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Defending Bridgegate

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Defending Bridgegate

George D. Brown*

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I. Introduction

The Supreme Court's decision in the "Bridgegate"¹ controversy has been the subject of intense debate. It has received strong support.² However, some critics assail the decision as representative of a pattern of recent cases in which the Court has shown itself as indifferent to political corruption, if not supportive of it.³ Somewhat lost in the discussion is the decision's potential to be the foundation for a seismic re-alignment of anti-corruption enforcement in the United States. The current model—with federal prosecution as the norm—is not cast in stone.

The facts of Bridgegate are well known. In 2015, associates of then Governor Chris Christie (Republican, New Jersey) executed a plan to alter access to the George Washington Bridge—the busiest motor bridge in the world. The plan involved reducing access lanes to the Bridge from Fort Lee, New Jersey. The result was gridlock and chaos in Fort Lee. The schemers wanted to punish the mayor of that town for not supporting the Governor's re-election. The result was a disaster for them on many fronts.⁴ The United States Attorney for New

1. Kelly v. United States, 140 S. Ct. 1565 (2020). In this article, *Kelly* will refer to the actual decision, while Bridgegate will refer to the defendants' conduct, and to the ensuing controversy.

2. See Randall D. Eliason, Opinion, *On 'Bridgegate,' the Supreme Court Got It Right*, WASH. POST (May 7, 2020, 8:54 PM), <https://perma.cc/RR4V-MS8S>; Corinne Ramey, *Was 'Bridgegate' Criminal, or Just Dirty Politics?*, WALL ST. J. (June 30, 2019), <https://perma.cc/4BPS-PPPC>.

3. E.g., Elie Mystal, *The Supreme Court Has Given Its Blessing to Public Corruption*, THE NATION (May 14, 2020), <https://perma.cc/P8SQ-NBYK>; Leah Litman, Opinion, *Prosecuting Political Corruption Cases Like Bridgegate Is Nearly Impossible*, WASH. POST (May 8, 2020), <https://perma.cc/4FFE-CHRE> [hereinafter Litman Op-Ed]; Ian Millhiser, *The Supreme Court's "Bridgegate" Decision Leaves a Big Hole in America's Anti-Corruption Laws*, VOX (May 7, 2020, 12:50 PM), <https://perma.cc/XP6Q-6LPU>.

4. They lost their jobs (two of them resigned). Christie was not directly implicated, but his public image suffered. See, e.g., Aaron Blake, *The 9 Things You Need to Know About Bridgegate*, WASH. POST (May 1, 2015), <https://perma.cc/K5E7-5UBB> ("And while he has not been implicated in any wrongdoing, Christie's approval rating in New Jersey continues to drop to this day—so much so that his 2016 presidential aspirations seem pretty dim.").

Jersey prosecuted them for violation of federal fraud statutes.⁵ Their convictions were upheld at both the district and appellate court level.⁶ In May of 2020, however, a unanimous Supreme Court reversed, vacating the convictions.⁷

Justice Kagan’s opinion for the Court analyzed the concept of fraud as embodied in the relevant statutes. She reasoned that they required that the defendants have obtained money and property from the owner of the Bridge: the Port Authority of New York and New Jersey.⁸ She viewed the lane realignment as a regulatory decision that did not involve the required gain or loss of property. The defendants had lied to Port Authority employees and the public to facilitate the scheme. Their conduct may have been fraudulent, even “corrupt,” but it did not constitute a violation of federal law.⁹

Early criticisms have not focused much on the fine points of the decision such as the proprietary/regulation distinction, or the question of whether and to what extent private gain is required in such cases. Instead, they have attacked the decision as part of the Roberts Court’s softness on corruption.¹⁰ They rely heavily on campaign finance decisions such as *Citizens United v. Federal Election Commission*,¹¹ as well as the body of Supreme Court decisions on ordinary corruption. The issue of

5. See 18 U.S.C. §§ 666, 1343 (2018). The charges included substantive violations and conspiracy to violate. There was also an allegation of violation of the Criminal Civil Rights statute, *Id.* § 242.

6. See *United States v. Baroni*, 909 F.3d 550, 558–60 (3d Cir. 2018); *United States v. Baroni*, No. 2:15-CR-00193-SDW-1, 2017 WL 1233892, at *1 (D.N.J. Mar. 30, 2017).

7. See *Kelly*, 140 S. Ct. at 1574 (vacating and remanding).

8. See *id.* at 1568–69.

9. See *id.* at 1568 (“The evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power. But the federal fraud statutes at issue do not criminalize all such conduct.”).

10. See, e.g., Litman Op-Ed, *supra* note 3; *c.f.* Zephyr Teachout (@ZephyrTeachout), TWITTER (May 7, 2020, 1:10 PM), <https://perma.cc/A8M2-28PJ> [hereinafter Teachout tweet] (“The case still fits within a pattern of the Court striking down key prosecutorial tools in the anticorruption fight but it was a relatively novel theory being used, and I think the real impact on prosecutions will be less than other cases.”).

11. 558 U.S. 310 (2010).

whether to analyze these decisions together is important.¹² *Citizens United* played no role in *Kelly v. United States*.¹³ It should not escape even the casual observer that the first group of cases have been split along ideological lines, while the second group are almost always unanimous. It is virtually inconceivable that the liberal justices would abandon their position on how to deal with corruption in one set of cases but not the other. The notion of a monolithic Roberts Court approach to all issues of corruption seems simplistic.

Focus on the Roberts Court's purported general approach to corruption may lead to insufficient attention to a specific aspect of Justice Kagan's opinion: the emphasis on federalism as a driving force behind the result. It is true that in other corruption decisions favoring the defendant, the Court has often invoked federalism.¹⁴ However, the concept is much more central in *Kelly*. The American model of anti-corruption enforcement has long been debated.¹⁵ Under the present model, the federal government plays the lead role in combating state and local corruption, particularly in high profile cases.¹⁶ This division of authority is not inevitable. After *Kelly*, a re-alignment seems possible. States have statutes on point and mechanisms to enforce them.¹⁷ Moreover, reconsideration of the federal role would come at a time when the allocation of

12. See, e.g., Jacob Eisler, McDonnell and Anti-Corruption's Last Stand, 50 U.C. DAVIS L. REV. 1619, 1626–27 (2017); see generally Joshua S. Sellers, Contributions, Bribes, and the Convergence of Political and Criminal Corruption, 45 FLA. ST. U. L. REV. 657 (2018).

13. 140 S. Ct. 1565 (2020).

14. E.g., McNally v. United States, 483 U.S. 350, 359–61 (1987).

15. Compare Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75, 144 (2003),) with Geraldine S. Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 207–08 (1994).

16. These cases set the tone for the entire field.

17. For example, the New Jersey statute on “unauthorized exercise of official functions,” N.J. STAT. ANN. § 2C:30-2 (West 2016), was cited in *Kelly*, 140 S. Ct. at 1571. The Louisiana laws on video poker licenses were cited by the Court in *Cleveland v. United States*, 531 U.S. 12, 15 (2000) (citing LA. REV. STAT. ANN. §§ 27:301–:324 (West Supp. 2000)). And many states have ethics commissions. See generally COUNCIL ON GOVERNMENTAL ETHICS LAWS, <https://perma.cc/4G4U-59NM>; *State Ethics Commissions: Jurisdiction*, NAT'L CONF. ON ST. LEGISLATURES (Aug. 21, 2020), <https://perma.cc/PPN7-8Y2J>.

responsibilities between the two levels of government seems up for grabs, with frequent calls for greater state responsibility. From partisan gerrymandering to immigration to police reform, there are stirrings of a “new federalism.” After *Kelly*, one must consider what a new anti-corruption federalism might look like.

Section I of the article sets out the legal context and the alarming facts of Bridgegate. Section II examines the Bridgegate legal saga from the indictment through the decision in the lower courts. Although its outcome almost always favored the prosecution, the shape of the case changed considerably during its journey to the Supreme Court, an indication, perhaps, of its difficulty. Section III examines the High Court's decision in *Kelly*. It considers both the Court's approach to the concept of fraud in the relevant statutes, and its emphasis on federalism concerns in construing them. Section IV weighs possible impacts of *Kelly*, both on future prosecutions under the existing model, and on that model itself. It revisits the criticisms of the Roberts Court, and contends that the unified vision of the Court's approach to corruption breaks down when one examines differing legal contexts and doctrines. The First Amendment plays a dominant role in campaign finance matters, but is largely absent from ordinary corruption cases. Federalism has nothing to do with campaign finance. It has a lot to do with anti-corruption enforcement.

II. Bridgegate: Alarming Facts and Uncertain Legal Context

A. The Facts: “Time for Some Traffic Problems in Fort Lee.”

In his 2013 re-election campaign, Republican New Jersey Governor Chris Christie sought the endorsement of multiple Democratic mayors of New Jersey towns to show bi-partisan support. He deployed his Deputy Chief of Staff, Bridget Kelly, to court the mayors for their endorsement, including the Mayor of Fort Lee, Mark Sokolich.¹⁸ Mayor Sokolich declined to endorse Christie that summer.

Since Fort Lee connects New Jersey to New York via the George Washington Bridge, Kelly reached out to William

18. This recital of the facts is drawn from the decisions of the Supreme Court and the Third Circuit. See *Kelly*, 140 S. Ct. at 1568–71; *United States v. Baroni*, 909 F.3d 550, 558–60 (3d Cir. 2018).

Baroni, the Deputy Executive Director of the Port Authority of New York and New Jersey and the highest ranking New Jersey official in the bi-state agency, and David Wildstein, who functioned as Baroni's chief of staff, for suggestions on how to respond. As a result of a decades old political agreement, three of the twelve toll booth lanes on the Bridge's upper level feed from local Fort Lee traffic, while the remaining nine lanes feed from various highways. Wildstein suggested that removing the dedicated Fort Lee lanes would cause rush hour traffic to back up for hours on local streets, creating a gridlock. The plan was later revised to allocate only one lane to Fort Lee traffic. Kelly agreed in a now famous email: "Time for some traffic problems in Fort Lee." Kelly followed up in a phone call that she wanted to "creat[e] a traffic jam that would punish Mayor Sokolich and 'send him a message.'" Baroni, using his power as the Deputy Director, gave the sign-off approving the plan. The prosecution framed this as obtaining property; the defense claimed it was a use of regulatory power.

Baroni did not have the power to reallocate the lanes arbitrarily. To put the plan in motion, Kelly, Baroni, and Wildstein created a cover story that "the lane change was part of a traffic study, intended to assess whether to retain the dedicated Fort Lee lanes in the future."

In order to effectuate the scheme, Kelly, Baroni, and Wildstein agreed to incur the cost of extra toll collectors. On September 9, 2013, the plan went into effect on the first day of school, without warning or advance notice to Mayor Sokolich or Executive Director of the Port Authority, Patrick Foye. The town of Fort Lee was engulfed in gridlock, with chaos and traffic rivaling September 11, 2001. Mayor Sokolich's repeated attempts to reach Baroni were met with radio silence, which was part of the schemers' communication plan. The realignment scheme lasted five days.

The public backlash was "swift and severe."¹⁹ Port Authority staff were asked to testify before the New Jersey State Assembly. In the following months, Wildstein and Baroni resigned and Governor Christie fired Kelly. On April 23, 2015, a federal grand jury returned an indictment charging defendants with violations of federal law. While Governor

19. *Kelly*, 140 S. Ct. at 1571.

Christie won re-election, his national reputation never recovered.

B. The Legal Context

1. Views of Corruption

The conduct outlined above certainly qualifies as bare-knuckle politics.²⁰ But two key questions arise: is it corruption; and, is it the type of corruption reached by federal law? A narrow view of corruption focuses on private gain through public office. As Jacob Eisler puts it, “[t]he law of corruption identifies when public officials betray their office for the sake of self-enrichment.”²¹ However, his analysis points to a broader framework:

Corruption is . . . intimately related to positive duties of government. Corruption can be understood as deviation from political integrity (itself informed by deep concepts such as sovereign legitimacy and the right to use the collective power of the state), and a particular corrupt act can be understood as the violation of a political duty.²²

Professor Teachout sees the debate over the meaning of “corruption” in a similar way. “Corruption, in the American tradition, does not just include blatant bribes and theft from the public till, but encompasses many situations when politicians and public institutions serve private interests at the public’s expense.”²³

Was Bridgagate corruption? Not surprisingly, both Eisler and Teachout reject a narrow, quid pro quo approach to corruption.²⁴ As they discuss, there are sharp divisions over the

20. See Brief for Petitioner at 6, *Kelly*, 140 S. Ct. 1565 (No. 18-1059), 2019 WL 4568203.

21. Eisler, *supra* note 12, at 1627.

22. *Id.* “The Court has committed to a particular theory of democracy that refuses to impose the expectation that the public good should be the politicians’ primary concern.” *Id.* at 1642. At a certain level of generality, Eisler’s critique can be applied to both campaign finance issues and ordinary corruption. The question about how closely they are related is discussed below.

23. ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA 2* (2014).

24. See *id.* at 12; Eisler, *supra* note 12, at 1629.

meaning of corruption.²⁵ Bridgegate shows how the divisions play out. If one focuses on using office for personal gain, the conduct can be seen as hardball politics, but not more. The political gain from harming the mayor does not seem to fit within the classical narrow concept. Certainly, it is hard to see a quid pro quo. Under a broader concept, however, Bridgegate may be condemned as corrupt. Eisler favors a “civic approach” based on the “expectation that the public good should be the politician’s primary concern.”²⁶ Bridgegate seems antithetical to any such approach. Eisler discusses the concept of “institutional corruption.”²⁷ “Institutional corruption occurs when the duties of public officers are abused not for explicitly private gain, but in order to yield prohibited benefit (which does not accrue to the official’s personal welfare).”²⁸ Practices such as logrolling and patronage are examples of other conduct that fit the broader context. In sum, under one perspective, Bridgegate can certainly be viewed as corruption.

2. Federal Law

Does this corruption violate federal law? It must be noted at the outset that there is no general federal code of anti-corruption law governing state and local government officials. Nonetheless, anti-corruption prosecutions are an important function of the Justice Department acting through individual United States Attorneys.²⁹ These prosecutions are brought under a series of individual statutes that, taken together, might be viewed as constituting a form of code. They cover mainly extortion,³⁰ bribery,³¹ and mail and wire fraud.³² None of these statutes leaps to mind in considering Bridgegate. At various times there has existed a federal crime of deprivation

25. This debate is largely animated by Supreme Court decisions which will be discussed *infra* Part III.

26. Eisler, *supra* note 12, at 1642.

27. *Id.* at 1630.

28. *Id.* at 1630–31 (discussing theories of Dennis Thompson).

29. See, e.g., NORMAN ABRAMS ET AL., FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 106–07 (7th ed. 2020).

30. 18 U.S.C § 1951 (2018).

31. *Id.* §§ 666, 1346.

32. *Id.* §§ 1341, 1343.

of the right to honest services.³³ Lower courts developed this right by broadly construing the nature of “fraud” to include the right to honest services. *McNally v. United States*³⁴ brought the doctrine to a halt. There is a background issue of separation of powers in *McNally*, but the decision is best known for its invocation of federalism. The Court warned against “the Federal Government . . . setting standards of disclosure and good government for local and state officials.”³⁵ Congress overruled *McNally*, and reinstated the honest services doctrine as within the reach of fraud statutes.³⁶ Bridgegate would have fit nicely within it.³⁷ However, the Supreme Court in *Skilling v. United States*³⁸ subsequently narrowed the scope of the doctrine to bribery and kickbacks.³⁹ The Court relied heavily on the vagueness doctrine, and also cited *McNally*.⁴⁰ The Court was, once again, using approaches to statutory construction in order to keep the federal judiciary from becoming an arbiter of good government within the states. But these approaches were, in part, based on the Constitution. Vagueness is one example. However, a conceivable reading of *Skilling* is that development of a criminally enforceable right to honest services is beyond the power of the federal courts or the Congress.

Were these developments a rejection of a broad view of corruption, or just statutory construction?⁴¹ Not surprisingly, defendants’ amici in *Kelly* portrayed the prosecution as an attempt to reintroduce honest services through the back door.⁴²

33. See, e.g., ABRAMS, *supra* note 29, at 347–51.

34. 483 U.S. 350, 358–61 (1987).

35. *Id.* at 360.

36. See, e.g., ABRAMS, *supra* note 29, at 350–51.

37. See generally Sorich v. United States, 555 U.S. 1204 (2009) (Scalia, J., dissenting from denial of certiorari) (describing examples of the doctrine).

38. 561 U.S. 358 (2010).

39. See *id.* at 408–09 (“To preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.”).

40. See *id.* at 402 (citing *McNally*, 483 U.S. at 360).

41. Cf. TEACHOUT, *supra* note 23, at 195–99 (praising lower courts’ adoption of doctrine because of its breadth).

42. See generally Brief of the National Ass’n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner, *Kelly v. United States*, 140 S. Ct. 1565 (2020) (No. 18-1059), 2019 WL 4729854.

Amici with the same perspective had played an influential role in *McDonnell v. United States*.⁴³ There, the defendant governor set up meetings and performed other minor favors for a would-be state contractor who had given him gifts. He was convicted of bribery. However, the Supreme Court unanimously rejected the notion that he had performed “official acts” on behalf of the donor, a requirement of the statutes at issue.⁴⁴ In sum, on the eve of Bridgegate, one could read Supreme Court doctrine as fundamentally hostile to honest services notions of corruption, or constrained by the vagueness doctrine to reject it.

III. The Bridgegate Prosecution and the Saga in the Lower Federal Courts

A. The Indictment and the Successful Prosecution

The unusual facts of Bridgegate presented the United States Attorney for New Jersey with a dilemma. On the one hand, the conduct looked corrupt—definitional niceties aside. On the other hand, an honest services theory was not available. Thus, he had to fall back on the array of statutes cited above, or find another source of federal criminal law. Yet, many of the criminal statutes rest on some form of quid pro quo, which Bridgegate did not present. He obtained an indictment that charged violation (and conspiracy to violate) of three federal statutes: the Federal Program Bribery Statute,⁴⁵ the Wire Fraud Statute,⁴⁶ and the Criminal Civil Rights Statute.⁴⁷

The essence of the three statutory theories is as follows. The Federal Program Bribery Statute—generally known as § 666—applies to officials of an entity that receives federal

43. See generally *McDonnell v. United States*, 136 S. Ct. 2355 (2016). Ironically, former Governor McDonnell himself joined in an amicus brief in *Kelly*. See generally Brief for Amici Curiae Lord Conrad Black and Former Governor Robert F. McDonnell in Support of Petitioner, *Kelly*, 140 S. Ct. 1565 (No. 18-1059), 2019 WL 1275301.

44. The concept of “official acts” derives from the definition of bribery in 18 U.S.C. § 201 (2018).

45. *Id.* § 666; Indictment at 1–29, *United States v. Baroni*, 2017 WL 1233892 (D.N.J. Mar. 30, 2017) (No. 2:15-CR-00193-SDW-1), <https://perma.cc/BVB7-4SMG> (PDF).

46. 18 U.S.C. § 1343; Indictment, *supra* note 45, at 29–35.

47. 18 U.S.C. §§ 241, 242; Indictment, *supra* note 45, at 33–36.

funding in certain instances, forbidding acts of bribery by such officials.⁴⁸ In addition, any such official violates the statute if he or she “embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the official owner *or* intentionally misapplies, property (of a certain description).”⁴⁹ The prosecutor argued that property could either be tangible or intangible, and that payments to employees—and control of the bridge—qualified.

The wire fraud statute provides in part that “[w]hoever, 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 . . . or promises [utilizes electronic means]” shall be punished.⁵⁰ Again, the prosecutor’s argument was that the indictment sufficiently alleged “obtaining” intangible property.⁵¹

The Criminal Civil Rights Statutes have not been widely used in the anti-corruption context.⁵² The key statute, 18 U.S.C. § 242, makes it a crime for a person acting under color of law to “willfully subject any person in any State, Territory . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”⁵³ The statute was arguably applicable because the defendants had deprived Fort Lee residents of their constitutionally based right to intrastate travel. The indictment survived a motion to dismiss; the jury convicted on all counts. However, the judicial saga had only begun. In particular, the prosecution had to worry about the defense’s general claim that the indictment allowed a

48. 18 U.S.C. § 666.

49. *Id.* § 666(a)(1)(A) (emphasis added).

50. *Id.* § 1343 (emphasis added).

51. *See* United States v. Baroni, No. 2:15-CR-00193-SDW, 2016 WL 3388302, at *8 (D.N.J. June 13, 2016).

52. *See* George Brown, *New Federalism’s Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption?*, 60 WASH. & LEE L. REV. 417, 490–91 (2003) (discussing use of criminal civil rights statutes).

53. 18 U.S.C. § 242 (2018).

back-door version of an honest services prosecution to sneak in through the property theories.⁵⁴

B. The District Court Opinion: Ignoring the Supreme Court?

The lower court opinions are discussed at some length because their differences illustrate the extensive flexibility of the two major federal statutes involved.⁵⁵ In denying defendants' motion to dismiss and motion for acquittal and for a new trial, Federal District Judge Susan Wiggenton delivered opinions that endorsed a broad federal role in combating state and local corruption.⁵⁶ Indeed, she seemed to ignore virtually everything the Supreme Court has been saying since *McNally*.

Her main focus was on the meaning of "misapplies" in § 666.⁵⁷ She read the statute as the equivalent of an honest services provision. It refers to "any improper use of property, whether or not for personal gain."⁵⁸ She noted that under Third Circuit Model Jury Instructions misapplication "includes the *wrongful* use of the money or property for an unauthorized

54. See Reply Memorandum of Law in Further Support of Ms. Kelly's Motion to Dismiss the Indictment in Its Entirety at 33, *Baroni*, 2016 WL 3388302 (No. 2:15-CR-00193-SDW), 2016 WL 1579981

Like *Cicco*, Ms. Kelly's argument is bolstered by the fact that had Congress intended § 666 to cover the conduct here, it would not have needed to enact the honest services statute, 18 U.S.C. § 1346, four years later. Section 1346 was enacted in response to the Supreme Court's decision in *McNally*, which held that § 1341 was not intended to protect intangible rights, only property rights. *McNally v. United States*, 483 U.S. 350 (1987). Congress made clear in § 1346 that it intended to include a 'scheme or artifice to deprive another of the intangible rights to honest services,' which had been interpreted, pre-*Skilling*, to cover just about any abuse of office by a public official or employee.

55. Professor Torres-Spelliscy also discusses the two lower court opinions. See Ciara Torres-Spelliscy, *Elegy for Anti-Corruption Law: How the Bridgegate Case Could Crush Corruption Prosecutions and Boost Liars*, 69 AM. U. L. REV. 1689, 1698–1700 (2020).

56. See *United States v. Baroni*, No. 2:15-CR-00193-SDW, 2017 WL 787122 (D.N.J. Mar. 1, 2017) (denying defendants' motions for judgments of acquittal and motions for a new trial); *Baroni*, 2016 WL 3388302 (denying defendants' motions to dismiss).

57. 18 U.S.C. § 666(a)(1)(A) (2018); see *Baroni*, 2016 WL 3388302, at *3–6.

58. *Baroni*, 2016 WL 3388302, at *5.

purpose.”⁵⁹ She rejected the defendants’ vagueness argument on the ground that the statute is “broad, but not unclear.”⁶⁰ The wire fraud convictions were upheld on the ground that “the object of the alleged scheme or artifice to defraud must be a traditionally recognized property right.”⁶¹ This could include tangible property such as employee salaries as well as intangible property. The court also upheld the civil rights convictions.⁶²

This is an extraordinary decision. It turns the misapplication prohibition of § 666 into something close to a general honest services statute. The jurisdictional trigger is receipt by a jurisdiction of \$10,000 in federal funds.⁶³ Virtually all state and local governments are covered. However, the misapplication applies to *all* property whether acquired by federal funds or not. Early arguments over § 666 focused on whether it applies this sweepingly.⁶⁴ The similarity in the district court’s analysis to notions of honest services is striking. It refers to “root[ing] out public corruption”⁶⁵ and to motives like

59. *Id.* (emphasis added) (quoting THIRD CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS § 6.18.666A1A-3 (2017), <https://perma.cc/9UL6-Y7GP> (PDF)).

60. *Baroni*, 2016 WL 3388302, at *3 (citing the ruling on the motion to dismiss indictments discussed *supra* note 56). She noted that even the Supreme Court had described it as having “plain and unambiguous ‘meaning’ and ‘expansive unqualified language,’” *Id.* at *3–4 (citing *Salinas v. United States*, 522 U.S. 52, 52, 57 (1997)). *Salinas* was decided 13 years before *Skilling* accepted a vagueness argument in the “honest services” context.

61. *Id.* at *6.

62. *See id.* at *7–8. They were upheld on the ground that the right to intrastate travel is sufficiently established. The court described at length the defendants’ “illegitimate purpose of harming Fort Lee residents,” although it had earlier stated that motive “is not an essential element of any of the crimes charged.” *Compare id.* at *2, *with id.* at *7.

63. 18 U.S.C. § 666(b) (2018). In addition, the transaction at issue must have a value of \$5,000 or more. *Id.*

64. In *Sabri v. United States*, 541 U.S. 600 (2004), the Supreme Court held by implication that it does. The core rationale was that Congress wants officials who handle its grants of money to be faithful servants of the public trust, lest their unfaithfulness extends to the federal moneys. *See id.* at 605–06.

65. *Baroni*, 2017 WL 787122, at *4 (citing *United States v. Willis*, 844 F.3d 155, 165 (3d Cir. 2016)).

“improper” or “wrongful use of property.”⁶⁶ Whether regulatory actions are a form of property is not addressed.

The decision would gladden the heart of anyone who criticizes the Supreme Court for softness on corruption. It shows a conception of the judicial role in this field similar to that imagined by Professor Teachout: courts resolve corruption issues, far beyond the boundaries of quid pro quo.⁶⁷ Is the district court ignoring the Supreme Court? Judge Wiggenton was able to cite to the Court’s decision in *Salinas v. United States*⁶⁸ for the view that *this* statute is to be broadly construed.⁶⁹ Section 666 is presented by the district court as a statute written for a broad purpose with language that is “broad but not unclear.”⁷⁰ Defendants are apparently on notice as to the purpose of the statute as well as its text and court decisions interpreting it.⁷¹

It is hard to reconcile this reasoning with the Supreme Court’s general approach to vagueness.⁷² More importantly, it is hard to reconcile the district court’s approach with the Court’s repeated reluctance to involve the federal judiciary in devising codes of conduct for state and local government.⁷³ The district court disposes of federalism in a footnote.⁷⁴ Another footnote distinguishes honest services rights from intangible property rights by stating that the two are different.⁷⁵ The criminalization of politics argument is also discussed summarily

66. *United States v. Baroni*, No. 2:15-CR-00193-SDW, 2016 WL 3388302, at *5 (D.N.J. June 13, 2016). The wire fraud portion of the opinion is also broad.

67. *See generally* TEACHOUT, *supra* note 23, at 231–34.

68. 522 U.S. 52 (1997).

69. *See Baroni*, 2016 WL 3388302, at *4 (citing *Salinas*, 522 U.S. at 57).

70. *Baroni*, 2016 WL 3388302, at *4.

71. *See id.*

72. *See, e.g.*, *Yates v. United States*, 574 U.S. 528, 529–30 (2015) (narrow construction of the word “object”); *Bond v. United States*, 572 U.S. 844, 859–60 (2014) (narrow construction of the Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-856 (1999) (codified as amended in scattered sections of 22 U.S.C.)).

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

74. *See Baroni*, 2016 WL 3388302, at *9, n.10.

75. *See id.* at *9, n.15.

in a footnote.⁷⁶ Had the case stopped here, the district court's opinion and decision would have stood as a sharp alternative to what the Supreme Court has been doing and saying about the federal anti-corruption enterprise.

C. The Third Circuit: Closer to the Supreme Court?

On appeal, the Third Circuit Court of Appeals upheld the corruption convictions, but in a way that hewed somewhat more closely to the Supreme Court's overall view of the issue.⁷⁷ The court did uphold the wire fraud convictions. The two key points reiterated the lower court's analysis: property under the statute can be intangible as well as tangible;⁷⁸ and wages of Port Authority personnel needed to carry out the scheme constitute "a form of intangible property."⁷⁹

The most important part of the decision is its narrowing of § 666. The Third Circuit was able to uphold that part of the convictions under a much narrower theory than the district court's. The suggestion that "misapplication" might be stretched to equal an honest services statute was put to rest. The objective language of § 666 covers an official who "embezzles, steals, obtains by fraud, . . . or intentionally misapplies" property of the entity receiving federal funds.⁸⁰ The circuit court read the verbs as similar, all parts of a theft-like offense.⁸¹ Misapplication is to be read narrowly, limiting § 666 to "theft, extortion, bribery, and

76. See *id.* at *4.

77. See generally *United States v. Baroni*, 909 F.3d 550 (3d Cir. 2018). The Court rejected the constitutional argument based on a right to intrastate travel. *Id.* at 585–89.

78. See *id.* at 564. The Third Circuit says that the property prong is met by the intangible property of employee time and labor, as well as the Port Authority's "unquestionable property interest in the bridge's exclusive operation, including the allocation of traffic through its lanes and of the public employee resources necessary to keep vehicles moving." *Id.* at 567.

79. *Id.* at 565. The court did not decide the argument that the "right to control" the bridge is a form of intangible property, but it indicated agreement with it. *Id.* at 566–67. The Court of Appeals had no difficulty in fitting the wire fraud counts within existing Supreme Court decisions.

80. 18 U.S.C. § 666(a)(1) (2018).

81. See *Baroni*, 909 F.3d at 570–76.

similar corrupt acts.”⁸² The court could then apply its wire fraud analysis of property to a case where the defendants “fraudulently obtained, knowingly converted, or intentionally misapplied the labor of Port Authority employees. . . .”⁸³

The defendants argued that acting with a prohibited interest would now constitute fraud if *any* government revenue were used to make or effectuate the decision.⁸⁴ The court flipped the argument on its head by arguing that there could never be “simple mail fraud or wire fraud” because “obtaining” would always constitute dishonest services.⁸⁵ Defendants attempted to turn the § 666 debate into one about the criminalization of politics. They argued the case amounted to a discretionary allocation of public resources in the normal course of operations, based on political concerns.⁸⁶ The court stuck to its guns. Any political dimensions concerned the defendants’ motive, which was not an element of the offense.⁸⁷ Even though § 666 was aimed at preserving the “integrity”⁸⁸ of recipients of federal assistance, it did so by focusing on “offenses involving fraud and theft. . . .”⁸⁹ The court also considered a vagueness challenge to the trial court’s use of “unjustifiable or wrongful” to define misapplication.⁹⁰ The court responded that “[j]urors are regularly trusted to understand the meaning of these ordinary words in criminal cases.”⁹¹

Both lower courts to a degree aimed their opinions at the Supreme Court’s general approach to anti-corruption cases,

82. *Id.* at 574 (quoting *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007)).

83. *Baroni*, 909 F.3d at 574.

84. *See id.* at 568.

85. *Id.* at 569.

86. *See id.* at 571.

87. Overall, the court presented a defensible reason for treating this case as property fraud rather than honest services. The Third Circuit’s treatment of federalism is less satisfactory. The court dealt with it by ruling that the Port Authority is “an interstate agency created by Congressional consent,” and that it “receives substantial federal funding.” *Id.* at 569. This would suggest that the decision is law only for the Authority and entities like it.

88. *United States v. Baroni*, 909 F.3d 550, 573 (3d Cir. 2018) (quoting *Fischer v. United States*, 529 U.S. 676, 678 (2000)).

89. *Id.* at 572.

90. *Id.* at 582.

91. *Id.* at 583.

although the district court seemed more concerned with evading it rather than following it. They realized that Bridgagate had substantial political overtones, and that the defendants were relying heavily on the Court's aversion to an honest services, good government approach to the application of federal criminal law to corruption cases. The district court dealt with the end run argument, but only in a footnote.⁹² The circuit court squelched the district court's apparent attempt to achieve a form of honest services through a broad reading of "misapplies" in § 666.⁹³ Two aspects of the lower court opinions seem odd, given that the judges knew their handiwork was likely to face sharp scrutiny in the Supreme Court. The first is the treatment of vagueness as an easy question. If "honest" is an uncertain term,⁹⁴ why cannot the same be said of "misapply," "wrongful" and "unjustifiable?" Perhaps the Third Circuit made this problem go away by reading "misapplication" as referring to a property offense like theft or fraud. More serious was the cursory treatment of federalism. The district court dealt with it in a brief footnote. The Third Circuit finessed it by focusing on the interstate nature of the Port Authority.

IV. Bridgagate in the Supreme Court: the Decision, the Reaction, and the Implications for the Future of Federal Anti-Corruption Law

A. The Decision: Kelly v. United States

At oral argument, the Supreme Court seemed puzzled over whether the case involved good government or property.⁹⁵ Justice Breyer questioned whether the issue was good governance or property fraud. Justice Kagan's analysis in the actual opinion came down squarely on the latter side: "The

92. *Id.* at 568 ("Defendants were charged with simple money and property fraud under Section 1343—not honest services fraud—and the grand jury alleged an actual money and property loss to the Port Authority.").

93. *Id.* at 574.

94. See *Skilling v. United States*, 561 U.S. 358, 422 (2010).

95. See, for example, pages 32 to 36 of the Transcript of Oral Argument, *Kelly v. United States*, 140 S. Ct. 1565 (2020) (No. 18-1059), <https://perma.cc/P3CK-3QA7> (PDF), in which Justice Breyer questions whether the issue is good governance or property fraud.

question presented is whether the defendants committed property fraud.”⁹⁶ Thus the case would seem to turn on whether the Third Circuit was right in finding an “obtaining” of property such as employee labor.

The Court apparently accepted the treatment of § 666 as coextensive with the wire fraud statutes.⁹⁷ This implicitly ratifies the narrowing of a potentially broad statute. The opinion also sounded a strong federalism note by quoting the *McNally* passage that federal courts are not to “set standards of disclosure and good government for local and state officials.”⁹⁸ The Court repeated the theme that this limit is found in the fraud statutes themselves, but it is clear that a broader, constitutional imperative of federalism underlies this construction. Congress’ attempt to enact an honest services law has, in part, been limited by the Court on vagueness grounds.⁹⁹ But, federalism concerns play a role in vagueness. The two classic justifications for the vagueness doctrine are the need to give citizens guidance and the need to prevent prosecutors from exercising unchecked power.¹⁰⁰ In corruption cases, that power is exercised by federal prosecutors on state and local officials, but we know that the federal government should not “use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking.”¹⁰¹

This federalism-based approach did not mean the Third Circuit was wrong in focusing on property. For the Supreme Court, the problem was that the defendants’ scheme was not “directed at the [Port Authority’s] property.”¹⁰² The court below seemed trapped by the dilemma that every act of maladministration can be recast as property fraud because property can be found in the picture somewhere. The Supreme Court escaped the dilemma by utilizing a different distinction.

96. *Kelly*, 140 S. Ct. at 1568.

97. *See id.* at 1571.

98. *Id.* (citing *McNally v. United States*, 483 U.S. 350, 360 (1987)).

99. *See Skilling*, 561 U.S. at 405, 410.

100. *See, e.g., Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

101. *Kelly*, 140 S. Ct. at 1574 (citing *Cleveland v. United States*, 531 U.S. 12, 24 (2000)).

102. *Id.* at 1572 (quoting Brief for Respondent at 44, *Kelly*, 140 S. Ct. 1565 (No. 18-1059), 2019 WL 6324152).

The lane realignment was “a quintessential exercise of regulatory power.”¹⁰³ A regulatory choice is an example of sovereign authority, not of government’s role as property holder.¹⁰⁴ This distinction may often not be easy to make. The Court drew heavily on *Cleveland v. United States*,¹⁰⁵ which involved a fraudulent attempt to secure video poker licenses. Certainly money was involved in administering the regulatory scheme.¹⁰⁶ The action in *Bridgagate* was a classic exercise of sovereign power. The Court accepted that some property, such as paid employee labor, was involved, but viewed it as incidental to the scheme to redirect the lanes.¹⁰⁷

One might accuse the Court of a somewhat old-fashioned view of property as essentially a thing rather than as a set of rights and duties. However, the Court is correct that “[m]uch of governance involves (as it did here) regulatory choice.”¹⁰⁸ Using the fraud statutes widely to affect that governance would seriously upset federalism values. Controlling state and local governance presents the same question of ultimate sovereignty as does “commandeering” them.¹⁰⁹

B. The Reaction: More Roberts Court Encouragement of Corruption?

In this subsection, I will discuss negative reactions to *Kelly*, and place them in the larger context of the “pro-corruption” critique of the Roberts Court.

Professor Torres-Spelliscy correctly viewed the oral argument as portending a win for defendants.¹¹⁰ She criticized the likely decision as an example of “the ever-escalating right to

103. *Id.* at 1572.

104. *Id.* at 1574.

105. 531 U.S. 12 (2000).

106. *See id.* at 15. The unused licenses had monetary value, but that value was derivative of the regulatory freedom they conferred.

107. *See Kelly v. United States*, 140 S. Ct. 1565, 1573–74 (2020).

108. *Id.* at 1574.

109. *See Printz v. United States*, 521 U.S. 898, 925 (1997) (“Federal commandeering of state governments is . . . a novel phenomenon.”).

110. *See Ciara Torres-Spelliscy, Will the Supreme Court Let the Bridgagate Defendants Get Away with Lying?*, BRENNAN CTR. FOR JUST. (Feb. 24, 2020), <https://perma.cc/57SB-J54V>.

lie and the ever-shrinking definition of corruption.”¹¹¹ The notion of the Court as advancing a right to lie is a recurrent theme of her writing.¹¹² Presumably, this right’s principal base is the Constitution.¹¹³ Whatever one thinks of this perspective, a “right to lie” played little if any role in Justice Kagan’s opinion for a unanimous Court. Her point was that what the defendants did was not an “obtaining”; it was a “run-of-the-mine exercise of regulatory power . . .”¹¹⁴ The fact that they lied to help the scheme did not change its nature. Lying is irrelevant, and certainly not a “right” enumerated in Justice Kagan’s opinion.¹¹⁵

As for corruption, Professor Torres-Spelliscy has criticized the Roberts Court for encouraging it. “Politicians who have been charged with serious allegations of political corruption are using the Supreme Court’s rebranding of corruption, including its lax interpretation of what counts as corruption from both campaign finance and criminal cases, to their legal advantage.”¹¹⁶ Like Professor Teachout, Professor Torres-Spelliscy relies heavily on campaign finance decisions such as *Citizens United*¹¹⁷ as influencing and reflecting the Court’s view of what might be called “ordinary corruption.”¹¹⁸ There are a number of excellent analyses explaining the relationship and differences between the two fields.¹¹⁹ Both can present questions of how representative government works, and more general issues of public-private interactions and the problem of private influence on public officials. However, the automatic equating of the two seems superficial. Elections almost always involve a flow of

111. *Id.* For other writings of Professor Torres-Spelliscy on Bridgegate, see *supra* note 55 and accompanying text; Ciara Torres-Spelliscy, *The Supreme Court Considers Political Lies in the Bridgegate Case*, BRENNAN CTR. FOR JUST. (Oct. 28, 2019), <https://perma.cc/R2S5-SZZF>.

112. *See, e.g.*, CIARA TORRES-SPELLISCY, POLITICAL BRANDS 32–38 (2019).

113. *See id.* at 34–37.

114. *Kelly*, 140 S. Ct. at 1572–73.

115. *Id.* at 1572. Justice Kagan stated that “[b]ecause 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.” *Id.* at 1574.

116. TORRES-SPELLISCY, *supra* note 112, at 5.

117. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

118. *See* TORRES-SPELLISCY, *supra* note 112, at 41–43; TEACHOUT, *supra* note 23, at 7–12.

119. *See, e.g.*, Eisler, *supra* note 12; Sellers, *supra* note 12.

private money.¹²⁰ Elected politicians campaign to the electorate by appealing to one side over the other. However, the principles of administration of the law—even by elected officials—start with a presumption of neutrality, and view the flowing of things of value to officials with great suspicion.¹²¹ I concede that there is not a wall of separation. As Professor Torres-Spelliscy points out, one can find echoes of *Citizens United* (campaign finance) in *McDonnell* (ordinary corruption).¹²² Indeed, as she notes, ordinary corruption defendants may cite *Citizens United* in support of a loose view of the political process.¹²³

A more fundamental critique of the positions of Professors Torres-Spelliscy and Teachout is that they do not have much to say about federalism. A central theme in the ongoing debate over combating corruption has been the relative roles of the federal and state governments. The debate has been robust, particularly in academia. In a landmark article, Professor Peter Henning pointed out the advantages of federal prosecution.¹²⁴ He contended for example that “[c]orruption is not a matter solely of state concern, reserved for the police powers of the states, but is instead a national concern that falls within the interests of the federal government.”¹²⁵ Proponents of this view have cited the political problem of state politicians prosecuting their colleagues—who may, in the case of governors, have appointed them¹²⁶—and the federal government's superior

120. Except for public campaign financing.

121. The Supreme Court's statement about the “impartial execution of the laws” demonstrates these principles. See *Civil Serv. Comm'n v. Nat'l. Ass'n. of Letter Carriers*, 413 U.S. 548, 565 (1973).

122. See TORRES-SPELLISCY, *supra* note 112, at 60.

123. See *id.* at 60–62; see also George Brown, *The Federal Anti-Corruption Enterprise After McDonnell—Lessons from the Symposium*, 121 PENN ST. L. REV. 989, 990–98 (2017) (citing the role of amici in *McDonnell*).

124. See Henning, *supra* note 15, at 144.

125. *Id.* at 86. “Federalism protects states, and thereby individuals, from oppression by the national government, but it does not permit public authority to be exercised corruptly, harming both the state and its citizenry by insulating non-federal officials from federal criminal prosecution.” *Id.*

126. For example, Christopher Porrino, who served as Governor Christie's Chief Counsel during the Bridgate scandal, was nominated and confirmed as the state's Attorney General two years after. Matt Arco, *Christie Nominates His Former Chief Counsel as N.J. Attorney General*, NJ.COM (June 16, 2016),

resources. The contrary view focuses on the existence of state laws and the widespread use by state ethics commissions, as well as traditional prosecution mechanisms.¹²⁷ States, it is argued, cannot fix their enforcement problems if they are never given a chance in the important cases.¹²⁸

Professor Torres-Spelliscy, of course, wrote before *Kelly*, and cannot be blamed for failing to discuss the extensive federalism underpinnings of the decision. However, cases such as *McNally* and *McDonnell* had certainly shown the Court's concern for federalism in allocating prosecutorial roles. The most prominent critic of the actual decision is Professor Leah Litman.¹²⁹ Writing in *The Washington Post* shortly after the decision, she opined that *Kelly* had made it "almost impossible" to prosecute corrupt politicians.¹³⁰ Professor Litman repeats many of the standard criticisms of the Roberts Court. There is for example, the reliance on *Citizens United* as a key step in the pro-corruption direction. *McDonnell* is cited as an example of the Court's laissez-faire attitude toward the subject. Professor

<https://perma.cc/Q8F2-F25R> (last updated Jan. 16, 2019). In Massachusetts, there has been uncertainty over the roles of the Attorney General's office and the State Ethics Commission in handling a state police scandal. See Andrea Estes, *DA, Ex-Head of State Police Probably Violated the Law by Ordering Arrest Report Altered, Panel Says*, BOS. GLOBE, <https://perma.cc/PUR4-TRK7> (last updated June 24, 2020). Such issues can take on a partisan dimension. See Press Release, Massachusetts Republican Party, AG Healy: Rule of Law Doesn't Matter If You're a Fellow Democrat (June 25, 2020), <https://perma.cc/8JTF-DPR7>.

127. See Richard Messick, *Law Profs: Stop the Overheated Rhetoric About Bridgegate*, GLOBAL ANTICORRUPTION BLOG (May 13, 2020), <https://perma.cc/H9WQ-PGY7>.

128. See generally Moohr, *supra* note 15; see also George D. Brown, *Carte Blanche: Federal Prosecution of State and Local Officials After Sabri*, 54 CATH. U.L. REV. 403, 413 (2005) (discussing the views of Professor Roderick M. Hills, Jr., that different levels of government have distinct political values, and "these prosecutions could impose on non-federal governments federal conflict-of-interest rules that are fundamentally inconsistent with the style of democracy that flourishes at the non-federal level" (quoting Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*, 6 THEORETICAL INQ. L. 113, 114 (2005))).

129. See Litman Op-ed, *supra* note 3; see also Leah Litman, *The Supreme Court Says Sorry, It Just Can't Help With Political Corruption*, THE ATLANTIC (May 8, 2020), <https://perma.cc/S9G9-D932>.

130. Litman Op-ed, *supra* note 3.

Litman does not really analyze *Kelly*. There is nothing about federalism.

There is, however, a strong element of partisanship. After citing *Citizens United*, Professor Litman notes that “[i]n other decisions that divided the Court along ideological lines, GOP-appointed justices invalidated laws designed to combat public corruption.”¹³¹ But this is a good example of overreliance on campaign finance law to analyze ordinary corruption. *Kelly* is the latest in a line of cases that have been decided unanimously, including *McDonnell*, *Skilling*, and *Cleveland*. Some of the opinions have been written by liberal, Democratic-appointed justices,¹³² including *Kelly* itself. It was Justice Kagan who wrote that “not every corrupt act by state or local officials is a crime.”¹³³ Of such language Professor Litman writes that “we have shielded officials from accountability and made public corruption inevitable.”¹³⁴ Along with the partisanship, one finds some guilt by association. We learn from Professor Litman that the law firm of Jones Day represented both Governor McDonnell and the Bridgewater defendants, and that it had “previously done some legal work for the President.”¹³⁵

Some of the analysis seems naive. Professor Litman complains that juries are likely to favor officials in corruption cases.¹³⁶ This will come as news to former Governor McDonnell,¹³⁷ former New York Speaker Silver,¹³⁸ and former New York Senate Majority Leader Skelos.¹³⁹ It also flies in the

131. *Id.*

132. For instance, Justice Ginsburg authored the *Cleveland* decision. *See generally* *Cleveland v. United States*, 531 U.S. 12 (2000).

133. *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020).

134. Litman Op-ed, *supra* note 3.

135. *Id.*

136. *See id.* (“Public officials may command more respect and receive more indulgence than the average criminal defendant from jurors, who often interpret conflicting evidence in their favor.”).

137. *See supra* Part II.B.2.

138. *See* Benjamin Weiser, *Sheldon Silver Is Convicted in 2nd Corruption Trial*, N.Y. TIMES (May 11, 2018), <https://perma.cc/T5NM-VXW4>.

139. Vivian Wang, *Guilty, Again: Dean Skelos, Former Senate Leader, Is Convicted of Corruption in Retrial*, N.Y. TIMES (July 17, 2018), <https://perma.cc/A6KN-K9EZ>.

face of common sense, as well as academic research, suggesting unfavorable public opinion toward possibly corrupt officials.¹⁴⁰ At times, Professor Litman seems unfamiliar with the material. After discussing *McNally*, she writes that “Congress has never amended the mail fraud statute to prohibit . . . pernicious . . . public corruption . . .” like that in *McNally*.¹⁴¹ Congress did essentially that a year after *McNally* when it enacted the Honest Services Statute.¹⁴² A section-by-section analysis of the broader statute of which it was a part states that it “overturns the decision in *McNally v. United States* in which the Supreme Court held that the mail and wire fraud statutes protect property but not intangible rights.”¹⁴³ I would not go so far as to call Professor Litman’s article “plain nonsense.”¹⁴⁴ However, if it is the best critics of the Court can do, the current, federalism-based attitude towards corruption seems in little danger.

The article did spark a useful debate in the pages of the Global Anticorruption Blog.¹⁴⁵ Richard Messick points out that the Court’s lenient attitude toward corruption has not prevented a high level of prosecutions.¹⁴⁶ He also rejects the ideological critique, noting that the Court has generally been unanimous in this area.¹⁴⁷ Indeed Justices Ginsburg and Kagan

140. See generally Christopher Robertson et al., *The Appearance and the Reality of Quid Pro Quo Corruption: An Empirical Investigation*, 8 J. LEGAL ANALYSIS 375 (Dec. 1, 2016).

141. *Id.*

142. See Anti-Drug Abuse Act of 1988 § 7603, 18 U.S.C. § 1346 (2018) (“[T]he term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”).

143. 134 CONG. REC. S17,360 (daily ed. Nov. 10, 1988) (statement of Sen. Biden).

144. See Messick, *supra* note 127 (stating that Professor Litman’s claim that the Court’s pattern in corruption cases makes it “almost impossible to put a crooked politician in jail.” . . . is plain nonsense.” (quoting Litman Op-Ed, *supra* note 3)).

145. See *id.*; see also Matthew Stephenson, *The U.S. Supreme Court’s Opinion in the “Bridgewater” Case: Some Quick Reactions*, GLOBAL ANTICORRUPTION BLOG (May 12, 2020) <https://perma.cc/6ZRD-LFGY>.

146. See Messick, *supra* note 127.

147. See Messick, *supra* note 127 (“That the decision was unanimous and written by a member of the Court’s liberal wing are two of several clues in the Court’s opinion showing it is no part of a Trump-inspired plot to legalize public corruption.”).

have written three opinions for a unanimous court.¹⁴⁸ It is hard to imagine the liberal, Democratic-appointed justices being prominent parts of a sinister attempt to enshrine corruption. There were dissenters in *McNally*, but it was Republican appointees who dissented.¹⁴⁹

Messick also defends an emphasis on federalism in anti-corruption enforcement.¹⁵⁰ This central element of *Kelly* is all but ignored by critics of the Court's "leniency." There is a real debate about this issue, but, for example Professor Teachout does not discuss it in her book *Corruption in America*.¹⁵¹ The critics' automatic assumption is that the federal government is the primary, if not the sole, locus of preventing state and local corruption. As Messick points out, states have their own enforcement mechanisms.¹⁵²

Messick's colleague, Professor Matthew Stephenson, defends Professor Litman by arguing that state performance is uneven.¹⁵³ Professor Stephenson takes the nationalist side in the debate discussed above. He contends that aggressive federal enforcement remains necessary.¹⁵⁴ The question whether states

148. See generally *Kelly v. United States*, 140 S. Ct. 1565 (2020); *Skilling v. United States*, 561 U.S. 358 (2010); *Cleveland v. United States*, 531 U.S. 12 (2000).

149. See *McNally v. United States*, 483 U.S. 350, 362–77 (1987) (Stevens, J., dissenting, joined in part by O'Connor, J.).

150. See Messick, *supra* note 127

Professor Litman would have readers believe that federal prosecutors are the only ones protecting citizens from corrupt, venal state and local leaders. That is of course not true. All states, and many cities and counties, have their own prosecutors. All but three states have state-level ethics commissions; many cities . . . have one as well, and if all these agencies can't hold corruption in check, there is always the ballot box.

151. She does discuss state anti-bribery efforts in the nineteenth century. See TEACHOUT, *supra* note 23, at 113–19.

152. See *supra* note 127 and accompanying text.

153. See Stephenson, *supra* note 145 (“[R]eliance on state law is problematic, particularly in settings w[h]ere state prosecutors, and perhaps state judges as well, are part of the same political machine as the corrupt officials. There’s a reason that . . . federal prosecutors . . . have played a central role in cleaning up state and local corruption.”).

154. See *id.* Messick agrees as to anti-bribery laws. See Messick, *supra* note 127 (“I don’t disagree that historically aggressive federal enforcement of the antibribery laws have been an important check on elected politicians and their political machines.”).

can police their own is at the heart of that debate. The cursory conclusion that they can't deserves further exploring. Take Bridgegate, for example. New Jersey has a statute aimed at maladministration.¹⁵⁵ But the Governor appoints the Attorney General. Would public opinion have forced him to act? Would state legal processes have led to some device such as appointment of a special prosecutor? We don't know. Certainly New Jersey's political processes played a strong role. The conspirators lost their jobs.¹⁵⁶ Governor Christie's state and national standing was seriously damaged.¹⁵⁷

In subsequent blog posts, Messick criticizes the role of the other federal branches in the enactment and enforcement of the broad anti-corruption laws.¹⁵⁸ He contends that "[t]hose genuinely interested in fighting corruption need to stop denouncing the Court and focus their energies instead on [the other] two branches of government."¹⁵⁹ I think this is analytically sound, but unlikely to happen. No one will lose their academic standing for criticizing the Roberts Court, especially if it can be labeled pro-corruption and linked to the Trump administration. Messick is certainly right in calling for scrutiny of United States Attorneys. They are important political actors in their states, even if largely unaccountable.¹⁶⁰ Messick points

155. See generally N.J. STAT. ANN. § 2C:30-2 (West 2020).

156. See Kelly, 140 S.Ct. at 1571 ("The fallout from the scheme was swift and severe. Baroni, Kelly, and Wildstein all lost their jobs.").

157. See generally Amber Phillips, *The Bridgegate Trial Is Over. So Is Chris Christie's Political Career, Probably*, WASH. POST (Nov. 4, 2016), <https://perma.cc/5DZF-MUKD>. I concede that the ultimately unsuccessful federal prosecution may have played a role in these developments, although I question whether that is the function of the U.S. Attorney.

158. See Richard Messick, *Where the Real Blame for Letting Bridgegate Defendants Off Lies: Part I*, GLOBAL ANTICORRUPTION BLOG (May 20, 2020) <https://perma.cc/8PH5-SDLV> [hereinafter *Real Blame Part I*]; Richard Messick, *Where the Real Blame for Letting Bridgegate Defendants Off Lies: Part II—the Congress*, GLOBAL ANTICORRUPTION BLOG (June 3, 2020), <https://perma.cc/PQ63-RT97>.

159. *Real Blame Part I*, supra note 158.

160. See Harvey A. Silverglate & Emma Quinn-Judge, *Tawdry or Corrupt? McDonnell Fails to Draw a Clear Line for Federal Prosecutions of State Officials*, 2016 CATO SUP. CT. REV. 189, 216 (2016), <https://perma.cc/3FP3-LWZN> (PDF) ("The central question is whether we want a system where federal prosecutors can act—with what comes close to a blank check—to regulate state and local politics.").

to the problem of the United States Attorney who seeks recognition through highly visible corruption prosecutions.¹⁶¹ Neither level of government is perfect. There is plenty of room for federalism debates on this subject in the future.

Federalism aside, Messick introduces another constitutional reason for questioning the extraordinary reach of U.S. Attorneys: the Due Process Clause as embodied in the vagueness doctrine.¹⁶² His focus is on the second value invoked for the doctrine: reining in enforcement authorities.¹⁶³ Thus, he seems to point to an ideal world in which the federal government would define its role more narrowly, and the states would assume a larger one.

C. The Impact of Bridgegate

1. Practical Implications

The principal criticism of *Kelly* is that in its result and larger context, it makes federal prosecutions of corruption more difficult, if not virtually impossible.¹⁶⁴ The criticism has been leveled before. A good example is the reaction to *McDonnell*.¹⁶⁵ In that case, a governor had accepted gifts from a person who wished to do business with the state. The governor arranged a number of introductions and, in general, showed support for the donor's product. There was no showing of pressure to buy it. Under the relevant federal statute, the question was whether

161. See Messick, *supra* note 127.

I am afraid the chance to bring a high-profile corruption [charge] too often brings into play career factors that blind some to the rule of law issues. Rudy Giuliani's decision while U.S. Attorney to personally prosecute the Queens borough chief after wrest[ing] the case away from local prosecutors could serve as exhibit one.

162. *Real Blame Part I*, *supra* note 158.

163. See generally *Sorich v. United States*, 555 U.S. 1204, 1204–08 (2009) (Scalia, J., dissenting from denial of certiorari); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 166–67 (1972) (“Where the list of crimes is so all-inclusive and generalized as the one in this ordinance, those convicted may be punished for no more than vindicating affronts to police authority . . .”).

164. See Litman Op-Ed, *supra* note 3.

165. *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

the governor had performed “official acts.”¹⁶⁶ A unanimous Supreme Court vacated his conviction, reversing the two lower courts that had upheld it.¹⁶⁷ The Court reasoned that the governor had not taken official action to help the donor.¹⁶⁸ What he had done fell within the general category of responsiveness to constituents.¹⁶⁹ The Court’s analysis of responsiveness in a democratic system seemed analogous to language in *Citizens United*. Critics and defense lawyers pounced on the decision. For the former, it was an example of the complacent attitude towards corruption discussed above. They saw it as calling into question a large range of bribery convictions, present and future. The lawyers began to use the case to attack existing prosecutions. They enjoyed initial success. However, the *McDonnell* boomlet fizzled. Federal courts found it distinguishable, and routinely upheld convictions where it was invoked.¹⁷⁰ The tendency in bribery cases appears to be for prosecutors to present enough evidence of a relation to an “official action” to satisfy *McDonnell*.

166. See *id.* at 2361 (“To convict the McDonnells of bribery, the Government was required to show that Governor McDonnell committed (or agreed to commit) an ‘official act’ in exchange for the loans and gifts.”). The honest services bribery statute, as it stands after *Skilling*, sends interpreters to 18 U.S.C. § 201, which includes the requirement of “official acts.” See 18 U.S.C. § 201 (2018) (“[T]he term ‘official act’ means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.”).

167. See *United States v. McDonnell*, No. 3:14-CR-12, 2014 U.S. Dist. LEXIS 166390 (Dec. 1, 2014), *aff’d* 792 F.3d 478 (4th Cir. 2015), *rev’d* 136 S. Ct. 2355 (2016).

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

169. See *id.* at 2372 (“[C]onscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time. The basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns . . .”).

170. See, e.g., *United States v. Stevenson*, 660 F. App’x 4, 7 n.1 (2d Cir. 2016) (rejecting the argument raised by Stevenson appealing to *McDonnell*); see also, e.g., DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW: CASES AND MATERIALS* 805 (6th ed. 2017) (discussing post-*McDonnell* developments). Of course, the converse can happen. *Evans v. United States*, 504 U.S. 255 (1992) (providing an example of Supreme Court precedent that considerably opened the door to increased anti-corruption prosecutions, at least initially).

Kelly involves a different statute, but critics have already labeled it as part of a pattern making it “almost impossible to put a crooked politician in prison.”¹⁷¹ A question post-*Kelly* will be how much official conduct is now shielded from mail and wire fraud as an “exercise of sovereign power.”¹⁷² If the exercise results in, or has as its object, personal gain, a court might hold that any obtaining of property is not incidental. Then it would be reachable if the case involved fraud and use of the mail or wires. A frequent hypo in the various stages of the case involved a mayor directing how snow is to be plowed.¹⁷³ Apparently, if she directs the crews to begin with neighborhoods that support her politically, that is an exercise of sovereign power. If, however, she directs that her own home be plowed first, that is an example of personal gain, and thus an obtaining of property.¹⁷⁴

Such lines may be hard to draw. Conceptually, she derives gain from seeing her supporters rewarded. Courts will face a number of fine distinctions. The problem stems from the fact that exercises of sovereign power often necessarily involve municipal property. The city owns the snowplows, and the wages paid to the driver can be viewed as property.¹⁷⁵ For line-drawing purposes, the *Kelly* Court postulated a distinction between scheming to influence a regulatory choice and a scheme to defraud the government of its property.¹⁷⁶ Drawing on *Cleveland*, the Court treated as fundamental the difference

171. Litman Op-Ed, *supra* note 3.

172. *Kelly v. United States*, 140 S. Ct. 1565, 1572 (2020) (“The defendant’s fraud ‘implicate[d] the Government’s role as sovereign’ wielding ‘traditional police powers’—note its role ‘as property holder’” (quoting *Cleveland v. United States*, 531 U.S. 12, 23–24 (2000))).

173. See Transcript of Oral Argument at 10–11, 36–40, *Kelly v. United States*, 140 S. Ct. 1565 (2020) (No. 18-1059), <https://perma.cc/P3CK-3QA7> (PDF).

174. See generally Transcript of Oral Argument, *Kelly*, 140 S. Ct. 1565. For general discussions of such problems, see *Kelly*, 140 S. Ct. at 1573–74; (describing fact scenarios sufficient to raise a loss of property to the government used in a scheme to defraud); *Baroni*, 909 F.3d at 571 (discussing the snowplow example).

175. See *Kelly*, 140 S. Ct. at 1572 (“By contrast, a scheme to usurp a public employee’s paid time is one to take the government’s property.”).

176. See *id.* (“And this Court has already held that a scheme to alter such a regulatory choice is not one to appropriate the government’s property.”).

between “property and regulatory power.” However, this formulation may not help much in a case where both are present. As further guidance, the Court’s analysis suggests two questions: whether any property loss or use is “only an incidental byproduct of the scheme,”¹⁷⁷ and whether the scheme’s “object . . . was to obtain the [government]’s money or property.”¹⁷⁸

It seems likely that use of the mail and wire fraud statutes will not be seriously curtailed by the decision.¹⁷⁹ Basic fraud like embezzling money will clearly be covered.¹⁸⁰ Where *Kelly* may have an effect is cases at the margin—when the role of any property is not significant—and cases that look like attempts to restore an honest services doctrine. More generally, it will be interesting to see if lower courts (finally) get the message that the Supreme Court wants them to approach federal anti-corruption prosecutions of state and local officials more cautiously.

2. Theoretical Dimensions of *Bridgegate*

Unlike some of the earlier decisions, *Kelly* does not rely on such statutory construction doctrines as vagueness¹⁸¹ or the rule of lenity.¹⁸² Two closely related concerns play a major role in the

177. *Id.* at 1572. “Or put differently, a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme.” *Id.* (citing *Cleveland v. United States*, 531 U.S. 12, 23 (2000)).

178. *Id.* at 1568.

179. See Teachout tweet, *supra* note 10.

180. See *Kelly*, 140 S. Ct. at 1573 (providing an example of outright embezzlement as constituting property fraud (citing *Pasquantino v. United States*, 544 U.S. 349, 357 (2005))).

181. See *Skilling v. United States*, 561 U.S. 358, 368 (2010) (“In proscribing fraudulent deprivations of ‘the intangible right of honest services,’ Congress intended at least to reach schemes to defraud involving bribes and kickbacks. Construing the honest-services statute to extend beyond that core meaning, we conclude, would encounter a vagueness shoal.” (citing 18 U.S.C. § 1346 (2018))).

182. See *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (“[T]o the extent that the word ‘property’ is ambiguous as placed in § 1341, we have instructed that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.’” (citing *Rewis v. United States*, 401 U.S. 808, 812 (1971))). *United States v. Sun-Diamond Growers of Cal.* is a well-known

Kelly decision: (1) the desire to avoid turning a broad federal statute into an honest services mandate; and, (2) general principles of federalism. The rise and fall of the honest services doctrine has been frequently detailed.¹⁸³ The focus here is on what has been animating the Court's insistence that no such doctrine can be derived from the mail and wire fraud statutes. *McNally's* disapproval of involving "the federal government in setting standards of disclosure and good government for local and state officials"¹⁸⁴ has been repeated and paraphrased in subsequent Supreme Court decisions curbing the federal role in prosecuting ordinary corruption.¹⁸⁵ *McNally* itself might be explained in separation of powers terms. The notion of an intangible right to honest public services, federally mandated by the fraud statutes, began in the lower courts.¹⁸⁶ It lasted for forty years as a sort of federal common law of corruption.¹⁸⁷ One can question whether this is a proper role for the courts. Richard Messick puts forward a different separation of powers argument: unbounded freedom to dictate what is good government vests too much power in federal prosecutors.¹⁸⁸ Justice Scalia raised this issue in his influential dissent from the denial of certiorari in *Sorich*.¹⁸⁹

example of strict statutory construction in the anti-corruption context. *See generally* 526 U.S. 398 (1999). The Court read the federal anti-gratuities statute narrowly. Professor Teachout, however, sees it as something more, reflecting a "deep logic of politics . . ." and encouraging the use of money to purchase influence. TEACHOUT, *supra* note 23, at 228–29.

183. *E.g.*, ABRAMS, *supra* note 29, at 347–50.

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

185. *E.g.*, *Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020); *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016); *Cleveland*, 531 U.S. at 20.

186. *See supra* note 183 and accompanying text.

187. *See United States v. Margiotta*, 688 F.2d 108, 139–44 (2d. Cir. 1982) (Winter, J., concurring and dissenting in part).

188. *See Messick, supra* note 127.

189. *See Sorich v. United States*, 555 U.S. 1204, 1206 (2009) (Scalia, J., dissenting from denial of certiorari)

Without some coherent limiting principle to define what 'the intangible right of honest services' is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct.

After *Kelly*, the question arises whether there will be a resurgence of the critique of the federal role and how far it might extend. Messick argues federal intervention is proper in cases of bribery.¹⁹⁰ This raises the old question of what sort of cases warrant federal intervention.¹⁹¹ But suppose the argument for a limit is constitutionally based, and points to no intervention. If state and local governance is protected from federal commandeering,¹⁹² why doesn't the protection extend to oversight of how that governance is exercised? On the other hand, is it significant that the *Kelly* Court did not discuss more general principles of constitutional federalism as discussed and debated in cases such as *Printz v. United States*, *United States v. Lopez* and *Younger v. Harris*?¹⁹³

Much of the problem stems from the fact that the Constitution does not contain a general anti-corruption clause granting Congress the power to deal with the issue. Professor Kurland has argued that the Guarantee Clause¹⁹⁴ is a clear constitutional foundation for the anti-corruption enterprise and acts as a grant of power to enact appropriate statutes.¹⁹⁵ This argument has force, but does not seem to have attracted wide support. Professor Teachout finds in the Foreign Emoluments Clause,¹⁹⁶ an anti-corruption imperative for the whole

190. *E.g.*, Messick, *supra* note 158.

191. *E.g.*, Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy*, 6 THEORETICAL INQUIRIES IN L. 113, 138 (2005).

192. *E.g.*, *Printz v. United States*, 521 U.S. 898, 898 (1997).

193. *See id.*; *United States v. Lopez*, 514 U.S. 549, 575–83 (1995) (Kennedy, J., concurring); *Younger v. Harris*, 401 U.S. 37, 44–45 (1971). It may be that the field of corruption should not be seen as one which is largely forbidden to Congress because of principles of federalism. Instead, those principles drive the Court to an exceedingly grudging and narrow reading of the statutes that purport to criminalize corruption.

194. *See* U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

195. *See* Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 415–70 (1989) (articulating the argument for the Guarantee Clause’s basis for federal jurisdiction for anti-corruption measures).

196. *See* U.S. CONST. art. I, § 9, cl. 8 (“[N]o Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”).

country.¹⁹⁷ While one can perhaps extract a hortatory message, it is hard to see the clause as a grant of power to Congress to deal with state and local corruption.

How is it, then, that virtually every week sees a prominent state or local official in the federal dock on corruption charges? As noted earlier, an array of federal statutes reach, or have been construed to reach, corrupt activity. Congress' power to enact them derives from specific authority granted in the Constitution, for example, the Commerce Clause, the Postal Power, or the Spending Power.¹⁹⁸ The Hobbs Act, for example, punishes extortion, defined as the obtaining of property from another “with his consent, induced by wrongful use of actual or threatened force . . . or under color of official right.”¹⁹⁹ “[C]olor of official right” sounds like it might extend to corrupt politicians, but where does Congress get the power to criminalize such obtaining in the first place? The answer is that the perpetrator must be someone who “in any way or degree obstructs, delays, or affects commerce or the movement of any or commodity in commerce, by robbery or extortion”²⁰⁰ The Act is in some tension with notions of federalism that the Court developed in different contexts.²⁰¹ True, the statutory language is broad, and the Court has said that it is to be broadly construed.²⁰² However, the federalism concerns that have recently become dominant might cause the Court to tighten up interpretation. Lower courts may be seen to have gone too far in holding that “an actual impact on commerce is sufficient if it is small or even ‘de minimis.’”²⁰³

197. See TEACHOUT, *supra* note 23, at 26–28 (discussing adoption of Clause and the Framers' intent). Professor Henning had sounded many of the same notes in his landmark article. See Henning, *supra* note 15, at 83–89 (discussing anti-corruption legacy of the Constitution).

198. See ABRAMS, *supra* note 29, 21–30.

199. 18 U.S.C. § 1951(b)(2) (2018).

200. *Id.* § 1951(a).

201. See Henning, *supra* note 15, at 76–84 (arguing that notions of a separate state sphere do not apply to fighting corruption).

202. See *Stirone v. United States*, 361 U.S. 212, 215 (1960) (“Th[e] Hobbs] Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference ‘in any way or degree.’” (citing 18 U.S.C. § 1951(a) (2018))).

203. ABRAMS, *supra* note 29, at 316.

Jurisdictional elements like those in the Hobbs Act are potential targets for reducing the reach of federal statutes used to pursue corruption. There is, of course, the question whether they measure the federal interest better than substantive elements. Either way, we are back to identifying when federal intervention is justified. Federalism post-*Kelly* may play a bigger role in answering that question. The issue is not limited to the Hobbs Act. The mail and wire fraud statutes require that these means of communication be a part of the scheme to defraud “for the purpose of executing such scheme or artifice.”²⁰⁴ Supreme Court decisions have taken a broad approach to this requirement.²⁰⁵ Again, emphasis on federalism might lead to a different approach. Recently, the First Circuit found this element lacking in a complex patronage scheme. It involved fake examinations, in cases where the successful applicant had already been chosen. Unsuccessful candidates received letters informing them of the results. The circuit court held the mailing was not an essential part of the scheme.²⁰⁶

Section 666—a fraud statute not tied to the Commerce Clause—was enacted pursuant to the Spending Power, and is triggered by a jurisdiction's receipt of a certain amount of federal funds.²⁰⁷ Congress' purpose was to protect federal funds. However, the Supreme Court has allowed its application to activity in the funded entity not connected to federal funds. Here too, an emphasis on federalism could lead the Court to a different result.²⁰⁸ Apart from specific statutes, general

204. 18 U.S.C. §§ 1341, 1343 (2018).

205. See, e.g., *Schmuck v. United States*, 489 U.S. 705, 710–11 (1989) (“To be part of the execution of the fraud, however, the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be ‘incident to an essential part of the scheme,’ or ‘a step in [the] plot’” (citing *Pereira v. United States*, 347 U.S. 1, 8 (1954))); *Badders v. United States*, 240 U.S. 391, 394 (1916)); ABRAMS, *supra* note 29, at 347–51.

206. *United States v. Tavares*, 844 F.3d 46, 59 (1st Cir. 2016).

207. 18 U.S.C. § 666.

208. See *Sabri v. United States*, 541 U.S. 600, 613 (2004) (Thomas, J., concurring in part, dissenting in part) (arguing that the broad scope of the statute did not justify the broad interest in prosecuting the instance of corruption).

statements of “Principles of Federal Prosecution” might be narrowed.²⁰⁹

It is possible that such questions will remain academic, in the pejorative sense of the word. Still, federalism is always on the table, and we live in an era when states are flexing their muscles in areas as diverse as epidemic control, immigration, and police reform.²¹⁰ Intergovernmental relations are undergoing extraordinary change in many areas, why not here?

V. Conclusion

In a term that featured blockbuster decisions and banner headlines,²¹¹ Bridgagate flew under the radar. However, the decision is of potentially great significance. The narrow holding's reach is far from clear.²¹² The theoretical implications could be sweeping. The Court repeatedly invoked federalism, sending a message to lower courts and prosecutors to the effect of “we really mean it.” Two implications stand out. The first, albeit implicit, is that the Court sees ordinary corruption as sometimes presenting different problems from campaign finance. In *Kelly* itself, the Court did not cite *Citizens United* in the opinion; it was not mentioned in oral argument and neither party cited it in their brief.²¹³ Some critics seem to posit a

209. See ABRAMS, *supra* note 29, at 235 (discussing the role of such principles).

210. See generally, e.g., Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703 (2013); Nicole St. Clair Knobloch, Opinion, *Governors Can Lead the Way on Climate Too*, BOS. GLOBE (May 9, 2020, 1:08 PM), <https://perma.cc/JLJ4-9495>.

211. See, e.g., *President is Not ‘Above the Law,’ Justices Decides*, N.Y. TIMES (July 10, 2020), <https://perma.cc/FKG4-7S9X> (PDF); Adam Liptak, *Supreme Court Rules Trump Cannot Block Release of Financial Records*, N.Y. TIMES (July 9, 2020), <https://perma.cc/564X-H2EV> (last updated July 10, 2020).

212. See Teachout tweet, *supra* note 10. Teachout continues to criticize the holding.

213. Senator Sheldon Whitehouse in amicus *supporting* the government cited it multiple times. Brief for Amicus Curiae Senator Sheldon Whitehouse in Support of Respondent, United States of America at 17 n.6, *Kelly*, 140 U.S. 1565 (No. 18-1059). Whitehouse’s main point appears to be that *Citizens United*, “caused democratic safeguards to rot from within, and it left the People with less voice, less power, and more cynical than ever.” *Id.* at 17–18.

monolithic Roberts Court view of corruption in all contexts.²¹⁴ However, a categorical view may go too far; a more nuanced approach is called for. There are, no doubt, as Eisler points out,²¹⁵ similarities between campaign finance and ordinary corruption decisions. Outcomes in each area may reflect the Court's underlying view of governance. At some level, one can perhaps draw useful comparisons, but the level is an extremely high one. For example, there are reasons why campaign finance cases often split five-to-four, while *Kelly* was unanimous. Campaign finance cases are dominated by First Amendment issues and questions of the nature of corruption. Federalism plays no role. In ordinary cases federalism—and potentially related issues such as vagueness—are dominant, especially if state and local officials are involved. This fact leads to the second implication. Decisions such as *Kelly* could give substantial impetus to a rethinking of the American anti-corruption model which places United States Attorneys at the forefront of prosecutions of state and local corruption. It is admittedly difficult to visualize how this rethinking would play out, and what results it would yield.²¹⁶ For example, would the federal role simply come to an end? This is doubtful. On the other hand, there are plenty of opportunities to narrow it. The extent to which federalism is a significant constitutional

214. See TEACHOUT, *supra* note 23, 9–10, 244–45; see also Ciara Torres-Spelliscy, *Deregulating Corruption*, 13 HARV. L. & POL'Y REV. 471, 505 (2019) (“Politicians who have been charged with serious allegations of political corruption are using the Supreme Court’s reduction of what counts as corruption from both the campaign finance and the criminal cases to their legal advantage.”).

215. See Eisler, *supra* note 12, at 1626 (“Though the doctrinal questions may differ, the shared issue of representative obligation means a failure to reconcile the treatment of governance between campaign finance law and official corruption law will inevitably create tensions.”).

216. Professor Eisler suggests that

State (and local) anti-corruption law designed along civic lines may offer a more promising possibility [than the Court's approach]. Such laws could adopt the broad drafting and flexible enforcement necessary to robustly encourage public-mindedness, with the additional benefit of greater intimacy between state government and their smaller, geographically compact constituencies. While there would be variance between state laws, this would reflect local norms and enable “laboratories of democracy.”

Eisler, *supra* note 12, at 1688 (citations omitted).

principle or a canon of construction is an important question. *Kelly* leads to this kind of questioning and rethinking. For this reason, it should be celebrated, rather than denigrated as some bastard offspring of *Citizens United*.²¹⁷

217. *Kelly* is helpful in pondering these issues, raised by scholars such as Professors Eisler and Hills. Although I have generally leaned toward the federalism position, I admit that I have at times found the nationalist approach appealing, particularly the idea of the national government as the beacon of civic integrity for the entire country. In recent years, this approach has somewhat lost its luster.