

CONTRIBUTIONS, BRIBES, AND THE CONVERGENCE OF  
POLITICAL AND CRIMINAL CORRUPTION

JOSHUA S. SELLERS\*

ABSTRACT

*Accusations of corruption in politics are ubiquitous, yet there is a decided lack of agreement over how to define corruption. The Supreme Court, in both its campaign finance and criminal political corruption doctrines, has adopted a narrow definition centered on quid pro quo exchanges. At first glance, this doctrinal convergence seems to provide an attractive symmetry of sorts: The government is constitutionally barred from restricting political spending unless such spending is highly likely to result in quid pro quo arrangements; and likewise, politicians may not be prosecuted unless they are found to have agreed to such arrangements.*

*In this Article, I argue against this doctrinal convergence, which I claim, problematically oversimplifies the concept of corruption. This oversimplification has both theoretical and legal significance. In brief, I argue that the Supreme Court’s decidedly narrow understanding of corruption and its effects on our politics elides important distinctions between corruption in the realm of campaign finance and corruption that warrants criminal sanctions. Campaign finance laws aim to prevent perceived democratic process failures. In contrast, criminal laws prohibiting bribery, extortion, and the like, aim to punish unscrupulous political actors. These are distinct purposes and should be recognized as such.*

*Drawing from the political science theory of “multiple elitism,” I introduce a new theory of corruption—“commonplace political corruption”—in presenting a defense of campaign finance regulations. Commonplace political corruption is the systematic influence of special interest groups on the democratic process and the entrenched advantages that follow. I argue that this type of corruption has been renewed as of late and that my theory strengthens the constitutional arguments for upholding responsive campaign finance laws.*

*The Article proceeds as follows: Part II outlines the theoretical distinction between commonplace political corruption and criminal political corruption. In short, the latter sanctions individual impropriety, whereas the former implicates a deeper, more considerable threat to democracy. Part III explores the campaign finance and criminal political corruption doctrines and examines three recent high-profile corruption cases—involving Sheldon Silver, Senator Robert Menendez, and Governor Robert McDonnell—each of which illustrates how the doctrines have converged. Part IV, in reliance on my theory of commonplace political corruption, sets forth the normative legal arguments for upholding robust campaign finance laws.*

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\* Associate Professor of Law, Arizona State University, Sandra Day O'Connor College of Law. This Article greatly benefitted from the feedback of many thoughtful readers. I am deeply grateful to all of you for strengthening the project: Sara Sun Beale, Samuel Buell, Guy-Uriel Charles, Steve Cleveland, Laura Coordes, Seth Endo, Luis Fuentes-Rohwer, Zachary Gubler, Katheleen Guzman, Stephen Henderson, Michael Kang, Rhett Larson, Kaipo Matsumura, Derek Muller, Victoria Sahani, Erin Scharff, Bijal Shah, Nicholas Stephanopoulos, Aaron Tang, Joseph Thai, Sherod Thaxton, and Franita Tolson offered particularly insightful suggestions. Dean Joseph Harroz of the University of Oklahoma College of Law provided generous financial support. I am also grateful to the participants at the University of Oklahoma College of Law’s Junior Scholars Conference, the Duke University School of Law’s Culp Colloquium, and the University of Houston Law Center’s Colloquium, where I presented draft versions of this Article.

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I. INTRODUCTION

*Of the holders of public office in the Nation or the States or their municipalities, I have found that not one in a hundred has been chosen by any spontaneous selection of the outsiders, the people, but all have been nominated and put through by little or large caucuses of the politicians, and have got in by corrupt rings and electioneering, not capacity or desert.*<sup>1</sup>

*It is true that the typical special interest bribe in the form of a campaign contribution is very rarely prosecuted. I doubt that this reflects approval of the practice as much as recognition of its pervasiveness, which in turn results from the fact that the receipt of special interest contributions is more or less a practical necessity for most legislators. This necessity may constitute an excellent reason for not prosecuting such routine transactions as bribes, but it does not justify preservation of the system that creates the necessity.*<sup>2</sup>

Money and politics. The former, the input; the latter, the yield. That money has a colossal effect on our representative democracy is as trite an observation as a political observer can make.<sup>3</sup> Politicians

1. WALT WHITMAN, *LEAVES OF GRASS & DEMOCRATIC VISTAS* 323 (J.M. Dent & Sons Ltd. ed., E.P. Dutton & Co. 1927) (1912).

2. Daniel H. Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 329 (1989) (footnote omitted).

3. See, e.g., LAWRENCE LESSIG, *REPUBLIC, LOST: THE CORRUPTION OF EQUALITY AND THE STEPS TO END IT* 73 (rev. ed. 2015) (reporting the average amount it took to run for reelection in the House in 2014 as \$1.4 million); Spencer A. Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 74-75 (2004) (“A

rely on and accept donations in order to stay in office. While in office, they do favors and vote on legislation with benefits that at least occasionally accrue to those who financially supported them. Individuals support politicians with the hope, and perhaps expectation, that their preferences will be delivered upon. As do corporations, labor unions, and interest groups. It is easy to view with suspicion the motives of those who donate exorbitant sums to political candidates.<sup>4</sup> Clearly, we think, they must be getting *something* in return. But when does money have an unacceptably corrupting effect on our politics? When are federal bribery laws, and the like, the appropriate remedy? And what is to be gained by considering these questions together?

Answering the first of these questions, as many have observed, depends in large part on one's understanding and definition of corruption.<sup>5</sup> Yet the urgency of achieving definitional clarity has been highlighted in a run of high-profile corruption cases in which criminal law and campaign finance law have intersected. These include the 2018 conviction of Sheldon Silver, the longstanding autocratic speaker of the New York State Assembly<sup>6</sup>—. There is also the failed federal bribery case against Senator Robert Menendez of New Jersey, in which the government alleged that the Senator illegally intervened with the U.S. Department of Health and Human Services on

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relatively small and wealthy group of individuals—the 'donor class'—gives large hard money contributions that fund the bulk of American politics.”).

4. See generally JANE MAYER: *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* (2016) (tracing the personal and political history of Charles and David Koch); see also Nicholas Confessore, Sarah Cohen & Karen Yourish, *Small Pool of Rich Donors Dominates Election Giving*, N.Y. TIMES (Aug. 1, 2015), <https://www.nytimes.com/2015/08/02/us/small-pool-of-rich-donors-dominates-election-giving.html> [<https://perma.cc/E5XM-BDXD>].

5. See, e.g., Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1396 (2013) (“We therefore disagree about what corruption is, at least in part because we disagree about what democratic politics, when healthy, entails. Consequently, an account of what constitutes corruption depends on a theory of democracy; yet there is substantial disagreement about what a commitment to democratic representation demands.”); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 126 (2010) (“Any constitutional test resting on corruption as the evil to be avoided begs for a definition of the good, or, in this case, the uncorrupted.”); see also Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 798-99 (1985) (“The element of corrupt intent requires that the facts described by the other elements be subject to characterization as wrongful, and thus requires the application, implicitly or explicitly, of normative political standards.”).

6. See Benjamin Weiser, *Sheldon Silver, Ex-New York Assembly Speaker, Gets 7-Year Prison Sentence*, N.Y. TIMES (July 27, 2018), <https://www.nytimes.com/2018/07/27/nyregion/sheldon-silver-sentencing-prison-corruption.html> [<https://perma.cc/8AUy-54DV>]; see also William K. Rashbaum & Thomas Kaplan, *Sheldon Silver, Assembly Speaker, Took Millions in Payoffs, U.S. Says*, N.Y. TIMES (Jan. 22, 2015), <https://www.nytimes.com/2015/01/23/nyregion/speaker-of-new-york-assembly-sheldon-silver-is-arrested-in-corruption-case.html> [<https://perma.cc/X56T-BH3S>].

behalf of a large donor.<sup>7</sup> And perhaps most notable is the case against former, and now exonerated, Virginia Governor Robert McDonnell, also for violating federal bribery laws.<sup>8</sup>

The *McDonnell v. United States* opinion reinforced the Supreme Court's understanding of corruption—in that instance, criminal political corruption—as consisting of a quid pro quo exchange.<sup>9</sup> The unanimous decision held that McDonnell, while undoubtedly having received gifts and loans from a company CEO who was seeking special treatment, and having prioritized the CEO's requests, did not engage in “official acts” on the CEO's behalf.<sup>10</sup> In short, the Court held, the government's characterization of the “quo” was overbroad.<sup>11</sup> As noted by Chief Justice Roberts:

[O]ur concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless interpretation of the federal bribery statute. A more limited interpretation of the term “official act” leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this Court.<sup>12</sup>

The Court's decision to center on quid pro quo exchanges as corrupting has the virtue of being rule-like, which, at least theoretically, cabins arbitrary prosecutions.<sup>13</sup> The *McDonnell* opinion also sustains the

7. See Amber Phillips, *How Sen. Bob Menendez's Corruption Case Could Change the Way Members of Congress Do Business*, WASH. POST (Feb. 29, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/02/29/how-sen-bob-menendezs-corruption-case-could-change-the-way-members-of-congress-do-business/?utm\\_term=.668aaa795bdb](https://www.washingtonpost.com/news/the-fix/wp/2016/02/29/how-sen-bob-menendezs-corruption-case-could-change-the-way-members-of-congress-do-business/?utm_term=.668aaa795bdb) [https://perma.cc/ZP4Y-CJSM].

8. *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016) (remanding the case); see Matt Zapotosky, Rachel Weiner & Rosalind S. Helderman, *Prosecutors Will Drop Case Against Former Va. Governor Robert McDonnell, Wife*, WASH. POST (Sep. 8, 2016), [https://www.washingtonpost.com/local/public-safety/prosecutors-will-drop-case-against-former-va-gov-robert-mcdonnell/2016/09/08/a19dc50a-6878-11e6-ba32-5a4bf5aad4fa\\_story.html?utm\\_term=.bb520a4a6ab7](https://www.washingtonpost.com/local/public-safety/prosecutors-will-drop-case-against-former-va-gov-robert-mcdonnell/2016/09/08/a19dc50a-6878-11e6-ba32-5a4bf5aad4fa_story.html?utm_term=.bb520a4a6ab7) [https://perma.cc/G9XG-4NQG].

9. *McDonnell*, 136 S. Ct. at 2371-72.

10. *Id.* at 2372.

11. *Id.* at 2372 (“In the Government's view . . . nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*.”).

12. *Id.* at 2375.

13. *Id.* at 2372 (suggesting that the government's position would elicit worry on the part of a hypothetical union leader who had given a campaign contribution to a public official); *Id.* at 2373 (“[U]nder 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.’” (quoting *Skilling v. United States*, 561 U.S. 358, 402-03 (2010))). On rules versus standards, see generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992). For a skeptical view of rules, see generally Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995). It should be noted that *McDonnell* has been criticized for making it harder to prosecute criminal political corruption. See Tara Malloy, *Symposium: Is It Bribery or “The Basic Compact Underlying Representative Government”?*, SCOTUSBLOG (June 28, 2016, 4:03 PM),



Court's commitment to the rule of lenity<sup>14</sup> and to interpreting statutes in preservation of the "federal-state balance."<sup>15</sup> But it does something else as well, something more interesting, yet more subtle. By defining criminal political corruption as constituting a quid pro quo exchange, the Court effectively converged its criminal political corruption doctrine with its campaign finance doctrine. In current campaign finance doctrine, the only accepted justification for the regulation of political spending is the avoidance of quid pro quo exchanges.<sup>16</sup>

The convergence of the two doctrines, at first glance, seems to provide an attractive symmetry of sorts: The government is constitutionally barred from restricting political spending unless such spending is highly likely to result in nefarious quid pro quo arrangements; and likewise, politicians may not be prosecuted unless they are found to have agreed to such arrangements. This convergence seems to offer clarity, reflect a realistic assessment of contemporary politics,<sup>17</sup> and protect both donors and politicians from undue government interference. In this Article, I argue against this doctrinal convergence, which I claim problematically oversimplifies the concept of corruption. In brief, I argue that the Court's decidedly narrow understanding of corruption and its effects on our politics elides important distinctions between corruption in the realm of campaign finance and corruption that warrants criminal sanctions. These distinctions, I

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<http://www.scotusblog.com/2016/06/symposium-is-it-bribery-or-the-basic-compact-underlying-representative-government/> [https://perma.cc/E2PN-67PC] ("While it is some relief that the Supreme Court has not enshrined the purchase of political access as a new constitutional right, its reading of the bribery statute will certainly make prosecutors' job harder.").

14. *McDonnell*, 136 S. Ct. at 2372-73 ("[T]he Government's legal interpretation is not confined to cases involving extravagant gifts or large sums of money, and we cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.' " (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010))); see also William N. Eskridge Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1115-17 (2008); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 109 (1998).

15. See *McDonnell*, 136 S. Ct. at 2373 ("The Government's position also raises significant federalism concerns. A State defines itself as a sovereign through 'the structure of its government, and the character of those who exercise government authority.' " (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991))); see also WILLIAM N. ESKRIDGE JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 323 (2016) (discussing the federal-state balance canon).

16. See, e.g., *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) ("[T]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors."); Issacharoff, *supra* note 5, at 125 ("In the Justice Kennedy majority opinion [in *Citizens United v. FEC*], only the risk of explicit quid pro quo corruption appears to survive as a basis for regulating campaign finance.").

17. See, e.g., *McDonnell*, 136 S. Ct. at 2372 ("The basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns . . .").

assert, have both theoretical and legal significance. Analyzing corruption along these two dimensions reveals the relevance of context when defining corruption, and ultimately aids in thinking about how corruption might be remedied, particularly in the campaign finance space. Why, then, consider both doctrines together? Because I believe that the juxtaposition lends clarity to the argument. As Daniel Lowenstein put it years ago, “[i]f political theory cannot help identify a bribe, there is little ground for supposing that it can help sort out other important and possibly more subtle problems of political ethics, such as those posed by conflicts of interest or various sorts of lobbying practices.”<sup>18</sup>

My argument starts at the level of theory, where my principal contribution to the existing literature is made. Theoretically, there is a difference between government attempts to rectify perceived democratic process failures and the criminal prosecution of unscrupulous political actors.<sup>19</sup> The group-based nature of politics warrants reasonable government regulation in furtherance of responsive government when the government is believed to be compromised.<sup>20</sup> This is different than the prosecution of underhanded donors and elected officials, which does not implicate democracy writ large in the same way.

Put differently, the corruption that most threatens our democracy is that of entrenched special interests.<sup>21</sup> It results from what the political scientist Andrew McFarland has termed “multiple elitism.”<sup>22</sup> I rely on the theory of multiple elitism, along with its variants across political science, in explicating what I label *commonplace* political

18. Lowenstein, *supra* note 5, at 790.

19. Dennis F. Thompson, *Two Concepts of Corruption* 10 (Harvard Univ. Edmond J. Safra Research Lab Working Paper No. 16, 2013) (“With personal gains like bribes, the aim is simply to prevent the gain, to stop the flow of cash as much as we can. But in the case of institutional gains, we should want not to stop the flow, but to just change its sources, and check its abuses.”).

20. See generally Vikram D. Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998).

21. Paul E. Peterson, *The Rise and Fall of Special Interest Politics*, 105 POL. SCI. Q. 539, 540-41 (1991) (“[A]n interest is special if it consists of or is represented by a fairly small number of intense supporters who cannot expect that their cause will receive strong support from the general public except under unusual circumstances.”).

22. Andrew S. McFarland, *Neopluralism*, 10 ANN. REV. POL. SCI. 45, 45 (2007) [hereinafter McFarland, *Neopluralism*]. McFarland previously referred to the same theory as “plural elitism.” Andrew S. McFarland, *Interest Groups and Theories of Power in America* 17 BRIT. J. POL. SCI. 129, 130 (1987) [hereinafter McFarland, *Interest Groups and Theories of Power*]. But compare *id.* at 130 (attributing the phrase “multiple elitism” to Kenneth Prewitt and Alan Stone), with Andrew McFarland, *Interest Group Theory*, in THE OXFORD HANDBOOK OF AMERICAN POLITICAL PARTIES AND INTEREST GROUPS 37, 40 (L. Sandy Maisel & Jeffrey M. Berry eds., 2010) (“This is the third step in the theoretical framework of interest group theory which I term ‘multiple-elitism,’ the position that multiple special interests tend to rule American politics.”).

corruption. Commonplace political corruption, I contend, is not, as many might suggest, simply the giving of large donations to candidates, political parties, or outside spending groups. It is also not the furtive exchange of money or gifts for political action, a transaction that all agree is impermissible. Nor is it the access that wealthy donors have to elected officials, access that those with fewer resources cannot gain. Rather, it is the systematic and most importantly, unvarying influence of special interest groups on the democratic process. That, in my estimation, is the type of corruption that both warrants and constitutionally justifies robust campaign finance laws. It is also the type of corruption that has been immunized by the Roberts Court's campaign finance decisions.

The principal objection to my definition of commonplace political corruption is that it is underinclusive. By defining corruption as a problem of special interest group entrenchment, many seemingly troublesome aspects of political giving are rendered acceptable. In my view, however, there are several reasons why my definition is preferable to the many alternatives. First, it targets a rectifiable problem. Debates about campaign finance reform are often impaired by arguments for equalization: equal political donations,<sup>23</sup> equal access to politicians,<sup>24</sup> equal influence on politicians,<sup>25</sup> and ultimately, equal representation by them.<sup>26</sup> While I am sympathetic to such arguments for reform, the Court has invariably rejected them for many years now.<sup>27</sup> Moreover, equality arguments often suffer from the absence of

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23. See, e.g., LESSIG, *supra* note 3, at 43-47.

24. See, e.g., Richard L. Hasen, *Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 64 (2004) ("[I]t is a reasonable, though contested, political equality determination that access to federal officeholders should not go to the highest bidder.").

25. See, e.g., Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 253 (2002) (noting that campaign finance laws "hope to democratize the influence that money can bring to bear upon the electoral process, thereby building public confidence in that process, broadening the base of a candidate's meaningful financial support, and encouraging greater public participation"); Spencer A. Overton, *The Participation Interest*, 100 GEO. L.J. 1259, 1261 (2012) ("Rather than continue to try to purge special interest influence through more restrictions likely to be struck down by the Court, reformers should embrace what will surely be a more effective strategy—namely, giving more people influence.").

26. See, e.g., LESSIG, *supra* note 3, at 4 (identifying the relevant problem as "a problem with the incentives for responsiveness that we have allowed to evolve within our Republic").

27. See, e.g., *Ariz. Free Enter. Club's Freedom PAC v. Bennett*, 564 U.S. 721, 741 (2011); *Citizens United v. FEC*, 558 U.S. 310, 381 (2010) (Roberts, J., concurring); *Davis v. FEC*, 554 U.S. 724, 742 (2008) ("Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives . . ."); see also RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* 80 (2016) ("The Court has now rejected this equality

a limiting principle. Disparities in political influence are derivative of societal disparities in resources, political intensity, and political acumen that are beyond the purview of campaign finance reform efforts.<sup>28</sup> My definition does not present this problem.<sup>29</sup>

Second, my definition of commonplace political corruption elucidates clear democratic harms—harms that justify judicial deference to campaign finance laws. Generalized criticisms of the volume of money in politics, or the disproportionate influence of wealthy individuals, often fail to identify the structural democratic harms caused by an under-regulated campaign finance system. Yet identifying such harms may be necessary to successfully make the case for reform. The Court's strong protection of political donations under the First Amendment demands the identification of countervailing constitutional interests if reform efforts are to succeed. Consider, for instance, Justice Breyer's characterization of the competing interests at stake in his *McCutcheon v. FEC* dissent.<sup>30</sup> There, Justice Breyer made the case that the First Amendment is not in fact undermined by campaign finance laws but enhanced by them.<sup>31</sup> His interpretation is supported by a time-honored theory of the First Amendment as a guarantor of democratic self-government.<sup>32</sup> Such constitutional traction is indispensable. Multiple elitism—again, the entrenchment of special interests with self-regarding agendas—undermines democrat-

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interest several times as inconsistent with the First Amendment.”); Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1462-66 (2015) (exploring equality arguments).

28. Issacharoff, *supra* note 5, at 122 (noting that equality arguments “logically extend[] to all disparities in electoral influence occasioned by differences in wealth”).

29. A related objection could be raised about my definition being overinclusive. That is, one could argue that special interest activity and influence is ubiquitous, thereby rendering my definition conceptually unhelpful. While I take the point, my definition is concerned, not with special interest formation and activity per se, but instead, with the entrenchment of select special interests that have effectively institutionalized their power and influence, at the expense of a more dynamic political system in which interest group activity is more variable and more diverse.

30. 134 S. Ct. 1434, 1465-72 (2014) (Breyer, J., dissenting).

31. *Id.* at 1467 (“Accordingly, the First Amendment advances not only the individual’s right to engage in political speech, but also the public’s interest in preserving a democratic order in which collective speech matters.”); see Fred Wertheimer, *The Court After Scalia: A New Liberal Justice Means a New Campaign Finance Jurisprudence*, SCOTUSBLOG (Sep. 8, 2016, 2:12 PM), <http://www.SCOTUSBLOG.com/2016/09/the-court-after-scalia-a-new-liberal-justice-means-a-new-campaign-finance-jurisprudence/> [<https://perma.cc/Y4Y3-CFFM>] (“By describing these broader goals as themselves First Amendment interests, not just as interests in tension with the First Amendment, Justice Breyer’s dissent provides the foundation for an amplified campaign finance jurisprudence.”); see also John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 631 (2005) (“Breyer locates the state interest in democratizing the political process in the First Amendment, which he interprets to promote participation by ordinary Americans in campaigns and elections.”).

32. See RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 12-17 (1992).

ic self-government.<sup>33</sup> Consequently, it implicates constitutional interests that I believe undercut the status quo under which political spending is protected as a form of speech.<sup>34</sup>

Other scholars, advancing arguments distinct from my own, identify countervailing constitutional interests in the Republican Guarantee Clause and the Equal Protection Clause.<sup>35</sup> Like the First Amendment, either Clause could be invoked in response to multiple elitism. Simply lamenting the ubiquity of money in politics is inadequate. A theory of corruption backed by a significant constitutional interest is essential, and my theory can be readily tethered to several. For a number of theoretical alternatives, their relationship to the Constitution is ambiguous.

Third, my definition privileges the substance of government activity. It follows the suggestion of Samuel Issacharoff, who advocates a shift in attention when considering campaign finance reform from “inputs” to “outputs.”<sup>36</sup> Issacharoff insightfully points out that “the problem is not the ability to deploy exceptional resources in election campaigns, but the incentives operating on governmental officials to bend their official functions to accommodate discrete constituencies.”<sup>37</sup> This malfunction—Issacharoff adopts the language of economists and comparative politics scholars in calling it “clientelism”—is a form of institutional pathology.<sup>38</sup> “The pathology . . . then rewards incumbent politicians for an expansion of the public sector in a way that facilitates sectional rewards to constituent groups.”<sup>39</sup> Though I situate the problem slightly differently than he does, Issacharoff and I are both trained on a problem that scholars from various disciplines have long tracked.<sup>40</sup> This lends further confirmation to its significance.

33. See David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POLY REV. 236, 237 (1991) (“The threat posed by concentrated wealth is not merely the aberration of a bribed official, but the structural threat of a monopolized marketplace of ideas.”).

34. See Deborah Hellman, *Money and Rights*, in MONEY, POLITICS, AND THE CONSTITUTION: BEYOND *CITIZENS UNITED* 57, 57 (Monica Youn ed. 2011) (“Many campaign finance laws restrict the ability to give or spend money. U.S. Supreme Court decisions treat such laws as restrictions on ‘speech’ that are therefore subject to heightened judicial review.”).

35. Hellman, *supra* note 5, at 1403-05 (discussing, though not endorsing, the countervailing constitutional interest in the Republican Guarantee Clause); see also David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1382-87 (discussing the constitutional interest arising from the reapportionment cases).

36. Issacharoff, *supra* note 5, at 126.

37. *Id.* at 130.

38. *Id.* at 127-28.

39. *Id.* at 128.

40. *Infra* Section II.A.4.

Aside from these three main reasons for adopting my preferred definition, it offers the additional benefit of conceptual distance from criminal political corruption. Federal bribery laws, along with related statutes aimed at curbing criminal political corruption, aim to punish and discourage egregious transactions involving self-interested actors. Such corruption concerns individual transgressions, rather than structural or institutional breakdown, as is the case with multiple elitism.<sup>41</sup> While it is true that criminal political corruption involves democratically elected officials, it does not threaten the whole of democratic government in the same way that commonplace political corruption does. In the former, the resulting corruption is narrow; in the latter, it is broad.

To be sure, democracy suffers when elected officials behave badly and privilege the desires of bribe-givers. But such infractions can effectively be policed by criminal law. Pursuing evidence of a quid pro quo exchange makes sense for criminal prosecutions. Application of the same approach when weighing the parameters of First Amendment speech rights in the campaign finance realm is inapt.

Aside from theory, the legal distinctions between commonplace political corruption and criminal political corruption demand recognition—recognition that the Court's convergence obscures. Most obviously, there are evidentiary differences between cases appraising legislative power and criminal cases. But more importantly for current purposes, the logic of the respective doctrines is distinct. For example, criminal political corruption prosecutions wrestle with questions of intentionality. This is an essential question when judging whether an elected official has committed bribery. After all, one of the most common defenses to an allegation of bribery is that the donation (or benefit, or gift) at issue did nothing to change the official's behavior. That question need not be a part of the debate over the prudence of campaign finance laws. This is but one reason why delineating the concept of corruption is so important and why the doctrinal convergence described above is so disorienting.

In sum, only after theorizing commonplace political corruption and criminal political corruption, respectively, and then juxtaposing the two theories, are the distinctions between the two made clear. The Court's doctrinal convergence, built around a deceptively elegant emphasis on quid pro quo exchanges, conceals the context-specific harms of corruption. Failure to work through the confusion invites

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41. Thompson, *supra* note 19, at 9 (“[I]nstitutional corruption occurs when an institution or its agent receives a benefit that is directly useful to performing an institutional function, and systematically provides a service to the benefactor under conditions that tend to undermine legitimate procedures of the institution.”).



remedial dormancy. As put by Tara Malloy of the Campaign Legal Center: “When campaign-finance laws are invalidated, bribery laws are invoked to save us; and when bribery standards are cut back, campaign-finance laws are the answer. Supreme Court scrutiny in this area is more Procrustean bed than reasonable review.”<sup>42</sup>

The precise relationship between donations and bribes, or, alternatively, a constitutionally protected right to engage in political expression and a criminal act, has confounded scholars and litigants for decades,<sup>43</sup> and I do not reasonably anticipate forever resolving the debate. My ambition here is to introduce a workable theoretical framework from which subsequent campaign finance reform efforts might draw. One point of clarification at the outset: To this point, I have referred to federal bribery laws. In fact, separate criminal statutes, each detailed below, prohibit bribery, extortion, and so-called “honest services” fraud. I view these statutes as collectively comprising criminal political corruption doctrine.

The Article proceeds as follows: Part II outlines the theoretical distinction between commonplace political corruption and criminal political corruption. In short, the latter sanctions individual impropriety, whereas the former implicates a deeper, more considerable threat to democracy. Part III explores the campaign finance and criminal political corruption doctrines, and examines the Silver, Menendez, and McDonnell cases, each of which illustrates how the doctrines have converged. Part IV, in reliance on my theory of commonplace political corruption, sets forth the normative legal arguments for upholding robust campaign finance laws.

## II. TWO DISTINCT THEORIES OF CORRUPTION

Analyses of political corruption have a distinguished academic and intellectual pedigree. John Ferejohn traces the inquiry to classical thinkers.<sup>44</sup> The political scientist V.O. Key completed a little-known project on political graft,<sup>45</sup> and his more famous *Southern Politics in*

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42. Malloy, *supra* note 13.

43. See SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 599 (5th ed. 2016) (“We might have a core understanding of the old-fashioned and paradigmatic concept of what it means to bribe a public official. But when, if ever, does or should an otherwise legal political contribution become a bribe? Trying to answer that question can be surprisingly elusive.”).

44. See, e.g., John Ferejohn, *Is Inequality a Threat to Democracy?*, in *THE UNSUSTAINABLE AMERICAN STATE* 34, 48 (Lawrence Jacobs & Desmond King eds., 2009) (“The idea of (active) corruption was a concern shared by both classical republicans like Cicero, Cato, and Brutus and their modern successors, Machiavelli, Harrington, and Rousseau, and their followers.”).

45. VALDIMER O. KEY, JR., *THE TECHNIQUES OF POLITICAL GRAFT IN THE UNITED STATES* (1936).

*State and Nation* included allegations of widespread electoral corruption.<sup>46</sup> The political scientist and anthropologist James Scott turned his attention to corruption for a time.<sup>47</sup> And the scholarly interest has hardly waned among contemporary scholars.<sup>48</sup>

Election law scholars are deeply invested in interrogating corruption.<sup>49</sup> This interest arises from the Supreme Court's repeated pronouncement that corruption, defined as quid pro quo exchanges, is the only justifiable basis for the regulation of political spending. Taxonomies abound: Yasmin Dawood identifies "at least seven forms" of corruption as inequality.<sup>50</sup> Deborah Hellman catalogs three ways in which an elected official might engage in corruption.<sup>51</sup> Zephyr Teachout perceives corruption as "a description of emotional orientation."<sup>52</sup> Guy-Uriel Charles, in responding to Lawrence Lessig's portrait of corruption ("dependence corruption"), asserts that Lessig's single definition actually encompasses "three different conceptions of 'dependence corruption,' " which he diagrams.<sup>53</sup> Dennis Thompson has twice bisected the concept of corruption.<sup>54</sup> These theories are rich, and collectively have much to recommend them. But I believe they each fail to articulate a workable theoretical framework that

46. VALDIMER O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 481 (5th prtng. 2001) (1949) ("The chances are about 99 to 1 that not a single serious race for state-wide office in any southern state (or any other state) during the past 20 years has been unaccompanied by perjury, morally if not legally, either by the candidate or his managers in reports of campaign receipts and expenditures.").

47. See generally James C. Scott, *Corruption, Machine Politics, and Political Change*, 63 AM. POL. SCI. REV. 1142 (1969); see also James C. Scott, *The Analysis of Corruption in Developing Nations*, 11 COMP. STUD. SOC'Y & HIST. 315 (1969).

48. See, e.g., ARNOLD J. HEIDENHEIMER & MICHAEL JOHNSTON, POLITICAL CORRUPTION: CONCEPTS & CONTEXTS 3 (Arnold J. Heidenheimer & Michael Johnston eds., 2002); SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES AND REFORM (1999); Paul Gowder, *Institutional Corruption and the Rule of Law*, 9 ETHICS F. 84 (2014); Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMMENT. 127 (1997).

49. HASEN, *supra* note 27, at 82-83 ("Advocates and scholars have made no judicial headway by arguing for expansive definitions of corruption. It is time to move beyond the semantic battle and to defend political equality head-on."); LESSIG, *supra* note 3, at 73; ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 284 (2014).

50. Yasmin Dawood, *Classifying Corruption*, 9 DUKE J. CONST. LAW & PUB. POL'Y 102, 123 (2014).

51. Hellman, *supra* note 5, at 1397-1401.

52. TEACHOUT, *supra* note 49, at 285.

53. Guy-Uriel Charles, *Corruption Temptation*, 102 CALIF. L. REV. 25, 30 (2014).

54. Thompson, *supra* note 19, at 6 ("We can make progress in developing an account of political corruption for modern society if we distinguish two ways in which the democratic process can be bypassed or short-circuited by private interests."); Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1037 (2005) (distinguishing "governmental corruption" from "electoral corruption").

speaks to the impairment of multiple elitism.<sup>55</sup> I therefore propose an alternative.

### A. *Multiple Elitism and Commonplace Political Corruption*

As noted above, I define commonplace political corruption as the systematic and unvarying influence of special interests on the democratic process. In doing so, I aggrandize Andrew McFarland's explanation of multiple elitism, along with its variants across political science. While McFarland's work is of great benefit, it is not expressly focused on interest groups that spend money on political campaigns. Furthermore, many of the channels through which money is filtered did not exist at the time when McFarland offered his analyses. As a result, there is more to be done in extending his work to the campaign finance environment. In order to appreciate multiple elitism, it is important to understand what the theory responds to.

#### 1. *The Pluralist Paradigm*

For much of the mid-twentieth century, political scientists inclined to the study of American government either subscribed or responded to the theory of pluralism.<sup>56</sup> The esteemed political scientist Robert Dahl is the name most associated with pluralism, and his theory of democracy—"polyarchal democracy"—is an essential part of the political science canon.<sup>57</sup> Dahl claimed both that interest groups

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55. Thompson's and Issacharoff's theoretical work most closely resembles my own. See Thompson, *supra* note 19, at 8-9 ("Corruption is institutional insofar as the benefit an official receives is political rather than personal, the service the official provides is systematic rather than episodic, and the connection between the benefit and the service manifests a tendency that disregards the democratic process."); Issacharoff, *supra* note 5, at 129 ("Clientelist pressures erode public institutions with incentives to increase the size, complexity, and nontransparency of governmental decisionmaking, with the corresponding impetus simply to increase the relative size of the public sector, often beyond the limits of what the national economy can tolerate."). Issacharoff's work, in turn, resembles that of John Joseph Wallis. John Joseph Wallis, *The Concept of Systematic Corruption in American History*, in CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 23, 25 (Edward L. Glaeser & Claudia Goldin eds., 2006) ("In [politics] plagued with systematic corruption, a group of politicians deliberately create rents by limiting entry into valuable economic activities, through grants of monopoly, restrictive corporate charters, tariffs, quotas, regulations, and the like. These rents bind the interests of the recipients to the politicians who create them.").

56. See Robert A. Dahl, *American Democratic Theory: Pluralism and its Critics*, 42 J. POL. 612, 612 (1980) (book review) ("Pluralist ideas regained influence, though in quite different fashion, after the publication in 1951 of David Truman's *The Governmental Process*.").

57. See ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY 101 (1974) [hereinafter DAHL, WHO GOVERNS?]; ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 136-37 (1956) [hereinafter DAHL, PREFACE]; Ira Katznelson & Helen V. Milner, *American Political Science: The Discipline's State and the State of the Discipline*, in POLITICAL SCIENCE: STATE OF THE DISCIPLINE 1, 5 n.8 (Ira Katznelson & Helen V. Milner eds., 2001) (stating that Dahl, "more than any other political scientist in the past

have an influential role in shaping government policy, and more notably, that citizens with sufficient motivation could form interest groups that would wield such influence. On its face, therefore, Dahl's pluralism was an inclusive theory, in which interest groups—along with government agencies, political parties, and other key players—collectively participate: “A central guiding thread of American constitutional development has been the evolution of a political system in which all the active and legitimate groups in the population can make themselves heard at some crucial stage in the process of decision.”<sup>58</sup>

In this regard, pluralism comports with the notion of a “market-place of ideas”—a central justification for the First Amendment generally, but in particular, to the Supreme Court's current campaign finance doctrine, which takes a skeptical view toward limiting donations; donations are designated a form of speech.<sup>59</sup> The shared premise of pluralism and campaign finance doctrine is that free-flowing money fosters the introduction of more information into the public sphere. The public can then act on that information in normatively desirable ways, including through the formation of interest groups. The trouble, of course, is that the pluralist paradigm has been thoroughly unsettled by subsequent scholarship. Classic challenges to its core presumptions were made by E.E. Schattschneider, who argued that interest groups privilege elite interests,<sup>60</sup> and The-

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half-century has placed democracy and its tension-ridden relationship with key features of the liberal political order at the center of his work”); David R. Mayhew, *Robert A. Dahl: Questions, Concepts, Proving It*, 8 J. POL. POWER 175, 177 (2015) (“‘Pluralism,’ for which it is probably fair to say that Dahl shared an updated post-World War II patent with David B. Truman, became the signature label for a kind of polity built on a jangling messiness among interests as its decision process.”); see also Richard W. Krouse, *Polyarchy & Participation: The Changing Democratic Theory of Robert Dahl*, 14 POLITY 441, 441 (1982) (“For more than a quarter century, Robert Dahl's theory of polyarchal democracy, in its various formulations, has ranked among the most formidable, influential, and enlightening versions of contemporary ‘revisionist’ democratic theory.”).

58. DAHL, PREFACE, *supra* note 57, at 137; John F. Manley, *Neo-Pluralism: A Class Analysis of Pluralism I and Pluralism II*, 77 AM. POL. SCI. REV. 368, 369 (1983) (“Pluralism . . . also sees the political system as reasonably open to multiple interests if these interests feel strongly enough about an issue to mobilize pressure.”). Dahl placed heavy emphasis on the role of elections. See DAHL, WHO GOVERNS?, *supra* note 57, at 101 (“In a political system where key offices are won by elections, where legality and constitutionality are highly valued in the political culture, and where nearly everyone in the political stratum publicly adheres to a doctrine of democracy, it is likely that the political culture, the prevailing attitudes of the political stratum, and the operation of the political system itself will be shaped by the role of elections.”).

59. See *supra* note 33 and accompanying text.

60. E.E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 23-24 (1960).

odore Lowi, who argued that special interests dominate certain government sectors.<sup>61</sup>

The most substantive challenge to pluralism, though, was made by the economist Mancur Olson, who presented a theory of politics under which small groups that stand to capture concentrated benefits through organizing are most likely to form interest groups.<sup>62</sup> Accordingly, special interest groups—often, but not always small—are capable of directing the distribution of public goods to their advantage.<sup>63</sup> As I detail below, current campaign finance doctrine has created a situation in which this is a credible danger. If true, the pluralist expectation—spontaneously formed and broadly representative interest groups wielding influence over government<sup>64</sup>—would be rendered nonviable.

## 2. *Multiple Elitism*

Growing skepticism of pluralism, academically led by Schattschneider, Lowi, and Olson, inspired competing theories of interest group formation and activity.<sup>65</sup> These theories share the presumption that interest groups are democratically unrepresentative and largely favor special interests.<sup>66</sup> McFarland, over the span of many years, has traced the boundaries of this theoretical framework,

61. THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 57 (2d ed. 1979) (“The pluralist component has badly served liberalism by propagating the faith that a system built primarily upon groups and bargaining is self-corrective. Some parts of this faith are false, some have never been tested one way or the other, and others can be confirmed only under very special conditions.”).

62. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 2 (1965).

63. *Id.* at 36 (“The most important single point about small groups in the present context, however, is that they may very well be able to provide themselves with a collective good simply because of the attraction of the collective good to the individual members.”). For an application of Olson’s insights to the legislative process, see WILLIAM N. ESKRIDGE JR. ET AL., *LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 43-48 (5th ed. 2014).

64. JACK L. WALKER, JR., *MOBILIZING INTEREST GROUPS IN AMERICA PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS* 42 (1991) (“Most group theorists prior to the 1960s assumed that once individual citizens began to experience some social or economic problem and became aware that they shared their difficulties with others, it would be perfectly natural for them to create a formal organization that would represent their joint interests before government decision makers.”).

65. See McFarland, *Interest Groups and Theories of Power*, *supra* note 22, at 129 (“[T]he credibility of the pluralist argument was destroyed for many by common experiences in the politics of the late 1960s and early 1970s.”).

66. WALKER, *supra* note 64, at 43-44 (observing that Dahl himself “has become increasingly concerned over the past decade with the power of great private corporations that control vast amounts of political influence and ‘loom like mountain principalities ruled by princes whose decisions lie beyond reach of the democratic process.’” (quoting ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY AUTONOMY VS. CONTROL* 194 (1982))).

which he terms “multiple elitism.”<sup>67</sup> The research in this genre is varied, yet is united by its emphasis on government capture: “Multiple-elite theorists emphasized the finding that oligarchical coalitions tend to control a particular area of policy making.”<sup>68</sup> The theory, I contend, is directly applicable to the current debate over the constitutionality of campaign finance laws.

What are the principal features of multiple elitism? McFarland, after compiling the leading scholarship, put forth the following synopsis:

(1) [M]any widely shared interests cannot be effectively organized within the political process; (2) politics tends to be fragmented into decision-making in various specific policy areas, which are normally controlled by special-interest coalitions; (3) there are a variety of specific processes whereby plural elitist rule is maintained; (4) a widespread ideology conceals this truth about American politics.”<sup>69</sup>

McFarland’s logic aligned with Lowi’s findings; specifically, that multiple elitism was commonplace within “distributive” sectors.<sup>70</sup> In such sectors, “a particular group or coalition rule[s] a specific issue area to the exclusion of higher democratic authority, such as chief executives, legislatures, or even higher courts[ ].”<sup>71</sup>

Multiple elitism was notably augmented by “neopluralism”—the theory that special interest groups do not, in fact, *dominate* most sectors, but are counterbalanced by opposition interest groups.<sup>72</sup> Exploring such opposition interest groups made sense in historical con-

67. See *supra* note 22 and accompanying text.

68. McFarland, *Neopluralism*, *supra* note 22, at 52.

69. McFarland, *Interest Groups and Theories of Power*, *supra* note 22, at 133.

70. Theodore J. Lowi, *American Business, Public Policy, Case-Studies, and Political Theory*, 16 *WORLD POL.* 677, 690 (1964) (reviewing RAYMOND A. BAUER ET AL., *AMERICAN BUSINESS AND PUBLIC POLICY: THE POLITICS OF FOREIGN TRADE* (1963)). See McFarland, *Interest Groups and Theories of Power*, *supra* note 22, at 134 (describing Lowi’s finding that “plural elitism tends to be found in areas in which benefits are divisible, such as government construction projects, grants, tax subsidies, special immigration rules, etc.”); McFarland, *Neopluralism*, *supra* note 22, at 54 (“Lowi argued that . . . lower-level executive decision makers interpreted the practical meaning of legislation after a process of bargaining with organized interest groups, thereby forming a special interest policy-making coalition specific to a particular area of public policy.”).

71. McFarland, *Neopluralism*, *supra* note 22, at 51.

72. McFarland, *Interest Groups and Theories of Power*, *supra* note 22, at 42 (“Case studies of public policymaking often did not reveal the pattern of some special-interest coalition dominating an area of policy, but instead showed a plurality of interests influencing policy, with none of such interests being dominant.”); McFarland, *Neopluralism*, *supra* note 22, at 54 (neopluralist studies “tended to appear between 1975 and 1985, in response to the research sequence set forth by Dahl’s political pluralism and its critique by Lowi and Olson”).



text—one in which many new interest groups emerged.<sup>73</sup> Importantly, “[n]eopluralists were careful to note that their observation of a proliferation of groups did not imply a fair and representative policy-making process in some issue domain.”<sup>74</sup> The theory thus reflected continued doubts about the sanguinity of classic pluralism, while bringing into question the generalizability of the conclusions found within multiple elitism.

What, then, does multiple elitism have to tell us about commonplace political corruption today? And why turn to multiple elitism as an instructive theory, if it was (partially) supplanted by neopluralism? The answers lie in understanding how current campaign finance doctrine has reconstituted special interest influence.

### 3. Campaign Finance Doctrine

A full appreciation of multiple elitism and its salience requires some background knowledge of campaign finance doctrine. I therefore provide that background before adverting back to multiple elitism. A fuller doctrinal overview is included in Part III.

Nearly all campaign finance debates operate in the shadow of the Supreme Court’s landmark decision in *Buckley v. Valeo*<sup>75</sup>—a case that, incidentally, expressly distinguished campaign finance offenses from criminal bribery.<sup>76</sup> In considering the former, the Court drew a sharp line between what it labeled contributions and expenditures.<sup>77</sup> A contribution is a donation given directly to a candidate or to a political party. An expenditure is money spent to influence an election, though not in coordination with a candidate or political party.

Congress’s contribution limits were upheld in *Buckley* based on the importance of “limit[ing] the actuality and appearance of corrup-

73. WALKER, *supra* note 64, at 64 (“Despite reservations inherent in all data, all available evidence points in the same direction, namely that there are many more interest groups operating in Washington today than in the years before World War II, and citizen groups make up a much larger proportion of the total than ever before.”); Peterson, *supra* note 21, at 542 (“In the wake of the civil rights movement, the war on poverty, Earth Day, and the formation of the Great Society, groups percolated up in places and around issues that had previously been of little significance.”); see also McFarland, *Interest Groups and Theories of Power*, *supra* note 22, at 135-36.

74. McFarland, *Neopluralism*, *supra* note 22, at 54.

75. 424 U.S. 1 (1976).

76. *Id.* at 27-28; see also Dawood, *supra* note 50, at 121 (“The Court described a political quid pro quo as including, but also extending beyond, the act of bribery.”).

77. See Issacharoff, *supra* note 5, at 119 (“The former category gives rise to potential regulation in order to combat a poorly specified corruption of the political process . . . while the latter is seen as within the domain of expressive liberties that the state may not seek to restrict.”).

tion resulting from large individual financial contributions.”<sup>78</sup> Absent from the opinion was a definition of corruption or how to evaluate its appearance.<sup>79</sup>

In contrast, the Court found expenditure limits to “represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.”<sup>80</sup> Political speech, of course, is afforded the highest level of First Amendment protection.<sup>81</sup> As such, the Court found no impropriety with *uncoordinated* spending: “The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”<sup>82</sup> The theoretical and practical sensibility of dividing contributions from expenditures is widely doubted,<sup>83</sup> yet the division remains “the key to current campaign finance regulation.”<sup>84</sup>

*Buckley’s* identification of quid pro quo exchanges as the central threat to “the integrity of the electoral process”<sup>85</sup> was not entirely irrational when considered in context; Congress set out to curb the volume of money in politics following Watergate and the abuses it revealed.<sup>86</sup> The egregiousness of the Nixon Administration’s actions—

78. *Buckley*, 424 U.S. at 26.

79. Hellman, *supra* note 5, at 1387 (“[T]he Court has vacillated between expansive and restrictive conceptions of corruption . . .”); Issacharoff, *supra* note 5, at 121 (“Once the Supreme Court announced in *Buckley* that the concern over corruption or even its appearance could justify limitations on money in politics, the race was on to fill the porous concept of corruption with every conceivable meaning advocates could muster.”).

80. *Buckley*, 424 U.S. at 19.

81. *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989).

82. *Buckley*, 424 U.S. at 47 (emphasis omitted).

83. See, e.g., Monica Youn, *First Amendment Fault Lines and the Citizens United Decision*, in *MONEY, POLITICS*, *supra* note 34, at 95, 98 (Monica Youn ed. 2011) (“The Supreme Court’s decision in *Buckley v. Valeo* is widely despised, and central to its unpopularity is its core holding that the First Amendment confers differential status upon contributions and expenditures.”); Charles, *supra* note 53, at 26 (“*Buckley’s* intervention (and that of the cases it spawned) has been detrimental to the cause of campaign finance reform, and not simply for the obvious reason that the Court dismembered Congress’s coherent reform effort.”); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1736 (1999) (“A generation has shown us that the expenditure/contribution distinction of *Buckley* not only is conceptually flawed, but has not worked.”). But cf. SMOLLA, *supra* note 32, at 239 (“Limits on political contributions . . . do not offend the First Amendment. But limits on expenditures do. The Court basically got it right the first time in *Buckley v. Valeo*.”).

84. ISSACHAROFF ET AL., *supra* note 43, at 420.

85. *Buckley*, 424 U.S. at 58.

86. Fred Wertheimer, *Campaign Finance Reform: The Unfinished Agenda*, ANNALS AM. ACAD. POL. & SOC. SCI. 86, 87-89 (1986); Daniel D. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 1 (1976); Elizabeth Drew, *How Money Runs Our Politics*, N.Y. REV. BOOKS, June 4, 2015 (“The first adoption of real campaign

a *Washington Post* column references “[s]ix-figure checks flown by corporate jet from Texas; bundles of payments handed over at an Illinois game preserve; a battered brown attaché case stuffed with \$200,000 in cash”<sup>87</sup>—was refracted by the Court into the current framework. The Court’s 2010 decision in *Citizens United v. FEC*<sup>88</sup> relied on *Buckley*’s constitutional framework in striking down limits on corporate-financed independent expenditures, finding no constitutionally satisfactory basis upon which such expenditures might be regulated.<sup>89</sup>

A subsequent D.C. Circuit case, *SpeechNow.org v. FEC*,<sup>90</sup> extended *Citizens United*’s animating logic to its end point, holding that contributions to independent-expenditure-only organizations (i.e., Super PACs) may not be limited.<sup>91</sup> The opinion reiterated “that the government has *no* anti-corruption interest in limiting independent expenditures.”<sup>92</sup> Since “independent expenditures do not corrupt or create the appearance of quid pro quo corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption.”<sup>93</sup> *Citizens United* and *SpeechNow.org* jointly opened the floodgates of outside political spending. I turn now to consider how those decisions also renewed multiple elitism.

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finance controls was approved on a broad bipartisan basis in 1974, after the Watergate revelations, in which a suitcase stuffed with cash was a symbol. The nation was shocked to learn that ambassadorships had been bought for \$100,000.”).

87. Dan Eggen, *Post-Watergate Campaign Finance Limits Undercut By Changes*, WASH. POST (June 16, 2012), [https://www.washingtonpost.com/politics/post-watergate-campaign-finance-limits-undercut-by-changes/2012/06/16/gJQAinRrhV\\_story.html?utm\\_term=.0f8ea3983846](https://www.washingtonpost.com/politics/post-watergate-campaign-finance-limits-undercut-by-changes/2012/06/16/gJQAinRrhV_story.html?utm_term=.0f8ea3983846) [https://perma.cc/NXU2-MP6Q].

88. 558 U.S. 310 (2010).

89. *Id.* at 365; see Richard Briffault, *On Dejudicializing American Campaign Finance Law*, in MONEY, POLITICS, *supra* note 34, at 176 (noting that *Citizens United* determined “that the corporate form is irrelevant to the constitutionality of limits on corporate spending.”); Issacharoff, *supra* note 5, at 125 (“*Citizens United* closed the circle on the *Buckley* scenario.”). Much has been written about *Citizens United*, most of it negative. Richard Pildes called it “the most countermajoritarian act of the Court in many decades.” Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 105 (2010). Richard Hasen predicted that “the capacious rhetoric in *Citizens United* will lead lower courts astray.” Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 584-85 (2011). Countless sources echo these arguments.

90. 599 F.3d 686 (D.C. Cir. 2010).

91. See *id.* at 689.

92. *Id.* at 693. These shadow parties encompass a plethora of (ostensibly) outside groups: Super PACs, 501(c)(4) social welfare organizations, and 501(c)(6) trade associations most notably. For background, see generally Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644 (2012).

93. *SpeechNow.org*, 599 F.3d at 694 (emphasis omitted).

#### 4. *The Renewal of Multiple Elitism*

*Citizens United* is one of the most polemical Court decisions in history, with the case name itself serving as a shorthand for democratic inequality. The actual effects of the case itself, however, are debatable. Consider Richard Briffault's observation that "[p]rior to *Citizens United*, corporations were already able to spend virtually as much as they wanted in connection with elections."<sup>94</sup> Even Lawrence Lessig concedes that "*Citizens United* is not clearly wrong."<sup>95</sup> What, then, did the case actually accomplish?

I suggest that *Citizens United* renewed multiple elitism. The mechanisms by which this has occurred must be spelled out in detail. The central claims of the theory are simplified as follows: (1) *Citizens United* and *SpeechNow.org* created what Heather Gerken has labeled "‘shadow parties,’—organizations outside of the party that house the party elites"<sup>96</sup>; (2) politicians, if they hope to stand a chance at election or reelection, are increasingly reliant on the shadow parties; (3) shadow parties are both less responsive to the public, and more responsive to special interest groups, than traditional political parties; and (4) as such, the preconditions for the renewal of multiple elitism are in place.

Let me untangle each of these propositions. First, and taken directly from Gerken, is the notion of a shadow party. A shadow party encompasses the web of Super PACs and nonprofit organizations that serve the role that traditional political parties used to. As Gerken writes, "[t]hey raise money, they push candidates and issues, and their leadership is often the mirror image of the leadership of the parties themselves."<sup>97</sup> Though existing laws prohibit "coordination"—a legal term of art—between shadow parties and candidates, these restrictions are widely understood to be shambolic and ineffective.<sup>98</sup> Not only that, but the shadow party leadership is commonly made up of former campaign operatives.<sup>99</sup>

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94. Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance after Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 643, 644 (2011); see also Heather K. Gerken, *The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, 97 MARQ. L. REV. 903, 911 (2014) ("Even before *Citizens United*, 501(c) organizations such as the Chamber of Commerce or Crossroads GPS—the independent organizations that absolutely dominated the 2012 elections—fell outside current regulations.").

95. LESSIG, *supra* note 3, at 245.

96. Gerken, *supra* note 94, at 905.

97. *Id.* at 918.

98. See Michael D. Gilbert & Brian Barnes, *The Coordination Fallacy*, 43 FLA ST. U. L. REV. 399, 401-02 (2016). See generally Note, *Working Together for an Independent Expenditure: Candidate Assistance with Super PAC Fundraising*, 128 HARV. L. REV. 1478 (2015).

99. Gerken, *supra* note 94, at 916.

What is so troublesome about shadow parties? Their autonomy and lack of transparency. Shadow parties are unencumbered by fundraising and spending limits, do not have to disclose their donors, and are not accountable to the public in the way that traditional political parties are. These advantages explain why *Citizens United* and *SpeechNow.org* incentivized their creation. Why work through traditional party channels when shadow parties are comparatively less burdensome to navigate?<sup>100</sup> But the problem runs deeper. As Gerken explains:

Parties also provide the energy that fuels our democracy—they are the source of much of its creativity and generativity. Party elites serve as “conversational entrepreneurs” in American politics. The battles between the parties, the battles within the parties, the wars among political elites and factions and interest groups all help set the policymaking agenda, tee up questions for voters, frame issues, fracture existing coalitions, and generate new ones.<sup>101</sup>

It is little surprise that more and more election law scholars are calling to strengthen political parties as a way to restore political order.<sup>102</sup>

The second proposition is that politicians are reliant on the shadow parties. Gerken equivocates a bit on this point, but does speculate that shadow parties may “develop[] into institutions with strong ties to the candidate, to his donor base, to all of the elite decision makers and interest groups that matter for a campaign.”<sup>103</sup> It hardly seems debatable at this point. Leading candidates for the 2016 presidential contest had Super PACs established for their benefit *before* they had even formally announced their candida-

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100. *Id.* at 918 (“Election lawyers spend endless amounts of time dealing with the hassles associated with the formal parties raising money. If you are a lawyer for one of the shadow parties, your biggest worry is that Congress or the [Federal Election Commission] might actually start doing its job and pass regulations. In this day and age, that’s not much of a worry.”).

101. *Id.* at 919 (footnotes omitted).

102. See, e.g., Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 809 (2014) (“The problem is not that we have parliamentary-like parties. Rather, it might well be that our political parties are not parliamentary-like *enough*: party leaders are now unable to exert the kind of effective party leadership characteristic of parliamentary systems.”); see also Morris P. Fiorina, *Parties, Participation, and Representation in America: Old Theories Face New Realities*, in POLITICAL SCIENCE, *supra* note 57, at 521 (“What is needed is a means of imposing coherence on government action, of centralizing the authority that institutions decentralize. According to various scholars over the decades, that means strong or responsible political parties.”); Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 55 (2012).

103. Gerken, *supra* note 94, at 920.

cies.<sup>104</sup> This trend is what Lessig refers to as the “Green Primary.”<sup>105</sup> Prospective candidates can gain momentum only by attracting early, large donations. For the reasons outlined above, such donations are most likely to be made to Super PACs and other outside groups.<sup>106</sup>

The point applies to incumbents as well, who, as we know, spend an inordinate amount of time fundraising (including fundraising for Super PACs).<sup>107</sup> Michael Kang cites the staggering totals spent by Super PACs in recent years, figures that continue to increase.<sup>108</sup> It is naïve to think that politicians are not dependent on this outside spending in order to remain competitive. Kang addresses an additional indicium of politicians’ increasing reliance on shadow parties: a party-sponsored Super PAC.<sup>109</sup> Such an entity provides a way for traditional political parties to circumvent existing contribution caps. The constitutionality of a party-sponsored Super PAC at the federal level is undetermined, with the Republican National Committee having withdrawn its suit against the

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104. Matea Gold, *Now It's Even Easier for Candidates and Their Aids to Help Super PACs*, WASH. POST (Dec. 24, 2015), [https://www.washingtonpost.com/politics/now-its-even-easier-for-candidates-and-their-aides-to-help-super-pacs/2015/12/24/d8d1ff4a-a989-11e5-9b92-dea7cd4b1a4d\\_story.html?utm\\_term=.f5d095e153ff](https://www.washingtonpost.com/politics/now-its-even-easier-for-candidates-and-their-aides-to-help-super-pacs/2015/12/24/d8d1ff4a-a989-11e5-9b92-dea7cd4b1a4d_story.html?utm_term=.f5d095e153ff) [https://perma.cc/NRL6-CQMU] (“Ahead of announcing his 2016 bid, for example, former Florida governor Jeb Bush (R) helped raise more than \$100 million for Right to Rise, a super PAC supporting him.”); see also Nicholas Confessore, *Huge ‘Super PAC’ Is Moving Early to Back Clinton*, N.Y. TIMES (Jan. 23, 2014), <https://www.nytimes.com/2014/01/24/us/politics/biggest-liberal-super-pac-to-fund-possible-clinton-bid.html?mtrref=www.google.com&gwh=FEF1E503B0E4CE7FDD763510FCCEFB7F&gwt=pay> [https://perma.cc/CM77-63KV].

105. LESSIG, *supra* note 3, at 12.

106. *Id.* (“We live in a time when what makes a candidate ‘credible’ is that she comes to the election with money. Money is the measure of a campaign, long before anyone is thinking about votes.”); HASEN, *supra* note 27, at 42 (“A candidate’s hopes for success in a party primary and in the general election almost always depend on raising sufficient funds, first to convince elites and then to promote the candidate in the media and, as necessary, attack his or her opponent.”); see also TEACHOUT, *supra* note 49, at 256 (“Within the decade in which I write this, unlimited outside spending by individuals and groups will likely become greater than political party and candidate spending.”).

107. LESSIG, *supra* note 3, at 316-18 n.12 (assembling the available data).

108. Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. 531, 594-95 (2016). There is not a great diversity of donors. See LESSIG, *supra* note 3, at 15 (“The top 100 individuals and organizations gave 60 percent of the super PAC money given [in 2014].”).

109. Kang, *supra* note 108, at 589 (“The [Colorado Republican Party] stipulated that it would appoint the committee membership of the party Super PAC, serve as the Super PAC’s parent corporation, and require the Super PAC to follow the party bylaws, as well as solicit funds for the Super PAC. However, the state party promised that it would not actively manage the Super PAC’s operations, nor direct its campaign spending, to avoid formal coordination with the Super PAC and preserve the independence of its expenditures.”).



FEC in support of its Super PAC's legality.<sup>110</sup> Nonetheless, the mere prospect of a party-sponsored Super PAC substantiates the second proposition.

The third proposition, that shadow parties are both less responsive to the public and more responsive to special interests than traditional political parties, is an empirical question for which the evidence is limited, though ample enough to provide strong corroboration. Here is what is known: Total outside spending is at an all-time high. The Center for Responsive Politics reports that as of September 1, 2016, a record \$660 million was spent by outside groups for the 2016 presidential election.<sup>111</sup> Most of that total was spent by Super PACs.<sup>112</sup> So-called "dark money" groups—501(c)(4) and (c)(6) organizations—surprisingly, did not spend at previous levels.<sup>113</sup> One lobbyist attributed the decrease to the candidacy of Donald Trump, who, he said, "[A]lienated corporate interests."<sup>114</sup> While anecdotal, the statement lends support to the notion that special interests—in this case, corporate interests—are active shadow party donors. Corporate interests, it can fairly be said, are not aligned with those of the public.

We also know a bit about which categories of interest groups generally contribute the most, and that at least some of this money is directed to outside groups. For instance, the finance, insurance, and real estate industries gave over one billion dollars during the 2015-2016 election cycle, exceeding all other sectors.<sup>115</sup> This is unsurprising given these industries' history of making contributions to both major political parties.<sup>116</sup> But the bulk of this spending went to outside groups, rather than the traditional political parties.<sup>117</sup> This indicates some apparent benefit these industries see to utilizing shadow parties.<sup>118</sup>

110. *Republican National Committee, et al. v. FEC Case Summary*, FED. ELECTION COMM'N: LITIGATION, <https://transition.fec.gov/law/litigation/RNC.shtml> [<https://perma.cc/B4RF-HMQY>].

111. Soo Rin Kim, *Super PAC Spending Hits \$500 Million, While 501(c)s Hit the Brakes*, OPEN SECRETS BLOG (Sept. 1, 2016), <https://www.opensecrets.org/news/2016/09/super-pac-spending-reaches-500m/> [<https://perma.cc/54RZ-THG2>].

112. *Id.*

113. *Id.*

114. *Id.* (quoting Craig Holman, government affairs lobbyist at Public Citizen).

115. *Totals by Sector: Election Cycle 2016*, OPEN SECRETS, <https://www.opensecrets.org/overview/sectors.php?cycle=2016> [<https://perma.cc/4L2T-GSM5>] [hereinafter *Totals by Sector*].

116. See, e.g., MIKE DAVIS, IN PRAISE OF BARBARIANS: ESSAYS AGAINST EMPIRE 20 (2007) ("The so-called FIRE sector (financial services and insurance) was split 58 percent Republican and 41 percent Democrat with commercial banking favoring Bush and venture capital gambling on Gore.").

117. See *Totals by Sector*, *supra* note 115.

118. See LESSIG, *supra* note 3, at 55 ("In the 2014 election cycle, 5 percent of the money contributed to candidates or organizations was 'dark.' 1.5 percent was semi-dark. So that

It is worth emphasizing that interest groups are generally unrepresentative of the populace. Kay Schlozman, a leading political scientist who studies interest groups, reports that “[o]f the nearly 14,000 organizations listed in the 2006 *Washington Representatives* directory . . . only a small fraction, 12.4 percent, are associations of individuals.”<sup>119</sup> Moreover, as Schlozman notes, “of all the organizations active in Washington, more than half, 51.6 percent, represent business in one way or another.”<sup>120</sup> In contrast, “the number of public interest groups is relatively small, accounting for less than 5 percent of the organizations active in Washington.”<sup>121</sup>

Perhaps most convincing are the findings of Martin Gilens and Benjamin Page, two renowned political scientists. In the leading empirical study of interest group influence, Gilens and Page find “that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence.”<sup>122</sup> This finding of what they label “biased pluralism”<sup>123</sup>—which is indistinguishable from multiple elitism—supports their disconcerting conclusion:

It is simply not the case that a host of diverse, broadly-based interest groups take policy stands—and bring about actual policies—that reflect what the general public wants. Interest groups as a whole do not seek the same policies as average citizens do. “Potential groups” do not fill the gap. Relatively few mass-based interest groups are active, they do not (in the aggregate) represent the public very well, and they have less collective impact on policy than do business-oriented groups—whose stands tend to be *negatively* related to the preferences of average citizens. These business groups are far more numerous and active; they spend much more money; and they tend to get their way.<sup>124</sup>

All told, it is evident that donations to shadow parties are almost certainly biased toward special interests with organizational and ide-

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means, we know with certainty where 93.5 percent of the money came from in 2014. Dark money is a problem. But a much more important problem than the dark money is the super PAC itself.”).

119. Kay L. Schlozman, *Who Sings in the Heavenly Chorus? The Shape of the Organized Interest System*, in OXFORD, *supra* note 22, at 425, 430.

120. *Id.* at 434.

121. *Id.*

122. Martin Giles & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POL. 564, 565 (2014).

123. *Id.* at 567 (“Theories of biased pluralism generally argue that both the thrust of interest-group conflict and the public policies that result tend to tilt toward the wishes of corporations and business and professional associations.”).

124. *Id.* at 575.

ological advantages, and that special interests do not reflect public aims. Their goal, of course, is to entrench such advantages. Rather than fostering balanced deliberation, “[m]ost corporate and trade PAC giving is ‘service-induced,’ aimed at incumbent politicians with agenda power, regardless of whether they face close elections.”<sup>125</sup> An alternative view suggests that it is the politicians themselves who induce special interest giving.<sup>126</sup> Whatever the case, the public is ill-served by a nontransparent system of campaign finance in which participation is heavily skewed toward a small number of institutionally-advantaged actors.

It might be argued that though special interest giving to shadow parties is undoubtedly biased, this does not establish anything about the actual behavior of the shadow parties. The strength of this argument is weakened once one pauses to consider the structure and incentives of shadow parties. As detailed above, the shadow parties are generally made up of former traditional political party operatives. These individuals have made the decision to join the shadow parties, given the institutional advantages they enjoy vis-à-vis the traditional parties. One major advantage they enjoy is the ability to circumvent the public deliberation, bargaining, and compromises that one finds in the traditional parties. In short, shadow parties can pursue their agendas without resistance.

And what are their agendas? Namely, whatever special interest groups demand, given the reliance that politicians have on special interest funding, and, in turn, the reliance that shadow parties have on capturing that funding. As Samuel Issacharoff and Pamela Karlan have observed, “groups that engage in independent advocacy have strong incentives to stress one issue around which to mobilize supporters and contributors as opposed to the range of programmatic positions that candidates must take.”<sup>127</sup> Further, shadow parties need not consider “brand protection,”<sup>128</sup> which makes them an attractive conduit for corporate entities with public relations concerns.<sup>129</sup> All of these factors provide strong support for the proposition that shadow

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125. Clyde Wilcox & Rentaro Iida, *Interest Groups in American Elections*, in OXFORD, *supra* note 22, at 552, 559.

126. See LESSIG, *supra* note 3, at 121-24 (exploring this possibility).

127. Issacharoff & Karlan, *supra* note 83, at 1714-15.

128. See HASEN, *supra* note 27, at 153 (discussing shadow parties and negative advertising).

129. Briffault, *supra* note 94, at 668 (“There is evidence that business corporations prefer not to sponsor ads in their own names, but rather seek to channel their funds through intermediary organizations that nominally sponsor the independent spending but are really acting for the donor firms that set up or control them.”).

parties do a worse job than traditional political parties at reflecting public concerns.<sup>130</sup>

The first three propositions lead to the fourth; namely, that the preconditions for the renewal of multiple elitism are in place. Recall that multiple elitism claims special interest groups dominate certain policymaking areas.<sup>131</sup> Recall also that multiple elitism was supplanted by neopluralism, which challenged the idea that special interests invariably achieved dominance. There was great variance across issue areas, neopluralists argued, and the complex relationships between legislatures, interest groups, and executive branch officials resulted in contestation more often than capture.<sup>132</sup>

Whether true or not at neopluralism's peak, I argue that *Citizens United*, *SpeechNow.org*, and the creation of shadow parties have renewed the likelihood and salience of multiple elitism. Writing several years ago, McFarland could accurately claim the following: "Campaign contributions from groups appear to reinforce special-interest politics in some areas of national policymaking, enhancing multiple-elitism, although the effect is limited by factors producing neopluralism (e.g., contributions from both business and labor to the same politician)."<sup>133</sup> The changed campaign finance landscape, with the bulk of donations now going to outside groups and, as I posit, shadow parties, undermines neopluralism's foundational premises. Select special interests enjoy systematic influence<sup>134</sup>

130. See Pildes, *supra* note 102, at 828 ("Of the various organizational entities that exist or that I can envision, the political parties, driven by the need to appeal to the widest electorate, remain the broadest aggregators of diverse interests.").

131. *Supra* Section II.A.2. Political scientists sometimes referred to these special interests as "subgovernments." See WALKER, *supra* note 64, at 125-26 ("Under a regime of subgovernments, national policy-making would be controlled by an elaborate pattern of interest communities, each capable of developing and administering public policy within its narrow realm without significant opposition from elsewhere in the governmental system and without much internal dissension.").

132. See McFarland, *Interest Groups and Theories of Power*, *supra* note 22, at 140 (discussing "case studies indicat[ing] that in the same area of policy *both* dominant economic producer interests *and* countervailing interests were influential in the passage and implementation of regulatory legislation"); WALKER, *supra* note 64, at 139 ("In our 1980 survey, we detected a higher level of group conflict than would have been anticipated after reading the literature on subgovernments. Newly invigorated occupationally based groups from the profit sector, backed by corporate patrons and focused on immediate commercial interests, were being confronted by a set of organizations claiming to represent broad collective interests backed by a diverse set of patrons, including private foundations, wealthy individuals, and the permanent government bureaucracy.").

133. McFarland, *Interest Groups and Theories of Power*, *supra* note 22, at 48.

134. Ken Doyle, *Shadow Parties Dominate Campaign Spending in Midterms*, BLOOMBERG (Oct. 26, 2018), <https://about.bgov.com/blog/shadow-parties-dominate/> [<https://perma.cc/D2PZ-JVTT>] ("The shadow parties rely almost exclusively on megadonors giving at least \$100,000 each or on undisclosed donors, researchers found.").

To be sure, it cannot be said with confidence that the existence of shadow parties necessarily leads to executive branch capture in quite the same way as some of the theorists of multiple elitism claimed; the links between shadow parties, legislatures, and agencies would need to be much tighter.<sup>135</sup> Nevertheless, special interests are well-placed to exploit the current environment to a perhaps unprecedented degree. Under the current rules of engagement, special interest groups are in many instances unrivaled.

Consider the findings of a widely cited study by the political scientists Frank Baumgartner and Beth Leech involving lobbying activity. Though lobbying is not identical to the work done by shadow parties, there is some operational overlap, and the behavior of lobbyists is nonetheless instructive. Baumgartner and Leech found that most interest groups proceed uncontested:

The vast majority of the lobbying occurs in a tiny fraction of the issues. Conversely, in the vast bulk of the issues on which interest groups are active, they have the grounds relatively to themselves. Even issues such as a proposal to amend the Passenger Services Act, changes to the student loan system, and a proposal to reorganize the federal home loan banking system attracted just three to five registered interest groups in 1996.<sup>136</sup>

In short, there is little reason to suspect that special interest groups are sufficiently opposed in their efforts to influence policy via shadow parties, and many reasons to suspect the opposite. This type of behavior is harmful, as multiple elitism holds, because of its upending of democratic responsiveness. I emphasize that the harm I have detailed is not one of inequality, not one of undue influence or access, and not one of unequal representation. By contrast, my theory cautions against institutionalizing special interest group advantages, while delimiting avenues for organic, competing democratic activity. Yet, regrettably, the Supreme Court's bounded definition of corruption has done just that. I now move to consider how criminal political corruption is theoretically distinct from what has been explicated in this section.

### *B. Theorizing Criminal Political Corruption*

Criminal political corruption involves individual impropriety. It does not pose as dangerous a threat to democracy writ large as does

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135. For one context where these links are apparent, see generally Troy A. Rule, *Buying Power: Utility Dark Money and the Battle over Rooftop Solar*, 5 LA. ST. U. J. ENERGY L. & RES. 1 (2017).

136. Frank R. Baumgartner & Beth L. Leech, *Interest Niches and Policy Bandwagons: Patterns of Interest Group Involvement in National Politics*, 63 J. POL. 1191, 1202 (2001).

commonplace political corruption. The doctrine's prioritization of quid pro quo exchanges is sensible in light of the general design of the criminal law and the singularity of the misconduct. I believe commonplace political corruption is best understood in contradistinction to criminal political corruption. I agree with Dennis Thompson that comparing both forms of corruption—in his framework, Thomas talks of *individual* versus *institutional* corruption—is important when promoting reforms.<sup>137</sup> I start with a basic overview of the principal laws against criminal political corruption, before offering a simple theory, the purpose of which is merely to provide a counterpoint to commonplace political corruption.

Some general background: Criminal political corruption, at the federal level, is generally prosecuted under one of four statutes: (1) 18 U.S.C. § 201, which prohibits the bribery of public officials;<sup>138</sup> (2)

137. Thompson, *supra* note 19, at 10 (“There is another reason the distinction between personal and institutional gain is so important. It affects what reforms we choose to focus on.”).

138. The statute provides in part:

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud . . . on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such an official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

. . . shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. § 201 (2012).



18 U.S.C. § 666, which prohibits bribery concerning programs receiving federal funds;<sup>139</sup> (3) 18 U.S.C. § 1951, also known as the Hobbs Act, which prohibits extortion, with extortion defined as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right”;<sup>140</sup> and (4) 18 U.S.C. § 1341, the mail fraud statute, which prohibits “any scheme or artifice to defraud,”<sup>141</sup> which section 1346, in turn, defines to include “a scheme or artifice to deprive another of the intangible right of honest services.”<sup>142</sup> I introduce each in turn.

### 1. *Bribery*

The federal bribery statute, 18 U.S.C. § 201, is commonly interpreted as containing two prohibitory categories; one for instances of bribery, and one for transactions involving “unlawful” or “illegal” gratuities.<sup>143</sup> The “corrupt intent” element of the former “is the primary distinction between bribery and unlawful gratuity offenses.”<sup>144</sup> The “anything of value” element, essential to both offenses, has been given a broad reading, as it has been applied to a wide variety

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139. The statute provides in part, and with regard to entities receiving more than \$10,000 per year in federal assistance:

(a) Whoever—

... (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of \$5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 666.

140. *Id.* § 1951. The latter phrase, “under color of official right,” is the relevant portion as pertains to public officials.

141. *Id.* § 1341.

142. *Id.* § 1346. The phrase “intangible right of honest services” is the relevant portion as pertains to public officials. See Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 *FORDHAM L. REV.* 463, 477-79 (2015).

143. See, e.g., *ESKRIDGE ET AL.*, *supra* note 63, at 266.

144. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404 (1999) (“The distinguishing feature [between bribery and unlawful gratuities] is [bribery’s] intent element.”); *ESKRIDGE ET AL.*, *supra* note 63, at 266 (“Payments to a public official for acts that would have occurred in any event are in most circumstances probably unlawful gratuities and not bribes.”).

of things, including stock with no commercial value,<sup>145</sup> freedom from jail on pretrial release,<sup>146</sup> repaid loans,<sup>147</sup> and promises of future employment.<sup>148</sup>

## 2. Federal Funds Bribery

The other federal bribery statute, 18 U.S.C. § 666, differs in its application to agents of organizations receiving federal funds. Like the bribery provisions of section 201, it requires, by its express terms, “corrupt” action, by either the briber or the recipient of the bribe.<sup>149</sup> The Supreme Court has not squarely addressed the issue of whether a section 666 prosecution requires proof of a quid pro quo exchange, though, following *McDonnell*, such proof is likely.

## 3. Extortion

Extortion, as defined in 18 U.S.C. § 1951—again, commonly known as the Hobbs Act—is “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”<sup>150</sup> As explained by James Lindgren, “extortion by a public official is the seeking or receiving of a corrupt benefit paid under an implicit or explicit threat to give the payor worse than fair treatment or to make the payor worse off than he is now.”<sup>151</sup> The Hobbs Act, unlike the federal bribery statute, covers any public official operating “under color of official right,”<sup>152</sup> extending the statute’s coverage to state and local officials. The precise relationship between Hobbs Act offenses and bribery offenses is unclear, though the Supreme Court has found their elements to overlap significantly.<sup>153</sup>

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145. *United States v. Williams*, 705 F.2d 603, 623 (2d Cir. 1983) (“Corruption of office occurs when the officeholder agrees to misuse his office in the expectation of gain, whether or not he has correctly assessed the worth of the bribe. When the Senator received shares of stock in the three corporations organized to hold the properties of the mining venture, he expected these shares to have considerable value . . .”).

146. *United States v. Townsend*, 630 F.3d 1003, 1011 (11th Cir. 2011) (“[W]e conclude that intangibles, such as freedom from jail and greater freedom while on pretrial release, are things of value.”).

147. *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986).

148. *Id.*

149. 18 U.S.C. § 201; *see id.* § 666(b)(2); *see also* *United States v. Ford*, 435 F.3d 204, 210, 210 n.2 (2d Cir. 2006).

150. 18 U.S.C. § 1951(b)(2).

151. James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 825 (1988).

152. 18 U.S.C. § 1951(b)(2).

153. *See, e.g., Evans v. United States*, 504 U.S. 255, 261 (1992).

#### 4. Mail Fraud (“Honest Services Fraud”)

The mail fraud statute, 18 U.S.C. § 1341 forbids “devis[ing] or intending to devise any scheme or artifice to defraud” through the use of the U.S. Postal Service.<sup>154</sup> A related statute, 18 U.S.C. § 1346, resolves that the phrase “ ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of *the intangible right of honest services*.”<sup>155</sup> Elected officials owe the public such a right. The inclusion of this language in the statute came at the request of the U.S. Department of Justice, which had long relied on the then textually unsupported doctrine of “honest-services fraud” as “an important tool in its battle against corruption.”<sup>156</sup> Historically, the doctrine was most commonly used in cases involving public officials,<sup>157</sup> though it has been used to prosecute private actors as well.<sup>158</sup>

#### 5. A Simple Theory of Criminal Political Corruption

Each of the four statutes is targeted at individual wrongdoing. Whatever challenges exist in defining statutory violations, they are largely ones of intent, or of unearthing an illegal exchange, rather than the structural concerns of commonplace political corruption. As such, a simple theory of criminal political corruption will suffice. Such a theory is useful for the purpose of providing a counterpoint to commonplace political corruption. Basically put, the theory holds that the singularity of criminal political corruption is a problem of individual impropriety, not one of entrenched advantage. The doctrine’s prioritization of quid pro quo exchanges is therefore sensible in light of the general design of the criminal law. While the impropriety of elected officials is certainly no benefit to democracy, the threat it poses to democracy writ large is less than that of commonplace political corruption. We might think of this less corrosive form of corruption as *singular* corruption.

Singular corruption is, to many people, conventional corruption.<sup>159</sup> It is the abuse of public office for personal gain.<sup>160</sup> It is initiated by

154. 18 U.S.C. § 1341.

155. *Id.* § 1346 (emphasis added).

156. Alschuler, *supra* note 142, at 477; *see also* Skilling v. United States, 561 U.S. 358, 400 (2010) (discussing the origin of the doctrine).

157. *Skilling*, 561 U.S. at 401 (“Most often these cases . . . involved bribery of public officials.” (quoting *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980)) (omission in original))).

158. *See, e.g.*, *United States v. Sullivan*, 522 F.3d 967, 974 (9th Cir. 2008).

159. *See, e.g.*, Jacob Eisler, McDonnell and *Anti-Corruption’s Last Stand*, 50 U.C. DAVIS L. REV. 1619, 1627 (2017) (“In generic terms, corruption refers to misuse of public office (including, potentially, citizenship) motivated by some desire for private gain by the misuser.”).

untoward actors—the briber in the case of bribery, the elected official in the case of extortion—for the purpose of personal enrichment. The resulting corruption is narrow and does not invariably tear at the democratic fabric.

Consider again the argument of Dennis Thompson, who has done exceptional theoretical work developing various types of corruption. More than anyone of whom I am aware, he has punctuated the distinction between singular corruption and the democratic dysfunction that results from institutional corruption. As he acknowledges, singular corruption is easily intelligible by comparison:

Those who bribe seek undeserved favors for themselves, and those who are bribed violate the public trust. To explain why this is wrong we do not need any elaborate theory of the democratic process. Indeed, we do not have to defend democracy at all, because this kind of corruption is regarded as wrong in many nondemocracies. All we have to say is that, as a matter of basic fairness, no one should receive special favors only because he offers money, whether in the form of cash, a gift, or a campaign contribution.<sup>161</sup>

Other scholars have similarly described singular corruption as comparatively basic.<sup>162</sup>

But saying that bribery is a basic concept does not resolve the questions of where the line between a donation and a bribe should lie and how we should define criminal political corruption. To answer those questions, we might briefly consider the general design of the criminal law, and how it informs the argument that we should distinguish corruption based on context. On perhaps the broadest level, the criminal law is concerned with a type of calculated wrongdoing. As put by Henry Hart, Jr., a crime is an act or omission and its accompanying state of mind which, “if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condem-

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160. Slight variations on this definition are ubiquitous. See, e.g., JOHN KLEINIG & WILLIAM C. HEFFERNAN, *The Corruptibility of Corruption*, in PRIVATE AND PUBLIC CORRUPTION 3 (William C. Heffernan & John Kleinig eds., 2004) (“If there is an orthodox account of corruption, it is that it consists in the improper use of public office for private gain.”); Dawood, *supra* note 50, at 106 (describing one view of corruption as occurring “when public power is being used by private gain”); Thompson, *supra* note 19, at 6 (“The first and more familiar concept is individual corruption: personal gain or benefit by a public official in exchange for promoting private interests.”).

161. Thompson, *supra* note 54, at 1040 (footnote omitted).

162. See, e.g., George D. Brown, *Applying Citizens United to Ordinary Corruption: With a Note on Blagojevich, McDonnell, and the Criminalization of Politics*, 91 NOTRE DAME L. REV. 177, 181 (2015) (“Ordinary corruption cases are simply matters of statutory interpretation. The campaign finance cases, on the other hand, require an in-depth examination of the nature of corruption because preventing it (or its appearance) is a government interest that justifies restrictions on activities otherwise protected by the First Amendment.”).

nation of the community.”<sup>163</sup> The “accompanying state of mind” element is precisely the type of consideration that necessitates this Article’s central argument—namely, that our concerns about corruption vary across doctrines.

To take one example, consider the language of the federal bribery statute, 18 U.S.C. § 201, introduced above, and how it has proven to be so perplexing. Subsection (b) of the statute covers anyone who:

[D]irectly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent . . . to influence any official act.<sup>164</sup>

Daniel Lowenstein proclaimed over thirty years ago that “the bribery statutes are intended to proscribe corrupt activity, but it is not easy to discern what, if anything, the concept of acting ‘corruptly’ adds as an *element* of the crime of bribery.”<sup>165</sup> Lowenstein ultimately concluded that the concept merely characterizes how the other elements of the statute should be understood.<sup>166</sup>

Albert Alschuler, writing much more recently, was still unable to describe with certainty what work the adverb “corruptly” does for the bribery statute.<sup>167</sup> Alschuler cites several cases in which it was interpreted to mean “bad,” “evil,” “improper,” or other similar terms,<sup>168</sup> before calling the statute a “relic[ ] of a time when crimes were defined far less precisely than they usually are today.”<sup>169</sup> Deborah Hellman is equally baffled.<sup>170</sup> Zephyr Teachout comments with regard

163. Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

164. 18 U.S.C. § 201(b)(1) (2012).

165. Lowenstein, *supra* note 5, at 798; *see also* Note, *Campaign Contributions and Federal Bribery Law*, 92 HARV. L. REV. 451, 453 (1978) (“To rest the distinction between a bribe and a campaign contribution on whether the money is given ‘corruptly’ raises problems of vagueness. The [bribery] statute nowhere defines ‘corruptly,’ and the legislative history offers only the unhelpful terminological substitution of dishonest intent for ‘corruptly.’”).

166. Lowenstein, *supra* note 5, at 806 (“The requirement of a corrupt intent in bribery statutes adds nothing by way of description to the definition of the crime of bribery. If the requirement means anything, it is that to constitute a bribe, the conduct that satisfies each of the descriptive elements also must be wrongful conduct.”).

167. Alschuler, *supra* note 142, at 467-68 (“Perhaps the word ‘corruptly’ is crucial, and perhaps it does most of the work. This fudgy adverb might prevent ‘intent to influence’ statutes from sweeping into their net the lobbyist’s lunch, other routine entertainment, and many campaign contributions.”).

168. *Id.* at 469 nn.29-33.

169. *Id.* at 469.

170. Deborah Hellman, *A Theory of Bribery*, 38 CARDOZO L. REV. 1947, 1954 (“When does one ‘corruptly’ give something of value to a public official, etc. as compared to noncor-

to past judicial decisions that “[i]f ‘corrupt’ was an element of the crime, courts largely left the definition of corrupt up to the jury or described it in equally moral and imprecise language.”<sup>171</sup> The point is that the difficulty in specifying how to think about and identify corruption in the criminal political context is a task that is analytically distinct from the concerns about special interest group entrenchment detailed in the previous section. Categorically reducing the relevant inquiry to whether a quid pro quo occurred is fallacious.

There are also federalism concerns at play when thinking about criminal political corruption. The *McDonnell* opinion raised federalism as a basis for reading 18 U.S.C. § 201 narrowly: “Here, where a more limited interpretation of ‘official act’ is supported by both text and precedent, we 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.’”<sup>172</sup> Many scholars advance the same concerns.<sup>173</sup> Again, this is not at issue when scrutinizing commonplace political corruption.

To reiterate, criminal political corruption is principally aimed at holding elected officials, or those who bribe them, accountable for improper behavior. Given that aim, a doctrinal emphasis on quid pro quo exchanges is sensible. No intricate theory of democracy is necessary to justify laws that police such behavior. But we should not confuse this form of corruption—which looks to individuals’ motives—with the commonplace political corruption that poses the greater threat to our democracy.<sup>174</sup> Appreciation of the theoretical distinction

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ruptly? The statute itself requires an account of corruption to complete it. In this sense, the statute appears circular.”).

171. TEACHOUT, *supra* note 49, at 202.

172. *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)).

173. Brown, *supra* note 162, at 187-88; Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 669, 700 (2000); Eisler, *supra* note 159, at 1627 (“An immediate policy solution to enable civic anti-corruption enforcement is state-led enforcement with federal cooperation, which would address federalism concerns and distance such prosecutions from federal judicial review.”); Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*, 6 THEORETICAL INQ. L. 113, 154 (2005) (“[T]he federal role in policing non-federal corruption should be strong but narrow—ideally, to shine the bright light of federal prosecutions on non-federal practices that are unquestionably corrupting because they are already condemned by state law. U.S. Attorneys have no special expertise on the wisdom of campaign finance reform or conflicts of interest.”); see also Charles N. Whitaker, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach*, 78 VA. L. REV. 1617, 1619-21 (1992).

174. See Thompson, *supra* note 54, at 1043 (“In the design of a representative system or in the practice of judging representatives, therefore, one cannot, in general, rely on being able to evaluate motives in individual cases.”).



is essential. I now take a limited look at the campaign finance and criminal political corruption doctrines, as well as the *Silver*, *Menendez*, and *McDonnell* cases, each of which illustrate how the doctrines have converged.

### III. THE CONVERGENCE OF DOCTRINES

With the theory building of the previous Part complete, I now provide a condensed summary of the campaign finance and criminal political corruption doctrines. Because the main focus of the Article is theoretical, and because many others have detailed each of these doctrines at length, I have chosen to focus only on major cases. Still, an understanding of how these respective doctrines have evolved is useful in understanding the recent convergence that has occurred. Following the doctrinal review, I evaluate three high-profile political corruption cases. The cases reveal how the doctrinal convergence severely complicates our ability to delineate different theories of corruption.

#### A. Campaign Finance Doctrine

Recall that *Buckley v. Valeo* placed a line between campaign contributions and expenditures.<sup>175</sup> The former, the Supreme Court held, raise the prospect of quid pro quo corruption, and are therefore entitled to only a limited degree of First Amendment protection.<sup>176</sup> Expenditures, in contrast, warrant greater First Amendment cover, as they entail core political speech that does not present the same risk of corruption.<sup>177</sup> The *Buckley* decision resolved most issues concerning political spending by individuals, but many questions remained about how and whether its framework applied to corporations and labor unions.

Corporations, in particular, have been at the center of many campaign finance cases.<sup>178</sup> Historically, corporations were prohibited from spending money in connection with federal elections.<sup>179</sup> But many questions arose about how far this ban extended and how the danger of corruption factored in. In 1978, the Court decided *First National*

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175. See *supra* notes 72-73 and accompanying text; see also *Buckley v. Valeo*, 424 U.S. 1 (1976).

176. See *Buckley*, 424 U.S. 1 at 45.

177. See *id.* at 80.

178. See Adam Winkler, *The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243, 1243 (1999) (“[E]lection law has not settled on a single, coherent conception of the corporation—what it is, what values it serves, and what role it should play in politics. As a result, election laws regulating corporate political activity have been based on a variety of divergent and often inconsistent views of the corporation.”).

179. *Id.* at 1246 (discussing the 1907 Tillman Act).

*Bank of Boston v. Bellotti*,<sup>180</sup> which involved a Massachusetts statute that prohibited banks and business corporations from making expenditures designed to influence opinions on state referendum proposals.<sup>181</sup> Following the *Buckley* decision's corruption rationale, five members of the Court held that referendum proposals are about "issues, not candidates for public office,"<sup>182</sup> and that the "risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue."<sup>183</sup>

In *FEC v. Massachusetts Citizens for Life, Inc.*,<sup>184</sup> the Court took up a question involving the spending rights of nonprofit corporations. As background, the Federal Election Campaign Act required corporations desiring to make expenditures in connection with candidate elections to do so from separate segregated funds (i.e., not from their general treasuries). The question was whether this requirement applied to nonprofit corporations as well.<sup>185</sup> Writing for five Justices, Justice Brennan held that nonprofit corporations are distinguishable from typical business corporations, and therefore the government may not prohibit their expenditures.<sup>186</sup> Notably, the majority found no danger of corruption:

Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form. Given this fact, the rationale for restricting core political speech in this case is simply the desire for a bright-line rule. This hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom.<sup>187</sup>

*Austin v. Michigan Chamber of Commerce*<sup>188</sup> stands out for having adopted a broad conception of corruption that seems incommensurate with *Buckley*'s strict divide between contributions and expenditures.<sup>189</sup> As characterized by Monica Youn, "although *Austin* dealt with political expenditures, it treated such expenditures in a manner more consistent with *Buckley*'s treatment of political contributions—

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180. 435 U.S. 765 (1978).

181. *Id.* at 767-68.

182. *Id.* at 790.

183. *Id.* (citations omitted).

184. 479 U.S. 238 (1986).

185. *Id.* at 241.

186. *Id.* at 263-64.

187. *Id.*

188. 494 U.S. 652 (1990).

189. Dawood, *supra* note 50, at 124 (describing the *Austin* Court as "recogniz[ing] a new kind of corruption distinct from quid pro quo corruption"); see also Issacharoff, *supra* note 5, at 122 (reading *Austin* as "the only case to adopt squarely the distortion of electoral outcomes view of corruption").

as low value, proxy speech.”<sup>190</sup> At issue in *Austin* was a Michigan law that prohibited corporations from making both contributions and, notably, expenditures in support of or opposition to state candidates.<sup>191</sup> The Michigan State Chamber of Commerce challenged the prohibition on First Amendment grounds.<sup>192</sup> The State of Michigan argued in response “that the unique legal and economic characteristics of corporations necessitate some regulation of their political expenditures to avoid corruption or the appearance of corruption.”<sup>193</sup> Justice Marshall, writing for six Justices, found that the Michigan law “articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations.”<sup>194</sup>

In *Nixon v. Shrink Missouri Government PAC*,<sup>195</sup> a Missouri law limiting the amounts that could be donated to state candidates was challenged under the First and Fourteenth Amendments.<sup>196</sup> The Court, with six Justices in support, upheld the law, finding credence in Missouri’s stated interests in eliminating “improper influence” and “opportunities for abuse.”<sup>197</sup> One year later, five Justices upheld limits on “coordinated expenditures”—those made in cooperation with a candidate or a candidate’s campaign operation—made by political parties in *FEC v. Colorado Republican Federal Campaign Committee*.<sup>198</sup>

Affirming *Austin*, five Justices in *McConnell v. FEC* upheld the “soft money” provision and issue advertising provision of the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>199</sup> In doing so, the Court found the prospect of corruption occurring via third parties (namely, political parties, corporations, and labor unions) to be sufficient grounds for regulation. The majority was troubled by “examples of

190. Youn, *supra* note 83, at 108.

191. *Austin*, 494 U.S. at 655.

192. *Id.* at 656.

193. *Id.* at 658.

194. *Id.* at 660. Those who favor equalizing political access and influence routinely champion the “anti-distortion” rationale at the heart of *Austin*. See Dawood, *supra* note 50, at 123-24; Hellman, *supra* note 5, at 1399-1400; Mark Alexander, *Citizens United and Equality Forgotten*, in *MONEY, POLITICS*, *supra* note 34, at 153, 159-60.

195. 528 U.S. 377 (2000).

196. *Id.* at 383.

197. *Id.* at 389-90 (internal quotation marks omitted); *Id.* (“In defending its own statute, Missouri espouses those same interests of preventing corruption and the appearance of it that flows from munificent campaign contributions.”). For further analysis on *Shrink Missouri*, see Hasen, *supra* note 24, at 42-44.

198. 533 U.S. 431, 464 (2001) (“There is no significant functional difference between a party’s coordinated expenditure and a direct party contribution to the candidate . . .”).

199. *McConnell v. FEC*, 540 U.S. 93 (2003). For a summary of “soft money,” see *id.* at 122-25 (describing it as “nonfederal money” that was not subject to the contribution limits of “hard money”). For a detailed analysis of *McConnell*, see Hasen, *supra* note 24, at 46-72.

national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations.”<sup>200</sup> In a now striking endorsement of the regulation of “improper influence” and “opportunity for abuse,” the *McConnell* decision asserts:

Our cases have firmly established that Congress’ legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing “undue influence on an officeholder’s judgment, and the appearance of such influence.” Many of the “deeply disturbing examples” of corruption cited by this Court in *Buckley*, to justify FECA’s contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials. Even if that access did not secure actual influence, it certainly gave the “appearance of such influence.”<sup>201</sup>

The strongly pro-limitation language of *McConnell* led one expert to question whether the Court was poised to uphold expenditure limits.<sup>202</sup>

Of course, the opposite occurred. In a shift commonly traced to the confirmation and appointment of Justice Samuel Alito in 2006,<sup>203</sup> a majority of the Court now adheres to a highly skeptical view of campaign finance restrictions in which only quid pro quo exchanges are deemed regulable. A harbinger came in *FEC v. Wisconsin Right to Life*, a case that revisited *McConnell*’s holding that corporate- and union-financed “issue ads”—as in, advertisements that endorse a specific candidate—could be banned.<sup>204</sup> Five Justices, in an opinion by Chief Justice Roberts, voted to strike down that prohibition as applied to ads that endorse a viewpoint, opposed to a specific candidate: “[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>205</sup>

*Citizens United* and *SpeechNow.org* followed, with their animating logic most recently applied in the 2014 *McCutcheon v. FEC* deci-

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200. *McConnell*, 540 U.S. at 150.

201. *Id.* (citations omitted).

202. Hasen, *supra* note 24, at 68 (“If the relevant anticorruption question from *McConnell* is whether there are sufficient *potential benefits to federal officeholders*, then surely some limits on independent expenditures could be warranted.” (footnote omitted)).

203. See, e.g., Briffault, *supra* note 89, at 176 (“The Court began its about-face on corporations following Justice Sandra Day O’Connor’s retirement and her replacement by Justice Samuel Alito.”).

204. *FEC v. Wis. Right to Life*, 551 U.S. 449 (2007).

205. *Id.* at 469-70.

sion.<sup>206</sup> At issue in *McCutcheon* was the BCRA's aggregate contribution limits. Prior to the decision, individuals were barred from contributing more than \$123,000 to political candidates and noncandidate committees within a two-year timeframe. Shaun McCutcheon—a donor seeking to contribute to twenty-eight separate candidates, at a total amount that would exceed the aggregate limits—challenged those limits under the First Amendment.

Five Justices found the First Amendment to protect his contributions: “An aggregate limit on *how many* candidates and committees an individual may support through contributions is not a ‘modest restraint’ at all. The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.”<sup>207</sup> Finding no substantial danger of quid pro quo corruption when an individual disperses donations widely, the majority reinforced its narrow definition of corruption and rebuffed the notion that donors, like McCutcheon, might elicit favoritism by spreading so much money around:

[T]here is a clear administrable line between money beyond the base limits funneled in an identifiable way to a candidate—for which the candidate feels obligated—and money within the base limits given widely to a candidate's party—for which the candidate, like all other members of the party, feels grateful.<sup>208</sup>

In this condensed summary of campaign finance doctrine, one can see the Court endeavoring to define corruption in a way that protects political speech, while leaving space for the regulation of flagrant examples of corruption. The Justices do not agree on what constitutes flagrancy. I, like many, am critical of the emphasis on quid pro quo exchanges that the majority of the Roberts Court has settled on.

### B. Criminal Political Corruption Doctrine

Though the emphasis on quid pro quo exchanges is more longstanding in criminal political corruption doctrine, there was a process of evolution there as well. Take, for example, the controlling federal bribery case, *United States v. Sun-Diamond Growers of California*.<sup>209</sup> The defendant, Sun-Diamond, is a trade association that lobbies on behalf of “approximately 5,000 individual growers of raisins, figs, walnuts, prunes, and hazelnuts.”<sup>210</sup> The government

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206. *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

207. *Id.* at 1448.

208. *Id.* at 1461; see also Richard Briffault, *Of Constituents and Contributors*, 2015 U. CHI. LEGAL. F. 29, 34.

209. 526 U.S. 398 (1999). See *supra* Section II.B.1 for bribery background.

210. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 400-01 (1999).

charged Sun-Diamond with violating a section of 18 U.S.C. § 201 that prohibits the giving of gifts in exchange for official acts.<sup>211</sup> The government alleged that gifts were given to Michael Espy, the then U.S. Secretary of Agriculture, in exchange for *the prospect of* favorable treatment with regard to a federal grant program, and *the prospect of* Espy persuading the Environmental Protection Agency to abandon a proposed agency rule regulating a common pesticide.<sup>212</sup>

The Court, in a unanimous decision, rejected the notion that the mere prospect of influence was sufficiently improper, and held that in establishing a violation, “the Government must prove a link between a thing of value conferred upon a public official and a specific ‘official act’ for or because of which it was given.”<sup>213</sup> As stated in the opinion, “[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act.”<sup>214</sup> The decision “effectively turned the bright-line gratuities statute into a more demanding bribery statute.”<sup>215</sup>

The Hobbs Act, the law prohibiting extortion, has been similarly interpreted.<sup>216</sup> Courts have read it as closely related to bribery.<sup>217</sup> The leading case concerning criminal political corruption is *McCormick v. United States*, which considered the legality of campaign contributions.<sup>218</sup> The case involved a member of the West Virginia House of Delegates, who accepted several questionable campaign contributions in exchange for helping foreign doctors receive practicing licenses.<sup>219</sup> The Court reversed his conviction and remanded his case, holding:

The receipt of such [campaign] contributions is also vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking. This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.<sup>220</sup>

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211. 18 U.S.C. § 201(c)(1)(A).

212. *Sun-Diamond*, 526 U.S. at 401-02.

213. *Id.* at 414.

214. *Id.* at 404-05.

215. TEACHOUT, *supra* note 49, at 228.

216. *See supra* Section II.B.3.

217. *See, e.g.*, *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993) (“As the law has evolved, extortion ‘under color of official right’ and bribery are really different sides of the same coin.”).

218. *McCormick v. United States*, 500 U.S. 257 (1991).

219. *Id.* at 259-61.

220. *Id.* at 273.



All of the Justices agreed on this point.<sup>221</sup>

Finally, consider the narrowing of the mail fraud statute, which, recall, prohibits so-called honest-services fraud.<sup>222</sup> The notable case against Jeffrey Skilling, the former CEO of Enron, limited the mail fraud statute's applicability.<sup>223</sup> Skilling was charged with, among other things, depriving Enron and its shareholders of the intangible right of honest services by manipulating financial reports, engaging in securities fraud, and making false representations.<sup>224</sup> Describing the honest-services statute as being in "considerable disarray,"<sup>225</sup> the Court, rather than striking section 1346 down on vagueness ground, interpreted it to apply only to "bribery and kickback schemes."<sup>226</sup> As documented by Alschuler, a subsequent effort by Senator Patrick Leahy to override the Court's decision in *Skilling* was unsuccessful, leaving the quid pro quo evidentiary requirement in place.<sup>227</sup>

As with campaign finance doctrine, criminal political corruption doctrine once included broader understandings of what constitutes a corrupt exchange. Those days have passed, and the respective doctrines have converged as of late in complex ways.<sup>228</sup> The next Section engages three recent cases in which the convergence was conspicuous.

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221. *Id.* at 276 (Scalia, J., concurring) ("If the prohibition . . . against receipt of money 'under color of official right' includes receipt of money from a private source for the performance of official duties, that ambiguously described crime assuredly need not, and for the reasons the Court discusses should not, be interpreted to cover campaign contributions with anticipation of favorable future action, as opposed to campaign contributions in exchange for an explicit promise of favorable future action."); *Id.* at 283 (Stevens, J., dissenting) ("Nevertheless, to prove a violation of the Hobbs Act, I agree with the Court that it is essential that the payment in question be contingent on a mutual understanding that the motivation for the payment is the payer's desire to avoid a specific threatened harm or to obtain a promised benefit that the defendant has the apparent power to deliver, either through the use of force or the use of public office. In this sense, the crime does require a 'quid pro quo.'"); see also TEACHOUT, *supra* note 49, at 222-26 (critiquing *McCormick*).

222. See *supra* Section II.B.4 for honest services fraud background.

223. *Skilling v. United States*, 561 U.S. 358 (2010).

224. *Id.* at 369.

225. *Id.* at 405.

226. *Id.* at 412.

227. Alschuler, *supra* note 142, at 479 ("Because Congress failed to enact the Leahy proposal, the post-*Skilling* honest-services statute remains compatible with the [Supreme] Court's quid pro quo requirement, at least for now.").

228. Teachout suggests that the convergence has confused Chief Justice Roberts. TEACHOUT, *supra* note 49, at 303 ("Roberts appears confused about the relationship between different types of corruption laws. [In *McCutcheon*] [h]e defines the constitutional concept of corruption by reference to . . . *McCormick*.").

*C. The Prosecutions of Silver, Menendez, and McDonnell*

In this Section, I demonstrate, through engagement with three high-profile cases—those against Sheldon Silver, Robert Menendez, and Robert McDonnell—the degree to which campaign finance doctrine and criminal political corruption doctrine have converged, illustrating the current conceptual disorientation.

*1. United States v. Silver*

The 2018 conviction of Sheldon Silver—the longstanding, autocratic speaker of the New York State Assembly—on corruption charges was momentous both for the prominence of the convicted and the rarity of the charges themselves.<sup>229</sup> Prosecutors successfully proved that Silver engaged in extortion, honest-services fraud, and money laundering. Specifically, they introduced evidence that he took official actions on behalf of a doctor and two real estate developers, who in turn directed business to two law firms—each of which shared the resulting fees with him.<sup>230</sup> In total, Silver obtained nearly \$4 million through these arrangements.<sup>231</sup> His initial conviction, in 2015, was overturned following the Supreme Court’s *McDonnell* decision. Prosecutors then quickly retried him, resulting in his conviction and sentencing earlier this year. The schemes that Silver engaged in were rather involved. I focus here on the “Real Estate Scheme.”<sup>232</sup> Two major real estate developers, Glenwood Management and the Witkoff Group, were reliant on various forms of favorable treatment from the New York government.<sup>233</sup> Silver wielded immense power over the granting of such treatment.<sup>234</sup> In abuse of that power, Silver encouraged both developers to direct their tax matters to a law firm, Goldberg & Iryami, PC, at which a friend of Silver’s worked.<sup>235</sup> Both developers complied. Silver received referral fees for the resulting

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229. See Weiser, *supra* note 6.

230. *Id.*

231. *Id.* Silver was technically not indicted under the federal bribery statute, but under the Hobbs Act, 42 U.S.C. § 1951 (2012), and two federal mail fraud statutes, 18 U.S.C. §§ 1341, 1346. Each of these statutes, however, has been interpreted to prohibit bribery. *Evans v. United States*, 504 U.S. 255, 260 (1992) (noting that at common law, and therefore as intended by Congress in drafting the Hobbs Act, “[e]xtortion by the public official was the rough equivalent of what we would now describe as ‘taking a bribe’”); *Skilling v. United States*, 561 U.S. 358, 412 (2010) (“Interpreted to encompass only bribery and kickback schemes, § 1346 is not unconstitutionally vague.”).

232. *United States v. Silver*, 203 F. Supp. 3d 370, 374 (S.D.N.Y. 2016).

233. *Id.*

234. *Id.*

235. *Id.*

business, fees that ultimately amounted to approximately \$835,000.<sup>236</sup>

In his motion for a new trial, Silver contested the introduction of evidence about Glenwood Management's campaign contributions to him.<sup>237</sup> The government introduced evidence that "Silver had personally solicited campaign contributions from Glenwood."<sup>238</sup> Citing *McCormick*, Silver referred to campaign contributions as "legal and proper."<sup>239</sup> Curiously, Silver contended that the evidence "invited the jury to conclude that campaign contributions and the referral fees at issue in this case were cut from the same cloth: that Glenwood's campaign contributions, like the referral fees Mr. Silver shared with Goldberg & Iryami, were just different types of corrupt quid pro quos."<sup>240</sup> The premise of this defense seems to be that campaign contributions, even if part of a quid pro quo exchange, are inherently uncorrupting. The recent doctrinal convergence invites confused arguments of this sort. A clearer demarcation between commonplace and criminal political corruption would aid in avoiding such confusion.

## 2. United States v. Menendez

The senior U.S. Senator from New Jersey, Robert Menendez, successfully defended himself against charges that he violated 18 U.S.C. § 201, the federal bribery statute discussed above. According to the indictment, Menendez was closely associated with a Florida ophthalmologist, Salomon Melgen (also a defendant), who:

[O]ffered and gave . . . things of value [to Menendez], including domestic and international flights on private jets, first-class domestic airfare, use of a Caribbean villa, access to an exclusive Dominican resort, a stay at a luxury hotel in Paris, expensive meals, golf outings, and tens of thousands of dollars in contributions to a legal defense fund.<sup>241</sup>

The indictment contained an assertion that an approximately \$300,000 donation made by Melgen to a Super PAC that supported Menendez qualified as "anything of value under section 201."<sup>242</sup> Menendez, it was argued, solicited the donation in exchange for in-

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236. *Id.*

237. Motion for a New Trial at 4-6, *United States v. Silver*, 203 F. Supp. 3d 370 (S.D.N.Y. 2016), 2016 WL 616649, at \*8-10.

238. *Id.* at 5 (quoting the trial transcript).

239. *Id.*

240. *Id.* at 6 (emphasis omitted).

241. Indictment of Robert Menendez and Salomon Melgen at 3, *United States v. Menendez*, 132 F. Supp. 3d 635 (D.N.J. 2015).

242. *Id.* at 62.

tervening on Melgen's behalf with the U.S. Department of Health and Human Services in a Medicare billing dispute.<sup>243</sup> Initially, in September 2015, District Court Judge William Walls refused to dismiss the Super PAC-related counts, writing: "Even if contributions to Majority PAC had no objective value to Menendez, they unquestionably had value to Majority PAC as an entity, and § 201(b)(2) criminalizes corruptly seeking anything of value, even for another person or entity, in return for being influenced in the performance of an official act."<sup>244</sup>

The convergence of campaign finance and criminal political corruption doctrines is evidenced by the fact that both Menendez and Melgen relied on the Court's language in both *Citizens United* and *McCutcheon* in their defenses.<sup>245</sup> The defendants' Motion to Dismiss contained the following rather remarkable language, which is worth quoting at length:

The Indictment is a direct assault on Supreme Court precedent. For the government to prove Counts 15 through 18 and Count 1's alleged bribery conspiracy, it must establish that Dr. Melgen's charged contributions to Majority PAC were given as part of an explicit and corrupt *quid pro quo* exchange in return for Senator Menendez being influenced in his performance of an official act. The Supreme Court's decisions in *Citizens United v. FEC*, 558 U.S. 310 (2010), *Buckley v. Valeo*, 424 U.S. 1 (1976), and their progeny make such a bribery charge impossible as a matter of law. These cases confirm that no *quid pro quo* corruption can arise when a private citizen contributes to a *bona fide* Super PAC, because a *bona fide* Super PAC does not coordinate its expenditures with a candidate. This lack of candidate control over the Super PAC's activities legally negates the possibility that a contribution it receives or an expenditure it makes could ever be a "thing of value" to a candidate in a *quid pro quo* arrangement. See 18 U.S.C. § 201(b). As a result, no inference of corruption can be inferred from the fact that such a political contribution has been made, and the government cannot invoke any compelling interest to justify punishing Defendants for what is First Amendment-protected election advocacy.<sup>246</sup>

It is hard to imagine clearer language demonstrating the morass that is the current campaign finance system.

The defense, however, was successful. Judge Walls, applying *McDonnell*, ultimately dismissed several of the charges brought

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243. *Id.*

244. *Menendez*, 132 F. Supp. 3d at 640.

245. *Id.* at 638.

246. Defendants' Motion to Dismiss at 2, *Menendez*, 132 F. Supp. 3d 635, 2015 WL 11112319, at \*5.

against Menendez after concluding that Melgen's contributions were not part of a quid pro quo exchange.<sup>247</sup> That decision resulted in the Justice Department dropping its case against Menendez.<sup>248</sup>

### 3. United States v. McDonnell

Former Virginia Governor Robert McDonnell was convicted of extortion and honest-services fraud in 2014.<sup>249</sup> McDonnell was alleged to have "solicit[ed] and obtain[ed] payments, loans, gifts, and other things of value" from Jonnie Williams, the CEO of a dietary supplements company, Star Scientific.<sup>250</sup> In exchange, it was claimed that he "perform[ed] official actions on an as-needed basis, as opportunities arose, to legitimize, promote, and obtain research studies for Star Scientific's products."<sup>251</sup> McDonnell's conviction was vacated by the Supreme Court in June 2016.<sup>252</sup>

McDonnell's defense included many of the same arguments advanced by Senator Menendez. For instance, in his Fourth Circuit reply brief, McDonnell opened by claiming that "[a]t most Williams obtained access and tried to ingratiate himself."<sup>253</sup> He then quoted *Citizens United* for the proposition that "[i]ngratiation and access . . . are not corruption."<sup>254</sup> The circuit court acknowledged the argument, yet stated, "[T]he talismanic significance [McDonnell] assigns to this language ignores its context; *Citizens United*, a campaign-finance

247. United States v. Menendez, 291 F. Supp. 3d 606 (D.N.J. 2018), 2018 WL 526746, at \*11 ("However, First Amendment values are implicated when the thing of value is a political contribution. Consequently, to prove that a political contribution was the subject of a bribe, the Government must prove an explicit *quid pro quo*.").

248. Nick Corasaniti, *Justice Department Dismisses Corruption Case Against Menendez*, N.Y. TIMES (Jan. 31, 2018), <https://www.nytimes.com/2018/01/31/nyregion/justice-department-moves-to-dismiss-corruption-case-against-menendez.html> [<https://perma.cc/59F5-MAGK>].

249. United States v. McDonnell, 64 F. Supp. 3d 783, 787 (E.D. Va. 2014), *aff'd*, 792 F.3d 478 (4th Cir. 2015), *vacated by*, 136 S. Ct. 2355 (2016); *see also* Adam Lip-tak, *Justices to Hear Appeal by Bob McDonnell, Ex-Governor of Virginia*, N.Y. TIMES (Jan. 15, 2016); *see also* Jennifer Steinhauer, *Bob McDonnell, Ex-Governor of Virginia, Is Sentenced to 2 Years for Corruption*, N.Y. TIMES (Jan. 6, 2015), <https://www.nytimes.com/2016/01/16/us/politics/bob-mcdonnell-supreme-court-ap-peal.html?mtrref=www.google.com&gwh=FD8E8D2CB1665E9CEE5A2F630285F62&gwt=pay>.

250. Indictment at 7, United States v. McDonnell, 64 F. Supp. 3d 783 (E.D. Va. 2014), 2014 WL 223601, at \*7.

251. *Id.*

252. *See McDonnell*, 136 S.Ct. at 2375.

253. Reply Brief of Defendant-Appellant at 1, United States v. McDonnell, 792 F.3d 478 (4th Cir. 2015).

254. *Id.* (alterations in original) (quoting *Citizens United v. FEC*, 558 U.S. 310, 360 (2010)).

case, involved neither the honest-services statute nor the Hobbs Act.”<sup>255</sup>

The convergence also informed the amicus brief filed with the Supreme Court by Nancy Gertner, Charles Ogletree, and John C. Jeffries, Jr.<sup>256</sup> These scholars cited *Citizens United* in arguing that

[T]he notion that the Constitution forbids the regulation of exchanging money or gifts for access and ingratiation in connection with an electoral campaign, but that a government official may be criminally convicted for the same exchange outside of a campaign cannot be fully explained by the context in which the issue arose.<sup>257</sup>

Though the *McDonnell* decision itself did not reference campaign finance doctrine, “[t]he vision of politics articulated in *Citizens United* and *McCutcheon* seemed very much alive in [the] decision, even if these cases were not explicitly referenced.”<sup>258</sup>

These are but three instances where the logic, underlying purposes, and context-specific nuances of commonplace and criminal political corruption have resulted in substantial conceptual confusion. Defendants, in reliance on campaign finance doctrine, have argued that they are insusceptible to criminal political corruption prosecutions. The doctrinal convergence described above lends credence to such arguments. This is so despite the decidedly distinct variants of corruption at issue in each context.

Having introduced a novel theoretical distinction between commonplace and criminal political corruption, summarized campaign finance and criminal political corruption doctrine, and illustrated the doctrinal convergence in three recent cases, I devote the next Part to making the normative legal argument for robust campaign finance laws.

#### IV. THE LEGALITY OF CAMPAIGN FINANCE LAWS

Backed by the theory of how *Citizens United* and *SpeechNow.org* renewed multiple elitism, we can now consider the normative legal argument for robust campaign finance laws. The definition of commonplace political corruption I detailed above aids in moving the conversation away from fruitless debates in which the First Amendment is presented as a sacrosanct defense against virtually all cam-

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255. *McDonnell*, 792 F.3d at 513.

256. Brief of Law Professors in Support of Petitioner as Amici Curiae Supporting Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474).

257. *Id.* at 5.

258. Malloy, *supra* note 13.



paign finance regulations. The identification of countervailing constitutional interests is vital in this regard. My theory of commonplace political corruption can be readily tethered to several.

### A. *First Amendment*

As discussed in the Introduction, Justice Breyer is perhaps the most prominent defender of an interpretation of the First Amendment that supports upholding campaign finance laws.<sup>259</sup> Justice Breyer views the First Amendment as foundational in preserving “the integrity of the political process—a process that itself translates speech into governmental action.”<sup>260</sup> As such, “campaign finance laws, despite the limits they impose, help to further the kind of open public political discussion that the First Amendment also seeks to encourage, not simply as an end, but also as a means to achieve a workable democracy.”<sup>261</sup> He advocates attention to proportionality and the employment of a balancing test in deciding relevant cases.<sup>262</sup> The utility of a balancing test has attracted other adherents as well.<sup>263</sup>

Justice Breyer is not alone in his reliance on the First Amendment as a basis for regulation. Robert Post has argued that campaign finance laws are justifiable as a means of ensuring “electoral integrity.”<sup>264</sup> Frederick Schauer and Richard Pildes argue for “electoral exceptionalism,” the notion that “elections should be constitutionally understood as (relatively) bounded domains of communicative activity.”<sup>265</sup> Accordingly, “developing distinct principles for electoral speech would not be appreciably different from the structure of existing First Amendment doctrine.”<sup>266</sup> In essence, these scholars see the applica-

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259. See *supra* notes 29-30 and accompanying text.

260. Breyer, *supra* note 25, at 253.

261. *Id.*

262. *Id.*

263. Michael K. Curtis & Eugene D. Mazo, *Campaign Finance and the Ecology of Democratic Speech*, 103 KY. L.J. 529, 597-98 (2015) (“The Court seems to have deferred to the First Amendment ‘rights’ of corporate and wealthy interests that wish to donate significant amounts of money to political candidates, instead of engaging in a true effort to balance these interests against competing interests that challenge them.”).

264. ROBERT POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 6 (2014); see also Robert Post, Commentary, *Regulating Speech Under the First Amendment*, 77 TEX. L. REV. 1837, 1840 (1999) (“[T]he First Amendment defines and safeguards the communicative dimensions of the social practice of democratic self-governance.”). But see Justin Levitt, *Electoral Integrity: The Confidence Game*, 89 N.Y.U. L. REV. ONLINE 70 (2014) (reviewing CITIZENS DIVIDED).

265. Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment* 77 TEX. L. REV. 1803, 1805 (1999).

266. *Id.* at 1835.

tion of the First Amendment as a context-specific task in which “election-specific principles” must be formulated.<sup>267</sup>

David Cole has called for a reconsideration of what the First Amendment necessitates. Cole claims, “It is no longer enough to construct a First Amendment ‘fortress’ against government action; we must at the same time empower government to minimize the threats to speech rights posed by private concentrations of wealth.”<sup>268</sup> He invokes the metaphor of “First Amendment antitrust” in defense of government regulation.<sup>269</sup> And Nicholas Stephanopoulos, in discussing the harms caused by “policy misalignment” (meaning, “a misalignment between the preferences of voters and the preferences of their elected representatives”<sup>270</sup>), postulates that if courts were to consider such misalignment, they might be more amenable to an interpretation of the First Amendment that permits at least some campaign finance laws.<sup>271</sup>

All of these arguments have force and introduce compelling defenses of the First Amendment’s role in structuring representative government. My purpose here is simply to note their compatibility with my theory of commonplace political corruption. As noted in the Introduction, one of the virtues of my theory is its avoidance of irreconcilable debates about equalization.<sup>272</sup> Whether one places the emphasis on opening up the public political discussion, ensuring electoral integrity, deriving election-specific principles, avoiding anti-trust-like lockups, or promoting policy alignment, acknowledgment of the renewal of multiple elitism is of value in strengthening the case.

### B. Equal Protection Clause

The Equal Protection Clause also provides a constitutional justification upon which campaign finance laws might rest, and a response to First Amendment absolutists who oppose regulation. The most

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267. *Id.* at 1836; see generally James Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibitions of Lies in Political Campaigns*, 71 OKLA. L. REV. 167 (2018).

268. Cole, *supra* note 33, at 272.

269. *Id.* at 276. Teachout, though she does not mention the First Amendment specifically, seems to endorse a similar framing. TEACHOUT, *supra* note 49, at 301-02.

270. Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 286 (2014).

271. *Id.* at 340 (“If the laws promise to exert substantial aligning effects, then courts would be more likely to tolerate the burden they impose on First Amendment rights, and vice versa.”).

272. See *supra* notes 23-28 and accompanying text; see also Ryan Pevnick, *An Egalitarian Approach to Campaign Finance Reform*, NEW RAMBLER REV., <http://newramblerreview.com/book-reviews/law/an-egalitarian-approach-to-campaign-finance-reform> [<https://perma.cc/Q3JC-EVPT>] (reviewing HASEN, *supra* note 27).

thorough argument of this type was perhaps put forth by Jamin Raskin and John Bonifaz, who argue that “the First Amendment paradigm does not begin to pose, much less resolve, urgent questions about our campaign finance system that concern the rights of all citizens, not just the wealthy, to ‘influence the political process effectively.’”<sup>273</sup> They defend, as an alternative, a Fourteenth Amendment paradigm, which reveals “that the current campaign finance regime is inconsistent with equal protection or, at the very least, warrants congressional action to vindicate equal protection.”<sup>274</sup> Their argument is nuanced, however, one of its central features is concern over the entrenchment of special interests, which of course, is a central feature of the multiple elitism detailed above.<sup>275</sup>

Other scholars make arguments that, while not expressly invoking the Fourteenth Amendment, sound in equal protection. Cass Sunstein, for example, has stated, “Properly designed campaign finance measures ought to be seen as fully compatible with the system of free expression, insofar as those measures promote the goal of ensuring a deliberative democracy among political (though not economic) equals.”

The Fourteenth Amendment also lurks behind analogies made by Guy-Uriel Charles and David Strauss between the issues raised in modern campaign finance cases and the issues raised by law of democracy cases from the 1960s. Charles posits that *Harper v. Virginia State Board of Elections*,<sup>276</sup> banning state-level poll taxes under the Equal Protection Clause, and *Kramer v. Union Free School District No. 15*,<sup>277</sup> striking down a New York law that limited school district election voting to certain qualified voters under the Equal Protection Clause, might serve as instructive guideposts.<sup>278</sup> Strauss draws comparisons between the logic of *Buckley* and the classic “one person, one vote” reapportionment cases.<sup>279</sup>

Once again, recognition of multiple elitism and its effects enhances the case for campaign finance regulation under any of these ra-

273. Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 278 (1993).

274. *Id.* at 279.

275. *Id.* at 311 (describing “the pervasive enactment by Congress of legislation which rewards and benefits specific groups of cash contributors” and the “deliberate state-sponsored return on the investment of campaign contributions by special interests”). For criticism of their expansive definition of state action, see Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 79-88 (1998).

276. 383 U.S. 663 (1966).

277. 395 U.S. 621 (1969).

278. Charles, *supra* note 53, at 35.

279. Strauss, *supra* note 35, at 1382-87.

tionales. When faced with the entrenchment of special interest groups, the Equal Protection Clause provides a potential basis for challenging such stasis.

### C. *Republican Guarantee Clause*

Article IV, Section 4 of the Constitution provides: “The United States shall guarantee to every State in this Union a Republican Form of Government.”<sup>280</sup> Since 1849, claims brought under this Clause—the Republican Guarantee Clause—have been deemed political questions, and therefore nonjusticiable.<sup>281</sup> Yet there are calls by prominent scholars to revisit the Republican Guarantee Clause as a basis for preserving representative government.

Jack Balkin, notably, argues that “we are not bound by the original expected application of the guarantee clause,”<sup>282</sup> and that “[w]e must ask what the guarantees of representative government and popular sovereignty mean today in our world.”<sup>283</sup> To Balkin’s mind, “[t]he goal of the guarantee clause is to protect popular sovereignty; it seeks to ensure that majorities rule and prevent aristocracy or oligarchy, whether the aristocracy or oligarchy is due to birth, concentration of economic power, or the result of political machination.”<sup>284</sup>

If this seems fanciful, consider the argument of Michael McConnell, who convincingly argues that the foundational reapportionment cases, which were decided under the Equal Protection Clause, would have been better decided under the Republican Guarantee Clause.<sup>285</sup> In a popularly cited phrase, McConnell claimed, “The gravamen of a Republican Form of Government challenge is not that individual voters are treated unequally, but that the districting scheme systematically prevents effective majority rule.”<sup>286</sup> If interpreted as such, the Republican Guarantee Clause would seem to be an ideal basis for challenging commonplace political corruption.

Indeed, Deborah Hellman and Mark Alexander have each looked to the viability of the Republican Guarantee Clause for bringing about campaign finance reform. Hellman contends that courts should defer to Congress were it to legislate under the Clause.<sup>287</sup> Alexander,

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280. U.S. CONST. art. IV, § 4.

281. *Luther v. Borden*, 48 U.S. (7 How.) 1, 32, 46-47 (1849).

282. JACK M. BALKIN, *LIVING ORIGINALISM* 241 (2014).

283. *Id.*

284. *Id.* at 243.

285. Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 106 (2000).

286. *Id.* at 114.

287. Hellman, *supra* note 5, at 1404.

who devotes an entire article to the Clause as “a legitimate basis for congressional action,”<sup>288</sup> concludes that “Congress must assist the states in protecting the republican form of government, a task that can be accomplished through campaign finance reform.”<sup>289</sup>

The threat posed by multiple elitism strikes at the core of our representative democracy. It entrenches special interests, emboldens shadow parties, and renders much of the voting population effectively irrelevant. If Congress needs a theoretical justification for legislating under the Republican Guarantee Clause, it can find one in the theory of commonplace political corruption.

## V. CONCLUSION

Wealthy individuals, corporations, unions, and other associations recognize the benefits that follow from financing political campaigns. Much of the money is directed towards what are known as shadow parties—networks of Super PACs and other outside spending groups with uncomfortably close relations with candidates. In the eyes of many, corruption and bribery are rampant.

In this Article, I have laid out the necessity of distinguishing criminal political corruption—namely, bribery and extortion—from what I have labeled commonplace political corruption. Making this distinction is an urgent task given the Supreme Court’s convergence of its campaign finance and criminal political corruption doctrines, where, in both cases, it has settled on a narrow definition of corruption that entirely turns on the existence of quid pro quo exchanges. This convergence marks a dangerous oversimplification, I have argued, that obscures the corruption that is most ruinous to our democracy. Drawing from and extending the political science theory of multiple elitism, I have attempted to show how the Court’s recent campaign finance jurisprudence has fostered an environment in which special interest groups can entrench their influence in systematically problematic ways.

This type of corruption is notably not bribery or extortion, which implicate different sets of concerns. Appreciating the separate contexts in which commonplace and criminal political corruption occur is the first step in developing reforms. I have shown how commonplace political corruption can be readily tethered to several constitutional interests—a necessary prerequisite to reform given the substantial First Amendment interests associated with political spending. Armed

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288. Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 WASH. & LEE L. REV. 767, 769 (2003).

289. *Id.* at 784.

with this framework, we are one step closer to salvaging the best features of our democracy.