

A THEORY OF BRIBERY

Deborah Hellman[†]

In a unanimous opinion in McDonnell v. United States, the Supreme Court invalidated the conviction of the former Governor of Virginia on charges of bribery and called attention to the critical role that bribery laws play in democratic government. Bribery laws fulfill this function by determining what actions of governmental officials are, and are not, for sale. Bribery laws also undergird the Court's campaign finance cases. Campaign finance doctrine rests on the assumption that a legitimate campaign contribution is distinguishable from a bribe, at least in theory. But is it? In order to answer this question, we need a theory of bribery. This is no easy task.

This Article offers a new theory of bribery according to which agreements to exchange official acts for something else only constitute bribery when the value exchanged for the political act is something external to politics. According to this "external value" account, trading a legislative vote for money is bribery, while trading it for another vote is not.

An "external value" theory of bribery explains why campaign contributions are controversial. Contributions can be seen as money or politics. However, recent Supreme Court cases treat giving money to the campaigns of political candidates and elected officials as a central form of political participation. But if the campaign contribution is a purely political act, it becomes increasingly difficult to distinguish a campaign contribution from a bribe.

[†] D. Lurton Massee Professor of Law, University of Virginia School of Law. I would like to thank Brookes Brown, John Duffy, Benjamin Eidelson, Kim Ferzan, Mike Gilbert, Rachel Harmon, Kasper Lippert-Rasmussen, Adam Lioz, David Mapel, Rich Schragger, and Bob Taylor, as well as the participants in the workshops hosted by the LeRoy Keller Center for the Study of the First Amendment at the University of Colorado Boulder, the Political Science Department at the University of Vermont, and at my home institution, the University of Virginia School of Law for the very helpful comments and critique. Daniel Boger, Tyler Jerrell, and Jonathan Jones provided excellent research assistance.

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INTRODUCTION

On the last day of the 2016 term, a unanimous Supreme Court vacated the conviction of the former Governor of Virginia Robert McDonnell on “bribery charges.”¹ While Chief Justice Roberts, writing for the Court, lamented the “tawdry tales of Ferraris, Rolexes, and ball gowns”² and acknowledged that the case is “distasteful” and “may be worse than that,”³ the Court held that the only acts that a public official is forbidden from trading for such goods are exercises of governmental

¹ McDonnell v. United States, 136 S. Ct. 2355, 2361 (2016).

² *Id.* at 2375.

³ *Id.*

power or attempts to pressure others who exercise such power.⁴ For that reason, while the jury found that McDonnell arranged meetings and hosted events for a Virginia businessman in exchange for these luxury items and other things of value, McDonnell did not, in the Court's view, commit bribery.⁵

One can read this opinion as an unremarkable exercise in statutory interpretation, as the opinion rests, in part, on the claim that the best understanding of the term "official act" in the federal bribery statute does not include merely setting up a meeting or hosting an event.⁶ If statutory interpretation is the basis of the Court's decision, then Virginia, or any other state, could pass a new statute that clearly prohibits the sale of these benefits.⁷ However, in other parts of the opinion, Chief Justice Roberts suggests that there may be deeper problems with convicting McDonnell for bribery if all he did was exchange money and luxury items for access.⁸

The Chief Justice worries that an expansive conception of "official act" will criminalize the normal operation of representative government as "[o]fficials 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."⁹ In

⁴ *Id.* at 2372 (explaining that to "qualify as an 'official act,' the public official must make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy,' or agree to do so" and that the "decision or action may include using his official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official").

⁵ The Court's opinion repeatedly describes the charges as "bribery" but in fact the offenses included several different corruption-related offenses including "one count of conspiracy to commit honest services fraud, three counts of honest services fraud, one count of conspiracy to commit Hobbs Act extortion, six counts of Hobbs Act extortion, and two counts of making a false statement." *Id.* at 2365.

⁶ The opinion draws in part on the language of the relevant statute and canons of interpretation in order to give content to such terms as "question" or "matter" in the statute. *Id.* at 2368–69 (explaining that "question" and "matter" should be read using the "familiar interpretive canon *noscitur a sociis*, 'a word is known by the company it keeps,'" to conclude that those terms, like "cause," "suit," "proceeding," and "controversy" should be interpreted to relate to a "formal exercise of governmental power"). As a result, the Court concludes that "[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of 'official act' from the federal bribery statute. *Id.* at 2372.

⁷ In response to the McDonnell scandal, the Virginia legislature passed a law limiting the value of gifts that the Governor and members of the Virginia General Assembly may receive to \$100. State and Local Government Conflict of Interests Act, ch. 777, § 2.2-3103.1, 2015 Va. Acts 2571, 2583–84 (codified as amended VA. CODE ANN. § 2.2-3103.1 (West 2015)). Campaign contributions are excluded from the coverage of the statute. VA. CODE ANN. § 2.2-3101.

⁸ See *McDonnell*, 136 S. Ct. at 2372–73.

⁹ *Id.* at 2372. The Court also draws on "federalism concerns," worrying that the Government's position in this case would involve the "Federal Government in setting standards [of] good government for local and state officials." *Id.* at 2373 (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)).

other words, whether the bribery statute should be read to prohibit the exchange of a Rolex for a meeting depends, in his view, on what bribery is and how bribery relates to democracy, properly conceived. While this short Supreme Court opinion¹⁰ hints at a theory of bribery and at bribery's relationship to democracy, it offers little more than that.

It is surprisingly difficult to articulate what bribery is in a way that accords with common sense intuitions. Yet a theory of bribery is critical because campaign finance jurisprudence rests on the assumption that there is a difference, at least in theory, between a legitimate campaign contribution and a bribe.¹¹ The Court's campaign finance cases both accept the legitimacy of prohibiting bribery and endorse the permissibility of giving money to political candidates. This combination of prohibition and permission suggests that there is a difference, both conceptually and legally, between a campaign contribution and a bribe.¹² Is there? And if so, what is it, exactly?

This Article proposes a new theory of bribery. The basic insight is that bribery requires a boundary crossing between different spheres of value.¹³ For example, parents might say that they "bribe" their kids to study in school. Why call this payment a "bribe"? The parents who use this terminology implicitly assert that money offers the wrong kind of reward for diligent study. Analogously, an agreement to exchange *X* for *Y* only constitutes bribery, on this account, when *X* and *Y* are acts or

¹⁰ The opinion is only twenty-eight pages long.

¹¹ The most restrictive conception of corruption found in campaign finance cases could be termed "corruption as the sale of favors." Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1400–01 (2013). While this view rejects a broader conception of corruption as a distortion of influence or a deformation of judgment, it acknowledges that the sale of governmental acts, bribery, is corrupt. See, e.g., *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 751 (2011) (holding that independent expenditures cannot be corrupting because their independence "negates the possibility" that they will "result in the sort of *quid pro quo* corruption with which our case law is concerned"); *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (insisting that corruption is "limited to *quid pro quo* corruption"); *Davis v. FEC*, 554 U.S. 724, 740–41 (2008) (finding that "reliance on personal funds reduces the threat of corruption" because one cannot exchange a political favor for value with oneself).

¹² The specter of campaign finance jurisprudence infuses the *McDonnell* opinion. McDonnell's brief cites both *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) and *Citizens United v. FEC*, 558 U.S. 310, arguing in his Petition for Certiorari that paying for "'access'—the ability to get a call answered or a meeting scheduled—is constitutionally protected and an intrinsic part of our political system." Petition for a Writ of Certiorari at 14, *McDonnell*, 136 S. Ct. 2355 (No. 15-474). Yet the *McDonnell* opinion does little to tie together the implications of excluding access from the definition of an "official act" under the federal bribery statute with its view that the fact that political contributors get access to politicians is not a form of corruption. See generally *McDonnell*, 136 S. Ct. 2355.

¹³ For a discussion of the implication of different spheres of value to law, see Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 780 (1994) (arguing that "human values are plural and diverse" and that they are "not commensurable" and discussing the implications of these claims).

things whose value derives from different domains. For example, if a public official agrees to exchange one official act for another (I'll vote for your bill if you vote for mine, i.e., logrolling), no bribery occurs. But when a public official agrees to exchange an official act for something external to the domain of politics, this exchange constitutes bribery.¹⁴

This "external value" account of bribery explains why campaign contributions are controversial. Money given to an elected official, or candidate for elected office, could be described as a political act and thus internal to the political sphere, or as simply money and thus outside of it. Interestingly, each view has support in our law. In criminal prosecutions of public officials for bribery, or related offenses, the Supreme Court holds unequivocally that agreeing to exchange political favors for campaign contributions is bribery.¹⁵ This position rests, albeit implicitly, on the view that campaign contributions should be understood as money, not politics. However, recent Supreme Court cases dealing with campaign finance laws challenge that view. For example, in *McCutcheon v. FEC*,¹⁶ Chief Justice Roberts characterizes contributing to a political campaign as a form of political participation analogous to voting.¹⁷

This change in how the Court characterizes campaign contributions has important practical implications that the conceptual account of bribery developed in this Article allows us to recognize. Bribery requires an exchange of values from different spheres. An agreement to exchange money for a political act is bribery but an agreement to exchange one political act for another is not. As a result, if contributing to a campaign is pure political participation, then an agreement to exchange a campaign contribution for an official act can no longer be a bribe.

This Article begins by examining definitions of bribery drawn from both statutes and scholars. Using stylized hypothetical examples, Part I

¹⁴ See *infra* Sections I.B–I.C (explaining that the type of link between the quid and the quo also matters).

¹⁵ See, e.g., *Evans v. United States*, 504 U.S. 255 (1992); *McCormick v. United States*, 500 U.S. 257, 273 (1991) ("The receipt of such contributions is also vulnerable under the [Hobbs] Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act."). While these cases wrestle with whether an agreement to exchange a campaign contribution for an official act needs to be explicit or whether implicit winks and nods will suffice, they are unequivocal in their view that campaign contributions can be bribes.

¹⁶ 134 S. Ct. 1434 (2014). Chief Justice Roberts announced the judgment of the Court in an opinion joined by Justices Scalia, Kennedy, and Alito. Justice Thomas filed an opinion concurring in the judgment.

¹⁷ *Id.* at 1440–41 ("There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign.").

demonstrates that the legal definitions are inadequate. Taken literally, the broad language of the federal bribery statute would seem to turn the ordinary campaign contribution into a bribe. Cases and commentators modify the statute by requiring an agreement to exchange something of value for an official act. However, this revision offers little help, as this definition makes campaign promises, legislative logrolling, and endorsement agreements into bribes. Part II turns to the theoretical literature. Unfortunately, the concept of bribery has received much less attention than it deserves.¹⁸ Part II takes on the leading philosophical account and demonstrates that it too is flawed.

In Part III, I propose the “external value” account of bribery and show how this account accords with widely shared intuitions about the hypothetical cases that caused problems for the previous accounts and actual cases that are under-theorized. Consider, for example, the case of Rod Blagojevich, the now disgraced Governor of Illinois who was charged with soliciting bribes.¹⁹ As Governor, Blagojevich was authorized to appoint someone to fill the Senate seat of then-President Elect Barack Obama. Blagojevich proposed to appoint Valerie Jarrett in exchange for either a private sector job or an appointment to the President’s Cabinet. According to Judge Easterbrook, while the first proposal solicits a bribe, the second does not²⁰ because “a proposal to trade one public act for another, a form of logrolling, is fundamentally unlike the swap of an official act for a private payment.”²¹ The external

¹⁸ For a prior conceptual analysis of bribery, see Thomas L. Carson, *Bribery, Extortion, and the “Foreign Corrupt Practices Act”*, 14 PHIL. & PUB. AFF. 66, 71 (1985) (“A bribe is a payment of money (or something of value) to another person *in exchange for* his giving one special consideration that is incompatible with the duties of his office, position, or role.” (emphasis added)); Kendall D’Andrade, *Bribery*, 4 J. BUS. ETHICS 239 (1985) (arguing the wrong of bribery is alienation of agency of a third party, to whom the bribee owes a prior allegiance); John R. Danley, *Toward a Theory of Bribery*, 2 BUS. & PROF. ETHICS J. 19, 22 (1983) (“[A] bribe [is] the offering or giving or promising to give something of value with the corrupt intent to induce a person to violate the duties of his or her role or office.”); Stuart P. Green, *What’s Wrong with Bribery*, in *DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW* 143, 144 (R. A. Duff & Stuart P. Green eds., 2005) (“[B]ribery is . . . an agreement in which a briber promises to give a bribee something of value in return for the bribee’s promise to act in furtherance of some interest of the briber’s. . . . [and] involves a breach of loyalty owed by the bribee arising out of her office, position, or involvement in some practice. . . .”); Michael Philips, *Bribery*, 94 ETHICS 621, 626 (1984) (“P is bribed by R when she accepts payment or the promise of payment for agreeing to violate a positional duty to act on R’s behalf.”); Alex Stein, *Corrupt Intentions: Bribery, Unlawful Gratuity, and Honest-Services Fraud*, 75 LAW & CONTEMP. PROBS. 61 (2012) (defending, in part, an economic analysis which distinguishes bribery from other transactions due to the off-market benefits both parties to a bribe gain by violating rules of permissible exchange).

¹⁹ See generally *United States v. Blagojevich*, 794 F.3d 729 (7th Cir. 2015), cert. denied, 136 S. Ct. 1491 (2016).

²⁰ *Id.* at 734.

²¹ *Id.*

value account provides the theoretical foundation for Judge Easterbrook's assertion that logrolling is different than a private payment and explains why this difference matters.

According to the external value account, bribery is a non-moral concept, as Part III also describes. Bribery requires an agreement to exchange value from one domain for value of another, but does not determine how spheres of value should be delineated, nor require that all such boundary crossing is wrong. But these important moral questions surround bribery inquiries.

Part IV then turns from theory to doctrine and applies this account of bribery to our campaign finance jurisprudence. One of the strengths of the external value account is that it explains *why* the campaign contribution is a hard case. It is hard because a campaign contribution is both a political act and at the same time simply money. Troublingly, these difficulties are exacerbated by the current Supreme Court's characterization of campaign contributions as a central form of political participation, and the responsiveness of elected officials to such contributions as a key element of democratic accountability. Monetizing political participation in this manner makes it difficult, conceptually, to distinguish a legitimate campaign contribution from a bribe.

But it need not be so difficult, as Part V explains. This Part traces the evolution in the way that Supreme Court cases have characterized campaign contributions and shows that the current view is of recent vintage. As a result, our current Court faces a choice. Drawing on the normative issues related to bribery, Part VI explores the alternatives open to a Court that is disturbed by the conclusion that an agreement to exchange a campaign contribution for an official act can no longer constitute a bribe. The Conclusion returns to the *McDonnell* case and explains how the external value account of bribery sheds light on the questions *McDonnell* leaves unexplored.

I. THE LEGAL DEFINITION OF BRIBERY

What is bribery? I begin with a legal definition, treating it as a working hypothesis of what bribery is. I focus, in particular, on bribery of public officials because if the task is to understand how bribery differs (if it does) from a legitimate campaign contribution, bribery of public officials will be most relevant. The federal bribery statute defines the crime of bribery of a public official in the following way:

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 act²²

has committed bribery. On this definition, a person commits bribery if she:

- gives, offers or promises,
- anything of value,
- to a public official,
- with the intent to influence an official act, and
- does so corruptly.

The first thing to note about this account is that it appears to generate more questions than it answers. When does one “corruptly” give something of value to a public official, etc. as compared to non-corruptly?²³ The statute itself requires an account of corruption to complete it. In this sense, the statute appears circular. Bribery is, one might think, a type of corruption. Perhaps the word “corruptly” here means simply “wrongfully.”²⁴ If so, it isn’t that helpful, as we’ll need to know when giving, offering, or promising something of value to a public official *is* wrong. And to determine that, we need a theory of when it is permissible to give, offer, or promise something of value to a public

²² 18 U.S.C. § 201(b) (2012).

²³ See, e.g., Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 796–806 (1985) (exploring whether the corrupt intent requirement in bribery statutes captures a separate element and if so what its content might be).

²⁴ Although the word “corruptly” was added to the federal bribery statute 18 U.S.C. § 201 in 1962, see Pub. L. No. 87-849, 76 Stat. 1119, and the legislative history of the addition indicates doing so in order to limit the statute’s reach, see *Federal Conflict of Interest Legislation: Hearing Before the Antitrust Subcomm. of the H. Comm. on the Judiciary*, 87th Cong. 36 (1961) (“The danger that innocent conduct may fall within the provisions of the proposed sections 201 and 202 may be avoided by the inclusion of a term such as ‘willfully’ or ‘corruptly’ in subsection (b).”), courts do not seem to have uniformly interpreted the word. Recent courts have understood “corruptly” to mean merely a quid pro quo requirement, see, e.g., *United States v. Alfisi*, 308 F.3d 144 (2d Cir. 2002) (finding jury instructions unproblematic for outlining the quid pro quo requirement in defining “corruptly”); *United States v. Jennings*, 160 F.3d 1006 (4th Cir. 1998) (finding erroneous the trial court’s jury instructions for not explaining that “corruptly” requires a quid pro quo element). However, one of the first federal appellate cases interpreting the amended statute, *United States v. Irwin*, 354 F.2d 192 (2d Cir. 1965), regarded the “corruptly” element as indicating a specific intent requirement, which has been understood in some statutes to mean “evil purpose.” See, e.g., *United States v. Haldeman*, 559 F.2d 31, 114 (D.C. Cir. 1976) (per curiam). However, a jury instruction which, in part, defined “corruptly” in 18 U.S.C. § 201 as “bad or evil purpose” was struck down by the same district court in *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974), partly for failing to appropriately distinguish between § 201(c) bribery and § 201(g) illegal gratuities. For a fuller analysis of the interpretations of “corruptly,” see Brennan T. Hughes, *The Crucial “Corrupt Intent” Element in Federal Bribery Laws*, 51 CAL. W. L. REV. 25 (2014).

official. Moreover, interpreting the term “corruptly” as “wrongly” makes the assumption that bribery is always wrong, which might not be correct. Perhaps it is only wrong because it is prohibited, rather than being wrong in itself.²⁵ The project of this Article, then, is to develop an account of what “corruptly” means that accords with considered judgments about what cases, both real and hypothetical, do in fact constitute bribery. The inclusion of the word “corruptly” in the statute suggests that sometimes a gift, offer, or promise of something of value to a public official made with the intent to influence an official act constitutes bribery and sometimes it does not. But when? And why? This Article fills in the normative content left unspecified by the statute and merely gestured at by cases.

I begin this project with a few provisional assumptions. First, as noted earlier, I start by treating the federal statute as a working hypothesis of the definition of bribery. Second, I provisionally assume that a campaign contribution that is within legal limits²⁶ and properly recorded²⁷ is not, or at least not always, a bribe. In other words, I am assuming that it is possible, at least in theory, to distinguish a campaign contribution from a bribe. Both of these starting assumptions could turn out to be false or misleading. The federal bribery statute might be starting us off on the wrong path. Perhaps there is no content that one can give to the term “corruptly” that can, together with the other elements, sort actual and hypothetical cases in a way that accords with our intuitions about what is bribery and what is not. In addition, the

²⁵ Crimes are *malum in se* if they are “inherently immoral, such as murder, arson, or rape,” while an act is *malum prohibitum* when it “is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral. . . . [Examples include] jaywalking and running a stoplight” BLACK’S LAW DICTIONARY (10th ed. 2014).

²⁶ Limits on contributions for federal elections by individuals and multicandidate political committees to candidates, candidate political committees, and party political committees are established under § 30116(a) of the Federal Election Campaign Act of 1971, including its amendments under the Bipartisan Campaign Reform Act of 2002. 52 U.S.C. § 30116(a) (2012). For example, the individual limit for contributions to candidates for federal public office is statutorily set to \$2000 per election. *Id.* § 30116(a)(1)(A). However, the Federal Election Committee (FEC) is permitted to increase some of these limits based on increases in price index as determined by the Department of Labor. *Id.* § 30116(c); *see, e.g.*, Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 80 Fed. Reg. 5750 (Feb. 3, 2015) (setting the 2015–2016 individual limit to \$2700 per candidate per election).

²⁷ Generally, most federal election campaigns and political committees are required to file both pre- and post-election reports with the FEC; however, during an election year, candidate campaigns additionally require monthly reports while political committees require quarterly reports. 52 U.S.C. § 30104(a). These reports must contain information about the amount of money the campaign or committee had at the start and end of the reporting period, the identities of persons who donate more than \$200, the identities of donor committees and parties, the amounts and dates of contributions, and amounts and dates of campaign expenditures, including the identities of recipients. *Id.* § 30104(b).

definition we settle on might make it impossible to distinguish campaign contributions from bribes. These assumptions are, thus, provisional. I am open to revising each of them if necessary. But, at least for now, they provide a good place to begin.

A. *Corruption as an Empty Idea*

The first possibility to investigate is that the word “corruptly” doesn’t add anything at all. Perhaps no additional element is needed to define bribery. To test this claim, consider the case of *the ordinary campaign contribution*.

The ordinary campaign contribution: Jane is a strong supporter of gun rights. As a result, she supports Congressman Jones because he too supports gun rights. Jones is up for reelection and is facing an opponent who favors gun control legislation that Jane opposes. In order to increase the likelihood that Jones will win and thus that the positions Jane favors will be adopted, Jane sends Jones a campaign contribution for an amount within the legal limit. Jones accepts the contribution and properly records it.

Using the definition provided by the federal bribery statute (but without any content filling out the term “corruptly”), *the ordinary campaign contribution* will not constitute bribery—a result that seems correct. So far, so good.

In this example, Jane’s intent is to influence the election rather than to influence the official (Jones) in his performance of an official act, and thus does not constitute bribery according to the statutory definition.²⁸ However, not all campaign contributions are made with the intent to influence elections rather than officials. When they are made with the latter purpose, complications may arise. Consider the following case.

²⁸ In saying that the fact that Jane attempts to influence the election rather than the official makes this case not bribery, I do not intend to take a position on whether the fact that people with the financial ability to make political contributions are able to have more political influence than people without the money to give is acceptable, morally or constitutionally. For an argument that it is troubling, see, for example, *Citizens United v. FEC*, 558 U.S. 310, 393 (2010) (Stevens, J., dissenting); Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470 (1997) (arguing that the current campaign finance system, which permits private expenditures of money for political purposes, limits the reach of ideas not supported by those with wealth, thereby violating First Amendment principles to promote equal competition and exchange of ideas in the public sphere); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204 (1994) (arguing for a constitutional amendment granting equal financial influence in elections because the intrinsic equality of people demands equal consideration of everyone’s interests, and that limiting access to political decision-making to the wealthy necessarily excludes accurate or fair consideration of interests of other groups, including the poor).

The persuasive campaign contribution: Jane is a strong supporter of gun rights. As a result, she supports Congressman Jones because he too supports gun rights. She knows he has been getting a lot of criticism for his position from others in their district and wants to influence him to remain steadfast in his views. This is especially important to her because it is well known that the House of Representatives will consider a bill in the next session that will impose new regulations on gun owners (a policy she opposes). Jane sends a contribution within the legal limit to Congressman Jones, accompanied by a note. In it she writes, “I support you because of your stand on gun rights. I hope you will remain steadfast in your views.”

In this case, we have a gift of something of value to a public official made with the intention to influence the official not to reconsider his views on gun rights. Under the federal bribery statute, *the persuasive campaign contribution* constitutes bribery. This doesn’t seem right. There may well be problems with contributions like this one (worries about distortion of democracy²⁹ and dependence of officials on their donors,³⁰ etc.), but this case doesn’t seem like bribery.

If *the persuasive campaign contribution* is not bribery, the addition of “corruptly” in the statutory definition must be doing some work. Before we go on to consider possible ways of fleshing out its content, I want to put one more alternative on the table, one that will allow me to highlight the third, provisional, assumption that I am making. Perhaps a campaign contribution—at least one within current legal limits—should not count as the “thing of value” referred to in the statute. If campaign contributions were excluded from being the “thing of value” of which the statute speaks, this would solve the problem of distinguishing bribery from a campaign contribution. Jane’s contribution in the case of *the persuasive campaign contribution* would not constitute bribery because no campaign contribution could ever constitute bribery, as campaign contributions would be excluded by definition. This approach would handle the problem presented by *the persuasive contribution*, but at the cost of making it the case that no campaign contribution could ever be a bribe. This is a possible approach and one I will return to later. For now, I will proceed on the assumption that a campaign

²⁹ For an argument criticizing the distorting effects of campaign contributions, see, for example, Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425 (2015) (summarizing empirical studies showing that current campaign finance laws allow wealthy donors, and donors as a class, a disproportionate impact on policy and arguing that this leads to misalignment between voters’ preferences and government policies).

³⁰ For arguments that such contributions lead to problems of dependence corruption, see, for example, LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011); ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA* (2014).

contribution, including one within the current legal limits, can sometimes be the basis for a bribe. I make this third provisional assumption because the Supreme Court has clearly held that campaign contributions can constitute bribes.³¹ Again, this is a provisional assumption that we may find a need to reject. For now, however, the prospect of gain to the elected official includes both personal gain and what one might call “professional” gain—i.e., a campaign contribution.

B. Acting “Corruptly” as Intending a *Quid Pro Quo* Exchange

Courts seem, at times, to have interpreted the term “corruptly” to relate to the intent element³² and to require that the person act with intent that the value given, offered, or promised induce the official action. For example, in *United States v. Sun-Diamond Growers of California*,³³ the Supreme Court explained the distinction between bribery and an illegal gratuity by emphasizing that “for bribery there must be a quid pro quo—a specific intent to give or receive something of value *in exchange* for an official act.”³⁴ As both the offeror and the offeree can commit bribery, this element similarly would require that for the public official (the bribee) to be guilty of bribery, he must accept the value with the intent to be influenced by it.³⁵

³¹ See, e.g., *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 497–98 (1985) (emphasizing that both “the prospect of financial gain to themselves or infusions of money into their campaigns” can be the basis of quid pro quo corruption).

³² See, e.g., *United States v. Peleti*, 576 F.3d 377, 382 (7th Cir. 2009); *United States v. Quinn*, 359 F.3d 666, 673 (4th Cir. 2004) (“[I]t is sufficient [for the Government to prove bribery] to show that the payor intended for each payment to induce the official to adopt a specific course of action.” (quoting *United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998))); *United States v. Strand*, 574 F.2d 993, 995–96 (9th Cir. 1978); *United States v. Pommerening*, 500 F.2d 92, 97 (10th Cir. 1974).

³³ 526 U.S. 398 (1999).

³⁴ *Id.* at 404–05 (distinguishing bribery from an illegal gratuity and explaining that “[a]n illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take . . . or for a past act that he has already taken”).

³⁵ When the public official who is alleged to have accepted a bribe is a member of Congress, there was some uncertainty about whether the Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1, provides an immunity from prosecution for accepting value in exchange for a vote on a piece of legislation or other legislative action. See *United States v. Johnson*, 383 U.S. 169 (1966) (considering whether the Speech or Debate Clause prevents a member of Congress from being prosecuted for participating in a conspiracy which, in part, included his giving a speech in Congress). While the Speech or Debate Clause does prohibit prosecution for legislative acts, like voting on a bill or speaking on its behalf, and has been interpreted also to prohibit courts from inquiring into the motives of legislators for these actions, *Id.* at 184–85 (“[A] prosecution under a general criminal statute dependent on such inquiries [into the motivation and authorship of a speech made by a Member of Congress] necessarily contravenes the Speech or Debate Clause.”), the Supreme Court, in *United States v. Brewster*, 408 U.S. 501 (1972), concluded that prosecution for an agreement to do these things is not precluded. The Court

I say “at times” above because there is some ambiguity in the language of the cases about whether the requirement of a *quid pro quo* exchange is equivalent to a requirement of an agreement. This raises a question, then, about the content of the relevant “corrupt” intent. Must the bribee intend only to be influenced by the payment or must he intend to form an agreement, committing himself to act in a particular way? For example, an influential D.C. Circuit case, *United States v. Brewster*,³⁶ explains the “criminal intent” required for the crime of bribery by explaining that “the briber is the mover or producer of the official act.”³⁷ The court in that case focuses on the donor’s intention to induce the official action, not on whether the donor and donee have exchanged promises and thereby formed an agreement or even on whether the donor has promised or committed to give money or other value in exchange for the official act. Yet a Justice Department Manual cites this case, and its companion,³⁸ for the proposition that bribery requires an “understanding”³⁹ or an “agreement.”⁴⁰

reasoned that the bribery occurs prior to the legislative act and does not require that the bribed person actually do what he promises to do; therefore, prosecution for bribery is not prosecution for the legislative acts of speech or debate. As the Court in *Brewster* explained:

The question is whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.

Id. at 526.

³⁶ *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974) (explaining on appeal the distinctions between the crimes of bribery and illegal gratuity in finding, in part, that the trial judge failed to properly outline the demarcation in his instructions to the jury).

³⁷ *Id.* at 72.

³⁸ *United States v. Anderson*, 509 F.2d 312 (D.C. Cir. 1974) (upholding conviction of the defendant, Anderson, who was found guilty of bribing Brewster, even though Brewster was found not guilty of accepting a bribe; on appeal, Anderson argued that the verdicts were inconsistent, but the court rejected this argument, concluding a briber can be convicted even when the bribee does not intend to, or otherwise cannot, follow through with the official act).

³⁹ Drawing on the D.C. Circuit’s opinion in *Brewster*, the Justice Department Manual explains that “the Federal crime of bribery requires that there have been an express corrupt understanding between the private donor and the public officer donee that the donee will perform specific official acts in exchange for the payment (called a *quid pro quo*).” U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 2045 (1997) [hereinafter CRIMINAL RESOURCE MANUAL], <https://www.justice.gov/usam/criminal-resource-manual-2045-us-v-brewster>; see also *Brewster*, 506 F.2d at 72.

⁴⁰ The Department of Justice Manual summarizes the distinction between bribery, an illegal gratuity, and a legitimate campaign contribution by emphasizing that “genuine political contributions made to *bona fide* political committees representing elected Federal public officers do not violate either the ‘bribery’ or the ‘graft’ offenses described in § 201. . . . because such contributions are not made as part of a *quid pro quo* agreement with the public officer.” CRIMINAL RESOURCE MANUAL, *supra* note 39, § 2045.

This confusion in the cases between whether bribery requires a quid pro quo exchange or instead requires an agreement is unfortunate because, as any student of contract law knows, these requirements are not equivalent. The idea that one thing is given in order to get something else⁴¹ sounds like the “consideration” requirement from contract law. Contract law goes to great lengths to distinguish gifts, or promises to make gifts, from actual bargains, as only the latter are legally enforceable. A promise to make a gift is distinguished from a promise exchanged for a return promise (or for a return act) by asking whether the promise was given *in order to induce* the return promise or act.⁴² The requirement of a quid pro quo, and especially the fact that courts emphasize it in distinguishing bribery from an illegal gratuity, makes this element sound like the consideration requirement of contract law. However, while consideration (or a consideration substitute) is a requirement of an enforceable contract, it is not sufficient. One also needs a promise. Yet the bribery statute speaks of gifts, offers, or promises, thereby inviting uncertainty about whether the reciprocal inducement (the quid pro quo) is what makes the act corrupt or whether corruption requires the commitment of a promise or exchange of promises in addition.

In this Section, I explore the claim that bribery requires the reciprocal inducement—quid pro quo—that is analogous to the consideration requirement of contract law. In the next Section (Section I.C), I consider whether bribery requires an agreement.

The current proposal I am evaluating is this: a gift, offer, or promise of something of value to a public official, made with the intent to influence an official act, is corrupt, and thus bribery, when the gift, offer, or promise is given in order to induce the official action. Will this account fare better than treating “corruptly” as empty of content? I don’t think so. Recall the case of *the persuasive campaign contribution*. In that case, Jane gives Congressman Jones the contribution in order to induce him to vote a particular way. In other words, she intends to link the money she sends to his official action.⁴³ If the term “corruptly” in

⁴¹ The meaning of “quid pro quo” is “something for something.” BLACK’S LAW DICTIONARY (10th ed. 2014).

⁴² Section 75 of the Restatement of Contracts defines “consideration” as something “bargained for and given in exchange for [a] promise.” RESTATEMENT (FIRST) OF CONTRACTS § 75 (AM. LAW. INST. 1932).

⁴³ I don’t intend here to split hairs about what the term “quid pro quo” means. The cases vacillate between treating this element as (a) requiring that the value is given to induce the official action (in a manner analogous to the consideration requirement of contract law), and (b) as requiring something more like an agreement. My point in this Section is just to show that if acting corruptly requires only the presence of a quid pro quo exchange, *the persuasive campaign contribution* will constitute bribery. One might wonder whether Congressman Jones in *the persuasive campaign contribution* would be guilty of accepting an illegal gratuity. He will

the federal bribery statute is understood to require that the payor gives, offers, or promises value with the intent to induce the public official to do an official act because of the value received, then *the persuasive campaign contribution* would constitute bribery. This doesn't seem right.

C. *Acting "Corruptly" as Agreeing to Exchange Value for Official Action*

Some scholars propose that bribes require more than *a gift, offer, or promise* of something of value. They assert that bribery requires *an agreement* to exchange something of value for the official act. For example, Stuart Green proposes that "[b]ribes involve an agreement to exchange something of value in return for influence, while gifts, tips, and campaign contributions involve no such agreement."⁴⁴ For Michael Philips: "A bribe, after all, presupposes an agreement. A gift may be made with the intention of inducing an official to show favoritism to the giver, but unless acceptance of what is transferred can be construed as an agreement to show favoritism, what is transferred is not a bribe."⁴⁵ Courts wrestling with distinguishing campaign contributions from bribes have also required an agreement where the thing of value in question is a campaign contribution.⁴⁶

not. An illegal gratuity requires that the public official benefit personally and thus excludes properly reported campaign contributions. CRIMINAL RESOURCE MANUAL, *supra* note 39, § 2041.

⁴⁴ Green, *supra* note 18, at 148.

⁴⁵ Philips, *supra* note 18, at 632.

⁴⁶ See, e.g., *McCormick v. United States*, 500 U.S. 257 (1991) (interpreting the Hobbs Act to require an explicit agreement before payments made to elected officials can constitute extortion). While *McCormick* dealt with extortion under the Hobbs Act rather than federal or state bribery laws, it has been influential in assessing when campaign contributions constitute bribery. See, e.g., *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993) ("Given the minimal difference between extortion under color of official right and bribery, it would seem that courts should exercise the same restraint in interpreting bribery statutes as the *McCormick* Court did in interpreting the Hobbs Act . . ."). *McCormick* required that the agreement be explicit. However, in *Evans v. United States*, 504 U.S. 255 (1992), Justice Kennedy's concurring opinion emphasized that the agreement need not be explicit. *Id.* at 274 (Kennedy, J., concurring) (explaining that "[t]he official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods" and that the "inducement from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it"). Lower courts have consistently held that in order for a campaign contribution to constitute bribery, there must be an agreement to exchange the contribution for an official act. See, e.g., *United States v. Terry*, 707 F.3d 607, 613 (6th Cir. 2013) ("What is needed is an agreement, full stop, which can be formal or informal, written or oral."); *United States v. Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011) ("The official must agree to take or forego some specific action in order for the doing of it to be criminal . . .").

On this view, a person commits bribery when she *agrees* to exchange something of value (including a campaign contribution) with a public official for an official act. We will need to massage the statutory definition with which we began to accommodate this account. So, we might say that a person “corruptly” gives, offers, or promises anything of value to a public official with the intent to influence an official act when the gift, offer, or promise is really a conditional promise of the form “I promise to give you *a*, if you give (or promise to give) me *b*.”⁴⁷ This definition covers what we might term *the classic bribe*.

The classic bribe: *X*, the owner of a business located within the district of *Y*, an elected official, calls *Y* and says the following: “If you promise to vote ‘no’ on bill *A* (which would be detrimental to *X*’s business), I will give you a large sum of money that you can use for whatever you like.” *Y* answers: “Great, I accept.”

On the definition of bribery we are currently considering, both *X* and *Y* are guilty of bribery. This holds true whether the money goes into *Y*’s pocket or his campaign account. Let’s call this definition Bribery₁.

Bribery₁ = *X* is guilty of bribery if she promises to give anything of value to a public official in exchange for an official act. *Y*, the public official, is guilty of bribery if he promises to do an official act in exchange for receipt of anything of value from *X*.

Bribery₁ has intuitive appeal. In addition, Bribery₁ is able to distinguish bribery from a campaign contribution. *The persuasive campaign contribution* is not bribery because neither Jane nor Congressman Jones promises to exchange the contribution for the official act. Bribery₁ interprets the term “corruptly” in the federal bribery statute as the intention that the “gift, offer, or promise” create an agreement.⁴⁸ So, we’re good so far.

⁴⁷ One party can be guilty of bribery without the other being guilty if the one acts with the intent to form an agreement and the other party does not. *See, e.g.,* United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1974); Vinyard v. United States, 335 F.2d 176 (8th Cir. 1964); United States v. Troop, 235 F.2d 123 (7th Cir. 1956); Hurley v. United States, 192 F.2d 297 (4th Cir. 1951); United States v. Schanerman, 150 F.2d 941 (3d Cir. 1945); Kemler v. United States, 133 F.2d 235 (1st Cir. 1942); United States v. Morrison, 10 C.M.A. 525, 528–29 (C.M.A. 1959). In that sense, bribery doesn’t require an agreement (as the passages from the scholars suggest) but rather that to be guilty of bribery, a defendant must act with the intent to form an agreement. *See supra* note 18. My definition of “corruptly,” above, captures this meaning.

⁴⁸ When one understands the term “corruptly” as related to the intention with which the briber or bribee acts, the inclusion of the term seems to collapse the distinction between the attempt to commit bribery and the commission of bribery. If *X* intends to form an agreement when he offers money to a public official in exchange for an official act, but the official declines, *X* is still guilty of bribery, *see, e.g.,* Lopez v. United States, 373 U.S. 427 (1963) (upholding Petitioner’s conviction of violating 18 U.S.C. § 201 for offering money to a federal agent, despite the agent not assenting to the agreement), though it might make more sense to call this attempted bribery. I am grateful to Kim Ferzan for pointing this out.

I should note, before continuing, that I am putting aside the difficult practical issue of determining when the parties have in fact made an agreement to exchange a campaign contribution for an official act. As Daniel Lowenstein has described, it is often difficult to determine whether an agreement has in fact been made.⁴⁹ Rather, I start with the easiest case in which an agreement is explicit in order to assess whether Bribery₁ constitutes bribery in those cases when we know such an agreement has been made.⁵⁰ Second, in considering this definition of bribery, I do not intend to claim that campaign contributions are only problematic when they constitute bribery.⁵¹ Third, some agreements may be better described as extortion, rather than bribery. For example, an outside group might threaten a public official by saying: “If you don’t take a particular position on a particular issue, we will spend large amounts of money to oppose you.”⁵² Again, I focus on the simplest examples in the hope that if we can uncover what bribery is in these cases, this will help us to understand more factually nuanced cases, as well as the threats that may well coexist alongside offers.⁵³

⁴⁹ Daniel H. Lowenstein, *When Is a Campaign Contribution a Bribe?*, in PRIVATE AND PUBLIC CORRUPTION 127 (William C. Heffernan & John Kleinig eds., 2004).

⁵⁰ In bribery cases in which there is no allegation that the value offered is a legitimate campaign contribution, courts consistently hold that the agreement need not be explicit. *Compare* *United States v. Ganim*, 510 F.3d 134, 142 (2d Cir. 2007) (citing *McCormick* for the claim that an express promise is required for Hobbs Act extortion involving campaign contributions), *and* *McCormick v. United States*, 500 U.S. 257, 273 (1991) (“The receipt of such [campaign] contributions is also vulnerable under the [Hobbs] Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.”), *with* *United States v. Kincaid-Chauncey*, 556 F.3d 923, 943 (9th Cir. 2009) (“Like the *quid pro quo* requirement for Hobbs Act extortion under color of official right charges, the *quid pro quo* necessary for a bribery honest services fraud conviction need not be explicit . . .”), *and* *United States v. Ring*, 768 F. Supp. 2d 302, 306 (D.D.C. 2011) (“[T]his Court has previously rejected . . . arguments in favor of expanding the scope of *McCormick*’s explicit *quid pro quo* requirement] to extend to things of value other than campaign contributions.”). Where the value allegedly provided in exchange for an official act is a campaign contribution, it is less clear whether implicit agreements can constitute bribery. Lowenstein, *supra* note 49, at 133. However, Justice Kennedy, concurring in part and concurring in the judgment in a case focused on the distinction between extortion and the solicitation of campaign contributions argued that implicit agreements suffice. *Evans*, 504 U.S. at 274 (“The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law’s effect could be frustrated by knowing winks and nods.”).

⁵¹ Justice Stevens, dissenting in *Citizens United v. FEC*, 558 U.S. 310, 447–48 (2010), argued, for example, that “[c]orruption operates along a spectrum, and the majority’s apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics.”

⁵² See Daniel P. Tokaji & Renata E. B. Strause, *How Sausage Is Made: A Research Agenda for Campaign Finance and Lobbying*, 164 U. PA. L. REV. ONLINE 223, 231 (2016), <http://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-223.pdf>.

⁵³ Threats may raise additional issues that offers to form agreements do not. For that reason, extortion may raise moral issues that bribery does not. For a treatment of the

Unfortunately, Bribery₁ also fails to capture common sense intuitions about some familiar, albeit stylized, examples. Consider the following hypothetical cases:

The case of the campaign promise: X, a legislator up for reelection, makes a speech at a campaign event in which she says: "If you promise to vote for me in the next election, I promise not to raise your taxes." At the end of the speech, Y, a voter attending the event approaches X and says, "great, I accept."

Here X has made an offer to the group of people present at the event to enter into an agreement providing that if they promise to vote for her, X commits to not raise their taxes. Now, of course, one could question whether the offer was seriously intended or whether it should be taken to have been seriously intended, given conventions about what candidates say in the context of campaigns. But if we put these worries aside, when the voter accepts the offer, we have an agreement to exchange something of value (a vote) for an official act (voting against any proposals to raise taxes on the promisee).⁵⁴

The case of the logrolling legislator: X, a legislator of one party says to Y, a legislator of another: "I will vote yes on bill C if you will vote yes on bill D." Y, the second legislator, agrees.

This is an agreement to exchange something of value (vote on one bill) for an official act (vote on another bill).

The case of the advocacy organization endorsement: An officer of an advocacy organization [the Sierra Club, the National Rifle Association, etc.] contacts an elected official who is up for re-election and says to her: "We will endorse you if you agree to support bill E in the next session." The elected official agrees.

Here, again, we have an agreement to exchange something of value (the endorsement) for an official act (support of the bill).

In each of these cases, there is an agreement to exchange something of value for an official act, yet none of these cases seem like bribery. The definition of bribery we have been working with will therefore need refinement. The most prominent theory of bribery found in the literature proposes that bribery requires a violation of duty.⁵⁵ For example, Stuart Green claims that, in order to constitute bribery, the

distinction between a threat and an offer see, for example, ALAN WERTHEIMER, COERCION 204 (1987) (arguing that threats coerce while offers do not and defining a threat as a proposal, which, if declined, makes the recipient of the proposal worse off than some baseline).

⁵⁴ In a provocative article, Kasper Lippert-Rasmussen argues that election promises are *not* inherently different from vote-buying. Kasper Lippert-Rasmussen, *Vote Buying and Election Promises: Should Democrats Care About the Difference?*, 19 J. POL. PHIL. 125 (2011).

⁵⁵ See *supra* note 18.

official must violate a duty of loyalty that he owes by virtue of his office or position.⁵⁶ In Green's view,

X (a bribee) is bribed by Y (a briber) if and only if: (1) X accepts, or agrees to accept, something of value from Y; (2) in exchange for X's acting, or agreeing to act, in furtherance of some interest of Y's; (3) by violating some duty of loyalty owed by X arising out of X's office, position, or involvement in some practice.⁵⁷

Call this Bribery₂. An agreement to exchange something of value for an official act constitutes bribery, on this account, when it violates a duty of loyalty that the bribee owes by virtue of her office. To recast this account as an interpretation of the term "corruptly" in the federal statute, we might say that the corruption derives from the violation of the official's duty.⁵⁸

Let's pause for a moment and take stock. The statutory definition of bribery as a gift, offer, or promise of anything of value to a public official made with the intent to influence an official act proved too broad as it made *the persuasive campaign contribution* into a bribe. While it is surely possible that this sort of campaign contribution is a bribe, this conclusion seems to conflict with our intuitions. We explored modifying the statutory definition by adding the requirement of the intent to form a quid pro quo exchange, but that account also did not rule out *the persuasive campaign contribution*. So we moved on to consider the possibility that bribery requires an agreement, which gave us Bribery₁. However, this account of bribery turned campaign promises, logrolling, and agreements to exchange endorsements for commitments on legislative acts into instances of bribery. These examples led us to consider supplementing this account with an additional element: violation of a duty. I consider that account in Part II below.

II. THE DUTY-BASED ACCOUNT

According to the duty-based account, an agreement to exchange something of value for an official act is bribery if, and only if, the

⁵⁶ Green, *supra* note 18. I find Green's view the most well-developed and thus use it for illustration in this Part.

⁵⁷ *Id.* at 145. Other scholars present similar views. See *supra* note 18.

⁵⁸ Green doesn't specifically understand this violation of duty as unpacking the requirement that the briber acts "corruptly" but this way of seeing his analysis fits nicely in the statute.

agreement violates the official's duties of office.⁵⁹ It is the violation of official duty that will do the heavy lifting in this account. To put the view in the terms of the statute, we could say that an official acts "corruptly" when she agrees to exchange something of value for an official act when doing so violates her duties of office. Conversely, the alleged briber acts "corruptly" when she attempts to induce such a violation of duty.

We turned to this account in the hope that it would explain why each of the three examples above—the campaign promise, logrolling, and the agreement to exchange an endorsement for a vote—do not constitute bribery. Let's explore how this might work.

To operationalize Green's account, we need to know what the duty of loyalty entails that the elected official owes to her constituents. For Green, this duty requires that the elected official do what is in the best interests of constituents.⁶⁰ Using this conception of the legislator's duties, Green's view seems initially promising as a way to explain why the logrolling legislator does not commit bribery. While the legislator does make an agreement to exchange something of value (vote on one bill) for an official act (vote on another bill), doing so may not violate her duty of loyalty to her constituents. The official may well make this trade in order to further her constituents' interests. If so, she does not violate her duty of loyalty to her constituents. On Green's account, therefore, logrolling is not an instance of bribery, or so it would seem.

But this resolution may be too quick. Green understands this duty to require that the official choose a course of action because the official believes it will serve his constituents' interests. Green emphasizes that this understanding of the obligations of office means that an official can be bribed even when he does exactly the same thing (or makes exactly the same decision) as he would have absent financial inducement. If the official acts for the wrong reasons (because of a payment rather than because it is the right thing to do), then the elected official violates his duty of loyalty to his constituents.⁶¹ The elected official may permissibly support or not support various bills. What makes his conduct a violation of the duty of loyalty is the fact that he does so for the wrong reasons.

⁵⁹ Green, *supra* note 18, at 160 ("In determining whether someone has committed bribery, it is necessary to determine whether he has in fact violated a positional or practice-related duty.").

⁶⁰ *Id.* at 158–59.

⁶¹ *Id.* at 162 ("The duty of loyalty that *L* [a legislator] owes to her principal is not to make one particular decision or another, but to make decisions *because* they are in her principals' interest.").

When we emphasize this aspect of Green's account, it begins to sound like the case of the logrolling legislator will count as an instance of bribery after all. In this case, the elected official commits herself to take a particular action *because* she has made an agreement to do so (rather than because it is in constituents' interests) and thus in making such an agreement, the legislator violates her duties of office. There may be a fix for this problem, however. Suppose the making of the agreement (rather than the act which is the content of the agreement) is itself in the constituents' interests. In other words, the legislator may believe that compromise is in her constituents' interests. If so, she acts rightly in making an agreement to exchange a vote on one bill for a vote on another. Even if the legislator doesn't believe that the first bill by itself serves her constituents' interests, she may well believe that the agreement to swap votes (the compromise) does. If so, the logrolling legislator acts in accordance with her duties of office. Thus, her agreement to exchange a vote with her colleague does not constitute bribery.

But acting in accord with constituents' interests is not the only way to understand the duties of office. The elected official may owe a duty to act in accordance with constituents' preferences rather than constituents' interests.⁶² In what follows, I use these stylized versions of legislative duty defined in contrasting ways to illustrate the fact that different understandings of the duty will point in different directions. If we adopt a more nuanced version of legislative duties, these differences will only replay themselves in a subtler fashion.

If the legislator's duty of loyalty to her constituents requires that she do what her constituents want, then the logrolling legislator violates her duties if her constituents are opposed to compromise. When the logrolling legislator makes an agreement to exchange her vote on one bill for a colleague's vote on another, she violates her duties of office and so commits bribery. She does so when she votes "yes" on the first bill *because* she has agreed to trade votes with her colleague—a practice forbidden by this understanding of her duties of office in those instances where her constituents abhor compromise.

The case of the campaign promise may also be permissible despite the fact that the elected official agrees to accept something of value for an official act. In this case, the elected official promises not to raise taxes if the voter promises to vote for the official. At first blush, this is an example of bribery under Green's account. By making the promise, the legislator obliges himself not to raise taxes, whether or not doing so

⁶² These two ways of understanding the legislator's duties roughly track the two classic conceptions of the legislator's role as either a delegate or a trustee. See, e.g., DENNIS F. THOMPSON, *POLITICAL ETHICS AND PUBLIC OFFICE* 99–100 (1987).

would serve constituent interests. The promise therefore violates his duty of loyalty. However, if the duties of office require (or allow) a legislator to do what his constituents want rather than what serves their interests, then acting in accordance with this agreement may be precisely what his constituents prefer. After all, the elected official states his position regarding taxes in the form of a promise precisely because both he and his constituents recognize the pressures that elected officials face to raise taxes—either because of needs that arise or in order to make a deal with the political opposition. By promising not to raise taxes, the elected official agrees not to revisit this decision even when the situation changes later. When the voter promises to vote for the official in exchange for the official's promise not to raise taxes, the voter does so because she too desires that the official be bound. Precisely what the voter wants is an elected official who isn't free to assess later whether raising taxes is now a good idea or not.

Like in the prior case, this example yields a different result if we understand the duties of elected office differently. Suppose that the duties of office properly understood require the legislator to do what she believes will further her constituents' interests, rather than doing what her constituents favor. If the legislator herself, though a supporter of lower taxes generally, thinks the current situation requires raising taxes, then her agreement not to raise taxes in exchange for the votes of constituents violates his duty of office and so constitutes bribery.

For Green, bribery requires an agreement that violates a duty. While this account initially seems promising, it has several problems, as we have seen. Green argues that when an official acts because he has made an agreement rather than because it furthers his constituents' interest, the official violates his duty of loyalty. What Green's account misses, however, is the fact that sometimes acting because one has made an agreement to do so is precisely what is required to further constituents' interests. If constituent interests are furthered by compromise, then logrolling agreements may further constituents' interests.

While Green might accept this emendation as a friendly suggestion, the discussion above reveals another problem with his account. Green assumes that the duties of elected office require the legislator to choose those actions that further her constituents' interests, to the best of her knowledge and ability. But this is only one possible way of understanding the duties that officials owe to those whom they represent. An action that is permissible under one conception of the

legislator's duties of office may well be impermissible under another.⁶³ Thus, the duty-based conception of bribery makes it the case that we cannot resolve whether we have an instance of bribery until we settle what a legislator's duties are. Different reasonable conceptions of legislative duties will yield different results in many cases. This fact doesn't rule out the duty-based conception of bribery. Perhaps we just need to figure out what the *real* duties of legislative office are and then we'll know which actions constitute bribery and which do not. I have a hunch, however, that the plausibility of various conceptions of legislative duty indicates that there is some space between a violation of legislative duty and the offense of bribery.⁶⁴ In my view, the cases just described are each plausible violations of legislative duty and yet, at the same time, clearly not instances of bribery. I recognize that this is a controversial intuition that the reader may not share. But, perhaps it doesn't matter as the duty-based account has a more fundamental flaw, which I elaborate below.

The duty-based account also must wrestle with how widely or narrowly to define the action which may violate the legislator's duties of office. According to Green, the official does not violate the duty of

⁶³ Green explicitly emphasizes the way in which his conception of bribery depends on an account of the duties of the office. For example, when he discusses whether a waiter is bribed when he accepts payment in exchange for seating a diner at a better table than the diner would have otherwise received, Green says "we cannot know whether *W* [the waiter] has accepted a bribe unless we know exactly what *W*'s position entails, including whether he is under any duty to assign tables 'impartially.'" Green, *supra* note 18, at 160.

⁶⁴ Federal law also prohibits what is known as "honest services" fraud. 18 U.S.C. § 1346 (2012). The statute, which is a part of the mail- and wire-fraud statutes, *id.* §§ 1341, 1343, prohibits a "scheme or artifice to deprive another of the intangible right of honest services." *Id.* § 1346. The use of the term "honest services," as well as language in the cases giving rise to it, suggests that honest services fraud may have its roots in the sort of violation of duty Green describes. See, e.g., *United States v. Mandel*, 591 F.2d 1347, 1363 (4th Cir. 1979) ("[T]he official's failure to disclose the existence of a direct interest in a matter that he is passing on defrauds the public and pertinent public bodies of their intangible right to honest, loyal, faithful and disinterested government."); *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941) ("No trustee has more sacred duties than a public official and *any scheme to obtain an advantage by corrupting such an [sic] one must in the federal law be considered a scheme to defraud.*" (emphasis added)), *overruled by United States v. Cruz*, 478 F.2d 408 (5th Cir. 1973); *United States v. Proctor & Gamble Co.*, 47 F. Supp. 676, 678 (D. Mass. 1942) ("When one tampers with that relationship [between employer and employee] for the purpose of causing the employee to breach his duty he in effect is defrauding the employer of a lawful right."). This duty to provide honest, loyal, faithful service proved vague and amorphous, however. Thus, in *Skilling v. United States*, the Supreme Court interpreted the statute to be limited to bribery and kickbacks. 561 U.S. 358, 408–09 (2010). One way to gloss the evolution of this doctrine would be to say that public and private officials do have duties of loyalty like those Green describes. But these duties are difficult to translate into criminal prohibitions because their content is controversial. To deal with this vagueness in their content, the Supreme Court has limited the criminal prohibition to core elements of the duty that are not vague: a prohibition on bribery and kickbacks. If this is correct, then bribery must be defined in a way other than by reference to violation of a duty of loyalty.

loyalty she owes her constituents if she makes a decision *because* it furthers her constituents' interests.⁶⁵ On this account, some clear instances of bribery will not be bribery according to the duty-based account if an elected official genuinely believes that accepting the money will serve constituent interests. Consider the following case:

The case of the practical politician: X, an elected official is running for reelection against an independently wealthy challenger, Y, who has promised to spend millions of her personal fortune to defeat X. Z, an equally wealthy private individual, offers to spend her own personal fortune on advertisements in support of X if X will agree to support an issue favored by Z. Z promises to match her spending to the spending of Y. X accepts the offer, reasoning as follows: "My policies will benefit my constituents far more than Y's would. If I support the issue Z wants me to, I do so because, overall, this will benefit my constituents (as it will allow me to fulfill my agreement with Z and get the advertising that will help me to defeat Y)."

On Green's account, the practical politician is not guilty of bribery.⁶⁶ X makes an agreement to accept something of value for an official act in a manner that does not violate her duty of loyalty to her constituents. X supports the issue *because* doing so provides her the best chance to defeat her challenger, which she genuinely believes will benefit her constituents. As a result, her actions comport with her duty.

Green's focus on the reason for which an official acts permits any well-motivated official to do anything, so long as she genuinely believes it will help her constituents. When the official chooses an action because it benefits her constituents, she violates no duty and thus does not commit bribery. But, as *the case of the practical politician* illustrates, this result seems perverse.

Perhaps the problem lies in the attenuated connection between the act (support for issue favored by Z) and the interests of X's constituents. However, it is not easy to say how close the connection must be. If the official must believe that the particular act (a proposed piece of legislation, for example) will itself benefit her constituents, then the logrolling legislator also violates her duty and thus commits bribery. Yet if we allow the official to consider the wider implications of her act for her constituents, then the practical politician acts in accordance with her duty to her constituents and thus does not commit bribery. There is no easy way out of this dilemma.

⁶⁵ Green, *supra* note 18, at 162 ("The duty of loyalty that L [a legislator] owes to her principal is not to make one particular decision or another, but to make decisions *because* they are in her principals' interest.").

⁶⁶ *See id.*

III. THE EXTERNAL VALUE ACCOUNT

We need to try a new approach. To find an alternative understanding of what bribery is, I begin by looking at some commonplace ways we talk about bribery. Consider a simple example. A parent claims that she “bribes” her kids to rake the yard. Why does she say she “bribes” them, rather than saying she “pays” them for the yard work? The parent, in calling this payment a “bribe,” asserts that she ought not to pay her children for doing something that they should do as members of the family. If another parent retorts: “That’s not a bribe. I always pay my kids to rake the yard,” this parent is, albeit implicitly, asserting that yard work is not part of familial obligation as she sees it. For that reason, paying kids to rake the leaves is payment for a job rather than a bribe.

Another parent might claim that he bribes his kids to get good grades. Why does this parent describe this payment as a bribe? The parent calls it a bribe because he believes that money is not the appropriate recompense for academic achievement. What about the practice of schools awarding high grades for academic mastery? Do grades bribe kids to work hard in school? Most of us are likely to say no. This is because we see grades as part of the same sphere of value as academic achievement. An academic marker is awarded for academic mastery.⁶⁷

Drawing from these examples, we might say that bribery involves a boundary crossing, the exchange of value from one domain or sphere of value into another.⁶⁸ Political bribery, then, is the exchange, or

⁶⁷ A recent *New York Times* article reports that there is both a right and a wrong way to bribe kids to read over the summer. KJ Dell’Antonia, *The Right Way to Bribe Your Kids to Read*, N.Y. TIMES (July 23, 2016), https://www.nytimes.com/2016/07/24/opinion/sunday/the-right-way-to-bribe-your-kids-to-read.html?_r=0. The article describes payment to kids for summer reading as a bribe and explains that research suggests that bribing kids to read might be counterproductive, replacing internal motivation with external motivation. *Id.* What interests me about this article is not the controversy about whether the bribe works, but instead how the different sorts of exchanges employed by parents were described. When money or toys are offered in exchange for reading, the author describes the payment as a bribe. But when the child’s reading is exchanged for a book discussion with the parent or time reading together, the author uses scare quotes, calling the exchange a “bribe” rather than a bribe. In other words, the article’s author recognizes that an exchange within the same domain (reading alone for reading together) isn’t really a bribe while an exchange of money or toys for student reading is.

⁶⁸ The reference to spheres of value is inspired by the work of Michael Walzer. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 10 (1983) (arguing that justice is concerned with social goods whose value is determined by social meaning and history, and that the different kinds of meanings of goods “constitutes, as it were, a distributive sphere within which only certain criteria and arrangements are appropriate”). Walzer himself speaks about bribery in the following way: “[T]he words *prostitution* and

agreement to exchange, a political act for something of non-political value. The key to whether something is bribery on this view—the element that does the heavy lifting—is the “thing of value” term. For this reason, I call this the “external value” account. The briber acts “corruptly” on this account, when he agrees to exchange something of non-political value for an official act.

In what follows in this Part, I demonstrate that this account explains the hypothetical cases that caused trouble for the duty-based account⁶⁹ and coheres with prominent, real cases.⁷⁰ In addition, I explain that on this account, bribery is not necessarily wrong.⁷¹ However, the question of how one ought to delineate spheres of value raises important normative questions.⁷²

A. *Explaining the Hypothetical Cases*

According to the external value account, *the classic bribe* is a bribe, but a *campaign promise*, *logrolling*, and *advocacy organization endorsement* are not. Take *the case of the campaign promise* first. Here, the legislator makes an agreement with a voter to exchange an official act for a vote. On the external value account, the campaign promise does not constitute bribery because the value that is exchanged for the official act is itself a political act: the citizen’s vote. Legislative logrolling is not bribery for the same reason. In *the case of the logrolling legislator*, an official act is exchanged for an official act. The “thing of value” is of the same kind or type as the official act for which it is exchanged. Similarly, in *the case of the advocacy organization endorsement*, the elected official agrees to exchange an official act for an endorsement, thereby trading a political act for another political act.

In contrast, *the classic bribe* is bribery, on the external value account, because the thing of value (money) that is exchanged for the official act is external to the political sphere. This is especially clear in *the classic bribe* because the money can be used for anything that the official wants. Of course, it is not only money that can be the thing of value that is exchanged. Rolex watches, visits to golf clubs, etc. also can be the basis for bribery because they too are of non-political value (in

bribery, like *simony*, describe the sale and purchase of goods that, given certain understandings of their meaning, ought never to be sold or purchased.” *Id.* at 9.

⁶⁹ See *infra* Section III.A.

⁷⁰ See *infra* Section III.B.

⁷¹ See *infra* Section III.C.

⁷² See *infra* Section III.D.

the usual case).⁷³ Compare those examples to the following: a party leader agrees to give her colleague a spot on a coveted committee or agrees to site a desired project in her district in exchange for a vote on another piece of legislation. Since the decision of whom to select for a committee or where to site a project is a political act, these exchanges do not constitute bribery.

B. *Explaining Real Cases*

The external value account coheres well with actual bribery cases as well. Consider first the bribery prosecution of former Illinois Governor Rod Blagojevich.⁷⁴ The external value account provides the theoretical basis for Judge Easterbrook's decision in which the court vacated some of the counts of which Rod Blagojevich was convicted.⁷⁵ Blagojevich was convicted on several counts related to his proposal to appoint Valerie Jarrett to the Senate. Because the jury instructions did not distinguish between an agreement to appoint Jarrett in exchange for an appointment to the Cabinet of then President-elect Barack Obama and an agreement to appoint Jarrett in exchange for a private-sector job or for money he could control, Judge Easterbrook vacated the conviction.⁷⁶ The problem with the jury instructions, according to Judge Easterbrook, was that the "instructions treated all proposals alike. . . . [but] they are legally different: a proposal to trade one public act for another, a form of logrolling, is fundamentally unlike the swap of an official act for a private payment."⁷⁷ Judge Easterbrook does not go on to explain why they are unlike, however.⁷⁸ The external value account of bribery provides an answer. An agreement to appoint Jarrett to the Senate in exchange for a position in the President's Cabinet would be an exchange of one political act for another. As a result, such an agreement would not constitute the boundary crossing that is the hallmark of bribery. An agreement to appoint Jarrett to the Senate in exchange for a private-

⁷³ Governor McDonnell was alleged to have exchanged these goods for official acts. *McDonnell v. United States*, 136 S. Ct. 2355, 2363–64 (2016).

⁷⁴ *United States v. Blagojevich*, 794 F.3d 729 (7th Cir. 2015).

⁷⁵ *Id.*

⁷⁶ *Id.* at 734–35.

⁷⁷ *Id.* at 734.

⁷⁸ Judge Easterbrook's main reason for excluding logrolling from the scope of the statute—and one he returns to repeatedly—is that logrolling among legislators is extremely common. He notes that neither the prosecution, nor his own research, could locate a single instance in which the relevant statute was the basis for a conviction for logrolling. Because logrolling is so common, "[i]t would be more than a little surprising to Members of Congress if the judiciary found in the Hobbs Act, or the mail fraud statute, a rule making everyday politics criminal." *Id.* at 735.

sector job, by contrast, would be an agreement to exchange a political act for something of value outside of politics. As a result, this exchange would constitute extortion (when proposed by Blagojevich)—a corollary offense to bribery.⁷⁹ According to the external value account, bribery requires that the values exchanged come from different spheres of value. Thus, an agreement to exchange a political act for something of value only constitutes bribery when the value exchanged for the political act is not itself a political act.⁸⁰

Judge Easterbrook supports his position by appeal to the story—possibly accurate, possibly not—that Chief Justice Earl Warren delivered California to President Eisenhower in exchange for a seat on the high court. According to Judge Easterbrook:

If the prosecutor is right, and a swap of political favors involving a job for one of the politicians is a felony, then if the standard account is true both the President of the United States and the Chief Justice of the United States should have gone to prison. Yet although historians and political scientists have debated whether this deal was made, or whether if made was ethical (or politically unwise), no one to our knowledge has suggested that it violated the statutes involved in this case.⁸¹

The external value account explains why this swap is not bribery.

Interestingly, Judge Easterbrook believes both that the purported exchange would not constitute bribery and that it might, yet, be unethical. In that sense, it coheres with my suggestion that there are some agreements to exchange value that violate duties of office, yet do not constitute bribery.⁸²

⁷⁹ Specifically, this act could constitute extortion under color of office under the Hobbs Act. See 18 U.S.C. § 1951(b)(2) (2012). When applied to public officials, the Supreme Court has held that extortion under color of office does not require active inducement by the public official, but requires only “that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.” *Evans v. United States*, 504 U.S. 255, 268 (1992). The difference between extortion under color of office and § 201 bribery is in the acceptance of payment in furtherance of the quid pro quo (required for Hobbs Act extortion), and to whom the statutes apply: § 201 bribery applies only to federal officials while Hobbs Act extortion applies to both private citizens and public officials. See 18 U.S.C. § 201(a)(1). For a historical analysis of the common-law development of these crimes, see James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695 (1993).

⁸⁰ *But see* *People v. Montgomery*, 132 Cal. Rptr. 558 (Ct. App. 1976) (upholding state bribery law conviction of California city councilman requesting a vote from another councilman for the position of mayor in exchange for offering favor as mayor to the voting councilman’s projects).

⁸¹ *Blagojevich*, 794 F.3d at 737.

⁸² See *supra* Part II and my assertion that agreements to exchange political acts for other value may violate duties of office and yet still not constitute bribery.

The external value account of bribery is also helpful in explaining the controversial case *United States v. Singleton*.⁸³ In *Singleton*, a three-judge panel of the Tenth Circuit reversed the conviction of Sonya Singleton for money laundering and conspiracy to distribute cocaine on the ground that the prosecutor violated a federal statute that prohibited giving, offering, or promising anything of value “for or because of” testimony.⁸⁴ In *Singleton*’s case, the prosecutor had promised the witness leniency in exchange for his true testimony. Sitting en banc, the Tenth Circuit reversed the three-judge panel decision, finding instead that the statute did not apply to prosecutors because the State could not prosecute itself.⁸⁵ While bribery itself was not at issue, as the statute at issue made certain gifts illegal without requiring a quid pro quo exchange, nonetheless the case and dispute surrounding it are relevant because each of the courts that considered the case struggled with whether an offer of leniency falls within the “thing of value” which the statute forbids giving *for* testimony.

The rationale provided by Circuit Judge Porfilio for the Tenth Circuit sitting en banc is unappealing, as both the concurring⁸⁶ and dissenting judges agreed.⁸⁷ Judge Porfilio found that the statute simply doesn’t apply to “an Assistant United States Attorney functioning within the official scope of the office.”⁸⁸ While the illegal gratuities statute at issue did not require that the prosecutor’s offer of leniency induce the witness to testify (or vice versa), the logic of the Judge’s rejection of the application of the statute would cover bribery prosecutions as well. Rather than conclude that neither the bribery statute nor the illegal gratuities statute apply to federal prosecutors at

⁸³ 165 F.3d 1297 (10th Cir. 1999). The initial decision by the Tenth Circuit was met with widespread derision. See, e.g., Justin M. Lungstrum, Note, *United States v. Singleton: Bad Law Made in the Name of a Good Cause*, 47 U. KAN. L. REV. 749, 761 n.107 (1999) (citing over 100 federal and state decisions declining to adopt *Singleton*’s reasoning). Much of the scholarship generated by *Singleton* has focused on the permissibility of plea bargains and the public policy reasons for or against including plea bargains in the bribery statute’s reach. See, e.g., Bryan S. Gowdy, *Leniency Bribes: Justifying the Federal Practice of Offering Leniency for Testimony*, 60 LA. L. REV. 447 (2000) (summarizing arguments that plea bargains result in unreliable testimony and undermine judicial integrity, while concluding that sufficient safeguards can be instilled to protect the benefits gained by the practice).

⁸⁴ *Singleton* alleged that the prosecutor had violated 18 U.S.C. § 201(c)(2). *Singleton*, 165 F.3d at 1298.

⁸⁵ *Id.* at 1298–1300.

⁸⁶ *Id.* at 1303, 1307 (Lucero, J., concurring) (disagreeing with “the majority’s holding that the word ‘whoever’ in 18 U.S.C. § 201(c)(2) . . . cannot include the government or its agents” and instead resting his concurrence on the fact that several statutes together “limit the ‘something of value’ that the government may offer”).

⁸⁷ *Id.* at 1308 (Kelly, J., dissenting).

⁸⁸ *Id.* at 1298 (majority opinion).

all,⁸⁹ the external value account of bribery I propose provides a more satisfying explanation of why a court could find that a prosecutor's offer of leniency in exchange for true testimony constitutes neither bribery nor an illegal gratuity. Here's why. Arguably, the prosecutor has discretion regarding her recommendation on sentencing. Similarly, a witness has discretion regarding whether to cooperate with the prosecutor. Each of these acts resides in the domain of criminal justice, broadly conceived. When the prosecutor offers a witness a reduced sentence in exchange for her true testimony, the prosecutor agrees to exchange things that are both within the same domain or sphere. For that reason, there is no bribery.

The external value account also explains why this decision is controversial. Both the witness and the prosecutor have ethical duties that may direct them to make these decisions for other reasons—the prosecutor should recommend a sentence that comports with justice and the witness should cooperate with the institutions of a just society. In the case under review, both actors may thus act in ways that violate their ethical duties. In rejecting the duty-based account of bribery in Part II, I do not reject the view that public officials and others have ethical duties. Sometimes actions violate these duties, and are thus rightly condemned, even if these same actions do not constitute bribery.

Second, the *Singleton* case may be controversial because the two acts—the witness's cooperation and the prosecutor's sentencing recommendation—may not, in fact, be acts of the same sphere of value. One might argue that the witness's cooperation is not an act belonging properly to the sphere of criminal justice. Perhaps it belongs instead to the domain of citizenship. If so, the prosecutor offers to trade an act of value within the domain of criminal justice (leniency in sentencing) for the performance of an obligation of citizenship.⁹⁰ As these acts lie in different spheres, the exchange may well constitute bribery.

*Singleton*⁹¹ demonstrates that determining whether an act belongs to a particular domain can be both difficult and controversial. However,

⁸⁹ In order to avoid the conclusion that a federal prosecutor can never act illegally even if she offers money to a witness to offer false testimony, for example, the majority limits its rationale to prosecutors acting properly. *See id.* at 1302 n.2. I find this reasoning circular and unhelpful.

⁹⁰ The fact that obligations to serve when one is drafted can no longer be sold expresses a similar idea. The obligation to serve when one is drafted, like the obligation to testify when one has relevant information, are, one might think, obligations of citizenship which ought not to be sold or traded for values of other kinds like money or leniency. *See, e.g.,* MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 75–79 (2009).

⁹¹ The scholarship generated in the immediate aftermath of *Singleton* generally focused on analyzing the arguments grounded in statutory interpretation that were offered by the Tenth Circuit in both decisions. *See, e.g.,* Korin K. Ewing, Note, *Establishing an Equal Playing Field for Criminal Defendants in the Aftermath of United States v. Singleton*, 49 DUKE L.J. 1371, 1384

the fact that there are difficult cases that fall in a gray area should not trouble us. The statuses of many acts are quite clear. Voting on a bill clearly is a political act. Paying the catering bill for the wedding of the Governor's daughter is not. Rather than troubling us, the difficulty in characterizing gray area cases helps to explain why we are unsure whether certain exchanges are, or are not, instances of bribery, as the *Singleton* example makes clear.

C. A Non-Moralized Account

When I assert that votes by a voter, votes in the legislature by a legislator, and endorsements by advocacy groups are "political acts," this is a claim about how these acts are understood in our society. These claims rest on empirical facts about how a society has, in fact, differentiated different domains of social life. Bribery is therefore a non-moral concept in two distinct ways. First, determining whether an exchange crosses a boundary requires us to understand what lines the society has in fact drawn. We may criticize its choices but the determination of where these boundaries are drawn is not a moral inquiry. Second, the concept of bribery refers to such a boundary crossing. But, one might ask, what's so bad about boundary crossing? According to the external value account of political bribery, bribery is not always, or necessarily, wrong. Rather, bribery is wrong, when it is, because such a boundary crossing is wrong for some other reason. For example, political bribery in a democratic society is a democratic wrong, meaning that its wrongness derives not from the fact that it is bribery but rather either from the fact that it rejects the authority of democratic

(2000). Analyses included the legislative history of 18 U.S.C. § 201(c)(2). See, e.g., Jeffrey M. Schumm, Note, *Courts Rush to Extinguish Singleton, but Are the Embers of the Panel's Decision Still Glowing?*, 27 FLA. ST. U. L. REV. 325, 341-42 (1999) (citing *United States v. Ware*, 161 F.3d 414, 423 (6th Cir. 1998), for that court's analysis of the statute's legislative history not being elucidating as to legislative intent of the act). Others focused on the debate about the policy arguments for or against exchanging leniency for testimony. See, e.g., A. Jack Finklea, Note, *Leniency in Exchange for Testimony: Bribery or Effective Prosecution?*, 33 IND. L. REV. 957, 987 (2000) (citing an example of a witness who repeatedly lied after making plea bargains with prosecutors); Tracy A. Levin, Comment, *Bribery or Effective Prosecution—Should Prosecutors Be Allowed to Give Something of Value to a Witness?*, 24 S. ILL. U. L.J. 137, 146 (1999) ("[T]he main reason we should not allow attorneys to give something of value to a witness . . . is that it promotes perjury."). The proponents of the interpretive arguments agree, however, that whatever the intent of Congress in passing the law, if the correct interpretation prohibits exchanging prosecutorial leniency for testimony, Congress was prepared to amend the statute. See, e.g., Steven M. Wernikoff, *United States v. Singleton: Is It Bribery for Prosecutors to Plea Bargain with Cooperating Witnesses?*, 4 PUB. INT. L. REP. 20, 23 (1999) ("[S]oon after the original Singleton decision, Capitol Hill legislators filed several quick fix bills, proposing exemptions for prosecutors from the federal bribery statute.").

decision-makers to delineate the political sphere from other domains or from the fact that democracy forbids the exchange of political acts for items of non-political value.⁹²

The fact that determining which acts are political and which are not in a particular society is an empirical question means that there can be cases of justified bribery. One such case, discussed by Green, is the example of a hypothetical Nazi prison guard who is paid money to allow prisoners to escape. Green says the guard isn't bribed because he owes no actual duty of loyalty to the Nazi regime and so has no duty to violate in accepting the payment in exchange for the official act. On the account of bribery I propose, by contrast, the guard *is* bribed. So long as the Nazi regime establishes the sorts of acts that are permitted to be exchanged for release and payment is not among them, this payment involves the sort of boundary crossing that is the hallmark of bribery. Should we worry that this analysis makes a crime of something that is morally justified, as Green seems to do? I don't think so. The fact that an evil regime has criminalized a justified act hardly seems surprising.⁹³ This government should be criticized for this reason, as well as for many more serious evils.

Bribery involves an agreement to exchange something of value from one sphere for something of value from another sphere, as those spheres of value are in fact delineated within a particular society. If this view is correct, it suggests that what is bribery in one society might not be bribery in another.⁹⁴ Is this a flaw in the account? Sometimes when corruption is rampant in a country, members of other nations who pay the bribes that are common in this country defend their actions by asserting "that's the way they do it here." Does my account suggest that if the practice is indeed routine, that it is not then bribery?

In order to see how my account would treat such an example and whether that treatment is problematic, we need to fix the details of the

⁹² See *infra* Part VI.

⁹³ I do not mean to claim that the Nazi guard who allows prisoners to escape in exchange for money is to be commended. Clearly his motivation is relevant to how we assess his moral character.

⁹⁴ The problem of cross-cultural conceptions of bribery was amplified with the passage of the Foreign Corrupt Practices Act in 1977, which prohibited domestic businesses or their employees from making payments to foreign government officials in order to influence their official decision-making. See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to -3 (2012)). The law did not provide an exception, however, for countries where such payments would be a permissible legal or cultural norm, leading to a proposed amendment to the Act in 1981 that would exempt payments that were made without violating foreign laws. However, the amendment failed to pass the House. See Carson, *supra* note 18 (discussing the economic and moral issues surrounding the passage of the Act). That one criticism of the Act was its failure to exempt norm- or culture-dependent actions that would otherwise constitute bribes in another norm or culture supports the claim that societies can define which actions constitute bribes.

example more clearly. Real world examples are likely to be complicated—as some aspects of how the country does things may suggest that payment for official acts are accepted (its routine nature and the fact that authorities look the other way, for example), while other aspects of the practices suggest that such payment constitutes a transgression (that such payments are illegal and that payments are made in cash, for example). Instead, consider a hypothetical case in which such payments are thoroughly accepted. For example, suppose, in some country, police officers are authorized to stop motorists whenever they like, for any reason or for no reason at all. Because this country lacks the funds to adequately compensate its police force, it authorizes officers to demand payment from stopped motorists in exchange for letting these motorists continue on their way. Because different motorists are likely to be able to afford different amounts, police officers are authorized to demand whatever amounts they see fit. These payments are duly recorded by police officers as income and taxes are paid on these receipts. Now, suppose you are stopped and the police officer tells you he will only allow you to proceed if you pay him a specified amount. Is this payment a bribe?

In my view, it is not. In that regime, payment for being allowed to proceed is authorized. As a result, the sphere of policing and the sphere of the market are intertwined. The payment does not involve any boundary crossing because the society has not erected a boundary between the domain of the market and the domain of governmental services.⁹⁵ Permission to proceed on the road is explicitly for sale.

Note, however, that to say that such payments are not bribery is not equivalent to saying that there is nothing wrong with them. Bribery requires a crossing of boundaries. If no boundaries are crossed, there is no bribery. But how or whether a society delineates the boundaries between spheres of social life is open to normative critique. We can easily criticize this hypothetical country that permits the police to charge random motorists to proceed on their way for its arbitrariness and deviation from other rule of law values.

⁹⁵ Interestingly, as Nicholas Parrillo describes, government officials in the United States used to be compensated largely through payments from those whom they served (which he terms “facilitative payments”) and payments for achieving certain ends (which he terms “bounties”) rather than by receiving a salary from the government. See NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940* (2013).

D. Normative Questions Related to Bribery

In the last Section, I described two ways in which bribery is a non-moral concept. First, bribery requires an exchange of value from two different spheres. But the fact that the values exchanged belong to different spheres does not make the exchange wrong.⁹⁶ Second, determining where any given society has in fact drawn boundaries between domains of value is an interpretive rather than moral inquiry. But there are two important normative questions that relate to the boundary drawing that makes bribery possible. First, how should domains of value be delineated? Second, who ought to decide the answer to these questions?

For illustration, let me return to the two commonplace examples with which I began this Part—paying kids to rake leaves and awarding grades according to academic mastery. There is an important distinction between the empirical question (is raking leaves an act of familial obligation in *that* family?) and the normative question (ought kids be required to rake leaves as part of their obligations as family members?). We must know the answer to the empirical question in order to know whether paying kids to rake the leaves bribes them. But parents decide whether to require leaf-raking for normative reasons. As a parent, one must ask oneself what kids ought to contribute to their families. In other words, determining where to set the boundaries between spheres of value involves normative issues.

However, sometimes people talk in a way that intertwines the normative and descriptive questions. Consider, for example, a critic of our current educational system who laments that grades bribe kids to work hard in school.⁹⁷ In calling the award of grades for academic mastery a *bribe*, this critic is not making a descriptive claim about how these boundaries are currently drawn. Rather, he is arguing that we ought to change the way we understand education such that awarding grades does constitute a boundary crossing. The use of the term “bribe” in making such an argument is, in essence, an argument for a shift in the way we understand the goals and values of education.

The second normative question related to bribery is, “who gets to determine where the boundary lines between spheres of value should be?” Return to the leaf-raking example. We might say that parents should determine for themselves whether raking leaves is a familial

⁹⁶ As I explained, in a democratic society, political bribery may be a democratic wrong because it thwarts the legitimate decision of democratic bodies to block certain exchanges.

⁹⁷ Such a critic is loosely based on Alfie Kohn. Alfie Kohn, *The Case Against Grades*, ALFIEKOHNS.ORG (Nov. 2011), <http://www.alfiekohn.org/article/case-grades/?print=pdf>.

obligation in their own family or not. Moreover, one might think this even when one has a firm view about which decision the parents ought to make. The view that parents should decide this question for their own family rests on understandings of parental rights and political theory. Analogously, who gets to decide what acts are political acts within a particular society? If the answer is legislatures, then Virginia, or any other state, *could* criminalize the sale of meetings, for example.⁹⁸ Alternatively, perhaps the Constitution limits how legislatures may draw these lines. Either claim rests on constitutional interpretation and on democratic theory—not on a theory of bribery.

This account of bribery leads to several observations about political bribery. First, the possibility of distinguishing political bribery from a campaign contribution depends on the existence of a boundary between acts or things of political value and acts or things of non-political value. Whether such a boundary exists today is an empirical, not a normative, question. Second, the external value account is agnostic about the normative questions regarding where that boundary line should be and who should set it.⁹⁹ Third, as the next Part explains, this account of bribery helps us understand *why* the campaign contribution is a difficult case. The campaign contribution straddles the line between a political act (like a vote for a candidate or bill, an appointment to a committee or to the Cabinet, and especially an endorsement by an advocacy group) and an act outside of the domain of politics (like a charitable donation or investment).

IV. THE EXTERNAL VALUE ACCOUNT OF BRIBERY MEETS CAMPAIGN FINANCE JURISPRUDENCE

An elected official commits bribery, on this account, if she agrees to accept a particular sort of valuable thing in exchange for an official act. If the parties agree to exchange something of political value for a political act, there is no bribery. This account thus explains *why* the campaign contribution is such a difficult case—both in theory and for courts. A campaign contribution is valuable not only within the political sphere but also outside of it. Money is, after all, a sort of general purpose good that is useful in many ways. It also explains why the contribution in excess of legal limits is less complicated to characterize than a contribution within legal limits. A contribution in excess of current legal limits is, almost by definition, no longer a political act, as it violates the

⁹⁸ See *supra* Introduction.

⁹⁹ In other writing, I have argued that the Court should allow legislatures more of a role in defining democracy. See Hellman, *supra* note 11.

explicit rules of politics. But the contribution within legal limits is not so easy to classify.

A. *The Campaign Contribution Revisited*

This account of bribery thus re-raises an issue I put aside earlier. Can a campaign contribution within legal limits be the basis for a bribe? Consider the following case:

The case of the campaign contribution agreement: X, the owner of a business located within the district of Y, an elected official, calls Y and says the following: “If you promise to vote ‘no’ on bill Z (which would be detrimental to X’s business), I will make a contribution to your campaign in the greatest amount permitted by law.” Y answers: “Great. I accept.”

Earlier I acknowledged that one could distinguish between a campaign contribution and a bribe simply by stipulating that a campaign contribution within legal limits cannot (ever) constitute a bribe.¹⁰⁰ I put this approach aside at the time both because the Supreme Court has rejected it and because it did not seem normatively attractive.¹⁰¹ In this Section and the next, I revisit both of these reasons for rejecting this approach. In this Section, I explain why, based on the account of bribery articulated above, recent Supreme Court cases push us to reconsider whether a campaign contribution can be the basis for a bribe. In the next Part, I describe how the Supreme Court’s recent campaign finance cases implicitly reject its earlier approach.¹⁰² In the final Part, I describe the choices that this development gives rise to.¹⁰³

A campaign contribution in an amount within the current legal limits that is properly reported could be seen as a political act similar to an endorsement. It is a way for a voter to express her support for a candidate. Moreover, unlike money that is not a contribution, its usefulness outside the sphere of politics is limited. It is a sort of “special purpose” money that can be used only for political activities.¹⁰⁴ Perhaps, then, campaign contributions within legal limits cannot be the basis of

¹⁰⁰ A statute implementing this approach could require that the campaign contribution is appropriately disclosed and recorded in order to count as a campaign contribution, for example.

¹⁰¹ See *supra* note 31.

¹⁰² See *infra* Part V.

¹⁰³ See *infra* Part VI.

¹⁰⁴ 11 C.F.R. §§ 113.1–113.5 (2017). Part 113 covers Permitted and Prohibited Uses of Campaign Accounts.

bribes. If so, the case of the campaign contribution agreement does not constitute bribery.

B. *Cases Characterizing Contributions as Political Acts*

Recent campaign finance cases decided by the Supreme Court implicitly endorse this line of reasoning because they treat campaign contributions as a form of politics. Indeed, they go further. They suggest that democracy requires a legislator to be responsive to her contributor's preferences as expressed via these contributions. If campaign contributions within legal limits are a form of politics in the way the Court describes, then an agreement to exchange these political acts for other political acts does not constitute bribery. The Court goes further still. When the Court asserts that democracy requires such responsiveness, it endorses the view that the exchange of contributions (albeit within legal limits) for official acts is not only not bribery; it is central to a well-functioning democracy.

In *Citizens United v. FEC*, Justice Kennedy, writing for the Court, asserts: "It is well understood that a substantial and legitimate reason, if not the only 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 political outcomes the supporter favors. Democracy is premised on responsiveness."¹⁰⁵ This passage is noteworthy in two respects. First, Justice Kennedy sees contributing to a campaign as an important method by which a citizen indicates her support to her representative. The "responsiveness" on which democracy is premised, for Justice Kennedy, is responsiveness to what constituents want, as indicated by the contributions they make. Contributing not only expresses support for the official and facilitates the speech of the official, it is a means by which the constituent communicates with her representative. Second, and perhaps more striking still, as a method of communication, contributing is treated as on par with voting.

Chief Justice Roberts asserts these same two propositions in an opinion announcing the judgment of the Court in *McCutcheon v. FEC*.¹⁰⁶ In *McCutcheon*, a case in which the Court struck down the aggregate limits on campaign contributions during each election cycle,

¹⁰⁵ 558 U.S. 310, 359 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in judgment in part and dissenting in part), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010)).

¹⁰⁶ 134 S. Ct. 1434 (2014). Chief Justice Roberts announced the judgment of the Court in an opinion joined by Justices Scalia, Kennedy, and Alito. Justice Thomas filed an opinion concurring in the judgment.

the Chief Justice claimed that “[c]onstituents have the right to support candidates who share their views and concerns,” whereby “support” he means give money.¹⁰⁷ He then goes on: “Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials.”¹⁰⁸ In other words, giving money is the means by which constituents communicate with their representatives and it is this communication of preferences to which the representative is, rightly, responsive. The Chief Justice also reprises Justice Kennedy’s treatment of communication by contribution as equivalent to communication by voting. After first stating that “[t]here is no right more basic in our democracy than the right to participate in electing our political leaders,”¹⁰⁹ he goes on to list the ways in which a citizen can participate: “Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate’s campaign.”¹¹⁰ Here again we see the Court treating contributing money to a campaign as one of the central ways that a citizen participates in politics, and again it is placed on par with voting.

In these passages, the Supreme Court treats giving money as a means of communicating support for particular issues to one’s representative and sees the elected official who decides how to vote or changes her vote in response to this communication as enacting the responsive politics that is the hallmark of democracy. Just as the official who changes her position on an issue to win the votes of constituents, the official who changes her position on an issue to win the contributions of constituents is simply enabling the meaningful participation of citizens.

C. *Implications for the Conceptual Possibility of Political Bribery*

The Supreme Court’s recent characterization of contributing money to a political candidate as a quintessential political act, analogous to voting, makes it conceptually impossible for an agreement to exchange such a contribution for a political act to ever constitute a bribe. To see why, let’s reconsider the following example:

¹⁰⁷ *Id.* at 1462.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1440–41.

¹¹⁰ *Id.* at 1441.

The case of the campaign contribution agreement: X, the owner of a business located within the district of Y, an elected official, calls Y and says the following: “If you promise to vote ‘no’ on bill Z (which would be detrimental to X’s business), I will make a contribution to your reelection campaign in the greatest amount permitted by law.” Y answers: “Great. I accept.”

Because Y is a careful reader of Supreme Court cases, she continues as follows:

In the past, I might have worried that this would be a case of bribery, but not anymore. To be bribery, I must make an agreement to exchange something of value for an official act. But the *something of value* can’t just be anything of value, otherwise ordinary logrolling would constitute bribery. I only commit bribery if what I agree to accept in exchange for the official act is a good that is extrinsic to the domain of politics rather than something properly within it. Previously, I might have thought that a campaign contribution was extrinsic in this way. But now I realize that contributing is how my constituents communicate with me and express their views. In that sense, it is like voting. Just as it isn’t bribery for a constituent to say: “If you promise to vote ‘no’ on bill Z, I promise to vote for you in the next election,” it isn’t bribery for her to say: “If you promise to vote ‘no’ on bill Z, I promise to make a contribution to your campaign in the greatest amount permitted by law.

While this little speech is clearly fanciful, the point is not. In recent cases, the Supreme Court describes contributing as a form of political participation that is akin to voting. As a result, an agreement to exchange a legal campaign contribution for an official act cannot constitute bribery.¹¹¹

The Court’s recent characterization of contributing money as a central political act is therefore extremely significant. Not only does it represent a departure from earlier characterizations of giving and spending money on campaigns, as I describe in the next Part, it also has the momentous, yet heretofore hidden, implication that agreements to exchange campaign contributions within legal limits for political acts cannot constitute bribery.

¹¹¹ One state, Oregon, explicitly exempts campaign contributions from coverage by its bribery statute. OR. REV. STAT. ANN. § 162.005(1) (West 2015). North Carolina, by contrast, specifically includes campaign contributions within the coverage of its state bribery law. N.C. GEN. STAT. ANN. § 14-217(d) (West 2014). The rest of the state statutes, like the federal law, do not specify whether a campaign contribution is included in the “thing of value” or “benefit” which may not be exchanged for an official act. See, e.g., KAN. STAT. ANN. § 21-6001 (West 2012); MASS. GEN. LAWS ANN. ch. 268A, § 1 (West 2008); N.J. STAT. ANN. § 2C:27-2 (West 2016); OKLA. STAT. ANN. tit. 21, § 308 (West 2002); S.C. CODE ANN. § 16-9-210 (2015).

Yet, the Court has continued to assert that legislatures may prohibit political bribery and, at least in earlier cases, has explicitly maintained that agreements to exchange campaign contributions for official acts do constitute bribery.¹¹² This combination of positions suggests that either the Court is unaware of the implications of its treatment of contributing as a central form of political participation, *or* that recent cases effectively retreat from the view that an agreement to exchange a campaign contribution within legal limits for an official act constitutes a bribe. In the next Part, I briefly describe how these recent cases constitute a departure from earlier cases.

V. THE EVOLUTION OF CAMPAIGN FINANCE JURISPRUDENCE

The Court's recent characterization of campaign contributions departs significantly from prior views. In the seminal campaign finance case *Buckley v. Valeo*,¹¹³ the Court held that the First Amendment is implicated when laws restrict either giving or spending money in connection with elections.¹¹⁴ Why? *Buckley* provides two answers. First, the Court protects *spending* money in connection with elections because money facilitates speech.¹¹⁵ In the Court's view, this connection between money and speech is especially close because speech is made possible by money.¹¹⁶ The connection that the *Buckley* Court finds between contributions and speech is less tight. Contributing is protected because it is an expressive act. However, contributing is only modestly expressive, in the Court's view, and this expressive element is adequately

¹¹² See *supra* note 50.

¹¹³ 424 U.S. 1 (1976).

¹¹⁴ The degree to which "speech" is limited by laws that curtail expenditures and contributions is different, however, in the Court's view. Limitations on expenditures are treated as significant restriction on speech and limitations on contributions less so. Whether this is the sole reason for the different treatment that follows (limits on expenditures are struck down and limits on contributions are upheld) or whether the difference lies in whether the provisions of the law at issue are narrowly tailored to avoiding corruption is less clear. In the Court's view, the only interest substantial enough to withstand the heightened scrutiny that is required of a restriction on "speech" is avoiding corruption or its appearance. See *id.*

¹¹⁵ *Id.* at 19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money." (footnote omitted)).

¹¹⁶ In other work, I challenge whether this claim is justified. I argue that money facilitates the exercise of all rights, not only speech, yet sometimes we protect the right to spend money on the exercise of rights and sometimes we do not. In order to decide when spending money to exercise a right ought to be protected as part of the right, one must say more than just that spending money facilitates the exercise of the right. See Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953 (2011).

accommodated by the act of giving a small and limited contribution. As the Court explains:

A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.¹¹⁷

Expenditures are protected because they facilitate speech. Contributions are protected, to some degree, because the act of contributing is symbolic and expresses a generalized support for the candidate or issue to which the person has made a contribution. The Court in *Buckley* is careful to emphasize that giving money isn't especially communicative in that nothing more than "yay John Doe" is expressed. We don't know how much the contributor likes Doe, as the Court emphasized that the size of the contribution is only a very rough indicator of the strength of the view or of why the contributor likes Doe.

Contrast this rationale for protecting contributions with the one articulated in the Chief Justice's opinion in *McCutcheon*, some of which I quoted earlier. The Chief Justice leads off by stating that "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders."¹¹⁸ He then goes on to list the ways a person can participate and, as I emphasized before, includes contributing money on the list of ways we participate in politics that likens it to voting and running for office. Chief Justice Roberts then goes on: "The right to participate in democracy through political contributions is protected by the First Amendment . . ."¹¹⁹ It is worth pausing here to see how dramatic this move is. *Buckley* protects contributions because they are somewhat expressive. *McCutcheon* protects contributions because contributing is a form of political participation.¹²⁰

It is also worth noting that the rationale of *Buckley* would seem to have no trouble with the aggregate limits at issue in *McCutcheon*. Shaun McCutcheon can express that he likes as many candidates as he wants so long as he gives only a small amount of money to each. The reason he

¹¹⁷ *Buckley*, 424 U.S. at 21.

¹¹⁸ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440–41 (2014).

¹¹⁹ *Id.* at 1441.

¹²⁰ Admittedly the contrast is sharpest when we compare *Buckley* decided in 1976 with the most recent cases.

runs up against the aggregate limit is that he gives the maximum legal amount to each individual candidate. But, as *Buckley* emphasized:

A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.¹²¹

Contributing money has thus evolved from an expressive act to a means of political participation. The significance of the size of the contribution has evolved from something of little expressive significance to something that meaningfully communicates the strength of constituent support.

Bribery requires a crossing of boundaries. This insight means that an agreement to exchange a campaign contribution for an official act will not constitute bribery if a campaign contribution is a political act. Is it? The Court has previously implied that it is not, in the context of a criminal prosecution of public officials.¹²² But the campaign finance jurisprudence is more equivocal. As this Part demonstrates, the foundational campaign finance case treats contributions as expressive but not fully political acts, while recent cases treat the act of giving money as one of the central means by which citizens participate in politics. If a campaign contribution is not a political act, as the criminal prosecutions of public officials and *Buckley* assume, then an agreement to exchange a campaign contribution for an official act can be a bribe. But if a campaign contribution is a political act, as *Citizens United* and *McCutcheon* assert, then an agreement to exchange a campaign contribution for an official act cannot constitute a bribe. The current Justices thus have a choice about the direction in which to take our jurisprudence.

VI. WHERE DO WE GO FROM HERE?

This Article makes two analytical contributions and highlights the choice that this investigation brings to the fore. First, and most importantly, this Article offers a conceptual account of bribery. The concept of bribery is critical to both criminal law and to campaign

¹²¹ 424 U.S. at 21.

¹²² *McCormick v. United States*, 500 U.S. 257, 273 (1991) (“The receipt of such contributions is also vulnerable under the [Hobbs] Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.”).

finance jurisprudence, yet it has been largely under-theorized. This Article develops a careful critique of the definitions of bribery provided by the federal statute, relevant case law, and scant scholarly commentary. Finding none of these definitions of bribery adequate, this Article proposes what I call the “external value” account. On this view, bribery of public officials requires an agreement to exchange a non-political act for an official or political act.

The second analytical contribution of this Article is to explore the implications of this conception of bribery. In particular, this analysis sheds light on why the campaign contribution has been a site of controversy. Is an agreement to exchange a campaign contribution for an official act a bribe? We can see now why that depends. It depends on whether a campaign contribution is best described as a gift of money with some expressive significance, or instead as a quintessentially political act. As this Article demonstrates, Supreme Court cases have characterized campaign contributions differently over time. As a result, an agreement to exchange a campaign contribution for an official act was, in the past, a bribe but may be no longer.

These two analytical contributions thereby expose the choice that the current Court faces. The Court could endorse the implications of its treatment of campaign contributions as central political acts. If the Court takes this path, an agreement to exchange a campaign contribution for an official act is not, and cannot be, bribery. There is nothing incoherent about this approach. The Court might accept it. If so, this Article’s practical payoff would be to highlight and emphasize the effect of treating the campaign contribution as a central political act. However, some readers, and perhaps some Justices, will not welcome this implication. What then?

There are two possible alternative routes our jurisprudence can take. As Part IV described, the current Court has defined campaign giving as a central mode of political participation and in so doing has asserted its prerogative to define it as such.¹²³ The Court could take a different position on each of these issues. First, the Court could back away from the view that contributing is a central method of political participation. Second, the Court could leave to the legislative branches the decision where to set the boundary between what is internal and what is external to the political sphere. While an argument for the adoption of either of these approaches would require an article of its

¹²³ As Section III.D explained, there are two normative questions related to bribery: who decides whether to draw the line between spheres of social life, and on what grounds should these decision-makers make this decision. The Court’s answers to these questions and the alternatives sketched above represent answers to each of these questions.

own, let me close by briefly sketching the issues raised by each alternative.

Recall the example of whether leaf-raking is a familial obligation or a job. Using the insight that bribery requires a boundary crossing, we know that paying kids to rake leaves might bribe them if leaf-raking is a familial obligation and can't bribe them if it is not. This understanding of bribery does not tell us, however, whether leaf-raking *is* a familial obligation or *who decides* the answer to that question.

In order to argue that leaf-raking is or is not a familial obligation, one needs a theory of childrearing or of the family. Similarly, when the Court determines that campaign contributions are political acts like voting, it implicitly relies on a normative account of democracy. Perhaps the implicit theory of democracy it relies on is flawed. How might an argument for an alternative view of the relationship between campaign contributions and democracy go? One would argue that contributing is different from volunteering and voting—the central political acts of citizens—because political participation in a democracy should be open to all on roughly equal terms. Just as the poll tax was problematic because the ability to pay ought not influence whether or not one can participate in politics, neither should the ability to make a campaign contribution affect a person's ability to participate in democracy. If voting seems different—more central, more important, more clearly of the world of politics—this illustrates the point. Contributing is not a political act like voting.

Call this approach *political equality*. It offers a normative argument about what democratic politics is or should aspire to be. Its virtue lies in the fact that democracy as a form of government must, at some level, be premised on a commitment to the equal status of citizens. This claim has already been recognized by the Court in myriad ways.¹²⁴ Yet, as with many such abstract and incontrovertible commitments, the devil is in the details. Thus the difficulty with the *political equality* approach will be to define what a commitment to the equal status of citizens requires in the domain of politics. Equal political influence is an elusive goal. Still, citizens must be able to participate in political acts in a manner that respects their equal status.¹²⁵ It is surely possible that such a formulation

¹²⁴ See, e.g., Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008); Bush v. Gore, 531 U.S. 98 (2000); Evans v. Cornman, 398 U.S. 419 (1970); Williams v. Rhodes, 393 U.S. 23 (1968); Reynolds v. Sims, 377 U.S. 533 (1964).

¹²⁵ Ronald Dworkin adopts such a view. RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 388 (2011) (arguing that political equality requires that “no adult citizen’s political impact is less than that of any other citizen for reasons that compromise his dignity—reasons that treat his life as of less concern or his opinions as less worthy of respect”).

would rule out contributions as political acts because people differ so dramatically in their practical ability to participate in this manner.

The Court also can take a second route to avoid the conclusion that an agreement to exchange a political contribution for an official act is no longer a bribe. Rather than argue that a contribution is not a political act (as sketched above), one might instead focus on who ought to decide whether it is or is not. So far, the Court has assumed that it should do so. But why?

Just as parents can choose whether raking the leaves is a familial obligation or a job in their family, perhaps the legislature ought to be free to determine where the boundaries lie between the domain of politics and the market economy. For example, when Congress passed the Affordable Care Act it moved health care, at least in part, from a good distributed according to ability to pay to a good distributed according to medical need. So too, one might argue, Congress and state legislatures ought to be able to determine whether and how much the ability to contribute ought to affect a person's ability to fully participate in politics.

This alternative we might call *self-government*.¹²⁶ It has the following virtues. First, *self-government* is agnostic about where the line between political acts and non-political acts should be drawn. Second, and relatedly, one of the central and self-defining questions of any polity is to determine the reach of the economic sphere, effectively what money can and cannot buy. Leaving that decision to legislatures thus has advantages of genuine self-government. But *self-government* has drawbacks as well. In particular, we might worry about legislatures drawing the line between political and non-political acts in ways that effectively advantage incumbents. Second, if the line is drawn such that offices are effectively for sale, the democratic provenance of future decisions may be called into question.

These brief thoughts only scratch the surface. If the account of bribery I have offered is correct, then the current treatment of campaign contributions as a central form of political participation makes an agreement to exchange a campaign contribution for a political act *not* a bribe. This is a striking conclusion. Perhaps the Court and readers are happy to accept it. If not, then a campaign contribution is not, or should not be, a political act. Whatever route one adopts to this conclusion (political equality, self-government, or something else), the implications of this conclusion for our campaign finance jurisprudence are significant.

¹²⁶ For a sketch of how this argument applies to campaign finance law more generally, see Deborah Hellman, *Resurrecting the Neglected Liberty of Self-Government*, 164 U. PA. L. REV. ONLINE 233 (2016), <https://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-233.pdf>.

CONCLUSION

I conclude the Article where I began, with the Supreme Court's recent opinion in *McDonnell v. United States*. Equipped with a theory of bribery, I want to answer the question I posed at the beginning. Could Virginia or another state prohibit the exchange of luxury items for access? The central contribution of this Article is the external value theory of bribery according to which an agreement to exchange X for Y only constitutes bribery if X and Y are values from different spheres. As a result, an agreement to exchange something of value for a political act only constitutes bribery when the value exchanged for the political act is something external to politics. Unlike the campaign contribution context, in *McDonnell* we have no doubt that the purchase of a Rolex watch or a shopping trip for the Governor's wife are not political acts. Rather, the controversy is on the other side of the quid pro quo exchange. If access is not an official act, then an agreement to exchange a Rolex for access does not constitute an agreement to exchange one type of value for another. As a result, we have no bribery.

Is the granting of access an official act? According to this Article, nothing in the nature of bribery provides an answer to this question. The Court is correct that granting access must be an official act in order for the sale of access to constitute bribery. This is so not only as a matter of statutory interpretation but also because bribery requires a boundary crossing between spheres of value. Moreover, the theory of bribery put forward here tells us that this question is empirical or descriptive in nature rather than normative. It asks whether granting access is an official act in our political culture. Statutory interpretation is a good way to begin to answer this question.

The theory of bribery also gives rise to two normative questions. First, where should such boundaries between spheres of value be drawn, and second, who decides the answer to this first question? In the context of the *McDonnell* case, these questions are: Should access be considered an official act and who should make this determination? Chief Justice Roberts hints at his answers to each of these questions. He suggests that access should not be considered an official act and in so doing, he assumes that it is the Court, rather than the legislature, that determines whether access is or is not an official act. However, each of these assertions is far more controversial than this short unanimous opinion would lead one to believe.