

# *The Supreme Court and the Corruption of Democracy*

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THE SUPREME COURT'S 2016 decision unanimously vacating the federal bribery conviction of Robert McDonnell, the former governor of Virginia, is too important to be ignored, as it largely has been. It sheds light on the court's view of how American government works and how it is supposed to work. That view is both uninspiring and at considerable odds with the civic republicanism espoused by the founding fathers. The court seems to regard representative government as little more than a series of reciprocal relationships between elected officials and well-heeled constituents. Nowhere does the opinion, written by Chief Justice Roberts, even hint that representatives have an obligation to serve the public good. As I will discuss, the court's view that representative government is essentially about individual self-seeking, both on the part of officials and citizens, leads it to an extraordinarily narrow conception of political corruption. This conception informs the court's jurisprudence regarding both individual corruption and campaign finance, and it has already done great harm to the country's public life.

In considering *McDonnell v. United States*, the best place to start is by summarizing the facts of the case and the principal legal issues. Jonnie Williams, a Virginia businessman, owned a company that made a dietary supplement that was also supposed to reduce pain, a pill derived from tobacco plants. Williams wanted state medical institutions to carry out costly tests on the product to determine its benefits. He believed that the tests would provide information about whether the product would be commercially successful. To get McDonnell's help, Williams provided the governor and his wife with loans and gifts totaling some \$175,000. Under Virginia law, this was legal. In return for Williams's largesse, McDonnell took a number of actions to get

state institutions in Virginia to run the tests that Williams sought. McDonnell hosted a party at the governor's mansion promoting the pill, spoke with subordinates on Williams's behalf, arranged meetings between Williams and state officials, and prodded state universities.

In order to convict McDonnell, the prosecutor had to prove three elements: first, that Williams offered McDonnell something of value; second, that there was a quid pro quo in which McDonnell promised to take certain actions in exchange for the loans and gifts provided by Williams; and third, that the actions that McDonnell promised were "official acts." The first element was uncontested. The second, the existence of a quid pro quo, was contested early in the case but was ultimately resolved against McDonnell. The prosecutor presented considerable evidence on the issue, including that McDonnell asked his staff for an update on his request for university research on Williams's product six minutes after discussing a \$50,000 loan with Williams. McDonnell contested the third issue, but after a five-week trial a jury convicted him, and the court of appeals affirmed the conviction. The only issue in the Supreme Court case was whether the actions that McDonnell promised to take on Williams's behalf were official acts.

The Supreme Court vacated McDonnell's conviction based on its determination that the trial judge incorrectly instructed the jury on the meaning of the term *official acts*, and that as a result the jury might have convicted McDonnell based on a mistaken assumption that the things he did for Williams, such as hosting events, speaking to subordinates, and setting up meetings, were official acts. According to the court, these were not official acts because they did not involve the exercise of the formal legal powers of the governor's office. Therefore, McDonnell's promise to take such actions, even in return for a lot of money, was not unlawful. McDonnell could have been lawfully convicted, said the court, if he promised to use his official position to pressure another official to perform an official act (as the evidence indicated that he did), but the problem with upholding his conviction on this basis was that it was unclear what the jury found because the trial judge did not explain the distinction between merely speaking favorably to other officials and exerting pressure on them.

The Court's decision is disturbing in a number of respects. For one thing, the court's opinion reflects a thoroughly unrealistic view of how politicians in a position like that of McDonnell operate and how they exert influence on subordinates and on policy. When senior public officials perform the kinds of activities that McDonnell engaged in on Williams's behalf, they are invariably exerting pressure to bring about government action. Their activities, otherwise, would have no point. As Harvard law professor Matthew Stephenson puts it, "let's get real":

Does anyone actually think that a senior public official, such as the governor, can express support for a decision to his subordinates in a way that does not (and is not intended to) "exert pressure" on those subordinates? And, for that matter, does anyone seriously believe that Mr. Williams gave the governor \$175,000 worth of benefits in exchange not for a promise to help him secure the studies he wanted, but merely for a promise to set up some meetings and express to his subordinates his view (his dispassionate, just-a-suggestion, not-exerting-any-pressure view) that perhaps supporting these studies might be a good idea? I think the answers are pretty obviously "No" and "No." There's basically no such thing as a senior executive's expression or demonstration of support for a particular government action (certainly not one made in exchange for personal material gain) that is *not* intend[ed] to exert pressure on another official, in the relevant legal sense. Would that make the scope of "official act" pretty broad? Sure—but so what?

The court's implausible view of how public officials like McDonnell function contributed to its conclusion that the supposedly flawed jury instruction was not a harmless error and required a new trial. On this point, the court also paid little attention to some of the things that McDonnell actually did, such as speaking to officials about encouraging state universities to do the research that Williams wanted and directing his counsel to "show support" for such research and to get the universities to respond. At one point, McDonnell's counsel stated that he had been asked by the governor to show support for the research Williams wanted but didn't think he should be doing it.

Thus, notwithstanding the multiple actions that McDonnell took on Williams's behalf and the money he received, the court determined that a differently instructed jury could have legitimately concluded that his conduct was acceptable.

This brings us to another disturbing aspect of the opinion: the court's excessive concern about chilling healthy interactions between elected officials and constituents and its utter absence of concern about improper connections between unethical representatives and wealthy private interests. It is surprising that the court could, in the same breath, speak of healthy interactions between elected officials and constituents and the McDonnell/Williams relationship. Yet, in discussing McDonnell's conduct, the court said,

Conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time. The basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns—whether it is the union official worried about a plant closing or the homeowners who wonder why it took five days to restore power to their neighborhood after a storm. The Government's position could cast a pall of potential prosecution over these relationships if the union had given a campaign contribution in the past or the homeowners invited the official to join them on their annual outing to the ballgame. Officials might wonder whether they could respond to even the most commonplace requests for assistance and citizens with legitimate concerns might shrink from participating in democratic discourse.

This passage is gratuitous because it has nothing to do with the issue before the court, which was whether McDonnell engaged in official acts. Conscientious public officials do things for constituents, to be sure, but this fact alone is irrelevant because conscientious public officials do not receive money for doing these things. Further, the court's concerns about inhibiting interactions between constituents and officials are enormously overblown. The only interactions that affirming McDonnell's conviction would have inhibited are those that involve

promises of money, gifts, or campaign contributions in return for a commitment by a public official to do something for the promisor. The court should not be concerned about chilling such interactions but about preventing them.

The *McDonnell* decision stems in substantial part from the court's uninspiring conception of the political process. As the passage quoted above indicates, the court regards the political process as consisting of reciprocal interactions between private interests and elected officials in which the private interests seek to ingratiate themselves with the elected officials for the purpose of seeking some benefit, and the elected officials do essentially the same thing in order to obtain political support. Because the court sees these kinds of reciprocal relationships as acceptable, even desirable, it does not want to do anything that might inhibit them, such as interpreting bribery and other anticorruption laws broadly. By interpreting such laws narrowly, the court makes it difficult to prosecute political corruption.

Although the court articulated its conception of the political process more clearly in *McDonnell* than it had previously, it did not explain why it regards reciprocal relationships between private interests and public officials as being in the public interest. In fact, the opinion is curiously devoid of the idea that there is such a thing as the public interest. The conception that the court expressed, however, is much the same as that articulated in its recent campaign finance cases, namely that democracy is about responsiveness, most definitely including responsiveness to contributors. Writing for the court in *Citizens United v. FEC*, Justice Kennedy stated that "a substantial and legitimate reason . . . to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those outcomes the supporter favors. Democracy is premised on responsiveness." It is disturbing both that the court sees responding to contributors as critical to democracy and that it places contributing on the same level as voting. Kennedy's statement, however, helps explain *McDonnell*. If democracy involves officials producing outcomes sought by contributors, it is understandable why the court did not want to affirm McDonnell's conviction.

In *McCutcheon v. FEC*, a decision striking down the aggregate limits on campaign contributions in an election cycle, the court expressed the same understanding of democracy. Writing for the court, the chief justice opined that constituents have the right financially to support candidates who share their concerns, that representatives can be expected to respond to these concerns, and that “such responsiveness is key to the very concept of self-governance through elected officials.” Again, it is appropriate for elected representatives to respond favorably to contributors.

In the court’s view, then, money, not only for access but also for action, is an essential aspect of the democratic process. Furthermore, based on the many friend-of-the-court (amicus) briefs filed by former government officials, business leaders, and lobbyists in support of McDonnell, this view is widely shared by political insiders. It is more than slightly shocking that McDonnell’s supporters treated his behavior as routine and his prosecution as a threat to the business of government. These supporters argued that affirming McDonnell’s conviction would chill relationships between private interests and public officials. Further, without apparent embarrassment, state officials asserted that they often received gifts and meals from private interests and were concerned about possible prosecution. The amicus briefs clearly had a considerable impact, for the court’s opinion reflects the same hostility to regulating self-interested political behavior that they so vigorously asserted.

It is also worth mentioning the *McDonnell* court’s reference to federalism, specifically its assertion that states have the right to determine what kinds of interactions between state officials and their constituents are permissible. This statement also reflects the arguments of McDonnell’s supporters, at least one of whom expressly disputed Congress’s power to authorize federal prosecutions of state and local corruption. The Constitution, however, includes a strong anti-corruption legacy that has long been regarded as support for broad congressional authority to enact legislation to prosecute state and local legislators for corruption, even if it does not directly affect the federal government. Furthermore, limiting federal authority in this

area could be problematic because many state and local governments have weak anticorruption laws, and some can be fairly characterized as ethical backwaters. Before *McDonnell*, Virginia, for example, had no rules regarding gifts to public officials. And federal prosecutors recently convicted New York State's assembly speaker, senate majority leader, and a number of other legislators of corruption charges. The *McDonnell* court's language, however, did nothing to foreclose the possibility of future federalism-based challenges to such prosecutions.

*McDonnell* was also a victory for the criminalization-of-politics critique, the notion promoted by conservatives in recent years that federal prosecutors have too aggressively prosecuted normal political activity that should be left to the judgment of the electorate. Commenting on McDonnell's conviction, for example, the columnist George Will stated that "the criminalization of normal political interactions is especially ominous when aesthetic considerations expose a person to prosecution for actions inseparable from the quotidian business of representative government." By "aesthetic," Will seems to mean that McDonnell's conduct merely looked bad. The amicus briefs supporting McDonnell vigorously supported this view, and it is present in the court's discussion about how conscientious public officials serve their constituents.

*McDonnell* is only the most recent case in which the court struck down a federal corruption conviction and narrowed the scope of federal anticorruption law. The court has been at this project for some time now. The principal federal anticorruption statutes include a law criminalizing bribery and the unlawful receipt of gratuities, a law criminalizing bribery involving federal funds, the Hobbs Act, which criminalizes extortion in interstate commerce, and a law providing that an individual can commit mail or wire fraud by depriving the victim of her entitlement to the defendant's honest services. As a result of the Supreme Court's decisions, however, the only way that a prosecutor can obtain a conviction under any of these statutes is by proving a quid pro quo in which a public official trades government action for some personal benefit. Other forms of corruption are no longer criminally punishable. A public official, for example, who because of his position learns

that the value of a company's stock is likely to increase because of a not-yet-announced government contract and then purchases such stock, engages in corrupt self-dealing. In 2010 in *Skilling v. United States*, however, the court decriminalized this behavior. Similarly, as the result of the court's 1999 decision in *United States v. Sun Diamond*, a public official who accepts formerly unlawful gratuities can no longer be convicted in the absence of a quid pro quo.

Furthermore, even when a prosecutor can establish a quid pro quo, a criminal conviction is not assured. This is because the court can make the elements of the exchange, the *quid* that the public official receives, the *quo* that the official performs, and the *pro* connecting them, easier or harder to prove. A large sum of money given to a public official will likely be considered a quid, but what about a job reference provided by a private party for a relative of the official? And, as the court made clear in *McDonnell*, a public official can do a lot for someone without it rising to the level of a criminal quo.

For a court that has long been dominated by conservatives, the decisions in *Skilling*, *Sun Diamond*, and *McDonnell* are uncharacteristically antiprospector. In these cases, the court expressed concern about the breadth of the anticorruption statutes and the possibility that federal prosecutors might abuse their discretion by bringing unwarranted charges. Washington University law professor Kathleen Clark noted how unusual this concern was, stating that the *McDonnell* court showed

an astounding solicitude for the class of people in this country who give gifts to elected officials as a way of achieving a political or personal goal. The Court doesn't want to interfere with the process of providing ball tickets or other benefits to elected officials. Is the Supreme Court's concern about abuse of prosecutorial discretion broad enough to reach people who aren't in the habit of giving their elected officials such gifts?

In a similar vein, Penn State law professor Lance Cole attributed the court's concern to the fact that the justices could "imagine themselves in the position of the defendants . . . had their careers taken a slightly

different turn.” The court’s concern about runaway prosecutors also appears somewhat unrealistic. In a symposium on *McDonnell*, two commentators separately made this point. The public-interest attorney Jennifer Ahearn asked, “How realistic is the concern, ‘gee I’m not sure I can take these baseball tickets because some federal prosecutor will come and make a case out of it’?” And the former anticorruption prosecutor Arlo Devlin-Brown said that the court seemed not to realize that it was highly unlikely that a prosecutor would bring such a case because it would not be successful.

It has been less than two years since *McDonnell*, but the decision has already taken its toll on corruption prosecutions. This process started with *McDonnell* itself. When the court vacated McDonnell’s conviction, it authorized prosecutors to retry him. The prosecutors, however, likely concerned about being able to satisfy the heavier burden that the court had imposed regarding proving official acts, chose to dismiss the case. Furthermore, because of *McDonnell*, the appellate court reviewing the corruption convictions of New York legislative leaders Sheldon Silver and Dean Skelos determined that the convictions had to be vacated. Other cases, too, have crumbled as a result of *McDonnell*. The conviction of William Jefferson, a onetime congressman from Louisiana who was caught with \$90,000 in his freezer, was recently tossed out, and federal prosecutors mentioned *McDonnell* as a factor in their decision not to bring a corruption charge against New York City’s mayor, Bill DeBlasio. *McDonnell* apparently also played a part in the decision by federal prosecutors in New Jersey not to retry the bribery case against United States Senator Robert Menendez, whose trial resulted in a hung jury. Prosecutors alleged that Menendez took several actions to benefit Dr. Salomon Melgen, a wealthy ophthalmologist, in exchange for lavish gifts and political contributions. After *McDonnell*, however, the problem for prosecutors was proving that the acts that Menendez took were official acts.

*Menendez* is also noteworthy because it suggests a certain resemblance between the present political era and the Gilded Age, which ran roughly from the end of the Civil War until about 1900. The Gilded Age was characterized by rapid industrial development,

including a great expansion of railroads, the creation of enormous individual fortunes, an intensely probusiness political culture, severe inequality, and much corruption. Many public officials depended on wealthy individuals and corporations, both politically and economically. The historian Richard White, describing Gilded Age corruption, explains that both businessmen and public officials distinguished between friendship, the preferred way of interacting, and bribery, which was unpleasant but sometimes necessary. From the standpoint of a railroad, for example, friends were public officials who, having received political or economic support or both, were already obligated and, thus, did not need to be bribed. Friendship was about reciprocity, about exchanging public goods for private benefits based on preexisting bonds of obligation. When, in *McDonnell*, Chief Justice Roberts praised the reciprocity that he saw as the essence of the democratic process, he likely did not have in mind the corrupt reciprocity described by White. Nevertheless, Roberts's idea of modern politics and White's description of Gilded Age corruption don't seem that far apart. As for *Menendez*, the senator argued that he was not guilty of bribery because he and Dr. Melgen were close friends and did for each other only what good friends do.

Several aspects of *McDonnell* deserve further discussion. One, previously touched on, is the court's conception of the roles of public officials and citizens and the nature of their interactions. As the legal scholar Jacob Eisler explains, there are two principal theories regarding this subject. According to one, sometimes referred to as civic republicanism or trustee theory, public officials are expected to devote themselves to the public good, to advancing the broader interests of the polity rather than implementing the preferences of constituents or interest groups to whom they are partial or obligated. And citizens, too, when acting in the public sphere, are thought to have a responsibility to consider the public good in making choices. Montesquieu, an architect of the philosophy of civic republicanism, believed that people could both be self-interested and interested in the public good, and that politics involved creating structures to encourage the latter. This conception of politics requires that votes and other actions

by public officials be supported with reasons relating to the public interest, not by private, self-regarding justifications or by reciprocal arrangements that are at bottom self-interested. As the term suggests, the trustee relationship emphasizes trust rather than influence or reciprocity. Citizens trust their representatives to behave with integrity, and representatives trust citizens to elect them primarily for their probity and ability, not simply because they serve as effective mechanisms for achieving specific desires. Trustee theory is relatively demanding both of public officials and citizens and not particularly tolerant of self-interested behavior. Thus, it is supportive of broad anticorruption laws.

The other approach, sometimes called delegate theory, is aligned more with the Hobbesian view that people are exclusively self-interested. Delegate theory, which goes back at least to the founding of the republic, sees public officials as advancing the views of those to whom they are partial or obligated. In the Supreme Court's view, anyone to whom an elected official feels gratitude is considered a delegate. And, as the legal scholar (and political activist) Zephyr Teachout explains, delegate theory perceives citizen-consumers to be self-serving. From this perspective, the unfolding of the democratic process is merely the expression of consumers' competing preferences and their ability to realize such preferences through representation. The engine of democracy is the unmitigated pursuit of self-interest by individuals and groups seeking to advance particular goals. Politics involves reciprocal relationships between representatives and their supporters, with representatives disproportionately favoring those who succeed in ingratiating themselves. This conception of politics minimizes the significance of public-minded thinking and is tolerant of self-interested and sometimes sleazy conduct up to the point where it becomes so egregious that it cannot be ignored.

In *McDonnell*, the court aggressively aligned itself with the citizen-consumer conception of representative government. It declined to impose on public officials the expectation that the public good should be their primary concern, and it made no attempt to place limits on how citizens may attempt to influence representatives. In

this respect, the court's position represents a departure both from the framers' idea of politics and the prevailing understanding during much of our history. As Teachout explains, in classical republican theory, which animated the framers, citizens and public officials were supposed to possess virtue, which meant being public oriented. Classic liberal theory, which became important in the late nineteenth and early twentieth centuries, drew a line between public and private spheres but in public life also expected representatives and citizens to be public oriented. Nothing in *McDonnell* suggests that the court's view of politics includes any notion of virtue or any obligation on officials or citizens to be public oriented.

Thus, the court's conception of the democratic process not only leads to a very narrow view of corruption but also imposes minimal standards of conduct on public officials and citizens. As Eisler points out, by refusing to impose on representatives the expectation that their primary concern should be the public good, the court undermines efforts to obligate public officials to behave in a public-regarding way. More demanding expectations in terms of public integrity would encourage representatives to be more attentive to the public interest and less concerned about the interests of favored groups or constituents. The court would do well to increase rather than decrease incentives for public officials to conduct themselves at a high level of integrity.

The court's narrowing of the scope of political corruption not only creates a disincentive for public officials to conduct themselves with integrity, it also minimizes the dangers of corruption. In this respect, too, the court departs from the approach of the framers and the philosophers on whose ideas they drew. Aristotle regarded government as always threatened by corruption. And John Locke feared that an individual or entity might use wealth to "corrupt the representatives and gain them to his purposes." The framers shared this outlook. They regarded republics as fragile and easily corrupted and believed that over time they could degenerate into oligarchies or autocracies.

Furthermore, for the framers, corruption was much broader than *quid pro quo*. The framers' concern was that self-interested actors

could undermine representative government. Although the framers were not indifferent to quid pro quo, their major concern was institutional rather than individual corruption. As Lawrence Lessig explains, in the framers' view an institution could be corrupted by developing an improper dependence. An example would be if the judiciary, which is supposed to be dependent only on the law, developed a dependence on the government that funded it and decided cases according to its wishes rather than the law. Lessig calls this type of corruption *dependence corruption* and argues that it is applicable to many elected bodies today, including Congress. While the framers intended that Congress be "dependent on the people alone," Lessig contends that many members develop an improper dependence on their political funders, who represent a small minority of the population and whose views often conflict with those of the general public.

Whether Lessig is right and to what extent, it is unsurprising that a court that recognizes only quid-pro-quo corruption and only a narrow form of that refuses to acknowledge the existence of anything resembling dependence corruption and becomes impatient when the subject is broached. Consider the court's handling of *Wisconsin Right to Life v. FEC*, a 2007 case addressing the constitutionality of a provision of McCain-Feingold, a federal statute which barred sham issue ads sixty days before an election. Sham issue ads are television ads that attack (or occasionally support) a candidate but do not use the words "vote against" or "vote for" and thus are not considered express advocacy and cannot be regulated. The reason most issue ads are sham is that their purpose is almost invariably to hurt a candidate rather than genuinely to discuss an issue. Because issue ads cannot be regulated, the people paying for them are not subject to contribution limits and need not be identified, and, for this reason, corporations and individuals who seek to influence government love them. After years of debate, Congress determined that these ads were corrupting because they had an effect on the votes of legislators who feared them. Congress concluded that such ads could create, in Lessig's terminology, an improper dependence based on a fear of the deep-pocketed special-interest groups that financed the ads.

In his opinion for the court's conservative majority striking down the law, Chief Justice Roberts (again) not only rejected Congress's determination but did so with particular impatience. Sham issue ads couldn't corrupt, said Roberts, because corruption is only quid pro quo, and sham issue ads are not quid pro quo. Thus, the corruption that the statute was designed to protect against did not exist, and it was, therefore, unnecessary to weigh the value of the statute against the First Amendment right to make political expenditures. Roberts's impatience with the argument that large political expenditures on attack ads could have a corrupting effect on Congress is evident in his curt response which consisted of three words: "Enough is enough." As Teachout puts it, Roberts summarily dismissed "years of Congressional work in response to public outcry" with three words.

As Roberts's response indicates, the court's conservatives are dug in on this issue. They reject not only the possibility that large political expenditures can cause corruption but also that they can create the appearance of corruption. In *Citizens United*, Justice Kennedy spoke to this point and, like Roberts's "Enough is enough," Kennedy's statement was based neither on expertise nor evidence nor law. Kennedy baldly asserted that the "appearance of influence or access [based on large political expenditures]. . . will not cause the electorate to lose faith in our democracy." This was so, he said, because "the fact that a corporation, or any other speaker is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials." In other words, as Kennedy saw it, citizens will take the fact that powerful special interest groups spend money on elections as evidence of their own strength.

Thus, neither Roberts nor Kennedy, the two principal architects of modern campaign-finance law, is able to respond persuasively to the argument that large political expenditures can create institutional corruption or the appearance of it. Possibly this is so because, if the justices were seriously to explore this argument, they would be compelled to acknowledge the complexities that their extreme libertarian campaign finance jurisprudence has ignored. For, as Tribe explains, the court's conservative majority has radically oversimplified the First

Amendment, ignored its egalitarian strain, and failed to recognize that sensitively interpreting it would involve attempting to accommodate competing constitutional values and competing visions of democracy. Instead, the majority has determined that the First Amendment privileges one view of democracy above all others, democracy by financial contributions. Unfortunately, on this issue, the court has displayed a doctrinaire absolutism and an unrealistic economic libertarianism. Given its approach to the First Amendment, it is no wonder that the court cannot accept the possibility that large political expenditures could have a corrupting effect.

I will conclude by briefly discussing inequality, an issue that the *McDonnell* court did not mention but that lurks close to the heart of the case. As is well known, the United States is plagued by record levels of economic inequality. And as many scholars have pointed out, most recently Ganesh Sitaraman in *The Crisis of the Middle-Class Constitution*, economic inequality leads inexorably to political inequality. Unequal economic power is the enemy of democracy. In republican governments, representatives are supposed to devote themselves to the public good and respond to the interests of the public as a whole, as opposed to the interests of powerful individuals and groups. When representatives violate this obligation, republican government gives way to oligarchy. Over time, our political system has become increasingly oligarchical. The judiciary can play a role in constructively responding to the problem of inequality. This is so, in part, because inequality raises significant legal issues. The Constitution, for example, guarantees equal protection of the law and a republican form of government. Also, equality issues are present in many cases, sometimes lurking just below the surface. Courts can contribute to the effort to combat inequality by being alert to these issues and taking them seriously.

*McDonnell* is an example of a case involving equality issues to which the court was oblivious. Political corruption cases inevitably involve equality because, when public officials violate their duty to govern with integrity for the sake of the entire polity, they harm the average citizen. The average citizen, of course, lacks the resources necessary

to access governmental decision-making processes. Corruption occurs when people who are privileged, either because they are public officials or have access to them, abuse their power. Thus, corruption cases should be thought of in a somewhat different way from other criminal cases. In corruption cases, courts not only must perform their traditional function of protecting defendants against governmental power, but they should also attempt to protect the average citizen who is victimized by governmental corruption. For this reason, courts can legitimately interpret anticorruption statutes broadly to encourage public mindedness in representative behavior. The *McDonnell* court could have construed easily and reasonably the anticorruption statute at issue to include McDonnell's conduct as official action.

The *McDonnell* court overlooked the equality issue in other ways as well. The opinion faithfully reflects the assertions presented in the amicus briefs filed by the political insiders supporting McDonnell. The court's emphasis on the reciprocal relationships between representatives and those who seek to influence them ignores the political reality that most people, particularly the poor and near poor, never contact public officials at all, much less seek favors from them or offer them gifts or invitations. Nor does the court mention that, while helping constituents is part of a representative's job, her primary obligation is to advance the public interest. Unfortunately, the overall impression left by the opinion in *McDonnell* is of one group of powerful people, members of the court, looking out for the interests of another group of powerful people, and paying little attention to the average citizen.