
Demoralizing Elite Fraud

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ABSTRACT. The Supreme Court’s effort to avoid interpreting morally weighted terms like “fraud” and “honest services” has led it to make bad and confusing law in wire-fraud cases. These cases, unlike *Citizens United* and its ilk, are unanimous, joining liberal and conservative Justices, reflecting a shared skepticism about anticorruption law.

INTRODUCTION

Since the 1970s, the American law of corruption and fraud has had a morality problem. Antifraud and anticorruption laws tend to be based on a moral code, to wit: those in power should not use that power for private, selfish ends. Yet the modern Court resists the moral language and the disapprobation that attends it, and seeks to find solid, simple positivist grounds on which to base its interpretations.¹

As I show in this Essay, in a series of cases from the 1970s to this year, the Court has repeatedly attempted to shift the linguistic framework of fraud cases from moral language to morally neutral language. As a result, the Court ends up making a hash of statutory interpretation, because it then has to interpret statutes that it has effectively rewritten.

Two extremely short, consequential wire-fraud cases from 2023 illustrate the problems created by this trend. In *Percoco v. United States*, the Court concluded that jury instructions regarding kickbacks during his time as an unpaid advisor violated Percoco’s due-process rights.² In *Ciminelli v. United States*, the Court held that Ciminelli did not deprive anyone of “property” when he schemed with

1. ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO *CITIZENS UNITED* 227-45, 255-75 (2014).

2. *Percoco v. United States*, 598 U.S. 319 (2023).

government officials to rig a bid.³ Both decisions were notably brief. The *Ciminelli* opinion was twelve pages and 2,500 words long, with a mere five paragraphs interpreting the statute.⁴ *Percoco* was only a few lines longer.⁵ While concision itself is not a sign of weak reasoning, it can signal a lack of care, especially in cases where the Court is overturning lower-court decisions and upending decades of accepted practice, and where the statutory and constitutional questions are complex. Both cases were unanimously decided, with short concurrences and none of the sharp dissents that mark other major corruption cases like *Citizens United v. FEC* or *McCutcheon v. FEC*.⁶

The decisions followed another short, unanimous corruption opinion in *Kelly v. United States* in the spring of 2020, overturning the New Jersey District Court and the Third Circuit Court of Appeals. In *Kelly*, the Court threw out the convictions of Bridget Anne Kelly and Bill Baroni concerning the scandal known as “Bridgegate.”⁷ That case, in turn, followed unanimous opinion in *McDonnell v. United States*,⁸ overturning former Virginia Governor Robert McDonnell’s convictions for exchanging access to university studies for gifts including a Rolex. *Kelly* also followed the controversial 2010 case,⁹ *Skilling v. United States*,¹⁰

3. *Ciminelli v. United States*, 598 U.S. 306 (2023).

4. *Id.*

5. *Percoco*, 598 U.S. 319.

6. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185 (2014).

7. *Kelly v. United States*, 140 S. Ct. 1565 (2020). The Court concluded that the term “property” in the federal wire-fraud statute, 18 U.S.C. § 1343, had been misapplied by the lower courts, and it summarily applied that same logic to 18 U.S.C. § 666(a)(1)(A), the federal programs bribery statute.

8. 579 U.S. 550 (2016).

9. See, e.g., Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court’s *Skilling* Decision: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 1-2 (2010) (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary); Samuel W. Buell, *The Court’s Fraud Dud*, 6 DUKE J. CONST. L. & PUB. POL’Y 31 (2010); see also Sara Sun Beale, *An Honest Services Debate*, 8 OHIO ST. J. CRIM. L. 251, 252-70 (2010) (reciting differing views on the outcome of *Skilling v. United States*).

10. 561 U.S. 358 (2010); see also Joan H. Krause, *Kickbacks, Honest Services, and Health Care Fraud After Skilling*, 21 ANNALS HEALTH L. 137, 142 (2012) (discussing *Skilling*’s implications for health care fraud); Ciara Torres-Spelliscy, *Deregulating Corruption*, 13 HARV. L. & POL’Y REV. 471, 497 (2019) (noting how *Skilling* has “opened new defenses for accused faithless corporate fiduciaries, as well as accused corrupt politicians” and led to some convicted politicians having their “convictions vacated”); Pamela Mathy, *Honest Services Fraud After Skilling*, 42 ST. MARY’S L.J. 645, 684 (2011) (describing how the Court in *Skilling* “limited the reach of § 1346 mail fraud to honest services fraud cases involving bribes or kickbacks”); J.B. Perrine & Patricia M. Kipnis, *Navigating the Honest Services Fraud Statute After Skilling v. United States*, 72 ALA. LAW. 294, 298-99 (2011) (discussing the uncertainty created by *Skilling*).

in which the Court deployed a new, narrow definition of the term “honest services” and overturned convictions of Enron executives.¹¹

I have written extensively about how the Supreme Court’s conservative majority has a high degree of skepticism towards corruption as a concept and therefore towards anticorruption efforts generally.¹² In this Essay, I build on that critique, showing how the series of mail- and wire-fraud cases represent a similar form of skepticism about elite fraud. I am particularly interested in highlighting the liberal wing of the Court, which joined each of the aforementioned opinions. While Justice Kagan, for instance, does not share the majority’s antipathy to bright-line campaign-finance rules, she is still skeptical of anticorruption frameworks and anticorruption rationales.¹³ Unlike Justice Stevens, who carried the anticorruption banner in several dissents,¹⁴ Kagan appears unpersuaded by the seriousness of the corruption threat, and uncomfortable with the moral language and condemnations regarding elite public failures.

Corruption skepticism appears as an ongoing recasting of the central problems the Court must grapple with. The Court takes a morally weighted concept and recasts it in a more neutral register.¹⁵ The fraud question becomes the property question; corruption becomes quid pro quo; honest services become bribes and kickbacks. The Court has tried to change the ground-off debate about fraud from “What is fraud?” to “What is property?” just as they have tried to shift from “What is corruption?” to “What is quid pro quo?”

None of these recasting moves resolve the difficult questions posed by the statute, they merely resituate the debates on different terrain. Inasmuch as there was a legitimate vagueness concern with the scope of fraud in wire fraud, for instance, relocating the central question to a definition of property did not resolve that concern. Redescribing honest services as kickbacks raised as many

11. *Skilling*, 561 U.S. at 413-14.

12. See TEACHOUT, *supra* note 1, at 246-57 (2014); Zephyr Teachout, *What John Roberts Doesn't Get About Corruption*, POLITICO (Apr. 14, 2014), <https://www.politico.com/magazine/story/2014/04/what-john-roberts-doesnt-get-about-corruption-105683> [<https://perma.cc/8CKR-9KYZ>].

13. See *infra* Part IV.

14. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 393 (2010) (Stevens, J., concurring in part and dissenting in part); *McNally v. United States*, 483 U.S. 350, 362 (1987) (Stevens, J., dissenting); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 754 (2008) (Stevens, J., concurring in part and dissenting in part); *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 648 (1996) (Stevens, J., dissenting).

15. This shift also has the impact of creating a kind of elite rule of lenity, and, as I discuss below, there could be reasons for that—fear of abuse, and fear of overreach. However, it is notable that the cases themselves do not sound in those register, and the cases have been uniformly decided on vagueness grounds, not overbreadth. While overbreadth and chilling are raised by amici, they are not part of the official grounds for decision-making.

questions as it answered. Narrowing corruption to quid pro quo had the effect of limiting public power, but not of clarifying the contours of what could be regulated; as the Sixth Circuit quipped, “not all quid pro quos are made of the same stuff.”¹⁶ The Court is both quick to call things vague and slow to provide guidance: In the *Ciminelli* case decided this Term – the Court summarily concluded that the jury instructions were vague and that they were not harmless error, without providing a clue as to the standard against which harmless error might be measured. In doing so, it left undefined the wire- and mail-fraud statutes’ applicability to informal exercises of governmental power.

The case law (and some other contributors to this Collection)¹⁷ suggests that the Court’s deepest fear is arbitrary prosecutions, and whether it uses due process or statutory interpretation, it is consistently narrowing and concretizing the law. However, the fact that the Court’s decisions have consistently *created* uncertainty, instead of mitigating it suggests that a deeper motive may be a discomfort with the moral tenor and criminal accusations accompanying conduct that many justices may recognize as within the bounds of their social and political communities. Inasmuch as corruption suggests something deeply *bad* about the wrong actor – that they should be socially banished – and not merely illegal, the language may cut too close to the bone. So, in these cases, the goal is to simultaneously shrink the scope of that which is called corrupt, and to suck it dry of its urgent moral power.

This Essay proceeds in four Parts, the first three of which describe the shifting sands. In Part I, I explore how the Court moved from fraud to property; in Part II, I look at how it shifted from corruption to quid pro quo; in Part III, from honest services to bribery. Then, in Part IV, I introduce the cases from this Term, and explore their genuine oddities – how they fail to engage in traditional modes of statutory interpretation: in *Ciminelli*, the Court fails to explore vagueness; in *Percoco*, the Court largely ignores the actual jury instructions that it strikes down. In Part V, I attempt to excavate the motivations underpinning these strange and often sloppy moves, highlighting how the shifting nature of the liberal dissents in the campaign-finance corruption cases can shed light on why and how these cases were decided, revealing a moralism and corruption skepticism among not only the conservative wing of the court but also the liberal wing.

16. *United States v. Abbey*, 560 F.3d 513, 517 (6th Cir. 2009).

17. See Daniel C. Richman, *Navigating Between “Politics as Usual” and Sacks of Cash*, 133 *YALE L.J.F.* 564, 566 (2023).

I. REPLACING FRAUD WITH PROPERTY: *MCNALLY* AND *CLEVELAND*

In this Part, I show how the Court moved the wire-fraud question from fraud into property, in an effort to shift the discourse from the charged language of fraud into what appear to be more tractable areas of law while actually creating more uncertainty. This shift had a direct bearing on both the outcomes and the methodology of the cases this Term.

Fraud is a mainstay of state civil and criminal law, and variations on the theme of fraud appear in over 100 places in our federal code. Some are subject-area specific (Medicare fraud, securities fraud), and some, like mail or wire fraud, are not tied to substantive areas of law.¹⁸ The heart of fraud is deception or omission in order to deprive another of something to which they have a right.

The federal mail-fraud statute, the basis of the wire-fraud statute, was passed in 1872.¹⁹ It initially criminalized the use of the mails “for any scheme or artifice to defraud.”²⁰ It was passed without debate and discussion, so all the subsequent statutory interpretation has been forced to rely on a combination of text, speculation, and comments of lawmakers regarding adjacent laws.²¹

In 1896, faced with its first review of the mail-fraud statute in *Durland v. United States*, the Supreme Court interpreted it broadly.²² In that case, concerning whether future representations were covered, or merely representations regarding present facts, the Court said that fraud includes “everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. *“The significant fact is the intent and purpose.”*²³

In 1909, thirteen years after *Durland*, Congress added an additional ground of liability to the fraud statute, adding that besides forbidding “any scheme or artifice to defraud,” the law forbids “obtaining money or property by means of false or fraudulent pretenses.”²⁴ There is no indication in the limited congressional record that Congress intended the addition to do anything but expand the scope of liability.²⁵ In 1952, Congress criminalized the use of the wires for the

18. Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 760-64, 767-68 (1999).

19. Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302 (repealed 1909).

20. *Id.* § 301, 17 Stat. 323.

21. See Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 782-86 (1980).

22. 161 U.S. 306 (1896).

23. *Id.* at 313 (emphasis added).

24. Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1088 (1909) (codified at 18 U.S.C. § 1341).

25. See Rakoff, *supra* note 21, at 816-17 (chronologizing Congress’s 1909 amendments following strict judicial interpretations that limited the statute’s breadth to instances of mail-dependent fraud); see also Christopher Q. Cutler, *McNally Revisited: The “Misrepresentation Branch” of the*

same behavior,²⁶ without any indication that it intended to signal any approach narrower than that taken by the courts.²⁷

For the first 115 years of the mail-fraud statute and the first thirty-five years of the wire-fraud statute, courts treated fraud as a broad category, covering both private and public arenas, in which deception led to the deprivation of something to which the defrauded party was entitled.²⁸ As the Fourth Circuit said in a representative passage, “The statute does not define a scheme to defraud, and it contains no restrictive language excluding any type of fraudulent conduct in which use of the mails plays an essential role.”²⁹

Mail fraud, therefore, was *not* limited by any requirement that the scheme seek a deprivation of money or property – a limitation that the Court discovers later. For instance, in an Eighth Circuit case involving an elaborate scheme to mail false voter-registration affidavits, the defendants argued that fraud required a scheme to deprive of money and property, and the court affirmed dismissal of the argument as wholly without merit.³⁰ The court said, “[N]o case or legislative history is cited by the appellants supporting such an interpretation of legislative intent, nor does there appear to be any authority justifying such a construction of the statute.”³¹

Prosecutors essentially treated the mail-fraud statute as an ancillary federal statute protecting the use of federal instrumentalities of the mail or wires to perpetuate “any scheme to defraud” as it would have been understood in the states. Dishonest deprivations of obligations owed to the public, as well as dishonest deprivations of property, were covered.³² And then came the 1980s.

Mail Fraud Statute a Decade Later, 13 *BYU J. PUB. L.* 77, 82 (2013) (explaining that the 1909 amendment effectively codified the *Durland* Court’s reasoning by further prohibiting future misrepresentations).

26. Act of July 16, 1952, ch. 879, § 18(a), 66 Stat. 722 (codified at 18 U.S.C. § 1343).
27. See H.R. REP. NO. 82-388, at 1 (1951) (“The general object of the bill is to amend the Criminal Code . . . making it a Federal criminal offense to use wire or radio communications as instrumentalities for perpetrating frauds upon the public. In principal it is not dissimilar to the post fraud statute . . .”).
28. See, e.g., *United States v. Clapps*, 732 F.2d 1148, 1152-53 (3d Cir. 1984), *cert. denied*, 469 U.S. 1085 (1984) (finding the mail-fraud statute applicable to a scheme to deprive an electoral body of its right to fair elections free from vote dilution); *United States v. Bronston*, 658 F.2d 920, 926-27 (2d Cir. 1981), *cert. denied*, 459 U.S. 915 (1982) (finding an attorney’s failure to disclose certain conflicts of interests to clients sufficient to violate the mail-fraud statute).
29. *United States v. Brewer*, 528 F.2d 492, 494-95 (4th Cir. 1975).
30. *United States v. States*, 488 F.2d 761, 764 (8th Cir. 1973).
31. *Id.*
32. See, e.g., *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941), *cert. denied*, 313 U.S. 574 (1941); *Gouled v. United States*, 273 F. 506, 508 (2d Cir. 1921).

A. *Demoralization Step One: McNally*

The Supreme Court significantly narrowed the scope of the mail-fraud statute in *McNally v. United States*,³³ a 1987 case reversing mail-fraud convictions for using the mail for a patronage scheme. In a 2,000-word decision, Justice White concluded that the first phrase in the mail-fraud statute – “any scheme or artifice to defraud” – should be read to include, as part of the word “defraud,” a limitation that it only applies to deceits regarding money and property.³⁴ Schemes to deprive the public of honest services, he held, were not covered.³⁵

Justice White came to this conclusion by relying on three different arguments. First, he argued that when the law was initially passed, it was designed to protect property.³⁶ Second, he invoked a 1924 Supreme Court case, *Hammerschmidt v. United States*, for the proposition that “[t]o conspire to defraud the United States means primarily to cheat the government out of property or money”³⁷ From *Hammerschmidt*, White concluded that the accepted public meaning of fraud included a limitation to cases where the object was cheating another out of property or money.³⁸ Third, White relied on the statutory addition of the phrase “money or property.” White held that “money or property” should be read into the phrase that precedes it.³⁹

These three historical building blocks for the property limitation had no substantive support. Because there were no contemporaneous debates, the only basis White could draw for his first conclusion was a statement by the sponsor of the precursor bill.⁴⁰ However, the sponsor never used the word property.⁴¹ Instead, the words quoted by White were that the law should address “rascallions generally.”⁴²

33. 483 U.S. 350 (1987).

34. *Id.* at 350-59.

35. *Id.* at 360.

36. *Id.* at 356-58.

37. *Id.* at 358 n.8 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).

38. *Id.* at 358-59.

39. *Id.*

40. *Id.* at 356, 356 n.5 (quoting Cong. Globe, 41st Cong., 3d Sess., 35 (1870) (remarks of Rep. Farnsworth)).

41. Cong. Globe, 41st Cong., 3d Sess., 35 (1870) (remarks of Rep. Farnsworth). Subsequently, much fuller exploration of all the related statutory debates revealed some interesting words, but no use of the word property.

42. *McNally*, 483 U.S. at 356, 356 n.5 (quoting Cong. Globe, 41st Cong., 3d Sess., 35 (1870) (remarks of Rep. Farnsworth)).

Far more damning, the text of *Hammerschmidt* explicitly includes nonproperty deprivations within the scope of that which is fraud:

To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention.⁴³

The whole clause after “property or money” indicates the opposite of the quoted phrase: fraud is about far more than property or money.

Finally, in a thorough dissent, Justice Stevens, joined by Justice O’Connor, noted that the clear disjunctive “or” strongly suggests that “scheme or artifice to defraud” is not limited to “money or property.”⁴⁴ White’s reading created a bizarre redundancy: the statute now reads as prohibiting “any scheme or artifice to defraud [another of money or property], or for obtaining money or property by means of false or fraudulent pretenses.”⁴⁵ Moreover, Stevens pointed out that the Court failed on Statutory Interpretation 101: It ignored the plain language of the statute, and the actual evidence of (a) the contemporary meaning of fraud (which was not limited to property),⁴⁶ and (b) the interpretation of fraud in other contexts (which included defrauding members of the public of a fiduciary obligation which they were owed).⁴⁷ For instance, Justice Posner had just recently defined fraud as

in its elementary common law sense of deceit . . . includ[ing] the deliberate concealment of material information in a setting of fiduciary obligation. A public official is a fiduciary toward the public, including, in the case of a judge, the litigants who appear before him, and if he deliberately conceals material information from them he is guilty of fraud.⁴⁸

43. *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924).

44. *McNally*, 483 U.S. at 373-74 (Stevens, J., dissenting).

45. 18 U.S.C. § 1343.

46. *McNally*, 483 U.S. at 365-67 (Stevens, J., dissenting).

47. *Id.* at 362-64.

48. *Id.* at 371-72.

B. *Demoralization Step Two: Cleveland*

Congress was not happy with the *McNally* development. It quickly amended the federal mail-fraud statute to overturn *McNally* by adding a provision stating that “[f]or the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”⁴⁹

Despite Congress’s rebuke, the Court continued to replace the mail-fraud statute’s focus on fraud with an analytic focus on property. On November 7, 2000, the Supreme Court issued its decision in *Cleveland v. United States*, a case involving two applicants for a state license who concealed that they were the true owners of the company for which they sought the license.⁵⁰ In *Cleveland*, the Court interpreted the congressional act *not* as a general rebuke of the *McNally* property limitation, but as a specific, narrow carve out of one aspect of *McNally*.⁵¹ This gloss was, to say the least, odd, because Congress seemed to be engaged in a rather standard rebuke of a judicial decision it disagreed with. However, the Court concluded that because “federal courts” had relied on *McNally* to dismiss other non-honest-services cases, the congressional action should be read to be intentionally limited to one aspect of intangible rights, not all of them.⁵² As support for this claim, the Court referred to a single Sixth Circuit case and provided no evidence that congressional drafters were aware of that case or that it shaped the scope of legislation.⁵³ Effectively, the Court concluded that Congress intended to endorse the broad property dicta while overturning the honest-services holding—a politically suspect supposition.

Cleveland then went on to provide a framework for analyzing “money or property” claims. It accepted *McNally*’s holding—without any reconsideration of its weak foundations—that the common understanding of fraud in 1872 was limited to wronging someone in their property rights.⁵⁴ *Cleveland* then hardened *McNally*’s rule. Instead of “wronging one in his property rights by dishonest methods or schemes,”⁵⁵ where property exists in the context of property rights,

49. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508 (codified at 18 U.S.C. § 1346).

50. 531 U.S. 12, 15-17 (2000). I mention the date because it was the day of the election between George W. Bush and Al Gore in 2000, and it may help explain why relatively little academic interest has focused on it. The anticorruption lawyers were busy elsewhere.

51. *Id.* at 19-20.

52. *Id.* at 20.

53. *Id.* at 20 n.3.

54. *McNally*, 483 U.S. at 356-58.

55. *Id.* at 358 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).

Cleveland limited fraud to those cases where someone is deprived of property, understood traditionally.⁵⁶ The shift is small but potentially significant; a deprivation of property is a taking of property, whereas a wronging of property rights is much broader, and allows for examining the incidents of property ownership and different ways in which they can be limited—such as interfering with the control of property.

C. *Property-land*

After *Cleveland*, enforcers had clear marching orders: instead of analyzing fraud (as Justice Stevens had done in dissent in *McNally*), courts were directed to analyze property. This served to narrow the statute, but not to clarify it. Property is among the most contested and contextual of legal concepts. I cannot encapsulate here the scope of the debate on the question “What is property?” But suffice it to say it puts the robust debate on “What is fraud?” to shame. Wesley N. Hohfeld’s famous 1913 analysis concluded that property is not a thing, but a feature of relationships between people, and that we should think of a holder as having an aggregation of rights, privileges, and powers, a “bundle of sticks.”⁵⁷ In 1935, Felix S. Cohen classified property as a kind of “transcendental nonsense” and called for a functional method to pragmatically understand property in the context in which it arose.⁵⁸ In 1980, Thomas C. Grey argued that as a result of modern theorization, “property ceases to be an important category in legal and political theory.”⁵⁹

This mainstream modern view of property asserts that the bundle of duties, rights, and obligations have clustering tendencies, but there is no property per se, just a shorthand word that refers to the bundle. Laura S. Underkuffler, one of the more trenchant observers of the property problem described it this way in 1990: “Various tests—such as the ‘ordinary understanding’ approach, the ‘reasonable expectations’ approach, the ‘functional’ approach, the ‘bundle of rights’ approach, and others—have been used The resulting incoherence is

56. *Cleveland*, 531 U.S. at 19.

57. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

58. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 810 (1935).

59. Thomas C. Grey, *The Disintegration of Property*, 22 NOMOS 69, 81 (1980).

profound.”⁶⁰ In 2015 she argued that “property” has “*no meaning apart*” from the recognition of rights in land, chattel, or specified sources of wealth.⁶¹

One does not have to ascribe to Underkuffler’s analysis to see the problem with the Court’s new effort to see property as the key to fraud: it opens up a box of complexity far harder than the fraud knot and actually creates vagueness concerns. If law professors, courts, and commentators cannot possibly untangle the “What is property?” question, how could a member of the public? Taking a property approach fundamentally obscured the actual—genuinely difficult—question before the court about the meaning of fraud.

In short, property definitional questions are always contextual. Under the Court’s new framework, we are supposed to ask questions like, “Did the state intend to recognize a property right in the right to control economic information?” But that question has no answer, because that wasn’t the language or framework of the drafters; fraud was. What is meant by fraud simply cannot be answered by asking “What is property?” The property conversation is fundamentally a round peg in a square hole.

To put it another way, when a word has multiple possible meanings, the typical canons of statutory construction would require an exploration of legislative history and *noscitur a sociis* (“a word is known by its associates”).⁶² In short, it would require an exploration of what property means in the context of fraud—which might return us to the discovery that property was not, at the time of the passage of the statute, part of the debates.

The Court’s effort to uncover the meaning of property is so vexed we end up with something more like “I know it when I see it” property jurisprudence. Replacing fraud with property as the center of the interpretative task served to *add vagueness* to the statute, not clear away the brush and provide clarity.

60. Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127,130 (1990).

61. Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 TEX. L. REV. 2015, 2030 (2015).

62. Sometimes the Court will utilize the principle of *noscitur a sociis* to “avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.” *Yates v. United States*, 574 U.S. 528, 543 (2015) (plurality opinion) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)). The principle has the effect of contextualizing broad terms to glean legislative intent, but it, like many other canons of interpretation, may not always crystallize a statutory provision’s meaning. Although the Roberts Court has expressed skepticism toward legislative history, it has not formally done away with its consideration. See James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1276 (2009) (highlighting how the Roberts Court relied on different sources of legislative history in its tax decisions and in its workplace decisions); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992) (“Using legislative history to help interpret unclear statutory language seems natural. Legislative history helps a court understand the content and purpose of a statute.”).

II. FROM CORRUPTION TO QUID PRO QUO

Meanwhile, the Court was engaged in a similar process in the election law arena. This section can't do all the twists and turns of that jurisprudence justice, but it will highlight the big switch to quid pro quo. In the 1976 case *Buckley v. Valeo*, the Court held that campaign-contributions limits burden speech but are justified when tailored to the government's interest in preventing corruption and the appearance of corruption.⁶³ Subsequent treatment of *Buckley* elevated this analysis to make corruption the center of the inquiry when considering campaign-finance laws.⁶⁴ The case was understood to mean that *only* corruption and the appearance of corruption – not equality or any other governmental interest – could justify limits on campaign contributions.

After *Buckley*, there was a thirty-five-year struggle within the courts about the scope of the governmental interest in preventing “corruption.” That fight culminated in a conclusion that corruption and quid pro quo were synonymous. This was by no means a foregone conclusion. *Buckley* did reference quid pro quo: “To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.”⁶⁵ However, it neither defined the noun, nor did it assert anything uniquely important about its constitutional role vis-a-vis corruption more broadly. Quid pro quo as a limitation on the definition of corruption rose slowly in the Supreme Court, largely in the context of dissents. Justice Thomas in 2000 scolded the majority for separating “‘corruption’ from its *quid pro quo* roots.”⁶⁶ Justice Kennedy, dissenting in part in *McConnell v. FEC*, argued that “*Buckley* made clear, by its express language and its context, that the corruption interest only justifies regulating candidates’ and officeholders’ receipt of what we can call the ‘*quids*’ in the *quid pro quo* formulation.”⁶⁷ Thomas wrote in *Colorado I* that “the only governmental interest that we have accepted as compelling is the prevention of corruption or the appearance of corruption . . . and we have narrowly defined ‘corruption’ as a ‘financial *quid pro quo*: dollars for political favors.”⁶⁸

63. 424 U.S. 1, 33 (1976).

64. See, e.g., *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n*, 518 U.S. 604, 616-18 (1996); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390-92 (2000).

65. *Buckley*, 424 U.S. at 26-27.

66. *Shrink Mo. Gov’t PAC*, 528 U.S. at 423 (Thomas, J., dissenting).

67. 540 U.S. 93, 292 (2003) (Kennedy, J., concurring in part and dissenting in part), *overruled by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

68. 518 U.S. at 641 (Thomas, J., concurring in judgment and dissenting in part).

The key shift occurred in 2007, when Chief Justice Roberts’s opinion for the Court announced that “[i]ssue ads . . . are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them.”⁶⁹ In the same case, Justice Scalia wrote that “[n]o one seriously believes that *independent* expenditures could possibly give rise to *quid-pro-quo* corruption without being subject to regulation as *coordinated* expenditures.”⁷⁰ The Court did not explain what quid pro quo meant, nor did it explain how the “roots” of corruption lay in quid pro quo. Nonetheless, the turn proved significant: in *Citizens United v. FEC*, Justice Kennedy used the phrase quid pro quo fourteen times, and with great purpose, as he argued that the evidence on direct, explicit exchange was weak.⁷¹ Inasmuch as the government had an interest in protecting against corruption, it was an interest in protecting against quid pro quo corruption. The phrase quid pro quo came to serve as a kind of redundant definitional phrase attached to the word, describing what corruption constitutes, or reinforcing that description.

So, what did this shift achieve? Quid pro quo is a Latin phrase meaning “this for that,” and has a long history in contract law. In contracts, the absence of relative equality of exchange might indicate that an actual contract was not formed. The term has been casually and colloquially used in relationship to corruption since the nineteenth century at least, where writers would sometimes refer to the quid pro quo received by bribed voters or elected officials.⁷² In those situations, quid pro quo stood in for a contractual relationship between politicians and an interested member of the public, and the use of a contract law term indicated that the relationship involved mutual benefit.

But the term quid pro quo didn’t *define* corruption until recently. Before *Buckley*, when quid pro quo showed up in corruption cases, it was in the contract law, “equality of exchange” sense. For instance, in one extortion case, employees demanded that a shoplifter pay them. The payment demanded was more than the amount shoplifted and less than that he should have paid, but the court found that no quid pro quo (equality of exchange) was required for extortion. And quid pro quo played a variety of roles in state bribery cases. In New York, the first mention of quid pro quo in the bribery context was in 1972, and it has been mentioned only seven times since.⁷³ When the elements of bribery are

69. Fed. Election Comm’n v. Wis. Right to Life, Inc., 551 U.S. 449, 478-79 (2007).

70. *Id.* at 490 n.4 (Scalia, J., concurring in part and concurring in judgment).

71. 558 U.S. at 318-72.

72. See TEACHOUT, *supra* note 1, at 239; see also Zephyr Teachout, *The Unenforceable Corrupt Contract: Corruption and Nineteenth Century Contract Law*, 35 N.Y.U. REV. L. & SOC. CHANGE 681, 702-03 (2011) (explaining that nineteenth-century courts did not limit corruption to quid pro quo exchanges).

73. *People v. Kohut*, 282 N.E.2d 312, 319 (N.Y. 1972).

listed, *quid pro quo* is not one of them. Florida and Maryland both concluded that their bribery statutes include no *quid pro quo* requirement.⁷⁴ The key to Arizona's statute is that someone acted with intent to influence an official with respect to his "duties and actions as a public officer."⁷⁵ Ohio does not use *quid pro quo*, but measures by "improper influence."⁷⁶ In Alabama, corrupt intent is the key, and it's measured by the jury.⁷⁷ Illinois does not require *quid pro quo*⁷⁸ and in other states like Indiana and Texas, courts have concluded that "*quid pro quo*" is required—but what they meant is that an identifiable official act be part of any arrangement.⁷⁹

In short, before the Court's shift, some corruption-related statutes were determined to require *quid pro quo*, and a handful of states in a handful of cases have required that a prosecutor prove a connection with an identifiable act to prove a bribery statute. But over most of American history, there was no deep association between bribery and either *quid pro quo* or the specific, identifiable act. Neither bribery nor conflict-of-interest crimes require specificity nor explicitness for conviction. Particularized exchange may be part of some of the law, but it is far from the essence of the law.

The definition also falls apart if it is tested against general intuitions, because corruption is not just bribery.⁸⁰ *Quid pro quo* as exchange excludes many behaviors traditionally associated with corruption like nepotism, graft, and embezzlement, where there is no exchange. There is no *quid pro quo* requirement for most illegal-gratuities statutes, many of which are called bribery statutes by their own terms.⁸¹ Likewise, there is no *quid pro quo* requirement for conflict-of-interest statutes.⁸²

74. *State v. Lopez*, 522 So. 2d 997, 1000 (Fla. Dist. Ct. App. 1988); *Spector v. State*, 425 A.2d 197, 209 (Md. 1981).

75. *State v. Ross*, 151 P.3d 1261, 1266 (Ariz. Ct. App. 2007).

76. Merom Brachman, Ohio Ethics Comm'n, Advisory Opinion No. 2001-04 at 3 (May 10, 2001).

77. *Barnette v. State*, 855 So. 2d 1129, 1132 (Ala. Crim. App. 2003).

78. *People v. Lumsargis*, 2017 IL App (4th) 170157-U, ¶ 70.

79. *Wurster v. State*, 708 N.E.2d 587, 594 (Ind. App. 1999), *aff'd*, 715 N.E.2d 341 (Ind. 1999); *Isassi v. State*, 330 S.W.3d 633, 644-45 (Tex. Crim. App. 2010).

80. TEACHOUT, *supra* note 1, at 45-46.

81. *See United States v. Mariano*, 983 F.2d 1150, 1159 (1st Cir. 1993) (citing *United States v. Muldoon*, 931 F.2d 282, 287 (4th Cir.1991)); *United States v. Griffin*, 154 F.3d 762, 764 (8th Cir. 1998) ("The core difference between a bribe and a gratuity is not the time the illegal payment is made, but the *quid pro quo*, or the agreement to exchange [a thing of value] for official action.").

82. *See United States v. Kincaid-Chauncey*, 556 F.3d 923, 940 (9th Cir. 2009) ("[W]e do not believe that a *quid pro quo* should be required in all § 1346 prosecutions; in fact, imposing a *quid pro quo* requirement on all § 1346 cases risks being under-inclusive, because some honest

When, in 2013, staff sergeant Jason Begany admitted he embezzled nearly \$1.3 million as a member of the Eighty-Second Finance Battalion in Afghanistan, he was convicted under a corruption statute, but there was clearly no quid pro quo.⁸³ The core definition of corruption as quid pro quo excludes a public official stealing from the government for herself.

Importantly for our purposes, the turn from corruption to quid pro quo does not alleviate definitional difficulties. It narrows the scope of corruption but still requires substantive content. Within the areas where quid pro quo has been litigated since its deployment in the 1970s, its meaning varies widely. Quid pro quo has no definite meaning either in constitutional or white-collar criminal law. In white-collar criminal cases, “quid pro quo” sometimes means the solicitation or offer of something specific in exchange for some specific governmental action.⁸⁴ It sometimes means an agreement without a particular governmental action identified.⁸⁵ It sometimes requires a spoken or written request—sometimes something less—when the potential bribe is a campaign contribution.⁸⁶ As the Sixth Circuit quipped, just before citing *The Godfather*, “Not all quid pro quos are made of the same stuff.”⁸⁷ Sometimes quid pro quo means merely things of value that are traded in an exchange,⁸⁸ sometimes it means that the things of value need to be specifically identified,⁸⁹ and sometimes it means that the

services fraud, such as the failure to disclose a conflict of interest where required, may not confer a direct or easily demonstrated benefit.”).

83. Indictment at 4, *United States v. Begany*, No. 13-CR-00036, 2013 WL 1146546 (E.D.N.C. Feb. 5, 2013), ECF No. 7.
84. See *Evans v. United States*, 504 U.S. 255, 268 (1992) (“[T]he offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense.”).
85. See *United States v. Abbey*, 560 F.4d 513, 519 (2009) (“[I]t is sufficient if the public official understood that he or she was expected to exercise some influence on the payor’s behalf The public official need not even have any intention of *actually* exerting his influence on the payor’s behalf.”).
86. See *McCormick v. United States*, 500 U.S. 257, 273 (1991) (holding that extortion under color of official right exists “only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act”); *United States v. McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010) (“[W]e now expressly hold there is no requirement . . . that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a *quid pro quo*.”).
87. *United States v. Abbey*, 560 F.3d 513, 517 (6th Cir. 2009).
88. See *United States v. Terry*, 707 F.3d 607, 614 (6th Cir. 2013) (affirming jury instructions that established a quid pro quo when a thing of value was accepted in exchange for official action).
89. See *United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994) (“Explicit, as explained in *Evans*, speaks not to the form of the agreement between the payor and payee, but to the degree to which the payor and payee were aware of its terms, regardless of whether those terms were articulated.”).

agreement or offer needs to be explicit.⁹⁰ In other words, quid pro quo can range from a broad “giving thing of value (including campaign contributions) with intent to influence an unidentified set of governmental actions” to a narrow “expressly giving things of value with intent to influence an identified governmental action.” In a New York case, the defendant claimed that his bribery indictment should be dismissed because although he presented cash-filled envelopes to a candidate with an understanding that they were loans that needn’t be repaid, he never clarified what he was asking for.⁹¹ On the quid pro quo defense raised, the court said that while there needs to be some relationship between payment and government action, “the law is not so naive to believe that bribery may only be shown by proof of a formal written contract setting forth the quid pro quo of the parties to the bribe as to the payment.”⁹²

In summary, quid pro quo corruption has no clear definition historically. Inasmuch as it reflects a theory of corruption as exchange, it fails to connect bribery and extortion to graft, and while it covers both public-official extortion and private-party bribery, it fails to explain why some attempts to influence government officials are corrupt while others are not.

III. FROM HONEST SERVICES TO BRIBES AND KICKBACKS

In 2010 the Court also transformed a duty to perform honest services into a prohibition against bribes and kickbacks. The case involved Jeffrey K. Skilling, the former chief executive officer of Enron, who was convicted of manipulating Enron’s publicly reported financial results and making false and misleading statements about Enron’s financial performance.⁹³ Skilling claimed his conviction was premised on an improper theory of honest-services wire fraud.⁹⁴ Skilling argued that § 1346 was unconstitutionally vague, or alternatively, that his conduct did not fall within the statute.⁹⁵ The Fifth Circuit affirmed Skilling’s convictions, and the Supreme Court granted certiorari.⁹⁶

The Court concluded that Skilling’s vagueness challenge had force because honest-services decisions preceding *McNally* were “not models of clarity or

90. See *United States v. Dozier*, 672 F.2d 531, 537-38 (5th Cir. 1982).

91. *People v. Morris*, 958 N.Y.S.2d 62, 2010 WL 2977151, at *28 (N.Y. Sup. Ct. 2010).

92. *Id.* at *41.

93. *United States v. Skilling*, 554 F.3d 529, 534-42 (5th Cir. 2009), *aff’d in part, vacated in part, and remanded*, 561 U.S. 358 (2010).

94. *Id.* at 542-43.

95. *Skilling v. United States*, 561 U.S. 358, 376 (2010).

96. *Id.*

consistency.”⁹⁷ But despite the general rule that a vague statute is no statute at all, the Court in *Skilling* determined that the statute should be construed and pared down to what it called the “core”⁹⁸ of pre-*McNally* case law concerning honest services. This unusual move of using constitutional avoidance to redraft a vague statute has been widely criticized.⁹⁹ In the place of pre-*McNally* case law, the Court installed “bribery or kickback schemes.” “[W]hatever the school of thought concerning the scope and meaning of § 1346, it has always been ‘as plain as a pikestaff that’ bribes and kickbacks constitute honest-services fraud.”¹⁰⁰

The *Skilling* decision met with withering criticisms from academics, who decried it as a fairly dishonest, incomplete argument.¹⁰¹ William W. Berry III, argued that in *Skilling*, the Supreme Court confused the constitutional avoidance canon with the void for vagueness challenge.¹⁰² Constitutional avoidance, he pointed out, is a doctrine designed to deal with fundamental statutory ambiguity, and in cases where a statute is susceptible of two different meanings, the Court should choose the meaning which is unlikely to run afoul of the Constitution.¹⁰³ Vagueness is a fundamentally different problem with a statute; it is not two different meanings the Court is choosing between, but the possibility that a statute will be interpreted to have the broadest possible reach and thereby chill legitimate expression.¹⁰⁴ The Court’s obligation in *Skilling* was to address the vagueness claim, and it entirely failed to do so. As a result, the Court ended up

97. *Id.* at 405.

98. *Id.* at 404.

99. See generally William W. Berry III, *Criminal Constitutional Avoidance*, 104 J. CRIM. L. & CRIMINOLOGY 105 (2014) (criticizing the use of the avoidance canon in *Skilling*); David Kwok, *Is Vagueness Choking the White-Collar Statute?*, 53 GA. L. REV. 495, 522 (2018) (noting that *Skilling* “introduces vagueness through an unclear test”).

100. *Skilling*, 561 U.S. at 412 (quoting *Williams v. United States*, 341 U.S. 97, 101 (1951)).

101. See, e.g., Torres-Spelliscy, *supra* note 10, at 505 (arguing these decisions essentially allow corrupt politicians “to escape appropriate accountability”); Anita Cava & Brian M. Stewart, *Quid Pro Quo Corruption Is “So Yesterday”: Restoring Honest Services Fraud After Skilling and Black*, 12 U.C. DAVIS BUS. L.J. 1, 12 (2011) (“Although it is now clear that a bribe or kickback is required for an honest services conviction, how § 1346 will be applied to address white collar crime in a modern business context is still hazy.”); Cava & Stewart, *supra*, at 20 (“The decision creates an open field of play for creative con men and women to enrich themselves and their friends without actually receiving bribes and kickbacks.”); Perrine & Kipnis, *supra* note 10, at 295 (arguing that the Court “curtailed the government’s ability to prosecute certain fraudulent schemes orchestrated by public officials as well as private employees”); Perrine & Kipnis, *supra* note 10, at 299 (“The exact contours of the honest services fraud statute are presently unknown, but the federal offense certainly encompasses a smaller scope of conduct than it did before the Supreme Court’s decision.”).

102. Berry, *supra* note 99, at 109.

103. *Id.* at 110-12.

104. See *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Gooding v. Wilson*, 405 U.S. 518, 521 (1972).

ignoring the precise constitutional questions raised and creating a new constitutional doctrine that vague statutes can be substantively rewritten (which had not been part of the vagueness doctrine up to this point). The Court both abdicated its role and improperly acted as a legislature.

What's more, while it claimed to resolve the vagueness issue, it wholly failed to do so, instead shifting the vagueness from the word "honest services" to the phrase "bribes and kickbacks." The Court read the statute in a not only narrow, but also strange manner, concluding that the statute was designed to address "bribes and kickbacks."¹⁰⁵ As Professor Joan H. Krause noted, although the *Skilling* decision did close the door to several types of common-law mail- and wire-fraud prosecutions, it left even more uncertainty about what was left.¹⁰⁶ Professor Sara Sun Beale reflected the view of many scholars when she noted that the Court's interpretation of § 1346 "came out of the blue," and no court had previously held that honest-services mail fraud is limited to bribery and kickbacks.¹⁰⁷ Moreover, *Skilling* lacked textual analysis.¹⁰⁸ Professor Samuel W. Buell offered a blunt critique of the *Skilling* decision, explaining that the Court's solution to the problem of honest-services fraud was somewhat "arbitrary" and "shallow."¹⁰⁹ As Buell points out, the Court's effort to limit § 1346 lacked principle as it made no distinctions on the dimension of relationship.¹¹⁰ He also explains that the Court's ruling on the honest-services statute will not reduce uncertainty about fraud law,¹¹¹ and that "the majority oversold the extent to which the old pre-*McNally* honest-services cases were clear about what a bribe or a kickback really is in this context."¹¹²

As Professor Beale points out, before the *McNally* decision, honest-services prosecutions resting on self-dealing and failure to disclose conflicts, not bribery or kickbacks, were an important part of the honest-services doctrine that Congress reenacted in § 1346.¹¹³ She also argues that the Court knew what Congress intended by § 1346 but did not like the "breadth of honest services, so it rewrote the statute."¹¹⁴ In conclusion, deciding whether legislation is well-written or good policy is not part of the Supreme Court's role. Even if it would be better to

^{105.} *Skilling*, 561 U.S. at 412.

^{106.} Krause, *supra* note 10, at 137.

^{107.} Beale, *supra* note 9, at 253.

^{108.} *Id.*

^{109.} Buell, *supra* note 9, at 31.

^{110.} *Id.* at 44.

^{111.} *Id.*

^{112.} *Id.*

^{113.} Beale, *supra* note 9, at 254.

^{114.} *Id.*

have a statute limited to bribes and kickbacks, that policy choice belongs to Congress, and “Courts can’t insert their policy preferences in the guise of interpretation.”¹¹⁵

Furthermore, it is unclear whether state law can be used to determine what constitutes bribery or a kickback given the Court’s declaration that its construction of § 1346 “establish[ed] a uniform national standard.”¹¹⁶ In Professor Elizabeth R. Sheyn’s roundup of uncertainties created, she pointed out that the Court failed to resolve pre-*McNally* uncertainties, failed to explain particular overlaps between fraud and “state and local corruption” laws, oddly suggested that bribery didn’t include honest services, and created a category of “serious culpable conduct” without defining or explaining how the unserious category would be treated.¹¹⁷

Whatever vagueness *Skilling* may have resolved, it produced even more.

IV. CIMINELLI AND PERCOCO

The cases this Term—*Ciminelli* and *Percoco*—enter this strange, reconstructed landscape in which the mail- and wire-fraud statutes have been functionally split in two: honest services has become kickbacks, and property is the center of the defrauding debate. While *Ciminelli* exemplifies what is problematic about the Court-created framework, *Percoco* extends it to new arenas, and elite fraud law is left narrowed and further muddled.

A. *Ciminelli’s Property Quagmire*

Ciminelli, the first case, required the Court to consider whether certain kinds of bid rigging constitute wire fraud. Is bid rigging, when aided by a governmental agent, fraud? That would be a fair question, and a question the Supreme Court in *Ciminelli* might have taken up, had it not been distorted by the previous case law. Instead, it ended up asking—and answering—a property law question.

When New York State initiated a major investment in the Buffalo area, with contracts worth up to \$750 million available, Louis Ciminelli, an owner of a Buffalo-based business, hired a lobbyist for \$180,000 a year, who then connected him with a powerful state actor who had the capacity to direct state contracts.¹¹⁸ The three of them—businessman, lobbyist, and state official—cooked up a

¹¹⁵ *Id.*

¹¹⁶ *Skilling v. United States*, 561 U.S. 358, 411 (2010).

¹¹⁷ Elizabeth R. Sheyn, *Criminalizing the Denial of Honest Services After Skilling*, 2011 WISC. L. REV. 27, 45-47 (2011).

¹¹⁸ *Ciminelli v. United States*, 598 U.S. 306, 310 (2023).

scheme to make sure that the state contracts went to Ciminelli by including in the request for proposals (RFP) a list of requirements that would all but ensure that Ciminelli's business would be selected as a preferred developer and secure state contracts.¹¹⁹ The conversations and planning between the three were extensive and resulted in an RFP that matched only Ciminelli and one other company.¹²⁰ In his application, Ciminelli signed a sworn statement that he had not hired anyone to secure an advantage in the process.¹²¹

When this arrangement came to light, Ciminelli was charged with a scheme to defraud the state under the wire-fraud statute. The prosecution argued that Ciminelli conspired with others to deceptively organize the bid-rigging process in a way that deprived the state of key economic information that would impact its decision to provide a major state contract.¹²² As a matter of law, the state argued that all they needed to show was that Ciminelli (a) intended to defraud his victim and (b) made material misrepresentations with the object of obtaining money or property.¹²³

The prosecutors argued that the sought-after property in this case was the right to control economically valuable information.¹²⁴ They relied on prior Second Circuit opinions that held that lying or withholding key information constituted a fraud on property rights.¹²⁵ As a prior decision held, “depriving a victim of ‘potentially valuable’ information *necessarily* creates a risk of tangible economic harm.”¹²⁶

After Ciminelli's conviction was upheld on intermediate appeal, the Supreme Court intervened. In a unanimous decision by Justice Thomas, the Court concluded that the theory used by the government was fatally flawed because the language of the statute requires a fraud around “money or property.”¹²⁷ The Court further entrenched the shoddy construction begun by *McNally*, stating that “traditional property interests” must be the north star of interpreting the

119. *Id.*

120. Joint Appendix at 27-30, *Ciminelli v. United States*, 598 U.S. 306 (2023) (No. 21-1170).

121. *Id.* at 30.

122. *Ciminelli*, 598 U.S. at 310-11.

123. Government's Omnibus Memorandum of Law in Opposition to Defendants' Pretrial Motions at 46-47, *United States v. Percoco*, 2017 WL 4385876 (S.D.N.Y. June 30, 2017) (No. 16-Cr-776) [hereinafter Government's Omnibus Memorandum of Law].

124. See *United States v. Percoco*, No. 16-CR-776, 2019 WL 1593882, at *3 (S.D.N.Y. Apr. 15, 2019), *aff'd*, 13 F.4th 180 (2d Cir. 2021), *rev'd and remanded*, 598 U.S. 319 (2023).

125. Government's Omnibus Memorandum of Law, *supra* note 123, at 47 (citing *United States v. Carlo*, 507 F.3d 799, 801 (2d Cir. 2007) and *United States v. Wallach*, 935 F.2d 445, 462-63 (2d Cir. 1991)).

126. *United States v. Finazzo*, 850 F.3d 94 (2017).

127. *Ciminelli*, 598 U.S. at 312.

federal fraud statute.¹²⁸ It quickly concluded that “potentially valuable economic information” “necessary to make discretionary economic decisions” is not a traditional property interest.¹²⁹ “Property” according to *Ciminelli*, could not include economic information because that is not what property meant at common law.¹³⁰

Ciminelli is Exhibit A of the problem with the property ground of debate. The government had a decent argument from within property-land that the right to control economic information is a traditional property interest. The argument could have gone like this: The right to control is typically seen as one of the most essential “sticks” in the “bundle of sticks.” Since at least 1905, economic information has been understood as property.¹³¹ Information, including economic information, has long been treated as property, and the right to have such information is treated as an incident of property ownership.¹³² For instance, appraisal fraud is both a form of recognized fraud and a form of fraud that impacts property interests by deceitfully interfering with the right to economically valuable information about the value of property.¹³³ Securities fraud encompasses deceit and omissions regarding economically important information. The stock scams of the late nineteenth and early twentieth centuries, and the suppression of potentially valuable economic information, were all treated as fraud at the time.¹³⁴ The stock-exchange fraud of 1814 was considered a scheme to defraud money or property at the time, and there was little reason to believe that judgment would be different by the lawmakers of 1872 or 1952.¹³⁵ Moreover, frauds on the government—a subset of fraud—involve deceptions regarding economically valuable information in the hands of the public. For example, in 1905, the Supreme Court in *Board of Trade of City of Chicago v. Christie Grain & Stock Co.* held

128. *Id.* at 309, 316 (citing *Cleveland v. United States*, 531 U.S. 12, 24 (2000)).

129. *Id.* at 308.

130. *Id.* at 315. To be fair, *Ciminelli* was a sloppily charged and argued case. It appears, as Justice Alito implies in a brief concurrence, *id.* at 317-18 (Alito, J., concurring), that it is possible that a different conviction on the same facts but different charges could have been upheld. It is a problematic case for the Court to have taken on such a serious issue for that reason.

131. *See Bd. of Trade of Chi. v. Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905).

132. *See, e.g., United States v. Richerson*, 833 F.2d 1147, 1156-58 (5th Cir. 1987) (finding that concealment of economic information can amount to an infringement on property rights).

133. *United States v. Hill*, 643 F.3d 807, 862-64 (11th Cir. 2011); *United States v. Hasson*, 333 F.3d 1264, 1270-75 (11th Cir. 2003); *United States v. Cooks*, 589 F.3d 173, 185-86 (5th Cir. 2009).

134. *See* Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347, 348-52 (1991) (detailing the emergence of state “blue sky” laws as a means of regulating highly speculative securities as if they were fraudulent).

135. *See* James Wm. Moore & Frank M. Wiseman, *Market Manipulation and the Exchange Act*, 2 U. CHI. L. REV. 46, 61 (1934).

that, having done the work of collecting information, that work should be recognized in property-law terms,¹³⁶ and that “the plaintiff’s collection of quotations is entitled to the protection of the law. It stands like a trade secret.”¹³⁷ Many other subsequent cases support this conclusion. Therefore, the right to control economic information seems, on its face, to be a core attribute of ownership.

The *Ciminelli* Court was not persuaded, in the absence of cases directly on point encompassing the right to control economically important information that is owned by the public.

But the exercise is fundamentally wrong-headed. It is not possible to wholly separate the property question from the fraud question. Property theory was not the sprawling debate it is today in 1872, and it is unclear which property theorists would have the upper hand, or should be listened to, in a conceptual debate about property. What is and is not property is a public, political choice, and almost always context-dependent. As discussed above, these questions forced by *McNally* and *Cleveland* are the wrong questions. The right question is “Is it fraud?” not “Is it property?”

The *Ciminelli* case illustrates why the “traditionally recognized property interest” is not a functional standard. It makes a hash out of looking to statutory history because property theory isn’t part of the public debates. The Court fails to give guidance on the methodology of making sense of “traditional property” — do we look at modern taxonomies, or nineteenth century ones? — leaving future prosecutors with little but a resounding, “Not this!” It reads more like “I know it when I see it,” both narrowing and muddying.¹³⁸

Ciminelli shows how the property framework has failed, and that the courts should return to attempting to describe the contours of fraud in interpreting the wire-fraud statute.¹³⁹

136. 198 U.S. 236, 250 (1905).

137. *Id.*

138. Ironically, Justice Thomas concludes, relying on *McNally* and *Kelly*, that the statute should be construed narrowly because it infringes on areas “traditionally left to state contract and tort law,” and the Court should not impose a federal vision of integrity on state actions. *Ciminelli v. United States*, 598 U.S. 306, 315-16 (2023). However, the Court actually imposed a Court-centered vision of integrity on the very states that were asking for federal help enforcing their own statutes. Inasmuch as the mail- or wire-fraud statutes froze in amber federal fraud law while state law had opportunities to develop, and potentially conflict with, that historic federal fraud law, then it might be worth exploring. But no exploration is done because such an exploration would reveal the lack of conflict and undermine Thomas’s argument.

139. I would advocate a return to the *Hammerschmidt* understanding of fraud: intent to deceive another to rob them of something of value, with a broad definition of what constitutes something of value. Such an interpretation has three virtues. First, it is rooted in the text of the statute, which has no artificial limitations. Second, it corresponds with popular understandings of what fraud meant in 1872 and 1952 and what it means today. Third, it serves a valuable

B. Percoco: Formalism over Functionalism

The issue raised in the second case, *Percoco*, is a difficult and important one: When should private citizens be held to the fiduciary obligations of those in public power? Unfortunately, the Supreme Court chose a new form of lane-changing – using *Percoco* as a foil for a very different case – and in the process, left more questions than answers in its wake.

From 2011 to 2016, Joseph Percoco was the senior aide to Governor Andrew Cuomo, and widely known as his right-hand man.¹⁴⁰ He had a powerful portfolio, including responsibility for hiring and firing alongside managing labor and intergovernmental relations.¹⁴¹ In 2014, he officially took leave for eight months to run Cuomo’s gubernatorial campaign.¹⁴² Although his paycheck was coming from the campaign during this time – not from the State of New York – his role as right-hand man continued.¹⁴³ He never gave up his physical office from which he made hundreds of phone calls and he continued making management, personnel, and policy decisions.¹⁴⁴ Percoco was going through financial difficulties, and used his perch of power to demand substantial financial rewards, including a job for his wife, in return for directing government contracts.¹⁴⁵

When it came to light, Percoco was charged with conspiring to commit honest-services wire fraud by engaging in “a scheme or artifice to deprive another of the intangible right of honest services.”¹⁴⁶ The government argued that he played a key role in directing state contracts and received kickbacks for doing so.¹⁴⁷

The judge instructed the jury that honest-services fraud could only exist when there is a fiduciary duty, and that for the time he was not employed by the state:

anticorruption interest of preventing public infrastructure from being used to undermine democratic self-government. But whatever path the Court takes, it should be grounded in fraud logic, not property-land.

¹⁴⁰. Government’s Omnibus Memorandum of Law, *supra* note 123, at 4.

¹⁴¹. Superseding Indictment at 3, *United States v. Percoco*, 2017 WL 4385770 (S.D.N.Y. Sept. 19, 2017) (No. 16-Cr-776).

¹⁴². *Id.* at 3-4.

¹⁴³. Joint Appendix (Volume I of II) at 77, *Percoco v. United States*, 598 U.S. 319 (2023) (No. 21-1158).

¹⁴⁴. *Id.* at 77, 179, 286.

¹⁴⁵. Government’s Omnibus Memorandum of Law, *supra* note 123, at 6, 10-11.

¹⁴⁶. Superseding Indictment, *supra* note 141, at 29.

¹⁴⁷. Government’s Omnibus Memorandum of Law, *supra* note 123, 12-13.

[Y]ou must determine, first, whether he dominated and controlled any governmental business and, second, whether people working in the government actually relied on him because of a special relationship that he had with the government. Both factors must be present for you to find that he owed the public a fiduciary duty. Mere influence and participation in the processes of government, standing alone, are not enough to impose a fiduciary duty.¹⁴⁸

The two-part conjunctive test – (a) domination and control of governmental business and (b) actual reliance by people in the government – represented a serious effort to separate those situations of influence from those where, in effect, someone without a title truly directs policy, and as such takes on the obligations of the state.¹⁴⁹ The jury convicted, and the conviction was upheld on appeal.¹⁵⁰

Percoco appealed to the Supreme Court. In a unanimous decision written by Justice Alito,¹⁵¹ the Supreme Court overturned Percoco’s conviction on vagueness grounds.¹⁵² The majority opinion is a unique and difficult piece of writing, for several reasons. It spends more time on a fifteen-year-old case, *United States v. Margiotta*’s facts and legal arguments than it does on Percoco’s conduct. It never directly reviews the instructions given in this case; it reviews the standard established in *Margiotta*. Here is the *entirety* of the Court’s discussion on the vagueness of the Percoco jury instructions:

Margiotta’s standard is too vague. From time immemorial, there have been *éminence grises*, individuals who lacked any formal government position but nevertheless exercised very strong influence over government

148. Jury Instructions at 25-26, *United States v. Percoco*, 2018 WL 1325008 (S.D.N.Y. Feb. 28, 2018) (No. 16-Cr-776).

149. *Percoco v. United States*, 598 U.S. 319, 323-24 (2023). For a fuller discussion of formal and functional understandings of corruption, see Zephyr Teachout, *The Problem of Monopolies & Corporate Public Corruption*, 147 DAEDALUS 111 (2018).

150. *Percoco*, 598 U.S. at 325.

151. *Percoco*, it will be noted, is one of the few corruption cases decided by Justice Alito, who recently defended accepting – and not revealing – over \$100,000 in a private jet and expensive meals from someone whom he claims not to know very well. Alito has been a quiet but critical force in the Supreme Court’s campaign-finance rulings. His arrival on the Court, following Justice O’Connor’s departure, is widely recognized as the big turning point to the modern anti-anticorruption Court. In 2007, in *FEC v. Wisconsin Right to Life, Inc.* he concurred to suggestions exploring striking down the McCain-Feingold Act. See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 482-83 (2007) (Alito, J., concurring). He joined not only Justice Kennedy’s *Citizens United* decision, but also the concurrences of Roberts and Scalia, and he publicly defended *Citizens United* at Federalist Society events. See *Citizens United v. FEC*, 558 U.S. 310, 316 (2010).

152. *Percoco*, 598 U.S. at 330.

decisions. Some of these individuals have been reviled; others have been respected as wise counselors. The *Margiotta* test could be said to apply to many who fell into both of these camps. It could also be used to charge particularly well-connected and effective lobbyists. See 688 F.2d at 142 (opinion of Winter, J.). *Margiotta* acknowledged that “the public has no right to disinterested service” from lobbyists and political party officials, but the rule it developed—which was embodied in the jury instructions given in this case—implies that the public *does* hold such a right whenever such person’s clout exceeds some ill-defined threshold. *Id.* at 122. *Margiotta* set a low bar, *i.e.*, the point at which a defendant’s influence goes beyond “minimum participation in the processes of government.” *Ibid.* The instructions in this case demanded more, *viz.*, proof of “dominat[ion],” but what does that mean in concrete terms? Is it enough if an elected official almost always heeds the advice of a long-time political adviser? Is it enough if an officeholder leans very heavily on recommendations provided by a highly respected predecessor, family member, or old friend? Without further constraint, *Margiotta* does not (and thus, the jury instructions did not) define “the intangible right of honest services” “with sufficient definiteness that ordinary people can understand what conduct is prohibited,” or “in a manner that does not encourage arbitrary and discriminatory enforcement.”¹⁵³

*Margiotta*¹⁵⁴ is a Second Circuit case in which the district court instructed the jury that, in order to convict the defendant for honest-services fraud, the prosecution must prove that the work done by the defendant in exchange for private benefits was “in substantial part the business of government, rather than being solely party business and that his performance of that work was intended by him and relied on by others in Government as part of the business of Government.”¹⁵⁵

I place the two instructions next to each other to compare:

<i>Margiotta</i> :	<i>Percoco</i> :
<ol style="list-style-type: none"> 1. Work was “in substantial part the business of government, rather than being solely party business;” 2. His performance of that work was: 	<ol style="list-style-type: none"> 1. “He dominated and controlled any governmental business,” not “mere influence and participation in the processes of government, standing alone, are

^{153.} *Id.* at 330–31.

^{154.} 688 F.2d 108 (2d Cir. 1982).

^{155.} *Id.* at 123.

<p>A) “intended by him . . . as part of the business of Government” and</p> <p>B) “relied on by others in Government as part of the business of Government.”¹⁵⁶</p>	<p>not enough to impose a fiduciary duty;”¹⁵⁷</p> <p>2. “People working in the government actually relied upon him because of a special relationship that he had with the government.”¹⁵⁸</p>
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As evident from the above comparison, the jury instructions in *Percoco* did not track those of *Margiotta*. This was therefore not a case about *Margiotta* or the *Margiotta* standard. In other words, the Court’s conclusion that “*Margiotta*’s standard is too vague”¹⁵⁹ is not responsive to either of the questions presented in the appeal or to the facts of the case.

When Justice Alito uses two rhetorical questions to make his point, he actually undermines his argument. He asks, “Is it enough if an elected official almost always heeds the advice of a long-time political adviser?”¹⁶⁰ and “Is it enough if an officeholder leans very heavily on recommendations provided by a highly respected predecessor, family member, or old friend?”¹⁶¹

The answer to each question is a resounding *no!* under the *Percoco* standard. Always heeding advice would not be sufficient evidence of control or domination. Evidence thereof would fail a sufficiency-of-the-evidence test. Moreover, it would lack the second necessary factor, evidence of actual deference. The answer to the second question is also clearly “no,” because the instructions require evidence of actual domination, not merely being leaned upon, and, as above, evidence that those in government treated the defendant as government. In other words, Justice Alito used *answerable* hypotheticals, the answers to both of which actually strengthened the government’s argument.

Finally, then, the Court wrote, “Without further constraint, *Margiotta* does not (and thus, the jury instructions did not) define ‘the intangible right of honest services’ ‘with sufficient definiteness that ordinary people can understand what conduct is prohibited,’ or ‘in a manner that does not encourage arbitrary

156. *Id.*

157. Jury Instructions at 25-26, *United States v. Percoco*, 2018 WL 1325008 (S.D.N.Y. Feb. 28, 2018) (No. 16-Cr-776).

158. *Id.* at 25.

159. *Percoco v. United States*, 598 U.S. 319, 330 (2023).

160. *Id.* at 331.

161. *Id.*

and discriminatory enforcement.”¹⁶² The parenthetical “thus” is not justified by the Court’s reasoning, because *Percoco* does not track *Margiotta*. But the rest of the paragraph is also unearned—it is not grounded in the reasoning of *Percoco*.

“Dominated and controlled” is part of existing law, and a claim that it is vague has implications outside the statute. “Dominate,” by established dictionary meaning and normal usage, requires more than influence, but control and fundamental final power in a situation. It is a part of current trade law. 18 U.S.C. § 1839, the definitional part of a criminal code which uses the phrase “foreign instrumentality,” defines foreign instrumentality as “any agency, bureau, ministry, component, institution, association, or any legal, commercial, or business organization, corporation, firm, or entity that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government.” Domination and control are the standards for determining whether a director is independent in corporate law.¹⁶³ Domination, in other words, provides the “more” that Alito sought, and is not a word that has been treated as illegible to the public in other contexts. Perhaps the Court disagreed. But because *Percoco* is fundamentally an impenetrable decision, it resists serious analysis.

If the Court were to follow settled vagueness doctrine, a criminal law should not be treated as vague if “the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant’s conduct was criminal.”¹⁶⁴ A vagueness challenge must begin with the presumption of validity;¹⁶⁵ vagueness should be used as a tool of last resort. A court should only strike down a vague law if no person of reasonable intelligence could understand what it says.¹⁶⁶ Moreover, even if “[c]lose cases can be imagined,”¹⁶⁷ that is insufficient to overturn a conviction. Typically, a statute that is declared invalid is struck down wholly.¹⁶⁸

But as we’ve seen, those general rules of vagueness are not applied in mail- and wire-fraud cases. In *Skilling*, the Court concluded that the term “honest services” was vague, and then reconstructed the statute to have it cover “bribes and

162. *Id.* (quoting *McDonnell v. United States*, 579 U.S. 550, 576 (2016)).

163. See *Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984) (holding that a director’s nonindependence may be demonstrated where a director is dominated or controlled by an interested party).

164. *United States v. Lanier*, 520 U.S. 259, 267 (1997).

165. *United States v. Nat’l Dairy Prod. Corp.*, 372 U.S. 29, 32 (1963).

166. See *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (explaining that a vague statute “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits”).

167. *United States v. Williams*, 553 U.S. 285, 306 (2008).

168. *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019).

kickbacks.”¹⁶⁹ *Percoco* showed that *Skilling* was not an outlier. Again, it found the *Margiotta* rule vague, but left the statute standing along with the possibility of a constitutional rule, without providing any direction about what, in the Court’s view, a constitutional set of jury instructions might look like.¹⁷⁰

As such, it created an impossible situation for itself in analyzing clear error. Because it did not state the standard against which *Percoco* could have been found guilty, it was impossible to test whether his conviction would have been clear error. In its wake, courts are left wholly without guidance on the correct jury instruction.

V. CORRUPTION SKEPTICISM?

There is a clear trend: the fraud and corruption statutes are narrowed, but they are not clarified. In this last Part, I try to make sense of the underlying motivations for the short and muddled jurisprudence the Court keeps churning out. Because the cases tend to be short and lack strong dissents, this Part is necessarily speculative. But it is an important arena for speculation: after *Skilling*, *Kelly*,¹⁷¹ and *McDonnell*,¹⁷² the decisions in *Ciminelli* and *Percoco* make five major recent cases in which all but one of the current Justices (Sotomayor in *Skilling*) lined up to overturn major elite-fraud convictions.

Why? It could be that these decisions embody two very different approaches of two different ideological camps converging into a single stream. Outspoken corruption skeptics (Justices Thomas, Alito, Roberts, Gorsuch, Kavanaugh, and Barrett) and criminal law skeptics (Justices Kagan, Sotomayor, and Jackson) could be joining together for very different reasons. The Thomas/Alito camp could be motivated by a general allergy to corruption laws and skepticism of the reality of corruption itself, whereas Kagan and the others could be motivated by a general allergy to criminal statutes with rough edges. However, if that were true, one would likely see carefully reasoned opinions with extensive concurrences, expressing the different foundations of the same substantive conclusion.

There’s another possible convergence, which I find more persuasive: skepticism about corruption itself among liberal justices. The opinions in the campaign-finance cases – the site of long-running, open disagreement and contestation – support this hypothesis.

169. *Skilling v. United States*, 561 U.S. 358, 410 (2010).

170. *Percoco v. United States*, 598 U.S. 319, 331-32 (2023).

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

172. *McDonnell v. United States*, 579 U.S. 550 (2016).

That line of cases began when the Court overturned part of the federal campaign-finance regime in *Buckley v. Valeo*,¹⁷³ concluding that expenditure limits did not further anticorruption goals. Since then, debate about corruption has been central to the Court's campaign-finance jurisprudence. In the last fifteen years, the conservative majority aggressively reshaped the field, narrowing the definition of corruption to quid pro quo.¹⁷⁴ It struck down a series of federal campaign-finance laws, including, most notably, the ban on corporate electioneering in *Citizens United*. The decisions in those cases are exceptionally fractured and long. Justices frequently concur, dissent, and concur in dissents, to clarify their statutory and constitutional logic. Those cases are among the longest of any cases, both in the majority opinions and dissents.¹⁷⁵ If length is measured by words written, these cases typically include several different concurrences and dissents. Nearly every point of reason is carefully, seriously argued. The Justices use sharp knives to debate the meaning of corruption, the value of political equality, and the meaning of the First Amendment.

The conservative wing of the Court has been transparent about its skepticism of the existence of corruption outside of explicit, quid pro quo exchanges. When Justice Alito joined the Court, and Justice O'Connor left, Justice Roberts wrote, in 2007, "enough is enough,"¹⁷⁶ frustrated with any definition of corruption that wasn't essentially cash for spoken promises to serve the briber. For conservative Justices, corruption outside of explicit exchange is an incoherent concept, because the selfish exercise of power is simply a description of how politics works.¹⁷⁷

For many years, the liberals had a strong rejoinder, grounded in corruption. Justice Stevens' famous and extensive dissent in *Citizens United v. FEC* laid out a powerful argument for the public interest in fighting corruption.¹⁷⁸ He argued that anticorruption was a foundational American principle, embedded in the

173. 424 U.S. 1 (1976) (per curiam).

174. See *supra* Part II.

175. See Adam Liptak, *Justices Are Long on Words but Short on Guidance*, N.Y. TIMES (Nov. 17, 2010), <https://www.nytimes.com/2010/11/18/us/18rulings.html> [<https://perma.cc/Y7Q4-R48K>]. At the time it was issued by the Court, *Citizens United* spanned 183 pages and more than 48,000 words, making it the then-ninth longest majority opinion in the Court's history. *Id.*

176. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478 (2007).

177. See *TEACHOUT*, *supra* note 1, at 7-8, 224-26.

178. Justice Stevens eloquently laid out the Court's legacy of recognizing the public's and Congress's interest in "preventing the money that is spent on elections from exerting an 'undue influence on an officeholder's judgement' and from creating 'the appearance of such influence.'" *Citizens United v. FEC*, 558 U.S. 310, 447 (2010) (Stevens, J., concurring in part and dissenting in part). Moreover, he connects these notions to the public's perception of the legitimacy of our democracy, noting that corporate electioneering can "generate the impression that corporations dominate our democracy." *Id.* at 470.

Constitution. He insisted that the majority's modern "myopic focus on *quid pro quo*" led to both a misunderstanding of the First Amendment and a misunderstanding of the importance of bans on corporate electioneering.¹⁷⁹ Stevens argued for the independent importance of anticorruption, both as a matter of democracy, and as a matter of constitutional history.¹⁸⁰

Now that Justice Stevens has left, the small remaining liberal wing of the Court appears less convinced of the problem of corruption and the threat it poses to society. In *McCutcheon v. FEC*, striking down aggregate limits on what an individual can contribute, Justice Breyer wrote a significant dissent.¹⁸¹ However, the dissent was not grounded in the same logic as that of Justice Stevens in *Citizens United*. In *McCutcheon*, Breyer characterizes corruption as a subsidiary problem of the general problem of speech that breaks the bond between citizen and elected official.¹⁸² Anticorruption, in Breyer's words, is "an interest rooted . . . in the First Amendment itself."¹⁸³ Anticorruption in Breyer's *McCutcheon* is not a freestanding compelling interest, let alone a constitutional principle of the first order.

Justice Kagan's more recent dissent in *FEC v. Cruz* also did not identify anticorruption as a principle with independent constitutional force.¹⁸⁴ In *Cruz*, the Court struck down Section 304 of the Bipartisan Campaign Reform Act of 2002, which had prohibited a candidate from using postelection donations to repay personal loans exceeding \$250,000 that they made to their campaign.¹⁸⁵ The law was passed to prevent the kind of corruption which occurs when officeholders, eager to cover their personal debts, get donations from donors who have policy interests.¹⁸⁶

Justice Kagan's dissent begins with a dissection of the First Amendment argument made by the majority.¹⁸⁷ It then moves to a scathing critique of the majority's failure to protect against *quid pro quo* corruption.¹⁸⁸ Kagan explains in

179. *Id.* at 451.

180. *Id.* at 451-52.

181. 572 U.S. 185, 232 (2014) (Breyer, J., dissenting).

182. *Id.* at 236.

183. *Id.*

184. 596 U.S. 289 (2022).

185. *Id.* at 294, 313.

186. See Russell Feingold, *Campaign Finance Reform: Senator Russell D. Feingold (D-WI)*, 22 YALE L. & POL'Y REV. 339, 341 ("I think the corruption rationale has worked well . . . I, along with Senator McCain, worked closely to follow [the corruption rationale], which has been reflected all the way back to *Buckley v. Valeo*.")

187. *Id.* at 314-15 (Kagan, J., dissenting).

188. *Id.* at 319-24.

great detail how Section 304 serves as an essential and tailored prophylactic to prevent quid pro quo deals.¹⁸⁹ However, by consistently characterizing the corruption as quid pro quo corruption (even while recognizing that quid pro quo can be broader than criminal bribery), she, *unlike* Justice Stevens, cedes all the non-quid pro quo field, and argues for the importance of the statute as if quid pro quo were the only kind of corruption that mattered. Unlike Stevens, she does not reach for American history or the critical importance of anticorruption measures to the founders. She writes entirely from the posture of one who concedes the corruption definitional fight, and while she is persuasive in this mode, it shuts out an alternative political theory of corruption. She is in dissent, effectively the wilderness, and has a full opportunity to lay out a different vision—but demurs.

What comes across in both post-Stevens dissents is that corruption is not a comfortable term for Breyer nor Kagan. Just as the Court reaches for property as a morality-free stand-in for fraud, Breyer and Kagan are seeking stand-ins for corruption, instead of addressing the thing itself. For Breyer, it is speech; for Kagan, quid pro quo. The dissents in *McCutcheon* and *Cruz* foreground disagreements about the First Amendment and the effectiveness of campaign-finance laws in preventing quid pro quo corruption, not disagreements about the meaning of corruption.¹⁹⁰ But the Breyer and Kagan dissents exhibit a reluctance to condemn rational acts—perhaps because to censure rational acts of fraud, corruption, or deprivation of honest services is to call purportedly respectable behavior unrespectable.

As such, perhaps the liberals on the Court are reluctant to embrace a broad fiduciary set of obligations for public officials because they, too, have adopted a view of human nature that expects self-serving behavior in the exercise of power. The moves to property law and contract law provide cover for this anxiety; the emphatic use of “property” or “quid pro quo” provides a psychological experience of certainty. Property suggests, atmospherically, something concrete and tractable, something which law can handle without investigating public betrayal and public immorality. Quid pro quo suggests, atmospherically, whatever is required in order to achieve a contract, such as intention, offer, acceptance, and consideration. These turns to property and contract demoralize essentially moral crimes and relieve justices of the responsibility of condemnation.

The traditional job of antifraud and corruption laws is, first, to deter and shape temptations, and, second, to condemn derelictions of duty as immoral. The language of fraud, corruption, and honest services matters enormously

189. *Id.*

190. *McCutcheon v. FEC*, 572 U.S. 185, 234 (2014) (Breyer, J., dissenting); *Cruz*, 596 U.S. at 314-15 (Kagan, J., dissenting).

because it provides the tools by which the powerless hold the powerful to account, not merely by prison time but also by accusatory language that robs the powerful of their superior status.

The Court's allergy to the moral character of these concepts is consistent with the most troubling explanation for the state of political-corruption jurisprudence: elite identification. The Justices who dissent in bright-line cases like *Citizens United* but cheerfully join or write these other cases may be driven by a deep sense of identification with the political advisors and officials who are the targets of these investigations. As a matter of modern social structure, these advisors and officials are in careers more closely aligned with that of the Justices; many former clerks go into government, or hover around it as advisors.¹⁹¹ In the campaign-finance cases, the Court makes only a policy judgment, not a personal one. But in the wire-fraud cases, because the Court sees itself as policing the line between corrupt and noncorrupt behavior, it appears to have an outsized fear of placing some normal activities in the bucket of corruptness – as if such misclassification is different in kind than the line drawing between stealing and not stealing, or assault and not assault.

We see this in Justice Kagan's language in *Kelly v. United States*, the Bridgegate case.¹⁹² There, Kagan spends more time insisting on the settled nature of the law and precedential constraints than she does exploring the actual history of the wire-fraud statute, or why the federal government might have significant interests in trying to protect against the use of the wires for traditional fraud.¹⁹³

A passage by Justice Alito in *Percoco* is particularly troubling on this front, especially since all the Justices joined that opinion or concurred in the judgment.¹⁹⁴ Alito writes:

From time immemorial, there have been *éminence grises*, individuals who lacked any formal government position but nevertheless exercised very strong influence over government decisions. Some of these individuals have been reviled; others have been respected as wise counselors. The *Margiotta* test could be said to apply to many who fell into both of these

191. See Huchen Liu & Jonathan P. Kastellec, *The Revolving Door in Judicial Politics: Former Clerks and Agenda Setting on the U.S. Supreme Court*, 51 AM. POL. RSCH. 1, 3-6 (2023); Mark Sherman, *Former Clarence Thomas Clerks Are a Big Presence in Trump Administration*, PBS (Aug. 6, 2018, 10:34 AM EST), <https://www.pbs.org/newshour/politics/former-clarence-thomas-clerks-are-a-big-presence-in-trump-administration> [<https://perma.cc/H3LD-73C4>].

192. 140 S. Ct. 1565 (2020).

193. *Id.* at 1572-74.

194. See *Percoco v. United States*, 598 U.S. 319 (2023).

campus. It could also be used to charge particularly well-connected and effective lobbyists.¹⁹⁵

This passage is not reassuring for those of us who see the Court's job as upholding federal statutes for all alike, rich and poor, connected and out of favor. It suggests that we should look with special indulgence on *éminence grises* and well-connected lobbyists, and use the fear of their condemnation as a lenity argument.

To answer Justice Alito's question, if a well-connected and effective lobbyist in fact controls government spending, and in fact is relied upon for such control, they shouldn't get kickbacks. Alito – and the Court – are signaling a special role for the powerful and suggesting that we should not risk their regulation or reputation.

In *McDonnell v. United States* – the 2016 case in which the Supreme Court overturned the conviction of Governor Bob McDonnell for accepting a Rolex and other gifts in exchange for setting up meetings – elite identification was the explicit defense strategy.¹⁹⁶ Appointed officials and former attorneys general flooded the Court with amici pointedly worrying over how expensive lunches with lobbyists (and the important business of government that occurs therein) could be threatened by upholding the conviction.¹⁹⁷ The Court relied heavily on their witness, with Chief Justice Roberts writing for a unanimous Court:

Officials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse. This concern is substantial. White House counsel who worked in every administration from that of President Reagan to President Obama warn that the Government's "breathtaking expansion of public-corruption law would likely chill federal officials' interactions with the people they serve and thus damage their ability effectively to perform their duties."¹⁹⁸

It was an astonishing passage upholding an astonishing decision. The question was not whether people could take meetings or do public favors, but whether

195. *Id.* at 330–31.

196. 579 U.S. 550 (2016).

197. See, e.g., Amicus Brief of Former Attorneys General in Support of Petitioner at 13, *McDonnell*, 579 U.S. 550 (No. 15-474) (noting that upholding the conviction would affect "whom Governors can invite into their home . . . or what personal introductions they can facilitate; whom Governors can invite on trade missions; and whom Governors (or other officeholders) can meet about government business").

198. 579 U.S. at 575 (citing Brief of Former Federal Officials as Amici Curiae in Support of Petitioner at 5, *McDonnell*, 579 U.S. 550 (No. 15-474)).

they could take bribes for nonofficial acts. The Court said yes, they can – because officials tell us that it is just normal politics.

Relatedly, these cases reveal a singular lack of trust in jurors as determinants of what constitutes defrauding the public or a corrupt act; the Court's own uncertainty about what constitutes illegitimate behavior may betray an anxiety about making such judgments themselves and an anxiety at the prospect of a group of twelve peers making such judgments. The Justices do not trust jurors; they do not trust themselves; they seek refuge in concepts that seem less fraught than fraud.

As I noted, these observations are necessarily speculative. But a combination of elite identification and corruption skepticism seems at least a good candidate for explaining the Supreme Court's fraud cases because it explains silence and clumsiness better than any other explanation. If the difference were more about notice and criminal defense or statutory interpretation, we'd see better and more thorough defenses, and more differences in reasoning.

The criminal wire-fraud cases are troubling on their own: they deprive prosecutors of powerful tools, and are weakly reasoned. But they are more troubling when understood as part of a larger anti-anticorruption project. Facing one of the greatest internal threats to democracy, the threat of crumbling apart from within, the Court simply can't find laws it likes to combat it.

CONCLUSION

Ciminelli and *Percoco* are not easy cases. They implicate genuinely challenging questions about the relationship between fraud and bid rigging, and the scope of the fiduciary obligation owed to the public by powerful people who wield functional power but lack a title. Unfortunately, the Supreme Court dealt with these difficult questions lightly and with proxies.

The Court's highly contested decisions in *Citizens United*, *McCutcheon*, and similar cases are undeniably the most problematic of the judicial interventions in corruption cases, severely undermining public power to limit the corrupting influence of money in elections and politics. But *Percoco*, *Ciminelli*, and the other mail- and wire-fraud cases matter more because the Court in the campaign-finance cases cut off the ability to pass bright-line rules and functionally mandated that the bulk of the anticorruption apparatus exist in criminal law.

What is left after these cases (and their predecessors) is an anticorruption regime well suited to catching bungling thieves who offer cash in IHOP bathrooms in exchange for a vote, but poorly suited to catch and deter corruption as it exists in sophisticated procurement schemes. What is left are weak and

uncertain tools when, by any objective measure, the United States is facing a corruption crisis that is getting worse by the year.¹⁹⁹

If we take a step back, we see consistent congressional efforts to broaden mail and wire fraud and consistent Court efforts to narrow them. The Court cases read like a picky royal from a fairy tale, rejecting all: *This statute is too fat, this one too thin, this one too loud*. Not only do these cases fail to justify themselves, they fail to present a positive vision of what a robust elite-fraud and corruption regime would look like.

It's not easy. The most serious flaw in these cases is not that which is said, but that which is unsaid: the lack of exploration, the lack of seriousness, the lightness with which the Court throws out decades of jurisprudence – as in *Ciminelli* – and conflates past and current jury instructions – as in *Percoco*. The cases look neither backwards (exploring history and statutory logic), nor forwards (charting a path, or fully obstructing it, for future prosecutors). Serious objections are waved away. *Percoco* and *Ciminelli* represent the Supreme Court's peak illegitimacy. They do not cohere as examples of serious statutory interpretation, and they barely scratch the surface of constitutional exploration.

In the end, the Court acts as if the criminal fraud and corruption law simply isn't treated as a subspecies of criminal law, but as its own unique arena, in which the Court, not lawmakers, have special insight into what laws should look like. But the ideal statute is never described – it exists just out of sight while lurking as a cudgel to strike down anything that doesn't feel right. While envelopes of cash being given to a state lawmaker in an IHOP bathroom might constitute a bribe, nearly everything else does not.²⁰⁰ The Court fancies itself as a guard against wily lawmakers and prosecutors trying to sneak something tricky by them, when in fact, they are themselves the guards opening the gate to more corruption and elite malfeasance.

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199. See, e.g., *United States Corruption Index*, TRADING ECON. (2022), <https://tradingeconomics.com/united-states/corruption-index> [<https://perma.cc/BKN2-JXL9>] (showing a downward trend line in corruption scores from 1995 to 2022, where a high score means very clean and a low score means very corrupt); *Corruption Perceptions Index*, TRANSPARENCY INT'L (2022), <https://www.transparency.org/en/cpi/2022/index/usa> [<https://perma.cc/JDX2-R8HL>] (same).

200. The IHOP examples refers, of course, to the former speaker of the North Carolina House, Jim Black, and his colorful deals with the chiropractor lobby. See Dan Kane & J. Andrew Curliss, *Former N.C. Speaker Gets 5-Year Sentence*, MCCLATCHY DC (July 12, 2007, 1:02 PM EST), <https://www.mcclatchydc.com/news/nation-world/national/article24466426.html> [<https://perma.cc/D7C9-AAS9>].

DEMORALIZING ELITE FRAUD

Journal who turned this from a rant into a theory, and to the great work of Lydia Laramore and Dena Shata of the Yale Law Journal.