whose behalf the lawsuit was brought."[94] Because *Perdue* will govern the "application of at least one hundred federal fee-shifting statutes,"[95] the resources expended litigating performance enhancements that will be unobtainable "in virtually every case"[96] could be substantial. Instead of waiting for the next case to bring the arc of performance enhancement jurisprudence to its inevitable terminus and inviting litigation in the meantime, the Court should have taken this opportunity to prohibit performance enhancements outright.

C. Honest Services Fraud

Covered Offenses. — CEOs behaving badly: that was the story behind the Enron Corporation's implosion in 2001 and the accounting improprieties at Hollinger International Inc. Prosecutors zealously pursued Enron's Jeffrey Skilling and Hollinger's Conrad Black, convicting them of honest-services fraud among other crimes. However, last Term in *Skilling v. United States*,[1] *Black v. United States*,[2] and a third case, *Weyhrauch v. United States*,[3] the Court vacated Black's and Skilling's convictions, holding that the federal statute prohibiting honest-services fraud[4] applies only to bribery and kickback schemes. The Court's reasoning was odd, but criminal procedure left no better options; without other tools to preclude prosecutors from pursuing conduct that only potentially, rather than indisputably, fits a statute, the Court had to invalidate the statute, prune it, or uphold dubious convictions. The honest-services fraud trilogy thus illustrates a systemic problem in criminal justice: When prosecutors charge conduct that only debatably violates the prohibiting statute, those prosecutions are less likely to serve the public interest. Unfortunately, no avenue for judicial review of those decisions exists other than the unwieldy vagueness doctrine. If judges could filter out such prosecutions at the beginning of the litigation process — rather than after the fact on appeal — prosecutors would make better charging decisions and the public would be saved the expense of unnecessary trials.

---

[94] Brief of the States of Alabama et al. as Amici Curiae in Support of Petitioners at 12–13, *Perdue*, 130 S. Ct. 1662 (No. 08-970), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-970_PetitionerAmCu30StatesandDC.pdf; *see also Perdue*, 130 S. Ct. at 1677 ("[M]oney that is used to pay attorney's fees is money that cannot be used for programs that provide vital public services.").

[95] Kenny A. *ex rel.* Winn v. Perdue, 547 F.3d 1319, 1331 (11th Cir. 2008) (Carnes, J., dissenting from denial of rehearing en banc).

[96] *Perdue*, 130 S. Ct. at 1678 (Thomas, J., concurring).

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

[2] 130 S. Ct. 2963 (2010).

[3] 130 S. Ct. 2971 (2010) (per curiam).

[4] 18 U.S.C. § 1346 (2006).

First, *Skilling*: Enron collapsed, unexpectedly and spectacularly, in late 2001. The Department of Justice's Enron Task Force sorted through the rubble, uncovering "an elaborate conspiracy"[5] to prop up the firm's stock price despite actual, daunting financial losses.[6] In 2004, Enron's former CEO and defrocked visionary,[7] Jeffrey Skilling, was indicted for his alleged part in the conspiracy. The charges included a count for depriving Enron and its shareholders of Skilling's "honest services."[8]

As the litigation began, Skilling hotly contested whether Houston — Enron's Ground Zero — could give him a fair trial.[9] To assuage this concern, the district court constructed an elaborate jury selection process.[10] An initial questionnaire winnowed out over 200 of the 400 potential jurors.[11] Next, a judge-led voir dire followed by counsel questioning further reduced the jury pool.[12] Even after this process, Skilling protested that he would have removed six empanelled jurors had he not already expended his peremptory challenges striking other potential jurors.[13]

After a four-month trial, the jury found Skilling guilty of honest-services fraud and eighteen other counts, and not guilty of nine insider-trading counts.[14] On appeal, the Fifth Circuit held that the honest-services fraud conviction was proper and that the district court's precautions had ensured a fair trial.[15] Notably, the panel did not address Skilling's contention that the honest-services fraud statute was unconstitutionally vague.[16] Skilling appealed to the Supreme Court, challenging the fairness of his trial and again arguing that the honest-services fraud statute was unconstitutionally vague.[17]

The Supreme Court affirmed in part and vacated in part. Writing for the Court on both issues, Justice Ginsburg affirmed that Skilling's trial had been fair[18] but vacated Skilling's honest-services fraud con-

---

[5] *Skilling*, 130 S. Ct. at 2907.

[6] *See id.*

[7] For a stunning, if slightly sensational, description of Skilling's revered role at Enron, see ENRON: THE SMARTEST GUYS IN THE ROOM (Jigsaw Prods. 2005).

[8] *Skilling*, 130 S. Ct. at 2907–08. Skilling's indictment and trial occurred in the U.S. District Court for the Southern District of Texas. District Judge Lake presided at the trial level.

[9] *See id.* at 2908.

[10] *See id.* at 2909–11.

[11] *See id.* at 2909.

[12] *See id.* at 2910–11.

[13] *Id.* at 2911.

[14] *Id.*

[15] United States v. Skilling, 554 F.3d 529, 547, 564 (5th Cir. 2009). Judge Prado wrote for a unanimous panel, which included Judges Smith and Ludlum.

[16] *See Skilling*, 130 S. Ct. at 2912.

[17] *See id.* at 2912, 2925.

[18] Justice Ginsburg was joined on this point by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas.

viction,[19] holding that the relevant statute applies only to bribery and kickback schemes.[20]

Justice Ginsburg first addressed Skilling's argument that Houston, saturated at the time of trial with negative media coverage of Enron's demise, was an improper venue for the trial. She distinguished on the facts the Court's precedents[21] finding unfair trials. Unlike those cases, Skilling's trial did not involve a televised confession of guilt or media coverage amounting to a "carnival atmosphere."[22] Rather, jurors were chosen from a large, diverse pool of candidates; media coverage of Enron had never been blatantly damning and had quieted by the time of trial; and, most importantly, the jury had acquitted Skilling of his nine insider-trading counts.[23] Thus, any presumption of prejudice was dispelled.[24]

Likewise, wrote Justice Ginsburg, the jury actually selected was not prejudiced. A screening questionnaire authored mostly by Skilling's lawyers, and the district court judge's own questioning of potential jurors, rooted out biased candidates.[25] Skilling's evidence of bias among the selected jurors, Justice Ginsburg held, was unconvincing.[26]

Justice Ginsburg then addressed Skilling's second contention, that the honest-services fraud statute was unconstitutionally vague. She reasoned that the statute was not vague, but that it applied only to kickback and bribery schemes.[27] Justice Ginsburg first recounted the statute's history. The honest-services fraud doctrine evolved among the courts of appeals as an extension of the wire and mail fraud statutes, prohibiting transactions in which a third party gains a benefit due to improper influence over a fiduciary.[28] While the betrayed party does not necessarily suffer a loss of money or property, courts reasoned that the party does suffer an intangible loss of the fiduciary's honest services.[29] The Court invalidated the honest-services fraud doctrine in *McNally v. United States*[30] as an unwarranted extension of the wire and mail fraud statutes.[31] However, soon after *McNally*, Congress ex-

---

[19] Justice Ginsburg was joined on this point by Chief Justice Roberts and Justices Stevens, Breyer, Alito, and Sotomayor.

[20] *See Skilling*, 130 S. Ct. at 2907.

[21] *See* Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963).

[22] *Skilling*, 130 S. Ct. at 2914 (quoting *Sheppard*, 384 U.S. at 358); *see id.* at 2915–17.

[23] *See id.* at 2915–16.

[24] *See id.* at 2916–17.

[25] *See id.* at 2919–20.

[26] *See id.* at 2920–25.

[27] *Id.* at 2931.

[28] *See id.* at 2926–27.

[29] *See id.*

[30] 483 U.S. 350 (1987).

[31] *See Skilling*, 130 S. Ct. at 2927 (citing *McNally*, 483 U.S. at 350).

panded the statutes to include a "scheme or artifice to deprive another of the intangible right of honest services."[32] The statute's timing and wording, particularly its use of the words "*the* intangible right," suggested to the *Skilling* Court that Congress meant to reestablish the pre-*McNally* case law.[33]

Next, Justice Ginsburg interpreted the statute.[34] While noting the case law's fuzzy borders, she stated that the doctrine retained a "solid core": "[O]ffenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes."[35] Thus, Justice Ginsburg reasoned that the statute meant to reach "*at least* bribes and kickbacks."[36] Reasoning further that courts must prefer limiting a statute to invalidating it, and that interpreting the honest-services fraud statute to cover more than its core cases *would* raise vagueness concerns, Justice Ginsburg pruned the statute's reach to *only* bribes and kickbacks.[37]

Under this construction of the statute, Justice Ginsburg invalidated Skilling's honest-services fraud conviction.[38] The government had charged Skilling with profiting from a misrepresentation of Enron's health to its shareholders, but the charge did not allege that Skilling did so in exchange for side payments from a third party.[39] However, since Skilling's conviction potentially rested on any of three alternative theories,[40] the Court remanded the case to the Fifth Circuit to determine whether submission of the honest-services fraud theory to the jury was only harmless error.[41]

Justice Scalia concurred in part and in the judgment,[42] but he disagreed sharply with the Court's paring of § 1346. He argued that the Court had salvaged an unconstitutionally vague law only by "wielding a power we long ago abjured: the power to define new federal crimes."[43]

Justice Scalia first questioned whether § 1346, which codified the pre-*McNally* case law, codified anything clear to begin with. He noted

---

[32] *Id.* (quoting 18 U.S.C. § 1346 (2006)) (internal quotation mark omitted).

[33] *See id.* at 2928–29.

[34] *See id.* at 2929–31.

[35] *Id.* at 2930.

[36] *Id.* at 2931.

[37] *See id.* at 2931–33.

[38] *Id.* at 2934–35.

[39] *See id.* at 2934.

[40] *See id.* The other two theories were money-or-property wire fraud and securities fraud. *Id.*

[41] *See id.* at 2934–35 (citing Hedgpeth v. Pulido, 129 S. Ct. 530 (2008) (per curiam) (holding that review under *Yates v. United States*, 354 U.S. 298 (1957), which requires reversals of verdicts based on alternative legal theories of guilt if one of those theories is legally invalid, is subject to harmless-error analysis)).

[42] Justice Scalia was joined by Justice Thomas and in part by Justice Kennedy.

[43] *Skilling*, 130 S. Ct. at 2935 (Scalia, J., concurring in part and concurring in the judgment) (citing United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)).

the pre-*McNally* fog over such issues as what categories of persons were subject to the honest-services fraud prohibition,[44] what legal source created the fiduciary duty prohibiting such fraud,[45] and what conduct would breach such a fiduciary duty.[46]

Justice Scalia next criticized the Court's pruning of § 1346: "Perhaps it is true that 'Congress intended § 1346 to reach *at least* bribes and kickbacks.' That simply does not mean . . . that '§ 1346 criminalizes *only*' bribery and kickbacks."[47] Justice Scalia conceded that the Court may apply a limiting construction to a statute to save it from unconstitutionality — but only when a *reasonable* limiting construction is available.[48] The majority's proffered limiting construction was *not* reasonable, according to Justice Scalia, so the only course of action left was to void the statute for vagueness.[49] Unfortunately, wrote Justice Scalia, the Court ignored this command and embraced its own interpretation, which resulted in the Court's ultra vires "prescription of criminal law."[50]

Justice Alito concurred, arguing that "if no biased jury is actually seated, there is no violation of the defendant's right to an impartial jury."[51] To Justice Alito, Skilling's evidence of public hostility and negative media coverage was simply irrelevant if impartial jurors were in fact seated.[52]

Justice Sotomayor[53] concurred in the Court's trimming of § 1346 but dissented on the Court's fair trial holding. She catalogued in vivid detail the burning hostility most Houstonians held toward Skilling.[54] After citing the Court's fair trial precedents,[55] Justice Sotomayor argued that the trial court's voir dire efforts to screen out prejudiced jurors were insufficient, given the level of animosity directed toward Enron and Skilling.[56]

Relying in large part on *Skilling*'s honest-services fraud analysis, the Court issued on the same day its opinion in *Black v. United*

---

44 *See id.* at 2936.

45 *See id.* at 2936–37.

46 *See id.* at 2937–38.

47 *Id.* at 2939 (quoting *id.* at 2931 (majority opinion)) (internal citations omitted).

48 *See id.* at 2939–40.

49 *See id.*

50 *Id.* at 2940; *see id.* at 2938–40.

51 *Id.* at 2941 (Alito, J., concurring in part and concurring in the judgment).

52 *See id.* at 2941–42.

53 Justice Sotomayor was joined by Justices Stevens and Breyer.

54 *See, e.g.*, *Skilling*, 130 S. Ct. at 2947 (Sotomayor, J., concurring in part and dissenting in part) (noting that at voir dire one potential juror proclaimed that he "would love to claim responsibility, at least 1/12 of the responsibility, for putting these sons of bitches away for the rest of their lives").

55 *See id.* at 2948–52.

56 *See id.* at 2954–63.

States.[57] In *Black*, newspaper mogul Conrad Black and two other executives of Hollinger International Inc. were indicted for mail fraud on theories of defrauding shareholders of money and of depriving shareholders of honest services.[58] After trial but before jury deliberations began, the defendants succeeded in replacing the government's proposed special verdict form, which would have required the jury to specify which theory or theories it relied on in its verdict, with a general verdict form.[59] The defendants suggested post-verdict interrogatories in which jurors could specify on which theory they relied, but the government rejected the suggestion.[60] The jury found the defendants guilty of mail fraud.[61]

On appeal, the defendants argued that the instructions to the jury on honest-services fraud were wrong and therefore, because of the general verdict given, they were entitled to a new trial under *Yates v. United States*.[62] The Seventh Circuit disagreed, holding that even if the honest-services fraud instruction was wrong, the defendants had waived the right to contest it by insisting on a general verdict.[63]

The Supreme Court vacated and remanded. Justice Ginsburg's[64] brief opinion held, first, that the defendants had not waived their right to contest the honest-services fraud jury instruction and, second, that the instruction actually given was incorrect.[65] Justice Ginsburg first noted that the Federal Rules of Criminal Procedure, in contrast to the Federal Rules of Civil Procedure, contain no instruction on special verdicts; however, they do plainly specify what a party must do to object to a jury instruction, which the defendants had done.[66] In contrast, the Seventh Circuit's waiver reasoning, "unmoored" to any law,[67] had added another requirement for preserving an objection: acquiescing to a special verdict when requested.[68] Further, under the Seventh Circuit's reasoning, a prosecutor could activate the waiver simply by

---

[57] 130 S. Ct. 2963 (2010).

[58] *Id.* at 2966–67. Black's trial took place in the U.S. District Court for the Northern District of Illinois. Judge St. Eve presided. *See* United States v. Black, No. 05 CR 727, 2007 U.S. Dist. LEXIS 81777 (N.D. Ill. Nov. 5, 2007).

[59] *Black*, 130 S. Ct. at 2967.

[60] *Id.*

[61] *Id.*

[62] 354 U.S. 298 (1957) (holding that a general verdict may be set aside when the jury possibly relied on an invalid legal theory to render it, *id.* at 312); *see Black*, 130 S. Ct. at 2968.

[63] *Black*, 130 S. Ct. at 2968 (citing United States v. Black, 530 F.3d 596, 602–03 (7th Cir. 2008)). Judge Posner wrote for a unanimous Seventh Circuit panel, which included Judges Kanne and Sykes.

[64] Justice Ginsburg was joined by Chief Justice Roberts and Justices Stevens, Breyer, Alito, and Sotomayor.

[65] *Black*, 130 S. Ct. at 2970.

[66] *See id.* at 2968–69 (comparing FED. R. CRIM. P. 23(c) with FED. R. CIV. P. 49(a)–(b)).

[67] *Id.* at 2970.

[68] *See id.*

requesting a special verdict.[69] And finally, Federal Rule of Criminal Procedure 57(b) requires actual notice before levying a sanction for violation of a requirement not in law or the federal rules. The defendants here were given no such notice.[70]

Justice Scalia[71] and Justice Kennedy concurred separately to reiterate their belief that § 1346 is unconstitutionally vague.[72]

Finally, after addressing Skilling's and Black's petitions, the Court decided *Weyhrauch v. United States*[73] — an honest-services fraud case involving an Alaska state legislator.[74] The Court, without opinion, vacated and remanded this case for further consideration in light of *Skilling*.[75]

The *Skilling* trilogy addressed an old problem: what to do when a prosecutor charges a defendant under a statute that only arguably applies to the defendant's conduct. The problem in these three cases was not whether the defendants' indictments were facially sufficient; technically, the text of § 1346 *could* reach the misdeeds of Skilling, Black, and Weyhrauch. Rather, the problem was whether § 1346 *should* have been used to prosecute these defendants in the first place. The fact that the conduct prosecuted here ranged so far from the archetypal honest-services fraud case suggests that the prosecutors had stretched the statute to its bounds. Unfortunately, the Court's solution, to trim the statute down to its core meaning,[76] was a bad one. As Justice Scalia's concurrence pointed out, this "paring down" maneuver was both unprecedented and constitutionally suspect.[77] Even so, the alternative — striking down the statute altogether — was little more appealing. The dilemma thus highlights a systemic problem in criminal adjudication: judges have only blunt tools to review prosecutions that, while arguably facially sufficient, lack fidelity to their public role.

Prosecutors wear two hats: the first as courtroom adversary and the second as fiduciary to the public. In the courtroom, prosecutors represent the state as an adversarial party. In this role, prosecutors' actions are readily appealable and occur in the shadow of the guilty-beyond-a-reasonable-doubt standard. Beyond these inherent disciplining mechanisms, judges themselves have a well-equipped toolbox to

---

69 *Id.*

70 *See id.* (citing FED. R. CRIM. P. 57(b)).

71 Justice Scalia was joined by Justice Thomas.

72 *See Black*, 130 S. Ct. at 2970 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 2970–71 (Kennedy, J., concurring in part and concurring in the judgment).

73 130 S. Ct. 2971 (2010) (per curiam).

74 United States v. Kott, No. 3:07-cr-00056 JWS, 2007 WL 2572355, at *1 (D. Alaska Sept. 4, 2007).

75 *Weyhrauch*, 130 S. Ct. at 2971.

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

77 *See id.* at 2938–40 (Scalia, J., concurring in part and concurring in the judgment).

rein in zealous representation before it becomes misconduct. Their tools include mistrials, new trials, facial insufficiency dismissals, judgments of acquittal, contempt sanctions, and sentencing discretion.

However, prosecutors have a second role as public fiduciary. In this capacity, the prosecutor "occupies a quasi-judicial position"[78] in which the goal is not to "win a case, but [to see] that justice shall be done."[79] Thus, "To this extent, our so-called adversary system is not adversary at all; nor should it be."[80] However, prosecutorial discretion in bringing charges, unlike prosecutorial action in the courtroom, is nearly unreviewable.[81] And because prosecutors choose whom to charge, with what, and when, they — not judges — are "the criminal justice system's real lawmakers."[82]

Of course, this arrangement may not appear to be a problem. In fact, it may appear to be exactly the way the system should work: under state and federal constitutions, the legislature writes the laws, the executive enforces the laws, and the judiciary interprets the laws. Thus, any sort of review of prosecutorial charging decisions would involve judicial encroachment upon the executive.[83] As a consequence, insulated judges could substitute their judgments for those of prosecutors, who are more sensitive to both the priorities of their elected administrations and the grim realities of the street.[84]

This assessment is correct — most of the time. What the *Skilling* trilogy demonstrates, however, is the problem of the executive prosecuting conduct not contemplated by a statute passed by the legislature. Yes, Skilling's and Black's conduct may have fit the proscriptions of the statute's words, but its prosecution may have been far from Congress's anticipation. As the government admitted, its honest-

---

78 State v. Boyd, 233 S.E.2d 710, 717 (W. Va. 1977).

79 Berger v. United States, 295 U.S. 78, 88 (1935); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-1.2(c) (3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict.").

80 United States v. Wade, 388 U.S. 218, 256 (1967) (White, J., dissenting in part and concurring in part).

81 *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."); Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379–82 (2d Cir. 1973) (judges cannot force federal prosecutions).

82 William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001); *see id.* at 578–79; *see also* Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77 (2010) (noting the extremely coercive impact of criminal charges, regardless of actual guilt, accompanying prosecutions of corporations and white collar defendants).

83 *See* Andrew B. Loewenstein, Note, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 AM. CRIM. L. REV. 351, 368 (2001) (citing, inter alia, United States v. Armstrong, 517 U.S. 456, 464 (1996)).

84 *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607–08 (1985).

services prosecution of Skilling "was not 'prototypical.'"[85] In these cases, prosecutors' discharge of their duty as public fiduciary is suspect, yet judges lack appropriate tools to keep prosecutors on track.

Three considerations suggest that prosecutorial charging of conduct not contemplated by the legislature is a poor execution of the public's trust. First, and obviously, conduct squarely within the prohibiting statute is most likely the conduct the legislature most wishes to stop. While a statute may have flexibility built into it, its "hard core"[86] of prohibitions is presumably that which the legislature wished to prioritize. Second, and relatedly, prosecuting boundary conduct diverts prosecutorial and judicial resources from these higher priorities. As conduct squarely within a statute's prohibitions cannot be challenged for vagueness,[87] resources spent on cases such as the *Skilling* trilogy could be avoided. And third, prosecuting boundary conduct raises concerns of pretextual prosecution. When boundary conduct is prosecuted, presumably there is no better statute available. The same holds true of pretextual prosecutions. In each case, a prosecutor cannot charge the defendant with his actual suspected misdeed, so a different statute is pressed into service. Whether the practice is effective or not, it is disingenuous and undermines confidence in the justice system.[88]

Of course, prosecutors cannot extend statutes as they did in the *Skilling* trilogy without broad statutes to begin with. Legislatures often pass laws in broad terms to allow flexibility for future developments or to defer details to specialized executive agencies.[89] Yet such legal flexibility must be balanced against persons' interests in knowing clearly what they cannot do. This is the concern addressed by the void-for-vagueness doctrine, which requires that every law "define the criminal offense [1] with sufficient definiteness that ordinary people

---

[85] *Skilling*, 130 S. Ct. at 2934 (quoting Brief for United States at 49, *Skilling*, 130 S. Ct. 2896 (No. 08-1394)).

[86] *Id.* at 2933 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973)).

[87] *See* City of Chicago v. Morales, 527 U.S. 41, 78 n.1 (1999) (Scalia, J., dissenting).

[88] *See* Daniel C. Richman & William J. Stuntz, Essay, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 600–05 (2005). For a defense of pretextual prosecutions, see generally Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135 (2004).

[89] Broadness is especially resonant in the context of white collar financial crime, which is both highly technical and a wellspring for infamously innovative schemes. *See, e.g.*, David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 2009 UTAH L. REV. 1223, 1233 ("Congress often uses broad statutory language to address white-collar crimes, because the sophistication of the regulated businesses makes it difficult, if not impossible, to anticipate all the scenarios where criminal prosecution might be appropriate.").

can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement."[90]

The frustrating fact for the *Skilling* Court, then, is that it could only pass on the statute's vagueness, rather than attack the root of the problem: prosecutors charging conduct outside the "hard core" of the statute. This is why the Court's holding in *Skilling* had to be so odd. Without the ability to review the prosecutors' decision to charge marginal conduct, the Court instead "pare[d]"[91] the statute to accomplish the same thing. Only in this way could the Court reach beyond its usual role vis-à-vis the prosecutor qua party to police the prosecutor qua public official in its charging decisions.

However, as Justice Scalia correctly noted, the "paring" maneuver was judicial overreaching. There is no reason to conclude that, since Congress meant § 1346 to reach *at least* bribes and kickbacks, the statute applies *only* to bribes and kickbacks.[92] As a matter of formal logic, the majority opinion's proposition fails. But more importantly, the majority overplayed its hand by trimming back the statute.[93] It substituted its own judgment for Congress's lacuna, steadying the statutory ark without leave to do so.

Even so, Justice Scalia's suggestion, that the statute is unconstitutionally vague even when applied to bribery and kickbacks,[94] is little better. The invalidation remedy, cutting off an entire face to spite the nose, is frustrating. In *Skilling*, as the majority correctly pointed out, the *core* purpose of § 1346 was to prohibit bribery and kickback schemes. However vague the statute may have been with regard to the actions of Skilling, Black, and Weyhrauch, surely it is not vague with regard to these core crimes. Thus, why should it be unconstitutional to secure convictions of those core crimes? To wipe out the statute entirely because prosecutors ventured beyond its established territory seems to be overkill.

While allowing courts greater review of charging decisions may be desirable, it must be done carefully. Some kind of early judicial review of whether a proposed prosecution fits a statute's purposes could encourage better prosecutorial choices. True, there are powerful reasons for giving prosecutors charging discretion, including a respect for the executive's role in the constitutional scheme, prosecutors' greater knowledge of the facts of a crime, and the executive's responsiveness

---

[90] *Skilling*, 130 S. Ct. at 2927–28 (alteration in original) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)) (internal quotation mark omitted).

[91] *Id.* at 2928.

[92] *See id.* at 2939 (Scalia, J., concurring in part and concurring in the judgment) (citing *id.* at 2931 (majority opinion)).

[93] *See id.* at 2938–40.

[94] *Id.* at 2940.

to the electorate.[95] But judicial review of executive action in other areas of the law[96] has found a balance — if not perfect, at least functional — between deference to executive expertise and court-imposed fidelity to the public. Allowing a form of gentle, very deferent judicial review of prosecutorial charging decisions to determine the decisions' harmony with legislative purposes could likewise benefit the public by avoiding the problems of "not 'prototypical'"[97] prosecutions set out above. Further, this form of judicial review would give judges a tool to weed out such prosecutions early in the process, rather than resorting to the void-for-vagueness doctrine after the costs of trial have already been spent. Until such a change in the law, however, review as it was done in *Skilling* will languish as a post hoc remedy for a problem that judges should be able to prevent before it begins.

D. Patent

Patent-Eligible Subject Matter. — Of the four categories of patent-eligible subject matter under section 101 of the Patent Act[1] — process, machine, manufacture, and composition of matter — the first has proved the most difficult for courts to define. Several requirements have been proposed — that a "process" must not be an abstract idea;[2] that it must be tied to a particular machine or else transform an article into a different state or thing (the "machine-or-transformation" (MOT) test);[3] and that it must not be a method of doing business.[4] Last Term, in *Bilski v. Kappos*,[5] the Supreme Court held that a process claim for a method of hedging risk was an unpatentable "abstract idea" but stressed that there is no categorical exception for business methods under the Patent Act, nor is the MOT test the exclusive test for patent eligibility of process claims. The Court made a wise policy decision

---

[95] *See, e.g.*, Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379–81 (2d Cir. 1973).

[96] *See, e.g.*, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[97] *Skilling*, 130 S. Ct. at 2934 (quoting Brief for United States at 49, *Skilling*, 130 S. Ct. 2896 (No. 08-1394)).

[1] Patent Act of 1952, 35 U.S.C. §§ 1–376 (2006). Section 101 of the Patent Act provides: "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." *Id.* § 101. Section 100(b) of the Act further explains that "[t]he term 'process' means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material." *Id.* § 100(b).

[2] *See, e.g.*, Parker v. Flook, 437 U.S. 584, 589 (1978).

[3] *See* Diamond v. Diehr, 450 U.S. 175, 184 (1981) ("Transformation and reduction of an article 'to a different state or thing' is the clue to the patentability of a process claim that does not include particular machines." (quoting Gottschalk v. Benson, 409 U.S. 63, 70 (1972)) (internal quotation marks omitted)); *In re* Bilski, 545 F.3d 943, 954–55 (Fed. Cir. 2008) (en banc).

[4] *See, e.g.*, *Bilski*, 545 F.3d at 998 (Mayer, J., dissenting); Alan Devlin & Neel Sukhatme, *Self-Realizing Inventions and the Utilitarian Foundation of Patent Law*, 51 WM. & MARY L. REV. 897, 927–36 (2009).

[5] 130 S. Ct. 3218 (2010).