BRIDGING THE GAP: ASSESSING THE STATE OF FEDERAL CORRUPTION LAW AFTER *KELLY V. UNITED STATES*

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Political corruption in the United States has become more and more prevalent in recent years. These days it seems difficult to turn on the news without hearing accusations of a public official caught in a scandal. Despite the frequency of the corrupt acts, however, the federal government remains largely unable to hold state actors accountable.

The U.S. Supreme Court has consistently overturned federal convictions of state officials charged with committing corrupt acts. The issue in these cases is not the lack of corruption or proof of the acts but rather, the lack of laws that adequately criminalize the corrupt conduct. As a result, the same corrupt actions being publicly denounced in the news are being excused in the justice system.

This Note examines the Court's recent corruption cases and analyzes the rationales behind them. This Note then applies this analysis to Kelly v. United States*, the most recent case in the federal corruption saga, to evaluate where the Court stands on federal corruption.*

Ultimately, this Note concludes that, in Kelly*, the Court is sending a clear message to Congress: amend the corruption laws to properly cover the conduct. It then proposes an amended version of the current law that takes into account the analysis of* Kelly *and other federal corruption cases.*

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INTRODUCTION

On September 9, 2013, high-ranking New Jersey officials ordered workers for the Port Authority of New York and New Jersey ("Port Authority") to shut down two lanes of the George Washington Bridge.[1] The three rush-hour lanes, which for decades had eased the flow of traffic out of Fort Lee, New Jersey, were abruptly reduced to a single lane.[2] Officials from the Port Authority cautioned against this, but the state responded that it was conducting a traffic study and that the Port Authority should not warn Fort Lee officials or police officers.[3]

The abrupt closure of the world's busiest bridge caused a public safety disaster. Motorists trying to enter Manhattan gridlocked Fort Lee.[4] On a week that included the first day of school, Yom Kippur, and the anniversary of the September 11 terrorist attacks, car-clogged streets brought Fort Lee to a standstill.[5] Traffic blocked emergency vehicles from responding to a heart

1. Kate Zernike, *The Bridge Scandal, Explained*, N.Y. TIMES (May 1, 2015), https://www.nytimes.com/2016/11/04/nyregion/george-washington-bridge-scandal-what-you-need-to-know.html [https://perma.cc/4MQH-SMFY].

2. *See* Kelly v. United States, 140 S. Ct. 1565, 1568 (2020).

3. *See* Zernike, *supra* note 1.

4. Adam Liptak & Nick Corasaniti, *Supreme Court Unanimously Overturns 'Bridgegate' Convictions*, N.Y. TIMES (May 7, 2020), https://www.nytimes.com/2020/05/07/us/supreme-court-bridgegate.html [https://perma.cc/X7AU-F3C3].

5. *See* Zernike, *supra* note 1.

attack victim[6] and left school buses parked in the streets for hours.[7] Half-hour commutes turned into four-hour nightmares.[8]

As Fort Lee mayor Mark Sokolich scrambled to contain the chaos erupting in his city, he contacted Port Authority deputy executive director Bill Baroni and pleaded for help.[9] One of his countless unanswered voicemails asked a simple, but glaring question: "Who's mad at me?"[10]

The answer was Bridget Anne Kelly, deputy chief of staff to then New Jersey governor Chris Christie.[11] What they portrayed as a "traffic study" was truly the result of a multilevel abuse of power aimed at punishing Fort Lee's Democratic mayor in what would soon become known as "Bridgegate."[12]

Upset that Sokolich had refused to endorse Chris Christie's reelection campaign, Kelly had reached out to Baroni to retaliate.[13] They planned to purposely close the Fort Lee rush-hour lanes to "'creat[e] a traffic jam that would punish' Mayor Sokolich and 'send him a message.'"[14] The resulting traffic catastrophe lasted for four days, only coming to an end when the Port Authority executive director discovered Kelly and Baroni's "abusive decision" and reversed it.[15]

Federal prosecutors charged Baroni and Kelly with wire fraud under 18 U.S.C. §§ 1343 and 666(a)(1)(A).[16] The jury found both of them guilty on all counts.[17] The Third Circuit affirmed, rejecting Baroni and Kelly's claim that the evidence was insufficient to support their convictions.[18] At a minimum, the circuit court held, Kelly and Baroni violated the wire fraud statute by depriving the Port Authority of the value of public employee labor.[19] The U.S. Supreme Court disagreed. In May 2020, the Court reversed the Third Circuit's decision in *Kelly v. United States*.[20] The Court held that a bridge closing scheme aimed at punishing a political adversary did not violate federal corruption laws.[21]

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6. *See Kelly*, 140 S. Ct. at 1570.
7. *See* Zernike, *supra* note 1.
8. *Id.*
9. *Id.*
10. *See* Kate Zernike & Noah Remnick, *Fort Lee Officials Recall Chaos and Turmoil as Lanes to Bridge Were Closed*, N.Y. TIMES (Sept. 20, 2016), https://www.nytimes.com/2016/09/21/nyregion/fort-lee-police-chief-recalls-chaos-and-turmoil-as-bridge-lanes-were-closed.html [https://perma.cc/BZ3G-B2UZ].
11. *See Kelly*, 140 S. Ct. at 1570.
12. *See id.* at 1569.
13. *See id.*
14. *Id.* (alteration in original) (quoting Joint Appendix (Volume I of II) at 254, *Kelly*, 140 S. Ct. 1565 (No. 18-1059)).
15. *Id.* at 1570.
16. *Id.* at 1568, 1571.
17. *Id.*
18. *See* United States v. Baroni, 909 F.3d 550, 562 (3d Cir. 2018), *rev'd and remanded sub nom.* Kelly v. United States, 140 S. Ct. 1565.
19. *See id.*
20. 140 S. Ct. 1565 (2020).
21. *See id.* at 1569.

Kelly is only the latest case exemplifying the Supreme Court's commitment to narrowly interpreting federal laws targeting corruption.[22] It is a familiar script: political actors do something widely recognized as corrupt and wrongful.[23] They are prosecuted for their corruption and convicted for using their offices and powers for their personal benefit. In doing so, they directly harm the very public they represent. Yet, under current federal laws, their acts are not criminal because those laws were not written to capture the misconduct.

The Court's consistent unwillingness to uphold federal corruption convictions could be the Court accepting this as the new normal—that even corrupt politicians cannot be regulated by federal laws.[24] If so, there is concern that the Court is entrenching corruption and bribery in the political system.[25] However, the Court may actually be alerting lawmakers to shortcomings in federal corruption statutes. *Kelly* appears to be an attempt to do this.

This Note seeks to clarify how the federal government should approach corruption laws. Part I investigates landmark federal corruption cases and how the Court has interpreted Congress's ambiguous legislative efforts to fight corruption. Part II discusses the different concepts and rationales behind the Court's decisions. Part III then applies the rationales to *Kelly* and recommends that Congress amend the honest services statute, 18 U.S.C. § 1346, to define "honest services" with reference to state law.

I. FOUNDATIONAL BEARINGS: BACKGROUND AND LEGAL CONTEXT

This part discusses the necessary background information concerning corruption legislation in the United States. Part I.A provides a brief description of the meaning of corruption. Part I.B summarizes the history of federal corruption law and the landmark cases that define it. Part I.C then discusses Congress's previous efforts to solve the federal corruption issue. Finally, Part I.D briefly summarizes how states have criminalized corruption.

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22. *See infra* Part I.B (discussing the cases fundamental to the Court's narrow ruling in *Kelly*).

23. *See, e.g.*, McDonnell v. United States, 136 S. Ct. 2355 (2016); United States v. Blagojevich, 794 F.3d 729, 735 (7th Cir. 2015).

24. *See* Leah Litman, *The Supreme Court Says Sorry, It Just Can't Help with Political Corruption*, ATLANTIC (May 8, 2020), https://www.theatlantic.com/ideas/archive/2020/05/supreme-court-embracing-deep-cynicism-about-world/611374/ [https://perma.cc/KH5P-KWZM].

25. *See* George D. Brown, McDonnell *and the Criminalization of Politics*, 5 VA. J. CRIM. L. 1, 22 (2017) ("Professor Zephyr Teachout has been quoted to the effect that the [*McDonnell*] decision 'enshrine[s] bribery in our politics.'"(second alteration in original) (quoting Dante Ramos, Opinion, *Va. Ex-governor Wins at Supreme Court, but Corruption Is Still Illegal*, BOS. GLOBE (June 28, 2016, 5:35 PM), https://www.bostonglobe.com/opinion/2016/06/27/governor-wins-supreme-court-but-corruption-still-illegal/1UHYwo06otnV9wkXgU0gLJ/story.html [https://perma.cc/3P58-LPKT]).

A. What Is Corruption?

When Benjamin Franklin accepted a diamond-encrusted snuffbox from King Louis XVI of France, Americans understood the danger that the luxurious gift posed to Franklin's obligations to the United States.[26] Even in 1785, the public feared that the king's gift would corrupt Franklin, causing him to favor the French king over his own country's interests.[27] The fear resulted in the Emoluments Clause of the Constitution, which is still used today to monitor foreign gifts to public officials.[28]

Corruption is a broad concept that can be characterized in several ways.[29] Usually, it requires a violation of a rule in connection with personal or political gain.[30] It can be defined as individuals with unique access to political power abusing that power and acting outside the range of behavior that is typically acceptable.[31] This conduct often involves altering political outcomes due to the influence of wealth or gifts.[32] Not necessarily a quid pro quo arrangement, corruption at its core involves secret deals that circumvent systems of political accountability.[33] The only consistent factor defining corruption seems to be the harm that comes to citizens who have entrusted their well-being to elected officials.[34]

This Note does not seek to offer a single definition of corruption. It is a concept that has escaped definition in the courts and legislatures for years.[35] But no matter how it is defined, whether in the year 1785 or 2021, society understands that corruption is harmful to the democratic process and should be controlled.

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26. *See* ZEPHYR TEACHOUT, CORRUPTION IN AMERICA 1–3 (2014). For a picture of the diamond snuffbox, see Allen McDuffee, *This Diamond Gift to Benjamin Franklin Is the Reason Donald Trump Can't Profit from the Presidency*, TIMELINE (Sept. 22, 2017), https://timeline.com/benjamin-franklin-emoluments-constitution-40339b04c159 [https://perma.cc/CR83-8DZR].

27. *See* TEACHOUT, *supra* note 26, at 2–3.

28. *See* U.S. CONST. art. I, § 9, cl. 8; TEACHOUT, *supra* note 26, at 27; *see also* Sharon LaFraniere, *Appeals Court Allows Emoluments Suit Against Trump to Proceed*, N.Y. TIMES (May 14, 2020), https://www.nytimes.com/2020/05/14/us/politics/trump-emoluments-clause-fourth-circuit.html [https://perma.cc/RJ2D-6967].

29. *See* Alexander K. Wilson, Note, *Different Quids for Different Quos: Why Congress Should Amend Anti-corruption Standards to Differentiate Between Campaign Contributions and Gratuities After* McDonnell, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 1033, 1033–35 (2019).

30. *See* Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1393 (2013).

31. *See* Jacob Eisler, McDonnell *and Anti-corruption's Last Stand*, 50 U.C. DAVIS L. REV. 1619, 1665 (2017).

32. *See* Samuel Issacharoff, Comment, *On Political Corruption*, 124 HARV. L. REV. 118, 122 (2010). Although *Citizens United v. FEC*, 558 U.S. 310 (2010), plays an important role in the federal corruption saga, this Note does not address *Citizens United* or the First Amendment implications of federal corruption laws. Instead, its scope is limited to statutory interpretations and the rationale behind the Court's more recent decisions regarding the honest services statute.

33. *See* Issacharoff, *supra* note 32, at 122.

34. *See* Eisler, *supra* note 31, at 1666–67.

35. *See infra* Part I.B (discussing the failure of the Court and Congress to officially define corruption).

B. The History of Federal Corruption Law

Originally passed in 1872 to address the sale of counterfeit currency through the mail,[36] the mail fraud statute became one of the federal government's most used instruments for combatting corrupt officials.[37] Congress amended the statute in 1901 to prohibit "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[38] In the 1940s, various circuit courts began to read the term "scheme or artifice to defraud" to include not only money or property but also a deprivation of "intangible rights."[39]

The "intangible rights doctrine" criminalized schemes that defrauded public and private entities of "intangible rights," such as a public official's loyalty and fiduciary services.[40] By the 1980s, the intangible rights theory had been accepted by all the courts of appeals in cases of public corruption and schemes to defraud private parties.[41]

Corruption prosecutions encountered a significant roadblock in 1987 when the Court severely limited the use of the mail fraud statute in *McNally v. United States*.[42] The Court declined to extend the mail fraud statute to apply to a public official who accepted commissions for granting insurance companies the rights to administer Kentucky's state insurance plans.[43] In the 1970s, Howard "Sunny" Hunt was chairman of the Kentucky Democratic Party and had de facto control over where the commonwealth would purchase its insurance policies.[44] Hunt arranged a deal with the Wombwell Insurance Company where, in exchange for the state's business, Wombwell would direct kickback commissions to companies of Hunt's choice.[45] In total, the Wombwell Insurance Company funneled $200,000 to a company controlled by Hunt and owned by petitioner Charles McNally.[46]

Federal prosecutors charged McNally and Hunt with mail fraud under 18 U.S.C. § 1341[47] based on the mailing of a commission check from one of the

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36. Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch over Us*, 31 HARV. J. ON LEGIS. 153, 158 (1994).

37. *See generally* Jed S. Rakoff, *The Federal Mail Fraud Statute* (pt. 1), 18 DUQ. L. REV. 771, 772–73 (1980).

38. Skilling v. United States, 561 U.S. 358, 399 (2010).

39. *See generally* Byung J. "BJay" Pak, *Private Sector Honest Services Fraud Prosecutions After* Skilling v. United States, DEP'T JUST. J. FED. L. & PRAC., Oct. 2018, at 149; *see also* 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."), *overruled in part by* U.S. v . Cruz, 478 F.2d 408 (5th Cir. 1973).

40. Peter M. Oxman, Note, *The Federal Mail Fraud Statute After* McNally v. United States*, 107 S. Ct. 2875 (1987): The Remains of the Intangible Rights Doctrine and Its Proposed Congressional Restoration*, 25 AM. CRIM. L. REV. 743, 744 (1988).

41. *See id.* at 747–48.

42. 483 U.S. 350 (1987).

43. *Id.* at 356, 361.

44. *Id.* at 352.

45. *Id.*

46. *Id.* at 353.

47. At the time of the ruling, U.S.C. § 1341 provided that:

insurance companies to Wombwell.[48] While fraudulent in nature, the Court found that the petitioners did not commit mail fraud because their conduct was not plainly within the statute.[49]

The Court reasoned that it should only assume a harsher reading of a criminal statute when Congress has spoken in "clear and definite language."[50] If the prosecutors had shown a deprivation of property rights by dishonest methods or schemes, the Court would have been willing to apply the mail fraud statute.[51] However, it declined to interpret every statute "in a manner that leaves its outer boundaries ambiguous" because it was not for federal officials to set "standards of disclosure and good government for local and state officials."[52] Congress needed to specifically set out what the statute criminalized for the Court to uphold the convictions.[53]

Congress did not take long to respond. In the following year, it enacted 18 U.S.C. § 1346, a statute designed to cover the "intangible right of honest services" that the lower courts had relied on before *McNally*.[54] Specifically, the honest services statute defined the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services."[55]

The short but direct legislative history of § 1346 makes Congress's intent abundantly clear. Congress designed the amendment to "arm Federal prosecutors with the jurisdictional and investigative tools they must have to fight fraud and corruption—tools that effectively had been taken away by McNally."[56] It sought to restore the authority of U.S. attorneys to go after "vote-buyers, corrupt officials, and white-collar criminals."[57] Congress intended to return the state of corruption law to the pre-*McNally* interpretations of mail fraud statutes and the intangible rights theory.[58]

For over twenty years, federal prosecutors enthusiastically accepted these congressional empowerments. Despite criticisms that § 1346 was vague and an unconstitutional violation of federalist principles,[59] circuit courts upheld

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> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, [uses the mails or causes them to be used], shall be fined not more than $1,000 or imprisoned not more than five years, or both.

McNally, 483 U.S. at 352 n.1.

48. *Id.* at 353.
49. *Id.* at 361.
50. *Id.* at 359–60.
51. Carpenter v. United States, 484 U.S. 19, 27 (1987).
52. *McNally*, 483 U.S. at 360.
53. *Id.*
54. Skilling v. United States, 561 U.S. 358, 402 (2010).
55. 18 U.S.C. § 1346.
56. *See* 134 CONG. REC. 32,639 (1988) (statement of Sen. Mitchell McConnell).
57. *Id.*
58. *See* 134 CONG. REC. S17,360 (daily ed. Nov. 10, 1998) (statement of Sen. Joseph Biden) ("The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change.").
59. Alex Hortis, Note, *Valuing Honest Services: The Common Law Evolution of Section 1346*, 74 N.Y.U. L. REV. 1099, 1102 (1999).

the constitutionality of the statute and the use of an intangible rights theory.[60] The circuit courts interpreted the scope of conduct covered by the honest services statute to be extremely broad.[61] Although most courts still required the alleged conduct to directly deprive the public of some entitlement, the government satisfied the honest services element once it established that a public official had engaged in "a scheme formed with the intent to defraud" the public of its right to "honest services."[62]

In 2010, the Supreme Court once again considered the definition of honest services, as revised under § 1346.[63] And once again they interpreted the statute to constrain the federal government's ability to prosecute corruption.[64] In *Skilling v. United States*,[65] the U.S. Department of Justice uncovered an elaborate scheme by Enron CEO Jeffrey Skilling to prop up the energy company's short-run stock prices by fraudulently overstating Enron's economic well-being.[66] Federal prosecutors charged Skilling with conspiracy to commit securities and wire fraud, alleging that through his false representation of Enron's well-being to public investors, Skilling had sought to "depriv[e] Enron and its shareholders of the intangible right of [his] honest services."[67]

Following the narrowing principles behind *McNally*, the Court reversed Skilling's jury conviction and ruled that the "honest services" of the statute were aimed at those involving mail fraud, not fraudulent schemes in general.[68] Although the Court recognized that Congress had reacted swiftly to amend the statute to override *McNally*, they agreed with Skilling's argument that Congress did not speak clearly.[69] To avoid striking down a congressional act as unconstitutionally vague, the Court chose to adopt its own construction of the statute, which limited its application to bribery and kickback schemes.[70]

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60. *See, e.g.*, United States v. Walker, 490 F.3d 1282, 1297 (11th Cir. 2007); United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997) (holding that when a "political official uses his office for personal gain, he deprives his constituents of their right to have him perform his official duties in their best interest"); United States v. Catalfo, 64 F.3d 1070, 1077 (7th Cir. 1995) (holding that defrauding of the right to control risk of loss had substantial tangible value).

61. *See, e.g.*, *Walker*, 490 F.3d at 1297; United States v. Potter, 463 F.3d 9, 18 (1st Cir. 2006) (convicting a businessman for attempting to pay a legislator); United States v. Hasner, 340 F.3d 1261, 1271 (11th Cir. 2003) (per curiam) (upholding the conviction of a local housing official who failed to disclose a conflict of interest); United States v. Rybicki, 354 F.3d 124, 142 (2d Cir. 2003) (upholding the conviction of lawyers who paid an insurance adjuster to process their clients' claims); United States v. Frost, 125 F.3d 346, 369 (6th Cir. 1997) (upholding the conviction of students who colluded with their professor to plagiarize).

62. *Walker*, 490 F.3d at 1297.

63. *See generally* Skilling v. United States, 561 U.S. 358 (2010).

64. *See generally id.*

65. 561 U.S. 358 (2010).

66. *Id.*

67. *Id.* at 369 (alteration in original) (quoting Joint Appendix at 318a, ¶ 87, *Skilling*, 560 U.S. 358 (No. 08-1394)).

68. *See* Kelly v. United States, 140 S. Ct. 1565, 1572 (2020).

69. *Skilling*, 561 U.S. at 404.

70. *See id.* at 408.

In 2016, the Court reinforced the narrow interpretation of *Skilling* by vacating the conviction of former Virginia governor Robert McDonnell.[71] Federal prosecutors charged McDonnell with meeting with the CEO of a dietary supplement company to discuss using McDonnell's office to implement research studies at Virginia public universities in exchange for gifts.[72] These included: offers to fly on private planes while campaigning,[73] an offer to buy an inauguration ball gown,[74] a Rolex,[75] the loaning of a Ferrari,[76] and other loans and gifts totaling over $150,000.[77]

McDonnell was charged with honest services fraud under 18 U.S.C. §§ 1343 and 1349.[78] The theory underlying the charges was that McDonnell had accepted bribes, so the parties agreed to define "honest services fraud" with reference to the federal bribery statute.[79] The statute, 18 U.S.C. § 201, makes it a crime for a public official to receive anything of value in return for being "influenced in the performance of any official act."[80] Section 201 subsequently defines "official act" to mean "any decision or action on any question, matter, cause, suit, proceeding or controversy" taken in a official capacity.[81]

In the unanimous opinion, Chief Justice Roberts explained that holding meetings to consider a matter, such as undertaking a research study at a public university, did not qualify as an "official act" under § 201.[82] An official act required the public official to "make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy,' or agree to do so."[83] Setting up a meeting to discuss holding an event, even with someone who has supplied the official with luxury gifts, does not qualify as such.[84] Therefore, prosecutors improperly instructed the jury that the meeting was an "official act" and the Court overturned the conviction.[85]

The *McDonnell* ruling significantly narrowed statutory interpretations of anti-corruption efforts. The Court established that the question or controversy had to be "more specific and focused than a broad policy objective."[86] McDonnell's conduct was undoubtedly "distasteful," but the "tawdry tales of Ferraris, Rolexes, and ball gowns" were not the Court's

71. *See* McDonnell v. United States, 136 S. Ct. 2355 (2016).
72. *Id.* at 2361–62.
73. *Id.* at 2362.
74. *Id.*
75. *Id.* at 2363.
76. *Id.*
77. *See id.* at 2362–64.
78. *Id.* at 2365.
79. *Id.*
80. *Id.* (quoting 18 U.S.C. § 201(b)(2)).
81. 18 U.S.C. § 201(a)(3).
82. *McDonnell*, 136 S. Ct. at 2371.
83. *Id.* at 2372 (quoting 18 U.S.C. § 201).
84. *Id.*
85. *Id.* at 2375.
86. *Id.* at 2374.

concern.[87] Instead, the Court focused on limiting the boundaries of the federal government's use of the federal bribery statutes.[88]

The 2020 ruling in *Kelly* demonstrates that the Court remains committed to those limitations. In the unanimous opinion, Justice Kagan explains that while the evidence clearly showed "deception, corruption, [and] abuse of power," the federal laws did not cover closing lanes of traffic in political retaliation.[89] Section 1343 criminalizes "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[90] Federal prosecutors, therefore, had to prove *property* fraud.[91] Prior cases before the Court[92] emphasized that the government was not only required to show that Kelly and Baroni engaged in deception but also that money or property was the object of their fraud.[93] Since the retaliatory scheme provided neither actor with financial gain, their conduct was not criminal under § 1343.[94]

C. Efforts by Congress

Congress has not completely taken a back seat as corrupt actors escape justice. Following *Skilling*, both the U.S. House of Representatives and the Senate considered bills that would have expanded federal corruption jurisdiction.[95] A 2012 House bill proposed to widen the definition of "official act" to include public official duties and increase the maximum sentence of imprisonment for breaking the law.[96] In the same Congress, the Senate introduced and passed the Stop Trading on Congressional Knowledge or STOCK Act,[97] which prohibited members of Congress from using information and influence gained through their positions for personal benefit. Although section 18 discusses "official acts," the STOCK Act mostly addressed public officials leveraging confidential information in the stock market.[98]

Of course, neither of these congressional efforts prevented the Court from reversing the conviction of Governor McDonnell, leaving a pothole for Congress to fill. In 2018, Senator Elizabeth Warren introduced the Anti-

87. *Id.* at 2375.
88. *Id.*
89. *See* Kelly v. United States, 140 S. Ct. 1565, 1568 (2020).
90. 18 U.S.C. § 1343.
91. *See Kelly*, 140 S. Ct. at 1568.
92. *See, e.g.*, Skilling v. United States, 561 U.S. 358, 408–10 (2010); McNally v. United States, 483 U.S. 350, 358 (1987).
93. *See Kelly*, 140 S. Ct. at 1571.
94. *Id.* at 1568–69.
95. *See* MICHAEL A. FOSTER, CONG. RSCH. SERV., R45479, BRIBERY, KICKBACKS, AND SELF-DEALING: AN OVERVIEW OF HONEST SERVICES FRAUD AND ISSUES FOR CONGRESS 23–24 (2020); Stop Trading On Congressional Knowledge Act, Pub. L. No. 112-105, 126 Stat. 291 (codified as amended in scattered sections of the U.S.C.); *see also* H.R. 2572, 112th Cong. (2011).
96. H.R. 2572, §§ 5–8.
97. Pub. L. No. 112-105, 126 Stat. 291 (codified as amended in scattered sections of the U.S.C.).
98. *See generally id.*

Corruption and Public Integrity Act in the Senate.[99] The bill, which proposed a variety of corruption regulations, restricted lobbyists' ability to seek "official action" from members of Congress and Congress's ability to accept gifts from lobbyists.[100] Warren later acknowledged that she wanted to expand the definition of "official act" to close the "tractor-sized loophole" left by *McDonnell*.[101] The bill ultimately died in a Republican-controlled Senate.[102]

Although the bill failed to become law, politicians seemed to hear Warren's call for better anti-corruption laws. During the 2019 Democratic presidential primary, several candidates, including South Bend, Indiana, mayor Pete Buttigieg and Senator Amy Klobuchar, committed to passing anti-corruption laws early in their prospective tenures.[103] The House followed up in 2019 with the For the People Act—a bill that sought to limit big money in politics and to enact stricter ethics rules for federal officials.[104] However, Senate Majority Leader Mitch McConnell called the bill the "Democrat Politician Protection Act" and it never passed the Senate.[105]

Shortly after *Kelly*, the Congressional Research Service published a report about honest services fraud and the cases that define it.[106] It concluded that Congress should revisit the issue and consider the federalism and vagueness concerns that had previously halted progress.[107]

D. State Corruption Laws

The Court's limiting constructions have largely left public corruption policing to the states.[108] In *Kelly*, Justice Kagan noted that New Jersey has its own official misconduct law, which prohibits the unauthorized use of official functions.[109] Many states have similar laws aimed at policing official

99. *See* S. 3357, 115th Cong. (2017).

100. *See id.* § 105(c)(1)(B), § 208 (prohibiting lobbyists from making gifts to legislative officials).

101. Elizabeth Warren, *My Plan to End Washington Corruption*, MEDIUM (Sept. 16, 2019), https://medium.com/@teamwarren/my-plan-to-end-washington-corruption-554c7f01aaa5 [https://perma.cc/4ERW-THQW].

102. *See S. 3357—115th Congress: Anti-corruption and Public Integrity Act*, GOVTRACK, https://www.govtrack.us/congress/bills/115/s3357 [https://perma.cc/3MWV-GQ3X] (last visited Mar. 16, 2021).

103. *See* Alexander Burns, *Seven 2020 Democrats Pledge to Focus First Bill on Fighting Corruption*, N.Y. TIMES (July 29, 2019), https://www.nytimes.com/2019/07/29/us/politics/end-citizens-united-pledge.html [https://perma.cc/Z5K3-QEPA]. Unfortunately, President Joe Biden was not one of these candidates.

104. *See* Catie Edmondson, *House Democrats Will Vote on Sweeping Anti-corruption Legislation. Here's What's in It*, N.Y. TIMES (Mar. 7, 2019), https://www.nytimes.com/2019/03/07/us/politics/house-democrats-anti-corruption-bill.html [https://perma.cc/CPP5-NDFQ]; *see also* H.R. 1, 116th Cong. (2019).

105. *See* Edmondson, *supra* note 104.

106. *See generally* FOSTER, *supra* note 95.

107. *See id.* at 24.

108. *See* Kelly v. United States, 140 S. Ct. 1565, 1571 (2020) ("The upshot is that federal fraud law leaves much public corruption to the States (or their electorates) to rectify.").

109. *See id.*; *see also* N.J. STAT. ANN. § 2C:30-2 (West 2021).

misconduct and public corruption.[110] These state laws make it illegal for public actors to obtain a "benefit" through the misuse of their official functions, setting a broader standard than the federal one.[111]

Courts have disagreed on whether federal honest service charges have to be based on state law violations.[112] Some courts have held that the honest services statute requires that a state official breach a state law duty rather than violate a federal definition of appropriate conduct.[113] Other courts have disagreed, holding that the states do not have exclusive control over the ethics of official conduct.[114] In the end, the Supreme Court declined to answer the question, instead opting to define "honest services" as requiring bribery and kickbacks.[115]

II. CROSSING TROUBLED WATERS: VAGUENESS, FEDERALISM, AND CRIMINALIZING POLITICS

The unanimous decisions in *McDonnell* and *Kelly* have seemingly cemented the notion that the Court will narrowly interpret statutes aimed at political corruption. Principles of vagueness and federalism are often advanced as the constitutional foundations behind these decisions. These principles' influence is traceable throughout the case law.[116] In many ways, these are two sides of the same coin: the principles advance constitutional values limiting the federal government's ability to prosecute crimes. However, the use of vagueness and federalism in unison has also led to a carveout for political actors that some have deemed "the critique of the criminalization of politics."[117]

Determining which side of the conceptual corruption bridge the Court lands on with these concerns in *Kelly* is crucial to Congress's ability to combat corruption. This part will explore the arguments made on both sides for these principles and examine how the courts applied those arguments in the aforementioned federal corruption cases. Part II.A examines federalism

110. *See, e.g.* COLO. REV. STAT. ANN. § 18-8-404 (2021) (defining first-degree official misconduct as an "unauthorized exercise of [official's] functions" with "intent to obtain a benefit" for the official or maliciously harm another); N.Y. PENAL LAW § 195.00 (McKinney 2021) (prohibiting a public servant from obtaining a benefit through "an unauthorized exercise of his official functions"); TENN. CODE ANN. § 39-16-402 (2021) (prohibiting "an unauthorized exercise of official power" knowingly used to obtain a benefit or to harm another); WASH. REV. CODE § 9A.80.010 (2021). For a table listing official misconduct laws and ethical violations for different states, see *Ethics and Public Corruption Laws: Penalties*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 8, 2020), https://www.ncsl.org/research/ethics/50-state-chart-criminal-penalties-for-public-corr.aspx [https://perma.cc/T855-TB7N].

111. *See, e.g.*, N.Y. PENAL LAW § 195.00 (prohibiting a public servant from obtaining a benefit through "an unauthorized exercise of his official functions").

112. *See* Skilling v. United States, 561 U.S. 358, 403 n.36 (2010).

113. *See* United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997).

114. *See* United States v. Weyhrauch, 548 F.3d 1237, 1244–45 (9th Cir. 2008), *vacated*, 561 U.S. 476 (2010).

115. *See Skilling*, 561 U.S. at 404.

116. *See infra* Part II (discussing the effect of the vagueness doctrine and federalism in federal corruption cases).

117. *See* Brown, *supra* note 25, at 37.

principles and how the Court has protected the states' right to self-regulate. Part II.B discusses the use of the vagueness doctrine in corruption cases, including reliance on the rule of lenity and limitations on prosecutorial discretion. Finally, Part II.C analyzes the "criminalization of politics" concept and the claim that the Supreme Court is protecting corrupt political activity from prosecution.

A. Federalism: Balancing Federal and State Powers

If you are wondering why corruption cases like *Kelly* and *McDonnell* are brought under obscure mail and property fraud statutes, you are not alone.[118] Often, they are the only authority that the federal government has to prosecute corruption. The Constitution provides measures to limit corruption in the federal government, but it does not directly regulate corruption at the state level except through the grant of Congress's enumerated powers.[119] None of these powers specifically grant the federal government police powers to address corruption by state officials.[120] Congress must therefore use what powers it does have to impose laws aimed at corruption. The postal power,[121] the commerce power,[122] and the spending power[123] have become some of the main sources of authority for federal corruption laws.[124]

Federalism in this context refers to the constitutional balance of federal and state power that guarantees and protects fundamental state liberties.[125] There are strict limitations on the power of the federal government to intervene in state and local affairs. This is particularly prevalent in criminal law.[126] Under the federal system, "[s]tates possess primary authority for defining and enforcing the criminal law."[127] Attempts to broadly define criminal statutes to include activity outside the delegated powers of Congress are therefore likely to be interpreted narrowly.[128]

One of the main critiques of federal corruption prosecutions is that they usurp the power of the states and treat them as subordinates.[129] Critics argue that the healthy balance of power promised by the federalist system is only maintained if the general police powers rest with the states, where they are

118. *See* Zernike, *supra* note 1.

119. *See* Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75, 89 (2004).

120. *See id.*

121. U.S. CONST. art. I, § 8, cl. 7.

122. *Id.* cl. 3.

123. *Id.* cl. 1.

124. *See* Brown, *supra* note 25, at 6.

125. *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

126. *See* George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post*-Lopez *Analysis*, 82 CORNELL L. REV. 225, 226–27 (1997).

127. Brecht v. Abrahamson, 507 U.S. 619, 635 (1993).

128. *See* United States v. Lopez, 514 U.S. 549, 561 (1995) ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. . . . It cannot, therefore, be sustained." (footnote omitted)).

129. *See* Brown, *supra* note 25, at 7.

constitutionally reposed.[130] The increase in federal crimes, especially those dealing with state affairs, upsets this constitutional balance.[131]

Arguments for the defendants in these cases commonly invoke these federalist principles. In general, petitioners argue federalism demands respect for the authority of states to govern their own officials.[132] They claim the Court should be cautious in interpreting any law in a way that promotes a change in the federal-state balance, and should only do so when Congress has made its intent explicitly clear.[133] When federal law does not capture an act, defendants argue that state laws and public perception are strong enough deterrents to curb corrupt behavior.[134] All states have their own criminal corruption laws,[135] many of which may be better equipped to handle state corruption.[136] Petitioners and their supporters argue that the states should be responsible for dealing with their own officials.[137]

The government conversely argues that the federalism concerns are not truly an issue in federal corruption cases.[138] Federalism concerns can arise when Congress fails to clearly state its intentions.[139] As the Court in *McNally* noted, if Congress wanted to reach corruption, it had to speak clearly.[140] The government has argued that Congress did so by enacting the honest services statute in an intentional attempt to override *McNally*.[141]

Even supporters of defendants' arguments acknowledge that a restriction on the federal government's ability to prosecute state actors might fail where a state has no corruption regulations.[142] But what about when a state has corruption regulations but fails to use them? The result might be similar to the Bridgegate scandal, where Christie-appointed prosecutors at the state and

130. *See* Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 837 (2000).

131. *See id.*

132. *See* Brief for the Petitioner at 22, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474), 2016 WL 825553, at *22.

133. *See id.* at 23–24.

134. *See* Reply Brief for Petitioner at 25, Skilling v. United States, 561 U.S. 358 (2010) (No. 08-1394), 2010 WL 636023, at *25.

135. *See* Brown, *supra* note 25, at 7–8.

136. *See, e.g.*, N.J. STAT. ANN. § 2C:30-2 (West 2021).

137. *See* Brief of Amici Curiae Virginia Law Professors in Support of the Petitioner at 1, *McDonnell*, 136 S. Ct. 2355 (No. 15-474), 2016 WL 946987, at *1 [hereinafter Brief of Virginia Law Professors] ("Principles of federalism dictate that federal charges rooted in claims of bribery against state public officials must be weighed first with reference to applicable state anti-corruption statutes . . . .").

138. *See* Brief for the United States at 36, *McDonnell*, 136 S. Ct. 2355 (No. 15-474), 2016 WL 1358962, at *36.

139. *See id.*

140. *See id.* at 36–37 (quoting McNally v. United States, 483 U.S. 350, 360 (1987)).

141. *See id.* at 37; *see also* 134 CONG. REC. S17,360–02 (daily ed. Nov. 10, 1988) (statement of Sen. Joseph Biden).

142. *See* Brief of Virginia Law Professors, *supra* note 137, at 12–13.

county levels declined to bring charges against Christie or his staff,[143] despite New Jersey's anti-corruption law criminalizing their conduct.[144]

This presents an important critique of the federalism defense. There has been a long-recognized unwillingness of state and local prosecutors to commit their efforts to pursuing corruption charges that interest the federal government.[145] This reluctance may become even more problematic when dealing with other government actors. In essence, friends do not prosecute friends. State governments may refuse to bring charges against state actors, especially those within the same political party.[146] Take, for instance, the federal conviction of Robert Sorich, a former member of Chicago's city government who was convicted under the honest services statute for granting thousands of civil service jobs based on political patronage and nepotism.[147] There is an obvious conflict of interest for a local prosecutor to pursue the very officeholder that appointed that individual. Federal intervention may therefore be necessary to protect the federal government's strong interest in promoting integrity at all levels of government.[148] Ensuring that state and local officials perform their duties in the interest of their constituents, and not for personal benefit, is itself a fundamental federalist principle that the Supreme Court should protect.[149]

The Court has held that these principles of federalism apply to vague federal statutes.[150] Of course, *McNally* set a strong precedent when the Court

143. In 2016, a New Jersey Superior Court judge signed a criminal summons against Christie, ruling that there was probable cause to charge him with official misconduct. *See* Aliyah Frumin, *Judge Finds Probable Cause to Probe Chris Christie Over Bridgegate*, NBC NEWS (Oct. 13, 2016, 11:45 AM), https://www.nbcnews.com/news/us-news/judge-finds-probable-cause-probe-chris-christie-over-bridgegate-n665766 [https://perma.cc/A4T7-NXUA]. State Attorney General Christopher Porrino recused himself shortly before the ruling. *See* Allison Pries, *Judge Again Denies Request for Special Prosecutor in Christie Case*, N. JERSEY (Dec. 23, 2016, 7:37 PM), https://www.northjersey.com/story/news/2016/12/23/judge-denies-motion-reconsider-rejection-special-prosecutor-christie-bridgegate-case/95793480/ [https://perma.cc/2BQP-V8F5]. The day after the ruling's announcement, Bergen County, New Jersey, prosecutor Gurbir Grewal, a Christie appointee, removed himself from the case as well and the charges were not brought. *Id.*

144. *See* N.J. STAT. ANN. § 2C:30-2 (West 2021) (prohibiting the "unauthorized exercise of official functions").

145. *See* S. REP. NO. 98-225, at 369 (1983) ("Indeed, a recurring problem in this area (as well as in the related area of bribery of the administrators of such funds) has been that state and local prosecutors are often unwilling to commit their limited resources to pursue such thefts, deeming the United States the principal party aggrieved.").

146. *See* Richard Messick, *Where the Real Blame for Letting Bridgegate Defendants off Lies: Part I*, GLOBAL ANTICORRUPTION BLOG (May 20, 2020), https://globalanticorruptionblog.com/2020/05/20/where-the-real-blame-for-letting-bridgegate-defendants-off-lies-part-i [https://perma.cc/8PH5-SDLV] ("State prosecutors may be part of a tight-knit ruling elite and thus either profit directly from corruption or fear the reproach of friends and colleagues if they were to 'upset the apple cart' by going after corrupt members of the elite.").

147. *See* United States v. Sorich, 523 F.3d 702 (7th Cir. 2008).

148. *See* Henning, *supra* note 119, at 102.

149. *See* Brief of the Brennan Center for Justice at N.Y.U. School of Law as *Amicus Curiae* in Support of Respondent at 10, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474), 2016 WL 1388255, at *10.

150. *See* Bond v. United States, 572 U.S. 844, 859 (2014).

held that it was not for the federal government to set "standards of disclosure and good government for local and state officials."[151] Most subsequent decisions heavily adhere to this guiding principle.

In *McDonnell*, the Court agreed with the defense that the government's position raised "significant federalism concerns."[152] It is a state's right to define its own sovereignty through the character of its officials.[153] That right includes the discretion to regulate how officials are allowed to interact with constituents.[154] Following the principle set forth in *McNally*, the Court in *McDonnell* narrowly interpreted "official act" to protect the states' rights to set their own standards of government.[155]

B. Due Process and the Vagueness Doctrine

A large portion of federal corruption decisions rest on the vague language used in fraud statutes. The vagueness doctrine commonly incorporates two guiding principles to narrow criminal statutory language: fair notice and limiting discriminatory prosecution.[156]

1. Fair Notice and the Rule of Lenity

The vagueness doctrine generally holds that a criminal statute must sufficiently define the offense so that ordinary people can easily understand what conduct is prohibited.[157] Based on the Due Process Clauses of the Fifth and Fourteenth Amendments, the doctrine focuses on requiring legislatures to establish clear guidelines to govern law enforcement.[158]

Due process is often tied to fair notice. The fair notice standard requires that a statute "provide a person of ordinary intelligence fair notice of what is prohibited."[159] When the average citizen does not know what is required under the law, courts may strike down statutes.[160] The vagueness doctrine, therefore, guarantees that ordinary individuals can determine what acts are illegal with reasonable certainty.[161]

The due process elements of the vagueness doctrine and, in particular the fair notice requirement, are foundational to the Court's well-established

151. McNally v. United States, 483 U.S. 350, 360 (1987).
152. *McDonnell*, 136 S. Ct. at 2373.
153. *See id.* (citing Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)).
154. *See id.*
155. *Id.*
156. *See id.* (citing Kolender v. Lawson, 461 U.S. 352, 358 (1983)).
157. *See* Kolender v. Lawson, 461 U.S. 352, 357 (1983).
158. *See id.* at 353–54, 358; *see also* Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 255, 266 (2010) ("It is now the Due Process Clause of the Fifth Amendment and its applications to the states through the Fourteenth Amendment that is the basis for the void for vagueness doctrine.").
159. United States v. Williams, 553 U.S. 285, 304 (2008).
160. *See, e.g.*, FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012) (citing Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)); Karem v. Trump, 960 F.3d 656, 664 (D.C. Cir. 2020).
161. *See* Lockwood, *supra* note 158, at 271–72.

commitment to the rule of lenity. When vagueness in a criminal statute creates more than one rational interpretation, the rule states that the Court should choose the option more favorable to the defendant.[162] The Court uses the rule of lenity to ensure fair notice by construing statutes to criminalize only clearly covered conduct.[163] Due process principles bar the Court from applying interpretations of statutes that are not clearly within congressional intent.[164]

Defendants' arguments in corruption cases rely heavily on precedent. They claim that the lack of clarity in the governing statutes leaves individuals such as McDonnell or Skilling without fair notice that they could be committing serious felonies.[165] Defendants claim they were left guessing as to what conduct the federal statute covered, creating significant due process concerns in criminal proceedings.[166] As McDonnell aptly argued, defendants "should not need to consult Nostradamus to know what federal law prohibits."[167]

Ambiguity may also extend beyond the language of the statute itself. One of the justifications for the government's broad interpretation of the honest services statute is that Congress's quick statutory override of *McNally* shows it intended to return the statute to its pre-*McNally* usage.[168] But defendants argue that simply referring to the state of the law pre-*McNally* is not enough, since the pre-*McNally* case law was an assortment of vague decisions.[169] They claim that the "jumble of disparate cases" construing the honest services statute in that era often produced inconsistent and conflicting results, leading to a variety of interpretations.[170] The lack of a well-defined statute combined with the ambiguity of the pre-*McNally* case law leaves the federal corruption laws in a vague condition that provides no fair notice.[171]

Where vague language blurs the line between what is lawful and unlawful, the rule of lenity may be invoked.[172] Briefs favoring the defendants in these cases argue that lower courts ignore this well-established canon of

162. *See* McNally v. United States, 483 U.S. 350, 359–60 (1987); United States v. Bass, 404 U.S. 336, 347 (1971); United States v. Phifer, 909 F.3d 372, 383–84 (11th Cir. 2018).

163. *See* United States v. Lanier, 520 U.S. 259, 266 (1997).

164. *See id.*

165. *See* Brief for the Petitioner, *supra* note 132, at 60.

166. *See id.* at 20–21.

167. *See id.* at 60.

168. *See supra* notes 56–58 and accompanying text.

169. *See* Brief for Petitioner at 39, Skilling v. United States, 561 U.S. 358 (2010) (No. 08-1394), 2009 WL 4818500, at *39.

170. *See* Amicus Curiae Brief of National Ass'n of Criminal Defense Lawyers in Support of Petitioner & Urging Reversal at 2, *Skilling*, 561 U.S. 358 (No. 08-1394), 2009 WL 5017531, at *2 [hereinafter Brief of Criminal Defense Lawyers] (quoting United States v. Brown, 459 F.3d 509, 523 (5th Cir. 2006)).

171. *See* Brief for Petitioner, *supra* note 169, at 42.

172. *See* Amicus Brief of Former Virginia Attorneys General in Support of Petitioner at 8, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 08-1394), 2016 WL 878861, at *8.

construction.[173] Petitioners argue that the "jumble of cases" pre-*McNally* and the interpretations of the statutes since then show Congress's failure to clearly define the conduct proscribed.[174] This inconsistency leads to multiple interpretations, the harsher of which "trap the innocent."[175] When this is the case, petitioners argue the rule of lenity compels the Court to side with defendants and reverse convictions.[176]

The Court in *Skilling* agreed with the defendant that the government's interpretation of the honest services statute implicated significant vagueness issues.[177] There was no doubt that Congress intended to reincorporate the pre-*McNally* intangible rights theory of fraud.[178] However, the Court ruled that the pre-*McNally* theory was neither clear nor consistent.[179] While pre-*McNally* decisions regularly applied the fraud statute to bribery and kickback schemes, there was almost no consistent application of the statute to intangible rights.[180] The Court reasoned that "Congress intended § 1346 to reach *at least* bribes and kickbacks" but widening the scope any further would raise due process concerns.[181] Relying on pre-*McNally* applications to define the statute provided inadequate fair notice.[182] Since the statute itself provides little guidance on the meaning outside the pre-*McNally* context, the Court ruled that the government's broad interpretation would have left the statute impermissibly vague.[183]

The Court in *McDonnell* also agreed that the government's interpretation of the statute raised due process concerns.[184] The Court recognized that "official act" is not defined with proper definiteness.[185] It ruled that the lack of meaningful limits on "official act" allows the government to squeeze too much conduct into the statute's coverage, some of which is otherwise lawful.[186] Not only was the term vague but the definition prosecutors gave the jury also failed to provide any qualifications that limited the statute's scope.[187] The Court found that the government's stance that all of

173. *See* Amici Curiae Brief of 77 Former State Attorneys General (Non-Virginia) Supporting Petitioner Robert F. McDonnell at 11, *McDonnell*, 136 S. Ct. 2355 (No. 15-474), 2016 WL 909266, at *11 [hereinafter Brief of 77 Former State Attorneys General].

174. *See* Brief of Criminal Defense Lawyers, *supra* note 170, at 4.

175. *See* Brief of Benjamin Todd Jealous, Delores L. McQuinn & Algie T. Howell as Amici Curiae in Support of Petitioner at 5, *McDonnell*, 136 S. Ct. 2355 (No. 15-474), 2016 WL 878851, at *5 [hereinafter Brief of Benjamin Todd Jealous et al.] (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).

176. *See* Brief for Petitioner, *supra* note 169, at 48.

177. *See* Skilling v. United States, 561 U.S. 358, 405 (2010).

178. *See id.* at 404.

179. *See id.* at 405.

180. *See id.*

181. *Id.* at 365, 408.

182. *See id.* 412–13.

183. *See id.*

184. *See* McDonnell v. United States, 136 S. Ct. 2355, 2373 (2016).

185. *Id.*

186. *See id.*

187. *See id.* at 2373–74.

McDonnell's acts qualified as official action created the type of baseless criminal prosecution that the Court has consistently rejected.[188]

While acknowledging the vagueness concerns, the Court in both *Skilling* and *McDonnell* declined to strike down the honest services statute as unconstitutionally vague.[189] In each case, the Court determined its interpretations of the statute avoided the constitutional vagueness concerns, allowing the statute to function with sufficient definiteness.[190] Even Justice Thomas, who would have constitutionally invalidated the statute in *Skilling*,[191] joined the unanimous decision in *McDonnell* refusing to do so.[192] By construing it narrowly rather than voiding the entire statute, the Court allowed the honest services statute to remain in place with "ample room for prosecuting corruption."[193]

2. Limiting Prosecutorial Discretion

The vagueness doctrine also serves the important role of limiting prosecutorial enforcement powers.[194] Although fair notice is vital, the Court has recognized that preventing the arbitrary enforcement of the law is more important.[195] It has ruled that overly vague statutes improperly give prosecutors and judges the ability to enforce and resolve law based on their own personal interpretations.[196] It is the legislatures' role, and not the courts' or prosecutors', to define criminality.[197]

The defendants and their supporters argue that §§ 1343 and 1346 are so vague that they not only allow but encourage arbitrary enforcement.[198] They claim that there is a significant constitutional problem when the only thing standing in the way of a felony indictment is the discretion of a federal prosecutor.[199] Defendants argue that even where the prosecutors use such discretion wisely, the mere exercise of that discretion due to a vague statute is unconstitutional all the same.[200] They claim that Congress cannot allow prosecutors and judges to dictate federal corruption law through intentionally

188. *See id.* at 2374.

189. *See id.* at 2375; Skilling v. United States, 561 U.S. 358, 403–04 (2010).

190. *See McDonnell*, 136 S. Ct. at 2375; *see also Skilling*, 561 U.S. at 404.

191. *See Skilling*, 561 U.S. at 415–16 (Scalia, J., concurring) ("A statute that is unconstitutionally vague cannot be saved by a more precise indictment nor by judicial construction that writes in specific criteria that its text does not contain."(citations omitted)). Justice Thomas joined Scalia in the concurrence. *Id.*

192. *See McDonnell*, 136 S. Ct. at 2355.

193. *See id.* at 2375.

194. *See* Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 4 (1997).

195. *See* Kolender v. Lawson, 461 U.S. 352, 358 (1983).

196. *See* Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972); *see also Lawson*, 461 U.S. at 357.

197. *See* United States v. Bass, 404 U.S. 336, 348 (1971).

198. *See* Reply Brief for Petitioner at 13, *McDonnell*, 136 S. Ct. 2355 (No. 15-474), 2016 WL 1496878, at *13; Brief of Criminal Defense Lawyers, *supra* note 170, at 3.

199. *See* Brief of Former Federal Officials as *Amici Curiae* in Support of Petitioner, *McDonnell*, 136 S. Ct. 2355 (No. 15-474), 2016 WL 878849, at *5.

200. *See* Brief for Petitioner, *supra* note 169, at 44.

ambiguous statutes.[201] If Congress wants to criminalize such conduct, it must do directly and speak clearly; it cannot delegate legislating to the courts and the discretion of prosecutors.[202]

The Court in *McDonnell* agreed that the limits of a criminal statute should not be defined at the discretion of federal prosecutors.[203] It could not allow the broad interpretation to stand in hopes that the government would wield excessive authority responsibly.[204] The statute's vagueness afforded prosecutors the discretion to define "official act" in any way they chose, and they chose to define it without any true bounds in violation of due process.[205]

Skilling also recognized the concerns about "arbitrary and discriminatory prosecution" that often accompany a vague criminal statute.[206] As with the fair notice concerns, the Court opted to "construe" rather than "condemn" Congress's enactment.[207] Using the newly minted interpretation of "honest services" as including only bribes and kickbacks, the Court reasoned that there was no true risk of arbitrary prosecution under the more confined definition.[208] Once again, the Court avoided invalidating the entire statute by interpreting it in a way that maintained what the Court felt was Congress's intended target.

C. The Criminalization of Politics

Protections against vagueness and principles of federalism apply to all criminal cases and a wide variety of other scenarios. However, when they combine to intervene in political affairs, they can form a third line of defense for political actors. Some scholars refer to this as "the critique of the criminalization of politics."[209]

The critique contends that vague statutes allow courts and prosecutors to interpret laws, such as the mail fraud statute, in a way that "mak[es] everyday politics criminal."[210] It is not just a minor interference in state affairs but the federal government subordinating state officials. This creates ample room for abuse, such as creating politically motivated traps for unwary politicians[211] or halting political interaction altogether.[212]

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201. *See* Reply Brief for Petitioner, *supra* note 198, at 3.

202. *See id.* at 3; *see also* Brief of Thomas Rybicki as *Amicus Curiae* in Support of Petitioner at 4, Skilling v. United States, 561 U.S. 358 (2010) (No. 08-1394), 2009 WL 4951297, at *4.

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

204. *See id.*

205. *Id.* at 2374.

206. *Skilling*, 561 U.S. at 412.

207. *Id.* at 403.

208. *Id.* at 412.

209. *See* Brown, *supra* note 25, at 37.

210. United States v. Blagojevich, 794 F.3d 729, 735 (7th Cir. 2015).

211. *See* United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 411 (1999).

212. *See Blagojevich*, 794 F.3d at 735 ("A political logroll, by contrast, is the swap of one official act for another. . . . Governance would hardly be possible without these accommodations, which allow each public official to achieve more of his principal objective while surrendering something about which he cares less, but the other politician cares more strongly.").

Critics argue that this interference can have serious negative implications for government functions. Governing is not easy work, and there are inevitable trade-offs that are necessary to public office.[213] Dealmaking and "back-scratching" have become essential components of American politics and are often used rationally to get the ball rolling on legislation.[214] If anything, critics argue these practices may be evidence of a "healthy political system, not a corrupt one."[215] Essentially, if everyone is doing it, how can it be that bad?

Although corruption prosecutions are presumably aimed at creating a better government, defendants argue they may do the exact opposite. Federal corruption prosecutions make state and local officials more accountable to the federal government than to those who voted for them.[216] The mere threat of federal prosecution and years in jail[217] may scare off extensive interaction and compromise.[218] In this way, attempts to curb police corruption and punish bad actors in the political system may have the ironic effect of negatively impacting healthy government functioning.[219]

Critics of criminalizing politics argue that, until Congress speaks more clearly on the issue, local political corruption should be left to the states in which the political actors are directly involved.[220] They assert that the broad limits of federal corruption law have left "headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs" with the autonomy to interpret the law to cover whichever actions they desire.[221] This federal interference violates both due process and federalist principles, forming a double violation that the courts should protect against.

Cases that accede to these arguments have been read as creating a constitutional shield for political corruption, allowing abusers of power to insulate themselves from federal prosecution using principles of vagueness and federalism.[222] Professor Zephyr Teachout has expressed concern that the *McDonnell* decision effectively "enshrined bribery in our politics."[223]

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213. *See* JONATHAN RAUCH, BROOKINGS INST., POLITICAL REALISM: HOW HACKS, MACHINES, BIG MONEY, AND BACK-ROOM DEALS CAN STRENGTHEN AMERICAN DEMOCRACY 15 (2015), https://www.brookings.edu/wp-content/uploads/2016/08/political-realism-rauch2.pdf [perma.cc/AU6S-CFBF].

214. *See id.* at 7.

215. *Id.*; *see also Blagojevich*, 794 F.3d at 735 ("Governance would hardly be possible without these accommodations . . . ."); Brown, *supra* note 25, at 12; *see, e.g.*, Thomas B. Edsall, Opinion, *The Value of Political Corruption*, N.Y. TIMES (Aug. 5, 2014), https://www.nytimes.com/2014/08/06/opinion/thomas-edsall-the-value-of-political-corruption.html?searchResultPosition=1 [https://perma.cc/EW6W-RAYS] (arguing that some corruption reforms negatively impact the political process).

216. *See* Moohr, *supra* note 36, at 175.

217. *See, e.g.*, 18 U.S.C. § 666 (imposing up to ten years imprisonment).

218. *See* RAUCH, *supra* note 213, at 19.

219. *See id.*

220. *See, e.g.*, United States v. Craig, 528 F.2d 773, 779 (7th Cir. 1976).

221. Sorich v. United States, 555 U.S. 1204, 1206 (2009) (Scalia, J., dissenting).

222. *See* Brown, *supra* note 25, at 14–15.

223. *See* Ramos, *supra* note 25.

The language of the critique is prominent in the briefs supporting McDonnell. Petitioners argue that vaguely defined corruption statutes pose particularly "grave dangers" for political figures.[224] The way the government attempts to apply honest services statutes allows prosecutors to investigate and indict any official they want.[225] Petitioners claim that any political dealing can be turned into a serious felony.[226] The discretion would allow prosecutors to target political adversaries, permanently changing the American political landscape.[227] Some supporters go so far as to compare politicians to other historically targeted groups, such as civil rights leaders in the 1960s.[228]

McDonnell and those in his corner claim that the "chilling effect" that this threat would have on political participation could upend the government process.[229] Using § 1343 to criminalize routine political actions would cast a shadow over political dealings and discourage beneficial interactions.[230] Every meeting with another politician or lobbyist would have to be second-guessed for fear of committing a federal felony.[231] Even if the Court consistently overturns convictions, they argue the mere ability of prosecutors to bring serious charges could completely derail the political logrolling central to American democracy.[232] Exercising political influence with constituents is not explicitly criminalized by the law,[233] and petitioners argue that to stretch the honest services statutes to capture such conduct robs constituents of their democratic right to support candidates who share their beliefs.[234]

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224. *See* Brief of *Amici Curiae* Law Professors in Support of Petitioner at 11, McDonnell v. United States, 136 S. Ct. 2355 (2016) (No. 15-474), 2016 WL 891338, at *11.

225. *See* Brief for the Petitioner, *supra* note 132, at 42.

226. *See* Brief of 77 Former State Attorneys General, *supra* note 173, at 2; *see also* Brief for the Petitioner, *supra* note 132, at 41.

227. *See* Brief of Amicus Curiae Republican Governors Public Policy Committee in Support of Petitioner at 15–16, *McDonnell*, 136 S. Ct. 2355 (No. 15-474), 2016 WL 891337, at *15–16 [hereinafter Brief of Republican Governors].

228. *See* Brief of Benjamin Todd Jealous et al., *supra* note 175, at 2–11 ("At various times in our history, legislatures have enacted deliberately vague criminal laws. Executive authorities have deliberately employed such laws to target political dissidents, homosexuals, African Americans, the civil rights movement, and other disfavored and marginalized segments of society. The Court has repeatedly invalidated convictions under these laws as violations of due process.").

229. Brief of Amici Curiae Public Policy Advocates & Business Leaders in Support of Petitioner at 3, *McDonnell*, 136 S. Ct. 2355 (No. 15-474), 2016 WL 891336, at *3; *see also* Brief for the Petitioner, *supra* note 132, at 40.

230. *See* Brief of 77 Former State Attorneys General, *supra* note 173, at 1 ("At the very least, it empowers federal prosecutors to *charge* state officials with crimes for routine political pleasantries, casting a fog over every dinner with a constituent or appearance at a fundraiser.").

231. *See id.* at 18.

232. *See id.* at 1.

233. *See id.* at 9 ("[T]rading on the 'network and influence that comes with political office' is not against the law." (quoting United States v. Urciuoli, 513 F.3d 290, 294, 296 (1st Cir. 2008))).

234. *See* Brief of Republican Governors, *supra* note 227, at 21–22 ("The facilitation of access for political supporters 'embod[ies] a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can

The *McDonnell* decision justifiably raises concerns that the Court would protect corrupt political dealings. The language of the critique can be found throughout the decision, much of it taken directly from the briefs. The Court directly agreed with the petitioners that "breathtaking expansion of public-corruption law would likely chill federal officials' interactions with the people they serve and thus damage their ability effectively to perform their duties."[235] Representative government requires that public officials communicate with their constituents and use their positions to tend to their concerns.[236] The Court expressed significant concern that the government's interpretation of the statute would damage the ability of officials to perform these duties.[237]

According to the Court, *McDonnell* was a case about interpreting the meaning of "official act" as part of a vague statute.[238] However, in interpreting the statute, the Court echoed the concerns of McDonnell and his supporters that "typical" political dealings should not fall within the interpretation, at least not without Congress's express indication.[239] The Court applied a narrow reading of "official act" that enforced what it conceived as meaningful limits on its interpretation by the government.[240] It found that a "cause, suit, proceeding or controversy" involved only "formal exercises of governmental power."[241] The Court ruled that the entire statute captured formal proceedings, such as lawsuits, congressional trials, and legislative votes, but not "typical" meetings that a public official regularly encounters.[242] Doing so avoided the "absurdities" of convicting public officials for holding meetings or speaking with constituents.[243]

Although the Court acknowledged that McDonnell's actions were far from typical constituent interaction, it nonetheless feared that upholding the government's interpretation would allow prosecutors to reach beyond exchanges of high-value gifts and into normal political conduct.[244] The Court was concerned that the government simply could not be trusted to prosecute responsibly when armed with such a vague statute.[245]

The Court considered vagueness- and federalism-related concerns, but it analyzed their constitutional implications separately from the political considerations.[246] It appears the Court is using the doctrines as constitutional

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be expected to be responsive to those concerns.'") (quoting McCutcheon v. FEC, 572 U.S. 185, 192 (2014))).

235. McDonnell v. United States, 136 S. Ct. 2355, 2372 (2016) (quoting Brief for Former Federal Officials as *Amici Curiae* in Support of Petitioner at 6, *supra* note 199).

236. *See id.*

237. *See id.*

238. *Id.* at 2368.

239. *Id.*

240. *See id.* at 2373.

241. *Id.* at 2374.

242. *See id.* at 2368–69.

243. *See id.* at 2370 (quoting United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 408 (1999)).

244. *See id.* at 2372–73.

245. *See id.*

246. *See id.*

support beams for the political criminalization argument, attaching the statutory interpretations to foundational constitutional theorems that are more well established.[247] Under this view, the Court seems to create the implication that it is not just applying these constitutional standards but creating a third line of defense for public officials.

III. ANOTHER ROADBLOCK IN THE DEMOCRATIC PROCESS?: THE IMPLICATIONS OF *KELLY*

Prior federal corruption cases have developed strong precedents with regard to federalism, vagueness, and the criminalization of politics. Mainly, the Court has established that it will protect the states' sovereign right to self-regulate, will not allow prosecutors to expand their jurisdiction based on vague statutes, and may be hesitant to criminalize what it considers to be routine political behavior. The question becomes where *Kelly* lands on each issue. Although *Kelly* reflects many of the concerns of *McDonnell* and *Skilling*, in the end, the opinion seems to stop short of condoning the corrupt behavior.

Part III seeks to determine where the Court currently stands on federal corruption in the wake of *Kelly*. Part III.A analyzes *Kelly* using the same principles as the other cases: vagueness, federalism, and the criminalization of politics. It discusses how the decision handles each of these principles in turn and compares them to *McDonnell* and *Skilling* to outline trends in the law. Part III.B then applies those trends to propose amendments to the federal law that would capture corruption while addressing the Court's true concerns.

A. Application to Kelly

Part III.A.1 applies the federalism principles used in other federal corruption cases to *Kelly*. Part III.A.2 follows by analyzing the case under the vagueness doctrine. Finally, Part III.A.3 examines the criminalization of politics argument in *Kelly*.

1. Federalism

In *Kelly*, the abuse of the Port Authority and its interstate facilities presented a unique federalism issue for the Court. The mail and wire fraud statutes used to prosecute Kelly and Baroni were enacted pursuant to Congress's interstate commerce powers.[248] Therefore, their conduct needed to involve interstate commerce for the statute to be validly applied. In *Kelly*, the use of the Port Authority, an interstate agency created by Congress,[249] to interfere with a bridge crossing from one state to another seemed to implicate

247. *See id.*
248. *See supra* Part I.
249. *See* United States v. Baroni, 909 F.3d 550, 569 (3d Cir. 2018), *rev'd and remanded sub nom.* Kelly v. United States, 140 S. Ct. 1565 (2020).

interstate commerce. It is therefore perhaps unsurprising that the Third Circuit rejected the federalism concerns presented by Kelly and Baroni.[250]

Despite arguments from Kelly that this rejection was ill founded,[251] the Supreme Court did not address the federalism issue in *Kelly*.[252] Such silence implies that the Court felt that charging Kelly and Baroni under the statute was an appropriate exercise of federal power. When interstate commerce is so blatantly involved, using the mail and wire fraud statutes is possible.

That is not to say that *Kelly* did not present other federalism issues. Like in *McDonnell*, the *Kelly* Court expressed concerns over the federal government interfering with a state's sovereignty.[253] Kelly and Baroni exercised a regulatory power, part of a state's "traditional police powers."[254] One of the driving forces behind the Court's narrowed definition of property was the often-cited *McNally* principle: "Federal prosecutors may not use property fraud statutes to 'set[] standards of disclosure and good government for local and state officials.'"[255] The Court reasoned that if it allowed "property fraud" to reach Kelly's conduct, then it would be permitting a broad expansion of the federal criminal law into matters that are reserved for the states.[256] This reasoning seemingly extended the *McDonnell* ruling that states have the sovereign right to define for themselves how and when officials may exercise governmental powers.[257]

The states' prerogative to regulate themselves seems to be a principle that the Court upholds in federal corruption matters. Of course, there are subtle differences in the federalism concerns. *McDonnell* deals with a state's ability to control its own actors, while *Kelly* is more focused on states' exercise of police powers.[258] However, both decisions are rooted in the federalism principle that the states must be free to regulate themselves and their officials.[259] The Court made clear in each case that the federal government does not have the authority to leave the outer boundaries of its criminal statutes ambiguous to create a broad expanse of federal jurisdiction over state actors.[260]

Professor George Brown argues that *Kelly* invites a rethinking of the role federalism plays in the anti-corruption saga.[261] He concludes that *Kelly*

250. *Id.* at 575.
251. *See* Brief for Petitioner at 17, *Kelly*, 140 S. Ct. 1565 (No. 18-1059), 2019 WL 4568203, at *17.
252. *See generally Kelly*, 140 S. Ct. 1565.
253. *Id.* at 1572.
254. *Id.*
255. *Id.* at 1574 (alteration in original) (quoting McNally v. United States, 483 U.S. 350, 360 (1987)).
256. *Id.*
257. *See supra* notes 152–54 and accompanying text.
258. *Kelly*, 140 S. Ct. at 1572–73.
259. *See id.* at 1574 (quoting McNally v. United States, 483 U.S. 350, 360 (1987)); McDonnell v. United States, 136 S. Ct. 2355, 2373 (2016).
260. *See Kelly*, 140 S. Ct. at 1574; *McDonnell*, 136 S. Ct. at 2373.
261. *See* George D. Brown, *Defending Bridgegate*, 77 WASH. & LEE L. REV. ONLINE 141, 176–77 (2020).

implies that federal prosecutors should no longer play the lead role that they currently do in the corruption model.[262] Although it is admittedly difficult to envision how this might work, Brown acknowledges there are plenty of opportunities to narrow the role of the federal government.[263]

While the Court clearly promotes a more narrow role for the federal government, it is not clear that it is calling for the erasure of federal prosecutors as the lead in corruption prosecutions. It certainly poses the question for legislatures that *McNally* and its predecessors have consistently reinforced: how can the federal government regulate the standards of state actors without setting those standards?[264] Nevertheless, immediately ruling out the ability of federal prosecutors to bring corruption charges would unnecessarily limit the options available to a Congress attempting to solve an already restricted issue. More importantly, federal intervention may be crucial in cases involving state and local actors where local authorities may otherwise not act.[265] *Kelly* focuses on the federal government interfering with state regulatory powers but stops short of saying that federal prosecutors should refrain from pursuing corruption charges. This distinction may be critical to future drafts of the law, and it is one of the reasons why *Kelly*, as even Brown notes, could be celebrated rather than chalked up to a win for corruption.[266]

2. Vagueness

Despite being raised in charges under a different statute, the vagueness components of *Kelly* appear very similar to those raised in *McDonnell* and *Skilling*. In particular, the Court's narrowing of "property" is analogous to the "official act" interpretation in *McDonnell*.[267] The *Kelly* "property" definition also relies on the *Skilling* principle requiring actual transfer of something of monetary value rather than violations of intangible rights.[268]

Although the decision does not directly reference the vagueness doctrine, vagueness principles can be found throughout. In *Kelly*, the Court found that the government's definition of "property" would impermissibly expand the reach of federal prosecutors.[269] Interpreting the normal meaning of the words, Kelly and Baroni did not "commandeer" state "property" in their scheme[270] any more than McDonnell undertook an "official act" by holding a meeting.[271] To prevent overreaching prosecutors from criminalizing conduct that is not clearly within the statute, the Court applied a very narrow

262. *See id.* at 176.
263. *See id.*
264. *See supra* note 151 and accompanying text.
265. *See* Messick, *supra* note 146; *supra* note 146 and accompanying text.
266. *See* Brown, *supra* note 261, at 177.
267. *See supra* note 240 and accompanying text.
268. *See supra* note 181 and accompanying text.
269. Kelly v. United States, 140 S. Ct. 1565, 1574 (2020).
270. *Id.* at 1573.
271. *See supra* notes 242–43 and accompanying text.

interpretation of "property," directly addressing the vagueness doctrine's prosecutorial discretion protections.[272]

In *Skilling*, the Court already decided that "intangible rights" were not within the core scope of the mail and wire fraud statutes.[273] In establishing the bribery and kickback requirement, the Court made it clear: the law dictates that to prosecute based on corrupt acts, an offical must have received tangible benefits.[274]

Kelly holds to this principle. In *Kelly*, the Court drew a firm line between "property" and what it deemed to be an exercise of regulatory power.[275] Section 1341 requires the object of the fraud to be actual property in the hands of the victim, not the state's exercise of its police powers.[276] The Court ruled that Kelly and Baroni exercising the state prerogative to realign traffic lanes did not involve such tangible property.[277] They did not pick up the lanes and take them or convert them for personal use.[278] They undoubtedly exercised their authority for malicious reasons, but all they did was "alter a regulatory decision," not take property.[279] Just as the Court in *Skilling* found that undisclosed self-dealing did not qualify as a bribe or a kickback and therefore was outside the scope of § 1346,[280] *Kelly* found that "property" in § 1343 simply did not include the use of regulatory power.[281]

The *Kelly* Court did not limit its narrow interpretation to solely the word "property." It doubled down and made it as clear as possible that in no way could what Kelly and Baroni did be interpreted as taking the state's property.[282] The Court held that under § 1343, property must not only play a role in the fraud—it must be the "object of the fraud."[283] It reasoned that the "object" of Kelly and Baroni's fraud was not to take the Port Authority's property—in this case, the wages of Port Authority employees—but to carry out their scheme.[284] They did not care about Port Authority labor or seek to obtain its services.[285] Labor costs were merely a byproduct of their lies, not a sufficient basis on which to uphold the convictions.[286]

The *Kelly* opinion's devotion to clarifying the language of the statute reflects the most consistent trend in federal corruption cases. The vagueness

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272. *See Kelly*, 140 S. Ct. at 1574.
273. *See* Skilling v. United States, 561 U.S. 358, 368 (2010).
274. *See id.* at 407–08; *see also supra* note 181 and accompanying text.
275. *Kelly*, 140 S. Ct. at 1572 (citing Cleveland v. United States, 531 U.S. 12, 23 (2000)).
276. *See* Cleveland v. United States, 531 U.S. 12, 23–26 (2000); *see also* United States v. Weigand, No. 20-CR-188, 2020 WL 5105481, at *5 (S.D.N.Y. Aug. 31, 2020).
277. *See Kelly*, 140 S. Ct. at 1572.
278. *See id.* at 1573.
279. *Id.*
280. *See* Skilling v. United States, 561 U.S. 358, 411 (2010).
281. *See Kelly*, 140 S. Ct. at 1572.
282. *See id.* at 1574 ("Because the scheme here did not aim to obtain money or property, Baroni and Kelly could not have violated the federal-program fraud or wire fraud laws.").
283. *Id.* at 1573 (quoting Pasquantino v. United States, 544 U.S. 349, 355 (2005)).
284. *Id.* at 1574.
285. *Id.* at 1573.
286. *Id.*

argument is at the foundation of *McNally*, *Skilling*, and *McDonnell*.[287] Although the Court does not explicitly cite the vagueness doctrine, its influence nonetheless appears in *Kelly*. The Court will not allow federal prosecutors to stretch the meaning of federal statutes to reach conduct that Congress did not clearly intend.[288] When forced to decide between two interpretations, such as whether holding a meeting is an official act or not or if closing lanes is taking property, it will err on the side of lenity and employ a narrow construction of the statutes.[289]

What is not present in *Kelly* may be just as important as what is. Like in *Skilling* and *McDonnell*, the Court did not strike down the statute as unconstitutionally vague.[290] In *Kelly*, the Court utilized statutory elements rather than constitutional ones to confine the boundaries of the statute.[291] It presents some hope for prosecutors in future proceedings. The mail and wire fraud statutes are independently constitutional; their language just does not capture the conduct that the federal government wants them to in these instances.

If provided with a statute properly tailored to the specific conduct, it is more than possible that the Court would uphold federal corruption convictions. The *Kelly* decision seems carefully written not to overextend the application of the holding. For example, with reference to § 1343, Justice Kagan emphasized that a "state or local official's fraudulent schemes violate *that* law only when, again, they are 'for obtaining money or property.'"[292] The Court agreed that what Kelly and Baroni did should not be protected but ruled that their conduct did not specifically violate the federal program fraud or wire fraud laws.[293] The government had to prove *property* fraud, and it failed to do so.[294] *Kelly*, therefore, reads less as a constitutional bar to federal prosecutions and more as a plea for congressional action.

Prosecutors' hands nonetheless appear to be tied until Congress changes the federal corruption laws in this respect. The government can continue trying to wiggle around the narrow standards set in *Skilling* and reinforced through *McDonnell* and *Kelly*,[295] but the Court has now established a strong precedent that it will take the narrow road and crack down on those attempts.

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287. *Supra* Part II.B.

288. *See* Skilling v. United States, 561 U.S. 358, 407–09 (2010) (citing McNally v. United States, 483 U.S. 350, 360 (1987)).

289. *See supra* notes 174–76 and accompanying text.

290. *See supra* note 189 and accompanying text.

291. *See supra* notes 275–81 and accompanying text.

292. Kelly v. United States, 140 S. Ct. 1565, 1572 (2020) (emphasis added) (quoting 18 U.S.C. § 1343).

293. *Id.* at 1574.

294. *See id.* at 1571.

295. *See* Brief for *Amici Curiae* Lord Conrad Black & Former Governor Robert F. McDonnell in Support of Petitioner at 7, *Kelly*, 140 S. Ct. 1565 (No. 18-1059), 2019 WL 1275301, at *7 [hereinafter Brief of Lord Conrad Black] ("[T]he Government aims to 'take[] the jurisprudence full-circle'—not by refighting old interpretive battles, but by pushing a new theory of liability that, if accepted, would render the critical limitations in *McNally*, *Skilling*, and *McDonnell* meaningless." (citation omitted) (quoting Petition for a Writ of Certiorari at 13, *Kelly*, 140 S. Ct. 1565 (No. 18-1059))).

3. Criminalization of Politics

Just as in *McDonnell*, the criminalization argument is present in the *Kelly* briefs.[296] Robert McDonnell himself submitted a brief in support of Kelly and Baroni,[297] and the petitioner's brief even uses the "chilling" language from the *McDonnell* decision in one of its argument headings.[298] The Court therefore once again faced an opportunity to condone the corrupt behavior on constitutional grounds.

Despite such opportunity, *Kelly* seems to tread on the perimeter of the criminalization argument without actually committing to the constitutional shield that *McDonnell* appeared to implement. The Court is indeed concerned with the federal government criminalizing state actions that are well within the traditional powers of the state.[299] It recognized that governance involves many regulatory choices and allowing the federal government to criminalize all lies would undercut the previously established standards of the Court.[300] This sounds strikingly similar to the criminalizing-everyday-politics arguments made, and seemingly endorsed, in *McDonnell*.[301]

However, *Kelly* turned on the statutory boundaries of "property."[302] What conduct the federal government could constitutionally prosecute did not fuel the decision. The Court was mostly worried about property statutes being used to prosecute state actions that fell outside the statutes' reasonable interpretations.[303]

This represents a significant departure from *McDonnell*. Some read the *McDonnell* decision as the Court normalizing the corrupt actions of officials

296. *See* Brief for Petitioner, *supra* note 251, at 17 ("There is no end to the (bipartisan) mischief that such a regime would facilitate, or to the chilling effect it would carry."); *Id.* at 20 ("It would be more than a little surprising . . . if the judiciary found in the . . . mail fraud statute[] a rule making everyday politics criminal."(quoting United States v. Blagojevich, 794 F.3d 729, 735 (7th Cir. 2015))); Brief of the National Ass'n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 9, *Kelly*, 140 S. Ct. 1565 (No. 18-1059), 2019 WL 4729854, at *9 ("Here, the government's theory of liability would politicize the mail fraud statute beyond repair, making every political decision that involved deception on the public vulnerable to criminal prosecution because in some collateral sense it was accompanied by a government expenditure.").

297. *See generally* Brief of Lord Conrad Black, *supra* note 295.

298. *See* Brief for Petitioner, *supra* note 251, at 19 (including the header: "The Government's Theory Criminalizes Politics and Chills Public Service"); *see also* McDonnell v. United States, 136 S. Ct. 2355, 2372 (2016).

299. *Kelly*, 140 S. Ct. at 1572.

300. *See id.* at 1574.

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

302. *See Kelly*, 140 S. Ct. at 1574 ("Because the scheme here did not aim to obtain money or property, Baroni and Kelly could not have violated the federal-program fraud or wire fraud laws. We therefore reverse the judgment.").

303. *See id.* ("Federal prosecutors may not use *property fraud statutes* to 'set[] standards of disclosure and good government for local and state officials.'" (alteration in original) (emphasis added) (quoting McNally v. United States, 483 U.S. 350, 360 (1987))).

by using political discourse to support its narrow interpretations.[304] In the course of interpreting "official act," *McDonnell* weaves the criminalization critiques into the constitutional arguments.[305] The *McDonnell* Court is not only focused on the expansion of federal jurisdiction reaching the decisions of state officials.[306] It is also concerned about the chilling effect such convictions would have on the general political atmosphere.[307] In other words, the Court is not just worried about an overreaching criminal statute; it is also worried that the reach will stop public officials from politicking. While McDonnell's political actions were not "normal," the *McDonnell* Court was hesitant to potentially criminalize any form of political activity.[308]

Kelly is not nearly as enthusiastic about protecting the everyday behavior of politicians. It confines its analysis to what property fraud statutes can and cannot do.[309] Federal attorneys were not restricted from prosecuting corrupt state officials because it would chill political behavior but because it is not what property fraud statutes are for.[310] According to the Court, those statutes bar schemes aimed at obtaining property, nothing more and nothing less.[311]

The distinction here is key to understanding where the Court now stands on federal corruption. As Justice Kagan notes, what Kelly and Baroni did was an abuse of power, but "not every corrupt act by state or local officials is a federal crime."[312] The Court has made abundantly clear that corrupt acts will not constitute a federal crime under property fraud statutes. *Kelly* does not imply that all politics are off-limits to federal prosecutors. They just need something more direct than wire fraud laws.[313]

B. Building the Bridge: How Congress Can Get over the Federal Corruption Issue

This section analyzes the impact that the *Kelly* decision will have on federal policymaking and how Congress can amend the law to conform with the Court's decisions. Part III.B.1 summarizes how *Kelly* dealt with each concept above to determine a direction for the Court moving forward. Part III.B.2 then proposes that Congress amend the honest services statute to define honest services violations with reference to state corruption laws.

304. *See* Zephyr Teachout (@ZephyrTeachout), TWITTER (May 7, 2020, 1:03 PM), https://twitter.com/ZephyrTeachout/status/1258442288562405376 [https://perma.cc/BSV7-E2F3]; *supra* Part II.C.

305. *See supra* notes 238–43 and accompanying text.

306. *See McDonnell*, 136 S. Ct. at 2372.

307. *See id.* ("In addition to being inconsistent with both text and precedent . . . .").

308. *Id.*

309. *See* Kelly v. United States, 140 S. Ct. 1565, 1574 (2020) ("The property fraud statutes do not countenance that outcome.").

310. *See id.*

311. *See id.*

312. *Id.*

313. *See id.*

1. The Court's Expectations for Corruption Law After *Kelly*

Kelly does not represent a victory for U.S. anti-corruption regulation. The Court overturned the corruption convictions and in the process, removed another viable federal prosecution tool. However, the rationale behind the decision may have paved a path forward to enact more comprehensive anti-corruption legislation.

As in previous cases, the *Kelly* Court once again ruled that Congress must provide clear legislation that shows that federal statutes are intended to reach specific conduct, such as that at issue in *Kelly*.[314] Federal prosecutors have attempted to prosecute corruption under the mail fraud statute in a variety of ways, but the Court has consistently rejected those arguments under vagueness and federalism principles.[315] Prosecutors can continue to experiment with interpretations of property fraud[316] or bribery statutes[317] but, given their lack of success, legislative action is a more practical solution.

There is already a congressional appetite to draft legislation that deals with federal corruption.[318] Amending the honest services statute to incorporate the Court's rulings in *Kelly*, *McDonnell*, and *Skilling* would be a viable legislative solution.[319] However, Congress will have to carefully tailor any legislation to meet the standards the Court established in these recent cases.

To start, Congress needs to adhere to the Court's vagueness concerns by narrowing the scope of the honest services statute. Congress has never defined "honest services,"[320] leaving the Court to develop its own definition using the bribery and kickback requirements.[321] The Court's reluctance to strike down the statute as unconstitutionally vague shows that it does not want to invalidate the statute, but it will require meaningful boundaries for "honest services" to satisfy vagueness requirements.[322] A congressional enactment will need to properly limit the statute's scope to sufficiently define "honest services" and prevent prosecutorial overreach.

There are also definite federalism concerns to be addressed. The *Kelly* decision furthers the Court's protection of states' ability to self-regulate.[323] However, this does not completely prevent congressional intervention. *Kelly* does not represent a total bar for federal prosecutors to bring charges against corrupt state actors. To succeed, prosecutors will need a congressional enactment that not only defines the boundaries of the law but also respects the federal-state balance and the ability of states to maintain their regulatory powers.

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314. *See id.*
315. *See supra* Parts I.A, II.
316. *See generally Kelly*, 140 S. Ct. 1565.
317. *See generally* McDonnell v. United States, 136 S. Ct. 2355 (2016).
318. *See supra* Part I.C.
319. *See* FOSTER, *supra* note 95, at 23–24.
320. *See* 18 U.S.C. § 1346 (using but not defining "honest services").
321. *See supra* note 181 and accompanying text.
322. *See supra* notes 189–93 and accompanying text.
323. *See supra* text accompanying note 257; *see also supra* notes 152–55 and accompanying text.

While the *Kelly* Court did focus on federalism and vagueness concerns, it did not focus on the "criminalization of politics" and neither should Congress. *Kelly* showed that the Court is not necessarily concerned with criminalizing political conduct so long as the criminalization adheres to well-established vagueness and federalism principles. If a statute clearly defines corrupt conduct and allows the states to maintain their ability to self-regulate, the Court is unlikely to extend protections to corrupt political actions. If Congress narrows the scope of the honest services statute to comport with the federalism and vagueness principles, the Court will likely allow corruption convictions under the statute to stand.

2. The Bridge Less Traveled: Defining Honest Services with Reference to State Law

The key to improving the honest services statute will be defining "honest services" with clarity to narrow its scope while still maintaining the regulatory sovereignty of the states. Congress should consider an amendment that both allows states to set their own standards for officials and simultaneously grants the federal government the ability to enforce those standards.

Most states not only have corruption laws but have very well-written and specific ones.[324] Recall New Jersey's official misconduct law, which prohibits the "unauthorized exercise of . . . official functions."[325] If state prosecutors brought the charges against Kelly and Baroni under this statute, the Court implied that their conduct likely would have fallen within its scope.[326] However, state officials did not bring the charges, highlighting the concern that local officials are unlikely to prosecute their peers.[327] Because it was a state law, the federal government was unable to bring the charges, leaving a gap in the law that Kelly and Baroni were fortunate enough to fall into.

Congress should bridge this gap by drafting an amendment allowing the federal law to define "honest services" with reference to state law. Defining federal law with reference to state violations is not a new concept, even within federal corruption law. A *McNally* footnote explains that the honest services statute is self-contained and therefore relies only on itself to define its content.[328] The Court then provides an example of a federal statute that, relying on the interstate commerce power, references state law to criminalize interstate gambling and prostitution.[329] The footnote details that § 1952(b) of the Travel Act[330] defines the broad term "unlawful activity" with reference

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324. *See supra* Part I.D.

325. *See* N.J. STAT. ANN. § 2C:30-2 (West 2021); *see also supra* note 109 and accompanying text.

326. *See* Kelly v. United States, 140 S. Ct. 1565, 1571 (2020).

327. *See supra* note 146 and accompanying text.

328. McNally v. United States, 483 U.S. 350, 377 n.10 (1987) (Stevens, J., dissenting).

329. *Id.*; *see also* 18 U.S.C. § 1952(b).

330. 18 U.S.C. §§ 1951–1952.

to state law.[331] The statute defines "unlawful activity" to include, among other things, extortion, bribery, and arson in violation of the law of the state where the conduct occurred.[332]

Although the Travel Act defines "unlawful activity" using state statutes, the Court has still granted federal prosecutors some discretion as to how to apply the law. For example, the state statute only needs to cover a generic definition of the alleged conduct. In *United States v. Nardello*,[333] the Court found that a state blackmail law could be used in a federal extortion indictment because the blackmail statute included "a type of activity generally known as extortionate."[334] The Court determined that when an act prohibited by state law falls within a generic definition of extortion, it constitutes an "unlawful act" under the Travel Act.[335] The Court reiterated that the *Nardello* decision leaves little uncertainty about the Travel Act's meaning and therefore dismissed federalism and rule of lenity concerns in *Perrin v. United States*.[336] The Travel Act represented Congress's deliberate intent to change the federal-state balance to enforce both state violations and federal bribery law in one swoop.[337] Until the Travel Act impeded a constitutional provision, the Court would leave its construction to Congress.[338]

Of course, the scope of the Travel Act is not unlimited. Not every unlawful activity qualifies as "unlawful activity" under the Act; it is only those activities specifically provided in the statute involving liquor, narcotics, controlled substances, gambling, prostitution, arson, bribery, or extortion.[339] The statute merely allows the government to use the state definitions of these individual crimes. Further, the conduct must still fit within a generic definition of the crime. For example, in *Scheidler v. National Organization for Women, Inc.*,[340] the Court reversed a conviction under the Travel Act because the conduct did not fit within the common definition of extortion.[341] The defendants did not obtain or attempt to obtain property and therefore did not commit extortion.[342] The Travel Act also requires that mail or interstate facilities actually be used to promote the unlawful activity, limiting its effect on intrastate governance.[343]

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331. *McNally*, 483 U.S. at 377 n.10 (Stevens, J., dissenting).
332. 18 U.S.C. § 1952(b).
333. 393 U.S. 286 (1969).
334. *Id.* at 296.
335. *See* Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 409–10 (2003).
336. 444 U.S. 37 (1979); *see also id.* at 49 n.13; *White Collar Crime: Fourth Survey of Law*, 24 AM. CRIM. L. REV. 735, 736 (1987) ("*Perrin* thus dismissed the argument expressed in *Rewis* that federalism concerns require a narrow interpretation of the Travel Act.").
337. *See Perrin*, 444 U.S. at 50.
338. *See id.*
339. *See White Collar Crime: Fourth Survey of Law*, *supra* note 336, at 737.
340. 537 U.S. 393 (2003).
341. *See id.* at 393.
342. *See id.* at 410.
343. *See* 3 JOEL ANDROPHY, WHITE COLLAR CRIME § 17:6 (2d ed. 2020); *see also* Andrew Wiktor, Note, *You Say Intrastate, I Say Interstate: Why We Should Call the Whole Thing Off*, 87 FORDHAM L. REV. 1323, 1357 (2018).

Despite the limitations, the Travel Act still provides federal prosecutors with the necessary flexibility to police acts that toe the line with respect to the delicate federal-state balance. Congress should take a similar approach with the honest services statute. Lower courts have considered in the past whether or not the definition of "honest services" must comply with state laws.[344] A congressional enactment answering the question in the affirmative would be a natural progression in the development of the law.

Following the structure of the Travel Act, Congress should amend § 1346 to include another provision defining "honest services," similar to the way the Travel Act defines "unlawful activity."[345] The amendment would utilize state official misconduct laws to define honest services in a way that reaches political corruption.[346] Such a provision might read:

> As used in this section "honest services" means extortion, bribery, or official misconduct in violation of the laws of the state in which committed or of the United States.

Adding such a provision would be an effective cure to the ailments that have plagued federal corruption prosecutions. To deal with vagueness concerns, the amendment would constitute a clear action by Congress, defining the conduct it intends to proscribe. Instead of leaving "honest services" open to the interpretation of federal prosecutors, this amendment would properly limit the scope of honest services by limiting it to bribery, extortion, or state official misconduct violations.

The defining provision also clarifies the covered conduct by comporting with current understandings of the law. The Court already uses bribery and kickbacks as the defining parameters of "honest services."[347] Drafting the amendment to include bribery and extortion credits the Court's previous rulings, rather than overriding them.[348] By adding rather than replacing, Congress would make its intentions clear: it intends to make both bribery and the abuse of official regulatory powers illegal. As with the Travel Act, the use of clear language to show what Congress intends will likely prevent successful challenges to the statute based on the rule of lenity and the vagueness doctrine.[349] If Congress wants to criminalize corrupt actions, it needs to speak clearly, and this amendment would do just that. It would properly limit the statute's scope to sufficiently define the criminal conduct and prevent prosecutorial overreach.

The amendment also addresses federalism concerns. Defining "honest services" with reference to state law prevents federal prosecutors from setting standards of good governance for states by using the standards states set

344. *See supra* notes 112–14 and accompanying text.
345. *See* 18 U.S.C. § 1952(b).
346. *See supra* Part I.D.
347. *See supra* note 181 and accompanying text.
348. *Compare* McNally v. United States, 483 U.S. 350, 360 (1987), *with* 18 U.S.C. § 1346; *see also supra* notes 55–56 and accompanying text.
349. *See supra* note 336 and accompanying text.

themselves.[350] The law would grant federal prosecutors the ability to target corruption but preserve the states' ability to determine what qualifies as "official misconduct" and what does not. States would thus retain the power to control what conduct their officials may be held liable for. If the law were to follow the same path as the Travel Act, the reservation of state regulatory power and the clear congressional intent of the amendment should extinguish the federalism and rule of lenity concerns.

As with any proposal, there are drawbacks to this amendment. For one, defining "honest services" using "official misconduct" may be trading one vague term for another. Some state courts have debated how "official misconduct" is defined within statutes.[351] The main question that arises is what qualifies as the public official's "duty" and what types of actions amount to "official misconduct."[352] Despite the Court's flexibility in applying "generic" definitions of extortion and bribery to the Travel Act, these terms have relatively well-understood meanings tied to property or monetary gain. Perhaps this is why the Court chose to define "honest services" using bribery.[353] An "official misconduct" definition may therefore raise the same vagueness issues as "honest services."

However, even though there are vagueness concerns with "official misconduct," the term is still not as vague as "honest services" and should not be enough to condemn the proposed amendment. While courts have struggled to define "honest services,"[354] they have successfully defined "official misconduct" using statutes, codes of conduct, and other well-defined regulations.[355] Unlike the possibly boundless scope of "honest services," courts have dismissed charges under "official misconduct" that fail to establish that a set of rules prohibit the official's actions.[356] "Official misconduct" therefore offers enough guidance to provide the meaningful limits to the law that "honest services" has failed to produce.

CONCLUSION

Kelly is not a win for anti-corruption efforts, but it does represent a potential guidepost to lead future attempts to police corrupt public officials.

350. *McNally*, 483 U.S. at 360.

351. *See generally* Abraham Abramovsky & Jonathan I. Edelstein, *Prosecuting Judges for Ethical Violations: Are Criminal Sanctions Constitutional and Prudent, or Do They Constitute a Threat to Judicial Independence?*, 33 FORDHAM URB. L.J. 727 (2006); Thomas Cerabino, Recent Development, *Penal Law § 195.00(2)*, 54 ST. JOHN'S L. REV. 137 (1979).

352. *Compare* Wright v. Beard, No. 14CV-90, 2014 WL 12769265, at *3 (W.D. Ky. Oct. 24, 2014) (holding that it is not clear what statute, rule, or law amounts to a violation of official misconduct), *with* People v. Garson, 848 N.E.2d 1264, 1265 (N.Y. 2006) (ruling that official misconduct for a judge may be defined using the New York Code of Judicial Conduct).

353. *See supra* note 181 and accompanying text.

354. *See supra* Part I.B.

355. *See, e.g.*, State v. Tolotti, No. A-5380-17T4, 2019 WL 692300, at *7 (N.J. Super. Ct. App. Div. Feb. 20, 2019) (upholding an official misconduct conviction based on a violation of the regulations of the official's local police department).

356. *See, e.g.*, State v. Kueny, 986 A.2d 703, 711 (N.J. Super. Ct. App. Div. 2010) (overturning an official misconduct conviction).

The Supreme Court's decision applies reasoning consistent with previous cases focused on vagueness and federalism concerns but stops short of normalizing the misconduct. The decision provides Congress with the necessary structure to enact new federal corruption laws that reach the conduct in *Kelly* and previous cases without upsetting well-established constitutional principles.

One option would be to amend § 1346 to define "honest services" using state laws. This would create a balance between the need to define the prohibited conduct and the right of the states to self-regulate. Despite its possible limitations, the amendment would be a simple way for Congress to provide federal prosecutors a viable statute to combat corruption while accounting for the Supreme Court's concerns. Given the history of the Court's interpretations, such an amendment is the best option to solve the ongoing corruption issue. *Kelly* shows that it will take Congress "speaking clearly" on corruption to successfully prosecute corrupt acts at the federal level. Congress should take the hint and enact an amendment to the honest services statute.

Citizens understand that political corruption at all levels has negative implications for society. The public has a natural expectation that when it elects officials, those official will serve the public's interest and not their own. When corrupt conduct such as occurred in the Bridgegate scandal goes unpunished, it undermines the foundations of American democracy and permanently leaves marks of distrust on the government. The United States needs to solve the federal corruption issue that has been evolving in the courts for over forty years in a way that fits within democratic principles. The Court has created the roadmap to do so through decisions like *Kelly*. It is now up to Congress to build the bridge and finally close the gap between public expectations and federal corruption prosecutions.