

COMMENTS

CHARTING VAGUENESS SHOALS THROUGH THE NARROWING OF CORRUPTION STATUTES

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INTRODUCTION

Imagine living in a society where the laws on the books are only as explicit as “Behave well in public spaces, or be subject to a fine.” When in public spaces you would likely curtail all behavior that you might possibly think could be considered unruly. In this same society you might also imagine, or even expect, that those enforcing the laws will have expansive discretion to determine who will be subject to prosecution for violating the condition of “behaving well.”¹ Now imagine serving in public office, and being prohibited from “Acting against the interests of constituents.” At first you might think this is fairly straightforward, and you should conform your conduct to that of a “good” public official. But very quickly you would find yourself in a situation where you must act in a way that enrages or disappoints a segment of your constituency. Did you just violate the law? What constitutes “acting,” what defines constituent “interests,” and who even are these constituents? This law prohibiting conduct is so vague that just about any action might be a violation of the law.

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¹ See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 47–51 (1999) (detailing an ordinance prohibiting gang members from loitering in public together or with others); *Kolender v. Lawson*, 461 U.S. 352, 359–61 (1983) (describing an ordinance lacking sufficient detail and giving police broad discretion to determine “credible and reliable” identification); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (declaring vagrancy statute void); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (detailing an ordinance stating “[i]f three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person who should happen to pass by.”).

In the United States, these sorts of broad criminal statutes are often found unconstitutional.² These broad and under-defined statutes fail under a well-developed vagueness doctrine. In the United States, criminal statutes must have an ascertainable standard of guilt, or they will fall to the vagueness doctrine.³ This is the premise of the “void-for-vagueness doctrine,” which is grounded in the due process clauses of the Fifth and Fourteenth Amendments.⁴ However, if the statute can be saved by a narrow construction, the court will read the statute narrowly and allow the law to stand in its curtailed form.⁵

In the context of government and politics, vague corruption statutes coupled with broad prosecutorial discretion pose a unique issue.⁶ Federal

² See, e.g., *Morales*, 527 U.S. at 60 (holding that the ordinance prohibiting gang member loitering was unconstitutionally vague because it failed to provide minimal guidelines to govern enforcement); *Kolender*, 461 U.S. at 359–61 (finding that an ordinance requiring loiterers to present “credible and reliable” identification was unconstitutionally vague because it gave officers too much discretion); *Papachristou*, 405 U.S. at 162 (holding a vagrancy ordinance unconstitutionally vague because it was too general and encouraged “arbitrary and erratic” enforcement); *Coates*, 402 U.S. at 614 (finding an ordinance mandating that groups of three or more people meeting on a sidewalk must not annoy police or passersby unconstitutionally vague because it creates an “unascertainable standard”). But see M. Katherine Boychuk, *Are Stalking Laws Unconstitutionally Vague or Overbroad?*, 88 NW. U. L. REV. 769, 769–71 (1994) (questioning the viability of stalking laws given the void-for-vagueness doctrine); Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 245 (2017) (arguing that teen sex statutes are overly-broad and under-defined, but are permissible despite vagueness doctrine considerations); Orin S. Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 MINN. L. REV. 1561, 1561–62 (2010) (describing the vague nature of 18 U.S.C. § 1030 and its permissibility despite vagueness doctrine).

³ *Williams v. United States*, 341 U.S. 97, 100 (1951); see, e.g., *Johnson v. United States*, 135 S. Ct. 2551, 2557–58 (2015) (finding the residual clause of 18 U.S.C. § 924(e)(2)(B) unconstitutionally vague because it has no ascertainable standard of guilt); *Palmer v. City of Euclid*, 402 U.S. 544, 544–45 (1971) (per curiam) (finding that a city’s “suspicious persons ordinance” was unconstitutional because it lacked an ascertainable standard of guilt); see also John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 253 (2002) (outlining the centrality of ascertainability to vagueness doctrine).

⁴ U.S. CONST. amends. V, XIV.

⁵ See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 662 (2012) (finding that the Court must construe the minimum-coverage provision of the Affordable Care Act as a tax and not a mandate-with-penalty if they wished to save it from constitutional infirmity); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 841 (1986) (quoting *Aptheker v. Sec’y of State*, 378 U.S. 500, 515 (1964)) (“[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it.”). See generally Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181 (2009). While courts can read statutes narrowly, they only do so if the narrow construction is readily apparent. See *Boos v. Barry*, 485 U.S. 312, 330 (1988) (“[F]ederal courts are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent.”).

⁶ Broad statutes criminalizing actions associated with government and politics may be vulnerable to

corruption statutes have been consistently challenged for vagueness, and the Court has frequently narrowed the apparent scope of corruption statutes in order to address vagueness issues and avoid complete invalidation of the statute. While the courts work to save vague statutes from themselves if they are able, they do not go so far as to read something into the statute that is clearly not there.⁷ Where do courts draw the line between vague and sufficiently specific?

In *Skilling v. United States*, Justice Ginsburg writing for the majority stated, “[c]onstruing the honest-services statute to extend beyond that core meaning, we conclude, would encounter a vagueness shoal.”⁸ Through this action, the Court found the statute at hand to be permissible on a narrow interpretation, because to read it any broader would bring it up against a shoal that would make the law impermissibly vague.

The Court has established no definitive line separating vague statutes from those that are sufficiently specific. Rather than draw an explicit line, it appears that the Court has navigated around shoals it wishes to not brush against. In this Comment, I will follow the narrowing of federal corruption statutes in an effort to chart these “vagueness shoals”⁹ that courts use to box-in otherwise vague laws. In Part I¹⁰ I will explore the history of the vagueness doctrine and how it has evolved into what it is today. This conversation follows with what the courts consider “vague” and what their options are upon deciding that a statute is too vague. There is also an account of why it matters to know how the courts handle vague criminal statutes, particularly when the subject matter deals with public corruption.

Following a discussion on the vagueness doctrine, Part II will navigate relevant statutes that shed light on the Court’s process of finding vagueness shoals.¹¹ The statutes being considered are the honest-services statute,¹² the

abuse for political gain. See, e.g., Abby Ohlweiser, *How Dinesh D’Souza’s Indictment Became ‘Proof’ of Obama’s Conservative Inquisition*, ATLANTIC (Jan. 24, 2014), <https://www.theatlantic.com/politics/archive/2014/01/how-dinesh-dsouzas-indictment-became-proof-obamas-conservative-inquisition/357351/> (discussing the allegations that President Obama targeted Republican and Conservative critics through federal indictments).

⁷ See *Schor*, 478 U.S. at 841 (“[The Supreme] Court will often strain to construe legislation so as to save it against constitutional attack, [but] it must not and will not carry this to the point of perverting the purpose of a statute . . .”).

⁸ 561 U.S. 358, 368 (2010).

⁹ Throughout this Comment, I use “vagueness shoals,” “shoals of vagueness,” and “shoals” in reference to practices, rights, and areas that the Supreme Court will not allow vague statutes to exist within or govern.

¹⁰ See *infra* Part I.

¹¹ See *infra* Part II.

¹² 18 U.S.C. § 1346 (2012).

bribery statute,¹³ the extortion statute,¹⁴ and the gratuities statute.¹⁵ Each of these sections will explore the background information surrounding the history and use of these statutes and will show how this connects to the process of charting vagueness shoals.

Part III is an assessment of the current state of statute narrowing in the corruption context and explains the benefits of definitively marking the shoals of vagueness.¹⁶ This Part also discusses recent cases dealing with public corruption – notably the corruption case against United States Senator Bob Menendez and the overturning of corruption convictions of former United States House Representative William J. Jefferson. This Part also discusses vagueness concerns regarding the Foreign Corrupt Practices Act and considers how a potential “void-for-vagueness” challenge might be resolved in light of the identified vagueness shoals.

I. THE VAGUENESS DOCTRINE

To establish the framework for the exploration of the narrowing of corruption statutes, a discussion on the history and the subsequent expansion of vagueness will be discussed below. The discussion will then turn to theoretical efforts to separate uncertain and vague from precise and permissible.

A. *History of Vagueness*

The vagueness doctrine stems directly from the Due Process Clauses in the Constitution.¹⁷ If a law does not give an average citizen sufficient

¹³ *Id.* at § 201(b). This provision of the United States Code contains multiple sections on bribery. The discussion in this Comment focuses on the narrowing of the term “official act” as it appears throughout the bribery statutes.

¹⁴ *Id.* at § 1951.

¹⁵ *Id.* at § 201(c)(1)(A). The discussion of gratuities throughout this Comment is centered on the Court’s definition of the quid pro quo requirement.

¹⁶ See *infra* Part III.

¹⁷ See *Screws v. United States*, 325 U.S. 91, 149 (1945) (Roberts, J., dissenting) (“As misuse of the criminal machinery is one of the most potent and familiar instruments of arbitrary government, proper regard for the rational requirement of definiteness in criminal statutes is basic to civil liberties. As such it is included in the constitutional guaranty of due process of law.”); see also PAUL H. ROBINSON & MICHAEL T. CAHILL, *CRIMINAL LAW* 65 (2d ed. 2012) (“The *vagueness* prohibition is rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution.”). The legality principle acts in a formal way to dictate the process of criminalizing actions. *Id.* at 64 (stating that doctrines within the legality principle define “*who* may create criminal offenses . . . *how* they must do so . . . and *when* the government may punish violations” as opposed to “*what*” may be criminalized). The vagueness doctrine makes up one of the pillars of

information to know what conduct is prohibited or what penalty will follow, then their ability to conform their actions to the law is inhibited.¹⁸

The vagueness doctrine in the United States is used to void laws that a court deems to be too uncertain or impermissibly vague. Turning back to the example given in the Introduction about “behaving well in public spaces,” if someone were arrested under this law, their defense would likely rest on the vague language of the statute and the inability to conform their behavior to an ill-defined standard. A law as vague as the one described would likely be found unconstitutionally vague.

A study of the history of the doctrine shows that it was initially used in conjunction with First Amendment law as “a way to invalidate laws that might chill protected speech.”¹⁹ However, the doctrine expanded beyond its initial use as a supplement to protect free speech. Vagrancy laws were laws passed by cities that criminalized common street behavior and granted wide discretion to police to enforce those laws.²⁰ In the tumultuous times of the Cold War and the Civil Rights Movement, these vagrancy laws led to the widespread arrest and prosecution of persons the police found undesirable in the community.²¹ The expansion of the vagueness doctrine to laws other than those associated with chilling protected speech was instrumental in overturning vagrancy laws.²² Vagueness arguments were

the legality principle, a principle that defines criminal law in the United States. *Id.*

¹⁸ See *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)) (“[V]oid for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.”).

¹⁹ RONALD JAY ALLEN ET AL., *CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL* 90 (2d ed. 2011); see *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (“If . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.”); *Smith v. California*, 361 U.S. 147, 151 (1959) (citing *Winters v. New York*, 333 U.S. 507, 509–10, 517–18 (1948)) (“[T]his Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech”); see, e.g., *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871–72 (1997) (identifying particular concern over the Communications Decency Act of 1996 because its vagueness poses a chilling effect on free speech).

²⁰ See Risa Goluboff, *The Forgotten Law that Gave Police Nearly Unlimited Power*, *TIME* (Feb. 1, 2016), <http://time.com/4199924/vagrancy-law-history/> (describing the history of vagrancy laws and their use by law enforcement).

²¹ *Id.* (describing the vagrancy laws underlying the 1949 arrest of Isidore Edelman, a “middle-aged, Russian-born, communist-inclined soapbox orator” in Los Angeles, CA, and the arrest of Margaret Papachristou, a “blond, statuesque, twenty-three [year old] . . . Jacksonville native” who was out with two black men in Jacksonville, FL 20 years later).

²² See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 64 (1991) (voiding an ordinance for lack of clarity on what actions were being criminalized and for legislature’s failure to provide guidelines

also used in other contexts to challenge laws targeting individuals who were deemed to be undesirable members of their communities.²³

B. *What Constitutes Vague?*

The process of deciphering vague from permissible is one that is shrouded in mystery and blurred lines. In his dissenting opinion in *Winters v. New York*, Justice Frankfurter described the vagueness doctrine as itself, vague.²⁴ The lack of a defining principle for vagueness likely stems from the fact that it comes from flexible language.²⁵ The common explanation given for the vagueness doctrine is that criminal statutes cannot be “so vague that individuals of common intelligence must guess at its meaning.”²⁶

This may lay the groundwork, but it is hardly sufficient by itself in guiding courts to determine whether laws are vague. To complicate matters more, this is not the only principle guiding vagueness. Writing for the majority in *Nash v. United States*, Justice Holmes stated, “[T]he law is full of instances where a man’s fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.”²⁷ This muddies the water and further complicates vagueness, but also serves as a realistic

for law enforcement); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (voiding a vagrancy statute due to its vagueness and utility as a discriminatory prosecutorial tool); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (voiding a law that prohibits three or more people from gathering on the sidewalk and engaging in behavior that a passerby might find annoying); Fred Barbash, *Supreme Court Strikes Down Vagrancy Law*, WASH. POST (May 3, 1983), https://www.washingtonpost.com/archive/politics/1983/05/03/supreme-court-strikes-down-vagrancy-law/a3fc2b52-f0f2-4f42-82a0-0b64836fe685/?utm_term=.a622b46a8105 (discussing the Court’s voiding of a San Diego, California vagrancy ordinance).

²³ See, e.g., *Reynolds v. Tennessee*, 414 U.S. 1163, 1168–69 (1974) (Douglas, J., dissenting from denial of certiorari) (arguing that a criminal statute used to arrest a protester of the Vietnam war was unconstitutionally vague because it failed to give fair notice of the criminalized conduct); *Bouie v. City of Columbia*, 378 U.S. 347, 348–51 (1964) (holding that a South Carolina criminal trespass statute being challenged by a black patron who was arrested for sitting in a segregated lunch counter was vague and violated the Due Process Clause); *Dennis v. United States*, 341 U.S. 494, 495–98 (1951) (describing a law criminalizing the spread of communist ideologies and the subsequent legal challenge).

²⁴ 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting) (stating “[Vagueness]’ is not a quantitative concept. It is not even a technical concept of definite components. It is itself an indefinite concept.”); see also Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL’Y & ETHICS J. 255, 259, 261 (2010) (arguing that the void-for-vagueness doctrine as applied by the Supreme Court lacks a definitive standard).

²⁵ It is important to note, however, that the flexible language of the vagueness doctrine allows it to adapt to various factual situations.

²⁶ *Gold Diggers, LLC v. Town of Berlin*, 469 F. Supp. 2d 43, 54 (D. Conn. 2007) (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

²⁷ 229 U.S. 373, 377 (1913).

view of the complexity of the doctrine.²⁸ It raises questions as to when a law that requires an average citizen to estimate what behavior is criminalized becomes insufficient due to lack of guiding principles. Vagueness is also not considered in a vacuum, but is considered in a context where it is presumed that the statutes passed by Congress are valid.²⁹

While vagueness guidelines are rather murky, the Supreme Court has spoken with clarity about vagueness in certain contexts. The West Virginia Supreme Court of Appeals in *State v. Flinn* recognized the lack of detailed guidelines governing vagueness, but found that the United States Supreme Court had been clear in defining vagueness in terms of “First Amendment and similarly sensitive constitutional rights.”³⁰

While laws dealing with certain rights are interpreted from the face of the statute, others require a deeper look to determine their certainty or uncertainty.³¹ In addition to being facially vague, statutes can also be vague as applied.³² A facially vague statute is one that is unconstitutional in all of its applications.³³ Alternatively, laws can be challenged on the basis that they are vague as-applied, meaning they are unconstitutional given their application to a specific circumstance.³⁴ This dichotomy in how laws can be

²⁸ For example, fraud statutes have to be sufficiently general to encompass a wide variety of schemes that are fraudulent in nature, but which are not described with specificity in the statute. *See, e.g.*, 18 U.S.C. § 1343 (2012) (referring to “any scheme or artifice to defraud” as opposed to describing specific actions).

²⁹ *See* *United States v. Nat’l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963) (“The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.”).

³⁰ *State v. Flinn*, 208 S.E.2d 538, 543 (W. Va. 1974) (citing *Thornhill v. Alabama*, 310 U.S. 88, 96 (1940)) (“Statutes governing potential First Amendment and similarly sensitive constitutional rights will be strictly tested for certainty by interpreting their meaning from the face of the statutes.”); *see also* *Smith v. Goguen*, 415 U.S. 566, 573 (1976) (“Where a statute’s literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts.”).

³¹ *See Nat’l Dairy Prods. Corp.*, 372 U.S. at 32–33 (upholding a statute as sufficiently certain by looking beyond the face of the statute and evaluating its application to the defendant’s situation).

³² *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994) (“Conventional wisdom holds that a court may declare a statute unconstitutional in one of two manners: (1) the court may declare it invalid on its face, or (2) the court may find the statute unconstitutional as applied to a particular set of circumstances.”).

³³ *See* *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (“[A] plaintiff can only succeed in a facial challenge by ‘establish[ing] that no set of circumstances exists under which the Act would be valid,’ i.e., that the law is unconstitutional in all of its applications.”).

³⁴ *See* *Johnson v. United States*, 135 S. Ct. 2551, 2580 (2015) (Alito, J., dissenting) (“It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms

ruled as vague is helpful in that it places vagueness considerations in one of two buckets, but it does not necessarily help in defining what vagueness looks like. The Court has undergone efforts to identify when vagueness challenges must be considered facially or as-applied, and has based that determination on whether the challenged law involves a First Amendment right.³⁵

There are some important additional considerations that help mark what may or may not be vague. One such addition is due process only requires that the law give “sufficient warning” so that people avoid that which is prohibited.³⁶ Furthermore, it takes a lawyer’s conclusion after extensive research to deem a law as vague, not the research or the understanding of the common citizen.³⁷ Given the potential need for a trained lawyer to decipher whether a law is vague or not, this doctrine has been described as disconnected from the lives of ordinary citizens.³⁸ This removal of notice requirements from ordinary life has led to the argument that vagueness doctrine inquiries should be in terms of “limiting arbitrary and discriminatory enforcement by police officers and prosecutors” as opposed to addressing fair notice.³⁹ In fact, the Court has identified that the prevailing factor in vagueness considerations is the ability for discriminatory application as opposed to concerns over fair notice.⁴⁰ By

must be examined’ on an as-applied basis.” (internal quotation marks and citation omitted) (quoting *United States v. Mazurie*, 419 U.S. 544, 550 (1975)).

³⁵ *See id.*

³⁶ *Rose v. Locke*, 423 U.S. 48, 50 (1975) (per curiam); *see also Golicov v. Lynch*, 837 F.3d 1065, 1075 (10th Cir. 2016) (holding that the residual definition of “crime of violence” under the Immigration and Nationality Act was unconstitutionally vague because it failed to provide sufficient warning of prohibited conduct); *United States v. Sun & Sand Imports, Ltd., Inc.*, 725 F.2d 184, 187 (2d Cir. 1984) (finding that the relevant standard under vagueness was whether the Flammable Fabrics Act gave sufficient warning and that definitions promulgated under the Act met the standard); *United States v. Speltz*, 733 F. Supp. 1311, 1312 (D. Minn. 1990) (finding that a statute’s failure to define “plant” in its regulation of the growth of marijuana plants did not render it unconstitutionally vague because it still provided fair warning).

³⁷ *See Rose*, 423 U.S. at 50 (“Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.”).

³⁸ *See Robert Batey, Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL’Y & L. 1, 5 (1997) ([T]here is something ‘inescapably fictive’ about the [vagueness inquiry regarding notice]; it focuses on a sort of ‘lawyer’s notice’ that seems far removed from ordinary life.” (citing John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 211 (1985))).

³⁹ *Id.* (citing *Kolender v. Lawson*, 461 U.S. 352, 355–57 (1983); *Smith v. Goguen*, 415 U.S. 566, 574 (1974); *Columbia Nat. Res., Inc. v. Tatum*, 58 F.3d 1101, 1105 (6th Cir. 1995); *StreetWatch v. Nat’l R.R. Passenger Corp.*, 875 F. Supp. 1055, 1062 (S.D.N.Y. 1995)).

⁴⁰ *See Goguen*, 415 U.S. at 574 (stating “perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.”); *see also Hill v. Colorado*,

focusing their concerns with vague laws to the issue of arbitrary enforcement, the Court has taken a step towards narrowing vagueness doctrine and providing guidance on what in fact constitutes a vague statute.

C. Options with Vague Statutes

Courts can save a vague statute from itself rather than void it on constitutional grounds, and not only do they have the power to do so,⁴¹ they have the duty to do so if possible.⁴² When faced with these statutes, courts decide between throwing the entire statute out or construing the statute narrowly, thus allowing it to stand, albeit in a tailored fashion.⁴³ This process of narrowing is not an open delegation of legislative power,⁴⁴

530 U.S. 703, 732–33 (2000) (finding a statute sufficiently specific by evaluating whether the statute provided law enforcement adequate guidance inhibiting discriminatory application). In its earlier opinions associated with unconstitutionally vague laws, the fair notice requirement was a constant thread throughout all of the Court's considerations. However, this shifted when the Court began using vagueness doctrine to overturn vagrancy laws. See *Lockwood*, *supra* note 24 at 272 (detailing the Court's decision to switch focus from public notice concerns to arbitrary enforcement concerns).

⁴¹ See *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982) (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)) (“When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction.”); *United States v. Thirty-seven Photographs*, 402 U.S. 363, 368–70 (1971) (“[I]t is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))).

⁴² See, e.g., *Ferber*, 458 U.S. at 769 n.24 (“When a federal court is dealing with a federal statute challenged as overbroad, it *should*, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction.” (emphasis added)); *Thirty-seven Photographs*, 402 U.S. at 369 (“When the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” (internal quotation marks omitted) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)) (noting *accord* with *Schneider v. Smith*, 390 U.S. 17, 26–27 (1968) (finding that the Court should read a challenged statute narrowly to avoid constitutional questions))).

⁴³ See *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 571 (1973) (“[The Court's] task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations.”); see also *Parker v. Levy*, 417 U.S. 733, 777 (1974) (Stewart, J., dissenting) (stating that facially vague statutes can be saved by a “narrow[] judicial construction.”).

⁴⁴ *But see* *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1485–86 (2018) (Thomas, J., concurring) (casting doubt on the authority of courts to excise or sever unconstitutional portions of statutes in order to allow the constitutional portions to stand); *Skilling*, 561 U.S. at 423–24 (Scalia, J. dissenting) (“It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government” (internal quotation marks omitted) (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875))).

but rather an opportunity for the judiciary to fashion the law that was passed into a state where it does not violate any constitutional provisions.⁴⁵ To develop this narrowed interpretation, courts turn to the various canons of interpretation,⁴⁶ where legislative history carries particular importance.⁴⁷

Some scholarship suggests that the Court throws out statutes under the vagueness doctrine in order to create a “buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms.”⁴⁸ This scholarship looks beyond *how* courts narrow statutes, and asks *when* courts make the determination that a narrowing must occur. The central argument, which will be explored in Parts below, is that the Court throws out statutes that venture too close to the freedoms identified in the Bill of Rights. But beyond those freedoms, there are other areas that the Court also wants to protect—identified below as vagueness shoals.⁴⁹

D. Why it Matters to Know the Shoals of Vagueness

Before exploring the narrowing of corruption statutes in order to find the vagueness shoals the Court considers, it is important to note the relevance of the vagueness doctrine in the context of public corruption statutes. Corruption is a pervasive issue and is a concern shared by a large segment of the United States’ citizens.⁵⁰ It is a concern that has been around since the formation of the American political system and has shaped the framework of our democracy.⁵¹ Given the proximity of corruption to politics, vague statutes that grant wide discretion to police and prosecutors are a legitimate cause for concern, because these vague

⁴⁵ See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems . . .”).

⁴⁶ See generally Larry M. Eig, Cong. Research Serv., 7-5700, *Statutory Interpretation: General Principles and Recent Trends* (2014).

⁴⁷ See *id.* at 45–46; see also Quintin Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 U. KAN. L. REV. 1, 5 (1954) (finding that the use of legislative history has greatly expanded in the federal courts).

⁴⁸ Student Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75 (1960).

⁴⁹ See *infra* Part III. A.

⁵⁰ See generally ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED* (2014); 75% in U.S. See *Widespread Government Corruption*, GALLUP (Sept. 19, 2015), <http://news.gallup.com/poll/185759/widespread-government-corruption.aspx> (describing the high levels of corruption that American citizens perceive in their government).

⁵¹ See, e.g., THE FEDERALIST NO. 68, at 393 (Alexander Hamilton) (Isaac Kramnick ed. 1987) (stating that at the Constitutional Convention, “[n]othing was more to be desired than that every practicable obstacle should be opposed to . . . corruption.”).

statutes could provide the basis for political prosecution and even greater levels of corruption.⁵² While vagueness doctrine is developing in other contexts,⁵³ this comment focuses solely on vagueness in the corruption context because of its highly political nature.

The Supreme Court has more closely scrutinized laws that might infringe upon First Amendment rights and other sensitive freedoms guaranteed by the Constitution.⁵⁴ Corruption statutes have the potential to impinge on sensitive rights and freedoms and prevent the expression of political dissent or unpopular social views.⁵⁵

Imagine a Democratic wave in an upcoming presidential election, in which the Democratic Party regains control of both houses of Congress and the presidency. If this new Democratic government proceeded to write and pass vague corruption laws and enforce them discriminately against their Republican colleagues, they could seriously undermine democracy and cripple the chances of any future challengers. The ability for one political party to use discriminatory prosecutorial discretion made available by vague statutes is a troubling thought.

While a scenario as extreme as the one described above is unlikely to occur,⁵⁶ it is worth noting that Congress does indeed pass what some might call “vague” laws quite often. While this vagueness might not reach the judicial standard of vagueness, the bills that leave Congress can, at times, be light on the details. There are numerous reasons why this is the case, and it’s a mixed bag of good and bad justifications. One reason Congress passes vague laws lacking detail comes from a practical governance point of view. By proposing legislation that is not too technical or down in the weeds, congressmen have a better chance of gaining their colleagues’ support and

⁵² See TEACHOUT, *supra* note 50, at 11 (“[B]roadly interpreted corrupt intent laws are troubling [because] . . . they can be used to punish political enemies.”).

⁵³ See *Sessions v. Dimaya*, 138 S. Ct. 1204, 1210–11 (2018) (considering the vagueness doctrine as it applies to the Immigration and Nationality Act and the clause defining “crime of violence.”).

⁵⁴ See *supra* note 30; see also *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (stating that “significant encroachments on First Amendment rights of the sort that compel[] disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest” but instead must withstand “exacting scrutiny.”).

⁵⁵ See *supra* notes 21–23 and accompanying text; see also TEACHOUT, *supra* note 50, at 7 (arguing that Supreme Court framework has placed civic interest in blocking corruption in opposition to First Amendment speech rights).

⁵⁶ But see Ohlheiser, *supra* note 6; Allison R. Hayward, Column, *The IRS Can Still Silence Political Dissent*, USA TODAY (June 9, 2015, 6:37 AM), <https://www.usatoday.com/story/opinion/2015/06/09/tax-regulation-irs-political-organizations-column/28477359/> (last updated June 11, 2015, 10:49 AM) (describing the IRS under a Democratic administration utilizing vague wording to target and delay Tea Party applications for tax exempt status).

seeing the bill become law. Rather than propose a bill with dozens of stumbling blocks that might trip up potential supporters, an easier path forward is to write a bill with a high-level of generality that avoids the sticky issues that might prevent others from supporting it. And in following this process, members can pass a vague bill that receives broad support across parties and then portray the legislation as a victory for their side and their set of views.

There are other justifications for Congress' propensity to draft and enact vague legislation. Another consideration is the appetite for Congress to police its own behavior, or the lack thereof. Regarding public corruption, the criminal statutes that are passed will undoubtedly apply to Congress and regulate the way they campaign and govern. Tasking Congress with criminalizing some of the behaviors that Members themselves engage in regularly is potentially too tall an order.⁵⁷ Again, rather than get down into the details, some might deem it best to stay high-level and not risk explicitly criminalizing some of the very same practices they themselves partake in.

Not all justifications have negative intentions. Corruption threatens democracy,⁵⁸ and Congress has attempted to root it out from the American political system through various laws, including those discussed in this Comment. One of the strongest justifications for passing a vague law in this context is that Congress is essentially engaged in a balancing act. It does not want to write criminal statutes that are so specific that they criminalize the behaviors of a small segment of the population in, perhaps, a discriminatory way. But it also does not want to pass laws so vague that there is truly no guiding principle in how to apply it or enforce it. This leaves Congress writing legislation that fits somewhere in the middle. Recognizing that people are adaptive and will try to find ways to operate outside the scope of the law, passing a broader statute can ensure that all

⁵⁷ See, e.g., Natalie Andrews, *Anti-Sexual Harassment Legislation Governing Lawmakers Stalled in Congress*, WALL ST. J. (July 17, 2018, 3:54 PM), <https://www.wsj.com/articles/anti-sexual-harassment-legislation-governing-lawmakers-stalled-in-congress-1531857273?ns=prod/accounts-wsj> (discussing the issues Congress is facing in reconciling two bills meant to root out sexual harassment in Congress); Bradley A. Smith, *Why Campaign Finance Reform Never Works*, WALL ST. J. (Mar. 19, 1997, 12:01 AM), <https://www.wsj.com/articles/SB858722905424003000> (“[W]hen it comes to political regulation and criticism of government, legislators have strong vested interests that lead them to mistake what is good for them with what is good for the country.”).

⁵⁸ See, e.g., International Anti-Corruption and Good Governance Act of 2000, Pub. L. No. 106-309, § 202, 114 Stat. 1090 (codified as amended at 22 U.S.C. §§ 2151–52 (2000)) (“Widespread corruption endangers the stability and security of societies, undermines democracy, and jeopardizes the social, political, and economic development of a society.”).

the behaviors Congress wishes to criminalize will fall under the spectrum.

Related to the concerns about Congress passing vague statutes is the concern that the unelected federal judiciary will fill in the missing details and essentially create laws.⁵⁹ By leaving statutes open and vague, the legislature is granting the courts the power to fill in the gaps and substitute their beliefs for those of the elected representatives charged with creating laws.⁶⁰

II. THE NARROWING OF CORRUPTION STATUTES

The sections below will provide discussion on the background and creation of federal corruption statutes and how the courts have narrowed their scope throughout time. The statutes discussed are the honest services statute,⁶¹ the federal bribery statute,⁶² the extortion statute,⁶³ and the gratuities statute.⁶⁴

A. *Honest Services*

This section discusses honest services, its history, and how the courts have narrowed the statute. Before discussing the narrowing of honest services, the sections below will chart the creation of honest services and its official codification in the law. The discussion will then analyze the case law throughout the statutes history to discover what shoals the courts have identified, explicitly or implicitly, to help narrow the law.

1. *History of Honest Services*

Honest services fraud has a history intimately tied to that of the mail and wire fraud statutes.⁶⁵ The mail and wire fraud statutes, codified as 18 U.S.C. §§ 1341 and 1343, respectively, have long been effective tools for

⁵⁹ See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 407–08 (2008) (arguing that the current scholarship surrounding the nondelegation doctrine largely ignores the judiciary, the third branch of government); see also Sasha Volokh, Opinion, *How Ambiguous a Statute may Congress Pass?*, WASH. POST (Aug. 31, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/31/how-ambiguous-a-statute-may-congress-pass/?utm_term=.4587486890d4 (detailing the conflict over congressional delegations to the judiciary).

⁶⁰ Lemos, *supra* note 59, at 436–38.

⁶¹ 18 U.S.C. § 1346 (2012).

⁶² *Id.* § 201(b).

⁶³ *Id.* § 1951.

⁶⁴ *Id.* § 201(c)(1)(A).

⁶⁵ *Id.* §§ 1341, 1343.

prosecutors seeking to target fraud and corruption.⁶⁶ A relevant element in both mail and wire fraud is a “scheme or artifice to defraud,”⁶⁷ which is a broad term that enabled courts to read in other duties and apply the statutes to schemes to defraud people out of honest services.⁶⁸ This expansion of the scope of the mail and wire fraud statutes to include honest services eventually reached the Supreme Court.

In the Supreme Court case *McNally v. United States*, the government brought charges against a Kentucky official who, in selecting the state insurance agent, devised a plan where he would receive kickbacks through money paid to companies he partially owned.⁶⁹ The case was brought on the argument that he effectively defrauded Kentuckians by depriving the citizens of their intangible right that the government’s business be conducted in an honest manner.⁷⁰ The Court, however, did not agree with the assessment that the statute protected the intangible right of honest services.⁷¹ Instead, the Court found that the mail fraud statute was intended to protect people from “schemes to deprive them of their money or property.”⁷² With this finding, the Court eliminated the concept of the intangible right to honest services and stated that if Congress wanted the statute to go further than just money or property, then it needed to “speak more clearly than it has.”⁷³

Congress acted on this statement and passed what is now the honest services statute the following year.⁷⁴ The statute sought to clarify what might have not been clear before, that a scheme to defraud could also

⁶⁶ See, e.g., Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 772 (1980) (describing the mail and wire fraud statutes as effective tools of prosecutors to attack fraud); Christopher M. Matthews, *Prosecutors Broadly Use Mail-Fraud, Wire-Fraud Statutes*, WALL ST. J. (June 9, 2015, 1:26PM), <https://www.wsj.com/articles/prosecutors-broadly-use-mail-fraud-wire-fraud-statutes-1433870788> (discussing the use of the mail and wire fraud statutes as a strong tool for prosecutors).

⁶⁷ See 18 U.S.C. § 1341 (2012) (“Whoever, having devised or intending to devise any *scheme or artifice to defraud . . .*” (emphasis added)); see also *id.* § 1343 (“Whoever, having devised or intending to devise any *scheme or artifice to defraud . . .*” (emphasis added)).

⁶⁸ See, e.g., *United States v. Siegel*, 717 F.2d 9, 13–14 (2d Cir. 1983) (holding that the mail and wire fraud statutes applied to private sector honest services and this duty could not be defrauded pursuant to the statutes); *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941) (holding that a scheme to defraud individuals out of public honest services fell within the scope of the mail and wire fraud statutes prohibition on schemes to defraud).

⁶⁹ *McNally v. United States*, 483 U.S. 350, 352 (1987).

⁷⁰ *Id.*

⁷¹ *Id.* at 356.

⁷² *Id.*

⁷³ *Id.* at 360.

⁷⁴ *Skilling v. United States*, 561 U.S. 358, 402 (2010).

include a scheme to defraud an individual of their intangible right to honest services.⁷⁵ Thus, in 1988, Congress created the modern honest services statute in direct reaction to the Court's *McNally* decision.

2. *The Narrowing of Honest Services*

From the *Skilling* decision in 2010 to the *McDonnell v. United States* decision in 2016, the Court has continued to narrow the honest services statute by identifying vagueness shoals that the law cannot run against. The first opportunity the Court had to rule on honest services following the enactment of the government statute in 1988 was in *Skilling*.⁷⁶

In *Skilling*, the charge of honest services fraud was against Jeffrey Skilling, who rose through the ranks of Enron Company to eventually become its CEO.⁷⁷ Soon after becoming CEO, Skilling left the company, and a few months later the company spiraled into financial ruin and declared bankruptcy.⁷⁸ A subsequent investigation of what occurred internally at Enron revealed that company officials were misrepresenting the health of the company and propping up its value, to the eventual detriment of the shareholders.⁷⁹ It was discovered that Skilling himself was involved in these schemes, and he was later charged with honest services fraud.⁸⁰ The Supreme Court in a 9-0 decision on the judgment found that Skilling could not be charged on honest services fraud, because the honest services statute only applied to schemes related to bribes and kickbacks.⁸¹

This limitation of the statute strictly to schemes to defraud others of honest services through bribery or kickbacks was a serious curtailing of the statute. The Court looked to the body of case law prior to the passing of the statute to determine its core application and found that the core consisted of bribery and kickback schemes.⁸²

In parsing down honest services, the Court prevented the doctrine from existing in its expansive manner, and may have revealed a vagueness shoal in the process. By allowing the increased expansion of honest services, the

⁷⁵ 18 U.S.C. § 1346 (2012).

⁷⁶ 561 U.S. 358 (2010).

⁷⁷ *Id.* at 368–69.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 368.

⁸² *Skilling v. United States*, 561 U.S. 358, 407 (2010) (“The ‘vast majority’ of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes.” (quoting *United States v. Runnels*, 833 F.2d 1183, 1187 (6th Cir. 1987))).

Court would grant prosecutors a catch-all tool to bring charges against a wide variety of actors for any number of actions.⁸³ By setting outer limits, the Court made clear their reluctance to allow prosecutors to run wild with the statute and rely on it for all of their prosecutions. In addition to gutting the use of the statute as a catch-all measure, it is not difficult to imagine that the Court saw the potential for an expansive honest services statute with ill-defined outer boundaries to run up against other areas, or shoals, the Court wishes to protect.

Following the decision in *Skilling*, it was affirmed in *United States v. Blagojevich* that honest services only applies to bribery and kickback schemes.⁸⁴ In this case, former Illinois Governor Rod Blagojevich was convicted under a number of corruption statutes for his actions following the election of then-President-elect Barack Obama.⁸⁵ Notably, Blagojevich wanted to engage in political trading with the President-elect by agreeing to appoint Obama's close colleague Valerie Jarrett to his old Senate seat in exchange for Obama either giving him a cabinet position, persuading a foundation to hire him with a substantial salary, or finding someone to donate \$10 million to an organization that Blagojevich would run.⁸⁶

By denying certiorari,⁸⁷ the Supreme Court allowed the Seventh Circuit judgment to stand. In reaching the appellate court decision, Judge Easterbrook described the political trading Blagojevich attempted to engage in as nothing more than permissible political logrolling.⁸⁸ The court reiterated the holding of *Skilling*, but also explicitly found that honest services could not possibly extend to something as essential to effective governance as logrolling.⁸⁹ This opinion takes the Supreme Court's *Skilling* decision and uses it to chart a potential vagueness shoal—the criminalization of actions taken by public officials in their efforts to govern. Allowing the criminalization of political trading by elected officials would give prosecutors the power to disrupt the political process. The *Skilling* decision was an instance where the Court recognized the potential for prosecutors to use the statute as a catch-all for “bad” behavior and decided

⁸³ *Id.* at 420 (Scalia, J., dissenting) (“The possibilities range from any action that is contrary to public policy or otherwise immoral, to only the disloyalty of a public official or employee to his principal, to only the secret use of a perpetrator’s position of trust in order to harm whomever he is beholden to.”).

⁸⁴ 794 F.3d 729 (7th Cir. 2015).

⁸⁵ *Id.* at 733.

⁸⁶ *Id.*

⁸⁷ *Blagojevich v. United States*, 136 S. Ct. 1491 (2016).

⁸⁸ *Blagojevich*, 794 F.3d at 736.

⁸⁹ *Id.*

to constrain how far the law could be applied.

B. Bribery and “Official Act”

The review of the bribery statute below will hone in on “official act” and how the definition has gone from an expansive definition to one more tailored to fit within the Court’s vagueness shoals. The discussion begins with *United States v. Birdsall*,⁹⁰ and then traces the narrowing of “official act” by the Supreme Court and circuit courts. The cases narrowing “official act” discussed below are *United States v. Muntain*,⁹¹ *United States v. Sun-Diamond Growers of California* (“*Sun-Diamond*”),⁹² and *McDonnell v. United States*.⁹³

1. History of Bribery and “Official Act”

Although the American government at its formation had goals of combatting corruption,⁹⁴ they did not pass any bribery statute of general applicability to public officials.⁹⁵ They passed a statute prohibiting bribes related to certain members of the judiciary, customs officers, and tax officers, but did not prohibit bribery of legislators.⁹⁶ It was not until 1853 that the first federal bribery act of general applicability became law.⁹⁷ Even then, Congress included broad jurisdictional language.⁹⁸

In 1962, Congress passed another federal bribery law in an effort to “reformulate and rationalize” criminal statutes dealing with government integrity.⁹⁹ In this law, Congress gave definition to an “official act,”¹⁰⁰ and in subsequent caselaw the Court acknowledged Congress’ intent to create a federal bribery law with broadly applicability.¹⁰¹

⁹⁰ 233 U.S. 223 (1914).

⁹¹ 610 F.2d 964 (D.C. Cir. 1979).

⁹² 526 U.S. 398 (1999).

⁹³ 136 S. Ct. 2355 (2016).

⁹⁴ See THE FEDERALIST NO. 68, *supra* note 51, at 393.

⁹⁵ See TEACHOUT, *supra* note 50, at 105.

⁹⁶ *Id.*

⁹⁷ See *Dixon v. United States*, 465 U.S. 482, 491 n.8 (1984) (citing to Act of Feb. 26, 1853, ch. 81, § 6, 10 Stat. 171).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ “The term ‘official act’ means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.” 18 U.S.C. § 201(a)(3) (1962).

¹⁰¹ See *Dixon*, 465 U.S. at 496 (referring to Congress’ “long standing commitment to a broadly-drafted federal bribery statute [and] its expressed desire to continue that tradition . . .”).

2. *An Expansive “Official Act”*

The case we will consider to set the stage is *United States v. Birdsall*.¹⁰² Birdsall was convicted of illegally selling liquor to Native Americans.¹⁰³ Following his conviction, it was discovered that Birdsall bribed two special officers appointed by the Commissioner of Indian Affairs.¹⁰⁴ These officers were responsible for advising the Commissioner on whether judicial clemency would advance the efforts of the Commission,¹⁰⁵ and by paying these individuals off, Birdsall attempted to influence the message they would send to the Commissioner regarding clemency.¹⁰⁶ While the trial court found that a bribery conviction was not warranted given that the law did not prohibit the acts,¹⁰⁷ the Supreme Court found that Birdsall's giving of money to his co-defendants in an effort to influence them in their official positions was illegal and constituted a bribe.¹⁰⁸ In this case, the Court took an expansive view of “official act” by finding that an official act includes “[e]very action that is within the range of official duty”¹⁰⁹ They also held that an official act need not be explicitly written down as a statute or a regulation, but could be something as informal as a settled or common practice.¹¹⁰ The Court would proceed to narrow this definition in subsequent cases.

3. *The Narrowing of “Official Act”*

While the Supreme Court narrowed “official act” in *Sun-Diamond*¹¹¹ and *McDonnell*, circuit courts engaged in their own narrowing process along the way. One such example is seen in *Muntain*, a 1979 case before the D.C. Circuit.¹¹² Charles Muntain was the Assistant to the Secretary for Labor Relations for the United States Department of Housing and Urban Development (“HUD”).¹¹³ While serving as a public official, he was involved in a scheme to sell group car insurance to labor unions as a benefit

¹⁰² 233 U.S. 223 (1914).

¹⁰³ *Id.* at 229–30.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 228–30.

¹⁰⁷ *Id.* at 227.

¹⁰⁸ *United States v. Birdsall*, 233 U.S. 223, 235–36 (1914).

¹⁰⁹ *Id.* at 230.

¹¹⁰ *Id.* at 231.

¹¹¹ *See infra* notes 120–129 and accompanying text.

¹¹² *United States v. Muntain*, 610 F.2d 964, 965 (D.C. Cir. 1979).

¹¹³ *Id.*

in union contract negotiations.¹¹⁴ To support this scheme, Muntain would travel across the country, often times on official business, and promote the group insurance to labor officials.¹¹⁵ For his efforts, he would receive a portion of any commission that might be generated.¹¹⁶ Muntain was convicted of receiving things of value in exchange for an official act, and appealed to the D.C. Circuit.¹¹⁷

On appeal, the court held that Muntain did not engage in any “official acts” in furtherance of his scheme. The court framed the “official act” inquiry by stating that “the determinative factor is whether Muntain’s actions involved a matter or issue that could properly, by law, be brought before him as Assistant to the Secretary for Labor Relations at HUD.”¹¹⁸ Finding that the promotion of group car insurance is not a matter that could be brought before him in his role, the court concluded that no official act took place.¹¹⁹ Although the Supreme Court in *Birdsall* held that an “official act” includes every action that is within the range of public duty, the Circuit Court narrowed that broad view by engaging in an inquiry of what fell within the public duties of the Assistant to the Secretary for Labor Relations at HUD.¹²⁰

The Supreme Court revisited the issue of “official act” in 1999 when it heard *Sun-Diamond*.¹²¹ Sun-Diamond Growers Association was a trade association that was charged with giving then-Secretary of Agriculture Mike Espy illegal gratuities.¹²² It was alleged that Sun-Diamond had an interest in not only persuading Secretary Espy to adopt a particular regulatory definition that would benefit the association’s members but also getting the Department of Agriculture to convince the Environmental Protection Agency to abandon a proposed rule that would be detrimental to the interests of the association.¹²³ The District Court convicted Sun-Diamond of giving illegal gratuities, the conviction was reversed by the Circuit Court, and the Supreme Court granted certiorari.¹²⁴

¹¹⁴ *Id.* at 966.

¹¹⁵ *Id.* at 966–67.

¹¹⁶ *Id.* at 966.

¹¹⁷ *Id.* at 967.

¹¹⁸ *United States v. Muntain*, 610 F.2d 964, 969 (D.C. Cir. 1979).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 967 n.3 (mentioning four other circuit courts that have engaged in a similar narrowing effort).

¹²¹ *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999).

¹²² *Id.* at 400–01.

¹²³ *Id.* at 401–02.

¹²⁴ *Id.* at 403–04.

Although *Sun-Diamond* was before the Court primarily on gratuities grounds,¹²⁵ the Court used the opportunity to further define “official act.” The Court considered the level of detail provided by Congress in defining “official act” in the statute and reasoned that this detailed description must require reference to a *particular* “official act” and not just *any* action taken by an office holder in the course of executing their duties.¹²⁶ Taking this a step further, the Court acknowledged that some actions taken by office holders involve “‘official acts’ in some sense” but are not “‘official acts’ within the meaning of the statute. While the Court in *Birdsall* found that an “official act” is “[c]very action that is within the range of official duty,”¹²⁷ the Court in *Sun-Diamond* held that not every “official act” is subject to the bribery statute.¹²⁸

The Court narrowed the scope of “official act” by finding that only certain types of actions were relevant in the context of the federal corruption statutes. By limiting “official act” to specific actions, the Court reasoned that it would be possible to “eliminate the absurdities” that would arise if prosecutors were allowed to bring charges against an official for any act.¹²⁹ To hold otherwise, the Court noted, would result in nothing but the government’s discretion preventing the prosecution of absurdities.¹³⁰

The vagueness shoal preventing prosecutors from using broad language in a statute as a catch-all seems to be at play in this unanimous decision. Prosecutorial discretion serving as the only check on the enforcement of vague criminal statutes does not seem to be something the Court is willing to rely on, particularly when prosecutors have a catch-all mechanism that enables them to go after just about any action. The limitation of which acts by public officials are subject to the bribery statute may also be an indication that the Court is hesitant to allow the prosecution of certain behaviors necessary for governance, but this shoal is not explicit in the Court’s reasoning.

¹²⁵ See *infra* Section II.C.2.

¹²⁶ *Sun-Diamond*, 526 U.S. at 405–06.

¹²⁷ See *supra* note 109 and accompanying text.

¹²⁸ The Court specifically identifies (1) replica jerseys given by champion sports teams each year to the President during their visit to the White House, (2) a high school principal gifting a school baseball cap to the Secretary of Education because the Secretary visited the school, and (3) a group of farmers providing a free meal to the Secretary of Agriculture when the Secretary is giving a speech to the farmers regarding matters of United States Department of Agriculture policy. *Sun-Diamond*, 526 U.S. at 406–07. Although all of these actions are performed in an official capacity, they are not official acts subject to the statute. *Id.* at 407.

¹²⁹ *Id.* at 408.

¹³⁰ *Id.*

The next case that charts the narrowing of “official act”—and one that provides great context for identifying vagueness shoals—is *McDonnell*. This is a case involving bribery charges against former Virginia Governor Robert McDonnell for his acceptance of gifts from Virginia businessman Jonnie Williams, as well as McDonnell’s work establishing programs at Virginia’s public universities that would benefit Williams.¹³¹ When Governor McDonnell was charged with honest services fraud and extortion,¹³² the government alleged that he had committed five official acts, thus making him subject to the statutes.¹³³ At trial, the Government requested that “official act” be defined in the jury instructions as follows:

The term “official action” means any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such public official’s official capacity. “Official action” as I just defined it includes those actions that have been clearly established by settled practice as part of a public official’s position, even if the action was not taken pursuant to responsibilities explicitly assigned by law. In other words, official actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description In addition, “official action” can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end.¹³⁴

McDonnell requested that the court instruct the jury that routine activities and settled practices such as “arranging a meeting, attending an event, hosting a reception, or making a speech are not, standing alone, ‘official acts,’ . . . because they are not decisions on matters pending before the

¹³¹ *McDonnell v. United States*, 136 S. Ct. 2355, 2361–65 (2016).

¹³² *Id.* at 2365.

¹³³ The “official acts” were as follows:

- (1) arranging meetings for [Williams] with Virginia government officials, who were subordinates of the Governor, to discuss and promote Anatabloc;
- (2) hosting, and . . . attending, events at the Governor’s Mansion designed to encourage Virginia university researchers to initiate studies of anatabine and to promote Star Scientific’s products to doctors for referral to their patients;
- (3) contacting other government officials in the [Governor’s Office] as part of an effort to encourage Virginia state research universities to initiate studies of anatabine;
- (4) promoting Star Scientific’s products and facilitating its relationships with Virginia government officials by allowing [Williams] to invite individuals important to Star Scientific’s business to exclusive events at the Governor’s Mansion; and
- (5) recommending that senior government officials in the [Governor’s Office] meet with Star Scientific executives to discuss ways that the company’s products could lower healthcare costs.

Id. at 2365–66 (internal quotation marks omitted).

¹³⁴ Proposed Jury Instructions of the U.S. at 54, *United States v. McDonnell*, 64 F. Supp. 3d 783 (E.D. Va. 2014) (No. 3:14-CR-00012).

government.”¹³⁵

The trial court decided not to give McDonnell’s instructions to the jury and he was convicted.¹³⁶ McDonnell appealed his conviction to the Fourth Circuit Court of Appeals, challenging the trial courts jury instructions regarding “official act,”¹³⁷ and the Fourth Circuit affirmed the lower courts decision.¹³⁸ The Supreme Court granted certiorari.¹³⁹

In considering the text of 18 U.S.C. § 201(a)(3),¹⁴⁰ as well as precedent and constitutional concerns, the Court found that the government’s broad interpretation was incorrect and the Court adopted a “more bounded interpretation of ‘official act’”¹⁴¹

While the Court formally utilized canons of statutory interpretation to narrow down the definition of “official act,”¹⁴² there are also vagueness shoals that help explain how they got to its decision.¹⁴³ The Supreme Court did not grant certiorari in the *Blagojevich* case and did not take the opportunity to consider the criminalization of efforts to govern as a vagueness shoal.¹⁴⁴ But in ruling on *McDonnell*, the Court acknowledged the same concern that Judge Easterbrook pointed out in *Blagojevich* – that some actions taken by public officials are necessary in their efforts to govern.¹⁴⁵

And on a similar theme, the Court recognized the substantial concern that vagueness in this context could lead to citizens “shrink[ing] from participating in democratic discourse.”¹⁴⁶ It could be that the vagueness shoal preventing the criminalization of efforts to govern might be related to another shoal, the chilling of the rights guaranteed under the First Amendment. A vague law whose use could have a chilling effect on

¹³⁵ *McDonnell v. United States*, 136 S. Ct. 2355, 2366 (2016).

¹³⁶ *Id.*

¹³⁷ *Id.* at 2367.

¹³⁸ *Id.*

¹³⁹ *McDonnell v. United States*, 136 S. Ct. 891 (Mem).

¹⁴⁰ “The term ‘official act’ means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.” 18 U.S.C. § 201(a)(3)

¹⁴¹ *McDonnell v. United States*, 136 S. Ct. 2355, 2367–68 (2016).

¹⁴² *Id.* at 2368–69 (using the “familiar interpretive canon *noscitur a sociis*, ‘a word is known by the company it keeps’” to narrowly define the words “question” and “matter” in the statute).

¹⁴³ *Id.* at 2368–69.

¹⁴⁴ *See supra* notes 87–89 and accompanying text.

¹⁴⁵ *Id.*; *see also McDonnell*, 136 S. Ct. at 2372 (“The basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns”) (emphasis in the original).

¹⁴⁶ *McDonnell*, 136 S. Ct. at 2372.

participation in the democratic process may be seen as entering a vagueness shoal. One criticism of the prosecution of Governor McDonnell was that he was being targeted because he was a high profile, popular Republican politician.¹⁴⁷ This fits directly with reasons why the Court narrows statutes, so that the federal government cannot crackdown on those with dissenting opinions, or even create the perception of a crackdown. A vague law that can be used to arbitrarily prosecute dissenters or chill participation in the democratic process crashes into the First Amendment, and the Court might see this as an opportunity to narrow the law to prevent this collision with a vagueness shoal.

Another issue raised by the Court, one that could be an explicit shoal, is their concern about an expansive definition of “official act” and its impact on federalism.¹⁴⁸ A vague law that can be read to apply federal standards to an area within state jurisdiction might be subject to narrowing by the courts to preserve the principles of federalism.

Finally, “official act,” as defined by the government, would give prosecutors a powerful and unchecked power. The expansive definition covering almost every action by any public official could be used as a catch-all tool with only the government deciding when its use is appropriate. And criminal statutes cannot be construed on the assumption that prosecutors will “use it responsibly.”¹⁴⁹

C. Extortion and Gratuities

The journey to discover vagueness shoals can also be seen in the Court’s consideration of cases related to both the gratuities statute¹⁵⁰ and the extortion statute.¹⁵¹ The cases, *McCormick v. United States*¹⁵² and *Evans v.*

¹⁴⁷ See, e.g., Ohlheiser, *supra* note 6 (questioning the motives behind the Obama administrations prosecution of his critics). During the *McDonnell* trial, lawyers for Governor McDonnell raised questions about why this Republican Governor was being prosecuted on an untested legal theory for actions that were no different than his Democratic predecessor. Defendant Robert F. McDonnell’s Motion #1 Motion for Discovery of Selected Recordings of Communications Between Prosecutors & Members of the Grand Jury, *United States v. McDonnell*, 64 F. Supp.3d 783 (E.D. Va. 2014) (No. 3:14-CR-12). They also raised the issue that the investigation of the Governor, an investigation riddled with leaks, took place during a hotly contested election to replace McDonnell and effectively sidelined him from any involvement in the campaign of his potential Republican successor. *Id.*

¹⁴⁸ *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (finding that “[it is the State’s] prerogative to regulate the permissible scope of interactions between state officials and their constituents.”).

¹⁴⁹ *Id.* at 2372–73 (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)).

¹⁵⁰ 18 U.S.C. § 201(c)(1)(A) (2012).

¹⁵¹ *Id.* § 1951.

*United States*¹⁵³ discuss the Court's operation within extortion statutes and how statute narrowing may not be as necessary in this space as it is in others. A revisiting of *United States v. Sun-Diamond Growers of California*¹⁵⁴ highlights other vagueness considerations before the Court.

1. Extortion

Extortion has its roots in state common law and was defined by Blackstone as a failure of trust by "taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than his due, or before it is due."¹⁵⁵ Extortion under the Hobbs Act, codified as 18 U.S.C. § 1951, can take the form of extortion under color of official right or extortion by force, violence, or fear. Extortion under color of official right is the type most associated with prosecuting corrupt public officials.

Robert McCormick was a state politician in West Virginia when he was indicted with five counts of violating the Hobbs Act.¹⁵⁶ McCormick was an advocate for a West Virginia program that allowed foreign medical school graduates to practice in the state under temporary permits while preparing for the state licensing exam.¹⁵⁷ Under this program, some medical students practiced for years under the temporary permit although they continuously failed the licensing exam.¹⁵⁸ When conversations about ending the program began to circulate, McCormick introduced legislation to extend the program and met with a lobbyist to discuss introducing a bill the following session to permanently address the issue.¹⁵⁹ During his reelection campaign, McCormick informed the lobbyist of the costs of the campaign and indicated that he had not heard from any of the foreign doctors.¹⁶⁰ Through the lobbyist, the doctors provided cash to McCormick on four separate occasions, and then paid him a fifth time after he was reelected and passed a law supporting the interests of the foreign doctors.¹⁶¹

¹⁵² *McCormick v. United States*, 500 U.S. 257 (1991).

¹⁵³ *Evans v. United States*, 504 U.S. 255 (1992).

¹⁵⁴ *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999).

¹⁵⁵ TEACHOUT, *supra* note 50, at 115–16 (internal quotation marks omitted) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *142).

¹⁵⁶ *McCormick v. United States*, 500 U.S. 257, 261 (1991).

¹⁵⁷ *Id.* at 259.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 260.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

Regarding extortion, the district court judge instructed the jury as follows:

In order to find Mr. McCormick guilty of extortion, you must be convinced beyond a reasonable doubt that the payment alleged in a given count of the indictment was made by or on behalf of the doctors with the expectation that such payment would influence Mr. McCormick's official conduct, and with knowledge on the part of Mr. McCormick that they were paid to him with that expectation by virtue of the office he held.¹⁶²

The jury convicted McCormick of violating the Hobbs Act and the Fourth Circuit Court of Appeals affirmed the district court's jury instructions.¹⁶³ On appeal the Fourth Circuit also held that there is no explicit quid pro quo (this-for-that) requirement under the Hobbs Act and the government need not prove that money given to a public official outside of campaigning was given in exchange for an official act.¹⁶⁴ The Supreme Court granted certiorari and reversed.¹⁶⁵

The Supreme Court found that, in the context of campaign contributions, there is an explicit quid pro quo requirement to show that a public official extorted someone.¹⁶⁶ Writing for the majority, Justice White stated:

Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right."¹⁶⁷

To find contrary would enable prosecution of actions that had long been seen as legal and that are inevitable given our system of private campaign contributions.¹⁶⁸

The following year, the Court revisited extortion under the color of official right when it heard *Evans*. In this case, a Georgia man served as an elected member of the Board of Commissioners of DeKalb County, Georgia.¹⁶⁹ In an investigation into alleged public corruption in the Atlanta area, an FBI agent posed as a real estate developer and spoke on the phone

¹⁶² McCormick v. United States, 500 U.S. 257, 265 (1991).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 265–66.

¹⁶⁵ *Id.* at 266–67.

¹⁶⁶ *Id.* at 273–74.

¹⁶⁷ *Id.* at 272.

¹⁶⁸ McCormick v. United States, 500 U.S. 257, 272 (1991).

¹⁶⁹ Evans v. United States, 504 U.S. 255, 257 (1992).

with the public official on a number of occasions.¹⁷⁰ The agent asked the public official for help in rezoning a particular tract of land, and paid the official \$7000 in cash and wrote him a \$1000 check for his campaign. The official reported the check, but not the cash.¹⁷¹ The official was charged with extortion and was convicted at trial.¹⁷²

On appeal, the Eleventh Circuit Court of Appeals affirmed the district courts ruling, and added that:

[P]assive acceptance of a benefit by a public official *is* sufficient to form the basis of a Hobbs Act violation if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power. The official need not take any specific action to induce the offering of the benefit.¹⁷³

The Supreme Court agreed with this statement of the law and affirmed.¹⁷⁴ In reaching its decision, the Court considered the common law origins of extortion and found that Congress had expanded the federal extortion law beyond its original use rather than narrow it.¹⁷⁵ The Court further found that the public official need not start the relationship with the extorted party and that the word “induced” in the definition of the statute does not equate to “initiate.”¹⁷⁶ Ultimately, in contrast to narrowing trends, the court held that “the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.”¹⁷⁷

This is an instance where the Court has not gone down a narrowing path, because the statute does not appear to collide with any vagueness shoals. The one area where a conflict might exist is in the context of First Amendment rights and campaign donations, but the Court in *McCormick* found that quid pro quo had to be shown, thus adding a layer of protection around the First Amendment freedoms.

Although *United States v. Enmons* is not a case about extortion under the “color of official right,” it still sheds light on some narrowing aspects of corruption laws.¹⁷⁸ In *Enmons*, the Court considered the balance of federalism and how Congress deals with the issue when criminalizing actions. In this

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 258.

¹⁷⁴ *Id.* at 259.

¹⁷⁵ *Evans v. United States*, 504 U.S. 255, 260–61 (1992).

¹⁷⁶ *Id.* at 266.

¹⁷⁷ *Id.* at 268.

¹⁷⁸ 410 U.S. 396, 411–12 (1973).

case, members of the Gulf States Utilities Company were on strike and were seeking new collective bargaining agreements.¹⁷⁹ The employees were accused of conspiring to obstruct commerce, and through their conspiracy, they would commit acts of violence to convince Gulf States Utilities Company to comply with their terms.¹⁸⁰ In furtherance of their conspiracy, five acts of violence were committed—firing rifles at three company transformers, draining oil from a transformer, and blowing up a transformer substation.¹⁸¹ The government sought charges under the Hobbs Act,¹⁸² claiming that the employees' actions fell within the scope of the act because they used extortion and violence to interrupt interstate commerce.¹⁸³

The district court, in hearing the government's arguments, was unconvinced that the Hobbs Act truly extended to the actions of the employees.¹⁸⁴ When the case made its way to the Supreme Court, it was ultimately swayed by the arguments of the district court.¹⁸⁵ The Court ultimately stated:

[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.¹⁸⁶

This case sheds light on the way the Court considers federalism and how that might be a basis for narrowing a vague law. When faced with a statute that is vague and does little to outline what exactly is prohibited, the Court might question whether the vague law can disrupt the balance that has been stricken between the federal government and the states. States and the federal government can often conflict, and the Court has to deal

¹⁷⁹ *Id.* at 397.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 398.

¹⁸² 18 U.S.C. § 1951 (2012) (“Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.”).

¹⁸³ *United States v. Enmons*, 410 U.S. 396, 398–400 (1973).

¹⁸⁴ *United States v. Enmons*, 335 F. Supp. 641, 646 (E.D. La. 1971) (“The union had a right to disrupt the business of the employer by lawfully striking for higher wages. Acts of violence occurring during a lawful strike and resulting in damage to persons or property are undoubtedly punishable under State law. To punish persons for such acts of violence was not the purpose of the Hobbs Act.”).

¹⁸⁵ *Enmons*, 410 U.S. at 411–12.

¹⁸⁶ *Id.* at 411–12 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

with that balance. For example, states and the federal government both sue each other, state leaders criticize federal leaders, and vice versa. For these reasons, and the various other conflicts between the federal government and the states, the Court narrows corruption statutes so that they do not set federal standards for state issues and enable federal officials to prosecute state politicians based on these standards.

These line of cases help to distinguish one of the potential vagueness shoals the Court has pulled out in their narrowing of “official act,” that broad laws that can be read to criminalize accepted means of governing are impermissible. While a vague law cannot stand if it can be read to criminalize political behaviors such as logrolling or scheduling meetings, that prohibition does not extend to laws criminalizing what society might deem as “bad behavior.” Federalism plays a role in this calculation, because if a state law finds certain behavior permissible but a vague federal law could be used to prosecute that behavior, the Court may see that as grounds to narrow. However, in the case of practices like extortion, which is not accepted by any state and has long been prosecuted under the common law, a vague federal law allowing for the prosecution of this behavior would not run into any federalism issues.

2. *Gratuities*

The facts of *Sun-Diamond* are detailed above.¹⁸⁷ The Court had the opportunity in this case to not only address what counts as an “official act,” but to also narrow the scope of the gratuities statute. At trial, the district court instructed the jury that the gratuities statute did not require a connection between the gift givers intent and a specific official act.¹⁸⁸ The Supreme Court found this interpretation to conflict with the text of the statute, which prohibits gratuities given or received “for or because of *any official act* performed or to be performed.”¹⁸⁹ Ultimately, the burden is on the government to prove “a link between a thing of value conferred upon a public official and a specific official act for or because of which” the thing was given.¹⁹⁰

The Court justified their view by looking to the text of the statute and determining which reading made the most sense, one that required a

¹⁸⁷ See *supra* notes 121–124 and accompanying text.

¹⁸⁸ *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 406 (1999).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 414.

connection to a particular act or one that did not.¹⁹¹ The framework of the text, along with the belief that Congress could have and would have explicitly stated that no connection to a specific act was necessary if that is what it intended, led the Court to hold that a gratuity is illegal when it is given or received because of a particular official act.¹⁹²

Finally, the Court considered the absurd effects a broad law would have on the regularly conducted business of public officials.¹⁹³ Allowing a vague law to be used to criminalize gift giving to public officials, with no consideration of what in particular the gift was meant to do, would limit the involvement of citizens in their government. A vague law in this space could chill public involvement with public officials, and might put in place a barrier between citizens and their government leaders. If citizens are afraid to give public officials anything at all for fear of being prosecuted, and public officials are afraid to accept anything based on that same fear, then this vague law would have successfully undermined some of the protections guaranteed under the First Amendment.

III. MOVING FORWARD POST-*MCDONNELL* AND *SUN-DIAMOND*

The sections below provide a concise summary of the vagueness shoals in existence and how they might interact together to create a consistent doctrine that allows the courts to manage vague laws. This Part will also discuss the recent action in both the Senator Robert Menendez corruption case and the Representative William Jefferson case. It will also address vagueness concerns related to the Foreign Corrupt Practices Act and consider the vagueness shoals to determine the potential outcomes of any future “void-for-vagueness” challenges.

A. *Charting Vagueness Shoals*

As seen through the narrowing of corruption statutes through the cases outlined above, the courts have utilized vagueness shoals as a method to trim down overly broad laws. These impermissible shoals, including catch-all statutes, infringing on the rights guaranteed under the First Amendment, undermining federalism, and criminalizing commonly accepted behaviors and practices used in efforts to govern could be woven together to paint a picture of how a vague corruption law might be curtailed.

¹⁹¹ *Id.* at 406.

¹⁹² *Id.*

¹⁹³ *See supra* note 128.

A great first inquiry would be whether the law could be used as an unchecked catch-all tool to prosecute a wide number of officials. If the only thing preventing the government from engaging in arbitrary enforcement is their own discretion, then courts might look to limit a law's application. Of course, prosecutorial discretion is an important part of our criminal justice system, so discretion alone will not be enough for a court to find a law too vague. But if that discretion is coupled with a vague term or phrase in a statute that allows prosecutors to bring charges against virtually anyone, with no forewarning of who might be covered by the statute, then a court might look for ways to narrow the law. To do that, they could turn to the other shoals.

Asking whether the law infringes on the freedoms guaranteed by the First Amendment is a good next step in paring down the statute. When considering a statute challenged on vagueness grounds, courts can look to see whether the statute could be extended in a way that allows the arbitrary prosecution of those with dissenting opinions. Moreover, if this statute could have a chilling effect on participation in the democratic process, the Court might narrow the law in a way that prevents potential collisions with the First Amendment. This shoal is particularly relevant in the context of public corruption, given the proximity of corruption laws to government and politics.

Once a court has identified a statute's use as a potential catch-all and has narrowed it to avoid First Amendment shoals, it can consider whether there are any federalism issues at play. Perhaps the best way to approach this shoal is to determine whether it is possible for federal standards of proper behavior to be applied to state and local officials, in contradiction with their own state or local rules dictating what is proper. If a court finds that Congress has not made it explicitly clear that they want to alter the federal-state balance on an issue and its prosecutors that are running with a vague law to alter that balance, then a court might narrow the law to avoid the federalism shoal. If Congress is explicit in their intention to alter the federal-state balance and dictate what is proper behavior of a public official, then that statute would not be subject to vagueness shoal narrowing.

Finally a court would consider whether the corruption law could be extended to criminalize behavior or actions that are commonly viewed as proper for effective governance. It is unclear by which standard the court will determine whether an action is considered proper for effective governance. In some instances like extortion, where the action has long been criminalized, the courts will find that no issue arises. On the other end of the spectrum, vague corruption laws that criminalize activities like logrolling and political horse-trading, activities that have long been

accepted, will be narrowed to allow the continued use of those activities. Courts might rely on what was criminalized under the common law to determine if federal criminalization of certain acts is acceptable, even if the underlying law is vague? But where will courts look to determine what is “long accepted?” If this shoal is considered by United States Court of Appeals, it could result in various different standards as the circuits look to what actions are commonly accepted by the states in their jurisdiction.

B. Utility of Charting Vagueness Shoals

Charting vagueness shoals allows Congress to envision the types of ways that their statutes might get interpreted in the courts. Given the heavy lift involved in passing legislation, Congress may prefer to write a law the first time around that adequately reflects their intentions and can also withstand judicial scrutiny. A knowledge of vagueness shoals on the front-end could lead to Congress getting the law “right” the first time and prevent the need to revisit and tweak the law around the edges in response to the Court’s rulings.

While prosecutors are likely aware of the best practices to argue corruption cases, knowing the shoals of vagueness could serve as an added benefit. By identifying these shoals explicitly in communications with courts, government lawyers can defend their use of corruption laws that may be challenged for vagueness.

Charting these shoals also allows an opportunity for scholars and practitioners alike to review recent actions in corruption cases to determine what role, if any, the shoals of vagueness had on a particular court’s decisions. Recent actions that could benefit from a shoals discussion include the Senator Menendez corruption case¹⁹⁴ and the recent vacating of corruption convictions against former Representative Jefferson.¹⁹⁵ While neither of these cases shed light on vagueness shoals, it is possible to see how the shoals are part of the conversation.

¹⁹⁴ United States v. Menendez, 291 F. Supp. 3d 606 (D.N.J. 2018); *see also* Nick Corasaniti & Nate Schweber, *Corruption Case Against Senator Menendez Ends in Mistrial*, N.Y. TIMES (Nov. 16, 2017), https://www.nytimes.com/2017/11/16/nyregion/senator-robert-menendez-corruption.html?_r=0 (reporting on the Senator Menendez mistrial).

¹⁹⁵ United States v. Jefferson, 289 F. Supp. 3d 717 (E.D. Va. 2017); *see also* Rachel Weiner, *Judge Lets Former Louisiana Congressman William Jefferson out of Prison*, WASH. POST (Oct. 5, 2017), https://www.washingtonpost.com/local/public-safety/judge-lets-former-louisiana-congressman-william-jefferson-out-of-prison/2017/10/05/8b53619e-aa0b-11e7-850e-2bdd1236be5d_story.html?utm_term=.8d06f3e02535 (reporting on legal developments on former Representative Jefferson’s corruption convictions).

1. Senator Menendez

Bob Menendez was the senior Democratic Senator representing the state of New Jersey when he, along with his friend Dr. Saloman Melgen, were indicted by a grand jury on April 1, 2015 on a number of public corruption charges.¹⁹⁶ Notably, Menendez was charged with bribery for seeking out flights and financial contributions in exchange for “official act”¹⁹⁷ – a term that was narrowed in *McDonnell*.¹⁹⁸

In their trial brief, the government detailed lavish trips that Menendez took, paid for by his friend Melgen.¹⁹⁹ These trips included private jets and first class travel to resorts in the Dominican Republic and a high-end hotel in Paris, France that cost over \$1,500 per night.²⁰⁰ The government argued that Menendez did not pay Melgen back for these gifts with money, but instead used “official acts” through his position as a United States Senator to return the favor.²⁰¹

For example, Menendez provided assistance in getting Melgen’s girlfriend a visa to the United States after her visa request was initially denied.²⁰² Menendez was also accused of pressing the Centers for Medicare and Medicaid Services and the Secretary of Health and Human Services to drop their demand that Melgen pay \$8.9 million in overbillings back to the government for payments he improperly received.²⁰³ Menendez’s advocacy on behalf of Melgen’s interests, the government argues, was made in exchange for a \$600,000 donation made to Majority PAC, a Super Pac supporting Democratic Senate candidates, earmarked

¹⁹⁶ United States v. Menendez, 109 F. Supp. 3d. 720, 724–25 (D.N.J. 2015). The corruption counts in the indictment relating to Menendez were as follows:

- (1) Count One charged Menendez with conspiracy to commit bribery and honest services wire fraud;
- (2) Counts Three through Eight charged Menendez with bribery for seeking out and receiving private flights in exchange for official acts;
- (3) Counts Nine through Eighteen charged Menendez with bribery for seeking out and receiving financial contributions in exchange for official acts; and
- (4) Counts Nineteen through Twenty-One charged Menendez with honest services fraud.

Id.

¹⁹⁷ *Id.*

¹⁹⁸ See *supra* notes 140–141 and accompanying text.

¹⁹⁹ United States’ Trial Brief at 3–5, United States v. Menendez, 291 F. Supp. 3d. 606 (D.N.J. 2018) (No. 2:15-CR-155).

²⁰⁰ *Id.*

²⁰¹ *Id.* at 5.

²⁰² *Id.* at 5–6 (alleging that Menendez made calls to government officials to have Melgen’s girlfriend re-interviewed by a different interviewing agent).

²⁰³ *Id.* at 6–8.

for New Jersey.²⁰⁴

In response to the government's allegations, Menendez argues that the government fails to allege any "official act."²⁰⁵ According to Menendez, the government is relying on a "stream of benefits" theory claiming that Menendez received gifts and donations in exchange for future advocacy for Melgen's priorities, if the opportunity arose.²⁰⁶

After a nine-week trial, the jury was unable to reach a verdict on the counts charged in the indictment.²⁰⁷ Menendez moved for a judgment of acquittal on the counts.²⁰⁸ The trial court granted the motion in part and denied it in part.²⁰⁹ While the government has stated they will not retry Menendez,²¹⁰ vagueness shoals could have played a factor in any subsequent appeals following trial.

A "stream-of benefits" theory by the government would not likely be used to turn the underlying statutes into catch-all tools. Under this theory, money and gifts flow towards the public official with the expectation that when the time comes, the public official will take actions to benefit the one providing the benefits. A specific set of circumstances would need to be present for the government to bring charges under this theory, thus closing the door on its use as a catch-all. It is also understood that limitations on how much citizens can donate to politicians are permissible, so it is unlikely that a court would find that a "stream of benefits" theory allows the statute to infringe on First Amendment rights. The theory does not call into question issues of federalism or criminalizing commonly accepted efforts to govern. If the "stream of benefits" theory came before an appellate court, it is likely that its use would stand.

2. Representative Jefferson

William Jefferson was a nine-term Congressman representing the Second Congressional District of Louisiana in the House of Representatives

²⁰⁴ *Id.* at 11–13.

²⁰⁵ Defendant's Response to the Government's Trial Brief at 2, *United States v. Menendez*, 291 F. Supp. 3d. 606 (D.N.J. 2018) (2:15-CR-00155).

²⁰⁶ *Id.*

²⁰⁷ *Menendez*, 291 F. Supp. 3d. at 611.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Colin Dwyer, *Justice Department Won't Retry Sen. Menendez After Corruption Case Mistrial*, NPR (Jan. 31, 2018), <https://www.npr.org/sections/thetwo-way/2018/01/31/582143169/justice-department-wont-retry-sen-menendez-after-corruption-case-mistrial>.

when he was indicted in 2007 on corruption charges.²¹¹ The government alleged that Jefferson solicited and received payments from various entities in exchange for promoting their business interests.²¹²

The government alleged that Jefferson agreed to promote Vernon Jackson's telecommunications company abroad in exchange for money and shares of the company.²¹³ Jackson signed a contract with Jefferson's family-owned marketing company and transferred over a total of 550,000 stocks in the telecommunications company.²¹⁴ Jefferson in turn promoted Jackson's company abroad by meeting with high-ranking West African officials, negotiating agreements, and arranging meetings with governmental agencies.²¹⁵ In order to ensure the vitality of the agreements he helped arrange, Jefferson determined that he needed the support of Nigeria Telecommunications Limited ("NITEL").²¹⁶ To get this support, he offered a bribe to the Nigerian Vice President in exchange for the Vice President's help in persuading NITEL to support Jefferson's endeavors.²¹⁷ Jefferson received the bribe money from a domestic partner who was working with the FBI and agreed that the money she was providing would be used to pay the bribe.²¹⁸ Two days later, the FBI searched Jefferson's home and found the money stashed in his freezer.²¹⁹

Jefferson was convicted on eleven counts and appealed his conviction to the Fourth Circuit Court of Appeals,²²⁰ which affirmed his conviction on all counts except one.²²¹ Jefferson was sentenced to thirteen years in federal

²¹¹ United States v. Jefferson, 289 F. Supp. 3d. 717, 721 (E.D. Va. 2017). The corruption counts in the indictment were as follows:

- (1) Count One charged Jefferson with conspiracy to solicit bribes, commit honest services wire fraud, and violate the Foreign Corrupt Practices Act;
- (2) Count Two charged Jefferson with conspiracy to solicit bribes and commit honest services wire fraud;
- (3) Count Three and Four charged Jefferson with solicitation of bribes;
- (4) Counts Five through Ten charged Jefferson with self-dealing and bribery-related honest services wire fraud;
- (5) Count Eleven charged Jefferson with foreign corrupt practices; and
- (6) Count Twelve through Fourteen charged Jefferson with money laundering related to bribery.

Id. at 725–26.

²¹² *Id.* at 721.

²¹³ *Id.* at 722.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 723.

²¹⁷ United States v. Jefferson, 289 F. Supp. 3d. 717, 723 (E.D. Va. 2017).

²¹⁸ *Id.*

²¹⁹ *Id.* at 723–24.

²²⁰ *Id.* at 727.

²²¹ *Id.*

prison,²²² but appealed his convictions following the Supreme Court's decision in *McDonnell*, arguing that the acts upon he was convicted are no longer criminal.²²³

The trial court found that in some instances, the jury had sufficient evidence and information to base a guilty verdict on despite the erroneous definition of official act,²²⁴ but in other instances it did not.²²⁵ One conviction that was upheld was Jefferson's violation of the Foreign Corrupt Practices Act ("FCPA"), which warrants further discussion to decipher what role vagueness shoals could have played if the FCPA were challenged as unconstitutionally vague.

C. *Vagueness Concerns of the Foreign Corrupt Practices Act*

While broad criminal statutes are often found to be unconstitutional, there are some statutes where vagueness appears to be, for the time being, permissible.²²⁶ One such statute relating to public corruption is the Foreign Corrupt Practices Act.

The FCPA is a federal law that criminalizes U.S. companies for engaging in foreign bribery and mandates certain record keeping requirements.²²⁷ Regarding bribery, the statute prohibits U.S. companies from bribing "foreign officials" to induce them to influence the decisions of a "foreign government or instrumentality thereof."²²⁸ Relevant to the vagueness discussion is the statute's prohibition on bribery—particularly who counts as a "foreign official" and what constitutes a "government instrumentality."²²⁹ The Department of Justice has adopted an expansive interpretation of the two terms, allowing for broad enforcement.²³⁰

²²² *Id.*

²²³ United States v. Jefferson, 289 F. Supp. 3d. 717, 721 (E.D. Va. 2017).

²²⁴ *Id.* at 741–42.

²²⁵ *Id.* at 736–37, 738–39.

²²⁶ See Boychuk, *supra* note 2; Godsoe, *supra* note 2; Kerr, *supra* note 2.

²²⁷ Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78m, 78dd-1–3, 78ff (1999).

²²⁸ *Id.* § 78dd-2(a)(1).

²²⁹ See Matthew W. Muma, Note, *Toward Greater Guidance: Reforming the Definitions of the Foreign Corrupt Practices Act*, 112 MICH. L. REV. 1337, 1340 (2014) (discussing the "vague" and "problematic" definitional terms within the FCPA). The statute itself defines a "foreign official" as follows:

The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

15 U.S.C. § 78dd-2(h)(2)(A).

²³⁰ *Id.* at 1340 (citing Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly*

The FCPA has not seen many vagueness challenges in courts,²³¹ likely because of the high level of settlement involved when the government brings charges.²³² But despite the government's success in prosecuting,²³³ there are still concerns over whether the FCPA is in fact precise enough to withstand vagueness challenges.²³⁴ The outer boundaries of the statute have not solidified, and this fluidity has led to claims that the law in its current state leads to too much discretionary enforcement, a claim that has roots in the vagueness doctrine.²³⁵ Without commenting on the likelihood of a future vagueness challenge, it is possible to anticipate how a court might view the challenge and whether a narrowing to avoid vagueness shoals is necessary. This is possible by using the vagueness shoal framework discussed above.²³⁶

The first inquiry is whether the government is using, or has the potential to use, the allegedly vague law as a catch-all tool. It has been alleged that the government has failed to provide sufficient guidance so that it can maintain broad enforcement powers without unnecessarily boxing itself in.²³⁷ An expanded scope for the FCPA can be compared to the once

Expansion of the Foreign Corrupt Practices Act, 45 GA. L. REV. 489, 533–34 (2011)).

²³¹ See Mike Koehle, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 994 (2010) (discussing the development of FCPA law outside the judicial process).

²³² See Stuart H. Deming, *The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act*, 96 J. CRIM. L. & CRIMINOLOGY 465, 500–01 (2006) (describing how the vast majority of FCPA cases are quickly settled).

²³³ See Joel M. Cohen, Michael P. Holland & Adam P. Wolf, *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1267 (2008) (“Because of the financial and reputational harm that a public FCPA prosecution can cause, nearly all companies targeted by the DOJ and SEC have opted for quick settlements of their FCPA disputes.” (footnote omitted)).

²³⁴ *Id.* at 1263–64 (describing a potential vagueness challenge to a provision of the FCPA and the merits of such a challenge). Not all courts see this as a vagueness issue, but rather see the FCPA as an ambiguous statute that simply must be interpreted. See *United States v. Kay*, 359 F.3d 738, 746 (5th Cir. 2004) (holding that the FCPA’s provisions are “amenable to more than one reasonable interpretation” and should be subject to the practices governing the interpretation of ambiguous statutes).

²³⁵ See DAVID LUBAN, JULIE R. O’SULLIVAN & DAVID P. STEWART, *INTERNATIONAL AND TRANSACTIONAL CRIMINAL LAW* 649 (2010) (“The challenge of [an] FCPA practice lies in part in the fact that there is little in the way of public precedents on the subject, and the FCPA itself is complex and, in many areas, vague.”).

²³⁶ See *supra* Section III.A.

²³⁷ See, e.g., Charles M. Carberry et. al., *DOJ/SEC’s Resource Guide to the U.S. Foreign Corrupt Practices Act: Jones Day Summary and Analysis*, JONES DAY (Dec. 2012), https://www.jonesday.com/DOJ_SEC_Resource_Guide_to_FCPA/ (“Perhaps most important . . . is to understand what the document does not say. Certain questions are . . . left unanswered. Many of these are matters of judgment while others are areas that the DOJ and SEC simply chose to leave vague, giving the government the most discretion possible in later . . . actions.”).

expanding scope of mail and wire fraud statutes.²³⁸ As prosecutors began to rely heavily on mail and wire fraud to achieve many of their goals, the Supreme Court eventually stepped in and limited the expansion.²³⁹ It is possible that a court would see the FCPA in a similar light and find that it has the potential to be used as a catch-all.

The next inquiry would ask whether the FCPA infringes on freedoms granted by the First Amendment. Being able to engage in the political process is tied in closely with the Freedom of Speech, but being able to participate in a foreign country's political process is not something that warrants the same protection by the courts. A vague law that has the potential to chill American participation in a foreign country's government is likely not going to be narrowed on First Amendment grounds.

Federalism issues likely would not play a large role in a court's consideration, especially given that bribery is not something that any state government currently endorses. With the FCPA, the federal government is not dictating what is proper in contradiction to state government. It is instead in alignment with state governments in the idea that bribing foreign officials is bad for government.

The FCPA is also not criminalizing commonly accepted actions necessary in efforts to govern. The bribing of foreign officials is likely not something that people would consider necessary for governing. Some people might see payments expediting decision-making as generally acceptable, but the FCPA allows for "greasing-the-wheel" in some sense by not criminalizing payments to move along the process, so long as those payments are not influencing the substance of the decision.²⁴⁰

Given the shoals of vagueness identified, the FCPA likely will not be struck down or narrowed on vagueness grounds. Although the statute may be subject to use as a catch-all tool by prosecutors, it does not crash into the other shoals that a court might use to conduct the actual narrowing process. A vague law that can be used to restrict a company's ability to send bribes to foreign officials does not collide with First Amendment rights or cross over into the spectrum of the federal government setting standards on what constitutes "good government," in opposition to the standards of state or local governments. A court is also unlikely to find that the law criminalizes commonly accepted actions necessary for effective governing.

²³⁸ See *supra* notes 65–68 and accompanying text.

²³⁹ See *supra* notes 69–73 and accompanying text.

²⁴⁰ 15 U.S.C. § 78dd-2(b).

While I do not believe that a court would narrow the FCPA based on the shoals I have identified, any subsequent narrowing and the justifications behind it will shed light on other vagueness shoals that courts consider.

CONCLUSION

The vagueness doctrine serves an important role in criminal law in the United States and ensures that individuals receive due process. Our criminal justice system relies on prosecutorial discretion, and this discretion itself is not problematic. But when the discretion is coupled with vague statutes that enable arbitrary and discriminatory enforcement, there is cause for concern. It is not unreasonable to question why the Court has continued to narrow corruption statutes and tweak them around the edges, as opposed to simply finding that Congress was too vague in writing the laws in the first place. However, if the Court intends to continue its practice of narrowing rather than invalidating, it will be useful to know the process it takes in going about its narrowing. Charting vagueness shoals is one way to piece together the Court's justification in narrowing federal corruption statutes.