

# Tawdry or Corrupt? *McDonnell* Fails to Draw a Clear Line for Federal Prosecution of State Officials

*Harvey A. Silverglate and Emma Quinn-Judge\**

In a decision that obfuscates as much as it clarifies, the Supreme Court has once again considered the reach of the honest-services-fraud statute, acknowledged the specter of unconstitutional vagueness that haunts certain readings of the statute, and attempted to “save” the statute by narrowing it. The decision this year comes in *McDonnell v. United States*, the “tawdry” and “distasteful” case of former Virginia Governor Robert (“Bob”) McDonnell, who was convicted for supposedly taking bribes from a businessman seeking to promote his company’s nutritional supplement.<sup>1</sup> Narrowly framed, the issue before the Court was how to define an “official act,” an element the government needed to prove to show that McDonnell had done something in exchange for the alleged bribes. Broadly framed, the issue was, as it often is in public corruption prosecutions, what distinguishes unlawful conduct from lawful conduct? Or, as Justice Antonin Scalia put it when the Court reviewed another honest services conviction just six years ago, “What is the criterion of guilt?”<sup>2</sup>

In a unanimous decision by Chief Justice John Roberts, the Court rejected the government’s suggestion that essentially any act performed by a public official is an “official act” and instead adopted a “more bounded interpretation” of the term, limiting “official act” to something “specific and focused” that involves a “formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee.”<sup>3</sup>

\* Mr. Silverglate is of counsel to and Ms. Quinn-Judge is a partner at Zalkind Duncan & Bernstein LLP. Mr. Silverglate is also an adjunct scholar with the Cato Institute.

<sup>1</sup> *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016).

<sup>2</sup> *Skilling v. United States*, 561 U.S. 358, 421 (2010) (Scalia, J., dissenting).

<sup>3</sup> *McDonnell*, 135 S. Ct. at 2368, 2371–72.

That this year's decision comes only six years after the Court "cured" concerns that the statute was unconstitutionally vague by announcing a "uniform national standard" for honest-services prosecutions, demonstrates the shortcomings of the solution articulated in that case, *Skilling v. United States*.<sup>4</sup> This year's attempt is equally flawed. The Court failed to meaningfully—and clearly—establish the limits for public corruption prosecutions alleging bribery, and it both raised and left unanswered important questions about the scope of such prosecutions. Thus, federal bribery prosecutions of state and local officials will continue to proceed without clearly defined boundaries. Politicians routinely engage in a range of transactions: they make deals with each other, they advocate for constituents (who are sometimes also donors), and they allocate benefits and favors. In the vast majority of states, moreover, public service is a part-time calling, and public officials must make their living in the private sector. These citizen-legislators and public servants enter into numerous transactions as private citizens, some of which may relate to or touch on their public-sector work.

Fundamental fairness requires that individuals be able to determine—*ahead of time*—when conduct crosses the line from permitted to prohibited. Criminal law is not supposed to be a trap for the unwary. In formal terms, due process requires that a statute define a criminal offense "[1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement."<sup>5</sup> Arbitrary and discriminatory enforcement of laws—meaning enforcement based on "personal predilections"<sup>6</sup>—is particularly concerning where the individuals being prosecuted under federal law are state and local public officials. Vague criminal laws permit federal prosecutors to intervene in state and local politics by convicting—or, at a minimum, bringing career-ending charges against—individuals for conduct that is frequently *permitted* by state law and state ethical rules. As the Supreme Court explained almost 30 years ago, where the "outer boundaries" of a public corruption

<sup>4</sup> 561 U.S. at 411.

<sup>5</sup> *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

<sup>6</sup> *Id.* at 358.

statute are ambiguous, attempted enforcement “involves the Federal Government in setting standards of disclosure and good government for local and state officials.”<sup>7</sup> Or, as Justice Scalia commented, a vague federal statute in this context is an “invitation for federal courts to develop a common-law crime of unethical conduct.”<sup>8</sup>

The time has come—indeed, it is long past due—for the Court to recognize that the honest-services statute is hopelessly vague and must be invalidated because it fails entirely to define the boundary between permitted and proscribed conduct. Moreover, as one of us argued six years ago, courts must reinvigorate the vagueness doctrine and the related rule of lenity to enforce the basic precepts of fair notice and avoiding arbitrary enforcement.<sup>9</sup> It is time “to restore Fifth Amendment due process to one of its core meanings: if a criminal statute does not give the average citizen a clear notion of what conduct is intended to be outlawed, that statute should not serve as a basis for turning the citizen into a criminal.”<sup>10</sup>

### **I. The Honest-Services Doctrine and Hobbs Act Have Evolved into Broad Tools for Prosecuting Public Corruption**

Governor Bob McDonnell was convicted of bribery and bribery-related offenses under the honest-services provision of the mail and wire fraud statute and the Hobbs Act, two statutes that do not mention the word bribe or define bribery.<sup>11</sup> Indeed, as one scholar

<sup>7</sup> *McNally v. United States*, 483 U.S. 350, 360 (1987).

<sup>8</sup> *United States v. Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of cert.).

<sup>9</sup> Harvey A. Silverglate & Monica R. Shah, *The Degradation of the “Void for Vagueness” Doctrine; Reversing Convictions While Saving the Unfathomable “Honest Services Fraud” Statute*, 2009–2010 *Cato Sup. Ct. Rev.* 201 (2010).

<sup>10</sup> *Id.* at 237.

<sup>11</sup> See 18 U.S.C. § 1346 (honest services fraud); 18 U.S.C. § 1951(b)(2) (Hobbs Act); see also Sara Sun Beale, *Comparing the Scope of the Federal Government’s Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 *Hastings L.J.* 699, 705 (2000). In describing such statutes, one scholar has noted repeatedly, “Members of Congress often speak of giving ‘tools’ to prosecutors. They never speak of giving ‘tools’ to defense attorneys and rarely speak of doing justice.” Albert W. Alschuler, *Terrible Tools for Prosecutors: Notes on Senator Leahy’s Proposal to ‘Fix’ Skilling v. United States* at 4, U. Chi., Pub. L. Working Paper No. 463 (Feb. 14, 2014) (emphasis added), <http://ssrn.com/abstract=2396146>; Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse* at 24 & n.115, U. Chi., Pub. L. Working Paper No. 502 (Jan. 26, 2015), <http://ssrn.com/abstract=255591>.

has astutely observed, “at first glance the cupboard seems virtually bare when one seeks federal laws explicitly aimed at state and local corruption.”<sup>12</sup> Only one “federal provision . . . refers explicitly to bribery or corruption by state and local officials[:] the federal program bribery statute.”<sup>13</sup> Despite the absence of explicit bribery prohibitions in the relevant criminal statutes, federal courts—at the urging of federal prosecutors—have expanded the reach of these statutes to enable relatively unconstrained federal prosecution of alleged state and local corruption.

#### A. *The Unfathomable Honest-Services-Fraud Doctrine*

The honest-services-fraud doctrine evolved from the traditional mail fraud statute which, when originally adopted in 1872, prohibited “any scheme or artifice to defraud.”<sup>14</sup> Congress amended the statute in 1909 and elaborated on the original language, proscribing “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.”<sup>15</sup> Over time, the various courts of appeals began to approve prosecution where a third party was deprived of the “intangible right” of the offender’s “honest services.”<sup>16</sup> While traditional fraud involved an interaction between a perpetrator and his victim, the intangible rights theory added a third party:

Unlike fraud in which the victim’s loss of money or property supplied the defendant’s gain, with one the mirror image of the other, the honest-services theory targeted corruption that lacked similar symmetry. While the offender profited, the betrayed party suffered no deprivation of money or property;

<sup>12</sup> Beale, *supra* note 11, at 705

<sup>13</sup> *Id.* Professor Beale’s analysis of the legal developments that have permitted expanded federal prosecution of state and local officials identifies three key legal developments, two of which are central to *McDonnell*: “(1) the interpretation of extortion as including official bribery under the Hobbs Act, (2) the evolving interpretation of the jurisdictional provisions of the federal program bribery statute that have attenuated the connection between the bribe and the federal funds, and (3), most important, the development of the intangible rights theory of mail and wire fraud and the amendment of these statutes to include the fraudulent deprivation of honest services.” *Id.*

<sup>14</sup> *Skilling*, 561 U.S. at 399.

<sup>15</sup> 18 U.S.C. § 1341; see also *Skilling*, 561 U.S. at 399.

<sup>16</sup> *Skilling*, 561 U.S. at 400–01 (collecting cases and tracing history).

instead, a third party, who had not been deceived, provided the enrichment. For example, if a city mayor (the offender) accepted a bribe from a third party in exchange for awarding that party a city contract, yet the contract terms were the same as any that could have been negotiated at arm's length, the city (the betrayed party) would suffer no tangible loss. Even if the scheme occasioned a money or property *gain* for the betrayed party, courts reasoned, actionable harm lay in the denial of that party's right to the offender's "honest services."<sup>17</sup>

The theory was a hit: "by 1982, all Courts of Appeals had embraced the honest-services theory of fraud."<sup>18</sup>

In 1987, the Supreme Court, in *McNally v. United States*, invalidated the honest-services doctrine, refusing to "construe the [mail fraud] statute in a manner that leaves its outer boundaries ambiguous."<sup>19</sup> The mail fraud statute, the Court held, was limited to a scheme or artifice to deprive someone of tangible property and could not extend to intangible rights fraud. Congress responded to that ruling by enacting 18 U.S.C. § 1346, which reinstated and codified the honest-services doctrine through a statute that reads, in its entirety: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."<sup>20</sup>

Despite Congress's utter failure to respond to the concerns articulated in *McNally* or to define "the intangible right of honest services," in the decades that followed, courts and prosecutors joined in the fiction that the statute defined proscribed conduct with sufficient clarity to pass constitutional muster.<sup>21</sup> The courts of appeals "[u]niformly . . . declined to throw out the statute as irremediably

<sup>17</sup> *Id.* at 400 (citations omitted).

<sup>18</sup> *Id.* at 401.

<sup>19</sup> *McNally v. United States*, 483 U.S. 350, 360 (1987).

<sup>20</sup> 18 U.S.C. § 1346.

<sup>21</sup> As one scholar has observed, "[t]here is no federal criminal common law. But there is." Ben Rosenberg, *The Growth of Federal Criminal Common Law*, 29 *Am. J. Crim. L.* 193, 202 (2002). Put another way, "Congress must speak before anyone can be convicted of a federal crime, but so long as Congress troubles itself to utter even a single word, the Judiciary will obligingly write the sentence—indeed, the paragraph, the book, and the screen play—that brings a criminal prohibition to life." Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 *Buff. Crim. L. Rev.* 5, 6 (1997).

vague,” and instead merely “divided on how best to interpret the statute.”<sup>22</sup> It was not until 2010 that the Supreme Court acknowledged the obvious: the statute “raise[d] the due process concerns underlying the vagueness doctrine.”<sup>23</sup>

Despite having twice determined—first in *McNally* and then in *Skilling*—that the honest-services-fraud doctrine triggered substantial constitutional concerns, the Supreme Court in *Skilling* applied the doctrine of constitutional avoidance and concluded that the statute “should be construed rather than invalidated.”<sup>24</sup> The Court therefore adopted a limiting construction and held that the statute “criminalizes only the bribe-and-kickback core of the pre-*McNally* case law.”<sup>25</sup> The Court rejected the government’s argument that the honest services statute reached “undisclosed self-dealing . . . i.e., the taking of official action by [an] employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty.”<sup>26</sup> Instead, *Skilling* limited the statute’s reach to its supposed pre-*McNally* core: “offenders who, in violation of a fiduciary duty, participate[] in bribery or kickback schemes.”<sup>27</sup>

The Court confidently concluded that, so limited, the statute was not vague because it would “draw[] content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes,” including 18 U.S.C. § 201(b) (the bribery statute for federal officials), 18 U.S.C. § 666(a)(2) (the federal funds bribery statute), and 41 U.S.C. § 52(2) (the Anti-Kickback Act for federal contractors).<sup>28</sup> This limitation, the Court declared, would create “a uniform national standard for [honest services] prosecutions.”<sup>29</sup>

Three concurring justices were less sanguine about the Court’s limiting construction. Justice Scalia, joined by Justices Anthony Kennedy and Clarence Thomas, concurred in part and in the judgment, but critiqued the Court’s limiting construction for failing to “solve the

<sup>22</sup> *Skilling*, 561 U.S. at 403.

<sup>23</sup> *Id.* at 408.

<sup>24</sup> *Id.* at 404.

<sup>25</sup> *Id.* at 409 (emphasis in original).

<sup>26</sup> *Id.* at 409–11.

<sup>27</sup> *Id.* at 407.

<sup>28</sup> *Id.* at 412.

<sup>29</sup> *Id.* at 411 (quotation marks and citation omitted).

most fundamental indeterminacy: the character of the ‘fiduciary capacity’ to which the bribery . . . restriction applies.”<sup>30</sup> Indeed, Justice Scalia observed that among the courts of appeals that had considered the issue “[t]here was not even universal agreement concerning the *source* of the fiduciary obligation—whether it must be positive state or federal law . . . or merely general principles.”<sup>31</sup> In other words, “even with the bribery and kickback limitation the statute does not answer the question ‘What is the criterion of guilt?’”<sup>32</sup> The pre-*McNally* case law on which the Court relied failed completely, he observed, to provide a meaningful limitation:

The possibilities range from any action that is contrary to public policy or otherwise immoral, to only the disloyalty of a public official or employee to his principal, to only the secret use of a perpetrator’s position of trust in order to harm whomever he is beholden to. The duty probably did not have to be rooted in state law, but maybe it did. It might have been more demanding in the case of public officials, but perhaps not. At the time § 1346 was enacted there was no settled criterion for choosing among these options, for conclusively settling what was in and what was out.<sup>33</sup>

The *Skilling* majority rejected this criticism, noting that debates about the “source and scope of fiduciary duties” were “rare in bribe and kickback cases,” where, the majority asserted, “[t]he existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute.”<sup>34</sup>

Enter *McDonnell*, where the Court had to grapple with a variation of this question.

### *B. The Transformation of the Hobbs Act from Extortion Statute to Bribery Law*

McDonnell was also convicted of bribery under the Hobbs Act, a public corruption statute that traditionally targeted extortion. On its face, the Hobbs Act bars “obtaining of property from another, with

<sup>30</sup> *Id.* at 421 (Scalia, J., concurring).

<sup>31</sup> *Id.* at 417 (emphasis in original; citations omitted).

<sup>32</sup> *Id.* at 421.

<sup>33</sup> *Id.* at 420.

<sup>34</sup> *Id.* at 407 n.41 (majority op.).

his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”<sup>35</sup> Decisions initially “required proof of duress or fear on the part of the victim and did not reach the acceptance of voluntary payments to influence or procure official action.”<sup>36</sup> In the 1970s, however, courts began to allow prosecutions for payments made “despite the absence of fear, duress, or threats.”<sup>37</sup> In 1992, in *Evans v. United States*, the Supreme Court concluded that this extortion statute also encompassed bribery: “the Government need only show 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.”<sup>38</sup> Three dissenting justices charged that “the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws—acts of public corruption by state and local officials.”<sup>39</sup>

While expanding the Hobbs Act to cover bribery, *Evans* appeared to adopt a *quid pro quo* formulation: proof of bribery required an “agreement to perform specific official acts.”<sup>40</sup> Subsequent decisions, however, have read *Evans* as applying a watered down *quid pro quo* standard. In *United States v. Ganim*, then-Judge Sonia Sotomayor emphasized that *Evans* did not require a specific *quo*. “Rather, it is enough 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.’”<sup>41</sup> Thus, in *Ganim*, the defendant’s “proposal—that a specific act be identified and directly linked to a benefit at the time the benefit is received—demands too much.”<sup>42</sup> A series of subsequent cases—that were, like *Ganim*, cited favorably by the Supreme Court in *Skilling*—upheld or allowed what came to be known as a “stream of benefits” formulation, and this modified *quid pro quo* standard

<sup>35</sup> 18 U.S.C. § 1951(b)(2).

<sup>36</sup> Beale, *supra* note 11, at 706 (citing *McCormick v. United States*, 500 U.S. 257, 277–78 (1991) (Scalia, J., concurring) (collecting cases)).

<sup>37</sup> *Id.* at 706 n.28.

<sup>38</sup> *Evans v. United States*, 504 U.S. 255, 268 (1992).

<sup>39</sup> *Id.* at 290–91 (Thomas, J., dissenting).

<sup>40</sup> *Id.* at 268.

<sup>41</sup> *United States v. Ganim*, 510 F.3d 134, 145 (2d Cir. 2007) (Sotomayor, J.) (quoting *Evans*, 504 U.S. at 268).

<sup>42</sup> *Id.* at 145.

was applied to bribery in public corruption prosecutions under both the Hobbs Act and the honest-services statute.<sup>43</sup>

## II. In *McDonnell*, the Court Claimed to Impose Boundaries on the Bribery Prosecutions of State and Local Officials

### A. *Virginia Governor McDonnell Received over \$175,000 in Gifts and Loans from a Businessman*

The Supreme Court's recent attempt to articulate a coherent standard for public corruption prosecutions starred Bob McDonnell, the 71st governor of Virginia. McDonnell was elected governor in November 2009, after running a campaign focused on economic development, with the campaign slogan "Bob's for Jobs."<sup>44</sup> Jonnie Williams was one of his constituents and the CEO of Star Scientific, a company developing a nutritional supplement, Anatabloc, made from a tobacco derivative, anatabine. As part of its efforts to secure Food and Drug Administration (FDA) approval for its product, Star Scientific aimed to persuade Virginia public universities to conduct independent studies of Anatabloc.

McDonnell and Williams first met in 2009, when Williams offered McDonnell the use of his private plane during McDonnell's election campaign. They reconnected after the election, and over the next several years, Williams provided the governor and his wife gifts and loans

<sup>43</sup> United States v. Whitfield, 590 F.3d 325, 350 (5th Cir. 2009) (honest services and federal fund bribery prosecution); United States v. Kemp, 500 F.3d 257, 281–82, 284 n.15 (3d Cir. 2007) (concerning honest-services prosecution, but relying on watered down *quid pro quo* analysis from Hobbs Act case); see Skilling, 561 U.S. at 413 (citing Ganim, Whitfield, and Kemp); see also United States v. Kincaid-Chauncey, 556 F.3d 923, 943 (9th Cir. 2009) (honest services and Hobbs Act prosecution).

<sup>44</sup> The facts set forth in this section come from the Supreme Court's description of McDonnell's conduct. See McDonnell, 136 S. Ct. at 2361–64. The Court's decision lavishes substantially less detail on the underlying allegations than the Fourth Circuit did in its decision, which describes golf outings, Ferrari rides, and Mrs. McDonnell's dealings at length. See United States v. McDonnell, 792 F.3d 478, 487–93 (4th Cir. 2015); see also Gregory M. Gilchrist, *Corruption Law after McDonnell: Not Dead Yet* at 3 n.5, U. Penn. L. Rev. Online (July 4, 2016) (forthcoming), <http://ssrn.com/abstract=2811228> ("The Fourth Circuit decision, overruled by the Supreme Court, presents a far more detailed, and hence more disturbing, factual background."). The Supreme Court's recounting also notably highlights disagreements in the evidence, pointing to testimony that is more favorable to McDonnell, even if disputed by other witnesses. See 136 S. Ct. at 2363, 2364 (including testimony by McDonnell, as well as statements by two other witnesses, that cast the facts in a light more favorable to McDonnell).

valued at over \$175,000. Surprising as this sum may sound, all parties agree that, when McDonnell was governor, such gift-giving was *legal* under Virginia law.<sup>45</sup> The federal government, however, alleged that these payments violated federal law in that they were bribes—that is, funds given to McDonnell in exchange for his taking certain official acts. McDonnell was ultimately convicted of eleven counts of honest-services fraud, Hobbs Act bribery, and conspiracy to commit the two substantive charges. The Fourth Circuit affirmed his convictions.<sup>46</sup>

The parties agreed that to prove McDonnell guilty of bribery under the relevant statutes, the government would have to show that he committed an “official act” in exchange for the loans or gifts. The parties did not, however, agree on how to define “official act.” The government alleged that McDonnell engaged in at least five such acts:

- 1) “arranging meetings for [Williams] with Virginia government officials, who were subordinates of the Governor, to discuss and promote Anatabloc;”
- 2) “hosting, and . . . attending, events at the Governor’s Mansion designed to encourage Virginia university researchers to initiate studies of anatabine and to promote Star Scientific’s products to doctors for referral to their patients;”
- 3) “contacting other government officials in the [Governor’s Office] as part of an effort to encourage Virginia state research universities to initiate studies of anatabine;”
- 4) “promoting Star Scientific’s products and facilitating its relationships with Virginia government officials by allowing [Williams] to invite individuals important to Star Scientific’s business to exclusive events at the Governor’s Mansion;” and
- 5) “recommending that senior government officials in the [Governor’s Office] meet with Star Scientific executives to discuss ways that the company’s products could lower healthcare costs.”<sup>47</sup>

<sup>45</sup> The Virginia legislature has since revised the law to prohibit gift-giving on such an extraordinary scale. See Patrick Wilson, *Virginia Lawmakers Approve New Gift Limit Rules*, (Norfolk) *Virginian-Pilot*, Apr. 18, 2015, [http://pilotonline.com/news/government/politics/virginia/virginia-lawmakers-approve-new-gift-limit-rules/article\\_3bf297a7-ac6b-5501-884b-20cc62733a51.html](http://pilotonline.com/news/government/politics/virginia/virginia-lawmakers-approve-new-gift-limit-rules/article_3bf297a7-ac6b-5501-884b-20cc62733a51.html).

<sup>46</sup> *United States v. McDonnell*, 792 F.3d 478, 487–93 (4th Cir. 2015).

<sup>47</sup> 136 S. Ct. at 2365–66 (quoting indictment).

To understand the extent of McDonnell's behavior—both what it did and did not entail, as well as some of the more unsavory elements of the timeline—requires a fuller recounting of the facts. After the election, McDonnell and Williams had dinner in New York, at which McDonnell's wife, Maureen, was present. Among the subjects of conversation at dinner were Mrs. McDonnell's search for an inauguration gown. Williams offered to purchase a dress, but, after speaking with the governor's counsel, Mrs. McDonnell declined the offer.

Almost a year later, in October 2010, Williams raised with McDonnell the question of persuading Virginia public universities to conduct research studies on anatabine. McDonnell introduced Williams to Virginia's Secretary of Health and Human Resources, Dr. William Hazel; the secretary took a meeting with Williams but did nothing further to promote anatabine studies.

Six months later, Mrs. McDonnell invited Williams to sit with her husband at a political rally. Prior to the rally, Williams took Mrs. McDonnell on a \$20,000 shopping spree; after the rally, Williams had dinner at the governor's mansion, during which he again discussed his nutritional supplement. After the dinner, Williams had a research article sent to Mrs. McDonnell, which she in turn forwarded to her husband. McDonnell then made some financial inquiries: he contacted his sister regarding struggling rental properties he and his sister owned and emailed his daughter about the expenses for her wedding. The next day, Mrs. McDonnell met with Williams and described the family's financial issues. She also highlighted her experience selling nutritional supplements and indicated that she could help Williams with his product, asking for financial help in exchange. At her request, Williams provided the McDonnells with a \$50,000 loan and a \$15,000 gift to fund some of their daughter's wedding expenses. Williams testified that he called McDonnell to confirm that he was aware of these arrangements; McDonnell denied having any such conversation with Williams.

In June 2011, Williams sent Mrs. McDonnell's chief of staff a letter addressed to the governor describing a proposed research protocol; McDonnell forwarded the letter to Dr. Hazel. In July 2011, shortly after a trip to Williams's vacation home, the governor asked Dr. Hazel to send an aide to a meeting with Williams and Mrs. McDonnell to discuss research studies. The aide attended the meeting, then sent a "polite blow-off" email. Around this time, Williams purchased a

Rolex watch at Mrs. McDonnell's request, which she later gave to the governor as a Christmas gift.

In August 2011, the McDonnells hosted an event for Star Scientific at the governor's mansion—described variously as a launch for Williams's product or merely as lunch—at which Star Scientific encouraged researchers to study anatabine and handed out \$25,000 checks for their use in preparing the needed grant proposals. At the event, McDonnell asked researchers whether this was worth pursuing and deflected a request for funding support by Williams, indicating that he had "limited decision-making power in this area."

In January 2012, Mrs. McDonnell requested a further loan for the rental properties; McDonnell then called Williams to discuss a \$50,000 loan. Williams subsequently complained to Mrs. McDonnell that he was not making headway with Virginia universities. Mrs. McDonnell transmitted the complaint to the governor and emailed his counsel asking—on behalf of the governor—why research studies were not moving forward. In mid-February, the governor emailed Williams again about the \$50,000 loan and then, within minutes, emailed his counsel asking to speak about Star Scientific's product. The following day, the governor's counsel called Star Scientific to "change the expectations" the company had regarding the governor's role.

In late February 2012, McDonnell hosted a healthcare industry reception to which Mrs. McDonnell invited several guests selected by Williams. The governor and Williams spoke again about the \$50,000 loan, which Williams provided to McDonnell shortly thereafter.

In March 2012, McDonnell met with two state employees to discuss the state employee health plan. During the meeting the governor took an Anatabloc pill and proclaimed that they were "working well for him" and "would be good for" state employees. He asked the two state employees to meet with Star Scientific. They did not; moreover, the state employee health plan does not cover nutritional supplements.

In May 2012, McDonnell requested and received an additional \$20,000 loan.

*B. The Supreme Court Rejected the Government's Broad Definition of Bribery and Purported to Apply a "More Bounded Interpretation"*

Because neither the honest-services statute nor the Hobbs Act defines bribery, the parties agreed to define bribery using the "official act" requirement set forth in the federal bribery statute for federal

employees, 18 U.S.C. § 201. Thus, they agreed that the government needed to prove that “McDonnell committed or agreed to commit an ‘official act’ in exchange for the loans and gifts from Williams.”<sup>48</sup>

The federal employee bribery statute defines an “official act” as “any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.”<sup>49</sup> The government argued that this language should be viewed broadly to include “any decision or action, on any question or matter, that may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity.”<sup>50</sup> This definition, the Court concluded, “encompasses nearly any activity by a public official.”<sup>51</sup> McDonnell argued for a narrower reading of the statute, arguing that an “official act” was limited to acts that “direct[ ] a particular resolution of a specific governmental decision.”<sup>52</sup> McDonnell also challenged the honest-services statute and Hobbs Act as unconstitutionally vague.

The Supreme Court—with a nod to “the constitutional concerns raised by Governor McDonnell”—adopted “a more bounded interpretation of ‘official act.’”<sup>53</sup> An “official act,” the Court concluded,

is a decision or action on a “question, matter, cause, suit, proceeding or controversy.” The “question, matter, cause, suit, proceeding or controversy” must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is “pending” or “may by law be brought” before a public official.<sup>54</sup>

The public official “must make a decision or take an action on” the relevant matter “or agree to do so.” The official may (1) act

<sup>48</sup> 136 S. Ct. at 2365.

<sup>49</sup> 18 U.S.C. § 201(a)(3).

<sup>50</sup> McDonnell, 136 S. Ct. at 2367 (quoting the government’s brief).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* (quoting McDonnell’s brief).

<sup>53</sup> *Id.* at 2368.

<sup>54</sup> *Id.* at 2371–72.

directly, or (2) “us[e] his official position to exert pressure on another official to perform an ‘official act,’” or (3) “advise another official, knowing or intending that such advice will form the basis for an ‘official act’ by another official.” Merely “[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.”<sup>55</sup> Or, as the Court stated repeatedly, such actions, “standing alone,” do not qualify as official acts.<sup>56</sup>

Relying in particular on three amicus briefs submitted by former federal officials, former Virginia attorneys general, and former state attorneys general from other states—all of which crossed party lines—the Court agreed that the government’s reading of the statute would constitute a “breathtaking expansion of public-corruption law [that would] likely chill . . . officials’ interactions with the people they serve and thus damage their ability effectively to perform their duties.”<sup>57</sup> As the Court explained, “[i]n the Government’s view, nearly anything a public official accepts—from a campaign contribution to lunch—counts as a *quid*; and nearly anything a public

<sup>55</sup> *Id.* at 2372.

<sup>56</sup> *Id.* at 2368, 2370.

<sup>57</sup> *Id.* at 2372 (quoting brief for former federal officials and noting that briefs from both Virginia and non-Virginia attorneys general echo these concerns). Thirteen amicus briefs in support of McDonnell were filed by a diverse array of signatories from across the political spectrum, including briefs by former federal officials, former state attorneys general (non-Virginian), former Virginia attorneys general, current and former members of the Virginia assembly, Virginia law professors, non-Virginia law professors, prominent civil rights advocates, and prominent business leaders. Five amicus briefs were filed in support of the government; those briefs focused primarily on limiting the expansion of the Supreme Court’s recent First Amendment campaign finance case law. Like the briefs in support of McDonnell, the First Amendment briefs also appear to have influenced the Court in that the First Amendment is never explicitly mentioned in the decision. Indeed, although McDonnell’s defense could be handily summarized in a quote from the most recent campaign finance decision, *McCutcheon v. FEC*—“[i]n gratiation and access . . . are not corruption” *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (quoting *Citizens United v. FEC*, 558 U.S. 310, 360 (2010))—Chief Justice Roberts, who authored both *McDonnell* and *McCutcheon*, omitted this language entirely from *McDonnell*. Thus, despite the fears of amici supporting the government, the Court did not—at least not explicitly—adopt the position that “*Citizens United* has eaten the corruption statutes.” See Garrett Epps, *Defining Corruption Downward*, *The Atlantic* (Apr. 26, 2015), <http://www.theatlantic.com/politics/archive/2016/04/bob-mcdonnell-corruption/479964>.

official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*.”<sup>58</sup> However,

conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time. The basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns—whether it is the union official worried about a plant closing or the homeowners who wonder why it took five days to restore power to their neighborhood after a storm. The Government’s position could cast a pall of potential prosecution over these relationships if the union had given a campaign contribution in the past or the homeowners invited the official to join them on their annual outing to the ballgame. Officials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse.<sup>59</sup>

The government’s definition, the Court concluded, failed to meet basic due process standards because “[u]nder the ‘standardless sweep’ of the Government’s reading, public officials could be subject to prosecution without fair notice, for the most prosaic interactions.”<sup>60</sup> In short, “[i]nvolving so shapeless a provision to condemn someone to prison for up to 15 years raises the serious concern that the provision does not comport with the Constitution’s guarantee of due process” and would implicate concerns about federalism, because state sovereignty “includes the prerogative to regulate the permissible scope of interactions between state officials and their constituents.”<sup>61</sup>

Because the jury was not correctly instructed on the definition of “official act,” the Supreme Court vacated McDonnell’s convictions. Having redefined “official act” to narrow its meaning, the Court rejected McDonnell’s vagueness challenge. Finally, the Court instructed the appeals court to determine whether McDonnell could be retried: if the Fourth Circuit concludes that there is sufficient evidence for a jury to convict McDonnell of “committing or agreeing to

<sup>58</sup> McDonnell, 136 S. Ct. at 2372.

<sup>59</sup> *Id.* (emphasis in original).

<sup>60</sup> *Id.* at 2373.

<sup>61</sup> *Id.* (quotation marks and citation omitted).

commit” an “official act” under the narrowed definition of “official act,” then his case “may be set for a new trial.”<sup>62</sup>

### III. *McDonnell* Did Not Create Coherent Criteria for Public Corruption Prosecutions

While promptly described—and decried—as a decision that will drastically limit public corruption prosecutions,<sup>63</sup> closer examination suggests that the constraints imposed by the Court are illusory or limited at best. Indeed, the decision reads as a compromise: firm general statements are followed by specific examples that undercut the broader rules announced. Given the potential for the Court’s decision about a politician who was once a rising star in the Republican Party to be perceived as political, the Court’s unanimity may have been a concerted effort to find narrow common ground in order to limit such criticism and to preserve the Court’s perceived institutional legitimacy.<sup>64</sup> Under scrutiny, the cracks in the decision appear: the definition of “official act” is not as narrow as it seems—and certainly leaves room for substantial expansion; the decision raises unanswered questions about how to treat prior precedents; and more fundamentally, the decision fails to address the problems created (or at least perpetuated) by *Skilling*.

#### A. *The Definition of “Official Act” Is Murky at Best and Will Expand under Pressure*

While *McDonnell* purported to adopt a “more bounded interpretation” of “official act” and to reject the government’s view that anything

<sup>62</sup> *Id.* at 2375.

<sup>63</sup> Lyle Denniston, Opinion Analysis: New Barrier to Public Corruption Cases, SCOTUSblog, June 27, 2016, <http://www.scotusblog.com/2016/06/opinion-analysis-new-barrier-to-public-corruption-cases>; Amy Davidson, The Supreme Court’s Bribery-Blessing McDonnell Decision, New Yorker, June 27, 2016, <http://www.newyorker.com/news/amy-davidson/the-supreme-courts-bribery-blessing-mcdonnell-decision>; Dahlia Lithwick, Supreme Court Breakfast Table: Entry 21: Dietary Supplement Peddlers: They’re Just Like You and Me, Slate, June 27, 2016, [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2016/supreme\\_court\\_breakfast\\_table\\_for\\_june\\_2016/the\\_bob\\_mcdonnell\\_ruling\\_resulted\\_in\\_some\\_absurd\\_analogies.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2016/supreme_court_breakfast_table_for_june_2016/the_bob_mcdonnell_ruling_resulted_in_some_absurd_analogies.html); but see Gilchrist, *supra* note 44 (arguing that corruption law is not dead yet).

<sup>64</sup> Alternately, or perhaps additionally, the dissenters in the campaign finance cases may have seen the value of joining a majority decision to prevent any further expansion of the *Citizens United* line of cases. See also *supra* note 57 (pointing out the conspicuous absence of any First Amendment discussion).

a public official does is official, the allegedly narrow definition may not be so narrow. An official act, the Court explained, is a “formal exercise of governmental power,” akin to a lawsuit, agency determination, or committee hearing, and it must be “specific and focused,” as well as pending or capable of coming before a public official. In other words, an official act is restricted to the formal exercise of governmental power on specific matters.

But the Court’s application of this standard immediately muddies the waters. The decision “to initiate a research study” would, for instance, constitute official action.<sup>65</sup> While such a decision retains some recognizable relationship to the formal exercise of governmental power (in particular, because it involves an expenditure), it sounds decidedly less formal than a lawsuit, agency determination, or committee hearing. Moreover, the Court explained that a “qualifying step” on the way to initiating a research study, “such as narrowing down the list of potential research topics,” would also constitute official action.<sup>66</sup> However, “[s]etting up a meeting, hosting an event, or calling an official . . . merely to talk about a research study or to gather additional information” would not.<sup>67</sup> There is a very fine line between “narrowing down the list of potential research topics” and “gather[ing] additional information”—which could, presumably, be a step on the way to narrowing down the topics. One hint about how to draw the appropriate distinction may lie in the Court’s explanation that to be “pending” or capable of being brought before a public official, a matter must be “the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete.”<sup>68</sup> The Court may also have been making an implicit distinction between “pure” speech and conduct.

However, even this very fine distinction between a meeting (not an official act) and something that can be “checked off as complete” (an official act) disappears completely when the question shifts to performance of an official act. As the Court explained, a public official performs—or promises to perform—such an act by (1) doing it directly; (2) exerting pressure on another official to perform an

<sup>65</sup> McDonnell, 136 S. Ct. at 2370.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 2369.

official act; or (3) advising an official, knowing that the advice will form the basis for that individual to engage in an official act. Thus, returning to the example of the research project, scheduling a meeting is not, “standing alone,” an official act, *but* “[a] jury could conclude” that in doing so “the official was attempting to pressure or advise another official on a pending matter.”<sup>69</sup> In other words, the relationship between a public official’s conduct and an official act can be highly attenuated and still meet the legal standard, and scheduling a meeting will not trigger liability, except when it does.

Moreover, the government has wide latitude in proving its case: “to determine whether the public official agreed to perform an ‘official act,’ . . . [t]he jury may consider a broad range of pertinent evidence, including the nature of the transaction.”<sup>70</sup> Thus, the government can offer abundant evidence that the defendant seems to be a bad person and can use that evidence to try to persuade the jury to hold him liable for bribery, so long as it can find *some* connection to an official act—be it a “qualifying step” on the road to a decision or an attempt to exert pressure or offer advice to another official who is performing an official act.

While the Court’s examples permit a broad reading of “official act,” practical pressure to expand the definition will come from cases involving other types of public officials. The *McDonnell* standard is informed by the conduct of a governor—and is problematic even in that context—but the standard is even more unwieldy when applied to lower-level employees. As the Supreme Court recognized during oral argument, the conclusion that scheduling a meeting is not an official act has a perplexing result: it suggests not only that a public official can charge for the privilege of a meeting (to the extent that public officials do not already do so in the context of campaign donations), but that a lower-level employee whose function is to manage his boss’s calendar can be paid to set up a meeting with his boss without either of those payments amounting to a bribe under federal law.<sup>71</sup> Indeed, the Supreme Court’s focus on the formal exercise of

<sup>69</sup> *Id.* at 2371.

<sup>70</sup> *Id.* As one scholar has observed, public corruption cases are sometimes tried as “extended smear campaigns” in which the usual evidentiary rules barring propensity or “other acts” evidence are discarded. See Alschuler, *Terrible Tools*, *supra* note 11, at 22 & n. 90.

<sup>71</sup> That such conduct may not be barred under federal law does not, of course, mean that it is legal or otherwise permitted; states have numerous laws, both civil and criminal, that regulate the conduct of state and local officials.

power can be read as permitting—at least under federal law—some pay-to-play conduct targeting state and local employees whose jobs may not appear to involve “official acts.” Put to the test, however, courts are likely to balk at this absurd result and may therefore respond by expanding the definition of “official act” to its very limits, leaving only “[s]etting up a meeting, talking to another official, or organizing an event”<sup>72</sup> outside the boundaries of an official act, while shoehorning all other conduct into the Court’s definition.

Although the Court recognized that leaving the contours of the “official act” definition broad and murky poses grave risks of “prosecution without fair notice” under a “shapeless provision,”<sup>73</sup> its decision may do very little to prevent precisely those risks.

*B. Whether the Stream of Benefits Theory Survives McDonnell Is Unclear*

The Court’s decision indirectly raises at least one other important question: can bribery still be proved on a stream of benefits theory, meaning on a showing that a public official has agreed to perform some undefined series of official acts in exchange for “a payment to which he was not entitled”?<sup>74</sup> While *McDonnell* did not squarely address this issue, one fair reading of the decision is that it silently rejected the stream of benefits theory.

The first hint that the stream of benefits theory may no longer be viable is the Court’s requirement of specificity: an “official act” must “be something specific and focused that is ‘pending’ or ‘may by law be brought’ before a public official.”<sup>75</sup> The next clue is that while *Skilling* favorably cited cases that endorsed a stream of benefits theory—including then-Judge Sotomayor’s decision in *Ganim*—those citations are conspicuously absent from *McDonnell*.<sup>76</sup> Instead, reciting the teachings of “this Court’s precedent”—but not citing the

<sup>72</sup> 136 S. Ct. at 2372.

<sup>73</sup> *Id.* at 2373.

<sup>74</sup> See *Ganim*, 510 F.3d at 145 (quoting *Evans*, 504 U.S. at 268); see also *supra* note 43 (collecting stream of benefits cases).

<sup>75</sup> 136 S. Ct. at 2372.

<sup>76</sup> *Skilling*, 561 U.S. at 413 (citing *United States v. Ganim*, 510 F.3d 134, 147–49 (2d Cir. 2007) (Sotomayor, J.); *United States v. Whitfield*, 590 F.3d 325, 352–53 (5th Cir. 2009); *United States v. Kemp*, 500 F.3d 257, 281–86 (3d Cir. 2007)). While *Skilling* did not formally endorse the stream of benefits analysis, the decision cited directly to the stream of benefits discussions in each of these three cases.

relevant precedents—the Court in *McDonnell* qualified the *quid pro quo* requirement as follows: it “need not be explicit, and the public official need not specify *the means* that he will use to perform his end of the bargain.”<sup>77</sup> The official need not even intend to carry out the official act; he need only “receive[] a thing of value knowing that it was given with the expectation that the official would perform an ‘official act’ in return.”<sup>78</sup> Thus, although “the means” need not be specified, it appears that “an” official act must be specified.

Of course, given the broad acceptance of the stream of benefits formulation to date, and because the Court failed to indicate whether the doctrine remains viable, *McDonnell* will likely generate inconsistent decisions in the courts of appeals, thereby continuing to undermine the Court’s stated goal of a “uniform national standard” for these federal prosecutions. The other possibility, of course, given the history of expansive readings of public corruption statutes, is that the courts of appeals will undercut any specificity requirement by reading “need not specify the means” to permit a stream of benefits theory, thereby further expanding the contours of the Court’s “bounded interpretation.”

### C. *McDonnell Failed to Resolve the Problems Created (or Perpetuated) by Skilling*

Finally, *McDonnell* only partly attempted to answer the question that *Skilling* ignored, “what is the criterion of guilt?”<sup>79</sup> What distinguishes a legitimate transaction from an illegitimate transaction? Even assuming that the Court’s definition of official act really is bounded, is every transaction that can be connected to an official act—directly, as a qualifying step, or through pressure or advice—now bribery under the relevant federal statutes? Or are there still instances when official acts may legitimately be exchanged for items of value without rising to the level of bribery? Politicians, for instance, routinely make political appointments to people who have provided them with items that could be considered things of value under federal public corruption statutes, including campaign contributions,

<sup>77</sup> 136 S. Ct. at 2371 (emphasis added).

<sup>78</sup> *Id.*

<sup>79</sup> *Skilling*, 561 U.S. at 421 (Scalia, J., dissenting).

travel reimbursements, or *de minimis* gifts.<sup>80</sup> Are all exchanges involving such acts unlawful, and if not, where is the line?<sup>81</sup>

A high-profile prosecution like the pursuit of McDonnell risks obscuring the reality of the part-time public servant or the citizen legislator. From state legislators—who serve on a part-time basis in 40 states<sup>82</sup>—to the many individuals who serve in part-time or unpaid roles on state, local, and municipal boards that oversee a wide range of government functions, state and local governance relies on the willingness of citizens to perform civic functions at little or no pay. In many states,

[l]ocal politicians are allowed, if not encouraged, to maintain private careers and businesses to support themselves and their families. Salaries paid to such political figures typically are modest, necessitating that anyone other than those with

<sup>80</sup> See McDonnell, 136 S. Ct. at 2372 (“In the Government’s view, nearly anything a public official accepts—from a campaign contribution to lunch—counts as a *quid*.”); see also Brief of Former Federal Officials as Amici Curiae in Support of Petitioner at 10–16, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474) (discussing the breadth of the *quid* requirement in federal corruption statutes, especially as applied to state and local officials), available at <http://www.scotusblog.com/case-files/cases/mcdonnell-v-united-states/>. While campaign finance contributions receive some additional protection under the law—the *quid pro quo* exchange must be “explicit,” McCormick, 500 U.S. at 273, but need not be “express” and may be inferred, see, e.g., Evans v. United States, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring in part and concurring in the judgment); United States v. Siegelman, 640 F.3d 1159, 1171–72 (11th Cir. 2011) (per curiam)—there are many examples of obvious correlations between donations and appointments, including at the federal level in the appointment of ambassadors. See, e.g., Max Fisher, This Very Telling Map Shows Which U.S. Ambassadors Were Campaign Bundlers, Wash. Post, Feb. 10, 2014, <https://www.washingtonpost.com/news/worldviews/wp/2014/02/10/this-very-telling-map-shows-which-u-s-ambassadors-were-campaign-bundlers>.

<sup>81</sup> Prosecutors have certainly pursued and obtained convictions in appointments cases. See Harvey Silverglate, Blagojevich Convicted, But Was He Really Guilty?, Forbes.com, June 29, 2011, <http://www.forbes.com/sites/harveysilverglate/2011/06/29/blagojevich-convicted-but-was-he-really-guilty/#192a59735dc3>; Harvey A. Silverglate & Daniel Schneider, Lessons for All as the Probation Department Saga Ends, Mass. Lawyers Weekly, July 24, 2014, <http://bit.ly/2aFqWec>; see also United States v. Blagojevich, 794 F.3d 729, 734 (7th Cir. 2015) (affirming most counts of conviction, but vacating select counts where the jury instructions could have permitted the jury to convict for political log-rolling rather than a private payment).

<sup>82</sup> See Nat’l Conf. of State Legislatures, Full- and Part-Time Legislatures (June 1, 2014), <http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx>.

inherited or earned wealth maintain an income-generating occupation while in public office. . . . [S]tate and local laws and political culture tolerate local officials' engaging in private business dealings that almost certainly benefit from their holding municipal office, so long as they do not engage in official acts, such as voting on municipal bodies on matters that directly affect their own financial interests.<sup>83</sup>

Such arrangements can be mutually beneficial, as when state and local governments acquire the expertise of individuals whose private-sector skills apply directly to public-sector decisionmaking; the attendant risk, however, is that these individuals who enter public service will also reap improper personal financial benefits from such public service. Balancing that risk requires an understanding of what conduct is and is not permitted, and that understanding has to recognize the reality that part-time and unpaid state and local officials must do things to make money, and that their income-earning activity may intersect with their public roles. Individuals may, for instance, enter into consulting contracts or perform lobbying work connected to their public roles. When individuals who are part-time public officials act in their private capacity as lobbyists or consultants and in that capacity exert pressure or advise other public officials, is that always bribery, or is there space for legitimate private-sector activity that touches on a public-sector role? State and local ethical codes and disclosure laws typically regulate such conduct. But under federal law, even with the Court's definition of "official act," what distinguishes permitted financial transactions and proscribed transactions for part-time and unpaid public officials? If all transactions that can be linked to an official act are potentially bribery, then the scope of federal authority to prosecute part-time state and local officials is staggering.

Defining bribery or corruption "means identifying as immoral or criminal a subset of transactions and relationships within a set that,

<sup>83</sup> Harvey A. Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* 5 (2011); see also *id.* at 3–14 (discussing the federal prosecution of Hialeah Mayor Paul Martinez, a real estate developer accused of profiting from his political position, who barely survived prosecution by a U.S. Attorney whose wife ultimately ran for, and won, the congressional seat that had been eyed by Mayor Martinez until the indictment, further raising eyebrows as to the propriety, as well as the legal validity, of the prosecution).

generally speaking, is fundamentally beneficial to mankind, both functionally and intrinsically.”<sup>84</sup> That definition—at least under federal law—remains incomplete.

The missing element may be that the public official must breach a fiduciary duty to be liable. *Skilling* required violation of such a duty as an element of a bribery or kickback scheme, at least under the honest-services statute, but failed to define the source of that duty, a failure that Justice Scalia charged created a “fundamental indeterminacy” in the statute.<sup>85</sup> As Justice Scalia noted, the pre-*McNally* cases located the fiduciary duty variously in “positive state or federal law,” “general principles,” “trust law,” and even the “general law of agency.”<sup>86</sup> Where courts relied on a “federal, common-law fiduciary duty, the duty remained hopelessly undefined,” with courts describing the duty “in astoundingly broad language.”<sup>87</sup> And “[m]any courts held that some *je-ne-sais-quoi* beyond a mere breach of fiduciary duty was needed to establish honest-services fraud,” although “there was disagreement as to what the addition should be.”<sup>88</sup>

After *McNally* and before *Skilling*, the courts of appeals remained split as to the fiduciary duty requirements. The Second and Eighth Circuits concluded that breach of a fiduciary duty was not even an element of an honest-services violation.<sup>89</sup> The Fifth Circuit required a state law violation to sustain an honest-services conviction,<sup>90</sup> while

<sup>84</sup> Zephyr Teachout, *Corruption in America* 18 (2014) (quoting Daniel Hays Lowenstein, *For God, for Country, or for Me*, 74 Cal. L. Rev. 1479, 1481 (1986)). This is, of course, not the only way to define corruption. An Aristotelian conception would require that all rulers “govern with a view to the common interest” because “governments which rule with a view to the private interest . . . are perversions.” Alschuler, *Criminal Corruption*, *supra* note 11, at 1–2 (quoting Aristotle, *Politics* 59 (Benjamin Jowett, tr.; Forgotten Books ed. 2007) and noting that our public corruption laws are, of course, vastly under-inclusive in the Aristotelian sense).

<sup>85</sup> 561 U.S. at 407, 421 (Scalia, J., dissenting).

<sup>86</sup> *Id.* at 417–18.

<sup>87</sup> *Id.* at 418.

<sup>88</sup> *Id.* at 419.

<sup>89</sup> *United States v. Ervasti*, 201 F.3d 1029, 1036 (8th Cir. 2000); *United States v. Sancho*, 157 F.3d 918, 920 (2d Cir. 1998), overruled on other grounds by *United States v. Rybicki*, 354 F.3d 124, 144 (2d Cir. 2003) (en banc); see also *Rybicki*, 354 F.3d at 155 (Raggi, J., concurring).

<sup>90</sup> *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997) (en banc); see also *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006) (honest services owed under state law include “fiduciary duties defined by the employer-employee relationship”).

the First, Third, Fourth, and Seventh Circuits concluded that state law could be used to supply the fiduciary obligation (but was not necessarily required).<sup>91</sup> By contrast, the Sixth, Ninth, and Eleventh Circuits explicitly held that “[f]ederal law governs the existence of fiduciary duty under the mail fraud statute.”<sup>92</sup>

Since *Skilling* adopted its limiting construction of the statute, the courts of appeals that have squarely addressed fiduciary duty have consistently acknowledged that breach of such a duty *is* required to establish an honest services violation.<sup>93</sup> However, beyond that basic point, the courts of appeals continue—as before *McNally* and *Skilling*—to disagree about the nature, source, and scope of that duty. Consistent with its pre-*Skilling* jurisprudence, the Fifth Circuit still looks to—and indeed, may still even *require*—violation of a state law duty to sustain an honest services conviction.<sup>94</sup> The Second Circuit, while recognizing the existence of the duty, has not clearly identified its source, noting that the “existence of a fiduciary duty is a question of fact for the jury.”<sup>95</sup> The Ninth Circuit has held that the duty “is not limited to a formal ‘fiduciary’ relationship well-known in the law,”<sup>96</sup> while the Eleventh Circuit has described the duty broadly, stating

<sup>91</sup> See *United States v. Sorich*, 523 F.3d 702, 712 (7th Cir. 2008); *United States v. Murphy*, 323 F.3d 102, 116–17 (3d Cir. 2003); *United States v. Sawyer*, 239 F.3d 31, 41–42 (1st Cir. 2001); *United States v. Bryan*, 58 F.3d 933, 941–42 (4th Cir. 1995).

<sup>92</sup> *United States v. Frost*, 125 F.3d 346, 366 (6th Cir. 1997); see also *United States v. Weyhrauch*, 548 F.3d 1237, 1248 (9th Cir. 2008) (honest services statute establishes a uniform federal standard); *United States v. deVegter*, 198 F.3d 1324, 1329 (11th Cir. 1999) (“The nature and interpretation of the duty owed is a question of federal law.”).

<sup>93</sup> See, e.g., *United States v. Halloran*, 821 F.3d 321, 337–40 (2d Cir. 2016); *United States v. Aunspaugh*, 792 F.3d 1302, 1306 (11th Cir. 2015); *United States v. Nayak*, 769 F.3d 978, 981 (7th Cir. 2014); *United States v. Milovanovic*, 678 F.3d 713, 722 (9th Cir. 2012) (en banc); *United States v. Urciuoli*, 613 F.3d 11, 26–27 (1st Cir. 2010).

<sup>94</sup> See *United States v. Teel*, 691 F.3d 578, 584 (5th Cir. 2012) (“[W]e read *Skilling* as recognizing that § 1346 prosecutions may involve misconduct that is also a violation of state law.”); see also *United States v. Grace*, 568 F. App’x 344, 348–49 (5th Cir. 2014) (“In order to convict for the federal crime of honest services fraud under § 1346, the government must prove that the conduct of a state official breached a duty respecting the provision of services owed to that official’s employer under state law.” (citation and quotation marks omitted)); *United States v. Sanchez*, 502 F. App’x 375, 381 (5th Cir. 2012) (unpublished) (finding error in federal-law-based instructions because *Skilling* “does not obviate the requirement that a state official, when prosecuted under § 1346, owe a state-law duty”).

<sup>95</sup> *Halloran*, 821 F.3d at 339–40 (2d Cir. 2016).

<sup>96</sup> *Milovanovic*, 678 F.3d at 724.

that “[p]ublic officials inherently owe a fiduciary duty to the public to make governmental decisions in the public’s best interest.”<sup>97</sup>

Wholly aside from the disconcerting disagreement among the federal appellate circuits, the messiness of the law in this area is exacerbated by the specter of undue federal discretion to exercise control—in the form of criminal prosecutions—over local political culture. That *McDonnell* did not resolve these doctrinal disagreements between the courts of appeals (and did not address these issues at all with respect to private sector prosecutions) means that they will, of course, continue to develop, with federal prosecutions proceeding under theories of liability that are not only vague, but are inconsistent across the country.<sup>98</sup>

The Supreme Court has acknowledged “that the failure of persistent efforts . . . to establish a standard can provide evidence of vagueness.”<sup>99</sup> By this measure, the honest-services doctrine is—as it should be—doomed.

#### **IV. Our Diverse Society Should Not Tolerate Vague Public Corruption Laws That Give Federal Prosecutors Wide Latitude to Regulate State and Local Political Conduct**

The fundamental problem with federal public-corruption prosecutions of state and local officials is—and remains after *Skilling* and *McDonnell*—that they proceed under statutes that do not explain

<sup>97</sup> *United States v. Nelson*, 712 F.3d 498, 509 (11th Cir. 2013) (quotation marks and citation omitted). The Eleventh Circuit’s standard derives substantially from that court’s decision in *United States v. Lopez-Lukis*, 102 F.3d 1164 (11th Cir. 1997), a case that interpreted the honest services statute based on a perceived mandate to construe it broadly, see *Lopez-Lukis*, 102 F.3d at 1171, and while the logic underpinning its conclusion has not survived *Skilling*, the court’s broad interpretation nonetheless has.

<sup>98</sup> One issue that *McDonnell* may help resolve is the Eleventh Circuit’s ongoing reluctance to definitively conclude that a *quid pro quo* is required in honest services convictions. See *Aunspaugh*, 792 F.3d at 1307 (“We have not decided whether a *quid pro quo* is required . . . and we need not do so here.”). There remains an underlying and related dispute about the scope of the *quid pro quo* requirement: the Supreme Court noted in *Skilling* that one of the statutes from which the honest services statute derives its content is the federal funds bribery statute, 18 U.S.C. § 666, *Skilling*, 561 U.S. at 412, and there is a circuit split around the *quid pro quo* requirement for that statute, see, e.g., Lauren Garcia, Note, *Curbing Corruption or Campaign Contributions? The Ambiguous Prosecution of Implicit Quid Pro Quos under the Federal Funds Bribery Statute*, 65 *Rutgers L. Rev.* 229, 239–46 (2012).

<sup>99</sup> *Johnson v. United States*, 135 S. Ct. 2551, 2558 (2015) (citation and quotation marks omitted).

ahead of time what conduct is permitted and what is proscribed. The development of the case law in public corruption cases has not solved the problem. To fall back on a cliché, bad facts make bad law. Public corruption cases involve allegations that public officials have gravely betrayed their obligations to a higher purpose—public service. The sense of outrage surrounding allegations of public corruption is therefore elevated, while, due to the parties involved, the cases themselves tend to be headline-worthy, whether in national or local press. Any court or individual who appears to endorse a politician's bad behavior risks immediate—and public—condemnation.

The pressure to contort the law to fit the alleged crime is therefore immense and occurs under public scrutiny. Indeed, even the Supreme Court repeatedly registered its distaste for McDonnell's "tawdry" conduct, thereby anticipating and trying to preempt the inevitable criticism that its decision would trigger. Lower courts face these same pressures. That no lower court recognized the facial vagueness of the honest-services statute for over two decades after *McNally*—despite the statute being plainly unintelligible to ordinary human beings—is one obvious illustration of this point. Likewise, after *Skilling*, rather than seeking to define "bribery" and "kickbacks" narrowly, courts have chosen instead to squeeze a range of conduct into the honest-services rubric.<sup>100</sup>

The federal government has shown no inclination to interpret these laws narrowly to avoid constitutional concerns. Indeed, despite having been warned in *Skilling* of the serious constitutional implications of its broad statutory interpretations, the government in *McDonnell* once again presented an unbounded definition of misconduct that the Court sharply rejected out of hand as dangerously vague.<sup>101</sup> In addition to ambition, both personal and political, one factor that goes generally unrecognized is that federal prosecutors face pressure from local news media to pursue politicians whom the

<sup>100</sup> Sarah P. Kelly & Megan E. Jeans, *Honest Services Fraud: The Trial Courts' Turn*, Mondaq (July 7, 2012), <http://www.mondaq.com/unitedstates/x/185554/White+Collar+Crime+Fraud/Honest+Services+Fraud+The+Trial+Courts+Turn>. See also *United States v. Nelson*, 712 F.3d 498, 515 (11th Cir. 2013) (Hill, J., dissenting) (noting that the prosecution began pre-*Skilling* under an undisclosed financial interest theory and was converted post-*Skilling* to a bribery theory). Both authors of this article, along with our colleague David Duncan, represented Tony Nelson on appeal.

<sup>101</sup> *Skilling*, 561 U.S. at 411 n.44; *McDonnell*, 136 S. Ct. at 2372.

media have dubbed “crooked” for engaging in what the politicians might consider “politics as usual,” but which investigative reporters and editorial writers label “corruption.”<sup>102</sup>

At a formal level, vague statutes punishing public corruption implicate several constitutional concepts. They violate due process because they do not tell a putative defendant whether his behavior is illegal and they do not constrain prosecutors from making arbitrary charging decisions. They raise concerns about federalism because they alter the balance of powers between the federal and state governments and permit the federal government to encroach on state prerogatives. They implicate the First Amendment because permitted speech may be chilled when the boundary between permitted lobbying and proscribed conduct—for example, offering advice or exerting pressure as a result of a bribe—is hard to discern.<sup>103</sup> Vague statutes also raise concerns about the balance of powers between the legislative and executive branches: “Because Congress systematically fails to specify the content of criminal statutes, and because courts routinely eschew the authority to give content to those statutes through policy-laden common lawmaking, U.S. Attorneys exercise effective criminal-lawmaking power by default.”<sup>104</sup>

Setting aside the constitutional formulations of the problem, the fundamental issue is the ease with which federal public corruption statutes allow, and indeed facilitate, “selective prosecution and political misuse.”<sup>105</sup> A vague federal statute makes “local politicians increasingly vulnerable to politically or professionally ambitious U.S. attorneys”<sup>106</sup> and permits “personal predilections” to govern law

<sup>102</sup> See Harvey Silverglate, *Politics as Usual Often Isn't a Crime*, Boston Globe, May 6, 2016, <https://www.bostonglobe.com/opinion/2015/05/06/politics-usual-often-isn-crime/o2NyNsC0Fq5ZCq6H6pG51K/story.html>.

<sup>103</sup> See *Liberty Lobby, Inc., v. Person*, 390 F.2d 489, 491 (D.C. Cir. 1967) (“trying to persuade Congressional action” involves “exercising the First Amendment right to petition”).

<sup>104</sup> Kahan, *supra* note 21, at 51–52.

<sup>105</sup> *United States v. Kincaid-Chauncey*, 556 F.3d 923, 949 (9th Cir. 2009) (noting that in the context of public officials, fair notice concerns are heightened), overruled by *Skilling*, 561 U.S. 358.

<sup>106</sup> Harvey A. Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* 3–27 (2009) (describing questionable prosecutions of state and local officials); see also Silverglate & Shah, *supra* note 9, at 222–32 (detailing similar prosecutions).

enforcement, whether those predilections involve personal animosity, political affiliation, religion, or race.<sup>107</sup>

State and local politicians present a target-rich environment: everyday political conduct ranges from merely disliked to truly distasteful in the eyes of the public. “It is said that no one should see how laws or sausages are made. But the occasional unpleasantness of the legislative process is just the stuff of political life in a representative democracy—until the Department of Justice intervenes to recast such activities as federal felonies.”<sup>108</sup> Or, to put it another way, “[i]n a democracy, the kind of wheeling and dealing that goes on daily, the compromises that are made, the threats and favors exchanged, the motives for this or that action (or inaction) engaged in by public officials high and low, paint a picture that is not always pretty. But the very essence of democracy necessarily entails some quite un-pretty scenarios, since getting something done is like the proverbial task of herding cats.”<sup>109</sup> The same laws that ensnare public officials in corruption prosecutions generally also permit prosecution of the gift-giver, potentially exposing both lobbyists and well-meaning constituents to federal scrutiny and prosecution for gifts large or small.

The central question is whether we want a system where federal prosecutors can act—with what comes close to a blank check—to regulate state and local politics. States can and do have laws and regulations governing political conduct.<sup>110</sup> Thus, excluding certain conduct from

<sup>107</sup> *Kolender*, 461 U.S. at 358; cf. *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (black students convicted of “an offense so generalized as to be . . . ‘not susceptible of exact definition’”); see also *Cox v. Louisiana*, 379 U.S. 536 (1965) (unconstitutionally vague statute used to convict civil rights demonstrators). One of the amicus briefs supporting McDonnell came from civil rights leaders who detailed the ignominious history of using vague statutes to target disfavored groups. See Brief of Benjamin Todd Jealous, Dolores L. McQuinn, and Algie T. Howell as Amici Curiae in Support of Petitioner, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-424), available at <http://www.scotusblog.com/case-files/cases/mcdonnell-v-united-states>.

<sup>108</sup> Nancy Gertner & Harvey A. Silverglate, *O’Brien Indictment: The Sausage Factory and the Democratic Process*, *Mass. Lawyers Weekly*, May 2, 2013, <http://bit.ly/2aAPfSr>.

<sup>109</sup> Harvey Silverglate, *Blagojevich Convicted, But Was He Really Guilty?*, *Forbes.com*, June 29, 2011, <http://www.forbes.com/sites/harveysilverglate/2011/06/29/blagojevich-convicted-but-was-he-really-guilty/#192a59735dc3>.

<sup>110</sup> See generally, National Conference of State Legislatures, <http://ncsl.org> (summarizing laws related to gift-giving, conflict of interest, financial disclosure, and other areas of state ethics).

the reach of federal statutes does not automatically render that conduct legal; it merely prevents prosecution for such conduct under *federal* law, while still permitting states to enforce their own laws. State laws punishing state corruption are informed by a broader state regulatory scheme, just as federal statutes punishing corruption by federal employees are “merely one strand of an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials.”<sup>111</sup> Federal prosecutions of state and local officials are therefore unique in that they arise from statutes that are not paralleled—and therefore given content and context—by a related regulatory scheme. As one scholar has noted, “[i]t would be fairer and more effective for Congress to draft a national code of conduct for state officials, telling them what gifts and campaign contributions they may accept, what gifts and campaign contributions they must disclose, and what conflicts of interest require them to disqualify themselves from acting.”<sup>112</sup> However, “[s]uch a code almost certainly would be unconstitutional.”<sup>113</sup> Allowing federal prosecutors to fill the void, however, requires an immense leap of faith: as the Supreme Court recognized in *McDonnell*, “we cannot construe a criminal statute on the assumption that the Government will ‘use it responsibly.’”<sup>114</sup>

Prosecutors, after all, wield immense power in making charging decisions. As Justice Robert Jackson remarked almost 80 years ago,

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous

<sup>111</sup> *United States v. Sun-Diamond Growers*, 526 U.S. 398, 409 (1999). As the Virginia law professors who submitted a brief in support of *McDonnell* explain: “Virginia’s bribery statutes dovetail with an entirely distinct statutory regime, codified as the ‘State and Local Government Conflict of Interests Act,’ devoted to regulation of gifts to state and local public officials, including the governor. The Act was adopted ‘for the purpose of establishing a single body of law applicable to all state and local government officers and employees on the subject of conflict of interests . . .’ Va. Code § 2.2-3100. The Act consists of no less than forty separate statutes and follows the theory of ‘sunshine laws’ by requiring disclosure of covered gifts, loans and other transactions as a means to prevent corruption.” Brief of Amici Curiae Virginia Law Professors in Support of the Petitioner at 16, *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (No. 15-474), available at <http://www.scotusblog.com/case-files/cases/mcdonnell-v-united-states>.

<sup>112</sup> Alschuler, *Terrible Tools*, *supra* note 11, at 16.

<sup>113</sup> *Id.*

<sup>114</sup> 136 S. Ct. at 2372–73.

power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.<sup>115</sup>

Times have not changed. A more recent anecdote illustrates the same point. According to a former assistant U.S. attorney in the Southern District of New York, he and his colleagues would play a “darkly humorous game”:

[S]omeone would name a random celebrity—say, Mother Theresa or John Lennon. It would then be up to the junior prosecutors to figure out a plausible crime for which to indict him or her. The crimes were not usually rape, murder, or other crimes you’d see on *Law & Order* but rather the incredibly broad yet obscure crimes that populate the U.S. Code like a kind of jurisprudential minefield: Crimes like “false statements” (a felony, up to five years), “obstructing the mails” (five years), or “false pretenses on the high seas” (also five years). The trick and skill lay in finding the more obscure offenses that fit the character of the celebrity and carried the toughest sentences.<sup>116</sup>

Federal prosecutors should not have unconstrained authority to pursue state and local officials under statutes that do not define the

<sup>115</sup> Robert H. Jackson, *The Federal Prosecutor*, 24 *J. Am. Jud. Soc’y* 18, 25–26 (1940).

<sup>116</sup> Hon. Alex Kozinski, *Criminal Law 2.0*, 44 *Geo. L.J. Ann. Rev. Crim. Proc.* iii, xlv (2015) (quoting Tim Wu, *American Lawbreaking*, *Slate*, Oct. 14, 2007, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/features/2007/american\\_lawbreaking/introduction.html](http://www.slate.com/articles/news_and_politics/jurisprudence/features/2007/american_lawbreaking/introduction.html)).

relevant offenses. The honest-services statute is hopelessly vague, and decades of attempts by courts to give it meaning should be rejected: the Court should take the first opportunity to strike down the statute. The next step is to reinvigorate the vagueness doctrine and the related rule of lenity, both of which seek to enforce the basic principle that an individual should have fair notice of whether his behavior is culpable, and both of which are frequently given short shrift by the courts. The vagueness doctrine can be applied to invalidate a statute—either on its face or as applied—where the statute’s failure to provide fair notice violates the Constitution’s guarantee of due process; the narrower rule of lenity is an interpretive mandate requiring that genuine ambiguity in a statute be resolved in a defendant’s favor.<sup>117</sup> While these doctrines have largely languished, just last year, the vagueness doctrine regained some force when the Supreme Court applied it to strike down a provision of the Armed Career Criminal Act in *Johnson v. United States*.<sup>118</sup>

Courts must now rigorously apply these core constitutional and interpretive principles even in headline-grabbing political corruption cases. Courts should not distort and judicially rewrite broad or amorphous statutes that were not enacted to target public corruption and that do not adequately define the conduct subject to prosecution. Instead, courts should constrain the interpretations of these statutes unless and until Congress enacts laws that clearly proscribe particular conduct. A mistake in judgment and even unethical behavior by an unpopular public figure should not be converted, after the fact, into a violation of federal law punishable by a prison term. The Supreme Court’s “cases establish that the Government violates [the Fifth Amendment’s] guarantee by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.”<sup>119</sup> This fundamental concept of fair play applies to everyone, even politicians.

<sup>117</sup> See, e.g., *Lockhart v. United States*, 136 S. Ct. 958, 968 (2016) (“We have used the lenity principle to resolve ambiguity in favor of the defendant only at the end of the process of construing what Congress has expressed when the ordinary canons of statutory construction have revealed no satisfactory construction.” (citation and quotation marks omitted)).

<sup>118</sup> *Johnson v. United States*, 135 S. Ct. 2551 (2015).

<sup>119</sup> *Id.* at 2556.

Unlike a Confucian legal system that governed a homogeneous society where notions of right and wrong and precepts of personal morality enjoyed broad social acceptance and agreement, ours is a diverse society where there is far less such agreement. While a Confucian society could rely on a precept akin to “thou shall not do that which should not be done,” a similar law in our system would, and should, be deemed utterly vague and hence unconstitutional.<sup>120</sup> It is not sufficient to outlaw corrupt behavior. It is, rather, incumbent on lawmakers—or as a last resort judges—to define corruption in terms that ordinary citizens and officials can understand.

<sup>120</sup>Cf. Jonathan Ocko, A Review of Geoffrey MacCormack, *The Spirit of Traditional Chinese Law*, 42 McGill LJ. 733, 739–40 (1997).