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**THE RIGHT-TO-HONEST-SERVICES
DOCTRINE—ENRON’S FINAL VICTIM:
PURE VOID-FOR-VAGUENESS IN
*SKILLING V. UNITED STATES***

*Wesley Burrell**

I. INTRODUCTION

In the October 2009 term, the U.S. Supreme Court heard argument on the appeal of former Enron CEO Jeff Skilling, in *Skilling v. United States*.¹ Skilling had appealed on two grounds. First, he challenged the fairness of his trial in Houston, claiming the jury was unconstitutionally prejudiced.² Second, he challenged the viability of his conviction for “honest services” wire fraud under 18 U.S.C. § 1346³ (“§ 1346”), contending the statute was unconstitutionally vague.⁴ As to the first ground, the Court ruled in line with its precedent, deferring to the trial court and finding Skilling’s jury constitutional, and thus foreclosing his hope for a new trial.⁵ Yet, on the second challenge, the Court’s ruling was both more favorable to Skilling and more notable in light of the Court’s jurisprudence. Breaking new ground on the void-for-vagueness doctrine, the Court held § 1346 to be so vague as to require a limiting construction lest it be struck down, despite the fact that it implicates no secondary civil right or personal liberty.⁶ On pure vagueness grounds, the Court circumscribed the conduct criminalized by § 1346 to include only conduct involving bribes and kickbacks, thus

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1. 130 S. Ct. 2896 (2010).

2. *Id.* at 2917.

3. 18 U.S.C. § 1346 (2006).

4. *Skilling*, 130 S. Ct. at 2925.

5. *Id.*

6. *Id.* at 2931.

rendering § 1346 inapplicable to Skilling himself.⁷ Due to Skilling's other convictions, this ruling may have little effect on him. However, the Court's holding regarding § 1346 and its determination based on vagueness are pivotal with respect to the Court's void-for-vagueness jurisprudence, and they will certainly be influential on future white collar criminal prosecution.

II. BACKGROUND AND FACTS OF THE CASE

In 2001, the Enron Corporation, the seventh highest-revenue-grossing company in America, and a company whose stock *Fortune* magazine named as one of the top-ten stocks likely to last the decade,⁸ crashed into bankruptcy.⁹ Nationwide media coverage of the crash followed. A federal investigation of what had gone wrong commenced, and its results revealed an unprecedented web of complex corporate fraud, at the center of which sat former CEOs Ken Lay and Jeff Skilling.

Enron formed in 1985.¹⁰ It started as a gas-pipeline company, selling and transporting natural gas in regulated energy markets.¹¹ In 1988, however, then-CEO Lay shifted the company's strategy.¹² As states began to deregulate energy markets, Lay determined that Enron should transform itself into a "free-agent merchant"—an energy broker for the new unregulated energy marketplace.¹³ Skilling joined the company in 1990 to facilitate this transformation.¹⁴ As chief executive for Enron's finance unit, Skilling spearheaded Enron's transition from an energy dealer to a commodities trading

7. *Id.*

8. Jeffrey D. Van Niel, *Enron—The Primer*, in ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER 61, 69 (Nancy B. Rapoport et al. eds., 2d ed. 2009) ("Enron was named the 'most innovative' company in the United States by *Fortune* magazine every year between 1996 and 2001. In mid-August 2000, *Fortune* magazine named Enron as one of the top ten stocks that would last the decade because Enron had so successfully transformed itself from a stodgy gas utility into the largest online broker of energy." (footnote omitted)).

9. *Skilling*, 130 S. Ct. at 2907; see also LOREN FOX, ENRON: THE RISE AND FALL, at xii (2003) ("With \$62 billion in assets, this [was] the biggest such filing in U.S. history up to that time.").

10. FOX, *supra* note 9, at vii.

11. *See id.*

12. *Id.* at 20.

13. *Id.* at 22. *See generally id.* at 22–25 (describing the suitability of Enron's business model for optimal success in unregulated markets).

14. *Id.* at 33.

and financial services company.¹⁵ Guided by Skilling, Enron adapted strategies from the financial industry, such as options, swaps, and other investment tools, to create a dynamic energy market.¹⁶ Skilling favored an “asset-light” strategy of business.¹⁷ He aimed to turn Enron into a financial company with value based more on intellectual capital and deal engineering than on physical assets.¹⁸

Unknown to analysts or Enron’s investors, however, part of Skilling’s business strategy included various earning and cash-flow “levers.”¹⁹ These enabled Enron to artificially inflate its earnings statements and hide large losses to meet its own growth targets and outside analysts’ expectations.²⁰ Enron could hide debt and losses through deals with purported third-party entities that were not actually independent of Enron.²¹ It also fabricated earnings and overvalued its assets through a form of accounting called “mark-to-market.”²² Additionally, it hid failing investments by “parking” them with investment partners to keep them off quarterly and year-end balance sheets.²³ Together, these levers enabled Enron to prop up its stock, conceal its debt, and create the appearance of corporate health and stability.²⁴

By 2000, Skilling’s tactics, coupled with his and Lay’s leadership, had made Enron the United States’ leading energy company, with claimed revenues totaling \$100.8 billion in 2000, up 750 percent from 1996—unprecedented growth in the energy-and-utility industry.²⁵ In January 2001, even after Enron’s stock had split, it hit \$80 per share.²⁶ The following month, Skilling was named

15. *Id.*

16. *Id.* at 35–37.

17. *Id.* at 34.

18. *Id.*

19. See Superseding Indictment at 8, *United States v. Causey*, No. H-04-25 (S-2) (S.D. Tex. July 7, 2004) [hereinafter *Indictment*].

20. *See id.*

21. *Id.* at 12–15.

22. FOX, *supra* note 9, at 40–42.

23. *Indictment*, *supra* note 19, at 16 (noting that Enron “parked” assets by engineering faux sales of bad assets solely to achieve year-end budget targets).

24. *Id.* at 7–8.

25. Bala G. Dharan & William R. Bufkins, *Red Flags in Enron’s Reporting of Revenues and Key Financial Measures*, in *ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS* 97, 99–100 (Nancy B. Rapoport & Bala G. Dharan eds., 2004).

26. *Indictment*, *supra* note 19, at 8.

CEO, with Lay staying on as chairman of the board.²⁷ However, Skilling served only six months before resigning and leaving Enron that August, citing personal reasons.²⁸ By that November, just three months after Skilling had departed, Enron unraveled.²⁹ The major credit rating agencies had downgraded Enron's bonds to "junk" status, and its stock was trading at sixty-one cents per share.³⁰ In December 2001, Enron declared bankruptcy.³¹

The media met Enron's collapse with virulent outrage and volumes of negative press.³² A congressional committee performed an inquiry, the SEC initiated a formal investigation, and the Justice Department created the Enron Task Force to investigate and prosecute criminal activity related to Enron's downfall.³³ In 2004, as a result of the Enron Task Force's investigation and after numerous Enron executives had pled guilty, a grand jury indicted Skilling and Lay.³⁴ Skilling was indicted for conspiracy to commit wire fraud and conspiracy to commit securities fraud, as well as wire fraud and securities fraud.³⁵ Skilling's fraud charges arose from his complicity in using levers to manipulate Enron's earnings statements, as well as the false and misleading disclosures that he authorized on balance sheets, and financial statements, and those he made personally in his statements to analysts and ratings agents.³⁶ Additionally, he was charged with two counts of making false statements to auditors and ten counts of insider trading.³⁷

Skilling and Lay were to be tried together in Houston.³⁸ But due to the overwhelming negative sentiment in Houston—the former location of Enron's headquarters and, perhaps, the city hardest hit by

27. FOX, *supra* note 9, at x.

28. *Id.*

29. *Id.* at xi–xii.

30. *Id.* at xii.

31. *Id.*

32. Skilling v. United States, 130 S. Ct. 2896, 2954 (2010).

33. See *The Rise and Fall of Enron*, PBS ONLINE NEWS HOUR (Jan. 2002), http://www.pbs.org/newshour/bb/infrastructure/power/enron_time.html.

34. Kristen Hays, *Enron at Eye Level: A Reporter's View of the Trials*, in ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER, *supra* note 8, at 3, 11–15.

35. Indictment, *supra* note 19, at 36–42, 46–49.

36. *Id.*

37. *Id.* at 49–53, 58–60.

38. Skilling v. United States, 130 S. Ct. 2896, 2907–08 (2010).

the firm's collapse—Skilling and Lay moved for a change of venue in their jury trial.³⁹ The court denied the motion.⁴⁰ At trial, a jury found Skilling guilty on all counts except the nine counts of insider trading that were alleged to have occurred prior to his time as CEO and Enron's implosion.⁴¹ The jury also found Lay guilty but he died before sentencing, and the trial judge vacated his conviction.⁴²

Skilling appealed his conviction on two grounds. First, he argued that the pretrial publicity in Houston was so prejudicial and pervasive as to raise a presumption of juror prejudice,⁴³ rendering his trial unconstitutional. Second, he argued that his convictions for conspiracy to commit wire fraud and for wire fraud itself, under the "intangible right to honest services" statute, § 1346, could not stand.⁴⁴ He argued that the statute was either unconstitutionally vague or, at least, could not be interpreted to include his actions.

On appeal, the U.S. Court of Appeals for the Fifth Circuit found Skilling's jury trial to have been constitutional⁴⁵ and rejected Skilling's second argument regarding the honest-services statute's vagueness.⁴⁶ It thereby upheld his convictions. Skilling sought certiorari and the Supreme Court granted it.⁴⁷ The Court ruled that Skilling had received a fair trial.⁴⁸ However, it vacated the Fifth Circuit's opinion with respect to § 1346.

III. SKILLING'S CONVICTION FOR WIRE FRAUD

After it disposed of Skilling's first contention of juror prejudice, the Court addressed his convictions for wire fraud and the contention that these could not stand because the right-to-honest-services statute on which they were based was unconstitutionally vague.⁴⁹ Skilling had been convicted of wire fraud and conspiracy to commit wire

39. *Id.* at 2908.

40. *Id.*

41. *Id.* at 2911.

42. David Ivanovich, *The Sentencing of Jeff Skilling*, HOUS. CHRON., Oct. 24, 2006, at A8.

43. *Skilling*, 130 S. Ct. at 2911.

44. *Id.* at 2911, 2925–26.

45. *Id.* at 2911–12.

46. *Id.* at 2912.

47. *Id.*

48. *Id.* at 2925.

49. *Id.* at 2925–34.

fraud under 18 U.S.C. § 1343.⁵⁰ To commit wire fraud, one must have “devise[d] a[] scheme or artifice to defraud, or for obtaining money or property by means of false . . . pretenses, representations, or promises”⁵¹ Typically, fraud requires that “the victim’s loss of money or property suppl[y] the defendant’s gain.”⁵² However, the honest-services theory of fraud, codified in § 1346, only requires that the defendant’s fraud deprive the victims of their “intangible right of honest services.”⁵³ This right results from a fiduciary duty that the defendant owes to the victims.⁵⁴ Meanwhile, the defendant’s gain comes about through some third party, wittingly or unwittingly.⁵⁵

The prosecutors theorized that the victims of Skilling’s fraud were Enron’s shareholders and investors.⁵⁶ Because he had not fraudulently obtained money or property directly from the investors and shareholders, Skilling could not have been guilty of money-or-property wire fraud. He had, however, fraudulently violated his duty to honestly represent the company’s condition to its shareholders and investors.⁵⁷ And in so doing, he had gained for himself \$14 million in salary and \$89 million in profits from stock options.⁵⁸ Under the prosecution’s theory, Skilling was guilty of wire fraud because he had deprived his victims of their right to his honest services to make money for himself. Skilling contended that he could not be guilty, however, because § 1346 lacked clarity such that it was unconstitutionally vague and therefore must be voided. In the alternative, he argued that the statute did not apply to his conduct.⁵⁹ The Court agreed with Skilling that § 1346 could not encompass his

50. *Id.* at 2907.

51. 18 U.S.C. § 1343 (2006).

52. *Skilling*, 130 S. Ct. at 2926.

53. 18 U.S.C. § 1346.

54. *See Skilling*, 130 S. Ct. at 2930–31.

55. *See id.* at 2926.

56. Brief for the United States at 50, *Skilling*, 130 S. Ct. 2896 (No. 08-1394), 2010 WL 302206 at *50 (“[Skilling] placed his interests in conflict with that of the shareholders, when, for his own financial benefit, he engaged in an undisclosed scheme to artificially inflate the stock’s price by deceiving the shareholders and others about the company’s true financial condition.”).

57. *See id.*

58. Indictment, *supra* note 19, at 6.

59. *Skilling*, 130 S. Ct. at 2926.

conduct, but it stopped short of voiding⁶⁰ the statute as a whole, choosing instead to apply a limiting construction.⁶¹

A. The Majority's Opinion on the Right-to-Honest-Services Fraud and Vagueness

The majority first reviewed the origins and application of the right-to-honest-services doctrine.⁶² The Court noted that the doctrine initially derived from the disjunctive wording of the wire fraud statute: from the “scheme . . . to defraud, or for obtaining money or property.”⁶³ Circuit courts had reasoned that the disjunctive phrasing conveyed Congress’s intent to outlaw both schemes to defraud victims of money or property and schemes to defraud victims that did not involve directly dispossessing them of money or property.⁶⁴ Over time, this developed into the doctrine of honest-services fraud. In *Skilling*, the majority found the core of this doctrine to have been consistent across circuits despite there being some variation as to its exact contours and application.⁶⁵ This doctrine was not based on a clear statement from Congress, however, and so in 1987, in *McNally v. United States*,⁶⁶ the Supreme Court struck it down.⁶⁷ There, the Court applied the rule of lenity in interpreting the wire fraud statute and eliminated the honest-services doctrine, stating that Congress would have to be clearer about its intent before the doctrine could be applied.⁶⁸ Congress responded a year later by passing § 1346, explicitly reinstating the honest-services doctrine by name but providing no further clarification as to its definition, application, or contours.⁶⁹ Thus, the majority in *Skilling* reasoned that Congress’s

60. *Id.* at 2929.

61. *Id.* at 2934.

62. *Id.* at 2926.

63. *Id.*

64. *Id.*

65. *See id.* at 2931.

66. 483 U.S. 350 (1987).

67. *Id.* at 361. *McNally* actually concerned mail fraud. *Id.* at 352. However, the phrasing of mail and wire fraud is identical as to the operative disjunctive underlying honest-services fraud and so the ruling also applied to wire fraud. Compare 18 U.S.C. § 1341 (2006) (criminalizing any “scheme or artifice to defraud, or for obtaining money or property”), with *id.* § 1343 (criminalizing activity defined identically when the fraud is transmitted by wire, radio, or television).

68. *See McNally*, 483 U.S. at 360.

69. *See Skilling*, 130 S. Ct. at 2927.

intent in defining honest-services fraud under § 1346 was to “refer to and incorporate the honest-services doctrine recognized in Court of Appeals’ decisions before *McNally*.”⁷⁰

Having established pre-*McNally* case law as the key for defining § 1346, the Court assessed whether the doctrine, so defined, was unconstitutionally vague. It determined that the doctrine had sufficient definiteness to (1) provide notice and (2) protect against arbitrary and discriminatory enforcement, if its application were limited to the core conduct that all courts had typically applied it to—that is to “bribery and kickback schemes.”⁷¹ The Court refused to void the statute as unconstitutionally vague and, instead, applied a limiting construction so as to restrict the doctrine’s application only to “offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes.”⁷² It justified this ruling by citing its obligation to “construe [and] not condemn, Congress’ enactments,”⁷³ noting that it has been the Court’s practice, when possible, to apply a limiting construction to a problematic statute before striking it as unconstitutional.⁷⁴ Outside the bounds of the limiting construction, the majority conceded that courts were in “considerable disarray over the statute’s application.”⁷⁵ To add further clarity to the conduct that the limiting construction encompassed, the majority explained that the honest-services doctrine “draws content” from other federal bribery and kickback statutes, including 18 U.S.C. § 201(b), 18 U.S.C. § 666(a)(2), and 41 U.S.C. § 52(2).⁷⁶

Because the government had already conceded that Skilling did not engage in bribery and that his conduct did not constitute a kickback scheme, the Court vacated his conviction for honest-services fraud.⁷⁷ However, the Court remanded his conviction for conspiracy because the prosecution had charged two alternative objects of the conspiracy: securities fraud and money-or-property

70. *Id.* at 2928.

71. *Id.* at 2933.

72. *Id.* at 2930.

73. *Id.* at 2928.

74. *Id.* at 2929 (“The elementary rule is that *every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality.” (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895))).

75. *Id.*

76. *Id.* at 2933.

77. *Id.* at 2934.

wire fraud.⁷⁸ His conviction for conspiracy will stand if the inclusion of honest-services wire fraud, now ruled to be inapplicable, with these alternative objects of conspiracy was a harmless error.⁷⁹

*B. Scalia's Concurrence on the Right to
Honest-Services Fraud and Vagueness*

Scalia concurred in the judgment but objected to the majority's application of a limiting construction to save § 1346.⁸⁰ Citing *United States v. Reese*,⁸¹ he argued that a "statute that is unconstitutionally vague cannot be saved by . . . judicial construction that writes in specific criteria that its text does not contain."⁸² Unlike the majority opinion, the concurrence did not find a consistent core to the pre-*McNally* case law.⁸³ Indeed, the concurrence noted that no court had ever previously limited the statute to what the majority called the doctrine's core conduct.⁸⁴ Additionally, Scalia pointed out that there has never been agreement as to the nature of the fiduciary duty to which the right to honest services applies, where it derives from, or what constitutes a breach.⁸⁵ The concurrence thus argued that the Court should have found the statute void for vagueness.⁸⁶

IV. ANALYSIS OF THE COURT'S RULING
ON THE INTANGIBLE RIGHT TO HONEST SERVICES

A. The Court's New Application of Vagueness

Though the Court vacated Skilling's conviction for honest-services fraud, many commentators maintain that his other convictions will likely stand.⁸⁷ The prosecution's theory was that

78. *Id.*

79. *Id.*

80. *See id.* at 2935 (Scalia, J., concurring).

81. 92 U.S. 214 (1876).

82. *Skilling*, 130 S. Ct. at 2935 (Scalia, J., concurring) (citing *Reese*, 92 U.S. at 219–21).

83. *See id.* at 2936.

84. *Id.* at 2939.

85. *Id.* at 2936–37.

86. *Id.* at 2935.

87. *See, e.g.*, Mark J. Stein & Joshua A. Levine, *Skilling: Is It Really a Game-Changer for Mail and Wire Fraud Cases?*, in SECURITIES LITIGATION AND ENFORCEMENT INSTITUTE 2010, at 938 (PLI Corp. Law & Practice, Course Handbook Ser. No. 23726, 2010) ("For Jeffrey Skilling, the Supreme Court's decision may make little difference. . . . [his] numerous other

Skilling had induced investors to make purchase decisions based on false information. This conduct fits squarely within the statutory definition of securities fraud.⁸⁸ Also, the Court's decision may not heavily alter future prosecutions for corruption under § 1346. Though the doctrine was well known for its versatility and favored by prosecutors for these characteristics,⁸⁹ the statute remains intact with regard to the core conduct of bribery and kickback schemes, and prosecutors have typically brought § 1346 cases for conduct that would qualify as bribery or kickbacks.⁹⁰ Also, although § 1346 is now limited, other versatile and malleable white-collar criminal statutes allow the government to prosecute much of the outlying conduct that § 1346 no longer criminalizes.⁹¹

The most exceptional aspect of the *Skilling* opinion, however, is not its direct effect on honest-services fraud prosecutions. *Skilling* marks a shift in the Supreme Court's use of the void-for-vagueness doctrine in criminal cases. Previously, this due process doctrine had functioned foremost as a means to protect other liberties such as civil rights, First Amendment liberties, or equal protection concerns.⁹² In his 1990 article projecting the likely inapplicability of the doctrine to another white-collar statute—the Racketeering Influenced and Corrupt Organizations Act (RICO) Act—Joseph Bauerschmidt noted that in a survey of more than seventy cases citing the void-for-vagueness doctrine between 1960 and 1990, courts consistently applied the doctrine as a means of protecting a secondary right rather

convictions are likely to still stand.”); *id.* at 935 (“Jeffrey Skilling probably will not escape jail-time given that he was also convicted of multiple other offenses . . .”).

88. See 17 C.F.R. § 240.10b-5 (2001); 15 U.S.C. §§ 78j(b), 78ff (2006).

89. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980) (“To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love.”).

90. Stein & Levine, *supra* note 87, at 938–39 (“[A] review of the more than 600 published decisions involving the honest-services statute reveals that the overwhelming majority of such cases involved either allegations of a bribe or kickback, or conduct that was, or could have been, charged as a traditional wire/mail fraud or under other federal statutes, such as those prohibiting securities fraud, extortion, and bribery.”).

91. See, e.g., Hobbs Act, 18 U.S.C. § 1951 (2006); Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968 (2006).

92. Joseph E. Bauerschmidt, “*Mother of Mercy—Is This the End of Rico?*”—Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO “*Pattern*,” 65 NOTRE DAME L. REV. 1106, 1116 (1990).

than for pure due process purposes.⁹³ Indeed, with the exception of *Skilling*,⁹⁴ in every case since 1990 in which the Court has considered the doctrine's applicability to a criminal statute, the statute in question has also implicated a secondary injustice from the violation of a civil right or personal liberty.⁹⁵ In contrast, in *Skilling*, the Court held § 1346 to be so vague as to require a limiting construction despite the fact that the statute does no injustice to a secondary liberty. Instead, the Court circumscribed § 1346 purely to protect the defendant's due process rights.

The injustice at issue in *Skilling* is of a different variety than the injustices at issue in previous void-for-vagueness decisions. In *Chicago v. Morales*,⁹⁶ for example, the Court applied the void-for-vagueness doctrine to remedy the injustice of a city anti-loitering ordinance because the statute impinged on citizens' right to move about or loiter.⁹⁷ In voiding the statute, the Court referred to the historical use of such loitering statutes as a means to discriminate against racial minorities and the poor.⁹⁸ Accordingly, the Court applied the doctrine to remedy an injustice implicating civil rights and economic discrimination. In contrast, the *Skilling* opinion cited no additional liberty concern. The injustice in *Skilling* was simply that "[w]ithout some coherent limiting principle . . . [§ 1346] invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of

93. *Id.* at 1118–20 (concluding based on Supreme Court precedent to that point, since RICO did not implicate a secondary personal liberty or civil rights it was probably not susceptible to a vagueness challenge).

94. One additional void-for-vagueness case does not implicate a secondary right. *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513 (1994). However, in *Posters 'N' Things*, the Court did not hold the statute to be vague in any way.

95. *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (considering whether a statute is void for vagueness because it "imposes an undue burden on a woman's right to abortion"); *Hill v. Colorado*, 530 U.S. 703 (2000) (deciding whether a statute that allegedly violated the defendant's First Amendment rights was unconstitutionally vague); *Chicago v. Morales*, 527 U.S. 41 (1999) (applying the vagueness doctrine to a statute impinging the personal liberty to loiter); *Tuilaepa v. California*, 512 U.S. 967 (1994) (considering whether a California statute is unconstitutionally vague with respect to defendant's Constitutional right against cruel and unusual punishment); *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991) (considering a void-for-vagueness challenge where a statute prohibiting lawyers from making extrajudicial statements to the press violated lawyers' First Amendment rights).

96. 527 U.S. 41.

97. *Id.* at 53, 55–56.

98. *Id.* at 53 n.20.

unappealing or ethically questionable conduct”;⁹⁹ the injustice remedied in *Skilling* is vagueness itself and the overcriminalization that is its result.¹⁰⁰

That this injustice occurred in *Skilling* is evident from the facts of the case. Enron’s fall was a national tragedy, a corporate bankruptcy of unparalleled scope.¹⁰¹ It resulted in vehement public outcry for the responsible parties to be brought to justice. Hence, since Skilling helmed Enron during its rise and as it began its fall, prosecutors had heavy incentives to prosecute Skilling for his risky and legally questionable conduct. But many of the accounting procedures Skilling implemented at Enron, which his indictment referenced, were common practices in other U.S. companies.¹⁰² Corporate managers at many other U.S. companies likewise shared his managerial focus on hyping projected accounting numbers to obscure the underlying economic realities.¹⁰³ Additionally, many of the complex business deals Enron engaged in to manipulate its debt disclosures—particularly its use of Enron-controlled, supposedly third-party entities (Special Purpose Entities) to conceal losses and heavy risk—were used by other corporations.¹⁰⁴ Most importantly,

99. *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari).

100. Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 748 (2005) (“Many argue that a good deal of so-called regulatory or ‘white collar crime’ should fall outside the ambit of the criminal law, to be dealt with by other bodies of specialized civil law, such as corporate governance, environmental, or election finance law.”); MARIE GRYPHON, *IT’S A CRIME?: FLAWS IN FEDERAL STATUTES THAT PUNISH STANDARD BUSINESS PRACTICE 2–3* (Manhattan Inst. Ed., 2009), available at http://www.manhattan-institute.org/pdf/cjr_12.pdf (noting that injustice results when “prohibited behaviors are . . . hard to distinguish from the kinds of productive activities that businesspeople [and government officials] are obligated to engage in” and suggesting that “businesspeople often try to go up to the line that separates legitimate, if aggressive, business conduct from indictable behavior without crossing it”).

101. Dan Ackman, *Top of the News: Enron Files Chap. 11*, FORBES (Dec. 3, 2001), http://www.forbes.com/2001/12/03/1203topnews_print.html (citing Enron’s bankruptcy filing as—at that time—the largest bankruptcy filing in U.S. history”).

102. Frank Partnoy, *Enron and the Derivatives World*, in ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER, *supra* note 8, at 105, 110.

103. *Id.* at 111 (“[C]orporate management’s performance is generally measured by accounting income, not underlying economics. Risk management strategies are therefore directed at accounting rather than economic performance.’ This alarming statement is representative of the accounting-driven focus of U.S. managers generally, who all too frequently have little interest in maintaining controls to monitor their firm’s economic realities.”).

104. See Bala G. Dharan, *Enron’s Accounting Issues: What Can We Learn to Prevent Future Enrons?*, in ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER, *supra* note 8, at 85, 89.

however, though prosecutors charged that Skilling had misrepresented the company's health, Enron had disclosed the details of its financial situation to shareholders and the investing public while under Skilling's leadership.¹⁰⁵ Skilling may have continued to insist on the healthiness of the company even though he knew that its health was quite questionable.¹⁰⁶ But he also released financial reports and other public statements sufficient to disclose the actual state of Enron's finances.¹⁰⁷ Analysts and reporters, through careful analysis of those documents alone, ascertained Enron's true financial situation.¹⁰⁸ In fact, it was the reporting on those disclosures that precipitated Enron's fall.¹⁰⁹ It is therefore plausible that Skilling's conduct was not in fact criminal but merely amounted to aggressive business practices coupled with a CEO's misguidedly optimistic projections. Ambiguity regarding the criminality of Skilling's conduct may have led prosecutors to rely on § 1346's ambiguity to get a conviction.

*B. Skilling and Vagueness in
White Collar Crime Generally*

Skilling reveals a general problem with criminalization in the white-collar arena. Two elements that are necessary to curb the injustice of overcriminalization and limit vagueness in criminal statutes are (1) scienter and (2) objective criteria that specify the harm to be protected against.¹¹⁰ These are difficult to apply in the white-collar arena, however, and are therefore often missing from (or

105. Malcolm Gladwell, *Enron, Intelligence, and the Perils of Too Much Information*, in ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER, *supra* note 8, at 269, 275.

106. *See id.* at 275.

107. *Id.* at 276.

108. *See id.* at 275–76.

109. *See id.* at 275; *see also* Joel M. Androphy, *The Enron Finale: Justice or Retribution?*, 70 TEX. B.J. 32, 33 (2007) (“Skilling and Lay contended that the media reporting [may have] caused a ‘run on the banks’ and loss of credit and confidence.”).

110. *See* *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 525–26 (1994) (holding that scienter and objective criteria are required for assessing whether items qualify as drug paraphernalia and that these requirements saved a criminal statute from being void for vagueness); Bauerschmidt, *supra* note 92, at 1124 (“Statutes with independent scienter requirements are never vague.”); *see also* J. Kelly Strader, *White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss*, 15 GEO. MASON L. REV. 45, 55 (2007) (arguing that without proof of “substantial, identifiable harm . . . the government should not resort to the criminal law”).

ambiguous in) white-collar criminal statutes. With respect to scienter, it is hard to prove that defendants like Skilling actually acted with specific intent to defraud shareholders or to illegally obtain money or property.¹¹¹ Often, it is quite likely they did not act with such intent¹¹² but intended simply to shrewdly and legally succeed in business or politics. Even when specific intent to defraud may exist, it can be difficult to prove. In *Skilling*, the prosecution lacked any “smoking-gun” evidence tying Skilling to much of the alleged wrongdoing, much less proving scienter.¹¹³

With respect to specifying harm, the harm of white-collar offenses is often difficult to ascertain and to prove. Corrupt conduct generally causes small individual harms “significant only in the aggregate,” making the actual cost of corruption difficult to calculate unless there is some major tragedy such as Enron’s collapse.¹¹⁴ Difficulty in determining the cost, in turn, leads to moral ambiguity with respect to the conduct itself.¹¹⁵ The complicated nature of harmful conduct in such cases also makes it difficult to prove to the jury the specific harm, as was the case in *Skilling*.¹¹⁶ These difficulties in ascertaining and proving harm result in Congress drafting statutes with uncertain scienter requirements, criminalizing vague and ambiguous harms so as to potentially encompass a broad array of conduct.¹¹⁷ Congress thereby lets prosecutors determine what conduct to criminalize. Such statutes shift Congress’s legislative crime-making power to prosecutors and courts.¹¹⁸ They also facilitate criminalizing conduct in hindsight, such as what occurred in *Skilling*.

111. See Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 195 (1994).

112. *Id.*

113. See John C. Hueston, *Behind the Scenes of the Enron Trail: Creating the Decisive Moments*, 44 AM. CRIM. L. REV. 197, 197 n.3 (2007).

114. Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 501, 509 (2004).

115. *Id.* at 510.

116. Hueston, *supra* note 113 at 200 (noting it was a “challenge . . . translating a complicated earnings manipulation scheme to a Houston jury”).

117. See Strader, *supra* note 110, at 96 (“The vagueness of many white collar statutes should be news to no one.”).

118. See *id.* (“[A]ll too often prosecutors overreach in instances of ambiguous harm and unproven legal theories.”); see also Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 763 (1999) (“[T]he breadth of federal criminal law owes far less to legislative choices than to creative judicial interpretations, spurred on by prosecutors careful to choose the right cases to advance their agendas.”).

When Congress does not set minimum guidelines to govern law enforcement, there is no limit to the conduct that can be criminalized.¹¹⁹

Some commentators suggest additional motives for Congress's drafting of ambiguous statutes. Such statutes allow legislators to avoid blame when laws do not produce desirable results. They enable legislators to appear tough on crime without requiring careful consideration of the specific conduct the laws criminalize or the degree to which the laws encroach on state police powers. Additionally, legislators can explain ambiguous legislation differently to different audiences. It thus "satisf[ies] a broader range of a heterogeneous population."¹²⁰ Furthermore, legislators may need ambiguity simply as a political practicality to build support for legislation.

Many factors motivate Congress to draft white-collar criminal statutes ambiguously. For these reasons, and because of the particular characteristics of white-collar crime discussed above, Congress has tended to pass ambiguous criminal statutes. Had the Court struck down § 1346 entirely, the Department of Justice would have likely sought a replacement with similar flexibility,¹²¹ and Congress would have likely passed one. Perhaps it is partly for this reason that the *Skilling* majority did not rule with Scalia's concurrence and void the statute entirely. Instead it ruled in line with Justice O'Connor's suggestion in *Morales*,¹²² applying a limiting construction with instructions for defining scienter as an "intent to perform an act in exchange for a benefit"¹²³ and specifying objective

119. See, e.g., *United States v. Carpenter*, 791 F.2d 1024, 1026 (2d Cir. 1986) (judging the defendant's conduct to be criminal for violating the terms of an employee handbook), *aff'd*, 484 U.S. 19 (1987).

120. Gillian K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 CALIF. L. REV. 541, 550 (1994).

121. Timothy P. O'Toole, *The Honest-Services Surplus: Why There's No Need (or Place) for a Federal Law Prohibiting "Criminal-esque" Conduct in the Nature of Bribes and Kickbacks*, 63 VAND. L. REV. EN BANC 49, 59 (2010).

122. *Chicago v. Morales*, 527 U.S. 41, 68 (1999) (O'Connor, J., concurring) ("[T]he . . . loitering ordinance could have been construed more narrowly. The term 'loiter' might . . . be construed . . . to mean 'to remain . . . with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities.'").

123. *United States v. Ganim*, 510 F.3d 134, 146–47 (2007); see *Skilling v. United States*, 130 S. Ct. 2896, 2934 (2010) (citing *Ganim*, 510 F.3d at 147–49, as an example of how § 1346 draws content from other federal bribery and kickback statutes).

criteria for assessing the harm by limiting § 1346 to its core conduct of bribery and kickback schemes.

*C. The New Applicability of Vagueness and
Remaining Ambiguity in § 1346*

The Court's limitation of § 1346 as a pure protection of due process may indicate a shift in its approach to criminal statutes generally. Most white-collar criminal statutes outlawing corporate or political crime do not implicate secondary liberties such as civil rights, First Amendment, or equal protection, despite their broad and often ambiguous applications. Yet such statutes perpetuate injustices in their own right. The Court's decision in *Skilling* may change the Court's consideration of such laws and may expand the applicability of vagueness challenges in lower courts as well.

But despite the Court's limitation of § 1346, the underlying statute's unchanged ambiguity continues to render its applicability somewhat uncertain. As Scalia points out, exactly what fiduciary duties the right to honest services applies to remains uncertain.¹²⁴ Likewise, while the scienter requirement drawn from bribery or kickback statutes will give additional contour to § 1346, it is uncertain whether § 1346's underlying scienter requirements, such as the "intent to defraud,"¹²⁵ survive the application of scienter for bribery or kickbacks. Is a scheme to defraud simply subsumed into the intent to receive a bribe or kickback, or is the scheme to defraud a separate element? If it is separate, how do they interact? Similarly, it is unclear whether a bribe functions differently under § 1346 than it would under 18 U.S.C. § 201 ("§ 201").¹²⁶ In *United States v. Ganim*,¹²⁷ the Second Circuit determined, pre-*Skilling*, that it does.¹²⁸ Section 201 bribery requires that the parties identify the specific act to be performed in exchange for the bribe when a party makes the

124. *Skilling*, 130 S. Ct. at 2936 (Scalia, J., concurring); see also John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 455 (1998) ("Although § 1346 may well constitute a clear statement that public officials are to remain subject to federal anticorruption legislation, relatively little is said about the private fiduciary context.").

125. *Screws v. United States*, 325 U.S. 91, 102 (1945) (plurality opinion) (quoting *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 502-03 (1925)).

126. 18 U.S.C. § 201 (2006).

127. 510 F.3d 134 (2007).

128. *Id.* at 147-48.

bribe or gives a promise of property.¹²⁹ In *Ganim*, the Court ruled, however, that § 1346 did not have this “specific act” requirement.¹³⁰ Indeed, for this reason it is possible that prosecutors could turn to § 1346 to get around the “specific act” requirement of § 201.¹³¹ Thus, some ambiguities remain in § 1346 despite the Court’s limiting construction in *Skilling*.

D. *Skilling and Federalism*

There is one additional ambiguity that the Court’s opinion does not address. A companion case to *Skilling*, *Weyhrauch v. United States*,¹³² raised the question of whether behavior not criminalized under a state statute could be criminalized under § 1346.¹³³ The Court remanded *Weyhrauch* in light of the ruling in *Skilling*, without answering this question.¹³⁴ The issue of federalism was almost entirely absent from the opinion in *Skilling*. The Court only addressed the issue to note that the remaining utility of § 1346, after it has been limited to bribery and kickbacks (conduct that other federal statutes criminalize), is its applicability to state, local, and private individuals whose conduct would be otherwise unreachable by federal prosecutors.¹³⁵ Notwithstanding the myriad other problems that result from federal intervention into state corruption,¹³⁶ to permit § 1346 to be applicable in the state arena without limiting its application to conduct that state law criminalizes seems to implicate some of the same due process concerns that form the basis of the Court’s decision in *Skilling*. Indeed, there are “no clear, uniform national standards of ethics in local politics or corporate governance”

129. *Id.* at 146–47.

130. *Id.* at 147.

131. See Randall D. Eliason, *Surgery with a Meat Axe: Using Honest Services Fraud to Prosecute Federal Corruption*, 99 J. CRIM. L. & CRIMINOLOGY 929, 970 (2009).

132. 130 S. Ct. 2971 (2010).

133. *Weyhrauch v. United States*, 548 F.3d 1237, 1239 (2008).

134. *Weyhrauch*, 130 S. Ct. 2971.

135. *Skilling v. United States*, 130 S. Ct. 2896, 2934 n.45 (“Overlap with other federal statutes does not render § 1346 superfluous. . . . [§] 1346’s application to state and local corruption and to private-sector fraud reaches misconduct that might otherwise go unpunished.”)

136. Federal criminalization of state and local corruption by means of standards that federal courts and federal prosecutors determine makes state and local officials more accountable to the federal government than those who voted for them. Moohr, *supra* note 111, at 175; see also *id.* at 174 (noting that federal prosecutions of this nature “encourage[] citizens to abdicate their responsibility for self-government at the state and local levels . . . [which] erodes the notion that the federal government lacks general police powers”).

to provide notice to defendants or to protect from arbitrary enforcement when § 1346 extends into the state arena.¹³⁷ Policing local politics and corporate governance is traditionally the state's domain. Defendants may expect that they are accountable only to the state law in these areas. The Court did not address this matter, however. Presumably, it is confident that *Skilling* and § 1346 itself provide sufficient notice to potential defendants that corporate governance is not the state's exclusive province when it comes to corruption. Nonetheless, such an apparent invasion of state sovereignty ought to come by way of a clear statement from Congress on its intent to do so, rather than from the judiciary. Section 1346 does not seem to satisfy that requirement.

V. CONCLUSION

It is unclear to what extent the remaining ambiguity of § 1346 will continue to permit unelected prosecutors to determine criminal conduct.¹³⁸ Unambiguous language from Congress would have been ideal. Nonetheless, the Court's decision brings new life to due process by limiting § 1346 on purely due process grounds. In so doing, it affirmed the right to notice and to be protected against arbitrary prosecution. The Court, likewise, pushed back against Congress instituting ambiguous criminal statutes and the resulting trend toward overcriminalization. Its opinion does much to reinforce judicial power, in particular the judiciary's power to define law when Congress will not.

137. Harvey A. Silverglate & Monica R. Shah, *The Degradation of the "Void for Vagueness" Doctrine: Reversing Convictions While Saving the Unfathomable "Honest Services Fraud" Statute*, 2009–2010 CATO SUP. CT. REV. 201, 205 (2010).

138. See Paul Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, LEGAL MEMORANDUM, Apr. 17, 2003, at 1, 15, available at www.heritage.org/research/legalissues/lm7.cfm ("Where once the law had strict limits on the capacity of the government to criminalize conduct, those limits have now evaporated. Society has come, instead to rely on the 'conscience and circumspection in prosecuting officers.'").