
QUID PRO NO:
WHEN ROLEXES, FERRARIS, AND
BALL GOWNS ARE NOT POLITICAL
CURRENCY

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INTRODUCTION

The misfortune of a republic is when intrigues are at an end; which happens when the people are gained by bribery and corruption: in this case they grow indifferent to public affairs, and avarice becomes their predominant passion. Unconcerned about the government and everything belonging to it, they quietly wait for their hire.¹

In its recent decision in *McDonnell v. United States*, a case concerning corruption charges against the former Governor of Virginia, Robert McDonnell, the Supreme Court faced a seemingly simple question of statutory interpretation: what constituted an “official act” for the purposes of the bribery statute, 18 U.S.C. § 201(a)(3).² In reality, not only did it answer a question far more complicated, but also, it provided far more than a simple answer.

In its attempt to reinforce democracy, the Court failed. Instead, it validated a pernicious definition of access, in which paid-for access, pay-to-play schemes, and bribery are the norm. Specifically, in claiming that this maligned form of access was necessary for a functioning democracy, the Court endorsed political norms that are, in fact, corrosive to society: stratified access to politicians and by association, democratic institutions. The Court ignored the reality of pervasive and systemic inequality—ranging from political, economic, social, and racial—in contemporary American society and the effect that inequality has on access. However, the Court did not arrive there alone—the many amici filing on behalf of the petitioner blinded it—at least partially—to the aforementioned realities and public opinion.

In short, in *McDonnell*, the Court claimed that its concern was not with the “tawdry tales” of a pay-to-play political culture in which Ferraris, Rolexes, and ball gowns carry political currency, but rather “with the broader

1. BARON DE MONTESQUIEU, 1 THE SPIRIT OF THE LAWS 12–13 (Thomas Nugent trans., Hafner Press 1975) (1748).

2. *McDonnell v. United States*, 136 S. Ct. 2355, 2361 (2016).

legal implications of the Government's boundless interpretation of the federal bribery statute."³ However, while so claiming, the Court narrowed not only the definition of what could constitute an "official act," but also overturned hundreds of years of jurisprudence on corruption law to democracy's and the public's detriments.⁴ Although a valid exercise of statutory interpretation, the Court nonetheless acted with ignorance to the realities of political bribery.

Part I of this Note provides a brief explanation of the instant case, including a discussion of its factual background and procedural history, as well as a brief discussion on the bribery statute used in the Eastern District of Virginia's prosecution of McDonnell.

Part II then focuses on the Supreme Court's analysis of the case. Although briefly reviewing the Court's interpretation of the bribery statute, this Part focuses primarily on the dicta in the Court's opinion. Here, I argue that the Court relied heavily on amici, implicitly assumed an equal playing field regarding access to politicians, and predicated its opinion on that equality, thus preserving that access. In this section of its opinion, the Court espoused a number of fears regarding the lower courts' interpretation of what constituted an "official act," almost all of which Governor McDonnell and other amici also discussed. Since statutory interpretation is an inexact science, the dicta showcases the Court's real motivation behind its decisionmaking.

Part III then discusses where, why, and how the Court's reasoning went wrong. First, I argue that the Court failed to consider social, political, and economic inequalities, all of which result in unequal access to politicians and public servants. Next, I argue that public opinion supports this notion that stratified access exists and ascribes a number of reasons for it, including, for example, campaign finance issues. Because that public opinion exists, I also argue that the Court could have examined stratified access in its opinion. After problematizing the Court's perception of what constitutes access, I examine why the Court ultimately decided the way it did, arguing that amici blinded the Court to public opinion. Therefore, as a result, I contend that the Court attempted, but failed, to reinforce democracy by discussing access in dicta after having already established what constituted an "official act" earlier in its opinion. In summary, in attempting to promote democracy and reinforce it, the Court failed. Instead, it promoted something inherently corrosive to democracy.

3. *Id.* at 2375.

4. *Id.*

Part IV of this Note suggests possible solutions. It suggests remedies to rectify what this Note problematizes in Parts II and III: the Court's failure to reinforce democracy; the Court's overreliance on amici and more generally, the problem of amicus briefs in Supreme Court jurisprudence; and finally, the problematic and limiting wording of the bribery statute used to prosecute Governor McDonnell. First, this Note suggests a limited rapprochement between the Court and public opinion, suggesting various methods for the Court to assess public opinion and prevent walling itself off as an elite institution. Second, this Note also suggests a number of remedies related to the role of amicus briefs in Supreme Court jurisprudence, including, but not limited to, limiting the actual number of amici that may file, while also providing rules and guidelines for ensuring novel arguments from amici. Finally, this Note suggests various ways that Congress could amend the bribery statute to mirror public sentiment by tracking ethics and public corruption reforms in New York as a baseline for nationwide reform efforts.

Beyond providing valuable insight into how the Supreme Court interacts with amici and amicus briefs and how those interactions may affect the Court's role as a democracy-reinforcing institution, the instant case also provides an interesting outlook on the current state of public corruption prosecutions. In the Southern District of New York ("S.D.N.Y."), where the U.S. Attorney's Office has relentlessly tackled public corruption in the state capital and elsewhere, numerous convictions—most notably, those of Dean Skelos,⁵ the former Majority Leader of the New York State Senate and Sheldon Silver,⁶ the former Speaker of the New York State Assembly—have been overturned. Although the Second Circuit maintained that sufficient evidence existed to prove that both defendants committed the crimes alleged,

5. *United States v. Skelos*, 707 F. App'x 733, 735 (2d Cir. 2017) (discussing how sufficient evidence existed to convict Skelos, but that the Second Circuit had to vacate and remand the case because of the erroneous jury instructions).

Upon independent review of the record, and for the reasons principally set forth in the district court's orders and judgments, we conclude that all of defendants' remaining challenges to their convictions are without merit. Nevertheless, because we identify charging error on the 'official act' elements of the crimes and conviction, which we cannot conclude is harmless beyond a reasonable doubt, we VACATE the district court's May 16, 2016 judgments and REMAND the case for further proceedings consistent with this order.

Id.

6. *United States v. Silver*, 864 F.3d 102, 106 (2d Cir. 2017) (similarly discussing how sufficient evidence existed and erroneous jury instructions created by the McDonnell decision forced the court of appeals to vacate and remand).

Though we reject Silver's sufficiency challenges, we hold that the District Court's instructions on honest services fraud and extortion do not comport with *McDonnell* and are therefore in error. We further hold that this error was not harmless because it is not clear beyond a reasonable doubt that a rational jury would have reached the same conclusion if properly instructed, as is required by law for a verdict to stand.

Id.

it was still was forced to overturn the respective convictions because of the erroneous jury instructions.⁷ The U.S. Attorney's Office for S.D.N.Y. later retried these cases, winning convictions on both of them.⁸ The *McDonnell* decision has also affected other corruption cases, like that of U.S. Senator Robert Menendez (D-N.J.),⁹ in which the judge declared a mistrial.¹⁰ The Supreme Court's actions have had real consequences as the Court "has slowly eroded the country's body of corruption laws" and resulted in a prosecutorial inability to challenge public corruption.¹¹ Therefore, the Court's decision may not only affect the public, but also prosecutors—both to their respective detriments.

As a result of the rising public opinion viewing government as ineffectual or corrupt,¹² coupled with pervasive and systemic inequality in the United States and the possible harmful effects the Court's decision may have on democratic institutions, examining *McDonnell* and the Court's underlying reasoning behind its decision is extremely valuable.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 21, 2014, the United States Attorney's Office for the Eastern District of Virginia indicted Virginia's Governor, Robert McDonnell,¹³ along with his wife, First Lady Maureen G. McDonnell, for their alleged roles in a "scheme to violate federal public corruption laws."¹⁴ The U.S. Attorney's Office charged the couple with one count of conspiracy to commit honest-services wire fraud, six counts of obtaining property under color of official right, three counts of honest-services wire fraud, one count

7. *Id.*

8. Vivian Wang, *Guilty, Again: Dean Skelos, Former Senate Leader, Is Convicted of Corruption in Retrial*, N.Y. TIMES (July 17, 2018), <https://nyti.ms/2JALyJw>; Benjamin Weiser, *Sheldon Silver Is Convicted in 2nd Corruption Trial*, N.Y. TIMES (May 11, 2018), <https://nyti.ms/2lc83Zm>.

9. Matt Ford, *Has the Supreme Court Legalized Public Corruption?*, ATLANTIC (Oct. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/10/menendez-mcdonnell-supreme-court/543354> (discussing how the decision in *McDonnell v. United States* hung over the prosecutor's case).

10. Nick Corasaniti & Nate Schweber, *Corruption Case Against Senator Menendez Ends in Mistrial*, N.Y. TIMES (Nov. 16, 2017), <https://nyti.ms/2hEl6a6>.

11. Alan Feuer, *Why Are Corruption Cases Crumbling? Some Blame the Supreme Court*, N.Y. TIMES (Nov. 17, 2017), <https://nyti.ms/2hJtkhl>.

12. Niall McCarthy, *Corruption of Government Officials Ranked Americans' Top Fear of 2017*, FORBES (Oct. 19, 2017, 8:05 AM), <https://www.forbes.com/sites/niallmccarthy/2017/10/19/corruption-of-government-officials-ranked-americans-top-fear-of-2017-infographic>.

13. Matt Zapotosky et al., *Prosecutors Will Drop Cases Against Former Va. Governor Robert McDonnell, Wife*, WASH. POST (Sept. 8, 2016), <http://wapo.st/2cakuAZ>.

14. Press Release, U.S. Att'y's Office for the E.D. Va., *Former Virginia Governor and Former First Lady Indicted on Public Corruption and Related Charges* (Jan. 21, 2014) [hereinafter Press Release, *Former Virginia Governor and Former First Lady Indicted*], <https://www.justice.gov/usao-edva/pr/former-virginia-governor-and-former-first-lady-indicted-public-corruption-and-related>.

of conspiracy to obtain property under color of official right, and one count of making false statements to a federal credit union.¹⁵

The core of the indictment related to a relationship the couple had with the Chief Executive Officer (“CEO”) of a major pharmaceutical firm conducting business with the state, Star Scientific.¹⁶ Prior to McDonnell’s election in 2010 and over the course of his campaign, Star Scientific’s CEO, Jonnie Williams Sr. (“JW”), and McDonnell and his wife developed an amicable relationship, meeting numerous times over the course of his campaign.¹⁷ McDonnell and JW became friendlier, as McDonnell even began using JW’s private planes to shuttle between political events.¹⁸ At one point, their relationship began to lay the foundation for the charged offenses, slowly discussing the “potential health benefits of anatabine and the need for scientific studies of these potential health benefits,” with McDonnell then placing JW in contact with other politicians and administrative officials.¹⁹

Even though McDonnell was elected governor in 2010, he continued to aid Star Scientific and received personal financial benefits from April 2011 until March 2013.²⁰ McDonnell received numerous forms of financial benefits, including luxury shopping trips, in return for arranging meetings for Star Scientific’s CEO with various high-ranking Virginian administrative officials and politicians, hosting events for the company as a means of promoting its products to Virginia state universities so that those universities would study the products and eventually refer new patients to those products.²¹ Over the course of their relationship, McDonnell received at least \$135,000, including shopping trips (\$10,999 at Oscar de la Renta, \$5,685 at Louis Vuitton, and \$2,604 at Bergdorf Goodman),²² loans for his daughter’s wedding (approximately \$50,000 at an exceedingly low interest rate),²³ wedding gifts (approximately \$15,000),²⁴ golf trips (at which McDonnell and his family charged approximately \$2,380 to JW’s account),²⁵ and other forms of enrichment.²⁶ Not only did McDonnell receive that money, but also,

15. *Id.*

16. *Id.*

17. See Indictment at 4–5, United States v. McDonnell, No. 3:14-CR-12 (E.D. Va. Jan. 21, 2014), ECF No. 1.

18. *Id.* at 6.

19. *Id.*

20. *Id.* at 6–7.

21. Press Release, Former Virginia Governor and Former First Lady Indicted, *supra* note 14.

22. Indictment, *supra* note 17, at 8.

23. *Id.* at 26.

24. *Id.* at 9.

25. *Id.* at 11.

26. See Indictment, *supra* note 17, at 7–32, for a full account of the enrichment, returns, and quid

he received it after he helped JW.²⁷ In return for all of the gifts McDonnell and his wife received, prosecutors argued that McDonnell arranged meetings and other opportunities for JW to market his company and products to other government officials.²⁸ The indictment also alleged numerous other instances of a seemingly quid pro quo relationship.²⁹

On September 4, 2014, after a five-week trial and merely three days of jury deliberations, a unanimous jury, believing the law to be clear on the issues, found McDonnell guilty of extortion under color of official right, obtaining property under color of official right, and honest services wire fraud.³⁰ The jury also found his wife guilty of honest services wire fraud, extortion under color of official right, obtaining property under color of right, and obstruction of a federal proceeding.³¹ In total, the jury found McDonnell guilty on eleven of the thirteen charges and his wife guilty on nine of the

pro quo relationship between Star Scientific and Governor Bob McDonnell.

27. *Id.*

28. *Id.*

29. *United States v. McDonnell*, 792 F.3d 478, 488 (4th Cir. 2015).

Two days after this private dinner—on May 1, 2011—Mrs. McDonnell received an email via Williams. The email included a link to an article entitled “Star Scientific Has Home Run Potential,” which discussed Star’s research and stock. Mrs. McDonnell forwarded this email to Appellant at 12:17 p.m. Less than an hour later, Appellant texted his sister, asking for information about loans and bank options for their Mobo properties. Later that evening, Appellant emailed his daughter Cailin, asking her to send him information about the payments he still owed for her wedding.

The next day, May 2, Mrs. McDonnell and Williams met at the Governor’s Mansion to discuss Anatabloc. However, Mrs. McDonnell began explaining her family’s financial woes—thoughts about filing for bankruptcy, high-interest loans, the decline in the real estate market, and credit card debt. . . .

Three days later, on May 5 at 11 a.m., Appellant met with Secretary Hazel and Chief of Staff Martin Kent to discuss the strategic plan for the state’s health and human resources office. Shortly after the meeting, Appellant directed his assistant to forward to Hazel the article about Star that Mrs. McDonnell had earlier brought to Appellant’s attention.

Id. (footnotes omitted).

30. Rosalind S. Helderman & Matt Zaposky, *Ex-Va. Governor Robert McDonnell Guilty of 11 Counts of Corruption*, WASH. POST (Sept. 4, 2014), <http://wapo.st/1vSbW8x> (“Three jurors who spoke about the verdict said the decision was an emotional one, particularly considering Robert McDonnell’s long career of public service. But they said they believed that the facts and the law were clear and that the verdict had not, in the end, been a difficult one to reach.”); *see also* Press Release, U.S. Att’y’s Office for the E.D. Va., *Former Virginia Governor and Former First Lady Convicted on Public Corruption Charges* (Sept. 4, 2014) [hereinafter *Press Release, Former Virginia Governor and Former First Lady Convicted*], <https://www.justice.gov/opa/pr/former-virginia-governor-and-former-first-lady-convicted-public-corruption-charges>.

31. Frank Green et al., *Bob and Maureen McDonnell Convicted in Historic Corruption Trial*, RICHMOND TIMES-DISPATCH (Sept. 4, 2014), http://www.richmond.com/news/state-regional/virginia-politics/bob-mcdonnell-convicted-on-of-counts-maureen-mcdonnell-on-of/article_7b9b6118-343c-11e4-bef2-001a4bcf6878.html; *see also* Press Release, *Former Virginia Governor and Former First Lady Convicted*, *supra* note 30.

thirteen.³²

McDonnell appealed his decision to the Fourth Circuit Court of Appeals.³³ The appeal centered on the definition of official act. The trial court had used the government's proposed jury instruction and defined an official act accordingly:

The term official action means any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such public official's official capacity. Official action as I just defined it includes those actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law. In other words, official actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description. And a public official need not have actual or final authority over the end result sought by a bribe payor so long as the alleged bribe payor reasonably believes that the public official had influence, power or authority over a means to the end sought by the bribe payor. In addition, official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.³⁴

McDonnell argued to the Fourth Circuit that these jury instructions were in error,³⁵ claiming "the court's definition was overbroad, to the point that it would seem to encompass virtually any action a public official might take while in office."³⁶ According to McDonnell, the definition in the jury instructions would result in the inclusion of all acts of governance as "official acts," because "[f]or public figures such as a governor, who interact with constituents, donors, and business leaders as a matter of custom and necessity, these activities might include such routine functions as attending a luncheon, arranging a meeting, or posing for a photograph."³⁷ Essentially, McDonnell argued that the possible deleterious effects of the district court's decision should drive the decisionmaking of the court of appeals.³⁸

32. Green et al., *supra* note 31.

33. *McDonnell*, 792 F.3d at 486.

34. *Id.* at 505–06.

35. *Id.*

36. *Id.* at 505.

37. *Id.* at 506.

38. *See id.*

The court of appeals affirmed the jury verdict.³⁹ In arriving at that decision, the court of appeals reviewed and focused on McDonnell's claims regarding the jury instructions on what constituted an "official act" for the purposes of the federal bribery statute,⁴⁰ which both sides agreed defined the "official act" or "official action" for the purposes of the honest services wire fraud statute and the Hobbs Act, respectively.⁴¹ The court affirmed the lower court's instructions to the jury that an "official act" constituted "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."⁴² The court also emphatically rejected McDonnell's arguments and fears associated with an expansive definition of "official act."

The court refused to acknowledge McDonnell's argument that the district court's decision would have a harmful effect on politics and democratic institutions, and even rejected his proposed jury instructions, believing them either to misstate the law or to subject the jury through jury instructions to the defendant's core legal arguments.⁴³ Finally, the court even entertained *broadening* the scope of what constituted an "official act" in spite of McDonnell's plea to narrow it, thus firmly denying McDonnell's argument.⁴⁴

39. *Id.* at 520; Travis Fain, *McDonnell Appeals Again, Stays Free for Now*, DAILY PRESS (July 24, 2015, 9:40 AM), <http://www.dailypress.com/news/politics/dp-mcdonnell-appeals-again-stays-free-for-now-20150724-story.html>.

40. 18 U.S.C. § 201(b)(2) (2018) (bribery of public officials); *id.* § 201(a)(3) ("official act" definition).

41. *McDonnell*, 792 F.3d at 504 (noting that "in their proposed instructions for honest-services wire fraud, both parties sought to import the definition of bribery set forth in 18 U.S.C. § 201(b)(2) . . . the parties [also] agreed that a charge of extortion under color of official right has four elements" one of which requires the defendant to have "'obtained a thing of value' . . . 'knowing that the thing of value was given in return for official action.'"). The court of appeals affirmed the district court's use of § 201(b)(2)'s definition of bribery in its instructions to the jury regarding the honest services wire fraud statute. The court also affirmed the lower court's jury instructions for the charge of extortion under color of official right. *Id.* at 504.

42. *Id.* (citing 18 U.S.C. § 201(a)(3)) (internal quotations omitted).

43. *Id.* at 513 ("Even if this were so, it is not a statement of law. Rather, it seems to us a thinly veiled attempt to argue the defense's case. . . . Taken as a whole, Appellant's proposed instruction on the meaning of 'official act' failed to present the district court with a correct statement of law.") (discussing the defendant, Governor Bob McDonnell's jury instructions which proposed that no settled practices or routine behavior could constitute official acts for the purpose of the statutes under which he was indicted).

44. *Id.* at 510–11 ("We further observe that an 'official act' may pertain to matters outside of the bribe recipient's control. . . . [M]ere steps in furtherance of a final action or decision may constitute an 'official act.' . . . [There is] no difficulty recognizing that proof of a bribe payor's subjective belief in the recipient's power or influence over a matter will support a conviction for extortion under color of official right.").

Taking his appeal to the Supreme Court, McDonnell again challenged the definition of an “official act”—arguing it should be limited to exercising some form of government power or struck down as unconstitutional for being overly broad.⁴⁵ In that petition, McDonnell argued the Supreme Court had never defined “official acts” in such a broad manner.⁴⁶ To the contrary, McDonnell argued,

[n]ot only has this Court held that actions like a visit, speech, or meeting are not, standing alone, “official acts,” it has even held that paying for such “access”—through campaign contributions or independent expenditures—is constitutionally protected. While the government can forbid true corruption—*i.e.*, the “direct exchange of an official act for money”—it “may not target . . . the political access such [financial] support may afford.”⁴⁷

According to McDonnell, “paying for ‘access’—the ability to get a call answered or a meeting scheduled—is constitutionally protected and an intrinsic part of our political system.”⁴⁸ Paying for access, therefore, constituted politics as usual and a fundamental part of the democratic system, which is protected much like other aspects of our democratic institutions such as voting and campaign finance.

The United States rejected McDonnell’s fears and reaffirmed its position “that such *quid pro quo* agreements are unlawful poses no threat to legitimate political activity.”⁴⁹ It also noted that affecting a specific part of government—or having a determinative effect on governmental policy or administrative outcome—was unnecessary for the purpose of applying the statute.⁵⁰

45. Petition for Writ of Certiorari at i, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474) (discussing the primary issue of concern of the appeal).

Under the federal bribery statute, Hobbs Act, and honest-services fraud statute, 18 U.S.C. §§ 201, 1346, 1951, it is a felony to agree to take “official action” in exchange for money, campaign contributions, or any other thing of value. The question presented is whether “official action” is limited to exercising actual governmental power, threatening to exercise such power, or pressuring others to exercise such power, and whether the jury must be so instructed; or, if not so limited, whether the Hobbs Act and honest-services fraud statute are unconstitutional.

Id.

46. *Id.* at i, 27–30.

47. *Id.* at 14 (citing *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014)).

48. *Id.* (citing *McCutcheon*, 134 S. Ct. at 1450–51).

49. Brief for Respondent at 12, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474).

50. *Id.* at 13–14 (“It has thus been settled for more than a century that the federal bribery statute ‘cover[s] any situation in which the advice or recommendation of a Government employee would be influential,’ even if the employee does not ‘make a binding decision.’” (citations omitted)).

II. THE SUPREME COURT'S DECISION IN *MCDONNELL V. UNITED STATES* AND ITS MISGUIDED THEORIES

After McDonnell filed his Petition for Writ of Certiorari, eleven amici filed briefs in support of it.⁵¹ On January 15, 2016, the Supreme Court granted McDonnell's petition.⁵² Shortly after the grant, the same amici filed again as did a number of others on behalf of McDonnell. Five amici eventually filed in support of the United States.⁵³ A mere six months later, on July 29, 2016, in a unanimous opinion, the Court vacated McDonnell's conviction and remanded it to the district court.⁵⁴

In that decision, the Court overturned the district court and court of appeal's view on what constituted an "official act" and instead held that it "is a decision or action on a 'question, matter, cause, suit, proceeding or controversy.'"⁵⁵ The aforementioned question or matter "must involve a *formal* exercise of governmental power," and "must also be something specific and focused that is 'pending' or 'may by law be brought' before a public official."⁵⁶ In arriving at its decision, the Court analyzed the bribery statute, employing a quintessential form of statutory interpretation.⁵⁷ The Court first "examined the bribery statute's text" and "next turned to § 201(a)(3)'s requirement of a *decision* or *action*."⁵⁸ As such, the Court used statutory interpretation to narrow what constituted an "official act" and to

51. The list for the Petitioner included the National Association of Criminal Defense Lawyers, the Republican Governors Public Policy Committee, a group of "Former Federal Officials," the American Center for Law and Justice, a group of "Public Policy Advocates and Business Leaders," a group of "Law Professors," a group of "Former Attorneys General," a group of sixty non-Virginian "Former State Attorneys General," a group of "Virginia Law Professors," members of the Virginia General Assembly, and Benjamin Todd Jealous, Delores L. McQuinn, and Algie T. Howell Jr. See *McDonnell v. United States*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/mcdonnell-v-united-states> (last visited Nov. 29, 2018) [hereinafter *McDonnell v. United States*, SCOTUSBLOG].

52. Robert Barnes, *Supreme Court Will Review Corruption Conviction of Former Va. Governor Robert McDonnell*, WASH. POST (Jan. 15, 2016), http://wapo.st/1Zq6fsP?tid=ss_tw&utm_term=.c9eeac23da58.

53. The list for the Respondents included the Citizens for Responsibility and Ethics in Washington, the Brennan Center for Justice at N.Y.U. School of Law, Judicial Watch, Inc. and the Allied Educational Foundation, Public Citizen, Inc. and Democracy 21, and the Campaign Legal Center. See *McDonnell v. United States*, SCOTUSBLOG, *supra* note 51.

54. *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016).

55. *Id.* at 2371.

56. *Id.* at 2372 (emphasis added).

57. *Id.* at 2367 ("The issue in this case is the proper interpretation of the term 'official act.' Section 201(a)(3) defines an 'official act' as 'any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.'").

58. *Federal Corruption Statutes—Bribery—Definition of "Official Act"*—*McDonnell v. United States*, 130 HARV. L. REV. 467, 470 (2016) (discussing the role of statutory interpretation in the Court's decisionmaking).

side with McDonnell's interpretation rather than the Fourth Circuit's. Finally, in deciding which definition applied, the Court also employed a familiar canon in Supreme Court jurisprudence: "a word is known by the company it keeps."⁵⁹

However, the Court also devoted a significant portion of its opinion to discussing, much like McDonnell did in his appeal and petition, the adverse effect on politics as usual if it were to support the government's position and endorse the opinion of the lower courts.⁶⁰ Such commentary was provided in dicta⁶¹—as discussed, the Court had already provided, through statutory interpretation, its belief that the court of appeals and the district court had erroneously defined what constituted an "official act."

However, since "statutory interpretation is not a science but an art,"⁶² understanding the Court's motivations provides some clarity into what is otherwise an opaque analysis. Further, the Court discussed its concerns with the lower courts' perspective on what constituted an "official act" *only after* using statutory interpretation to determine its definition and exploring that issue in fourteen pages of text.⁶³ For this reason and because "unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision," examining the background of a decision involving statutes is especially important.⁶⁴ The presence of that dicta in *McDonnell* can therefore reveal the Court's reasoning in how it extracted precision from the relevant statute or with what motivations it undertook that task.

The Court embraced McDonnell's discussion on the deleterious effects of the court of appeal's assessment of what constituted an "official act" in

59. *McDonnell*, 136 S. Ct. 2368 ("To choose between those competing definitions, we look to the context in which the words appear. Under the familiar interpretive canon *noscitur a sociis*, 'a word is known by the company it keeps.'" (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961))); *see also id.* at 2368–69 (containing a review of the Court's analysis of various dictionaries).

60. *Id.* at 2372–73.

61. Ryan S. Killian, Comment, *Dicta and the Rule of Law*, 2013 PEPP. L. REV. 1, 7–8 (2013) ("Classically, dicta is regarded as any portion of the opinion that is inessential to the outcome." (footnote omitted)) (discussing how dicta plays a role in a Court opinion, being unnecessary towards the reasoning or logic behind the actual holding).

62. Jerome N. Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1259 (1947); *see also* Justice Felix Frankfurter, Sixth Annual Benjamin N. Cardozo Lecture Delivered Before the Bar Association of the City of New York: Some Reflections on the Reading of Statutes (Mar. 18, 1947), in 2 REC. ASS'N B. CITY N.Y. 213, 216–17 (1947), *reprinted in* 47 COLUM. L. REV. 527, 530 (1947) (similarly concluding).

63. *McDonnell*, 136 S. Ct. at 2372–73.

64. Justice Frankfurter, *supra* note 62, at 214, *reprinted in* 47 COLUM. L. REV. at 528.

three interconnected fears in dicta.⁶⁵ In doing so, the Court examined its desires to promote democracy by promoting access to politicians and allowing constituents and public servants to interact, to provide clear guidelines for politicians and public servants to avoid corrupt behavior, and finally, to preserve democracy by limiting the ability of overzealous prosecutors to target all public servants.

In discussing these fears and desires, the Court explicitly stressed the underlying importance of access to politicians in any democracy. So much so, it argued that access and interactions with public servants constituted a “basic compact underlying representative government” that assumed that “public officials will hear from their constituents and act appropriately on their concerns—whether it is the union official worried about a plant closing or the homeowners who wonder why it took five days to restore power to their neighborhood after a storm.”⁶⁶ Therefore, JW’s access to McDonnell—perhaps aboard his private jet—was necessary for democracy to operate effectively or at least with some marginal forms of representation. Accordingly, the Court validated paying for audiences with elected officials.⁶⁷ However, implicitly, the Court also granted those with the ability to pay for those audiences greater visibility with those that wield political power, out of a perceived necessity.⁶⁸

In discussing its first fear—of halting democracy—the Court discussed the deleterious effects the lower courts’ decisions would have on governance and on any interactions constituents would have with their representatives. In discussing how the public engages their public officials, the Court noted that, “conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the

65. In a sense, the fears espoused by the Court in this instance were not new. In *United States v. Sun-Diamond Growers*, 526 U.S. 398, 407 (1999), the Court discussed the relevant “absurdities” in creating a clear-cut rule regarding corruption or quid pro quo exchanges in that case, because doing so would criminalize “a complimentary lunch for the Secretary of Agriculture.” Mark Walsh, *Supreme Court Narrows Definition of “Official Acts” in Public Corruption Laws*, EDUC. WEEK (Jun. 27, 2016, 12:08 PM), http://blogs.edweek.org/edweek/school_law/2016/06/supreme_court_narrows_definiti.html. See ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO *CITIZENS UNITED* (2014), for a discussion of prior court precedence on the issue of public corruption and for a discussion on the role that fears of criminalizing politics as usual play in Supreme Court decisions.

66. *McDonnell*, 136 S. Ct. at 2372.

67. Tara Malloy, *Symposium: Is It Bribery or “The Basic Compact Underlying Representative Government”?*, SCOTUSBLOG (June 28, 2016, 4:03 PM), <http://www.scotusblog.com/2016/06/symposium-is-it-bribery-or-the-basic-compact-underlying-representative-government> (“As all *Hamilton* fans know, it pays to be in ‘The Room Where It Happens.’ Taken to its logical end, the Court’s approach permits officials literally to put ‘access’ up for sale . . .”) (analogizing how the concept of access approved or validated by the Court goes beyond a general access).

68. *Id.*

time.”⁶⁹ Regardless of socioeconomic status, race, or other statuses, the Court believed that politicians—as fundamental to their role—organize and work on behalf of their constituents, which sometimes requires arrangements like the one in *McDonnell*. More importantly, the Court believed that these public officials would always respond to the calls and requests to meet with any of their constituents. Thus, the Court wanted to avoid a situation in which “citizens with legitimate concerns might shrink from participating in democratic discourse.”⁷⁰ Without the aforementioned access or interactions being possible, the Court feared that democracy would falter.

The Supreme Court espoused a second concern: that the lower courts’ decisions would create vagueness and difficult guidelines for politicians and public officials to follow. Specifically, in discussing this secondary concern, the Court noted, “under the Government’s interpretation, the term ‘official act’ is not defined ‘with sufficient definiteness that ordinary people can understand what conduct is prohibited,’ or ‘in a manner that does not encourage arbitrary and discriminatory enforcement.’”⁷¹ Such vagueness would occur because it would not be clear which conduct was legal and which conduct could result in an overly eager prosecutor in a U.S. Attorney’s Office taking note of a politician’s supposedly benign actions and subsequently issuing an indictment.⁷² According to the Court, people in general—and not just politicians—would be unclear as to what constituted legal interactions with governing officials. This possibility could also feed into the Court’s first fear, namely, that the vagueness would have a chilling effect on governance.

The Court espoused a third fear as well. Along with the aforementioned theme of emboldening prosecutors, the Court also feared that supporting the court of appeals’ holding would bestow an unrivaled power on the government against defendants in criminal public corruption cases. The Court espoused this final fear, noting that “[u]nder the ‘standardless sweep’ of the Government’s reading . . . public officials could be subject to prosecution, without fair notice, for the most prosaic interactions.”⁷³ As a result of the vagueness created by the lower courts’ reading of the statute, the Court adamantly believed that prosecutors would exploit the now broadened statute to target behavior that may or may not be corrupt. Despite

69. *McDonnell*, 136 S. Ct. at 2372.

70. *Id.*

71. *Id.* at 2373 (citing *Skilling v. United States*, 561 U. S. 358, 402–03 (2010)).

72. *Id.* (“[W]e decline to ‘construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards’ of ‘good government for local and state officials.’” (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987))).

73. *Id.* (citing *Kolender v. Lawson*, 461 U. S. 352, 358 (1983)).

the system of checks that exists for any public corruption prosecution, which requires numerous forms of approval from various Department of Justice officials,⁷⁴ the Court feared that federal prosecutors may, on the faintest trace of information suggesting corruption, prosecute with wild abandon.⁷⁵

Accordingly, the Court perceived itself as a democracy-reinforcing institution because it believed that by upholding the trial court's decision, democracy would suffer. Specifically, upholding that decision would wreak havoc on the ability of government to function, perhaps bringing democracy to a screeching halt. Even in doing so, however, the Court did find the instant facts of McDonnell's case problematic or even troublesome. It admitted that it condoned a maligned form of access acknowledging that the "governor's activities were 'distasteful' and 'crass' and 'dishonest.'"⁷⁶ The Court even acknowledged that, at minimum, McDonnell provided JW with repeated access to governmental decisionmakers crucial to his business interests.⁷⁷ Thus, even though it interpreted statutes and applied dictionary definitions in that process, the Court still expressed some opinions regarding the facts of the case. Therefore, examining how the Court arrived at a point of both awareness that it promoted a disparaged concept of access while still voicing and premising its decision on the deleterious effects of that concept of access is of value.

III. THE COURT ERRED: WHY, HOW, AND WHAT THIS MEANS FOR ITS DEMOCRACY-REINFORCING ROLE

Although the Court used statutory interpretation to decide the instant case, it discussed its motivating factors in dicta shortly after interpreting the relevant statutes. In doing so, it made implicit assumptions regarding political access, as indicated via the discussion in Part II. However, it is extremely worrying that the Court disregarded certain inequalities in the United States. First, in neglecting the pervasive inequalities that permeate American society, the Court also disregarded the widespread public opinion

74. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-85.210 (2018), <https://www.justice.gov/usam/usam-9-85000-protection-government-integrity#9-85.210>.

Consultation with the Public Integrity Section of the Criminal Division is required in all federal criminal matters that focus on violations of federal or state campaign financing laws, federal patronage crimes, and . . . These include . . . prosecutive theories that focus on election fraud or campaign fund raising violations using 18 U.S.C. §§ 1341, 1343, and 1346; 18 U.S.C. § 1952; 18 U.S.C. §§ 1956 and 1957.

Id. See generally *McDonnell*, 136 S. Ct. at 2355.

75. From the Court's opinion, it is unclear whether the Justices were aware of this process. However, no mention of it is made in the opinion. See generally *McDonnell*, 136 S. Ct. at 2355.

76. Malloy, *supra* note 67; see also *McDonnell*, 136 S. Ct. at 2375.

77. See generally *McDonnell*, 136 S. Ct. at 2361–64 (describing the various engagements and events organized); Malloy, *supra* note 67.

regarding public corruption and unequal access to politicians. Second, the Court overemphasized both the role of the amici and their voices. Its error here is especially problematic, as those amici did not expressly represent public opinion but rather emphasized and reemphasized McDonnell's fears of the possible deleterious effects the lower courts' decision may have on democratic institutions. These amici therefore provided a biased view on the issue. Finally, as a result of the above, the Court failed to reinforce democracy, one of its keystone roles.

A. WHY THE COURT'S VIEW ON ACCESS IS INCORRECT

As indicated above, preserving access to politicians motivated the Court's decisionmaking.⁷⁸ Embracing a theory of participatory democracy, the Court believed that by promoting access to politicians and public servants, it advocated allowing constituents to play a role in the laws that govern society.⁷⁹ However, issues relating to inequality pervade American society, propounding a view to the contrary: the Court subscribed to a utopian democracy absent in American society.⁸⁰ The translation of a lack of access to democratic institutions into powerlessness, subsequently exacerbated by socioeconomic, racial, and economic inequalities, brings the Court's aforementioned implicit assumptions into question. Access to politicians constitutes power, but when highly unequal access permeates any society, that inequality is corrosive to democracy—and the Court's decision ultimately perpetuated that highly unequal access.⁸¹

Inequality translates across the American political experience, from political inequalities that limit the ability for certain individuals to vote to economic inequalities limiting access to higher education and other social goods. All told, far from being a society in which all men are created equal, the American experience is one of harsh and pervasive inequality.⁸²

78. See *supra* Part II.

79. For a discussion on what constitutes a participatory democracy, as well as for a philosophical basis on the social contract, governance, democracy more broadly, and other theories underpinning American society, see JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT & DISCOURSES* (G.D.H. Cole ed. & trans., E.P. Dutton & Co. 1913) (1782), http://lf-oll.s3.amazonaws.com/titles/638/0132_Bk.pdf.

80. The reasons for such inequality are broadly discussed in this Note, but are not explored heavily.

81. See Jeffrey R. Brown & Jiekun Huang, *All the President's Friends: Political Access and Firm Value*, CATO INST.: RES. BRIEFS IN ECON. POL'Y, Aug. 2017, at 1–2, <https://object.cato.org/sites/cato.org/files/pubs/pdf/rb83.pdf> (“First, political access may enable firms to secure contracts to provide goods or services to government. . . . Second, companies with direct access to politicians can seek regulatory relief and influence political decision-making. . . . Third, access to politicians may enable companies to gain an informational advantage about government policies and actions”) (discussing how access constitutes a competitive advantage and power for organizations).

82. *20 Facts About U.S. Inequality that Everyone Should Know*, PATHWAYS MAG. (2011),

Although an inequality in access to politicians exists between donors to campaigns and non-donor constituents,⁸³ a review of other inequalities and how those inequalities translate to political experiences is of value when examining how extensive inequality is in modern America. However, despite numerous distinguishing and confounding factors that affect minority group experiences in the United States, the general experience is that “[g]roups that are ‘anonymous and diffuse’ . . . are systematically disadvantaged in a pluralist democracy.”⁸⁴ These systemic inequalities also can affect the success or lack thereof of specific groups in advancing their political agendas, again questioning the image of access the Court implicitly referenced.⁸⁵

The Court also disregarded the role racial inequality may play in political access. Racial discrimination occurs in a wide variety of settings, including, but not limited to, financial lending and housing,⁸⁶ employment,⁸⁷ within the criminal justice system,⁸⁸ and education.⁸⁹ Alarming, these instances of discrimination are not limited to a purely non-political sphere, but rather pervade society. In testing the responsiveness rate of politicians to constituents based on varying the race of the constituent, researchers found that “U.S. state legislators were less responsive to requests from blacks than

<http://inequality.stanford.edu/publications/20-facts-about-us-inequality-everyone-should-know> (discussing wage inequality, CEO pay inequality, homelessness, education wage premium inequality, gender pay gaps, occupational sex segregation, racial gaps in education, racial discrimination, child poverty, residential segregation, health insurance, intragenerational income mobility, bad jobs inequality, discouraged workers, wealth inequality, intergenerational income mobility, deregulation of the labor market, job losses, immigration, and incarceration).

83. Tara Siegel Bernard, *A Citizen's Guide to Buying Access*, N.Y. TIMES (Nov. 18, 2014), <https://nyti.ms/1vnwgyR> (“The findings are far from shocking: Those emails that offered the prospect of a donor meeting were three times as likely to result in a meeting than those offering the prospect of a constituent meeting, [with] a far greater chance of securing meetings with more senior officials, including . . . members of Congress.”) (discussing a study that cold-called or wrote politicians with the experiment testing the different responses for active donors versus local constituents).

84. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724 (1985) (discussing the role that minority status plays in access, whether it may be discrete minorities or diffuse ones).

85. See, e.g., Zoltan L. Hajnal et al., *Minorities and Direct Legislation: Evidence from California Ballot Proposition Elections*, 64 J. POL. 154, 174–75 (2002).

86. Aaron Glantz & Emmanuel Martinez, *For People of Color, Banks Are Shutting the Door to Homeownership*, REVEAL NEWS (Feb. 15, 2018), <https://www.revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership>.

87. Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SO. 181, 187 (2008).

88. Ronald Weich & Carlos Angulo, *Racial Disparities in the American Criminal Justice System*, in RIGHTS AT RISK: EQUALITY IN AN AGE OF TERRORISM 186 (Dianne M. Piché et al. eds., 2002).

89. Kim Rueben & Sheila Murray, *Racial Disparities in Education Finance: Going Beyond Equal Revenues passim* (Urban-Brookings Tax Policy Ctr., Paper No. 28, 2008), <https://www.taxpolicycenter.org/publications/racial-disparities-education-finance-going-beyond-equal-revenues/full>.

from whites for help with registering to vote when no signal about partisanship was given.”⁹⁰ In other instances and at a different level of government, the tone in response communications for public housing requests revealed “racial differences,” with “Hispanic housing applicants were 20 percentage points less likely to be greeted by name than were their black and white counterparts.”⁹¹ At varying levels of governance and for differing requests, race plays a role in the contemporary American political experience, harming some while benefitting others. Despite the harmfulness of the possibility of race having a role in service provision, it is but one of the many factors that affects access.

Beyond the perniciousness of racial inequalities, economic inequality also affects access to politics and democracy in contemporary American society. At base, “[c]ampaign donations buy access to politicians” and “politicians themselves have admitted that big donors get special treatment.”⁹² However, even removed from the explicit instances involving campaign donations, money, wealth, or income all have an effect on one’s role within American democracy. As wealthier individuals are more likely to vote, “[e]conomic inequality also feeds the political kind, driving everything from the actions of our political representatives to the quality and quantity of civic engagement.”⁹³ Beyond wealth having a positive effect on participation, economic inequalities also drive down the participation of those who are less advantaged, limiting access to those stricken by poverty.⁹⁴ Specifically, such inequalities result in “[d]eclining political interest,” which in turn suggests that “issues on which a consensus exists among richer individuals . . . become increasingly unlikely even to be debated within the political process regardless of whether poorer citizens would care to raise them.”⁹⁵ Accordingly, even with a desire to participate, some individuals lack the ability to do so because their financial statuses have already foreclosed any access to certain aspects of democracy.

90. Daniel M. Butler & David E. Broockman, *Do Politicians Racially Discriminate Against Constituents? A Field Experiment on State Legislators*, 55 AM. J. POL. SCI. 463, 472 (2011).

91. Katherine Levine Einstein & David M. Glick, *Does Race Affect Access to Government Services? An Experiment Exploring Street Level Bureaucrats and Access to Public Housing*, 61 AM. J. POL. SCI. 100, 100 (2017).

92. Bernard, *supra* note 83.

93. Christina Pazzanese, *The Costs of Inequality: Increasingly, It’s the Rich and the Rest: Economic and Political Inequities Are Interlaced, Analysts Say, Leaving Many Americans Poor and Voiceless*, HARV. GAZETTE (Feb. 8, 2016), <https://news.harvard.edu/gazette/story/2016/02/the-costs-of-inequality-increasingly-its-the-rich-and-the-rest>.

94. See Frederick Solt, *Economic Inequality and Democratic Political Engagement*, 52 AM. J. POL. SCI. 48, 53–58 (2008).

95. *Id.* at 57–58.

Finally, other aspects of basic political inequalities that inherently stratify access exist as well, like felon voter disenfranchisement and voter identification laws. These forms of inequality directly limit certain individuals' ability to participate in democracy by outlawing basic aspects of their participation in democratic systems. Although "the days of outright exclusion from the voting process are mostly behind us in the United States, there remains a steady stream of initiatives to limit participation."⁹⁶ These methods include "inadequate voter outreach to poor or immigrant neighborhoods, poorly staffing polling places, [and] preventing some felons from voting," thus almost eliminating the line between "neglect" and "willful disenfranchisement."⁹⁷ Voter identification laws have a similar effect, at least inasmuch as the "laws skew democracy toward those on the political right" and "have a differentially negative impact on the turnout of racial and ethnic minorities in primaries and general elections."⁹⁸ Therefore, voter disenfranchisement limits an essential aspect of access to democratic institutions: the right to vote.⁹⁹ Regardless of the methods deployed to limit access—and if they are direct disenfranchisement or identification laws—the effect is the same, as "the voices of some citizens are not heard" and lessens the "long-accepted principle that all citizens have effective access."¹⁰⁰ In such instances, political access is not limited, but rather absent, with some individuals missing some of the essential forms of participating in a democracy.

In summary, a number of variables affect political access, all limiting the access of specific minorities or those with certain socioeconomic backgrounds. This inequality, of course, exists even without delving into the significant intersectionality of race, socioeconomic status, and other factors in contemporary American society—the reality that for certain groups, the intersection of minority status only serves to multiply their powerlessness.¹⁰¹ The Court failed to consider the role of stratified access in the United States,

96. JOSEPH STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* 130 (2012).

97. *Id.*

98. Zoltan Hajnal et al., *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POLS. 363, 363 (2017).

99. Christopher Uggen et al., *Felony Voting Rights and the Disenfranchisement of African Americans*, 5 SOULS 48 (2003).

100. STIGLITZ, *supra* note 96, at 164.

101. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991) ("The embrace of identity politics, however, has been in tension with dominant conceptions of social justice. Race, gender, and other identity categories are most often treated . . . as vestiges of bias or domination—that is, as intrinsically negative frameworks in which social power works to exclude or marginalize those who are different.").

as it simply validated the necessity of access without qualifying who actually has access and who does not. Although the reality of stratified access should be sufficient in showing the Court erred, public opinion indicating disapprobation towards that reality further underscores that the Court erred.

B. WHY CONTRADICTIONARY PUBLIC OPINION PROBLEMATIZES THE COURT'S HOLDING

Inasmuch as the Court felt it reinforced democracy, it did so erroneously. The Court embraced a concept of access it believed to be crucial to a thriving democracy, but one that the public abhorred. Widespread public opinion regarding campaign finance reform, money in politics, and finally government corruption questions the theory of access the Court espoused. It further indicates that the Court may have been cognizant of how the public would perceive its theory regarding access, especially considering that the Court often responds to public opinion.¹⁰² Yet in no place in its *McDonnell* opinion did it discuss public opinion.

Public opinion regarding government corruption indicates that, from the perspective of the general public, some inequality of access exists. Recent polling suggests that as much as 75% of Americans view their government as corrupt, and that “[t]his alarming figure has held steady since 2010, up from 66% in 2009.”¹⁰³ When presented with an option to choose between the federal government, the news media, banks and financial institutions, the police, and organized religions, a plurality of 38% of respondents chose the federal government as the most corrupt institution in the United States (leading the news media, which placed second, by more than 20 points).¹⁰⁴ Not only is the opinion that public corruption exists prominent in the United States, but also, it exists at a much higher percentage than in other Western countries, like the United Kingdom (46%), Canada (44%), Germany (38%), and Sweden (14%).¹⁰⁵

The public's perspective on campaign finance reform indicates that the public generally views disdainfully how politicians and administrative

102. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 14–15 (2009) (arguing that the Supreme Court often follows public opinion on matters deemed especially contentious).

103. Jim Clifton, *Explaining Trump: Widespread Government Corruption*, GALLUP NEWS (Jan. 6, 2016), <http://news.gallup.com/opinion/chairman/188000/explaining-trump-widespread-government-corruption.aspx>.

104. *60 Minutes/Vanity Fair Poll: Corruption*, CBS NEWS: 60 MINUTES (June 9, 2015), <https://www.cbsnews.com/news/60-minutesvanity-fair-poll-corruption>.

105. *75% in U.S. See Widespread Government Corruption*, GALLUP NEWS (Sept. 19, 2015), <http://news.gallup.com/poll/185759/widespread-government-corruption.aspx>.

officials fundraise, and subsequently, the access afforded to the wealthy by politicians and administrative officials alike. Although the Court claimed that donating to campaigns in return for access does not constitute a quid pro quo relationship,¹⁰⁶ public opinion rejects that view. A poll from the Pew Research Center found that 76% of Americans believe that money has a greater influence on politics now than it has before, running across party lines.¹⁰⁷ Similarly, Americans, in a *N.Y. Times–CBS News* survey, viewed the political system as requiring change—85% believed that a change to the way political campaigns are funded is necessary, with 46% also saying that a complete rebuild is necessary.¹⁰⁸ Such results are common across several research agencies and are hardly limited to specific individuals—rather, this perspective is shared by almost all Americans who participated in the polls.¹⁰⁹ Of course, such perspectives also assume or implicitly imply another factor: money has an effect on political access.

Even though the Court dismissed discussing the aforementioned widespread opinion, further probing the source of that opinion indicates that a majority of Americans believe that an inequality of access to politicians, administrative officials, and public servants contributes to its perception as a legitimate issue. Access is stratified, in the opinion of many Americans, as 66% claim that the wealthy have more access, compared to 31% who believe equal access to politicians exists.¹¹⁰ This belief that the wealthy have more access exists beyond an abstract notion of access and contributions: 85% of Americans believe that “candidates who win public office promote policies that directly help the people and groups who donated money to their campaigns.”¹¹¹

These beliefs are bipartisan as well, given that “[l]arge majorities of Americans believe that members of Congress will favor the interests of those who donate to Super PACs over those who do not—and that Super PAC donors can pressure elected officials to alter their votes.”¹¹² When moneyed

106. *See supra* Part II.

107. Drew DeSilver & Patrick Van Kessel, *As More Money Flows into Campaigns, Americans Worry About Its Influence*, PEW RES. CTR.: FACT TANK (Dec. 7, 2015), <http://www.pewresearch.org/fact-tank/2015/12/07/as-more-money-flows-into-campaigns-americans-worry-about-its-influence>.

108. *Americans' Views on Money in Politics*, N.Y. TIMES (June 2, 2015), <https://nyti.ms/2kajjpi>; Nicholas Confessore & Megan Thee-Brenan, *Poll Shows Americans Favor an Overhaul of Campaign Financing*, N.Y. TIMES (June 2, 2015), <https://nyti.ms/1HlaEhH>.

109. Daniel Hensel, *New Poll Shows Money in Politics Is a Top Voting Concern*, ISSUE ONE (June 29, 2016), <https://www.issueone.org/new-poll-shows-money-in-politics-is-a-top-voting-concern>.

110. *Americans' Views on Money in Politics*, *supra* note 108.

111. *Id.*

112. *National Survey: Super PACs, Corruption, and Democracy*, BRENNAN CTR. FOR JUST. (Apr. 24, 2012), <https://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and>

interests and the interests of an electorate diverge, “[m]ore than three-quarters of all respondents—77%—agreed that members of Congress are more likely to act in the interest of a group that spent millions to elect them than to act in the public interest.”¹¹³ Bipartisan support exists for that claim too—79% of Democrats compared to 81% of Republicans polled believed in that divergence.¹¹⁴

Americans—regardless of political affiliation—believe that their government is corrupt, more corrupt than other countries, and that this corruption is on the rise. They also believe that bought-for access constitutes a basis, or at least is partially responsible, for that perception. Therefore, at least from the public’s perspective, a general corruption pervades government, subverting a major theory that the Court used in arriving at its decision. These studies showing that American society is plagued by systemic and pervasive social inequalities, coupled with the public opinion indicating that the Court erred, problematize the Court’s perception of what constitutes politics as usual.

Yet in the face of overwhelming and inundating public opinion decrying the status quo of the contemporary American political system, the Court held that a maligned access is a required factor for any democracy and vindicated McDonnell’s actions on that theory. But as is shown, that is rarely the case—stratified access exists according to a majority of Americans, and Americans believe that contributions or donations result in access. Although the Court implicitly supported a theory of equality of parity of access, it did not arrive there alone. Rather, it was aided by the flood of amici—most of whom were in fact, politicians, administrative officials, or public servants—who all supported McDonnell’s position and shared his fears.¹¹⁵

C. HOW THE AMICI BLINDED THE COURT TO PUBLIC OPINION

The Court erred because instead of acknowledging the aforementioned public opinion and inequality, it deferred to the opinion of the amici writing on behalf of the Governor, as is evident by its almost rote repetition of the fears espoused by those amici as well as the fears espoused by the former Governor. Numerous amici wrote to the Court, mostly supporting the petitioner, McDonnell.¹¹⁶ These amici all decried the supposedly deleterious

democracy.

113. *Id.*

114. *Id.*

115. *See supra* note 51 (listing all the amici who filed in support of McDonnell).

116. *Compare supra* note 51 (listing groups filing amicus briefs on behalf of petitioner), *with supra* note 53 (listing groups filing amicus briefs on behalf of respondent).

effects of the court of appeals' ruling, supporting McDonnell's claims.¹¹⁷ This Section focuses on the role some of those amici played, with an understanding that a caveat may exist in discussing their importance because they wrote or filed against the United States.

The Republican Governors Public Policy Committee's (the "Committee") amicus brief reinforced the centrality of access in any functioning democracy. First, the Committee noted that "facilitating 'access' is a central part of *any* modern elected official's job" and then cited to instances by former Governor of Florida Jeb Bush, former Secretary of State Hillary Clinton, and former President of the United States Barack Obama that could be seen as corrupt or engaging money for influence under the court of appeals' definition of an "official act" that the United States sought to affirm, mirroring the fear that the Court later expressed in their opinion—that the lower court decisions would punish normal acts of governance.¹¹⁸ The Committee also believed that the decision would embolden prosecutors, much like the Court feared as well. Elucidating that argument, the Committee pivoted and reinforced the harmful ramifications on democracy of affirming the conviction, noting that "if other courts adopted this understanding of 'official act,' potentially every elected official in the nation would be in danger of indictment by an overzealous federal prosecutor. To be sure, the prosecutor would be required to show the existence of a quid pro quo to obtain a conviction."¹¹⁹ As no public official or public servant would

117. Brief for Am. Ctr. for Law & Justice as Amici Curiae for Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474); Brief for Former Federal Officials as Amici Curiae for Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474); Brief for Former Va. Atty's Gen. as Amici Curiae for Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474); Brief for Jealous et al. as Amici Curiae for Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474); Brief for James Madison Ctr. for Free Speech as Amici Curiae for Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474); Brief for Law Professors as Amici Curiae for Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474); Brief for Members of Va. Gen. Assemb. as Amici Curiae for Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474); Brief for Nat'l Ass'n of Crim. Def. Lawyers as Amici Curiae for Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474); Brief for Republican Governors Pub. Policy Comm. as Amici Curiae for Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474); Brief for Pub. Policy Advocates & Bus. Leaders as Amici Curiae for Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474); Brief for Seventy-Seven Former State Att'ys Gen. (Non-Va.) as Amici Curiae for Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474); Brief for U.S. Justice Found. et al. as Amici Curiae for Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474).

118. Brief for Republican Governors Pub. Policy Comm. as Amici Curiae for Petitioner at 12–14, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474).

119. Brief for Republican Governors Pub. Policy Comm. as Amici Curiae for Petitioner in Support of Petition for a Writ of Certiorari at 8–9, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474).

know if his or her conduct was lawful, he or she would fear acting at all, and ultimately, according to the Committee, democracy would suffer.

In addition, a group of Former Virginia Attorneys General strongly supported the Court's first fear, namely, that the decision could harm governance and possibly weaken democracy. Citing to their vast experience, "including providing legal advice,"¹²⁰ these Former Virginia Attorneys General noted—in line with both the Court's eventual opinion and McDonnell—"[t]he overly-expansive interpretation of 'official action' in the decision below will disrupt the public life of Virginia" and the other states within the Fourth Circuit, and it would create a different rule for participatory democracy in the Fourth Circuit than the one that applies in other circuits.¹²¹ According to these amici, upholding the lower courts' perspective on what constituted an "official act" would strike such a strong blow to public life as to disrupt it. Not only did these amici reinforce the argument of the possibly deleterious effects of the lower court's decision, but also, much like the Court itself did, they discussed the necessity of access in a democracy.

Other politicians supported the aforementioned theory of access and the Court's fears. Sixty Former State Attorneys General from states other than Virginia also supported McDonnell, and argued (in an exercise of hyperbole meriting mention) the deleterious effect of defining an "official act" as the court of appeals did.¹²² Those former Attorneys General even noted that "it could chill the delivery of those services altogether," and that even other individuals connected to governors and public officials would refrain from discussing political or policy issues out of fear of prosecution.¹²³ In this instance, the former State Attorneys General supported the Court's first fear, but instead focused on the possibility that constituents would hesitate becoming politically involved.

In summary, amici, writing on behalf of McDonnell, flooded the Court with briefs, all indicating similar issues—the overall deleterious effects of the court of appeals' ruling. These amici hardly hid their stake or interest in the litigation, as well, directly indicating that they feared prosecution, again implicitly referencing that such conduct is politics as usual.¹²⁴ Referring back

120. Brief for Former Va. Att'ys Gen. as Amici Curiae for Petitioner at 2, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474).

121. *Id.* at 4, 12–15.

122. Brief for Sixty Former State Att'ys Gen. (Non-Va.) as Amici Curiae for Petitioner at 17–18, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474) ("Dangling the threat of criminal liability over every lunch with a lobbyist and every meeting with an interest group would impede the proper functioning of state and local governments.").

123. *Id.* at 17–20.

124. Brief for Members of Va. Gen. Assemb. as Amici Curiae for Petitioner at 2, *McDonnell v.*

to the Court's opinion, it becomes clear that the Court had these individuals in mind—rather than the plethora of public opinion—in arriving at its decision. Given that the Court then discussed those effects in its decision,¹²⁵ despite having already used statutory interpretation to arrive at its decision, an examination of the role the amici played in the Court's decision is of value.

D. HOW THE COURT'S ACTIONS RELATE TO THE USEFULNESS (OR LACK THEREOF) OF AMICUS BRIEFS

The Court's use of amici provides insight into the possibly pernicious role that amicus briefs can play when they fail to represent public opinion or do not adequately represent both sides in any given case before the Supreme Court. Such a result indicates a general problem of elevating concentrated interests at the expense of diffuse ones and having an inability to protect minority groups or those without strong political voices.

Perhaps the possibility of amici providing a biased understanding of the issue in any case before the Court is unsurprising, given the rise in the role of amici over the past century in Supreme Court jurisprudence.¹²⁶ Not only have amici submitted more briefs, but also “[t]here is no question . . . that the frequency of such references [to amici] has been increasing over time.”¹²⁷ In many instances, the Court utilizes amici as a means of gaining insight into a specific matter before it, either providing alternative views on issues, “important technical or background information,” or at times, simply reinforcing the perspectives of the already existing parties.¹²⁸ Undoubtedly, therefore, amicus briefs are “an institutional part of U.S. court systems.”¹²⁹

United States, 136 S. Ct. 2355 (2016) (No. 15-474) (referring to the interest of amici).

The conviction of Governor Robert McDonnell on a uniquely broad interpretation of the federal corruption statutes blurs the line between honest political interactions with constituents and public corruption. It now appears that accepting gifts from a constituent—even in the absence of the legislator's promising or undertaking an official act—may lead to federal prosecution should the constituent request even the slightest assistance from the legislator.

Id.

125. See *supra* Part II.

126. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 744 (2000) (“In one respect, however, there has been a major transformation in Supreme Court practice: the extent to which non-parties participate in the Court's decision-making process through the submission of amicus curiae, or friend-of-the-court, briefs. Throughout the first century of the Court's existence, amicus briefs were rare.”); see also ANDREW JAY KOSHNER, *SOLVING THE PUZZLE OF INTEREST GROUP LITIGATION* 7–11 (1998) (exploring the increasing role of public interest participation before the Supreme Court).

127. Kearney & Merrill, *supra* note 126, at 757.

128. *Id.* at 745.

129. Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FL. ST. U. L. REV. 315, 319 (2008).

However, they can also have a destructive effect of either misrepresenting or failing to represent parties in a Supreme Court decision.¹³⁰ For example, these briefs sometimes provide no value to the Court, instead reiterating what has already been argued and, therefore, providing no new information.¹³¹ Regardless, these briefs have become so common—“[i]ndeed. . . so common that some judges are looking for ways to limit them”—that a brief review of their limitations is of use.¹³²

The Court can fall victim to a flood of one-sided amicus briefs, either due to the lack of proponents on one side of an issue or because of an inability to convey the opinions of one side effectively. Justice Scalia referred to this possibility in his dissent in *Jaffee v. Redmond*, in which, despite the adversarial nature of the American court system and the possibility of having multiple amici file on behalf of both parties, “[n]ot a single *amicus* brief was filed in support of petitioner.”¹³³ That was no surprise, according to Scalia, because “[t]here is no self-interested organization out there devoted to pursuit of the truth in the federal courts.”¹³⁴ A similar situation is at play in *McDonnell*, as few vehicles exist for the representation of public opinion in the form of amicus briefs beyond the non-profit organizations and think tanks that participated as amici and then Justices being cognizant of general public opinion. Here, much like in *Jaffee*, individuals could not represent themselves in a fashion similar to public officials. Although no formal organization existed to represent public opinion, the Court nonetheless could have considered that information, either because the Justices are “social beings confronted with the plethora of stimuli emanating from American culture, media and politics,”¹³⁵ or out of concern “about their legitimacy in the short and long-terms.”¹³⁶

Beyond the plausibility of few organizations existing to actively

130. See Kearney & Merrill, *supra* note 126, at 746–47, 784–87.

131. See *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997). After 16 years of reading amicus curiae briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, indeed a fish-eyed, fashion. The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigant’s brief. Such amicus briefs should not be allowed.

Id. (Posner, J., in chambers).

132. Garcia, *supra* note 129, at 316.

133. *Jaffee v. Redmond*, 518 U.S. 1, 35–36 (1996) (Scalia, J., dissenting).

134. *Id.* at 36.

135. Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468, 471 (1997).

136. Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 281 (2010).

represent public opinion before the Court,¹³⁷ the Court was also inundated with more than a dozen amicus briefs on behalf of McDonnell from the time he filed his Petition for a Writ of Certiorari to when he argued before the Court.¹³⁸ Only five organizations filed in support of the respondents, and all were filed only after the petition had been granted.¹³⁹ Regardless of whether that stark difference is due to the role the United States played as the respondent, “[i]n order to maximize their own public reputations or the reputation of the Court, the Justices need information about public opinion.”¹⁴⁰ In many instances, public opinion is unavailable on an issue before the court.¹⁴¹ However, as discussed in Section III.B, that was not the case in *McDonnell*. Rather, the “groups most affected by [the] decision . . . likely [had] very pronounced views about how these issues should be resolved as a policy matter”¹⁴² that contradicted the Court’s holding.

Accordingly, in *McDonnell*, the amici failed to provide the Supreme Court with an adequate representation of public opinion, instead blinding the Court to what the public truly believed. Rather than referring to the interests of all parties and the public, as Justice Scalia suggested in *Jaffee* was the interest “that *this Court* will have . . . prominently—indeed, primarily—in mind,”¹⁴³ the Court abrogated that responsibility. Although amicus briefs can play “an important role in the democratic process, . . . not just as an element of interest group lobbying in today’s society . . . but rather as an integral part of participatory democracy,”¹⁴⁴ public opinion did not factor into the voices of the amici.¹⁴⁵ Therefore, Justices were unable to look to “amicus briefs as a barometer of opinion on both sides of the issue;”¹⁴⁶ instead, they were only presented one side. As a result, the voice of the one-

137. Although perhaps, myriad amici briefs flooding the Court in support of granting a Petition for Writ of Certiorari and again in the Court’s decision would indicate a number of stakeholders in the pending decision, and thus illustrate the importance of the issue, as mentioned throughout this Section, that flood poses problems when an imbalance exists between those filing for the petitioner and the respondent. See *Jaffee v. Redmond*, 518 U.S. 1, 35–36 (1996) (Scalia, J., dissenting) for a discussion on the possible effects that imbalances in amicus briefs may have on Supreme Court jurisprudence and why such imbalances ultimately pose significant problems for strong adversarial litigation. Another issue of note, but one not explored here, is the effect of amicus briefs in Supreme Court jurisprudence when one party is the United States.

138. See *supra* note 51 (listing groups filing amicus briefs on behalf of petitioner).

139. See *supra* note 53 (listing groups filing amicus briefs on behalf of respondent).

140. Kearney & Merrill, *supra* note 126, at 785.

141. *Id.*

142. *Id.*

143. *Jaffee v. Redmond*, 518 U.S. 1, 36 (1996) (Scalia, J., dissenting).

144. Garcia, *supra* note 129, at 320.

145. See *supra* note 117 (listing all amicus briefs on behalf of petitioner).

146. Kearney & Merrill, *supra* note 126, at 786.

sided amici overpowered the general American public's collective voice.

E. IN DEFERRING TO AMICI AND NEGLECTING INEQUALITIES AND PUBLIC OPINION, THE COURT FAILED TO REINFORCE DEMOCRACY

As a result of the stark contrast between public opinion and the opinions presented to the Court by the amici as well as the Court's heavy reliance on the opinions of the amici, the Supreme Court falsely believed it was acting as a democracy-reinforcing institution and actually promoted something wholly corrosive to democracy. Beyond the fact that it deferred to the voice of amici over the voice of the public, the Court failed to act as a democracy-reinforcing institution because of the plausibility or likelihood that its decision will actually hurt democracy and the public.

The concept of the Court acting as a democracy-reinforcing institution is best described by John Ely's *Democracy and Distrust*.¹⁴⁷ Ely, in a particularly trite comment, referenced the role of the Supreme Court in contemporary society, noting, "[t]he Constitution may follow the flag, but is it really supposed to keep up with the *New York Review of Books*?"¹⁴⁸ This view is particularly valuable for understanding the role of the Court: specifically, as an adaptive branch of government that can respond to contemporary ideals, opinions, or sentiments, while still keeping with the general theme of the Constitution.¹⁴⁹ Here, academic opinion agrees that Ely proposes "a notion of representation which . . . forms the general theory of our entire constitution" and "that the Supreme Court, in construing the more open-ended provisions of the constitution, *should* solely concern itself with preserving the ideal of representation"¹⁵⁰ In this sense, Ely's theories uphold or describe a basic tenet that the Court should reinforce democracy by protecting minority populations while still upholding the importance of majority government.¹⁵¹ The primary role of the Supreme Court, then, has been to protect "geographical outsiders," the "literally voteless," and the "functionally powerless."¹⁵² Here, the Court neglected that duty.

The Court failed to intervene in support of public opinion or represent the public's interests, instead kowtowing to the voices of the elite few who

147. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing for the Supreme Court's role as reinforcer of democracy).

148. *Id.* at 58.

149. See *id.* at 12.

150. Richard W. Burgh, *John Hart Ely, Democracy and Distrust: A Theory of Judicial Review*, *Cambridge: Harvard University Press, 1980*, Book Review 1 L. & PHIL. 481, 482 (1982).

151. ELY, *supra* note 147, at 12.

152. John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 466 (1978).

submitted briefs as friends of the Court. The Court did not act in support of a neglected population, even though it should have intervened because the “market [was] malfunctioning.”¹⁵³ The market malfunctioned not solely because of an unideal outcome, but rather, because “the in’s [were] choking off the channels of political change to ensure they will stay in and the out’s will stay out”¹⁵⁴ Here, individuals, already ingratiated with public servants as a result of their wealth, gained better and considerably more access. Further, the Court yielded to the voice of the few (the amici, who predominantly were past public servants either from Virginia or elsewhere) instead of the general public. As a result of yielding to a distinct and already empowered voice, a limited interest—and not the public interest—guided the Court’s decisionmaking.

Finally, the Court failed to act as a democracy-reinforcing institution because of the harmful effects of the Court’s decision on the general public. Although the Court’s actions may be largely invisible to most people, its “rulings have enormous impact on people in the most important, and sometimes the most intimate, aspect of their lives.”¹⁵⁵ The scourge of public corruption affects the very functioning of any democracy, including adversely affecting investment projects, causing a diminution of economic activity, encouraging inefficiency, contributing to a misallocation of human resources, creating uncertainty, and generally adversely affecting the poor more so than the rich.¹⁵⁶ Because public corruption has such a broad and injurious effect on democracies, the public stands to suffer from the Court’s decision.¹⁵⁷ Therefore, by supporting those firmly entrenched in government

153. *Id.* at 486 (“A referee analogy is also not far off: the referee is to intervene only when one team is gaining unfair advantage, not because the ‘wrong’ team has scored.”) (describing another possible analogy to the political market theory, in which the Court must insert itself and rectify market inequalities or asymmetries in power to yield more beneficial outcomes, but can insert itself only when such inequalities exist).

154. *Id.*

155. Erwin Chemerinsky, *The Supreme Court, Public Opinion, and the Role of the Academic Commentator*, 40 S. TX. L. REV. 943, 955 (1999).

156. Augusto Lopez-Carlos, *Nine Reasons Why Corruption Is a Destroyer of Human Prosperity*, WORLD BANK (Mar. 31, 2014), <http://blogs.worldbank.org/futuredevelopment/nine-reasons-why-corruption-destroyer-human-prosperity>; see also Susan Rose-Ackerman, *Corruption: Greed, Culture, and the State*, 120 YALE L.J. FORUM (2010), <https://www.yalelawjournal.org/forum/corruption-greed-culture-and-the-state>.

157. *What We Investigate: Public Corruption*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/investigate/public-corruption> (last visited Nov. 30, 2018).

Public corruption . . . poses a fundamental threat to our national security and way of life. It can affect everything from how well our borders are secured and our neighborhoods protected to how verdicts are handed down in courts to how public infrastructure such as roads and schools are built. It also takes a significant toll on the public’s pocketbooks by siphoning off tax dollars—it is estimated that public corruption costs the U.S. government and the public billions of dollars each year.

and those already benefitted, the Court acted “at the expense of individuals whom the Constitution is designed to protect.”¹⁵⁸

The Court abrogated its role as a democracy-reinforcing institution not only because it acted against public opinion, but also, because as a result of its decision, the public stands to suffer. As a result of the Court supporting a specific (and already powerful) subset of the population and not the majority, as well as the plausibility of those actions actually harming both democracy and the general public, the Court failed in its role as a democracy-reinforcing institution.

IV. POSSIBLE SOLUTIONS

This Note has explored a number of divergent areas where the Court erred in its *McDonnell* decision, including, but not limited to, its neglect of pervasive public opinion regarding government corruption and the reality of systemic inequalities (political and otherwise) in the United States, its overreliance on biased amici, and finally, an analysis of the bribery statute that, at base, is ill-equipped to handle contemporary prosecutions of public corruption. This Part assesses possible solutions for each one of those areas and is divided into three broader categories: (1) the Court’s failure to reinforce democracy resulting from its failure to recognize those inequalities and public opinion; (2) the Court’s reliance on amici briefs; and (3) the statute of concern in *McDonnell*.

These solutions not only tackle the issues at hand in *McDonnell*—specifically, how the Court failed as an institution—but also attempt to remedy general issues surrounding contemporary public corruption law. With regards to the changes to the Court’s operations, this Note advocates enhancing certain democratic features of the Supreme Court and ensuring that the voice of the public heard throughout its halls, albeit with a deference to the Court’s inception as a politically insulated branch of government.

Further, policy remedies are necessary, as the *McDonnell* decision has already impacted prosecution strategy and other corruption cases across the Country—this is far from a settled issue. As mentioned earlier, the U.S. Attorney’s Office for S.D.N.Y. retried Sheldon Silver and Dean Skelos. Elsewhere in the hallowed Chambers of the Thurgood Marshall Courthouse, the trial of Joe Percoco—a top aide to New York Governor Andrew Cuomo, another subject of ethics investigations—was affected by the changes

Id.

158. ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 10 (2014).

resulting from *McDonnell*.¹⁵⁹ Seemingly, this decision has not affected this particular office significantly given successful retrials and convictions.¹⁶⁰ However, just across the Hudson River, the decision has had negative effects: the District of New Jersey U.S. Attorney's Office, having faced a mistrial, now dismissed all charges against Senator Robert Menendez.¹⁶¹ This is far from a Northeastern problem, either. Across the country, prosecutors at all levels of government tackle corruption, regardless of the level of government at which it occurs or the type of illicit acts engaged in.¹⁶² As a direct result of the *McDonnell* decision, prosecutors have strategized and developed new theories of prosecution, but not all of them have been successful. Therefore, the policy changes proposed here are necessary to empower prosecutors across the Country to battle the scourge of public corruption and restore efficacious governance.

A. RECTIFYING THE COURT'S FAILURE TO REINFORCE DEMOCRACY

As established above, the Supreme Court failed to reinforce democracy by ignoring widespread public opinion that sees extensive government corruption in addition to ignoring societal and political inequalities. The source of such failures could arise from a number of areas, like the Court's role as an elite institution or its self-perception as such, or even from the rules governing amici briefs.

In writing that “[i]t is emphatically the province and duty of the judicial department to say what the law is,”¹⁶³ Justice John Marshall ensured that the Court would be the final arbiter of executive and legislative actions.¹⁶⁴ The Supreme Court, therefore, can act as an institution designed to ensure majority rule while still safeguarding the rights of minority groups. Some take this theory to an extreme, arguing that the Court best analyzes the law

159. Jimmy Vielkind & Laura Nahmias, *Cuomo's Ambitions at Risk as Former Aide Goes to Trial*, POLITICO (Jan. 22, 2018, 5:04 AM), <https://www.politico.com/states/new-york/albany/story/2018/01/19/cuomos-ambitions-at-risk-as-former-aide-goes-to-trial-199286>.

160. See *infra* notes 213–14.

161. Corasaniti & Schweber, *supra* note 10.

162. E.g., Press Release, U.S. Att'y's Office S.D. Tex., Former Webb County Commissioner Convicted (Oct. 18, 2018), <https://www.justice.gov/usao-sdtx/pr/former-webb-county-commissioner-convicted>; Michael R. Blood & Julie Watson, *US Rep Duncan Hunter, Wife Indicted on Corruption Charges*, ASSOCIATED PRESS (Aug. 21, 2018), <https://www.apnews.com/9e63df7d58f549f5a034589a08036ee2>.

163. *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

164. See Robert J. Harris, Book Review, *Robert McClosky*. The American Supreme Court, 336 ANNALS AM. ACAD. POL. & SOC. SCI. 179, 179 (1961) (“In the first, from 1789 to 1860, the Court under the shrewd guidance of John Marshall, was primarily interested in devising a system of constitutional law which would establish judicial power . . .”).

when assessing legal questions with close scrutiny of public opinion.¹⁶⁵ Judges undertake emphatically democratic tasks, creating new law through their interpretation of statutes or prior common law.¹⁶⁶ How exactly the Supreme Court should act—or under what mechanisms—in order to validate public opinion in its decisionmaking is still a valuable question worth exploring.

First, judges must consider that they operate within a system which requires that “[t]he rules applied to the decision of individual controversies cannot simply be isolated exercises of judicial wisdom.”¹⁶⁷ In turn, recognizing that one operates within a vast chain of precedent and within society as a whole requires transparency, as “[a] judiciary that discloses what it is doing and why it does it will breed understanding.”¹⁶⁸ The flipside of requiring transparency, of course, is a limitation of insulation from the public. The Court, operating within a transparent system, requires awareness not only of its role relative to the people it effectively governs, but also, of its role relative to other institutions within government.¹⁶⁹ Doing so breaks the Court’s role solely as an interlocutor between the Constitution and contemporary legal questions, but does not totally abrogate it; rather, the Court still exhibits fidelity to features within the Constitution, but does so cognizant of its role relative to other documents, institutions, and peoples.

Second, and almost as a corollary to the first rule, judges must also keep abreast of information regarding the society they effectively govern through their decisionmaking. As “one cannot bridge the gap between society and law without having reliable information about society,” judges should strive to understand public opinion.¹⁷⁰ In arriving at such an end, “the Court must determine the public mood, develop a mode of rhetoric that the public finds acceptable, and make decisions that the public at least tolerates.”¹⁷¹ Finding “any easy method, any three-prong test, to determine which definitions of

165. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 367–85 (2009).

166. Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 23 (2002) (“The meaning of the law before and after a judicial decision is not the same. Before the ruling, there were, in the hard cases, several possible solutions. After the ruling, the law is what the ruling says it is. The meaning of the law has changed. New law has been created.”).

167. LON L. FULLER, *ANATOMY OF THE LAW* 94 (Greenwood Press, Inc. 1976) (1968).

168. Justice William O. Douglas, 8th Annual Benjamin N. Cardozo Lecture Delivered Before the Association of the City of New York: *Stare Decisis* (Apr. 12, 1949), in 4 REC. ASS’N B. CITY N.Y. 152, 175–76 (1949), reprinted in 49 COLUM. L. REV. 735, 754 (1949).

169. See *id.* at 172–76, reprinted in 49 COLUM. L. REV. at 752–55.

170. Barak, *supra* note 166, at 33.

171. James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037, 1083.

public opinion should be admitted into constitutional adjudication and how much weight those definitions should be given” is not of significant importance, but rather, public opinion “should enter the multi-factored, balancing equation” of judicial decisionmaking.¹⁷²

Such an entente between the Court and public opinion would empower the public to see itself as a legitimate actor of change. David Cole, in *Engines of Liberty*, provides a clear explanation of how the public could avail itself of a democracy-reinforcing Supreme Court. Cole argues that “[m]ost of the work of constitutional law reform takes place outside the federal courts” because “[o]verlapping state, federal, and international legal systems offer multiple possibilities for doing the groundwork necessary for constitutional change, whether in city councils, state legislatures, state courts, Congress, the executive branch, or international forums.”¹⁷³ As Cole posits, the public sets democratic actions in the Supreme Court in motion. Constitutional law, therefore, is innately and intensely democratic, and the result of political processes—inasmuch as constitutional principles matter, so do advocates.¹⁷⁴

As a caveat, an acknowledgement of public opinion does not connote an abandonment of all precedent and other forms of interpretation.¹⁷⁵ Rather, “[c]onstitutional law is designed to stand above ordinary politics, and it is not—and should not be—directly responsive to political pressure in the way that legislation or executive action is.”¹⁷⁶ Although “[t]he justices’ role is not to represent constituents,” some obeisance towards public opinion is evident.¹⁷⁷ Therefore, although the Supreme Court, under this approach, makes wholly new law and must in some way be insulated from political movements and politics more generally, it can and should respond to failures of democratic institutions and democracy more generally.

The Court should return to its role as a democracy-reinforcing institution, doing so by recognizing the system in which it operates and by acknowledging public opinion. Such an acknowledgment does not require an abrogation of using other forms of analysis in its decisionmaking, but rather, requires that the Court at least exhibit an awareness to the public mood. By recognizing the importance of public opinion in its decisionmaking, or at least by exhibiting an awareness to it, the Court can

172. *Id.* at 1134.

173. DAVID COLE, *ENGINES OF LIBERTY* 223–24 (2016).

174. *Id.* (“The advocates featured here pursued their claims wherever they found a promising forum.”).

175. *See* Wilson, *supra* note 171, at 1127–28.

176. COLE, *supra* note 173, at 225.

177. *Id.*

reinforce democracy by, as Ely mentioned, inserting itself where the political market malfunctions and limits access to representation to some.

B. RECTIFYING THE COURT'S RELIANCE ON AMICUS BRIEFS

As discussed in Sections III.C and III.D, amicus briefs form a vital part of Supreme Court decisionmaking: in short, and at their best, they provide the Court with new and innovative approaches to understanding legal issues and allow for parties interested in the litigation, but not necessarily part of it, to express opinions. As Justice Black opined, “[m]ost cases before this Court involve matters that affect far more people than the immediate record parties,”¹⁷⁸ and amicus briefs allow for that representation. However, as mentioned in Sections III.C and III.D, amicus briefs can often represent a distorted or impartial view of a specific issue, and as a result, some attention to how the Court handles or processes amicus briefs may be of value.

The Court has come to rely heavily on amicus briefs, as in the 2014–2015 term, Justices cited amicus briefs in 54% of all signed opinions.¹⁷⁹ Beyond a heavy reliance on amicus briefs in general, the Court also relies on a specific subset of elite lawyers to both argue before the Court and file amicus briefs.¹⁸⁰ Both the heavy reliance on amicus briefs and on specialized lawyers are unlikely to change, especially as the “new hunger for information outside the record” grows.¹⁸¹ However, the Court can scrutinize the motivations behind amicus briefs and institute certain rules regarding their admissibility.

First, the Court could benefit from assessing the motivations of amici. For example, a recent article by Allison Orr Larsen and Neal Devins found that quite often, when amici file briefs it is not a result of a self-interest, but rather at the behest of the parties in the pending litigation.¹⁸² Essentially, “[w]hen the Court grants certiorari (or ‘cert’), these very lawyers strategize about which voices the Court should hear and they pair these groups with

178. Order Adopting Revised Rules of the Supreme Court of the United States, 346 U.S. 945, 947 (1954) (statement of Black, J.).

179. Anthony J. Franze & R. Reeves Anderson, *In Unusual Term, Big Year for Amicus Curiae at the Supreme Court*, LAW.COM: SUPREME COURT BRIEF (Sept. 21, 2016), <https://www.law.com/supremecourtbrief/almID/1202767950930>.

180. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1487–88 (2015) (“During the past two decades, the Supreme Court has witnessed the emergence of an elite private sector group of attorneys who are dominating advocacy before the Court to an extent not witnessed since the early nineteenth century.”).

181. Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1906 (2016).

182. *Id.* at 1904–06.

other Supreme Court specialists to improve their chances with the Court.”¹⁸³ Often, as a result, what is presented before the Court is not a culmination of individual actors attempting to provide background, clarity, or innovative approaches to a complex legal question, but rather something “orchestrated and intentional” by the litigating parties.¹⁸⁴ Accordingly, assessing the motivations behind an amicus brief would allow the Court to contextualize the brief in its entirety, as, for example, in *McDonnell*, where politicians filing briefs on behalf of another politician may not provide a wholly unbiased view. Although a primary purpose behind amicus briefs is to provide a specific view on an issue, contextualizing those views may provide the Court better perspective on the legal question as a whole.

Second, the Court can institute requirements regarding what amicus briefs must provide in order to be admitted. As mentioned above, these briefs can provide a useful insight into complex legal questions, but oftentimes fall prey to simply rehashing the opinions set forth in the briefs by the respective parties. Although a non-exhaustive list of what possible remedies exist to solve this amicus problem, the Court could explore the following options. Judge Posner suggests the following possibilities and allows amicus briefs

only when (1) a party is not represented competently or not represented at all; (2) the amicus has an interest in some other case that may be affected by the decision in the case before the court; or (3) the amicus has unique information or a unique perspective that can provide assistance to the court beyond what the lawyers for the parties can provide.¹⁸⁵

Although providing myriad reasons for such a limitation, Judge Posner also hesitates at allowing interest group politics to pervade the Supreme Court and distort the judicial decisionmaking process.¹⁸⁶

Amicus briefs benefit the Court greatly, but also have the possibility of manipulating the Court’s perspective on an issue and adversely affecting a party in the case. By scrutinizing this process, the Court will ensure that

183. *Id.* at 1903–04.

184. *Id.* at 1904.

185. Eugene Volokh, *Judicial Attitudes Towards Amicus Briefs*, VOLOKH CONSPIRACY (July 23, 2009, 1:51 PM), <http://volokh.com/2009/07/23/judicial-attitudes-towards-amicus-briefs>.

186. *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003).

[J]udges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties’ briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process.

Id. (emphasis added) (citing *Nat’l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 616–17 (7th Cir. 2000)).

amicus briefs that reach it actually aid it in its decisionmaking, rather than producing an echo chamber as was the case in *McDonnell*, in which amici merely repeated other amici or the petitioner and provided no new insight on the legal question before the Court. These suggestions would also assuage the problem evident in *McDonnell*, namely that amici flooded the Court to support the petitioners and grossly outnumbered the amici on behalf of the respondents.

Further, these suggestions would prevent the aforementioned fears espoused by Justice Scalia, namely, that certain groups fundamentally interested in the outcome of a certain case, but unable to organize and present their opinions, would be absent from consideration in the decisionmaking process.

C. RECTIFYING THE BASIS OF THE COURT'S FAILURE: A STATUTE ILL-EQUIPPED TO TACKLE CORRUPTION

Congress should also pass legislation that would reinforce contemporary public opinion's broad perception of what constitutes corruption, countering the Supreme Court's actions in *McDonnell*. Since the Court narrowly construed what constituted an "official act" for the bribery statute, Congress should defer to public opinion and repudiate that narrow construction. Finally, in harkening back to what the framers perceived as corrupt behavior, Congress should look to New York state (and its corruption legislation) as a means of providing some guidance.

The main statute designed to target public corruption explicitly, the bribery statute—18 U.S.C. § 201—is limited by language, and therefore is prone to interpretation by the Court, as in *McDonnell*. The statute defines the *quo* of the quid pro quo relationship 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."¹⁸⁷ Beyond the bribery statute, few other statutes or codes at the federal level are concerned exclusively with public corruption prosecutions. Enacted in 1946, Congress created the Hobbs Act with the intent of managing labor disputes.¹⁸⁸ However, the Department of Justice's "Justice Manual" notes how "the extortion statute is frequently used in connection with cases involving public corruption."¹⁸⁹ Beyond these

187. See 18 U.S.C. § 201(a)(3) (2018) (defining "official act").

188. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL, CRIM. RESOURCE MANUAL § 2404 (2018), <https://www.justice.gov/usam/criminal-resource-manual-2402-hobbs-act-generally> ("[T]he Hobbs Act was enacted in 1946 to combat racketeering in labor-management disputes . . .").

189. *Id.*

statutes, the honest services fraud statute,¹⁹⁰ as well as the Travel Act,¹⁹¹ have also been used as vehicles for prosecution. Finally, passed in 1970, with the Congressional intent of empowering prosecution of mob activity,¹⁹² the Racketeer Influenced and Corrupt Organizations Act (“RICO”) now empowers prosecution of public corruption, assuming that a person be involved in an enterprise that operates through a “pattern of racketeering activity.”¹⁹³ All of the aforementioned statutes empower federal prosecutors to tackle public corruption;¹⁹⁴ however, none of these acts or statutes reference public corruption prosecution, as case law has illuminated that specific area of law.

Given that the federal statutes that cover public corruption rarely if ever directly refer to it, Congress should look to New York state for both clarifying the statute on what constitutes an “official act” and for determining if any new legislation could be passed that would better reflect the realities of political dealings and public opinion. In 2013, New York revisited its bribery statutes, with Governor Cuomo proposing the Public Trust Act which criminalized directly, without need for other statutes, the bribery of a public servant,¹⁹⁵ “corrupting the government,”¹⁹⁶ and the failure to report corruption.¹⁹⁷ The Public Trust Act, as ultimately enacted in 2014,¹⁹⁸

190. 18 U.S.C. § 1346 (2018); U.S. DEP’T OF JUSTICE, JUSTICE MANUAL § 9-43.100 (2018), <https://www.justice.gov/usam/usam-9-43000-mail-fraud-and-wire-fraud>.

191. 18 U.S.C. § 1952 (2018).

192. U.S. DEP’T OF JUSTICE, U.S. DEP’T OF JUSTICE, JUSTICE MANUAL § 9-110.100 (2018), <https://www.justice.gov/usam/usam-9-85000-protection-government-integrity>.

193. 18 U.S.C. § 1962(c) (2018); *see also* CTR. FOR THE ADVANCEMENT OF PUB. INTEGRITY, COLUMBIA LAW SCH., A GUIDE TO COMMONLY USED FEDERAL STATUTES IN PUBLIC CORRUPTION CASES: A PRACTITIONER TOOLKIT 12–13 (2017) [hereinafter COMMONLY USED FEDERAL STATUTES IN PUBLIC CORRUPTION CASES], https://www.law.columbia.edu/sites/default/files/microsites/public-integrity/a_guide_to_commonly_used_federal_statutes_in_public_corruption_cases.pdf.

194. U.S. DEP’T OF JUSTICE, JUSTICE MANUAL § 9-85.000 (2018), <https://www.justice.gov/usam/usam-9-85000-protection-government-integrity>. Although statutes exist that cover bribery of federal officials and interfering with the integrity of elections, few statutes have the explicit purpose of criminalizing quid pro quo activities, and most of this law has been clarified by case law. COMMONLY USED FEDERAL STATUTES IN PUBLIC CORRUPTION CASES, *supra* note 193.

195. Press Release, Office of the Governor of N.Y., Governor Cuomo Proposes New Class of Public Corruption Crimes (Apr. 9, 2013), <https://www.governor.ny.gov/news/governor-cuomo-proposes-new-class-public-corruption-crimes> (“Under the new Public Servant Bribery provision, a prosecutor would only have to prove that the person paying the bribe intended to influence the public official or that the person receiving it intended to be so influenced . . .”).

196. *Id.* (“The proposed legislation would hold accountable anyone whether or not they are a public official who is found to have engaged in defrauding the government. . . . Under the new law, anybody, whether acting in concert with a public servant or not, who engages in a course of conduct to defraud a state or local government would be guilty of a crime . . .”).

197. *Id.* (“The proposed legislation would for the first time make it a misdemeanor for any public official or employee to fail to report bribery.”).

198. Press Release, Office of the Governor of N.Y., Governor Cuomo and Legislative Leaders

included the latter two proposed provisions as well as enhanced prosecutorial powers through changing the statute of limitations and evidentiary standards.¹⁹⁹ New York provides an opportune study, not only because of how pervasive public corruption is in the state,²⁰⁰ but also because the New York statute accurately reflects public opinion on corruption and therefore is broadly worded.

Section 496 of New York's Penal Law provides a model for public corruption legislation, providing statutes regarding what constitutes public corruption generally, and then also what constitutes corrupting the government.²⁰¹ Its bribery laws—enshrined in Section 200 of the Penal Law—also provide some valuable guidance for possible federal laws, with Sections 200.10 through 200.12 specifically addressing quid pro quo relationships.²⁰² Specifically, the New York State Penal Law criminalizes bribery when any public servant receives any benefit “upon an agreement or understanding that his or her vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced”²⁰³ Such an open definition of what constitutes the *quo* in a quid pro quo (that it could be any “vote, opinion, judgment, action, decision or exercise of discretion”) better relates to the reality of contemporary American politics.

Such legislation would better reflect the realities of public corruption at the national stage, understanding how public opinion factors into how to tackle the issue while also recognizing the benefits in perceiving it as an abuse of the public's trust. Over the past thirty years, “convictions of federal officials and employees . . . [comprised] about 56% of all convictions.”²⁰⁴ The majority of these charges come under Title 18, as mentioned above, “with the most common specific charges being related to bribery,

Announce Passage of 2014–15 Budget (Mar. 31, 2014), <https://www.governor.ny.gov/news/governor-cuomo-and-legislative-leaders-announce-passage-2014-15-budget> [hereinafter Press Release, 2014–2015 Budget] (“The Budget includes further reforms to ensure New Yorkers have confidence that their elected officials are serving them honestly and with transparency.”).

199. N.Y. CRIM. PROC. LAW § 30.10 (McKinney 2016) (Statute of Limitations); N.Y. PENAL LAW § 200.00–.56 (McKINNEY 2016) (Bribery); *id.* §§ 496.01–07 (Corrupting the Government); *see also* Press Release, 2014–2015 Budget, *supra* note 198 (summarizing the enacted Public Trust Act provisions).

200. Alan Greenblatt, *Congratulations, New York, You're #1 in Corruption*, POLITICO (May 5, 2015), <https://www.politico.com/magazine/story/2015/05/how-new-york-became-most-corrupt-state-in-america-117652> (“Other states have plenty of corruption, but it's hard to beat New York when it comes to sheer volume New York doesn't so much have a culture of corruption as an entire festival.”).

201. N.Y. PENAL LAW § 496.01–.07 (McKinney 2016).

202. *Id.* § 200.10–.12.

203. *Id.*

204. Adriana S. Cordis & Jeffrey Milyo, *Measuring Public Corruption in the United States: Evidence from Administrative Records of Federal Prosecutions*, 18 PUB. INTEGRITY 127, 137 (2016).

conspiracy, embezzlement, false statements, and theft.”²⁰⁵ However, divided at the federal level, for the 9,101 indictments filed over the same period, the charges come from a diverse range of acts, spanning across at least four different titles of the U.S. Code.²⁰⁶ Because of the wide variety of statutes used to target public corruption, the public could benefit from a singular statute harmonizing these factors and construing it as an abuse of the public trust.

Defining corruption similarly to the New York state statute would also approximate the public’s view of what constitutes corrupt behavior. Public opinion, as indicated above, regards the intent and context of the corrupt actors, rather than on whether the items exchanged actually constituted something bestowed on a politician by the virtue of the politician’s public office. Essentially, if a public servant used “his public office primarily to serve his own ends,” the servant engaged in corrupt behavior, and more importantly, “[t]his understanding of corruption focuses the discussion on the intent and context of the potentially corrupt actor (or actors).”²⁰⁷ Under this approach, it was not so much the form or specific acts carried out by the politician or public servant, but rather, the simple fact that by doing so, the politician served his or her own ends and not his or her constituents.

If Congress is unable to pass new legislation concerning public corruption, it at least should support a clarification of the statute. Currently, two members of Congress—Tom Suozzi (D-N.Y.) and Brian Fitzpatrick (R-Pa.)—have proposed bipartisan legislation to clarify the statutory defect that resulted from the Court’s decision. Suozzi, saying that “[w]e can’t allow corruption convictions to be overturned based on legal technicalities,” unveiled the Close Official Acts Loophole Act, which would borrow language from the federal conflicts of interest statutes and apply that language to what constitutes an “official act.”²⁰⁸ Explaining the rationale

205. *Id.*

206. *See id.* at 138 (including in Title 18: § 201 Bribery of Public Officials and Witnesses, § 371 Conspiracy to Commit Offense or Defraud the United States, § 641 Public Money, Property or Records, § 666 Theft or Bribery in Programs Receiving Federal Funds, § 1001 Fraud and False Statements or Entries Generally, § 1028 Fraud and Related, ID Documents, § 1341 Mail Fraud, Frauds and Swindles, § 1709 Theft or Destruction of Mail by Officers or Employees, § 1951 Hobbs Act, and § 1962 RICO Prohibited Activities; in Title 21: § 841 & § 843 Manufacture and Distribution of Drugs, § 844 Simple Possession of Drugs, and § 846 Attempt and Conspiracy; in Title 26: § 7201 Tax Evasion and § 7206 Fraud and False Statements; and in Title 42: § 408 SSDI Penalties and § 1973 Denial or Abridgement of Right to Vote).

207. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 374 (2009).

208. Kenneth Lovett, *L.I. Congressman Seeks to Close Corruption Loophole with New Bill After Dean Skelos Conviction Tossed*, N.Y. DAILY NEWS (Sept. 27, 2017, 11:27 PM), <http://www.nydailynews.com/news/politics/congressman-unveils-bill-prosecuting-corrupt-pols-easier->

behind the bill, Fitzpatrick, a former Supervisory Special Agent for the Federal Bureau of Investigation (“FBI”) and the national supervisor for its Public Corruption Unit, noted, “[c]orruption can and does take many different forms, and we must provide investigators and prosecutors with all the tools they need to combat [its] erosive effects”²⁰⁹ The bill would elaborate what constituted the “quo” of a quid pro quo relationship, indicating that acting 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” in return for some pecuniary benefit would constitute bribery.²¹⁰

Of note, passing such amendments as opposed to passing new legislation mirroring New York’s would also allay the Court’s concerns of overeager prosecutions and criminalizing all forms of governance. This list, proposed by Suozzi and Fitzpatrick, mirrors the one in New York, in some capacity, expanding what constitutes an “official act” to matters related to the discretion of the public servant.²¹¹ However, it still draws on language from already existing statutes, which the Court passively approved in its opinion. Further, the petitioner differentiated the bribery statute from the already existing statutes on the basis of these semantic differences, but did not denigrate those specific statutes.²¹²

Such legislation is necessary because it better covers the nefarious aspects of access explored by this Note. By expanding what constitutes an “official act” and bringing it line with aforementioned public opinion and certain realities of access, Congress can ensure that the public’s perspective on what constitutes corruption is enshrined in law. Further, by enshrining that definition in law, Congress will rectify the situation—of a limited definition of what constitutes corruption—created by the Supreme Court in *McDonnell*.

article-1.3525148.

209. Press Release, Office of Congressman Thomas Suozzi, Suozzi Proposes Legislation to Close “Official Acts” Loophole that Resulted in Overturned Political Corruption Convictions (Sept. 27, 2017), <https://suozzi.house.gov/media/press-releases/suozzi-proposes-legislation-close-official-acts-loophole-resulted-overturned>.

210. Close Official Acts Loophole Act of 2017, H.R. 3843, 115th Cong. (as introduced by H. Reps. Brian K. Fitzpatrick and Thomas R. Suozzi, Sept. 26, 2017).

211. *Id.*

212. Brief of Petitioner at 13–14, 35–36, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474). Notice that the petitioner accused respondents of importing a definition from another statute, but reserved judgment as to the “better” definition. *See id.* at 49–55.

CONCLUSION

A number of possible caveats exist to the arguments made in this Note. I did not explore whether the Court's decision would ultimately benefit the public—perhaps the decision and its logical results would allow for public servants to more freely interact with their constituents with no fear of prosecution—or harm it. Beyond that, I also assumed that the presence of multiple amici on behalf of the petitioner caused an uneven playing field against the respondent, the United States, which may also not be the case. The instant case is also factually contingent on amici not representing public opinion—many instances may exist where amici *do* represent public opinion (and do so very well), thus questioning another argument made here. Despite these caveats, the Court's decision has already had real effects on democracy.

As mentioned earlier, the Court's decision, affected a number of other decisions in a small amount of time. The deleterious effect mentioned, however, by the Court, amici, and McDonnell, might be misplaced. In the wake of the decision, various courts of appeal have overturned convictions, reversing and remanding them for reconsideration in line with *McDonnell*. Yet the U.S. Attorney's Office for S.D.N.Y.—a powerhouse of public corruption prosecutions—and other U.S. Attorney's Offices across the country announced they would retry them, succeeding in winning convictions.²¹³ In fact, at the time of reversal, the Second Circuit Court of Appeals even noted that the evidence submitted in two prominent S.D.N.Y. cases—those of Dean Skelos and Sheldon Silver—was sufficient to convict.²¹⁴ The Court's fear of giving prosecutors a carte blanche may have been misplaced, as prosecutors continue their zealous attempt to rid statehouses, bureaucracies, and Congress of corruption.

213. See Press Release, U.S. Att'y's Office for the S.D.N.Y., Statement on Second Circuit Decision, *United States v. Sheldon Silver* (July 13, 2017), <https://www.justice.gov/usao-sdny/pr/statement-acting-us-attorney-joon-h-kim-second-circuit-decision-united-states-v-sheldon> (“While we are disappointed by the Second Circuit's decision, we respect it, and look forward to retrying the case. . . . Although it will be delayed, we do not expect justice to be denied.”) (statement of Acting U.S. Attorney for the Southern District of New York, Joon H. Kim, in response to the Second Circuit's decision to overturn the conviction); see also Wang, *supra* note 8 (Skelos convicted); Weiser, *supra* note 8 (Silver convicted).

214. See *United States v. Skelos*, 707 F. App'x 733, 739 (2d Cir. 2017); *U.S. v. Silver*, 864 F.3d 102, 124 (2d Cir. 2017).

[T]he evidence presented by the Government was sufficient to prove the Hobbs Act extortion and honest services fraud counts of conviction against Silver[,] . . . [and] the evidence presented by the Government was sufficient to prove the money laundering count of conviction against Silver because the Government was not required to trace criminal funds that were commingled with legitimate funds under 18 U.S.C. § 1957.

Silver, 864 F.3d at 124.

Additionally, the writing of this Note occurred as the Special Counsel Investigation into Russia's influence on the 2016 presidential election was underway.²¹⁵ Various public officials, non-profit organizations, and politicians raised numerous allegations regarding President Trump's and his aides' relationships with Russian officials and representatives. In these allegations, these public officials, non-profit organizations, and politicians accuse the President and his aides of some type of corruption.²¹⁶ In such a context, the importance of *McDonnell's* outcome increases, especially as corruption became a politicized issue in the 2016 election.²¹⁷ With a limited scope on what constitutes corruption, it is possible that some acts could go unnoticed and unprosecuted.

However, even if "[a] means can be justified only by its end"²¹⁸ and the ultimate effect of the holding is limited, the Court's process of arriving at its decision is also worrisome. That the Court deferred to amici, in spite of overwhelming public opinion opposing the views of those amici, ultimately calls into question the role of amici, or at least how the Court interacts with them and the public. A majority of those Americans surveyed, cutting across tense political lines, viewed, and still view, the Court's reasoning as problematic, suggesting that the Court's motivations should not go unquestioned.

A further question at play in the litigation, and one this Note touches tangentially, is how to manage the Supreme Court when it fails to police itself. Despite its design as an institution insulated from politicking, as described above, the Court must eschew devolving into an elitist institution completely unaware or ignorant to realities of contemporary social ills. Of course, the Court is not wholly insulated to public opinion. Jurisprudence on a number of legal issues—including privacy rights related to gay marriage, the right to contraception, school integration, and other issues—indicate the Court's willingness to contemplate social developments and public opinion in its decisionmaking.²¹⁹ Further, the Supreme Court is often most powerful

215. See, e.g., Marshall Cohen et al., *Tracking the Russia Investigations*, CNN, <https://www.cnn.com/interactive/2017/politics/russia-investigations> (last visited Nov. 30, 2018); Scott Shane & Mark Mazzetti, *The Plot to Subvert an Election*, N.Y. TIMES (Sept. 20, 2018), <https://nyti.ms/2NmUcIP>.

216. See Shane & Mazzetti, *supra* note 215.

217. See Sarah Chayes, *It Was a Corruption Election. It's Time We Realized It*, FOREIGN POL'Y (Dec. 6, 2016, 1:02 PM), <http://foreignpolicy.com/2016/12/06/it-was-a-corruption-election-its-time-we-realized-it-trump-united-states>.

218. Leon Trotsky, *Their Morals and Ours*, NEW INT'L, June 1938, at 163, 172.

219. See Michael Klarman, Opinion, *The Supreme Court Is Most Powerful When It Follows Public Opinion*, N.Y. TIMES (July 6, 2015), <https://nyti.ms/2CQ3AYL> ("Rulings such as *Brown v. Board of Education* and *Obergefell* were inconceivable until enormous changes in the surrounding social and

when it follows public opinion because “justices often delay or minimize their interventions” when “[s]ensitive to the possibility of backlashes. . . .”²²⁰ Given that public opinion ran counter to the Court’s holding, the question of what possible backlash exists emerges and further problematizes the Court’s holding.

Accordingly, from an open snub to public sentiment to an unabashed, almost sycophantic, restatement of the many amici (representing public servants, politicians, or former versions of the two) who filed on behalf of McDonnell, the Court narrowed the definition of what constituted an “official act.” By doing so, it also limited what constituted quid pro quo behavior and propagated a theory of access wholly corrosive to democracy. Finally, if doing so were not enough, the Court’s reasoning in *McDonnell* shows no deference to understanding (let alone assuaging) the systemic political, economic, and social inequalities in the United States, or to public opinion supporting change regarding the Court’s view on access. As a result, in its decision in *McDonnell*, the Court repudiated its role as a democracy-reinforcing institution.

political context had first occurred.”).

220. *Id.*

