAN ROSNER RESEARCH (Feb. 8, 2010), https://marylandpirg.org/sites/pirg/files/resources/Campaign-Finance-Memo-Final.pdf [https://perma.cc/45TJ-G652] (noting that voters opposed *Citizens United* decision by a "stark 64 to 27 percent margin").

[23] Dan Eggen, *Poll: Large majority opposes Supreme Court's decision on campaign financing*, WASH. POST (Feb. 17, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html [https://perma.cc/B4W2-ERR6] ("Eight in 10 poll respondents say they oppose the high court's Jan. 21 decision to allow unfettered corporate political spending . . . .").

[24] Ashley Balcerzak, *Study: Most Americans want to kill 'Citizens United' with constitutional amendment*, CTR. PUB. INTEGRITY (May 10, 2018, 11:45 AM), https://www.pri.org/stories/2018-05-10/study-most-americans-want-kill-citizens-united-constitutional-amendment [https://perma.cc/V52M-JL4J] ("Three-fourths of survey respondents — including 66 percent of Republicans and 85 percent of Democrats — back a constitutional amendment outlawing Citizens United.").

[25] Stan Greenberg et al., *Two years after Citizens United, voters fed up with money in politics*, GREENBERG QUINLAN ROSNER (Jan. 19, 2012), https://static.squarespace.com/static/53347cbfe4b005ac7b3746ca/53fcdeffe4b0dedf238b5707/53fcdf48e4b0dedf238b662a/1409081160804/images_Blog_posts_documents_2012_January_PCAF_memo_FINAL.pdf?format=original [https://perma.cc/J6Q2-77MB].

[26] Greg Stohr, *Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot*, BLOOMBERG (Sept. 28, 2015, 5:00 AM), https://www.bloomberg.com/news/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spend

2013 found eighty-eight percent agreed that "corporations are not people and money is not speech."[27] A Corporate Reform Coalition poll found eight-nine percent of respondents agreed that there was too much corporate money in politics.[28]

Certain polls have also asked Americans how they would solve the problem of money in politics. For instance, a poll of 1200 Americans commissioned by People for the American Way conducted from February 5 through February 9, 2010 found strong support for post-*Citizens United* Congressional reforms:

- 78% believe that corporations should be limited in how much they can spend to influence elections, and 70% believe they already have too much influence over elections;
- 73% believe Congress should be able to impose such limits, and 61% believe Congress has done too little in the past to limit corporate influence over elections;
- 82% support limits on electioneering by government contractors, and 87% support limits on bailout recipients; and
- 85% support a complete ban on electioneering by foreign corporations.[29]

Some of these reforms that the public found so appealing have been held unconstitutional by the Roberts Supreme Court.

Other solutions have also been embraced by the American public. A poll commissioned by the Brennan Center for Justice at New York University School of Law found, "that nearly 70 percent of Americans believe Super PAC spending will lead to corruption and that three in four Americans believe limiting how much corporations, unions, and individuals can donate to Super PACs would curb corruption."[30] An Ipsos poll in 2017 done at the request of the Center for Public Integrity found, "[g]iven the chance to change the campaign finance system, a majority of Americans (57%) would place limits on the amount of money super PACs can raise and

ing-spigot [https://perma.cc/M3MK-QF2K] ("Americans . . . are united in their view of the 2010 Supreme Court ruling that unleashed a torrent of political spending: They hate it.").

[27] Tiffany Demasters, *SLC residents believe corporations, politics, money should not mix, opinion poll shows*, FOX 13 (Oct. 8, 2013), https://fox13now.com/2013/10/08/slc-residents-believe-corporations-politics-money-should-not-mix-opinion-poll-shows/ [https://perma.cc/ZL2Z-2Z5E].

[28] Brad Bannon, *Executive Summary for National Survey on Corporate Reform*, BANNON COMMC'NS RESEARCH (Oct. 18, 2012), https://www.citizen.org/sites/default/files/bannon-communications-research-executive-summary.pdf [https://perma.cc/U6J8-TVUJ].

[29] *New Poll Shows Broad Support for "Fixing" Citizens United*, PEOPLE FOR THE AM. WAY (Feb. 18, 2010), http://www.pfaw.org/press-releases/new-poll-shows-broad-support-for-fixing-citizens-united/ [https://perma.cc/4TUX-RRFU].

[30] BRENNAN CTR. FOR JUST., NATIONAL SURVEY: SUPER PACS, CORRUPTION, AND DEMOCRACY 1 (Apr. 2012), https://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy [https://perma.cc/AF6L-APNP].

spend."[31] Another Pew poll found seventy-seven percent of respondents wanted limits on the money that individuals and groups could spend in election.[32]

Focus group studies by political scientists also offer a glimpse into the mindset of the American voter. Christopher Robertson, D. Alex Winkelman, Kelly Bergstrand, and Darren Modzelewski conducted an experiment where they asked forty-five people sitting in mock grand juries whether they would indict using fact scenarios that are not illegal. The fact scenario was: "a case of everyday politics in the USA, in which a regulated industry sought from a Congressman a deregulatory rider on a major piece of legislation, and the Congressman sought support for his reelection."[33] In the experiment, seventy-three percent of the mock grand jury was willing to indict.[34] This could indicate that the participants in this study's definition of bribery is broader than where the legal definition of bribery now stands.

In a different study to test the theory of whether independent spending can never corrupt (as the *Citizens United* majority assumed), Rebecca L. Brown and Andrew D. Martin asked study subjects about different levels of political spending. The results exhibited "a statistically significant effect. Respondents had the highest level of faith in democracy when $10,000 was the amount contributed, . . . with a contribution of $1 million evoking the lowest average level of faith in democracy."[35] As Brown and Martin concluded, "The [Supreme] Court has assumed that, in the absence of such corrupt bargains between candidates and donors, money in politics does not adversely affect the electorate. Our study suggests that this is incorrect . . . . Simply put, it does not take a bribe to corrode their [the American voters'] faith in the democratic process."[36] This study as well could indicate how out of touch the Supreme Court's definition of corruption has strayed from the intuitions of average citizens. Of course, with 325 million Americans, difference of opinion on corruption likely abounds. But the empirical evidence surveyed in polls and political science studies points towards most American caring a great deal about political corruption. And depending on how the

---

[31] IPSOS, MAJORITY OF AMERICANS SUPPORT CAMPAIGN FINANCE REFORM (Aug. 28–29, 2017), https://www.ipsos.com/sites/default/files/ct/news/documents/2017-08/CPI%20Topline%208%2029%202017.pdf [https://perma.cc/75X2-BWL9].

[32] Bradley Jones, *Most Americans want to limit campaign spending, say big donors have greater political influence*, PEW RESEARCH CTR. (May 8, 2018), http://www.pewresearch.org/fact-tank/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/ [https://perma.cc/A6R9-MF7A] ("And there is extensive support for reining in campaign spending: 77% of the public says "there should be limits on the amount of money individuals and organizations" can spend on political campaigns; just 20% say they should be able to spend as much as they want.").

[33] Christopher Robertson, D. Alex Winkelman, Kelly Bergstrand & Darren Modzelewski, *The Appearance and the Reality of Quid Pro Quo Corruption: An Empirical Investigation*, 8 J. LEGAL ANALYSIS 375, 395 (2016), https://academic.oup.com/jla/article/8/2/375/2502553 [https://perma.cc/NM27-EVKC].

[34] *Id.* at 397.

[35] Rebecca L. Brown & Andrew D. Martin, *Rhetoric and Reality: Testing the Harm of Campaign Spending*, 90 N.Y.U. L. REV. 1066, 1086 (2015).

[36] *Id.* at 1089–90.

question is framed, many American see a link between the role of money in politics and corruption in the political system.

II. How the Supreme Court Has Changed the Meaning of Corruption in Campaign Finance Jurisprudence

Against this backdrop of public concern about the integrity of American democracy, the Supreme Court has shifted radically, in just a dozen years, in its basic views of money in politics. A key rhetorical move the Roberts Supreme Court has made is redefining what counts as a compelling state interest to justify the constitutionality of campaign finance laws. The Roberts Court has taken a different stance on this area of the law than its predecessor, the Rehnquist Court. Below, I compare and contrast the Roberts Court's approach to money in politics with the Rehnquist Court's approach.

A. A Reasonable Take on Campaign Finance Reform from the Rehnquist Court

The Roberts Supreme Court (2005–present) has wreaked havoc on the meaning of the word corruption—nearly defining it away to meaninglessness—while simultaneously gutting nearly every campaign finance law it has touched. The Supreme Court wasn't always like this. The Roberts Court's approach to political corruption was a drastic change from the Rehnquist Court which preceded it. The Rehnquist Court (September 26, 1986 – September 3, 2005)[37] upheld campaign finance laws in many different cases, including in *Austin v. Michigan Chamber of Commerce*, which upheld a ban on corporate independent expenditures;[38] *McConnell v. Federal Election Commission*, which upheld nearly every new restriction in the Bipartisan Campaign Reform Act (BCRA), including bans on soft money and corporate electioneering communications;[39] *Nixon v. Shrink Missouri Government PAC*, which upheld Missouri's then-in-effect campaign finance laws;[40] and *Federal Election Commission v. Beaumont*, which upheld the Tillman Act's ban on direct corporate contributions.[41]

If the Roberts Court conceptualizes corruption as a personal problem, the Rehnquist Court thought of corruption as a systemic problem. The Rehnquist Court had an expansive view of corruption of the entire American political system, which encompassed the special access to lawmakers and at-

---

[37] *Justices 1789 to Present*, U.S. Supreme Court, https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/LBQ3-LZH9] (last visited Oct. 20, 2018).

[38] *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 652 (1990).

[39] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 224, 231 (2003) (leaving BCRA's core restrictions in place, while striking down a limit on minors' donating).

[40] *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 397 (2000).

[41] *See* Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 149 (2003).

tendant influence that large campaign donors often enjoy.[42] As the Rehnquist Court wrote, "[t]ake away Congress' authority to regulate the appearance of undue influence and 'the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.'"[43] The Rehnquist Court adopted the following far-reaching definition of corruption: "[c]orruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusion of money into their campaigns[.]"[44] The Court continued, opining that enormous political spending could create the appearance of corruption for the American electorate: "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters."[45]

The Rehnquist Court made capacious statements about why campaign finance regulations were good for a healthy, well-functioning democracy. For example, in *Beaumont* the Court articulated there is a "public interest in 'restrict[ing] the influence of political war chests funneled through the corporate form.' . . . '[S]ubstantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators.'"[46] Later in the opinion the Court referred to this as "war-chest corruption."[47]

These rulings from the Rehnquist Court upholding campaign finance laws were decided by a closely divided Court, which left them vulnerable to reversal.[48] If Justices Rehnquist and O'Connor were persuadable on the issue of regulating money in politics, their replacements—Justices Roberts and Alito—were dogmatically hostile to campaign finance reform.[49] Consequently, as soon as their replacements donned their robes, they joined three other conservative members of the court to dismantle campaign finance statutes and the precedent that had protected them.

---

[42] *See* Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance after* Citizens United, 20 CORNELL J.L. & PUB. POL'Y 643, 644 (2011); Torres-Spelliscy, *Time Suck*, *supra* note 10, at 280.

[43] *McConnell*, 540 U.S. at 144 (quoting *Shrink Mo. Gov't PAC*, 528 U.S. at 390).

[44] *Shrink Mo. Gov't PAC*, 528 U.S. at 389 (quoting Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985)).

[45] *Id.* at 395.

[46] *Beaumont*, 539 U.S. at 154 (citation omitted).

[47] *Id.* at 155.

[48] *See* Derigan Silver & Dan V. Kozlowski, *Preserving the Law's Coherence:* Citizens United v. FEC *and* Stare Decisis, 21 COMM. L. & POL'Y 39, 79–85 (2016) (arguing that *Citizens United* misapplied *stare decisis*).

[49] *See* Torres-Spelliscy, *The Democracy We Left Behind*, *supra* note 10, at 116–17 (noting "Justice O'Connor had provided swing votes to uphold campaign finance regulations").

B. The Hostility to Campaign Finance Reforms by the Roberts Court

As will be evident below, the conservative majority on the Roberts Court has reduced the justification for campaign finance reform to merely *quid pro quo* corruption. And it has even restricted what counts as a *quid pro quo*. The 180 degree turn from the Rehnquist Court to the Roberts Court on the matter of campaign finance was nearly immediate. The Supreme Court went from upholding nearly all campaign finance laws it reviewed under Chief Justice Rehnquist's leadership to striking down nearly all campaign finance laws it reviewed under Chief Justice Roberts' leadership.[50] By contrast with its predecessor, the Roberts Court strangely equates spending money with voting[51] and then equates the ability to raise money with fame.[52] At oral arguments Justice Alito has shown an absurd tolerance for letting more money into politics. For instance, in the oral argument in *McCutcheon* (a case that challenged the $123,000 limit on giving to candidates and political parties), in response to the Solicitor General saying: "Justice Alito, . . . circumvention is not the only problem. The delivery of the solicitation and receipt of these very large checks is a problem, a direct corruption problem . . . ."[53] Justice Alito responded sarcastically: "I just don't understand that. You mean, at the time when the person sends the money to this hypothetical joint fundraising committee, there is a corruption problem immediately, even though what if they just took the money and they burned it? That would be a corruption problem there?"[54] As any serious student of politics knows, money in elections isn't burned. It is spent on campaign salaries, political consultants, web designers, yard signs, door hangers, pins, bumper stickers, office space, rally spaces, bunting, balloons, caterers, as well as print, broadcast, and internet political ads. Justice Alito's hypothetical seems willfully blind to how political campaigns actually work.

In another example of how conservative Justices view money in politics on the Roberts Court, Justice Scalia, in the *Randall v. Sorrell* oral argument, equated money with speech. He said: "you're not talking about money here. You're talking about speech. So long as all that money is going to campaigning, you're talking about speech."[55] This rhetorical move of equating money and speech is repeated in decisions by the Roberts Court and undergirds its arguments that money is somehow good for democracy. The idea that infus-

---

[50] David Earley & Avram Billig, *The Pro-Money Court: How the Roberts Supreme Court Dismantled Campaign Finance Law*, BRENNAN CTR. JUSTICE (Apr. 2, 2014), https://www.brennancenter.org/analysis/pro-money-supreme-court [https://perma.cc/72D9-DW4C].

[51] *See* McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 191 (2014).

[52] *See* Davis v. Fed. Election Comm'n, 554 U.S. 724, 742 (2008) ("Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name.").

[53] Transcript of Oral Argument at 50–51, McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014) (No. 12-536).

[54] *Id.* at 51.

[55] Transcript of Oral Argument at 50, Randall v. Sorrell, 548 U.S. 230 (2015) (No. 04-1528).

ing money into the electoral process is beneficial seems akin to the old belief that lead paint was good for you; and hence lead paint was used in hospitals and on children's toys.[56] Only later did officials and the public at large realize lead paint is actually toxic.[57]

The Roberts Court sees campaign finance reform as negatively impacting American democracy, from acting as incumbency protection plans[58]—an idea that the data do not support[59]—to silencing First Amendment speakers,[60] to discriminating against the rich.[61] While equality is prized in other parts of election law, like in the one-person-one-vote jurisprudence,[62] or in even *Bush v. Gore* that demanded equality in counting votes,[63] equality is an anathema to the Roberts Court in the area of campaign finance, as the Court made clear in its most recent campaign finance case *McCutcheon*: "No matter how desirable it may seem, it is not an acceptable governmental objective to 'level the playing field,' or to 'level electoral opportunities,' or to 'equaliz[e] the financial resources of candidates.' The First Amendment prohibits such legislative attempts to 'fine-tun[e]' the electoral process, no matter how well intentioned."[64]

The Roberts Supreme Court has adopted an antagonistic stance towards campaign finance reform[65] from its very first term.[66] The Roberts Court's first foray into campaign finance deregulation happened in 2006 when it ruled that Vermont's campaign finance law with expenditure limits and low contribution limits was unconstitutional.[67] This was followed by ruling that a part of Bipartisan Campaign Reform Act (BCRA), called the

---

[56] *See* Laura Bliss, *The Long, Ugly History of the Politics of Lead Poisoning*, CITY LAB (Feb. 9, 2016), https://www.citylab.com/equity/2016/02/the-long-ugly-history-of-the-politics-of-lead-poisoning/461871/ [https://perma.cc/FSF7-RQJN].

[57] *See* David Rosner & Gerald Markowitz, *Why It Took Decades of Blaming Parents Before We Banned Lead Paint*, ATLANTIC (Apr. 22, 2013), https://www.theatlantic.com/health/archive/2013/04/why-it-took-decades-of-blaming-parents-before-we-banned-lead-paint/275169/ [https://perma.cc/5ZVC-AHZ7].

[58] *See* Randall v. Sorrell, 548 U.S. 230, 248 (2006).

[59] *See* CIARA TORRES-SPELLISCY ET AL., BRENNAN CTR. FOR JUST., ELECTORAL COMPETITION AND LOW CONTRIBUTION LIMITS 2 (May 2009), https://www.brennancenter.org/sites/default/files/legacy/publications/Electoral.Competition.pdf [https://perma.cc/997R-X6TY].

[60] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 326 (2010) ("We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker."); *see also* McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 229 (2014).

[61] *See* Davis v. Fed Election Comm'n, 128 S. Ct. 2762, 2764 (2008).

[62] *See generally* Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

[63] *See* Bush v. Gore, 531 U.S. 98, 104–05 (2000).

[64] *McCutcheon*, 572 U.S. at 207.

[65] *See* Torres-Spelliscy, *Time Suck*, *supra* note 10, at 285 (2018) ("[F]undraising pressures for incumbents have likely worsened because the Supreme Court has loosened restrictions on campaign finance laws since 2006.").

[66] *See* Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 85–100 (2016) (arguing the Roberts Supreme Court is the most free-speech-protective Court in memory).

[67] *See* Randall v. Sorrell, 548 U.S. 230 (2006) (invalidating VT. STAT. ANN. tit. 17, § 2801 (West 1997)).

Millionaire's Amendment, was unconstitutional in *Davis v. Federal Election Commission*.[68] Then another part of BCRA about electioneering communications was constricted with an unlikely reading of how it should apply in *Federal Election Commission v. Wisconsin Right to Life, Inc* (*WTRL II*).[69] The Court also cut the Arizona public finance law into tatters in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.[70] In 2010, the Roberts Court had a blockbuster case in *Citizens United v. Federal Election Commission* that allowed corporations an unfettered ability to spend money on independent ads in all American elections.[71] In the next term, the Supreme Court summarily reversed the Montana Supreme Court for ignoring *Citizens United*.[72] This was followed by *McCutcheon v. Federal Election Commission*,[73] which made it easier for wealthy individuals to spend money on more federal campaigns.[74] The only exceptions to this hostility to campaign finance laws came in *Bluman v. Federal Election Commission*,[75] which summarily upheld the ban on foreigners' spending in elections,[76] and in *Williams-Yulee v. Florida Bar*,[77] which upheld a ban on the personal solicitation of campaign funds by judicial candidates.[78]

The Roberts Court's conservative majority has a different ideological view about money in politics than previous iterations of the Supreme Court; and it certainly holds a contrasting view from their liberal colleagues on the bench with them.[79] If other Supreme Courts in the past thought of money as threatening democratic integrity; for the conservative majority of the Roberts

---

[68] *See* 554 U.S. 724, 724 (2007).

[69] *See* 551 U.S. 449, 476 (2007).

[70] *See* 564 U.S. 721, 728 (2011).

[71] *See* 558 U.S. 310, 365 (2009); *see also* Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 889–90 (2016) (arguing that *Citizens United* cannot be defended by a disciplined application of the originalist method of constitutional interpretation because it is at odds with the historical understanding of corporations' limited, and specially granted, rights as reflected in federal and state legislation and judicial application); Melina Constantine Bell, *Citizens United, Liberty, and John Stuart Mill*, 30 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 2 (2016) (arguing that in *Citizens United*, the Court held itself out as advancing the Anglo-American free speech tradition represented by John Stuart Mill, but it instead undermined the liberal tradition of free expression championed by Mill).

[72] *See* Am. Tradition P'ship, Inc. v. Bullock, 567 U.S. 516, 516 (2012).

[73] *See* 572 U.S. 185, 192 (2004).

[74] *Id.* (quoting Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 360 (2010)) ("Ingratiation and access . . . are not corruption."); *see also* Michael D. Gilbert & Emily Reeder, *Aggregate Corruption*, 104 KY. L.J. 651 (2016) ("Frequency was previously addressed by aggregate limits, ensuring contributors were only able to cull favor with a limited number of candidates, but with the removal of aggregate limits the overall social cost of quid-pro-quo corruption will increase.").

[75] *See* Williams-Yulee v. Florida Bar, 135 S. Ct. 1656 (2015).

[76] *Id.*

[77] *See* Bluman v. Fed. Election Comm'n, 565 U.S. 1104 (2012).

[78] *Id.*

[79] *See infra*.

Court, money is at least benign or even a laudatory addition to the democratic process.[80]

As summarized above, the Roberts Supreme Court has been hostile to campaign finance laws since its very first term. Below I explain in greater detail, case by case how the Court has changed campaign finance law by narrowing corruption again and again. The first chance for the Roberts Court to expose its new hostility to campaign finance arrived in *Randall*, a review of Vermont's unique campaign finance law, which contained expenditure limits and the lowest contribution limits in the nation.[81] But the *Randall* case would be the last campaign finance case in the Roberts Court written by a liberal Justice—in this instance by Justice Breyer. Arguably, Justice Breyer wrote the opinion carefully to do as little harm to existing campaign finance jurisprudence as possible while striking down Vermont's campaign finance law—both its contribution limits and its expenditure limits.

The change in tone around the meaning of corruption is not in Justice Breyer's opinion for the Court, but rather in Justice Kennedy's concurrence. In his *Randall* concurrence in 2006, Justice Kennedy began to plant the seeds of doubt about the conception of political corruption that would be reaped in future cases. As Justice Kennedy wrote: "[t]here is simply no way to calculate just how much money a person would need to receive before he would be corrupt or perceived to be corrupt (and such a calculation would undoubtedly vary by person)."[82] This type of language was dismissive of corruption as a real problem, and sentiments like this would move to center stage in later cases. Meanwhile, Justice Breyer has never since been given the pen in a campaign finance case. The Roberts Court's rebranding of corruption had begun ever so quietly.

One year later, *Davis v. Federal Election Commission*,[83] with Justice Alito writing for the Court, struck down the Millionaire's Amendment—a mechanism to help candidates facing a self-financed rich opponent to raise enough money to stay competitive by raising the contribution limit for the non-self-financed candidate.[84] Instead of thinking of the Millionaire's

---

[80] *Compare* Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 163 ("[T]he corporate PAC option allows for corporate political participation without the temptation to use corporate funds for political influence . . . ."), United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers 352 U.S. 567, 576 (1957) (quoting 65 Cong. Rec. 9507–08 (1924)) ("One of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions."), United States v. Cong. of Indus. Org., 335 U.S. 106, 113 (1948) (explaining Taft-Hartley was motivated by "the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties . . ."), *and* Burroughs v. United States, 290 U.S. 534, 545 (1934) ("[The U.S. government] undoubtedly . . . possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.") *with* the Roberts Court decisions discussed *infra* pp. 10–18.

[81] *See* Randall v. Sorrell, 548 U.S. 230 (2006) (invalidating VT. STAT. ANN. tit. 17, § 2801 (West 1997)).

[82] *Id.* at 273 (Kennedy, J., concurring in the judgement).

[83] 554 U.S. 724 (2007).

[84] *See id.* at 724.

Amendment as a way to enable the rich candidate and the not so rich candidate alike to have a fair election that is not entirely pre-determined by their relative wealth, Justice Alito (and the other conservatives on the Court) found the law's allowance for the non-wealthy candidate to raise more money against a self-financed candidate was unconstitutional, writing: "[t]he burden imposed by [the Millionaire's Amendment] on the expenditure of personal funds is not justified by any governmental interest in eliminating corruption or the perception of corruption. . . . [The Millionaire's Amendment], by discouraging use of personal funds, disserves the anticorruption interest."[85] Justice Alito thereby rejected the government's asserted interest in leveling the playing field between wealthy and non-wealthy candidates: "'Congress enacted [the Millionaire's Amendment],' the Government writes, 'to reduce *the natural advantage* that wealthy individuals possess in campaigns for federal office.' . . . [P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances . . . ."[86] Thus, *Davis* takes the legislative justification of "leveling the playing field" among rich and poor candidates off the table as a compelling state interest which could validate the adoption of future campaign finance laws. This is particularly limiting since many campaign finance advocates point to the ability of campaign finance laws to "level the playing" field as one of the reasons why electorates or legislatures should adopt laws regulating money in politics in the first place.[87]

In his *Davis* dissent, Justice Stevens critiqued the majority's holding that preventing corruption or the appearance of corruption are the only permissible justifications for campaign finance laws. As Justice Stevens explained, "[t]he Court is simply wrong when it suggests that the 'governmental interest in eliminating corruption or the perception of corruption,' is the sole governmental interest sufficient to support campaign finance regulations."[88] Moreover, Justice Stevens continued, *stare decisis* pointed in the other direction about what previously counted as a compelling state interest to justify campaign finance laws: "we [the Supreme Court] have long recognized the strength of an independent governmental interest in reducing both the influence of wealth on the outcomes of elections, and the appearance that wealth alone dictates those results. In case after case, we have held

---

[85] *Id.* at 740–41.

[86] *Id.* at 741 (emphasis in the original) (citations omitted).

[87] *See, e.g.*, Greg Brophy & B.J. Nikkel, *Level the playing field and close the millionaire loophole*, THE DAILY SENTINEL (Sept. 23, 2018), https://www.gjsentinel.com/opinion/columns/level-the-playing-field-and-close-the-millionaire-loophole/article_97cae59c-bed1-11e8-bbd1-10604b9f1ff4.html [https://perma.cc/TGN9-CU6T]; Hazel Dukes & Denora Getachew, *State campaign finance reform would level the playing field*, AMSTERDAM NEWS (Mar. 20, 2014, 1:48 PM), http://amsterdamnews.com/news/2014/mar/20/state-campaign-finance-reform-would-level-playing-/?page=1 [https://perma.cc/L56A-BY2E]; Martin Frost, *Congress can level the playing field on campaign finance*, THE HILL (Feb. 1, 2010, 8:13 PM), https://thehill.com/opinion/op-ed/79069-congress-can-level-the-playing-field-on-campaign-finance [https://perma.cc/CV9A-ZD48].

[88] *Davis*, 554 U.S. at 754–56 (Stevens, J., dissenting) (citations omitted).

that statutes designed to protect against the undue influence of aggregations of wealth on the political process—where such statutes are responsive to the identified evil—do not contravene the First Amendment."[89] Justice Stevens thus based his critique on the conservative majority's cherry-picking supportive precedents, whilst ignoring cases that contradicted them.

In *Federal Election Commission v. Wisconsin Right to Life* ("*WRTL II*"),[90] the Court continued the dismantlement of the Bipartisan Campaign Reform Act (BCRA) that it had started in *Davis*. This time the Court considered a different part of the law that allowed for the regulation of "electioneering communications" or what are sometimes referred to as "sham issue ads."[91] Under BRCA, "electioneering communications" are defined as broadcast ads that mention a federal candidate right before a federal election, cost at least $10,000, and reach at least 50,000 constituents.[92] In *WRTL II*, the Supreme Court in 2007 found that certain political ads from a nonprofit corporation (Wisconsin Right to Life) could not be constitutionally regulated, even though they fit the statutory definition of regulable "electioneering communications" campaign ads. Writing for the majority of the Court, Chief Justice Roberts stated:

> None of the interests that might justify regulating WRTL's ads are sufficiently compelling . . . Issue ads like WRTL's are not equivalent to contributions, and the corruption interest cannot justify regulating them. A second possible compelling interest lies in addressing 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.' . . . [But] [t]his interest cannot be extended further to apply to genuine issue ads like WRTL's, because doing so would call into question this Court's holdings that the corporate identity of a speaker does not strip corporations of all free speech rights.[93]

---

[89] *Id.* (Stevens, J., dissenting) (citing Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990) (upholding statute designed to combat "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas"); Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986) ("Th[e] concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas . . . . Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace[.]").

[90] 551 U.S. 449 (2007).

[91] *See Primer on Issue Ads Issue Advocacy: Electioneering Issue Advocacy vs. Genuine Issue Advocacy*, PUB. CITIZEN, https://www.citizen.org/article/primer-issue-ads [https://perma.cc/T6Z4-8JZJ] (last visited October 8, 2018).

[92] *See* TORRES-SPELLISCY, TRANSPARENT ELECTIONS AFTER *Citizens United*, *supra* note 10.

[93] *Wis. Right to Life, Inc.*, 551 U.S. at 452 (citations omitted).

Additionally, the *WRTL II* Court seemed almost petulant in claiming that *McConnell* from just four years prior, which had upheld BCRA's definition of "electioneering communications," had gone too far in its conception of what could corrupt the political system, stating in a harrumph: *"Enough is enough*."[94]

The Court hereby excused WRTL's ads from regulation but, in their concurrence, Justices Scalia, Kennedy, and Thomas piled on, adding: "[t]he 'corruption' to which the Court repeatedly referred was of the '*quid pro quo*' variety, whereby an individual or entity makes a contribution or expenditure in exchange for some action by an official."[95] This language is a particularly restrictive way of thinking about the issue of money in politics.

Justice Scalia in his *WRTL II* concurrence compared regulating campaign speech to regulating pornography:

> It will not do to say that this burden must be accepted—that WRTL's . . . constitutionally protected speech can be constrained—in the necessary pursuit of electoral "corruption." We have rejected the 'can't-make-an-omelet-without-breaking-eggs' approach to the First Amendment, even for the infinitely less important (and less protected) speech category of virtual child pornography . . . . [In *Ashcroft v. Free Speech Coalition*, t]he Court rejected the principle that protected speech may be banned because it is difficult to distinguish from unprotected speech. "[T]hat protected speech may be banned as a means to ban unprotected speech," it said, "turns the First Amendment upside down." The same principle [that applied to pornography] must be applied here [to political speech].[96]

Thus, while these bodies of law could be easily distinguished, according to Justice Scalia, if the government cannot regulate certain virtual child pornography, then it should not be able to regulate certain potentially corrupting political ads either.

In his dissent in *WRTL II*, Justice Souter, writing for the liberal minority, argued that a more expansive view of political corruption was more appropriate than the narrow conception embraced by the majority. Justice Souter lamented that just a few years earlier the Supreme Court had embraced a broader definition of political corruption:

> Neither Congress's decisions nor our own have understood the corrupting influence of money in politics as being limited to outright bribery or discrete *quid pro quo*; campaign finance reform has instead consistently focused on the more pervasive distortion of electoral institutions by concentrated wealth, on the special access

---

[94] *Id.* at 478–79 (emphasis added).

[95] *Id.* at 486 (Scalia, J., concurring).

[96] *Id.* at 494 (Scalia, J., concurring) (citations omitted) (citing Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002)).

> and guaranteed favor that sap the representative integrity of American government and defy public confidence in its institutions.[97]

But alas, the *WRTL II* majority thereby ignored a century of precedents which pointed in the opposite direction.

The Roberts Court accelerated its deregulatory pace in *Citizens United*, a case that was argued twice.[98] *Citizens United* concluded five to four that corporations (and by logical extension unions) had a First Amendment right to spend an unlimited amount on political ads in any American election.[99] To reach this result, the Court invalidated parts of two federal statutes (BCRA and the Taft-Hartley Act) and all state laws that had previously banned expenditures by corporations. In *Citizens United*, Justice Kennedy, writing for the majority, relied on *Buckley v. Valeo* in narrowing the definition of corruption, thereby skipping and invalidating intervening case law that held to the contrary.[100] *Buckley v. Valeo* is a case from 1976 which upheld most of the Federal Election Campaign Act of 1974 (FECA '74), a post-Watergate reform.[101] In *Buckley*, the Court invalidated expenditure limits for individuals, but upheld the creation of the Federal Election Commission; contribution limits, disclosures, and disclaimers; and presidential public financing.[102] Justice Kennedy leaned heavily on *Buckley*'s precedent to justify the end result of *Citizens United*. For example, Justice Kennedy wrote: "The *Buckley* Court recognized a 'sufficiently important' governmental interest in 'the prevention of corruption and the appearance of corruption.' This followed from the Court's concern that large contributions could be given 'to secure a political *quid pro quo*.'"[103] Justice Kennedy continued:

> The practices *Buckley* noted would be covered by bribery laws, if a *quid pro quo* arrangement were proved. The Court, in consequence, has noted that restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements. The *Buckley* Court . . . did not extend this rationale to independent expenditures, and the Court does not do so here.[104]

Justice Kennedy concluded for the Court in *Citizens United*: "[l]imits on independent expenditures [by corporations], . . . have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the [corporate] speech here in question."[105] And thus Justice Kennedy took the *Buck-*

---

[97] *Id.* at 522 (Souter, J., dissenting).
[98] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
[99] *See id.* at 355–56.
[100] *Id.* at 344.
[101] *See* 424 U.S. 1, 143 (1976).
[102] *See id.*
[103] *See Citizens United*, 558 U.S. at 344 (citation omitted).
[104] *Id.* at 356–57 (citation omitted).
[105] *Id.* at 357.

ley precedent that applied to human beings, and extended the logic to non-human corporate entities. Following Justice Kennedy's logic, if expenditures from humans were not sufficiently corrupting in *Buckley*, then expenditures from corporations were not sufficiently corrupting in *Citizens United*.

Justice Kennedy tipped his hand in his *Randall* concurrence about how he really wasn't all that concerned about political corruption.[106] Justice Kennedy's failure of the imagination about the how politics really works was also evident in the *Citizens United* majority when he wrote that: "we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[107] According to Justice Kennedy's strange world view: "[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy."[108] He thereby turned an empirical question into a statement of law. If the polling that started this piece in Part I is considered, Justice Kennedy's views embodied in *Citizens United* have largely been rejected by most Americans.

Justice Stevens' view of how politics can and should operate could not have been more different than Justice Kennedy's descriptive and normative views. Justice Stevens in his dissent in *Citizens United* argued that the campaign finance laws at issue in the case "target a class of communications [from corporations] that is especially likely to corrupt the political process . . . ."[109] For Justice Stevens, there were multiple reasons that justified regulating money in politics including "Congress' legitimate interest in preventing the money that is spent on elections from exerting an "'undue influence on an officeholder's judgment'" and from creating "'the appearance of such influence,'" beyond the sphere of *quid pro quo* relationships."[110]

As Justice Stevens explained, corruption exists on a spectrum; it is not a single act:

> Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics. It certainly does not accord with the record Congress developed in passing BCRA, *a record that stands as a remarkable testament to the energy and ingenuity with*

---

[106] *See* Randall v. Sorrell, 548 U.S. 230, 264–65 (2006).
[107] *Citizens United*, 558 U.S. at 357.
[108] *Id.* at 360.
[109] *Id.* at 419 (Stevens, J., concurring in part and dissenting in part).
[110] *Id.* at 447 (Stevens, J., concurring in part and dissenting in part) (citations omitted).

> *which corporations, unions, lobbyists, and politicians may go about scratching each other's backs*. . . .[111]

He added: "Unlike the majority's myopic focus on *quid pro quo* scenarios . . . , this broader understanding of corruption has deep roots in the Nation's history. 'During debates on the earliest [campaign finance] reform acts, the terms "corruption" and "undue influence" were used nearly interchangeably.'"[112]

Justice Stevens' dissent noted that in *McConnell* from 2003 the Court had upheld the very law—the Bipartisan Campaign Reform Act—that *Citizens United* was striking down:

> "When we asked in *McConnell* whether a compelling governmental interest justifie[d BCRA], we found the question easily answered [in the affirmative]: . . . BCRA . . . is faithful to the compelling governmental interests in preserving the integrity of the electoral process, preventing corruption, . . . sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government, and maintaining the individual citizen's confidence in government."[113]

Yet, the majority ignored *stare decisis*.

For Justice Stevens, his conservative colleagues on the bench sorely underestimated the damage that can be done to the faith of average voters in a political process rife with undue influence by large political spenders. As Justice Stevens explained,

> Our undue influence cases have allowed the American people to cast a wider net through legislative experiments designed to ensure, to some minimal extent, that officeholders will decide issues . . . on the merits or the desires of their constituencies, and not according to the wishes of those who have made large financial contributions—or expenditures—valued by the officeholder. When private interests are seen to exert outsized control over officeholders solely on account of the money spent on (or withheld from) their campaigns, the result can depart so thoroughly from what is pure or correct in the conduct of Government . . . .[114]

Justice Stevens noted the corrupting effect corporate-sponsored political ads could have in the American political process. According to him, corporate independent expenditures had become "essentially interchangeable with

---

[111] *Id*. at 447–48 (Stevens, J., concurring in part and dissenting in part) (emphasis added).

[112] *Id*. at 451 (Stevens, J., concurring in part and dissenting in part) (citing Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 601 (2008)).

[113] *Id*. at 440 (Stevens, J., concurring in part and dissenting in part) (quotation marks omitted).

[114] *Id*. at 449–50 (Stevens, J., concurring in part and dissenting in part) (quotation marks and citation omitted).

direct contributions in their capacity to generate *quid pro quo* arrangements. In an age in which money and television ads are the coin of the campaign realm, it is hardly surprising that corporations deployed these ads to curry favor with, and to gain influence over, public officials."[115] And in a dissent filled with poignant zingers he added, "*[a] democracy cannot function effectively when its constituent members believe laws are being bought and sold*."[116] Again, when polling after *Citizens United* is considered,[117] Justice Stevens hit closer to the truth than the majority did.

Building on the hostility to campaign finance reform in *Randall*, *Davis*, *WRTL II*, and *Citizens United*, the Roberts Court then set its sights on Arizona when it granted cert in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, a challenge to the state's public financing system.[118] Arizona's public financing system allowed for extra rescue funds to a candidate who was running "clean" using only public financing moneys, if their opponent spent over certain thresholds, or if independent spending against the clean candidate went over certain thresholds.[119] This Arizona system was intended to prevent publicly financed candidates from becoming sitting ducks who could be roundly outspent without any ability to fight back.[120]

When Arizona's public financing system was challenged as violating the First Amendment, lawyers for the State justified the law by fitting it into the Roberts Court's crabbed vision of preventing *quid pro quo* corruption.[121] The Court nonetheless rejected this framing of the law. Writing for the majority in *Bennett*, Chief Justice Roberts insisted that "when confronted with a choice between fighting corruption and equalizing speech, the drafters of the matching funds provision chose the latter."[122] The *Bennett* Court ruled the rescue funds in the Arizona public financing system were unconstitutional.[123]

Chief Justice Roberts admonished the *Bennett* dissenters that democracy is not a game: "'[l]eveling the playing field' can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the 'unfettered interchange of ideas'—not whatever the State may

---

[115] *Id.* at 455 (Stevens, J., concurring in part and dissenting in part).

[116] *Id.* (Stevens, J., concurring in part and dissenting in part) (emphasis added).

[117] *See* Demasters, *supra* note 27.

[118] *See Citizens United*, 564 U.S. at 721.

[119] *See* ARIZ. REV. STAT. ANN. § 16-940 (West, Westlaw through the First Special and Second Regular Session of the Fifty-Third Legislature (2018)).

[120] *Arizona Citizens Clean Elections Act, Proposition 200 (1998)*, BALLOTPEDIA, https://ballotpedia.org/Arizona_Citizens_Clean_Elections_Act,_Proposition_200_(1998) [https://perma.cc/9GPV-FGBR] (quoting former Gov. Rose Mofford: "The Clean Elections Act reduces special interest influence, limits campaign spending, and enables candidates without access to wealth to run for office, waging a battle of ideas rather than bank accounts. . . . It's time for Arizona voters to vote "YES" for Clean Elections reform and restore the principles of fairness, equality, and integrity to our democracy.").

[121] *See generally* Brief of State Respondents, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011) (Nos. 10-238, 10-239), 2011 WL 547486.

[122] *Bennett*, 564 U.S. at 749 (citations omitted).

[123] *See id.* at 762–63.

view as fair."[124] The dissent by Justice Kagan shot right back at him, "Arizonans deserve better. Like citizens across this country, Arizonans deserve a government that represents and serves them all. And no less, Arizonans deserve the chance to reform their electoral system so as to attain that most American of goals. Truly, democracy is not a game. I respectfully dissent."[125]

Justice Kagan's dissent in *Bennett* was more realistic about American political history noting that "[c]ampaign finance reform over the last century has focused on one key question: how to prevent massive pools of private money from corrupting our political system. If an officeholder owes his election to wealthy contributors, he may act for their benefit alone, rather than on behalf of all the people."[126] In so doing, Justice Kagan echoed the sentiments of the majority in cases decided by the Rehnquist Court.[127]

As Justice Kagan's dissent in *Bennett* recognized, the Arizona public financing system was enacted by the people of Arizona in response to actual political corruption in the AzScam scandal, not some imagined or hypothetical problem.[128] AzScam was a corruption scandal involving cash bribes, wherein seven Arizona legislators were arrested and one tenth of the Arizona legislature resigned from office.[129] "Arizona had every reason to try to develop effective anti-corruption measures. . . . [T]he State suffered 'the worst public corruption scandal in its history.' In . . . 'AzScam,' nearly 10% of the State's legislators were caught accepting campaign contributions or bribes in exchange for supporting a piece of legislation. . . . [Then] they adopted . . .

---

[124] *Id.* at 750.

[125] *Id.* at 785 (Kagan, J., dissenting).

[126] *Id.* at 757 (Kagan, J., dissenting); *see generally* ROBERT E. MUTCH, BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM (2014); Jaime Fuller, *From George Washington to Shaun McCutcheon: A brief-ish history of campaign finance* reform., WASH. POST (Apr. 3, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/04/03/a-history-of-campaign-finance-reform-from-george-washington-to-shaun-mccutcheon/?noredirect =on&utm_term=.5bedeb787e38 [https://perma.cc/8KS2-GURA]; Torres-Spelliscy, *How Much Is an Ambassadorship?*, *supra* note 10, at 71 (discussing the history of campaign finance reform).

[127] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 150 (citations omitted) (finding "[m]any of the 'deeply disturbing examples' of corruption cited by this Court in *Buckley* to justify FECA's contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials"); Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 441 (2001) ("Colorado Republican II") (acknowledging that corruption extends beyond explicit cash-for-votes agreements to "undue influence on an officeholder's judgment"); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) ("Money is property; it is not speech."); *Shrink Mo. Gov't PAC*, 528 U.S. at 389 (contribution limits may be used to "address the power of money 'to influence governmental action' in ways less 'blatant and specific' than bribery") (quoting Buckley v. Valeo, 424 U.S. 1, 28 (1976); Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010), (the "corrosive and distorting effects of immense aggregations of [corporate] wealth" justified a ban on corporate independent expenditures).

[128] *See Bennett,* 546 U.S. at 761 (Kagan, J., dissenting).

[129] Alyssa Newcomb, *Caught on Tape: Massive Arizona Sting Forced Reforms*, ABC NEWS (Oct. 25, 2010), https://abcnews.go.com/Blotter/caught-tape-massive-arizona-sting-forced-reforms/story?id=11949443 [https://perma.cc/V3FY-G77J].

public funding . . . ."[130] Thus, to Justice Kagan, the State was constitutionally justified in crafting a public financing system to prevent another AzScam scale fiasco.

Moreover, Justice Kagan felt that the *Bennett*'s conservative majority was holding Arizona to a new double standard. As she said, "[t]his Court . . . has never said that a law restricting speech (or any other constitutional right) demands two compelling interests. One is enough. And this statute has one: preventing corruption."[131] For Justice Kagan, the Arizona public financing system was, as the State's attorneys had argued, intended to lawfully prevent political corruption: "public financing 'reduce[s] the deleterious influence of large contributions on our political process.' When private contributions fuel the political system, candidates may make corrupt bargains to gain the money needed to win election. And voters . . . may lose faith that their representatives will serve the public's interest."[132] But alas, the majority could not or would not see the wisdom of the design of the Arizona public financing system.

In 2012, the Supreme Court summarily reversed the Montana Supreme Court without even granting oral argument in *American Tradition Partnership v. Bullock*.[133] Montana had tried to keep its century-old corporate expenditure ban in place despite *Citizens United*. The Court would have none of it and invalidated the Montana ban.[134] In a dissent from the summary reversal written by Justice Breyer for the liberal minority, he argued "Montana's experience, like considerable experience elsewhere since the Court's decision in *Citizens United,* casts grave doubt on the Court's supposition that independent expenditures do not corrupt or appear to do so."[135]

In *McCutcheon* one can see a stark example of the contrasting world views between the conservative and liberal wings of the Supreme Court. For Chief Justice Roberts, money is as beneficial to democracy as voting.[136] For the dissent in *McCutcheon*, money is a potential danger to democracy.[137] Mr. McCutcheon challenged the aggregate biennial limits under Federal Election Campaign Act (FECA) of $123,000. He wished to donate $1,776 to a number of federal candidates, but because of the aggregate limit he could not give $1,776 to every candidate that he wanted to support.[138] Chief Justice Roberts opens *McCutcheon* thusly:

> There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves,

[130] *Bennett,* 546 U.S. at 761 (Kagan, J., dissenting).
[131] *Id*. at 783 (Kagan, J., dissenting).
[132] *Id*. at 776–77 (Kagan, J., dissenting) (citations omitted).
[133] *See* 567 U.S. 516, 517 (2012).
[134] *See id.*
[135] *See id* at 2491–92 (Breyer, J., dissenting).
[136] *See* McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014).
[137] *See id.* at 235–39 (Beyer, J., dissenting).
[138] *See id.* at 194–95.

> vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign. This case is about the last of those options. The right to participate in democracy through political contributions is protected by the First Amendment . . . . [Congress] may not regulate contributions simply to reduce the amount of money in politics. . . .[139]

One of the things that is so jarring about this passage from the Chief Justice is its equating voting and money.

The Chief Justice in *McCutcheon* seems particularly tone deaf about the common sense meaning of political corruption, writing: "government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. 'Ingratiation and access . . . are not corruption.' They embody a central feature of democracy. . . ."[140] So to the Chief Justice the dependence that Congress or the President has on their large political donors is only natural.

In *McCutcheon*, Chief Justice Roberts continued to insist that only *quid pro quo* corruption counted as an acceptable reason to enact campaign finance reform. He stated campaign finance regulations must target "'*quid pro quo*' corruption or its appearance: That Latin phrase captures the notion of a direct exchange of an official act for money. 'The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.' Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government 'into the debate over who should govern.' And those who govern should be the *last* people to help decide who *should* govern."[141] The Chief Justice also narrowed what *quid pro quo* meant in the following way: "Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption."[142]

Chief Justice Roberts in *McCutcheon* conceptualized money in politics as a natural and harmless outgrowth of political parties: "When donors furnish widely distributed support, . . . leaders of the party or cause may feel particular gratitude. That gratitude stems from the basic nature of the party system, in which party members join together to further common political beliefs, and citizens can choose to support a party because they share some, most, or all of those beliefs. To recast such shared interest, standing alone, as an opportunity for *quid pro quo* corruption would dramatically expand government regulation of the political process."[143]

McCutcheon was notable because it was the first time that the Supreme Court has specifically overruled a holding from *Buckley*. *Buckley* upheld aggregate limits on federal campaign contributions.[144] *McCutcheon* ruled the

---

[139] *Id.* at 191 (citations omitted).
[140] *Id.* at 192 (citations omitted).
[141] *Id.* (emphasis in the original) (citations omitted).
[142] *Id.* at 208.
[143] *Id.* at 226 (citation omitted).
[144] *See* Buckley v. Valeo, 424 U.S. 1, 83 (1976).

same aggregate limits were unconstitutional.[145] This is different from the previous cases like *Randall*[146] and *Citizens United*[147] which purported to be faithful with *Buckley*. The Chief Justice wrote in *McCutcheon*, "we conclude that the aggregate limits on contributions do not further the only governmental interest this Court accepted as legitimate in *Buckley*. They instead intrude without justification on a citizen's ability to exercise 'the most fundamental First Amendment activities.'"[148]

In his dissent in *McCutcheon*, Justice Breyer calls out the limited vision of corruption by the plurality: "The plurality's first claim—that large aggregate contributions do not 'give rise' to 'corruption'—is plausible only because the plurality defines 'corruption' too narrowly. . . . In the plurality's view, a federal statute could not prevent an individual from writing a million dollar check to a political party . . . ."[149] Justice Breyer also notes the larger context of the First Amendment's place in America's democratic tradition: "the anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest . . . in maintaining the integrity of our public governmental institutions. . . . [As] Chief Justice Hughes reiterated . . . 'A fundamental principle of our constitutional system' is the 'maintenance of the opportunity for free political discussion *to the end* that government may be responsive to the will of the people.'"[150]

Justice Breyer explained in his *McCutcheon* dissent that political speech is only meaningful if citizens can communicate their needs to their representatives.[151] The risk of the pernicious uses of money in politics is that representatives will only be responsive to rich donors and will ignore the needs of average citizens. As Justice Breyer explained:

> [T]he First Amendment advances . . . the public's interest in preserving a democratic order in which collective speech *matters*. What has this to do with corruption? It has everything to do with corruption. Corruption breaks the constitutionally necessary 'chain of communication' between the people and their representatives. It derails the essential speech-to-government-action tie. Where enough money calls the tune, the general public will not be heard. Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point.[152]

Justice Breyer explained the importance of preventing the appearance of corruption in a democratic system where political apathy is a real risk. As he said, "a cynical public can lose interest in political participation alto-

---

[145] *See McCutcheon*, 572 U.S. at 227.
[146] *See* Randall v. Sorrell, 548 U.S. 230 (2006).
[147] *See* Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).
[148] *McCutcheon*, 572 U.S. at 227.
[149] *Id.* at 235 (Breyer, J., dissenting).
[150] *Id.* at 235–36 (Breyer, J., dissenting) (citations omitted).
[151] *See id.* at 237 (Breyer, J., dissenting).
[152] *Id.* (Breyer, J., dissenting).

gether. . . . Democracy . . . cannot work unless 'the people have faith in those who govern.'. . . [W]e can and should understand campaign finance laws as resting upon a broader and more significant constitutional rationale than the plurality's limited definition of 'corruption' suggests."[153] If the reader will consider the empirical polling data referenced in Part I, Justice Breyer's (and those of other liberal Justices' dissents during the Roberts Court era) have largely been borne out. The public is deeply suspicious of political corruption and political apathy—as evidenced by abysmally low voter turn-out, even in Presidential elections—continues to plague American society.

To sum up the rhetorical moves by the Roberts Court in the area of campaign finance jurisprudence, over the vigorous objections of liberal Justices and despite precedents to the contrary, the conservative majority on the Roberts Court has compressed the justification for campaign finance reform to merely *quid pro quo* corruption. And it has even constricted what counts as a *quid pro quo*. The impact of these moves on the ability of lawmakers to craft new campaign finance laws should not be underestimated. For some this is an obvious point but, to be clear, the Supreme Court has changed campaign finance laws using the First Amendment. This means that they have ruled many parts of these laws governing money in politics are unconstitutional. Legislative drafters have to navigate these rulings. And as a result of the *Randall* to *McCutcheon* arc of cases, legislatures can no long place limits on the expenditures of corporations, can no longer build in mechanisms to level the playing field between wealth and poor candidates, can no longer establish public financing systems which protect the candidates who run clean, and can no longer establish aggregate contribution limits for individuals.

III. Ever-Shrinking Anti-Corruption Criminal Law

As this article has explained, the Roberts Court has been narrowing the definition of corruption over a series of seven campaign finance cases. The Roberts Court's impact on corruption in the criminal law occurred in just two key cases: *Skilling v. United States*[154] and *McDonnell v. United States*.[155]

Just as the Rehnquist Court embraced a more capacious view of what counted as political corruption, the Rehnquist Court also recognized that political contributions could be an element in a crime. In *McCormick v. United States*, a case about money going to a state legislator in West Virginia, the Rehnquist Court ultimately exonerated him and remanded the case, but before they did so the Court noted: "[t]his is not to say that it is impossible for an elected official to commit extortion in the course of financ-

[153] *Id.* at 238 (Breyer, J., dissenting).
[154] 561 U.S. 358 (2010).
[155] 136 S. Ct. 2355 (2016).

ing an election campaign. Political contributions are of course vulnerable if induced by the use of force, violence, or fear."[156]

The Roberts Supreme Court has not just been narrowing the definition of corruption in the area of campaign finance law, the court has simultaneously been tightening the definition of corruption in criminal law too. It did so by redefining what counts as "honest services fraud" in *Skilling* in 2010,[157] which arose out of the massive corporate fraud at Enron, which led to the largest corporate bankruptcy in American history at that time.[158] Mr. Skilling was an executive at Enron when the fraud happened, and he originally received a sentence of twenty-four years.[159] Mr. Skilling argued that his conviction for honest services fraud was erroneous. Justice Ginsburg, writing for the Court, agreed with him and concluded: "[i]n proscribing fraudulent deprivations of 'the intangible right of honest services,' § 1346, Congress intended at least to reach schemes to defraud involving bribes and kickbacks . . . . Because Skilling's alleged misconduct entailed no bribe or kickback, it does not fall within § 1346's proscription."[160] After Mr. Skilling won in the Supreme Court, he was resentenced to fourteen years.[161]

Honest services fraud has been used by federal prosecutors to go after corrupt politicians[162] and, as in Skilling's case, corporate fiduciaries who owe a duty of loyalty to shareholders.[163] Thus, when the Supreme Court compressed the definition of honest services fraud, it opened new defenses for accused faithless corporate fiduciaries, as well as accused corrupt politicians.[164] And, as noted below, politicians have had convictions vacated based on *Skilling*.

In the context of federal bribery law, the Supreme Court has also narrowed the understanding of what counts as "an official act," which is an element of the crime of bribery. In essence, to be guilty of bribery a briber must give a thing of value in exchange for an official act by a member of the

---

[156] *See* McCormick v. United States, 500 U.S. 257, 273 (1991) ("The receipt of such contributions is also vulnerable under the [Hobbs] Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.").

[157] *See Skilling*, 561 U.S. at 411.

[158] *Enron Fast Facts*, CNN (Apr. 23, 2018, 11:19 AM), https://www.cnn.com/2013/07/02/us/enron-fast-facts/index.html [https://perma.cc/UB96-NZAL].

[159] *See Skilling*, 561 U.S. at 375 ("District Court sentenced Skilling to 292 months' imprisonment . . . .").

[160] *Id.* at 368.

[161] *See* Press Release, U.S. Dept. of Justice, Former Enron CEO Jeffrey Skilling Resentenced to 168 Months for Fraud, Conspiracy Charges (June 21, 2013), https://www.justice.gov/opa/pr/former-enron-ceo-jeffrey-skilling-resentenced-168-months-fraud-conspiracy-charges [https://perma.cc/5UR7-L64G].

[162] *See* James D. Zinn, *Court Rules on 'Honest Services' Fraud*, FORBES (June 25, 2010, 1:00 PM), https://www.forbes.com/2010/06/25/honest-services-supreme-court-opinions-contributors-james-d-zirin.html#521ba8c2214f [https://perma.cc/MUN3-7YDH].

[163] *See Skilling*, 561 U.S. at 409.

[164] *See* IRIS E. BENNETT ET AL., HONEST SERVICES AFTER *Skilling*: Judicial, Prosecutorial, and Legislative Responses (2010), https://jenner.com/system/assets/publications/10293/original/CrimLit_Fall10_honest.pdf [https://perma.cc/K6HB-B3AG].

government—this is a *quid pro quo*. In 2016, in a case called *McDonnell*, the Supreme Court unanimously rejected the Governor of Virginia's conviction for bribery. Governor McDonnell, who was deep in financial debt, had admittedly accepted $175,000 in gifts and loans, including payment for the Governor's daughter's wedding from businessman Jonnie Williams. The case turned on what the Governor did in return for all of this largess and what counts as an "official act" for the purposes of anti-bribery laws.[165] The prosecution in the case argued that when the Governor set up meetings on behalf of Mr. Williams, the *quid pro quo* was complete. But the Supreme Court decided that merely setting up meetings (with nothing more) would not constitute an "official act." As the Supreme Court wrote: "[A]n official act . . . must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is 'pending' or 'may by law be brought' before a public official."[166] And, thus, the Court vacated Governor McDonnell's conviction.

The federal prosecutors had argued that because Governor McDonnell had done actions like setting up meetings for Mr. Williams' benefit, that he had violated anti-bribery statutes. Chief Justice Roberts rejected this contention in *McDonnell* writing: "the Government's expansive interpretation of 'official act' would raise significant constitutional concerns. [The law] prohibits *quid pro quo* corruption . . . . In the Government's view, nearly anything a public official accepts—from a campaign contribution to lunch—counts as a *quid*; and nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*."[167] Chief Justice Roberts was worried about criminalizing normal politics: "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."[168]

---

[165] *See* McDonnell v. United States, 136 S. Ct. 2355, 2365 (2016) ("[T]he federal bribery statute, 18 U.S.C. § 201 . . . makes it a crime for 'a public official or person selected to be a public official, directly or indirectly, corruptly' to demand, seek, receive, accept, or agree 'to receive or accept anything of value' in return for being 'influenced in the performance of any official act.' § 201(b)(2). An 'official act' is defined as 'any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.' § 201(a)(3).").

[166] *Id.* at 2371–72.

[167] *Id.* at 2372.

[168] *Id.*

Not unlike the Supreme Court's position in campaign finance cases, the Court in *McDonnell* sees no problem with a governor who is deeply in debt receiving money from a businessman who wants the State to do things for him in return. In the Court's estimation, Mr. Williams is just like any other poor constituent who hadn't paid for the Governor's daughter's wedding. As the Chief Justice wrote on behalf of the Supreme Court: "this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless interpretation of the federal bribery statute."[169] Many Court watchers were left wondering post-*McDonnell* exactly what would count as criminal corruption. In Governor McDonnell's own case, prosecutors decided against re-trying him.[170]

IV. What Does a Crooked Politician Hear from the Supreme Court?

Does it matter if the Supreme Court rebrands corruption to mean less and less? This could seem like just so much legal minutiae. But this move to redefine corruption by the Supreme Court has real-world consequences in what politicians feel free to do and how difficult it is to prosecute them for corrupt acts. What the Supreme Court has done to deregulate corruption has not fallen on deaf ears. In particular, those facing criminal prosecutions for political corruption have been eager to make arguments in court that just like Governor McDonnell, they should be free men.[171] Some have also argued that campaign finance cases like *McCutcheon* (which invalidated aggregate contribution limits for individuals)[172] and *Citizens United* (which allowed corporations to spend an unlimited amount on political ads)[173] indicate that their "crimes" were not "crimes" at all.[174] Below we can see how the Supreme Court's deregulation of corruption impacts how allegedly corrupt politicians are treated.

Political corruption is an entirely bipartisan phenomenon. Ex-Governor McDonnell from Virginia was a Republican, but one of the most infamous governors in prison for corruption is the Democratic Ex-Governor of Illi-

---

[169] *Id.* at 2375.

[170] *See* Matt Zapotosky, Rachel Weiner & Rosalind S. Helderman, *Prosecutors will drop cases against former Va. governor Robert McDonnell, wife*, Wash. Post (Sept. 8, 2016), https://www.washingtonpost.com/local/public-safety/prosecutors-will-drop-case-against-former-va-gov-robert-mcdonnell/2016/09/08/a19dc50a-6878-11e6-ba32-5a4bf5aad4fa_story.html?utm_term=.caa80054399e [https://perma.cc/5F95-MUJR].

[171] All of the cases citing *McDonnell* of which the author is aware have involved men as criminal defendants.

[172] *See* McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 227 (2014).

[173] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 355–56 (2010).

[174] *See infra* discussion of Rod Blagojevich, Joseph Bruno, Dean Skelos, Sheldon Silver, and Robert Menendez.

nois, Rod Blagojevich. Blagojevich has tried to reduce or overturn his sentence by taking advantage of McDonnell's Supreme Court success.

In January 2009, Governor Blagojevich was impeached by the Illinois Legislature and removed from office.[175] Then he went through a series of federal trials for corruption. One of the charges he faced was for trying to sell the U.S. Senate seat vacated by President-elect Obama. He also stood accused of shaking down a children's hospital for campaign donations, among other crimes. In 2011, he was convicted on seventeen charges and sent to prison for fourteen years.[176]

In 2013, Blagojevich launched an appeal arguing that his convictions should be vacated and, at points, he cited *Citizens United* in support of his argument.[177] The Seventh Circuit agreed with some of Blagojevich's legal arguments, including that his alleged attempt to sell Senator Obama's Senate seat to whomever might give Blagojevich a high federal political appointment was not a crime because exchanging a public appointment for a public appointment was different than exchanging an official act for a private gain. This resulted in his being eligible for resentencing.[178] He was resentenced in 2016, but the judge decided to keep his term in prison exactly the same.[179] He appealed back to the Seventh Circuit arguing that the judge should have reduced his prison sentence citing *McDonnell*. The Seventh Circuit disagreed and let the new, identical sentence stand in part because Blagojevich had been found guilty of multiple crimes in addition to the attempted sale of the Senate seat.[180]

In 2017, Blagojevich urged the Supreme Court to review his case. In his certiorari petition Blagojevich's lawyers cited to *McDonnell* and *McCutch-*

---

[175] *See* Ray Long & Rick Pearson, *Impeached Illinois Gov. Rod Blagojevich has been removed from office*, CHI. TRIB. (Jan. 30, 2009), http://www.chicagotribune.com/news/chi-blagojevich-impeachment-removal-story.html [https://perma.cc/X5WG-FWKL].

[176] *See* Tal Kopan, *Who is Rod Blagojevich and what was he convicted of?*, CNN (May 31, 2018, 5:31 PM), https://www.cnn.com/2018/05/31/politics/who-is-rod-blagojevich-conviction/index.html [https://perma.cc/DAL8-LCHH] ("[P]rosecutors . . . [won] the second trial and securing convictions on 17 of 20 corruption charges . . . .").

[177] Brief and Short Appendix for Defendant-Appellant at 58, United States v. Blagojevich, 794 F.3d 729 (7th Cir. 2015) (No. 11-3853), 2013 WL 3914027 at *58 (citing *Citizens United* in arguing that "Blagojevich's decision to ask a [particular individual] to help fundraise . . . did not make it a crime").

[178] *See* United States v. Blagojevich, 794 F.3d 729, 734 (7th Cir. 2015) ("We conclude . . . a proposal to trade one public act for another, a form of logrolling, is fundamentally unlike the swap of an official act for a private payment.").

[179] *See* Jason Meisner & Patrick M. O'Connell, *Blagojevich faces 8 years more in prison after judge sticks to 14-year term*, CHI. TRIB. (Aug. 9, 2016, 8:13 PM), http://www.chicagotribune.com/news/ct-rod-blagojevich-appeal-20160809-story.html [https://perma.cc/GS4N-A7RU].

[180] *See* Blagojevich, 854 F.3d at 921 ("According to Blagojevich, *McDonnell* calls the reasoning of our first decision into question. Not so.").

eon.[181] In April 2018, the Supreme Court refused to hear his appeal, which left the ex-governor in prison.[182]

Illinois has certainly had its problems with corruption with two consecutive Governors (Ryan and Blagojevich) going to prison. But New York is neck and neck with Illinois when it comes to dysfunctional state government.[183] In New York, the problem has been most acute among state legislators. Two consecutive New York Senate Majority Leaders have been criminally charged, as has a Speaker of the Assembly.[184] These prosecutions were spearheaded by U.S. Attorney Preet Bharara who made prosecuting political corruption a priority. All three men have tried to use the corruption-shrinking case law discussed above to their advantage in their respective corruption trials.

Joseph Bruno was the Majority Leader in the New York State Senate for fourteen years until 2008. In December 2009, Mr. Bruno was convicted of two counts of honest services mail fraud for his failure to disclose conflicts of interest while serving as a New York State Senator.[185] Bruno appealed his conviction to the Second Circuit citing *Skilling*. The Second Circuit agreed with his argument stating "[i]n light of *Skilling,* we vacated Bruno's convictions."[186] Then Mr. Bruno faced a second trial, but this time the jury acquitted him on all charges.[187]

After Mr. Bruno, Dean Skelos was the on-again-off-again majority leader between 2008 and 2015.[188] (Because of turmoil in a split chamber,

---

[181] Petition for Writ of Certiorari at 26–27, Blagojevich v. United States, 138 S. Ct. 1545 (Mem) (2018) (No. 17-658), 2017 WL 8794297 at *26–27 (citing *McDonnell* in arguing that "the location of the line between lawful campaign solicitation and felony extortion is a question of undeniable practical importance to candidates throughout the country," and citing *McCutcheon* in arguing that "the present uncertainty also implicates constitutional concerns of the highest order. Seeking and making campaign donations implicates fundamental First Amendment rights.").

[182] *See* Blagojevich v. United States, 138 S. Ct. 1545 (2018).

[183] *See* Michael Cooper, *So How Bad Is Albany? Well, Notorious*, N.Y. TIMES (Jul. 22, 2004), https://www.nytimes.com/2004/07/22/nyregion/so-how-bad-is-albany-well-notorious.html [https://perma.cc/WBA2-T3E6].

[184] *See* Grace Segers, *Percoco Verdict Proves Corruption Won't Go Unpunished, After All*, CITY & STATE N.Y. (Mar. 13, 2018), https://www.cityandstateny.com/articles/politics/new-york-state/percoco-found-guilty-corruption-charges.html [https://perma.cc/ZF76-DYNH] ("Silver and Skelos had their charges vacated in 2017, based on a narrowed definition of what constitutes corruption by public officials outlined in the 2016 U.S. Supreme Court case *McDonnell v. United States*.").

[185] *See* Nicholas Confessore, *Bruno Gets 2-Year Prison Term, but Stays Free*, N.Y. TIMES (May 6, 2010), https://www.nytimes.com/2010/05/07/nyregion/07bruno.html [https://perma.cc/MB2J-AV4U].

[186] United States v. Bruno, 531 Fed. Appx. 47, 48 (2d Cir. 2013) (denying double jeopardy bars second criminal trial for Bruno) (citing United States v. Bruno*,* 661 F. 3d 733 (2d Cir. 2011)).

[187] Jury Verdict, United States v. Bruno, No. 1:09-cr-29 (N.D.N.Y. May 16, 2014) (finding defendant not guilty on both counts).

[188] *See* Jon Campbell, *Former New York Senate leader Dean Seklos' conviction overturned*, USA TODAY:LOHUD (Sept. 26, 2017, 2:14 PM), https://www.lohud.com/story/news/politics/politics-on-the-hudson/2017/09/26/ex-senate-leader-dean-skelos-conviction-overturned/1060 10662/ [https://perma.cc/VB3W-4RCF].

there were actually disputes about who held the gavel.)[189] He was indicted in 2015.[190] Following a jury trial in 2016, Mr. Skelos, and his son, Adam were convicted of Hobbs Act conspiracy, Hobbs Act extortion, honest services wire fraud conspiracy and federal program bribery.[191] They appealed their convictions to the Second Circuit.[192] The Appeals Court agreed that applying *McDonnell* to the case that the jury instructions on "official act" was too expansive and vacated the convictions.[193] Before his retrial in 2018, Dean Skelos argued that his indictment should be dismissed because the grand jury was not instructed properly under *McDonnell*.[194] The judge overseeing his case denied this request.[195] On July 17, 2018, Mr. Skelos and his son were convicted for a second time.[196]

In the lower house of the New York State Legislature, the climate for corruption was just as bad. Sheldon "Shelly" Silver served as Speaker of the Assembly for twenty-one years.[197] After Mr. Silver was convicted by a jury in 2015 of two counts of honest services mail fraud, two counts of honest services wire fraud, two counts of Hobbs Act extortion, and one count of money laundering, he appealed to the Second Circuit.[198] The Second Circuit ruled in his favor in 2017 finding that the jury instruction on what counted as "an official act" was too broad.[199] The Second Circuit concluded that "the

---

[189] *See* Danny Hakim & Jeremy W. Peters, *Judge Gives State Senators Weekend to Negotiate*, N.Y. TIMES (June 12, 2009), https://www.nytimes.com/2009/06/13/nyregion/13albany.html?_r=1&ref=NYregion [https://perma.cc/BFB8-6H2C].

[190] *See* William K. Rashbaum, *Grand Jury Indicts Dean Skelos, Ex-New York Senate Leader, and Son in Corruption Case*, N.Y. TIMES (May 28, 2015), https://www.nytimes.com/2015/05/29/nyregion/dean-skelos-ex-senate-leader-and-son-are-indicted-in-corruption-case.html [https://perma.cc/DSB8-28ST].

[191] *See* United States v. Skelos, 707 Fed. Appx. 733, 733–36 (2d Cir. 2017).

[192] *See id.*

[193] *See id.* at 736 ("We identify charging error in light of *McDonnell v. United States* . . . we are obliged to vacate the convictions.").

[194] *See* United States v. Skelos, 15-CR-317 (KMW), 2018 WL 2849712, at *2 (S.D.N.Y. June 8, 2018) ("[Skelos] contend[s] that when the grand jury indicted Defendants in July 2015, the Government likely instructed the grand jury using this Circuit's then-controlling definition of 'official action,' which was much broader than the current definition provided by the Supreme Court in *McDonnell v. United States*[.]").

[195] *See id.* at *1.

[196] James T. Madore, *Dean Skelos, son convicted of corruption*, NEWSDAY (July 17, 2018, 10:10 PM), https://www.newsday.com/long-island/crime/dean-skelos-corruption-retrial-1.19878648 [https://perma.cc/4CMK-VJNJ].

[197] *See* Larry Neumister, *Former New York Assembly Speaker gets 7 years in prison*, ASSOCIATED PRESS (July 27, 2018), https://apnews.com/f16deb43e02749929ea99501f426e942 [https://perma.cc/7GCC-KWQL].

[198] *See* United States v. Silver, 184 F.Supp.3d 33, 37 (S.D.N.Y. 2016) ("Silver orchestrated two criminal schemes that abused his position as the Speaker . . . for unlawful personal gain . . . . Silver received bribes and kickbacks in the form of referral fees from third party law firms in exchange for official actions. Silver also engaged in money laundering . . . ."); United States v. Silver, 864 F.3d 102, 105–106 (2d. Cir. 2017), *cert. denied*, 138 S. Ct. 738 (2018).

[199] Matt Zapotosky, *The Bob McDonnell effect*, WASH. POST (July 3, 2017), https://www.washingtonpost.com/world/national-security/the-bob-mcdonnell-effect-the-bar-is-getting-higher-to-prosecute-public-corruption-cases/2017/07/13/5ac5745c-67e6-11e7-9928-22d00a47778f_story.html?utm_term=.4da363868d98 [https://perma.cc/M3PM-LF9Z] ("A federal appeals court's decision to overturn the convictions of former New York State Assembly

District Court's instructions on honest services fraud and extortion do not comport with *McDonnell*," and vacated the court's judgment of conviction on all counts.[200] The Second Circuit's opinion was appealed to the Supreme Court, but it refused to hear the *Silver* case.[201] Federal prosecutors decided to retry Mr. Silver. In May of 2018, Silver was convicted a second time by a second jury.[202] Once again, Mr. Silver has appealed his case which is unresolved as of the writing of this piece, which means the meter is still ticking for the cost of the state to bring Mr. Silver to justice.[203]

Next door in New Jersey, a high-profile political corruption prosecution fell apart in 2018.[204] In 2015, U.S. Senator Robert Menendez was charged with bribery for his relationship with a donor to a Super PAC that supported the Senator.[205] In 2017, a corruption trial of Senator Menendez ended with a hung jury.[206] After the hung jury, Senator Menendez moved for acquittal. In January 2018, the trial judge agreed to acquit on seven charges, but refused on eleven others.[207] Interestingly, he did not accept Senator Menendez's arguments about the application of *McDonnell*. The trial court held rather that: "[a]gainst the backdrop of established Third Circuit authority approving the stream of benefits theory, *McDonnell*'s silence regarding that theory cannot be its death knell."[208] The trial judge continued in the *Menendez* case: "The key to whether a gift constitutes a bribe is whether the parties intended for the benefit to be made in exchange for some official action; . . . As long as that action is an 'official act' under *McDonnell*, it is a crime."[209] Thus, the trial court judge refused to acquit Senator Menendez based on the defen-

---

speaker Sheldon Silver shows how public corruption cases have become much more difficult to substantiate in the wake of a Supreme Court decision narrowing what qualifies as corruption . . . ."); *see also* Alan Feuer, *Why Are Corruption Cases Crumbling? Some Blame the Supreme Court*, N.Y. TIMES (Nov. 17, 2017), https://www.nytimes.com/2017/11/17/nyregion/menendez-seabrook-corruption-cases-crumbling-.html [https://perma.cc/E4UX-LTWB] ("Sheldon Silver, the powerful former speaker of the New York State Assembly, survived his corruption prosecution in July. That's when an appeals court overturned his bribery conviction.").

[200] *Silver*, 864 F.3d at 105–06 (internal citations omitted).

[201] *See id.*

[202] *See Silver*, No. 15-CR-93 (VEC), 2018 WL 4440496 at *1 (finding defendant guilty on all counts).

[203] Notice of Appeal, United States v. Silver, No. 18-2380 (2d Cir. Aug 13, 2018).

[204] Feuer, *supra* note 199 ("[A jury] declared that they were deadlocked in the high-profile corruption trial[ ] of Robert Menendez, a Democratic senator from New Jersey . . . .").

[205] *See* United States v. Menendez, 137 F. Supp.3d 688, 691 (D.N.J. 2015) ("On April 1, 2015, Defendants Robert Menendez, who has represented New Jersey in the United States Senate since 2006, . . . [was] indicted in the District of New Jersey on charges of bribery and related crimes.").

[206] Joseph Ax, *Corruption trial of Senator Menendez ends in mistrial*, REUTERS (Nov. 16, 2017), https://www.reuters.com/article/us-new-jersey-menendez/corruption-trial-of-senator-menendez-ends-in-mistrial-idUSKBN1DG2NP [https://perma.cc/G788-SKAH].

[207] *See Menendez*, 291 F.Supp.3d at 611 (holding that "Defendants' Rule 29 motion is granted in part, and denied in part.").

[208] *Id.* at 616.

[209] *Id.* at 614.

dant's interpretation of *McDonnell* since "a rational juror could find that Defendants entered into a *quid pro quo* agreement."[210]

The trial court judge also refused to acquit Senator Menendez based on his reading of *Citizens United*. As the judge stated: "the Government alleges that Defendants engaged in a *quid pro quo* bribery scheme, not that either defendant violated campaign finance regulations . . . . [T]he charges in this case concern bribery, not political speech . . . . [N]othing in *Citizens United* or related cases implies a First Amendment bar to bribery prosecutions."[211] And the trial judge in Senator Menendez's case noted, "a donation to an independent Super PAC can constitute 'anything of value'" under bribery law.[212]

Nonetheless a few months later, in 2018, the Department of Justice (DOJ) decided not to pursue the case and dropped all charges against Senator Menendez.[213] As reported in the *Washington Post*, "'Given the impact of the court's Jan. 24 order on the charges and the evidence admissible in a retrial, the United States has determined that it will not retry the defendants on the remaining charges,' the Justice Department said."[214] It seems at least plausible that those in DOJ knew pursuing this case could create even worse case law about the scope of anti-corruption laws and so they stopped. We won't know for sure until lawyers involved with this case feel free to talk about the reasons for dropping the prosecution. The public may never know.

To sum up, in the wake of *McDonnell*, *Skilling*, *Citizens United*, and *McCutcheon*'s deregulation of corruption, ex-Governor Blagojevich was resentenced, Majority Leader Bruno was retried and exonerated by a jury, Majority Leader Skelos was retried, Assembly Speaker Silver was retried, and U.S. Senator Menendez had a hung jury followed by all charges being dismissed. As this complicated story shows, upon retrial, Skelos and Silver were both convicted for a second time. But these examples show the extra lengths that federal prosecutors have to go to bring corrupt politicians to justice in the fraught legal environment created by the Supreme Court.

CONCLUSION

With respect to the argument that the Supreme Court is just avoiding criminalizing politics, I counter that they are going too far in the other direc-

---

[210] *Id.* at 616 (citing McDonnell v. United States, 136 S. Ct. 2355, 2371 (2016).

[211] *Id.* at 621.

[212] *See id.* at 622.

[213] *See* Laura Jarrett, Dan Berman & Sarah Jorgensen, *Justice Dept. won't retry Sen. Bob Menendez*, CNN (Jan. 31, 2018), https://www.cnn.com/2018/01/31/politics/menendez-charges-dismiss/index.html [https://perma.cc/84HQ-8HA2].

[214] Devlin Barrett, *Judge dismisses all charges against Sen. Menendez following request from prosecutors*, WASH. POST (Jan. 31, 2018), https://www.washingtonpost.com/world/national-security/justice-departments-seeks-to-toss-out-charges-against-sen-menendez/2018/01/31/19a3094c-06a8-11e8-b48c-b07fea957bd5_story.html?noredirect=on&utm_term=.d5e10b9ae7d3 [https://perma.cc/28SQ-AZEF].

tion: allowing potential criminals to ascend to and keep political office.[215] Politicians who have been charged with serious allegations of political corruption are using the Supreme Court's reduction of what counts as corruption from both the campaign finance and the criminal cases to their legal advantage. This is arguably allowing certain politicians to escape appropriate accountability.

Additionally, as the Supreme Court narrows the legal justifications for new campaign finance laws, they rob legislatures of the ability to enact prophylactic rules to protect the integrity of the democratic process. As described above, legislators are limited in the types of contribution limits, expenditure limits, and public financing that they can enact in the future.

Against this legal backdrop, is it surprising to have accusations of corruption reaching the President's Cabinet and even the Oval Office?[216] Not really. This is the path that the Supreme Court began charting for the nation in 2006. That any individual gave into temptation left open by the Supreme Court to be corrupt is, of course, the fault of each person. But the Supreme Court opened wide the door for corruption to dance in, high-kicking, like a line of Rockettes.

---

[215] *See* Ciara Torres-Spelliscy, *The Supreme Court Throws Kryptonite at Democracy's Supermen*, HUFF. POST (Jun. 30, 2016), https://www.huffingtonpost.com/ciara-torresspelliscy/scotus-throws-kryptonite-_b_10758060.html [https://perma.cc/4QPU-7PJ2] ("While we do not want prosecutors to criminalize politics, we also do not want the Supreme Court to give wider and wider berth for corrupt politicians to get away with using their positions of power to enrich themselves.").

[216] *See Cohen Plea Deal Makes Trump 'Unindicted Co-Conspirator,' Watergate Prosecutor Says*, WBUR (Aug. 22, 2018, 1:25 PM), http://www.wbur.org/hereandnow/2018/08/22/cohen-plea-deal-trump-watergate-prosecutor [https://perma.cc/M25N-4AS6].