11-1-1988

The Rise and Fall of the Right to Honest Government: Prosecuting Public Corruption after McNally v. United States

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Recommended Citation
Available at: https://digitalcommons.lmu.edu/lr/vol22/iss1/5

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THE RISE AND FALL OF THE RIGHT TO HONEST GOVERNMENT: PROSECUTING PUBLIC CORRUPTION AFTER McNALLY v. UNITED STATES

I. INTRODUCTION

In June of 1987, the United States Supreme Court turned the Justice Department upside down by severely limiting the Department’s most powerful tool for combating white-collar crime. In McNally v. United States, the Court announced that the mail fraud statute, known as the “true love” of the United States Attorney’s Office, could no longer be used to prosecute fraud that deprived an individual of an “intangible right,” such as the right to honest government. Instead, the Court held that the mail fraud statute was limited in scope to protection of property rights. This holding was surprising because intangible rights had been protected under the statute by the federal circuit courts since the 1940s. The holding was also unexpected considering that it came from a Court known to be hard on criminal defendants.

Five months after McNally, the newly-limited scope of the mail fraud statute was altered by the Court’s decision in Carpenter v. United States. The Carpenter Court concluded that while mail fraud must in-

2. Id.
5. “Intangible rights” are non-monetary rights and include the right to honest services of government officials, United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); the right of an employer to the honest services of employees, United States v. Bohonus, 628 F.2d 1167 (9th Cir.), cert. denied, 447 U.S. 928 (1980); the right of privacy as to confidential information, United States v. Louderman, 576 F.2d 1383 (9th Cir.), cert. denied, 439 U.S. 896 (1978); and the right to have elections conducted free of fraud, United States v. States; 488 F.2d 761 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974).
7. Id.
deed involve a loss of money or property, "property" can include such intangibles as confidential information or the "property" right to a newspaper's publication schedule. Thus, in Carpenter, the Court expanded the definition of "property" to include certain kinds of intangible rights. The expanded definition in Carpenter took some of the "sting" out of the McNally decision by recognizing a wider range of conduct that may fall within the purview of the mail fraud statute. However, the McNally holding—that a deprivation of intangible rights alone was not sufficient to sustain a mail fraud conviction—remained unchanged by Carpenter.

This Note initially outlines the history of the mail fraud statute and the development of the intangible rights doctrine. The Note then sets forth a statement of McNally v. United States and analyzes the Court's reasoning. Additionally, this Note explores the effect that the decision will have on the future of prosecution of public corruption, and discusses the flurry of reversals of convictions that have already resulted in the wake of McNally. Finally, various proposals for legislative change to reverse the effects of the McNally decision are examined.

II. HISTORY OF THE MAIL FRAUD STATUTE AND THE INTANGIBLE RIGHTS DOCTRINE

A. Legislative History of the Mail Fraud Statute

The original mail fraud statute was enacted in 1872, following recommendations made by a congressionally appointed commission established to revise the postal laws. At the time it was enacted, the statute generated virtually no congressional debate and, as a result, contained little indication of legislative intent. Representative Farnsworth, the House sponsor of the legislation, explained that the statute was necessary
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"to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rascals generally, for the purpose of deceiving and fleecing the innocent people in the country." 19

While this expansive purpose may not seem overly illuminating at first, examining the language of the statute and the historical context in which it was drafted is helpful. The original statute indicated that to violate the statute, three elements must be met: (1) a person devised a scheme or artifice to defraud; (2) the person intended to effectuate this scheme by opening some correspondence through the post office; and (3) the person actually carried out the scheme by depositing or receiving a letter or packet through the mails. 20 Thus, the statute's purpose was to prevent fraudulent schemes that used the post office as the scheme's instrumentality.

Historically, the mail fraud statute was part of extensive federal legislation enacted during the Reconstructionist Period. 21 One commentator has noted that during this post-Civil War period, two impulses prompted Congress to create numerous criminal and civil statutes. 22 One concern was the increase in large scale, national crime. 23 Since state and local criminal codes were not equipped to deal with interstate behavior, federal intervention was deemed necessary. 24

The second impetus behind broad federal legislation during the Reconstruction Period was a perception of enhanced federal power following the Civil War. 25 This perception, coupled with the public's cry for relief from rampant post war bribery and fraud, caused Congress to pass new laws in broad, sweeping language, which clearly demonstrated mas-

19. CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth). In 1870, Representative Farnsworth introduced the bill based on the Postal Commission's recommendations to the 41st Congress. The bill failed to pass, and was reintroduced in 1872 at the 42nd Congress. It passed at that time, with the substance of the Commission's recommendations still intact. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323.

20. Id. The statute as originally enacted provided in pertinent part:
That if any person having devised or intending to devise any scheme or artifice to defraud, [to] be effected by either opening or intending to open correspondence or communication with any other person . . . shall, in and for executing such scheme or artifice . . . place any letter or packet in any post-office of the United States . . . shall be guilty of a misdemeanor. . . .

Id.

21. See generally Rakoff, supra note 4, at 779-86 (discussion of early history of mail fraud statute in context of Reconstructionist era).

22. Id. at 780.

23. Id. (citing W. Dunning, Reconstruction, Political and Economic 224-37 (1962); H. Faulkner, American Economic History 483-86, 516-17 (1960); J. Franklin, Reconstruction After the Civil War 8-9, 146-49, 174-77 (1961)).

24. Id.

25. Id.
sive federal power. An example of this kind of statute is one enacted in 1867, making it a crime to "defraud the United States in any manner whatever." The mail fraud statute, enacted just five years later, contained the same kind of broad prohibition against fraudulent activity through use of the post office.

In spite of the seemingly clear language of the mail fraud statute, early judicial interpretation was inconsistent. The statute required an intent to effectuate the scheme through the use of the mails; thus, some courts reasoned that the only schemes that the statute proscribed were those in which the mails were absolutely essential. A court could easily find that the mailing was not essential to the fraud by simply noting that it was not the kind of fraud that necessarily depended on the mails for the fraud to be effectuated. Thus, many fraudulent swindlers slipped past the reach of the statute.

Congress amended the mail fraud statute in 1889 in an attempt to deal with this judicial confusion. The revised statute prohibited specific schemes, such as "spurious coin, bank notes, paper money . . . the 'saw-dust swindle' . . . [and] 'green cigars.' Unfortunately, this amend-

26. Id. Rakoff noted that much of Congress' more specific legislation encountered resistance immediately following the Civil War from "recalcitrant southerners" and "economically depressed and dislocated northerners." Id. at n.46. For example, attempts to collect the federal excise tax on whiskey were met with bribery of distillery inspectors and fraudulent documents submitted to revenue agents. Id. Thus, Congress enacted broad federal legislation to demonstrate the coherent power of the federal government in putting an end to this kind of fraudulent activity.

27. Act of March 2, 1867, ch. 169, § 30, 14 Stat. 484. This provision is now section 371 of Title 18, and provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States . . . each shall be fined not more than $10,000 or imprisoned not more than five years, or both.


28. See United States v. Jones, 10 F. 469, 470 (C.C.S.D.N.Y. 1882) (scheme to sell counterfeit money held actionable under the statute, since use of the mails involved). But see United States v. Owens, 17 F. 72, 74 (E.D. Mo. 1883) (fraudulent creditor not covered under statute even though scheme used mails to claim bill payment had been lost, since credit avoidance is not dependent upon mails).

29. See, e.g., United States v. Mitchell, 36 F. 492, 493 (W.D. Pa. 1888) (court held that more than mere sending of letter forming part of fraud is needed to constitute offense; therefore, scheme to deceive accident insurance company as to date of remittance is not within statute); Owens, 17 F. at 74 (statute was designed to strike at "common schemes" whereby fraudulent circulars are distributed through mails; consequently, credit avoidance is not kind of "common scheme" intended to be covered under statute). But see United States v. Watson, 35 F. 358, 359 (E.D. N.C. 1888) (plan to cheat by ordering goods through mail with intention of not paying constitutes scheme to defraud).

30. See, e.g., Owens, 17 F. at 74; Mitchell, 36 F. at 493.

ment did not succeed in providing any uniformity to the decisions that followed. Courts remained divided over how essential the use of the mails needed to be in these schemes to constitute a violation of the statute.33

Two impetuses occurred to cause the mail fraud statute to be amended in 1909. One was the judicial uncertainty over the extent to which the mailings had to be essential to the scheme to defraud. In response to this concern, the 1909 amendment removed much of the "mail emphasizing" language from the statute.34 Under the amended statute, the elements of mail fraud were: (1) a person must have devised a scheme or artifice to defraud; and (2) must have effectuated the scheme by placing a letter with the post office.35 Intent to effectuate the scheme by use of the mails was no longer an element of the crime. This change clarified the notion that even crimes that did not absolutely require use of the mails would still be covered under the statute.36 Thus, the amendment seemed to broaden the statute's reach.

The second impetus for the 1909 amendment was a desire to codify the Supreme Court's holding in Durland v. United States.37 Durland was decided in 1896, and was the first case in which the Supreme Court interpreted the scope of the mail fraud statute.38 Durland involved a bond investment scheme, whereby parties were promised that, in exchange for payment, they would be issued bonds with increased redemption value.39 In fact, the defendants never intended to follow through on their promises. The defendant argued that since the scheme involved only false promises with respect to future payments, he could not be guilty of

33. See, e.g., Etheredge v. United States, 186 F. 434, 442 (5th Cir. 1911) (ordering goods with no intention to pay cannot amount to mail fraud scheme to defraud, as not mail dependent); United States v. Clark, 121 F. 190, 191 (M.D. Pa. 1903) (correspondence-school swindle not covered under statute since distribution of circulars not mail dependent); United States v. Smith, 45 F. 561, 562-63 (E.D. Wis. 1891) (fraudulent inducements to medical treatment not covered under statute as not mail dependent). But see Milby v. United States, 109 F. 638, 642-43 (6th Cir. 1901) (scheme to sell counterfeit money covered under statute, as it constitutes scheme to defraud); Culp v. United States, 82 F. 990, 990-91 (3rd Cir. 1897) (ordering goods with no intention to pay is scheme to defraud within statute).


36. Id. at 161. The lower court had dismissed the case, finding that the mails were not essential to the scheme. Id. at 158-59. The Supreme Court reversed. Id. at 162.


38. Id. at 313-15.

39. Id. at 312.
The Court held that the statute "includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." The defendant's promises with respect to future payments were, therefore, included within the statute's scope.

The 1909 amendment was a codification of the holding in Durland, and the most crucial change in the new language of the statute reflected the statute's expanded reach. The 1909 statute thus proscribed "[a]ny scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises." As with the original statute, Congress did not provide any legislative history of this change. Senator Heyburn, sponsor of the amendment, stated that the change was obvious, and needed no further explanation.

Indeed, if further explanation of the statute's scope was needed, the Court answered any questions in Badders v. United States, decided in 1916. Badders involved a challenge to the constitutionality of the mail fraud statute under the argument that Congress had no power to legislate against "a fraudulent scheme that is itself outside the jurisdiction of Congress to deal with." In upholding the constitutionality of the statute, Justice Holmes writing for a unanimous Court, stated that Congress may regulate the use of the mails. Accordingly, Holmes concluded that when the mails are involved, Congress had the power to "forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not."

The decision in Badders clarified a number of aspects about the statute. The amended statute contained two important changes—it eliminated the mailing-intent requirement and included the crime of false pretenses only if misrepresentations of existing or past facts were made. The crime of false pretenses did not include false promises—intentions not to carry out acts in the future.

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40. Id. at 312-13. At common law, one could be convicted of the crime of false pretenses only if misrepresentations of existing or past facts were made. Id. at 313. The crime of false pretenses did not include false promises—intentions not to carry out acts in the future. Id.
41. Id.
43. Id. The amended statute read, in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises... for the purpose of executing such scheme or artifice or attempting to do so, place... any... writing... in any post-office... shall be fined not more than one thousand dollars or imprisoned not more than five years, or both.

44. 42 CONG. REC. 1026 (1908) (remarks of Sen. Heyburn).
46. Id. at 393.
47. Id.
48. Id.
promises. *Badders* held that these changes were unquestionably constitutional.\(^{49}\) Moreover, the Court concluded that the "scheme to defraud" requirement was to be read broadly, i.e., to include schemes that may not have fallen within Congress' power to regulate "but for" the use of the mails.\(^{50}\) Holmes' expansive reading of the phrase "scheme to defraud" proved to be the most crucial language in the *Badders* decision, as future courts struggled to determine exactly what kinds of schemes were proscribed.\(^{51}\) In particular, the statement that Congress could proscribe "any scheme contrary to public policy" led courts to develop what has become known as the intangible rights doctrine.\(^{52}\)

**B. Development of the Intangible Rights Doctrine**

In the original mail fraud statute and the 1909 amendment, Congress chose not to define "scheme to defraud." Perhaps Congress believed that no definition was necessary because, as Justice Holmes' said, "the law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity."\(^{53}\) Courts however, have had to set guidelines as to what constitutes "defraud" within the meaning of the mail fraud statute.\(^{54}\) Many courts have formulated the definition of fraud by using the *Badders v. United States*\(^{55}\) view that any scheme contrary to public policy which involves deception can be prosecuted under the mail fraud statute if the mails are used in the execution of the scheme.\(^{56}\) For example, in *Gregory v. United States*,\(^{57}\) the Fifth Circuit held that measuring a "scheme to defraud" involves determining "moral

\(^{49}\) Id.

\(^{50}\) Id.

\(^{51}\) See United States v. Brewer, 528 F.2d 492, 495-96 (4th Cir. 1975) (scheme to enable Florida residents to obtain cigarettes without declaring sales and use tax); United States v. States, 488 F.2d 761, 764 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974) (election fraud scheme); see also United States v. Condolon, 600 F.2d 7 (4th Cir. 1979) (scheme to seduce woman through bogus talent agency); United States v. Louderman, 576 F.2d 1383 (9th Cir.), cert. denied, 439 U.S. 896 (1978) (scheme to obtain confidential information).


\(^{53}\) Weiss v. United States, 122 F.2d 675, 681 (5th Cir.), cert. denied, 314 U.S. 687 (1941).


\(^{55}\) 240 U.S. 391 (1916).

\(^{56}\) Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958) (to measure a scheme to defraud, determine moral uprightness and fundamental honesty); see also Mandel, 591 F.2d at
uprightness . . . fundamental honesty, fair play and right dealing in the general and business life of members of society.\textsuperscript{58} This kind of definition of "defraud" in the context of the mail fraud statute was instrumental in the development of the intangible rights doctrine.

The intangible rights doctrine grew out of the notion that morally reprehensible behavior or conduct against public policy could be prosecuted under the mail fraud statute.\textsuperscript{59} Application of the statute was not restricted to cases in which the victim had suffered monetary or property loss.\textsuperscript{60} Rather, a "scheme to defraud" was found if the defendant had defrauded someone of a "lawful right,"\textsuperscript{61} or had used the mails for a scheme involving deception that failed to measure up to accepted moral standards and notions of honesty and fair play.\textsuperscript{62}

Among the earliest cases to interpret the far-reaching Badders holding, and frequently cited for the intangible rights doctrine,\textsuperscript{63} are United States v. Proctor & Gamble Co.\textsuperscript{64} and Shushan v. United States.\textsuperscript{65} In Proctor & Gamble, an employee was found to have defrauded his employer of "loyal and honest" services by selling confidential information.

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\textsuperscript{1360} (citing Badders rationale); Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967) ("law puts its imprimatur on accepted moral standards").
\textsuperscript{57} 253 F.2d 104 (5th Cir. 1958).
\textsuperscript{58} Id. at 109.
\textsuperscript{60} See, e.g., United States v. Lovett, 811 F.2d 979, 985 (7th Cir. 1987) (no money or property loss needed for mail fraud finding); United States v. Curry, 681 F.2d 406, 410 (5th Cir. 1982); United States v. Isaacs, 493 F.2d 1124, 1149-50 (7th Cir.), \textit{cert. denied}, 417 U.S. 976 (1974).
\textsuperscript{62} Mandel, 591 F.2d at 1361; \textit{States}, 488 F.2d at 764; Blachly, 380 F.2d at 671.
\textsuperscript{63} Mandel, 591 F.2d at 1362 (citing Shushan rationale); United States v. Bryza, 522 F.2d 414, 421 (7th Cir. 1975), \textit{cert. denied}, 426 U.S. 912 (1976) (citing Proctor & Gamble rationale); United States v. Bush, 522 F.2d 641, 646 (7th Cir. 1975), \textit{cert. denied}, 424 U.S. 977 (1976) (citing Proctor & Gamble rationale); Isaacs, 493 F.2d at 1150 (citing Shushan rationale). \textit{But see Intangible-Rights, supra note 18, at 584-87. The author stated that Proctor & Gamble and Shushan do not support the intangible rights doctrine, and cases that have relied on them have done so erroneously. The author reasoned that in both cases victims had been deprived of money or property, and any statements by the courts that could be construed as supporting the intangible rights doctrine were dicta.}
\textsuperscript{64} 47 F. Supp. 676 (D. Mass. 1942).
\textsuperscript{65} 117 F.2d 110 (5th Cir.), \textit{cert. denied}, 313 U.S. 574 (1941).
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The court found that the employee's breach of duty had "defraud[ed] the employer of a lawful right"—the employer's right that the employee be honest and loyal to the employer's interests and not wrongfully divulge confidential information.7 This breach of duty, coupled with the employee's deception in concealing the sale, constituted a "scheme to defraud."68

Shushan involved the bribery of a public official,69 and is therefore often cited in public corruption cases.70 The scheme in that case centered on obtaining inflated fees for bond issues. To effectuate the scheme, the bribed official had to persuade the city's Parish Levee Board to go along with the plan, concealing both the fact that the bonds were being issued at inflated prices and that the official would ultimately receive the excess monies.71 In holding that such conduct constituted mail fraud, the court reasoned that "[n]o trustee has more sacred duties than a public official, and any scheme to obtain an advantage by corrupting... one must in the federal law be considered a scheme to defraud."72 Thus, the court held that when a public contract is obtained on more favorable terms by bribing a public official, a "scheme to defraud the public" has occurred.73

Shushan and Procter & Gamble are both premised on the theory that

66. Proctor & Gamble, 47 F. Supp. at 678.
67. Id.
68. Id. The court stated that:

When one tampers with [the employer-employee relationship] for the purpose of causing the employee to breach his duty he in effect is defrauding the employer of a lawful right. The actual deception that is practised is in the continued representation of the employee to the employer that he is honest and loyal to the employer's interests.

69. Shushan, 117 F.2d at 110.
71. Shushan, 117 F.2d at 114-15.
72. Id. at 115.
73. Id.
certain relationships create a fiduciary duty on the part of an employee. Accordingly, when the fiduciary fails to disclose material information that he is under a duty to disclose by virtue of the fiduciary relationship, and the failure to disclose could or does result in harm, the employee has devised a "scheme to defraud." The theory is the same in both the public and private sector. In explaining the duty of a public official, the First Circuit stated, "the affirmative duty to disclose material information arises out of a government official's fiduciary relationship to his or her employer, whether as a public or as a private employee." Thus, a fiduciary's failure to disclose this information violates the mail fraud statute.

Following Shushan, numerous circuit courts adopted the view that schemes involving bribery, falsification and non-disclosure of material information, particularly by public officials, constituted mail fraud. In United States v. States, for example, two politicians running for election were found guilty of mail fraud by submitting false and fraudulent voter registration affidavits bearing the names of fictitious persons for the purpose of influencing the outcome of the upcoming elections. The court noted that the purpose of the mail fraud statute was to "prohibit the misuse of the mails to further fraudulent enterprises." The court held that falsification of election results was a fraudulent enterprise, and therefore fell within the purview of the mail fraud statute, even though there had been no loss of money or property.

In United States v. Mandel, the Governor of Maryland was convicted of mail fraud when the court found that he had concealed his}

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74. Id.; Proctor & Gamble, 47 F. Supp. at 678.
76. United States v. Silvano, 812 F.2d 754, 759 (1st Cir. 1987) (concealment of kickback scheme by City Budget Director).
77. See, e.g., Clapps, 732 F.2d at 1153; Mandel, 591 F.2d at 1359-60; United States v. Brown, 540 F.2d 364, 374-75 (8th Cir. 1976); United States v. Keane, 522 F.2d 534, 546 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976), petition for writ of error coram nobis denied, 678 F. Supp. 708 (N.D. Ill. 1987), aff'd, 852 F.2d 199 (7th Cir. 1988); Isaacs, 493 F.2d at 1150.
79. Id. at 763.
80. Id. at 764.
81. Id. at 766.
personal stake in legislation that he supported. The Mandel court stated that Mandel's "failure to disclose the existence of a direct interest in a matter that he [was] passing on defraud[ed] the public . . . of their intangible right to honest, loyal, faithful and disinterested government." The Mandel court further noted that "[a]t this late date, there can be no real contention that many schemes to defraud a state and its citizens of intangible rights, e.g., honest and faithful government, may not fall within the purview of the mail fraud statute."

The McNally v. United States case reached the Supreme Court against this background of years of precedent at the circuit level upholding the intangible rights doctrine. Prior to McNally, the Court had never considered the issue of intangible rights. In fact, the Court had consistently refused to grant certiorari to every intangible rights case that was presented to it. When the Court finally decided to consider the doctrine in McNally, its holding marked a radical departure from the Mandel court's confidence in the viability of intangible rights.

III. McNally v. United States: Statement of the Case

James Gray and Charles McNally were convicted by jury of mail fraud under section 1341 of Title 18 of the United States Code, for conducting a "scheme . . . to defraud," as provided by the mail fraud statute. A third person, Howard "Sonny" Hunt was also indicted. Hunt, however, pleaded guilty to mail fraud and was sentenced to three years in prison.

Hunt, Gray and McNally were politically active in the Democratic Party of Kentucky during the 1970s. After Julian Carroll was elected Governor of Kentucky in 1974, Hunt was appointed chairman of the state Democratic Party. Gray served as Secretary of Public Protection and Regulation from 1976 to 1978, and also as Secretary of the Governor's Cabinet from 1977 to 1979. McNally occupied no public office, but

83. *Id.* at 1364.
84. *Id.* at 1363.
85. *Id.* at 1362.
87. See, e.g., *Margiotta*, 688 F.2d 108 (certiorari denied); *Mandel*, 591 F.2d 1347 (certiorari denied); *Isaacs*, 493 F.2d 1124 (certiorari denied). Prior to McNally, the Supreme Court had not addressed the meaning of "scheme to defraud" in more than 60 years. See *Fasulo v. United States*, 272 U.S. 620 (1926) ("scheme to defraud" does not encompass use of mails to obtain money by means of threats of murder or bodily harm).
90. *Id.* at 2878.
91. *Id.* at 2877.
was "a staunch political ally of Governor Carroll."  

One of Hunt's responsibilities was to select the insurance agencies from which the state would purchase its policies. Hunt suggested to Robert Tabeling, Vice-President of the Wombwell Insurance Company (Wombwell), that, in exchange for purchasing the state's insurance with Wombwell, Wombwell should agree to share or "kickback" any commissions in excess of $50,000 a year with other insurance agencies specified by Hunt. Wombwell agreed to this arrangement.

Between 1975 and 1979, Wombwell distributed $851,000 to 21 agencies designated by Hunt. One of these agencies, Seton Investments, Inc., (Seton) was a company controlled by Hunt and Gray, and nominally owned and operated by McNally. Seton was established in 1975 by Hunt and Gray for the sole purpose of receiving commissions from Wombwell. Of the $851,000 distributed by Wombwell, approximately $200,000 was paid to Seton. Hunt and Gray used the money to purchase two condominiums and a car. Additionally, Seton provided Hunt's son with checks totalling $38,500. In order to accomplish the distribution of funds, Hunt had directed Wombwell to make payments to the Snodgrass Insurance Agency, which in turn gave the money to McNally. Thus, McNally personally received $77,500 "in return for acting as Seton's frontman." 

Based on this series of events, federal authorities charged Hunt with mail and tax fraud. Hunt pleaded guilty. Gray and McNally each went to trial on one count of conspiracy and one count of mail fraud. The mail fraud count alleged that Gray and McNally had devised a scheme to defraud the citizens and government of Kentucky of their right to have their affairs conducted honestly, impartially, and free from bias. The count also alleged that Gray and McNally had devised a scheme to obtain "money and other things of value by means of false pretenses and the concealment of material facts." 

The jury found Gray and McNally guilty of both mail fraud and

93. Id. at 1292.
95. Id. at 2877-78.
96. Gray, 790 F.2d at 1293.
98. Gray, 790 F.2d at 1293.
100. Id.
101. Id.
conspiracy. The Sixth Circuit affirmed the convictions relying on the line of cases holding that the mail fraud statute proscribes schemes to defraud citizens of their right to honest and impartial government. The United States Supreme Court reversed, and held that the mail fraud statute was limited to the protection of property rights. Since there was no proof that the citizens of Kentucky had been deprived of money or property, the Court concluded that the defendants' conduct did not fall within the reach of the mail fraud statute.

IV. REASONING OF THE COURT

The majority's reasoning in McNally v. United States focused on Congress' intent in passing the mail fraud statute. First, the Court discussed the original statute's purpose as derived from legislative history. The majority then examined the effect and purpose of the statute's amendment in 1909. Additionally, the Court explored the common understanding of the word "defraud" to develop a firm definition of the phrase "scheme to defraud." Finally, following the concept of lenity, the Court stated that since section 1341 is a criminal statute, it should not be harshly read. Accordingly, the Court held that the statute protected only property rights, based on the fact that Congress had not expressly intended to include intangible rights within the statute's scope. Applying this reasoning to the facts of McNally, the Court concluded that McNally and Gray could not be guilty of mail fraud.

102. Id. at 2879. McNally was convicted on the mail fraud count as an aider and abettor.
103. Gray, 790 F.2d at 1298.
106. Id. at 2882.
108. Id. at 2879-81.
109. Id. at 2879-80. See infra notes 115-21 and accompanying text.
110. Id. at 2880. See infra notes 122-39 and accompanying text.
111. Id. at 2880-81. See infra notes 140-54 and accompanying text.
112. Id. at 2881. See infra notes 155-62 and accompanying text.
113. Id.
114. Id. at 2881-82.
A. The Majority's Analysis of Legislative History

In its analysis of the mail fraud statute, the majority in *McNally* recognized that the legislative history of the statute is sparse, limited primarily to the remarks of the bill's original 1872 sponsor, Representative Farnsworth. The Court cited Farnsworth's comments on the statute's purpose—that the statute was necessary "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rascals generally, for the purpose of deceiving and fleecing the innocent people in the country." Additionally, the Court noted that one specific type of fraud mentioned by Farnsworth was a scheme whereby the mail was used to solicit the purchase of counterfeit bills. The Court therefore concluded that the legislative history "indicates that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property." Further, the Court found that the language in the statute's 1889 amendment, in which specific schemes such as "green coin" and "green cigars" were expressly prohibited, merely described many of the same types of counterfeit currency schemes as those mentioned by Farnsworth during the debates on the original bill. Therefore, the Court concluded that the addition of the 1889 amendment "appears to have been nothing more than a reconfirmation of the statute's original purpose."

B. The Majority's Analysis of the 1909 Amendment

The *McNally* Court continued its analysis by examining the 1909 amendment of the mail fraud statute. Initially, the Court discussed the reach of *Durland v. United States*, the case that led to the statute's 1909 amendment. *Durland*, the Court noted, had held that the statute "is to be interpreted broadly insofar as property rights are concerned, but did not indicate that the statute had a more extensive reach." Specifically, the *Durland* Court had held that the term "any scheme or artifice
to defraud” was not limited to misrepresentations of existing facts, but also included suggestions or promises as to the future. Accordingly, in *Durland*, the use of the mails to sell bonds that the defendant did not intend to honor had fallen within the statute.

The *McNally* Court then discussed the codification of this holding by Congress in 1909. According to the Court, in codifying *Durland*, Congress “gave further indication that the statute’s purpose is protecting property rights.” The Court noted that the 1909 amendment merely added the phrase “or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” Thus, the Court concluded that Congress had extended the statute to include use of the mails to convey false promises—an activity that would not have been included within the common-law definition of “false pretenses.” Therefore, the sole crime added to the statute in 1909 was future misrepresentations. Consequently, the Court stated that the statute’s original purpose of protecting property rights remained unchanged by the amendment.

The Court, however, recognized that after the codification of *Durland*, the statute proscribed “schemes or artifices ‘to defraud’ or ‘for obtaining money or property by means of false . . . pretenses.’” The two phrases appear in the disjunctive, and “it is arguable that they are to be construed independently.” Thus, the Court noted, many circuit courts have held that the money-or-property requirement of the second phrase does not limit “any scheme to defraud” to those involving a deprivation of money or property. The Court stated that this erroneous reading of the statute had enabled the circuit courts to develop the intangible rights doctrine.

The Court indicated that the circuit courts that developed the intangible rights doctrine were incorrect in reading the statute as they had.

126. *Id.* at 2880 (citing *Durland* v. United States, 161 U.S. 306, 313 (1896)).
127. *Id.*
129. *Id.*
131. *Id.* See supra text accompanying note 40.
132. *Id.* at 2881.
133. *Id.* at 2880.
134. *Id.*
136. *Id.* Although the Court did not explicitly state that the two phrases are not to be read disjunctively, this seems to be the Court’s implication.
Instead, the Court’s reading of the statute revealed that because the 1909 amendment added only false promises to the statute’s scope, no additional requirement of money or property was to be imparted to the statute. According to the Court, the statute had always required a deprivation of money or property. The Court therefore concluded that, although the statute appears to contain two independent phrases, the money-or-property requirement, which appears only in the second phrase, really modifies both phrases. The Court then interpreted the word “defraud” to involve a deprivation of money or property as the statutory meaning of the phrase “scheme to defraud.”

C. The Majority’s Interpretation of the Word “Defraud”

The McNally Court determined that the circuit courts that have construed the statute to encompass intangible rights were mistaken for two reasons. First, the Durland v. United States codification only added the inclusion of false promises; it did not change the meaning of the phrase “any scheme to defraud.” Second, the words “to defraud” commonly refer “to wronging one in his property rights by dishonest methods or schemes.” The Court stated that there was no indication that Congress intended to depart from this “common understanding” of the word “defraud.” Thus, the Court reasoned that the circuits that had interpreted “defraud” to include intangible rights had expanded the statute beyond what Congress intended it to encompass: protection of property rights.

As support for the holding that the word “defraud” is limited to property rights, the Court cited Hammerschmidt v. United States, a case that interpreted the scope of the predecessor to 18 U.S.C. section 371 (the conspiracy statute). The conspiracy statute, enacted in 1867, five years prior to the original mail fraud statute, made criminal

137. Id. at 2880-81.
138. Id. at 2881.
139. Id. at 2880.
143. Id. (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)).
144. Id. at 2881.
145. Id. at 2880.
146. 265 U.S. 182 (1924).
any conspiracy “to defraud the United States.” The *Hammerschmidt* Court held that “to defraud” as used in section 371 means “to cheat the Government out of property or money.”

The *McNally* Court noted that other cases have interpreted section 371 as reaching conspiracies other than those directed at property interests. Nonetheless, the *McNally* Court concluded that courts that applied a broad construction to section 371 “based [their holdings] on consideration[s] not applicable to the mail fraud statute.” The Court stated that the distinction between the two statutes is that “[s]ection 371 is a statute aimed at protecting the Federal Government alone; however, the mail fraud statute . . . had its origin in the desire to protect individual property rights.” Therefore, the Court concluded that the “common understanding” of the term “defraud” as limited to property rights by the *Hammerschmidt* Court also applies to the mail fraud statute.

**D. The Majority's Reading of the Statute**

The *McNally* Court recognized that the view it adopted—that the mail fraud statute only protects property rights—was at odds with the position taken by many circuit courts—that the statute also protects intangible rights. The Court, however, noted that “when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.” Additionally, the Court stated that before a person can be punished for a criminal offense, “it must be shown that his case is plainly within the statute.” The Court then discussed the extension of the mail fraud statute by the circuit courts. By encompassing protection of intangible rights as within the scope of statute, the Court reasoned that the circuit courts were construing the statute in a manner that left its “outer boundaries ambiguous.” The Court did not elaborate on what it was referring to by “ambiguous boundaries.” Instead, the Court suggested that intangible rights were never clearly defined as within the stat-

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149. Id. at 2881 n.8 (citing 18 U.S.C. § 371).
150. Id. (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)).
151. Id. (citing Glasser v. United States, 315 U.S. 60 (1942); Haas v. Henkel, 216 U.S. 462, 480 (1910)).
152. Id.
153. Id. (citing Curley v. United States, 130 F. 1 (1st Cir.), cert. denied, 195 U.S. 628 (1904)).
154. Id. at 2881.
156. Id. at 2881 (quoting United States v. Bass, 404 U.S. 336, 347 (1971)).
157. Id. (quoting Fasulo v. United States, 272 U.S. 620, 629 (1926)).
158. Id.
ute's scope. Presumably, the Court reasoned that prosecuting an individual for violating intangible rights would involve a "harsher reading" of the statute.

Further, the Court noted that the intangible rights doctrine "involves the Federal Government in setting standards of disclosure and good government for local and state officials." The Court stated that, absent a clearer directive from Congress, the Court would not interpret the statute to have this harsher reading. Thus, the Court held that the statute is limited in scope to the protection of property rights.

E. The Majority's Application of the Holding to the McNally Facts

The Court applied the limited interpretation of the mail fraud statute to the facts of McNally and found that there was no evidence to support a conviction for mail fraud. The jury had not been charged nor required to find that the state itself was defrauded of money or property to convict the defendants. Nor had the jury been instructed that to convict it had to find that, absent the scheme, the state would have paid lower insurance premiums. Additionally, there was no proof that the money received by Hunt, Gray and McNally from Wombwell was the state's money. The Court reasoned that insurance premiums would have been paid to some agency, and Hunt, Gray and McNally had simply shared part of the premiums that Wombwell received. Thus, since there was no finding at trial that the state had actually lost money or property, Gray and McNally's conduct did not constitute mail fraud.

At trial, Gray was found to have defrauded the people of Kentucky of their right to honest government by his failure to disclose the arrangement whereby Hunt, McNally and he shared insurance commissions with the Wombwell agency. The Court assumed, however, that requiring the Wombwell agency to share its commissions did not violate state law. Further, the Court assumed that state law did not prohibit Hunt and Gray from owning one of the agencies with which the Wombwell agency shared its commissions. Finally, the Court noted that

\[159. \text{Id. at 2879-81.}\]
\[160. \text{Id. at 2881.}\]
\[161. \text{Id.}\]
\[162. \text{Id.}\]
\[164. \text{Id. at 2882.}\]
\[165. \text{Id.}\]
\[166. \text{Id.}\]
\[167. \text{Id. at 2878-79.}\]
\[168. \text{Id. at 2882 n.9.}\]
state law did not require state officers such as Hunt and Gray to disclose this type of arrangement.\textsuperscript{169}

The Court reasoned that since the entire scheme was not prohibited under state law, it would be incongruous to require Gray to disclose such a scheme, stating that:

[I]f state law expressly permitted or did not forbid a state officer such as Gray to have an ownership interest in an insurance agency handling the State’s insurance, it would take a much clearer indication than the mail fraud statute evidences to convince us that having and concealing such an interest defrauds the State and is forbidden under federal law.\textsuperscript{170}

Thus, the Court refused to hold that the mail fraud statute imposed a duty to disclose a scheme that was not contrary to state law.

Finally, the Court left open the possibility that Congress could constitutionally criminalize using the mails to further a state officer’s efforts to profit from governmental decisions which he is empowered to make, even if there is no state law which proscribes such profiteering.\textsuperscript{171} However, the Court held that under the current mail fraud statute, profiting from governmental decisions is not prohibited.\textsuperscript{172} Thus, the Court reversed the decision of the lower court upholding Gray and McNally’s conviction for mail fraud.\textsuperscript{173}

\textbf{F. The Dissent}

Justice Stevens wrote a biting four part dissent; Justice O’Connor joined in parts I, II, and III.\textsuperscript{174} Initially, the dissent described the long history of circuit decisions upholding the intangible rights doctrine in cases involving public officials depriving citizens of honest government, and cases involving private individuals for accepting kickbacks or selling confidential information.\textsuperscript{175} Justice Stevens stated that the circuits that have considered the intangible rights doctrine shared a common conclusion: “They have realized that nothing in the words ‘scheme or artifice to defraud’ or in the purpose of the statute, justifie[d] limiting its application to schemes intended to deprive victims of money or property.”\textsuperscript{176}

\textsuperscript{169. Id.}
\textsuperscript{170. Id.}
\textsuperscript{171. Id.}
\textsuperscript{172. Id. at 2882.}
\textsuperscript{173. Id.}
\textsuperscript{175. Id. at 2882-83 & nn.1-4 (Stevens, J., dissenting).}
\textsuperscript{176. Id. (Stevens, J., dissenting).}
In Part I, the dissent examined the plain language of the statute, and found that since the phrases “scheme or artifice to defraud” and “for obtaining money or property by means of false . . . pretenses” appear in the disjunctive, the phrases should be construed independently.\textsuperscript{177} Further, Justice Stevens stated that the purpose of the statute was to protect the integrity of the United States mails.\textsuperscript{178} Accordingly, he concluded that the conjunctive interpretation that the Court adopted “show[ed] no fidelity to Congress’ words or purpose.”\textsuperscript{179}

Part II of the dissent focused on the majority’s misinterpretation of the common understanding of the word “defraud.”\textsuperscript{180} Specifically, Justice Stevens discussed the use of the term “defraud” in the criminal conspiracy statute.\textsuperscript{181} In the context of that statute, “defraud” does not necessarily encompass the loss of money or property.\textsuperscript{182} Justice Stevens also assailed the majority for suggesting that it was justified in interpreting the mail fraud and conspiracy statutes differently because the latter protects the United States while the former benefits private individuals.\textsuperscript{183} Additionally, he examined the definition of fraud at common law, and found that the term was not limited to deprivations of money or property.\textsuperscript{184} Finally, he noted that the mail fraud statute, as other legislation enacted by Congress in the 19th century, was “written in broad general language on the understanding that courts would have wide latitude in construing them to achieve the remedial purposes that Congress

\textsuperscript{177} Id. at 2884 (Stevens, J., dissenting).

\textsuperscript{178} Id. (Stevens, J., dissenting). “The focus of the statute is upon the misuse of the Postal Service, not the regulation of state affairs, and Congress clearly has the authority to regulate such misuse of the mails.” Id. (Stevens, J., dissenting) (quoting United States v. States, 488 F.2d 761, 767 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974)).

\textsuperscript{179} Id. at 2885 (Stevens, J., dissenting). Justice Stevens also summarized some of the types of fraud that had been prosecuted under the intangible rights doctrine, and stated that the doctrine played “an indispensable role in effectuating Congress’ goal of preserving the integrity of the Postal Service.” Id. (Stevens, J., dissenting) (citing United States v. States, 488 F.2d 761 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974) (election fraud); United States v. Rauhoff, 525 F.2d 1170 (7th Cir. 1975) (right to have business of office of Secretary of State free from bribery)).

\textsuperscript{180} Id. at 2886 (Stevens, J., dissenting).

\textsuperscript{181} Id. (Stevens J., dissenting) (citing 18 U.S.C. § 371 (1982)).

\textsuperscript{182} Id. (Stevens, J., dissenting) (citing Hammerschmidt v. United States, 265 U.S. 182 (1924); Haas v. Henkel, 216 U.S. 462 (1910)).

\textsuperscript{183} Id. (Stevens, J., dissenting) Justice Stevens stated: [It is] ludicrous to think that a Congress intent on preserving the integrity of the Postal Service would have used the term ‘defraud’ in a narrow sense so as to allow mailings whose purpose was merely to defraud citizens of rights other than money or property.

\textsuperscript{184} Id. at 2887 (Stevens, J., dissenting).
had identified.”185

The dissent continued by discussing the majority’s misplaced use of the rule of lenity. First, Justice Stevens noted that even if criminal statutes are to be strictly construed, that does not mean a statute must be “‘given the narrowest possible meaning in complete disregard of the purpose of the statute.’”186 Second, even if the statute was ambiguous as written by Congress, whatever doubt existed was removed by the numerous circuit decisions construing the statute.187 Accordingly, the dissent argued that the defendants had ample knowledge that their actions were unlawful.188

The final portion of the dissent criticized the Court for rejecting the “accumulated wisdom” of the judges who had found that the mail fraud statute encompassed the intangible rights doctrine. Justice Stevens stated:

This quality of this Court’s work is most suspect when it stands alone, or virtually so, against a tide of well-considered opinions issued by state or federal courts. In this case I am convinced that those judges correctly understood the intent of the Congress that enacted this statute. Even if I were not so persuaded, I could not join a rejection of such a long-standing, consistent interpretation of a federal statute.189

Justice Stevens concluded his dissent by stating that the Court “ha[d] made a serious mistake” by having acted “so dramatically to protect the elite class of powerful individuals who [would] benefit from [the] decision.”190

V. ANALYSIS

This analysis parallels the McNally Court’s reasoning, discussing

185. Id. (Stevens, J., dissenting).
186. Id. (Stevens, J., dissenting) (quoting McElroy v. United States, 455 U.S. 642, 658 (1982)).
187. Id. (Stevens, J., dissenting). The dissent noted that not only did the Supreme Court decisions construing the conspiracy statute make it clear that fraud was not limited to the deprivation of tangible property, but also:
the series of Court of Appeals’ opinions applying this very statute to schemes to defraud a State and its citizens of their intangible right to honest and faithful government, notwithstanding the absence of evidence of tangible loss, removed any relevant ambiguity in this statute.
Id. at 2890 (Stevens, J., dissenting).
188. Id. (Stevens, J., dissenting).
189. Id. (Stevens, J., dissenting).
190. Id. at 2891 (Stevens, J., dissenting). Justice O’Connor did not join in this final portion of the dissent. Id. at 2882.
each of the four areas outlined in Parts A through D above. First, the analysis examines the legislative history relied upon by the Court, and determines whether there was in fact any basis for the Court's conclusion that the statute protects only money or property. Second, the analysis explores *Durland v. United States* and the subsequent amendment of the mail fraud statute, and considers whether either indicate that the statute's purpose was the protection of property rights. Third, the meaning of the word "defraud" is examined as that word is used in two other federal statutes and as the word is defined in dictionaries published during the period in which the mail fraud statute was enacted. Finally, the analysis considers why the Court may have decided that the statute should be read narrowly.

**A. Analysis of Legislative History**

In *McNally v. United States*, the majority's reasoning rests on the premise that Congress' purpose in enacting the mail fraud statute was "to protect the people from schemes to deprive them of their money or property." The Court derived this crucial proposition from Representative Farnsworth's remarks at the time he introduced the original bill to Congress. As the Court conceded, Representative Farnsworth said very little. The Court, however, concluded that Farnsworth only intended money or property to be protected under the statute. This conclusion was based on Farnsworth's example of a counterfeiting scheme as the type of scheme that the statute should proscribe.

Representative Farnsworth's full comment on this point was:

I have here on my desk a large number of specimen circulars and letters sent out, which have been forwarded to the Post Office Department in this city. They were sent from various bogus offices in the large cities, professing to be from agents of some enterprise or other, which are well enough upon their face, but upon examination are found to be entirely bogus. Some of them are schemes for selling counterfeit money.

[Farnsworth proceeded to describe such a scheme.]

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191. *See supra* notes 115-62 and accompanying text.
194. *Id.* at 2879.
195. *Id.* at n.5 (citing *Cong. Globe*, 41st Cong., 3d Sess., 35 (1870) (remarks of Rep. Farnsworth)).
196. *Id.* at 2879.
Thus all through the country thousands of innocent and unsophisticated people, knowing nothing about the ways of these city thieves and robbers, are continually fleeced and robbed, and the mails are made use of for the purpose of aiding them in their nefarious designs. 198

The Court concluded from this comment that Farnsworth’s purpose in proposing the mail fraud statute was to protect money or property rights.

The counterfeiting scheme mentioned by Representative Farnsworth was simply an example of one type of scheme that Farnsworth felt should be covered under the statute. 199 Counterfeiting schemes, along with lotteries and so-called gift concerts, were popular during the late 1800s. 200 Thus, the counterfeiting example was an effective illustration for Farnsworth to use, as it presumably was easily understood by Congress. In any event, the scheme to sell counterfeit money was merely one specific example of a prevalent scheme. Farnsworth’s comments do not suggest that this type of scheme—one that results in a deprivation of money—is the only type of scheme that he believed should be prohibited. 201

When Farnsworth’s comments are examined in totality, it is apparent that his overall concern was that “innocent and unsophisticated people... are continually fleeced and robbed, and the mails” are used to aid such schemes. 202 The bill’s primary purpose, therefore, was to protect the mails from being used as instruments to aid in the “nefarious designs” of such “thieves and robbers.” 203

Contrary to the McNally Court’s conclusion, 204 the bill contained nothing about thieves and robbers who specifically take property or money. Further, the Court’s conclusion is not supported by Farnsworth’s language. Innocent people can be “fleeced and robbed” of more than merely money or property. Indeed, Chief Justice Burger once suggested that the mail fraud statute should remain strong to “cope with the new varieties of fraud that the ever-inventive American ‘con artist’ is sure

199. Id.
200. In 1868, Congress enacted the “lottery law,” which prohibited the mailing of any letters or circulars “concerning [illegal] lotteries [and] so-called gift concerts.” Act of June 27, 1868, ch. 246, § 13, 15 Stat. 196. See generally Rakoff, supra note 4, at 781-82. Rakoff noted that during the period of “economic turmoil” after the Civil War, “fraudulent lotteries were a common swindle.” Id. at 782.
202. Id.
203. Id.
204. McNally, 107 S. Ct. at 2879.
to develop."\(^{205}\) While Farnsworth did not explicitly state that all varieties of fraud that these con artists could develop would be covered under the statute, neither did his remarks limit the statute to frauds involving only money or property.\(^{206}\)

The Court's premise that the original impetus behind the mail fraud statute was to protect only money or property\(^{207}\) is also unsupported by historical analysis. Commentator Jed Rakoff analyzed the statute in the context of the Reconstructionist era. He concluded that, after the Civil War, federal intervention was needed to dispel widespread fraud.\(^{208}\) Congress reacted by passing statutes "drawn in sweeping language appropriate to the federal government's new-found sense of power."\(^{209}\) The mail fraud statute was an example of "a host of federal legislation . . . that extended federal authority to areas previously reserved to the states."\(^{2210}\)

If Rakoff's premise is correct—that Congress' primary purpose in passing the mail fraud statute was to empower the federal government to prosecute fraud—there would be no reason to limit the statute to only fraudulent schemes whereby money or property is lost.\(^{211}\) The McNally

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\(^{205}\) United States v. Maze, 414 U.S. 395, 407 (1974) (Burger, C.J., dissenting); see also Weiss v. United States, 122 F.2d 675, 681 (5th Cir.), cert. denied, 314 U.S. 687 (1941) ("The variety of means which may be employed in the execution [of a scheme to defraud] is limited only by the ingenuity of the schemer.").


\(^{207}\) McNally, 107 S. Ct. at 2879.

\(^{208}\) Rakoff, supra note 4, at 780.

\(^{209}\) Id. In the McNally dissent, Justice Stevens discussed legislation enacted by Congress in the 19th Century. McNally, 107 S. Ct. at 2888 (Stevens, J., dissenting). Justice Stevens noted that "[s]tatutes like the Sherman Act, the civil rights legislation, and the mail fraud statute were written in broad general language on the understanding that the courts would have wide latitude in construing them to achieve the remedial purposes that Congress had identified." Id. (Stevens, J., dissenting).

\(^{210}\) Rakoff, supra note 4, at 779. Rakoff also noted that in 1872, when the original mail fraud statute was enacted, "doubts of its constitutionality would have been far from idle." Id. at 786 n.65. Beginning in 1866, the Court struck down several "Radical Reconstructionist" statutes as unconstitutional, particularly those the Court felt constituted "federal interference with state or individual preserves that did not find justification in the exercise of some overriding federal purpose." Id. at 786-87 n.65. Rakoff concluded that "it was but the better part of prudence for the draftsmen of the original mail fraud statute to include much language in the statute seemingly directing its thrust toward the protection of the mails, rather than toward the prosecution of fraud." Id. at 787 n.65.

\(^{211}\) At the time the mail fraud statute was enacted, "fraud" was defined as "to deprive of a right . . . to withhold from another what is justly due him," and "any cunning, deception or artifice used to circumvent or deceive another." See McNally, 107 S. Ct. at 2887 (Stevens, J., dissenting) (citing 1 BOUVIER'S LAW DICTIONARY 530 (1897); W. Anderson, A DICTIONARY OF LAW 474 (1893); 1 BURRILL'S LAW DICTIONARY 658-59 (1859)); see also supra notes 320-27 and accompanying text. Thus, the definition of fraud encompassed deprivations of more than simply money or property.
Court did not address this issue, and instead stated the statute's ostensibly clear purpose in conclusory terms.\(^\text{212}\) The statute's precise purpose, however, is far from clear. Given the broad aim of much Reconstructionist legislation, and the fact that the mail fraud statute reflected a "manifest... purpose of Congress to utilize its powers... to protect people against fraud,"\(^\text{213}\) a conclusion contrary to the McNally Court's seems more likely. If the statute's aim was the broader goal of protecting people against fraud, the Court limited the statute in a manner inconsistent with this goal. The Court's finding of a money or property limitation is not supported by legislative history or historical analysis.\(^\text{214}\)

Consequently, the McNally Court's conclusion, that the sole purpose of the mail fraud statute was to protect against schemes that deprive people of money or property, cannot be supported by legislative history. Representative Farnsworth's comments merely indicate that the statute's purpose was to protect the integrity of the mails and prevent them from being used to aid in fraudulent schemes.\(^\text{215}\) The record is devoid of any statement by Farnsworth suggesting that the statute be limited to fraudulent schemes involving money or property. Additionally, the Court's interpretation of the statute is inconsistent with a historical analysis of the Reconstructionist period.\(^\text{216}\) The mail fraud statute was one of several federal statutes enacted during this period for the purpose of empowering the federal government to "dispel widespread fraud."\(^\text{217}\) Therefore, an examination of both the legislative history of the statute and the historical context in which it was enacted indicates that the statute was not limited to schemes that deprived a person of money or property. An analysis of both these areas suggests that protection of intangible rights is within the statute's scope.

\(^{212}\) McNally, 107 S. Ct. at 2879.

\(^{213}\) Rakoff, supra note 4, at 788 n.72 (quoting Donaldson v. Read Magazine, 333 U.S. 178, 190 (1948)).

\(^{214}\) The Court's final point concerning the statute's legislative history was that the 1889 amendment, which added examples of popular schemes of the period, "appear[ed] to have been nothing more than a reconfirmation of the statute's original purpose." McNally, 107 S. Ct. at 2880 n.6. The Court derived this conclusion from the fact that the examples added by Congress in 1889 were removed in 1948, when Congress declared the language to be "surplusage." Id. (citing Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 763). At that time, Congress stated its intent was to simplify the statute without changing its meaning. Id. (citing H.R. Rep. No. 304, 80th Cong., 1st Sess., A100 (1947)). The 1889 amendment, therefore, is of little assistance in either supporting or dispelling the Court's conclusion as to the statute's original purpose.

\(^{215}\) See supra notes 198-206 and accompanying text.

\(^{216}\) See supra notes 208-17 and accompanying text.

\(^{217}\) See supra notes 208-10 and accompanying text.
The McNally Court examined the holding of *Durland v. United States*218 and the 1909 amendment of the mail fraud statute.219 As the McNally Court discussed, the *Durland* decision extended the reach of the statute to include false or fraudulent pretenses, representations or promises.220 This holding was reflected in the 1909 amendment.221 The logical leap that the McNally Court took, however, was in concluding that *Durland* stood for the proposition that “the phrase [scheme to defraud] is to be interpreted broadly insofar as property rights are concerned.”222 Additionally, the McNally Court viewed the 1909 amendment as giving “further indication that the statute’s purpose is protecting property rights.”223 Neither the *Durland* Court nor the amendment stated that the statute’s sole purpose was the protection of property rights.

1. *Durland v. United States*

While the McNally Court did not address the facts of *Durland* in detail, the *Durland* facts demonstrate that the McNally Court misstated the holding of that case. In *Durland*, the defendant argued that his fraudulent bond investment scheme did not fall within the mail fraud statute because the scheme did not fall within the common-law definition of fraud.224 The defendant noted that, at common law, “fraud ... must be the misrepresentation of an existing or a past fact, and cannot consist of the mere intention not to carry out a contract in the future.”225 Accordingly, the defendant asserted the “defense” of false promises—he argued that since he had only made false promises with respect to whether or not he would honor the bonds in the future when they became due, his conduct did not constitute fraud.226 The *Durland* Court rejected this contention, stating that the statute was broader than the defendant claimed, since it proscribed “any scheme or artifice to defraud.”227 Therefore, the *Durland* Court concluded that “[s]ome schemes may be promoted through mere representations and promises as to the future,

220. Id. See supra notes 37-43 and accompanying text.
221. Id. at 2880 (citing Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130).
222. Id. at 2879-80.
223. Id. at 2880.
225. Id. at 313.
226. Id. at 312-13.
227. Id.
yet are none the less schemes and artifices to defraud." 228

To justify this conclusion, the Durland Court reasoned that "beyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning." 229 The Court found that the evil the mail fraud statute sought to remedy was any scheme or plan which held out the prospect that one would receive more than they parted with. 230 Therefore, the Court concluded that "[i]t was with the purpose of protecting the public against . . . intentional efforts to despoil, and to prevent the post office from being used to carry [these efforts] into effect, that this statute was passed." 231 The Durland Court noted that if the statute were confined to the common-law definition of fraud and limited to only misrepresentations of existing fact, the statute would be "strip[ped] . . . of value." 232

Two significant questions were answered in Durland. First, the Court reasoned that, to carry out the purpose of the mail fraud statute, the meaning of fraud had to be expanded beyond the common-law definition. 233 The Durland Court broadly defined the word "fraud," holding that future misrepresentations were to be included within the meaning of the word within the context of the mail fraud statute. 234 The Court, however, did not address the issue of whether only property was included within the statute's scope. Therefore, contrary to the McNally Court's assertion, the Durland Court did not hold that "the phrase [scheme to defraud] is to be interpreted broadly insofar as property rights are concerned." 235 In fact, the Court in Durland held nothing insofar as property rights were concerned, and only addressed expanding the reading of the word "fraud" with respect to future misrepresentations generally.

The McNally Court failed to consider the second important issue addressed in Durland—the articulation of the statute's purpose. According to the Durland Court, the statute was written to protect the public against "intentional efforts to despoil," and to prevent the post office from being used as the instrumentality to carry such schemes into effect. 236 Prior to McNally, some circuit courts had viewed the Durland decision as calling for a broad interpretation of the mail fraud statute—

228. Id. at 313.
229. Id.
230. Id.
231. Id. at 314.
232. Id.
233. Id. at 313.
234. Id.
236. Durland, 161 U.S. at 314.
that "the purpose [of the mail fraud statute] is to prevent the post office department from being used to carry out fraudulent schemes,"\textsuperscript{237} or to "prohibit the misuse of the mails to further fraudulent enterprises."\textsuperscript{238} Based on these interpretations of the statute's purpose, numerous courts had concluded that a victim need not lose money or property to invoke the statute.\textsuperscript{239}

These courts' interpretation of \textit{Durland} regarding the statute's purpose followed from the \textit{Durland} Court's statement that the statute is to protect against "intentional efforts to despoil."\textsuperscript{240} Black's Law Dictionary defines "despoil" as a "means by which one is deprived of that which he possesses."\textsuperscript{241} Since a person can possess much more than money or property—for example, constitutional or civil rights—a scheme that deprives one of rights other than money or property is still an "intentional effort to despoil." As long as the mails are used to execute such a scheme, the conduct would fall within the purpose of the mail fraud statute as set forth in \textit{Durland}.\textsuperscript{242} The \textit{McNally} Court ignored the purpose of the mail fraud statute as expressed in \textit{Durland}, and therefore reached the incorrect conclusion that only schemes involving money or property were within the statute's reach. Properly read, however, \textit{Durland} did not indicate that intangible rights were outside the scope of the mail fraud statute.

2. The 1909 amendment

In addition to its use of \textit{Durland}, the \textit{McNally} Court also cited the 1909 amendment as support for its interpretation of the purpose of the mail fraud statute.\textsuperscript{243} The \textit{McNally} Court found that the 1909 codification of \textit{Durland} indicated that "the statute's purpose is protecting property rights."\textsuperscript{244} The Court drew this conclusion from the fact that the amended statute prohibited "any scheme or artifice to defraud or for ob-


\textsuperscript{239} See, e.g., United States v. Lovett, 811 F.2d 979, 985 (7th Cir. 1987); United States v. Margiotta, 688 F.2d 108, 121 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); United States v. Curry, 681 F.2d 406, 410 (5th Cir. 1982); Mandel, 591 F.2d at 1362; States, 488 F.2d at 764.

\textsuperscript{240} \textit{Durland}, 161 U.S. at 314. See supra text accompanying note 231.

\textsuperscript{241} \textit{BLACK'S LAW DICTIONARY} 403 (5th ed. 1979).

\textsuperscript{242} \textit{Durland}, 161 U.S. at 314.


\textsuperscript{244} \textit{Id.} (citing Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130).
taining money or property by means of false or fraudulent pretenses, representations or promises.” The McNally Court seemed to suggest that, even though the two phrases—“scheme or artifice to defraud” or “for obtaining money or property by means of false . . . pretenses”—appear in the disjunctive, they are not to be read independently. Therefore, the Court concluded that the “money or property” requirement modifies both “schemes to defraud,” and schemes that involve “false or fraudulent pretenses, representations or promises.”

The Court’s reading of these two phrases is a curious statutory construction. As Justice Stevens stated in his dissent in McNally:

As the language makes clear, each of these restrictions is independent. . . . Until today, it was . . . obvious that one could violate the first clause by devising a scheme or artifice to defraud, even though one did not violate the second clause by seeking to obtain money or property from his victim through false pretenses. . . . Every court to consider the matter has so held. Yet, today, the Court, for all practical purposes, rejects this longstanding construction of the statute by imposing a requirement that a scheme or artifice to defraud does not violate the statute unless its purpose is to defraud someone of money or property. . . . Certainly no canon of statutory construction requires us to ignore the plain language of the provision.

Therefore, Justice Stevens viewed principles of statutory construction as mandating reading the two phrases disjunctively, rather than conjunctively, as the Court held.

Justice Stevens is indeed correct in stating that the longstanding construction of the statute was to read the two phrases as they were written—in the disjunctive. For example, in United States v. States, the defendants argued that the “money or property” limitation in the second phrase revealed that “Congress believed that the first phrase in the original legislation dealt only with schemes to defraud of money or property.”

The Eighth Circuit responded:

[A] reading of the statute as a whole reveals that the two

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246. Id.
247. Id. at 2884 (Stevens, J., dissenting).
248. See, e.g., Margiotta, 688 F.2d at 121; United States v. Condolon, 600 F.2d 7, 9 (4th Cir. 1979); United States v. Louderman, 576 F.2d 1383, 1387 (9th Cir.), cert. denied, 439 U.S. 896 (1978); United States v. Isaacs, 493 F.2d 1124, 1150 (7th Cir.), cert. denied, 417 U.S. 976 (1974); States, 488 F.2d at 764.
250. Id. at 764.
phrases in question are part of an uninterrupted listing of a series of obviously diverse schemes which result in criminal sanctions if the mails are used. The more natural construction of the wording in the statute is to view the two phrases independently, rather than complementary of one another.251 Thus, the Eighth Circuit's position was in accord with that of Justice Stevens in *McNally*—that the two phrases should be read disjunctively. Under the Eighth Circuit's construction, a scheme to defraud need not involve a loss of money or property.252 The *McNally* Court's conjunctive reading, despite the fact that the plain language of the statute is in the disjunctive, does not comport with common sense.

3. Commentary supporting the Court's statutory construction

The *McNally* Court did not clearly set forth its reasoning of why the phrases "scheme to defraud" or "for obtaining money or property by means of false pretenses" are not to be read disjunctively or independently. The Court simply stated that the erroneous disjunctive reading resulted in the intangible rights doctrine.253 However, several years prior to *McNally*, a commentator set forth a theory which stated that the phrases were not meant to be read independently.254 The *McNally* Court did not state that it was following this commentator's theory. However, the commentator's analysis may illuminate the Court's reasoning on this point.

This commentator stated that in codifying the *Durland* decision in 1909, Congress meant to "expand narrowly the crime of mail fraud by removing" the common-law defense of false promises.255 Accordingly, if the amendment merely added a separate crime concerned with obtaining money or property, the amendment would have been unnecessary. After all, the mail fraud statute had been used to prosecute crimes against property well before 1909.256 Therefore, for the amendment to have any meaning, it must have added something different from a crime to obtain money or property. Specifically, the commentator's theory suggested that rather than adding a crime to obtain money or property, the purpose of the amendment was to simply clarify that the defense of false promises was not available in a prosecution for "a scheme to defraud."257

251. Id.
252. Id.
255. Id. at 571.
256. Id.
257. Id.
The commentator additionally stated that “reading the two phrases independently [would] defeat[.] Congress’s aim of codifying Durland; the common-law defense, under such a reading, would be available when the defendant is prosecuted for schemes to defraud rather than for schemes to obtain money or property by false or fraudulent pretenses.”258 In other words, if the phrases are read independently, one could not “obtain money or property by means of false . . . promises,” as that would clearly be prohibited by the statute. However, “a scheme to defraud” could be conducted by means of false promises and not fall within the statute, as false promises would not modify a scheme to defraud.259

The commentator reasoned that reading the phrases independently would be inconsistent with basic principles of statutory construction.260 Consequently, his theory stated that the phrase “for obtaining money or property” only served to illustrate what was comprehended by schemes to defraud; “by means of false or fraudulent pretenses, representations or promises” applied to all schemes to defraud.261 Therefore, the commentator concluded that “Congress codified Durland’s interpretation of ‘any scheme or artifice to defraud’ as applicable only to crimes against property.”262

This theory is flawed for several reasons. First, the commentator stated that if the amendment added a separate crime of obtaining money or property, it would have been unnecessary, as crimes against property had been prosecuted since before 1909.263 It is true that crimes against property had been prosecuted under the statute prior to 1909;264 however, the issue of whether the mail fraud statute encompassed crimes by means of false promises was not considered until Durland.265 In that respect the amendment was not at all unnecessary. It added an entirely new element to the statute—namely that crimes to obtain money or property by means of false promises were now proscribed under the

258. Id.
259. To state the commentator’s proposition another way, the statute clearly proscribed a scheme to obtain money or property by means of false promises. However, under the disjunctive reading, the statute would not proscribe a scheme to defraud by means of false promises. Id. According to the commentator, this would be inconsistent with the purpose of the 1909 recodification, since the purpose of the recodification was to make clear that a scheme to defraud by means of false promises was within the statute’s scope. Id. Therefore, the two phrases cannot be read disjunctively. Id.
260. Id. at n.60.
261. Id. at 571-72.
262. Id. at 572.
263. Id. at 571.
264. See, e.g., Culp v. United States, 82 F. 990 (3rd Cir. 1897); United States v. Watson, 35 F. 358 (E.D.N.C. 1888); United States v. Jones, 10 F. 469 (C.C.S.D.N.Y. 1882).
265. Durland, 161 U.S. at 313.
Second, the commentator stated that reading the phrases independently would mean that the defense of false promises would be available when a defendant is prosecuted for a scheme to defraud. There is nothing illogical in this reading at all. Congress may reasonably have intended that the defense of false promises would only be available for schemes to defraud, and would not be available to a scheme to obtain money or property. This is logical, considering that the Durland Court expanded the definition of fraud beyond its common-law basis. Congress may have wanted to limit that expansion by only allowing the defense to schemes to defraud. Congress wrote the amendment with this limitation clearly delineated, and it would be inconsistent to conclude it intended otherwise.

Finally, the commentator's theory concluded that the phrase “for obtaining money or property” merely illustrates what was already comprehended by schemes to defraud—that all schemes to defraud must involve money or property. If the money or property requirement simply reiterated a requirement already implicit within the phrase “any scheme to defraud,” then the language of the amendment would be redundant. This reading would conflict with basic principles of statutory construction. Rather than interpret the amendment to include superfluous language and disjunctives that have no meaning, or to read the statute to say something other than that which it clearly says, the more logical view is to read the statute as it was written—as two separate, independent phrases. Under this reading, it would be possible to violate the first phrase without violating the requirements of the second phrase.

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267. Intangible-Rights, supra note 18, at 571.
269. As the commentator himself noted, “[i]t is the duty of the court to give effect, if possible, to every word and clause [sic] of a statute.” Intangible-Rights, supra note 18, at 571 n.60 (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1882)).
270. Id. at 571-72.
272. In other words, it would be possible to violate the mail fraud statute by: (1) engaging in a scheme to defraud; or (2) engaging in a scheme to obtain money or property by means of false pretenses. To violate part (1), a person need only engage in a scheme to defraud; there is no requirement that such a scheme involve a loss of money or property. The language of the statute is clear. It is illogical to read it in any way other than what the plain language of the statute states.
4. Conclusion: *Durland* and the 1909 amendment

Contrary to the *McNally* Court's interpretation, the *Durland* decision lends support to the intangible rights doctrine by articulating a broad statutory purpose. While *Durland* expanded the definition of "defraud" beyond the term's common-law meaning, the Court did not hold that "defraud" involves only property rights. Additionally, the *Durland* Court concluded that the purpose of the statute was to "protect the public against... intentional efforts to despoil" and to prevent the post office from being used to carry out such fraudulent enterprises. With this as the statute's purpose, it would be inconsistent to limit the statute to only schemes involving loss of money or property.

The 1909 amendment also does not support the *McNally* Court's assertion that "the statute's purpose is in protecting property rights." The Court based its conclusion on reading the two phrases "scheme or artifice to defraud" and "for obtaining money or property by means of false... pretenses" conjunctively. The Court offered no reason why any "canon of statutory construction [would] require[] [it] to ignore the plain language of the provision." If the Court reached this conclusion by employing the same reasoning as the commentator discussed above, then the theory cannot withstand careful scrutiny. There is simply no justification for ignoring the plain language of the provision. The statute contains no requirement that a "scheme to defraud" must involve a loss of money or property.

C. Analysis of the Majority's Interpretation of the Word "Defraud"

The *McNally* Court next discussed the meaning of the word "defraud." Three relevant interpretations of the word "defraud" are examined in this section. The first discussion focuses on the term as defined by the *McNally* Court, based on the way the term is used in 18 U.S.C. section 371 (the conspiracy statute). Second, the use of the term "defraud," as used in regulation 10b-5 promulgated pursuant to the Securities Exchange Act of 1934, is examined. Finally, this section discusses dictionary definitions of "defraud" from the late 19th century when the mail fraud statute was enacted.

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274. *Id.* at 314.
276. *See supra* notes 255-72 and accompanying text.
1. "Defraud" as used in the criminal conspiracy statute

As additional support for the holding that the mail fraud statute reaches only schemes that deprive an individual of money or property, the McNally Court noted that the words "to defraud" commonly refer to "'wronging one in his property rights by dishonest methods or schemes.'" 280 This definition of "defraud" is found in Hammerschmidt v. United States,281 a case that discussed the predecessor to 18 U.S.C. section 371.282 That statute rendered criminal any conspiracy "to defraud the United States . . . for any purpose."283

In Hammerschmidt, the Court considered whether pecuniary loss must have been inflicted on the government for the defendant's acts to fall within the statute.284 The Court's complete statement on this issue was as follows:

To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud. . . . [T]he words "to defraud" . . . usually signify the deprivation of something of value by trick, deceit, chicane or overreaching. They do not extend to theft by violence. They refer rather to wronging one in his property rights by dishonest methods or schemes.285

Thus, Hammerschmidt stated that a loss of money or property need not have been inflicted on the government for the criminal acts to fall within the statute.

Consequently, the Hammerschmidt quotation does not support the McNally Court's proposition that "defraud" refers only to a deprivation of property rights. While the Hammerschmidt Court did use the phrase quoted in McNally that "defraud" refers to property rights, the Hammerschmidt Court also stated that "defraud" refers to the "deprivation of something of value," and specifically stated that money or property loss

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280. McNally, 107 S. Ct. at 2880-81 (citing Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)).
281. 265 U.S. 182 (1924).
282. Id.
285. Id. at 188 (emphasis added).
is not necessary.\textsuperscript{286} "Something of value" could thus refer to constitutional or civil rights such as the right to honest government or the right to privacy.

The \textit{Hammerschmidt} Court held that pecuniary or property loss to the government was not necessary for one to be convicted of defrauding the government under this statute.\textsuperscript{287} The holding reaffirmed a line of cases that explicitly recognized that "it is not essential to charge or prove an actual financial or property loss to make a case under [section 371].\textsuperscript{288} Therefore, the term "defraud," as used in the context of section 371, clearly does not refer solely to deprivations of money or property. The term refers to "depriving [the government] of its lawful right."\textsuperscript{289}

\textsuperscript{286} Id. While the \textit{Hammerschmidt} Court stated that defraud refers to "wronging one in his property rights by dishonest methods or schemes," the Court also stated that defraud signifies the "deprivation of something of value." Id. These two definitions of the word defraud may be viewed as somewhat conflicting.

Immediately preceding the statement that "defraud" refers to wronging one in his "property rights" is the idea that the term "defraud" does not extend to thefts by violence. It is possible that the \textit{Hammerschmidt} Court was trying to draw a distinction between what fraud generally extends to, and what it does not. An earlier circuit decision held that "defraud" in the context of the mail fraud statute extended to the act of sending threatening letters. \textit{Horman v. United States}, 116 F. 350 (6th Cir.), \textit{cert. denied}, 187 U.S. 641 (1902). \textit{Hammerschmidt} considered \textit{Horman} a questionable decision in its broad interpretation of the word "defraud," as the element of deceit was lacking from a scheme that simply involved threats. \textit{Hammerschmidt}, 265 U.S. at 188-89.

The question of whether fraud extended to violent acts with respect to the mail fraud statute was answered negatively by the Court two years later in \textit{Fasulo v. United States}, 272 U.S. 620 (1926). In \textit{Fasulo}, the Court held that the use of the mails to obtain money by means of threats of murder or bodily harm does not constitute a scheme to defraud within the meaning of the mail fraud statute. \textit{Id.} at 628.

Therefore, in trying to make the point that fraud does not encompass theft by violence, the \textit{Hammerschmidt} Court went on to state what fraud \textit{does} encompass in narrow language. \textit{Hammerschmidt}, 265 U.S. at 188. In any event, the \textit{Hammerschmidt} statement that fraud applies to property rights is inconsistent with that Court's statement earlier in the opinion that fraud applies to "something of value." \textit{Id.} The statement also must be read in conjunction with the Court's earlier statement that fraud refers \textit{primarily} to deprivations of property or money. \textit{Id.} Finally, the ultimate holding of \textit{Hammerschmidt} clearly states that a finding of pecuniary loss is not necessary for a conviction of conspiracy to "defraud" the government. \textit{Id.}

Indeed, in his dissent in \textit{McNally}, Justice Stevens stated that "[i]t is extraordinary that the only support the Court presents for its narrow definition [of the term 'defraud'] is some language in \textit{Hammerschmidt}, . . . even though \textit{Hammerschmidt} itself goes on to expressly reject the notion that fraud is limited to interference of property rights." \textit{McNally}, 107 S. Ct. at 2886 n.6 (Stevens, J., dissenting).

\textsuperscript{287} \textit{Hammerschmidt}, 265 U.S. at 188.


\textsuperscript{289} \textit{Haas}, 216 U.S. at 480 ("That it is not essential to charge or prove actual financial or property loss to make a case under the statute has been more than once ruled.").
The *McNally* Court conceded that other cases considering the conspiracy statute had held that the statute "reaches conspiracies other than those directed at property interests." However, the Court distinguished those cases by noting that the conspiracy statute involves considerations inapplicable to the mail fraud statute. Specifically, the Court noted that "[a] statute which... has for its object the protection of the individual property rights of the members of the civic body, is one thing; a statute which has for its object the protection and welfare of the government alone, which exists for the purpose of administering itself in the interests of the public, [is] quite another." The Court accordingly determined that since the conspiracy statute protects the government, the term "defraud" was intended to have a broader meaning in the context of that statute. Conversely, in the Court’s view, since the mail fraud statute "had its origin in the desire to protect individual property rights," the term "defraud" was intended to be more narrowly limited to the protection of property rights.

In determining that the narrow definition of "defraud" should apply to the mail fraud statute, the Court’s reasoning is circular. The Court began with the premise that the mail fraud statute's original purpose was to protect property rights. The Court then concluded that the term "defraud," within the context of the mail fraud statute, is limited to property rights. This conclusion was based on the Court's view of the statute's purpose. However, the Court derived its original premise of the statute's purpose from, in part, the meaning of the word "defraud." Thus, the original premise was derived in part from the conclusion, which was derived from the original premise.

Quite apart from this convoluted logic, the Court did not provide a substantive justification for treating government and individual rights differently under the two statutes. The Court simply stated that "individual property rights... [are] one thing [and] the government... [is] quite another." While this statement is true, it does not adequately

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290. *McNally*, 107 S. Ct. at 2881 n.8 (citing Glasser v. United States, 315 U.S. 60, 62 (1942); Haas v. Henkel, 216 U.S. 462, 480 (1910); Curley v. United States, 130 F. 1, 6-7 (1st Cir.), cert. denied, 195 U.S. 628 (1904)).
291. Id.
292. Id. (citing Curley v. United States, 130 F. 1, 7 (1st Cir.), cert. denied, 195 U.S. 628 (1904)).
293. Id.
294. Id. at 2879.
295. Id. at 2879-80.
296. Id. at 2880-81.
297. Id. at 2881 n.8 (citing Curley v. United States, 130 F. 1, 6-7 (1st Cir.), cert. denied, 195 U.S. 628 (1904)).
afford a reason why two statutes, enacted five years apart and using identical language, should be given two entirely different meanings. There is neither a basis in history nor evidence of legislative intent regarding the conspiracy statute to indicate that Congress intended the conspiracy statute to have a broader reach than the mail fraud statute.

Moreover, the Court determined that the mail fraud statute should have a more limited definition of “defraud” because the statute was originally designed to benefit private individuals rather than the government. This assessment is not precisely accurate. The statute was originally enacted to protect the mails from being used as instruments to aid in the “nefarious designs” of “thieves and robbers.” The statute’s purpose, therefore, was to protect the integrity of the United States Post Office, in addition to private individuals. Thus, there is no persuasive reason to use the term “defraud” in a different way in the mail fraud statute than it is used in section 371. Even accepting that there may be a plausible justification to treat government and individual rights differently in two similar statutes, the Court has inaccurately characterized the purpose of the mail fraud statute so that it will fit within its rationale.

2. “Defraud” as used in the Securities Exchange Act of 1934

The Court did not examine the use of the term “defraud” in any other federal statutes. However, rule 10b-5, promulgated under section 10(b) of the Securities Exchange Act of 1934 (“10b-5”) uses language similar to the mail fraud statute by making it unlawful “to employ any device, scheme or artifice to defraud” in connection with the purchase or sale of any security.

298. Id. See supra notes 292-93 and accompanying text.
302. 17 C.F.R. § 240.10b-5. Section 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, codified at 15 U.S.C. § 78j (1982), prohibits the use “in connection with the purchase or sale of any security . . . of any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe.” Id. at § 78j(b). Pursuant to this section, the Securities and Exchange Commission [SEC] promulgated rule 10b-5, which provides in pertinent part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud.

17 C.F.R. § 240.10b-5.
Supreme Court in *Chiarella v. United States* held that an "insider" trading in securities using inside information may be criminally liable under the rule, regardless of whether anyone suffered an actual loss of money or property.

Liability in these cases has been premised on finding that the insider took "advantage of [inside] information knowing it [was] unavailable to . . . the investing public." According to the Securities and Exchange Commission [SEC], a corporate insider must abstain from trading unless he has first disclosed all material inside information known to him. If the insider does not disclose material information and trades based on that information, he is liable for violating the provisions of rule 10b-5. For a criminal violation, there need be no showing that anyone has suffered a monetary or property loss from such trading.

In *Dirks v. SEC*, the Supreme Court held that "fraud" in the context of rule 10b-5 derived from the "'inherent unfairness involved where one takes advantage of 'information intended to be available for a corporate purpose and not for the personal benefit of anyone.'" This definition is in accord with the definition of "fraud" used by the circuit courts applying the intangible rights doctrine under the mail fraud statute. For example, in *United States v. Keane*, the Seventh Circuit stated that it was "actionable under the mail fraud statute for [a public official] to make use of inside advance information obtained by virtue of his official position for his own personal gain." Under this view, the mail fraud intangible rights concept is virtually indistinguishable from the concept of fraud as defined by the *Dirks* Court under a rule 10b-5 violation.

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304. Id. at 229 (liability must be premised on a duty to either disclose or abstain); see also Sec. and Exch. Comm'n v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969) (insider must either disclose non-public material information or abstain from trading in securities).
306. Id. at 911.
307. Id.
308. See id.; see also Chiarella, 445 U.S. at 229; Texas Gulf Sulphur, 401 F.2d at 848.
310. Id. at 654 (quoting In re Merrill Lynch, Pierce, Fenner & Smith, Inc., 43 S.E.C. 933, 936 (1968)).
312. Id. at 545. See also United States v. Groves, 122 F.2d 87, 90 (2d Cir.), cert. denied, 314 U.S. 670 (1941) (use of inside information by corporate officers for personal benefit constitutes mail fraud); United States v. Buckner, 108 F.2d 921, 926 (2d Cir.), cert. denied, 309 U.S. 669 (1940) (obtaining secret profits based upon inside information constitutes active fraud for purposes of mail fraud statute).
Further, the *Dirks* Court stated that "fraud" within a violation of rule 10b-5 resulted when one failed to disclose material nonpublic information and made "secret profits." Similarly, in *McNally*, Gray was charged with failing to disclose his arrangement with Wombwell to other persons who might have been affected by the disclosure, thereby gaining a personal financial advantage. The Court in *McNally*, however, refused to find that profiting from governmental decisions and concealing a personal financial interest "defrauds the State." Under the reasoning employed by the Court in analyzing "fraud" within a rule 10b-5 violation, Gray's conduct should have fallen squarely within the statute.

The *McNally* Court did not address why the term "defraud" should be accorded a broader meaning within the Securities Exchange Act than within the mail fraud statute. The rationale that the term should have a broad meaning when the government is the object of the statute's protec-

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313. *Dirks*, 463 U.S. at 654. In *Dirks*, the Court stated that a rule 10b-5 insider trading violation requires two elements: "(i) the existence of a relationship affording access to inside information intended to be available only for a corporate purpose, and (ii) the unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure." *Id.* at 654 (quoting Chiarella v. United States, 445 U.S. 222, 227 (1980)).

Moreover, the Court in *Dirks*, 463 U.S. at 654, noted that "not 'all breaches of fiduciary duty in connection with a securities transaction,' however, come within the ambit of Rule 10b-5." *Id.* (quoting Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 472 (1977)). There must also be some manipulation or deception. *Id.* Similarly, in applying the mail fraud statute in intangible rights cases, circuit courts also required a breach of duty coupled with deception. See supra note 68 and accompanying text.

Under the Court's 10b-5 interpretation, "fraud" resulted when a person used his position of trust and confidence to perpetrate a deception on others. Compare Chiarella, 445 U.S. at 227 (10b-5 violated when failure of fiduciary to disclose material information in order to receive a benefit) with *Mandel*, 591 F.2d at 1364 (mail fraud statute violated when deliberate concealment of facts in order to receive a benefit). Thus, the circuit courts that applied the intangible rights doctrine used a definition of "fraud" wholly consistent with that set forth by the Court under rule 10b-5.


315. *Id.* The Court stated that:

The violation asserted is the failure to disclose [Gray and McNally's] financial interest, even if state law did not require it, to other persons in the state government whose actions could have been affected by the disclosure. . . . If state law expressly permitted or did not forbid a state officer such as Gray to have an ownership interest in an insurance agency handling the State's insurance, it would take a much clearer indication than the mail fraud statute evidences to convince us that having and concealing such an interest defrauds the State and is forbidden under federal law.

*Id.* Concealment of material information to obtain a personal advantage over the investing public constitutes "fraud" as the Court defined it under rule 10b-5. See *Dirks*, 463 U.S. at 654. The Court's reluctance to find that a similar concealment defrauds the state is particularly inconsistent with the Court's analysis of "defraud" under section 371, considering the Court seemed willing to afford a broader meaning to the term "defraud" when the government is the object of a statute's protection. See supra notes 290-98 and accompanying text.
tion is not applicable to rule 10b-5. According to the Court, the purpose of rule 10b-5 is to "prevent inequitable and unfair practices on . . . the market." Thus, rule 10b-5 is aimed at protecting the investing public. Given that the purpose of the Securities Exchange Act is to protect individual rights, and that this act uses a broad definition of the word "defraud," it becomes even more difficult to comprehend why the McNally Court treated the term differently in the mail fraud statute.

3. "Defraud" in dictionary definitions of the late 19th century

The McNally Court did not consider dictionary definitions of the term "defraud." However, there is ample evidence that in the late 19th century, when the mail fraud statute was enacted, the term "defraud" did not have two different definitions, one broad and one narrow, depending on whom the statute was protecting. Dictionaries from the period do not define the word "defraud" as limited to deprivations of money or property rights. Rather, the word was defined as "to deprive of a right by an act of fraud . . . to withhold from another what is justly due him." Additionally, Justice Story, in his commentary, Equity Jurisprudence, defined the term as "any cunning, deception, or artifice used to circumvent[,] cheat or deceive another.

Given that, in the late 19th century, "defraud" meant "to deprive of a right", it is untenable to conclude that intangible rights should not be accorded protection under the mail fraud statute, from either a legal or linguistic standpoint.

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316. See supra notes 290-93 and accompanying text.
318. See Chiarella, 445 U.S. at 227; Texas Gulf Sulphur, 401 F.2d at 848.
319. In McNally, the Court attempted to distinguish the broad reach of "defraud" as used in the conspiracy statute, from the narrow reach of "defraud" that it applied to the mail fraud statute. 107 S. Ct. at 2881 n.8. According to the Court, the mail fraud statute had its origin in the protection of individual rights, and thus, "any benefit which the Government derives from the statute must be limited to the Government's interests as property-holder." Id. The Court did not elaborate on why the Government's benefit under the statute must be limited, simply because the statute's origin was the protection of individual rights. See supra notes 290-93 and accompanying text. In any event, the court concluded that since the mail fraud statute had its origin in protecting individual rights, it could not be afforded as expansive a reach as the conspiracy statute. Id. This distinction fails to explain why rule 10b-5, which protects only individual rights, is afforded as expansive a reach as the conspiracy statute.
320. See McNally, 107 S. Ct. at 2887 (Stevens, J., dissenting) (citing 1 BOUVIER'S LAW DICTIONARY 530 (1897); W. ANDERSON, A DICTIONARY OF LAW 474 (1893); 1 BURRILL'S LAW DICTIONARY 658-59 (1859)).
321. Id.
322. Id. (quoting W. ANDERSON, A DICTIONARY OF LAW 474 (1893)).
323. Id. (quoting 1 J. STORY, EQUITY JURISPRUDENCE § 186, 189-90 (1870)).
324. Intangible rights include constitutional rights, such as the right to privacy, United
did not mean what the *McNally* Court contended. Further, since “intangible rights” often include political, civil or constitutional rights, they are “rights” at least on an equal footing to tangible property rights. In holding that only property rights are entitled to protection under the mail fraud statute, and that civil and constitutional rights are not, the *McNally* Court has taught an odd lesson. As Justice Stevens stated:

> Can it be that Congress sought to purge the mails of schemes to defraud citizens of money but was willing to tolerate schemes to defraud citizens of their right to an honest government, or to unbiased public officials? Is it at all rational to assume that Congress wanted to ensure that the mails not be used for petty crimes, but did not prohibit election fraud accomplished through mailing fictitious ballots? Given Congress’ “broad purpose,” I “find it difficult to believe, absent some indication in the statute itself or the legislative history, that Congress would have undercut sharply that purpose by hobbling federal prosecutors in their effort to combat” use of the mails for fraudulent schemes.

The *McNally* Court’s conclusion that the statute only reaches schemes that deprive one of property rights, but does not cover constitutional or civil rights, results in an “irrational” interpretation of Congress’ intent.

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325. See, e.g., *Louderman*, 576 F.2d at 1387; *United States* v. *McNeive*, 536 F.2d 1245, 1249 (8th Cir. 1976); *States*, 488 F. 2d at 767; see also cases cited supra note 324.

326. *McNally*, 107 S. Ct. at 2879. Prosecuting only crimes that cause a deprivation of money or property can have curious results as well. For example, following *McNally*, three charges of mail fraud were dropped against a judge. *United States* v. *McCollom*, No. 86 CR 410 (N.D. Ill. March 5, 1987) (LEXIS, Genfed library, Dist file). These charges were based on the theory that, by accepting bribes to fix drunk driving cases, the judge had defrauded citizens of their intangible right to have their cases decided honestly. There was no allegation that the city had lost money or property, and consequently, the mail fraud charges could not be sustained. However, prosecutors sought to maintain one other mail fraud charge against this judge for accepting bribes to fix parking tickets. That count could be sustained even in light of *McNally*, prosecutors contended, since it was arguable that the city lost parking ticket revenue. See Chi. Daily L. Bull., July 1, 1987, at 1, col. 3-4. Thus, accepting bribes to fix drunk driving cases might not be within mail fraud, but accepting bribes to fix parking tickets might. After *McNally*, criminality in a case like this might not be based on the judge’s conduct, but on what type of cases a judge “fixes.”

4. Conclusion: the definition of “defraud”

In sum, the McNally Court’s analysis of the meaning of “defraud” as used in the mail fraud statute contains several difficulties. First, it does not appear from dictionary definitions published in the late 19th century that the meaning of fraud was limited to property rights. Second, other federal statutes that use the word “defraud” do not restrict its meaning to deprivations of property rights. Third, while the Court tried to draw a distinction between the use of the term “defraud” in the conspiracy statute and in the mail fraud statute, the Court mischaracterized the purposes of the latter. Additionally, the Court’s reasoning is not firmly based on either legislative history or legal authority. Finally, the conclusion that property rights are worthy of protection under the mail fraud statute, while constitutional and civil rights are not, is disturbing.

D. Analysis of the Majority’s Reading of the Statute

As further support for its narrow interpretation of the mail fraud statute, the McNally Court stated that “when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.” This language echoes a familiar rule that in construing criminal statutes, doubts are to be resolved in favor of the defendant. There are two principles behind this policy. “First, ‘a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.’” “Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.”

The Supreme Court has followed the rule of lenity numerous times

328. See supra notes 320-24 and accompanying text.
331. Id. at 2879.
335. Id.
in construing criminal statutes. In some cases, the Court's principal concern has been that "interpret[ing] the statute otherwise would be to criminalize a broad range of apparently innocent conduct." The Court has used this rationale when a criminal statute is challenged as "void for vagueness" because it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."

1. The "void for vagueness" challenge

The McNally Court was clearly cognizant of the "void for vagueness" challenge to the mail fraud statute. This awareness is demonstrated by the statement that before one can be punished for a criminal offense, "it must be shown that his case is plainly within the statute." Here, the Court's fear was that circuit courts construing the statute did so in a manner that left its "outer boundaries ambiguous," and therefore, the statute as interpreted by the circuit courts would include some conduct that was not proscribed under the statute. While the Court did not elaborate in detail on this issue, its concern seemed to be that no specific definition of what constituted a "scheme to defraud" had ever been firmly adopted by the circuits.

336. See, e.g., Dowling v. United States, 473 U.S. 207 (1985) (refusal to extend the National Stolen Property Act to cover transportation of bootleg phonograph records); Liparota, 471 U.S. at 434 (refusal to extend statute covering federal food stamp fraud); Williams v. United States, 458 U.S. 279 (1982) (refusal to extend application of federal statute to check kiting scheme).

337. Liparota, 471 U.S. at 426; see also Williams, 458 U.S. at 286.

338. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (quoting United States v. Harris, 347 U.S. 612, 617 (1954)); see also Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (as a matter of due process, a law is void on its face if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application").

339. Although the Court did not specifically discuss the "void for vagueness" theory, that argument was presented by defendant James Gray. His brief contended that "it is virtually impossible for a person of average intelligence to determine what is declared by the [mail fraud] statute." Brief for Petitioner Gray at 10, McNally v. United States, 107 S. Ct. 2875 (1987) (86-928).

340. McNally, 107 S. Ct. at 2881 (quoting Fasulo v. United States, 272 U.S. 620, 629 (1926)).

341. Id.

342. The mail fraud statute had come under the "vagueness" attack in the past. See United States v. Bohonus, 628 F.2d 1167 (9th Cir.), cert. denied, 447 U.S. 928 (1980). There, the court rejected the claim, stating:

A vagueness challenge will not be upheld if judicial explication of a statute provides sufficient clarity to afford fair notice. The numerous decisions which have applied [the mail fraud statute] . . . to the deprivation of intangible rights in general afforded the defendant reasonable notice that his conduct might well fall within the proscriptions of the mail fraud statute.

Id. at 1174.
This concern is not without merit. The intangible rights doctrine was largely a judicial creation, developed over the years by judges who agreed with the principle set forth in *Shushan v. United States*, that "[n]o trustee has more sacred duties than a public official." This basic proposition led to the belief that a public official who breaches that fiduciary duty by failing to disclose a material interest or by accepting bribes has engaged in a scheme to defraud citizens of their right to honest government. However, the kind of conduct that constituted such a scheme was never precisely delineated.

Several circuit courts have commented on the type of conduct that constitutes a "scheme to defraud." The Fifth Circuit observed in *Blachly v. United States*:

The fraudulent aspect of the scheme to "defraud" is measured by a nontechnical standard. Law puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the "reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." This is indeed broad.

Under the *Blachly* standard, a scheme to defraud could result from conduct that a court has determined did not comport with its notion of accepted moral standards.

On one hand, some courts have found that this expansive interpretation was justified, since limiting the mail fraud statute to deprivations of tangible interests might weaken the statute by excluding from its scope schemes that deprive people of significant intangible rights. On the

343. 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 574 (1941).
345. *See, e.g.*, Mandel, 591 F.2d at 1362. In *Margiotta*, 688 F.2d at 120-29, this theory was extended even further to cover an individual who was not a public official, but who participated substantially in governmental affairs. The *Margiotta* court held that a person who makes governmental decisions may be considered a "government fiduciary" under the theory that such a person has "de facto control." *Id.* at 122. See *infra* text accompanying note 431 for further discussion of *Margiotta* and the "de facto" control test.
346. 380 F.2d 665 (5th Cir. 1967).
348. *See Van Dyke*, 605 F.2d at 225 (6th Cir.); *Keane*, 522 F.2d at 545.
other hand, not all circuits have agreed with the Fifth Circuit's view in *Blachly*.\(^{349}\) *Blachly*'s broad language encompassed schemes that not only deprived people of intangible rights, but also those that failed to live up to "accepted moral conduct," whatever that may be. The Seventh Circuit has remarked:

> [T]he words 'scheme or artifice to defraud' don't reach everything that might strike a court as unethical conduct or sharp dealing. . . . The frequently quoted suggestion . . . that whatever is not a 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society' is fraud cannot have been intended and must not be taken literally. It is much too broad . . . .\(^{350}\)

Thus, the Seventh Circuit was concerned that a "scheme to defraud" should not be defined so vaguely as to encompass whatever a court might conclude constituted unethical or immoral conduct.

The Eighth Circuit has also considered the problem of whether a defendant's conduct was sufficient to constitute a "scheme to defraud" in *United States v. McNeive*,\(^ {351}\) a case which illustrates the difficulty resulting from the lack of clear delineation under the statute.\(^ {352}\) At trial, McNeive was convicted of mail fraud for accepting five dollar gratuities for the issuance of state plumbing contracts.\(^ {353}\) Preliminarily, the Eighth

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\(^{350}\) See *Holzer*, 816 F.2d at 309. *Holzer* involved a state court judge who systematically asked lawyers representing plaintiffs before him for "personal loans." *Id.* at 305. The court found that "[a] public official is a fiduciary toward the public, including, in the case of a judge, the litigants who appear before him, and if he deliberately conceals material information from them he is guilty of fraud." *Id.* at 307. Accordingly, in spite of the court's strong language criticizing the broad view that the Fifth Circuit took of proscribed behavior under the mail fraud statute, the *Holzer* court ultimately concluded that the judge's conduct did constitute a "scheme to defraud." *Id.* at 309. As a consequence of the *McNally* decision, Judge Holzer was released. He had been serving an 18 year sentence. *Holzer*, 840 F.2d at 1349. See infra note 506 for a discussion of the effect of *McNally* on Holzer's case.

\(^{351}\) 536 F.2d 1245 (8th Cir. 1976).

\(^{352}\) *Id.* at 1251.

\(^{353}\) *Id.* at 1246. McNeive was the Chief Plumbing Inspector for the City of St. Louis. *Id.* Among his duties was the issuance of plumbing permits to various contractors. *Id.* One contracting company "had long indulged in the practice of sending its plumbing permit applications accompanied with two checks - one payable to the City of St. Louis for the proper permit fee and a second one, payable to cash, for $5 for each permit application." *Id.* The defendant was charged with ten counts of mail fraud. His acceptance of each five dollar gratuity was characterized by the government as "a scheme . . . to defraud the City of St. Louis and its citizens of their right to the honest, faithful, and lawful decisions and actions in the performance of [a public official's] duties . . . and of their right to have the City's business and its affairs conducted honestly . . . ." *Id.* at 1247.
Circuit acknowledged the viability of the intangible rights doctrine. However, the court was reluctant to extend the statute beyond what it believed was Congress' intent. The court ultimately decided that McNeive's conduct did not amount to a cognizable scheme to defraud. The court's conclusion was based on the fact that McNeive never deviated from strictly enforcing the plumbing code, never concealed his receipt of these “tips,” and never believed that his acceptance of the tips was illegitimate. In essence, McNeive had no intent to defraud, nor could McNeive be said to have accepted a bribe. The court viewed his conduct as essentially trivial; at worst, he had committed a misdemeanor.

The Eighth Circuit reversed McNeive's conviction, stating:

While we sympathize with the zealous prosecutor's view in this case that tipping has no place in the administration and operation of a governmental agency, this does not transform the practice into a mail fraud violation, nor does it give the prosecutors a license to inject themselves into local affairs to attempt to rectify the problem. To permit the Government to do so in this case would effect a further extension of [the mail fraud statute] so as to cover all actions which might offend the Government's sense of personal propriety. This we refuse to do, particularly since our acceptance of the Government's theory in this case would have far-reaching ramifications as to the reach of the already pervasive mail fraud statute.

Thus, the Eighth Circuit refused to extend the mail fraud statute to encompass such a minor infraction, even though the conduct arguably could be said to conflict with accepted moral conduct.

While the McNeive court did not hold that the defendant's conduct constituted mail fraud, it is possible that another circuit might have up-

354. Id. at 1249.
355. Id. at 1247 n.3.
356. Id. at 1252.
357. Id. The court considered McNeive's conduct a “minor peculation.” There was the possibility that the acceptance of these gratuities amounted to a violation of a city ordinance that prohibited the acceptance by city officials of “any payment or gift of money... for any service performed in his official capacity.” Id. at 1246.
358. Id. at 1252 The McNeive court questioned making “a federal case” out of this matter, stating:

Why the Government would reach out to prosecute this type of case in federal court is an enigma. ... While we do not wish to impinge upon the sanctity of prosecutorial discretion, it seems that the Government's vast prosecutorial and investigative resources would be far better occupied if petty cases such as these were left to the province of state legal, or even political, processes.

Id. at n.13.
held McNeive's conviction. If the words of the Fifth Circuit regarding "conduct which fails to match" moral uprightness\(^\text{359}\) had been literally construed by the Eighth Circuit, McNeive might have been found guilty of mail fraud. This result would arguably have constituted an undue extension of the statute, considering McNeive had no intent to defraud; he in fact considered his behavior legitimate.\(^\text{360}\) The fact that such a result was entirely possible under some courts' broad application of the mail fraud statute may have been one reason for the McNally Court's narrow reading of the statute. Had McNeive's conviction been upheld, it is arguable that the statute would have criminalized "a broad range of apparently innocent conduct."\(^\text{361}\) This would have violated the principle that a criminal statute must give fair notice that specific conduct is forbidden.\(^\text{362}\)

2. Federalism concerns

Still another concern that may have caused the McNally Court to narrow the scope of the mail fraud statute involves principles of federalism.\(^\text{363}\) As discussed above, the Court will harshly construe a criminal statute only when Congress has clearly intended such a reading.\(^\text{364}\) The

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\(^{359}\) See Blachly, 380 F.2d at 671; Gregory, 253 F.2d at 109.

\(^{360}\) A conviction under the mail fraud statute requires proof of a specific intent to defraud. See United States v. Bronston, 658 F.2d 920, 927 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982); United States v. Weidman, 572 F.2d 1199, 1202 (7th Cir.), cert. denied, 439 U.S. 821 (1978). See generally Note, A Survey of the Mail Fraud Act, 8 MEM. ST. U.L. REV. 673, 677-78 (1978). Thus, McNeive's good faith may have been a defense to the charges of mail fraud. See United States v. Curry, 681 F.2d 406, 410 (5th Cir. 1982) (good faith is defense to charges of mail fraud). However, specific intent to defraud may be proven by the scheme to defraud and may be inferred from other facts. See United States v. Westmoreland, 841 F.2d 572, 581 (5th Cir. 1988). Arguably, the prosecution still may have proven that McNeive had the requisite intent to defraud based on the fact that, although McNeive never affirmatively concealed receipt of the tips, he never revealed his receipt of the tips either. See United States v. Von Barta, 635 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981) (failure to disclose material information and breach of fiduciary duty constitutes mail fraud); United States v. George, 477 F.2d 508 (7th Cir.), cert. denied, 414 U.S. 827 (1973) (mail fraud violation for failure of employee to provide honest and faithful services even though employee provided no preferential treatment in exchange for kickback).

\(^{361}\) Liparota, 471 U.S. at 426; see also Williams, 458 U.S. at 286.

\(^{362}\) Bass, 404 U.S. at 348 (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J.)); see also Papachristou, 405 U.S. at 162; Connally, 269 U.S. at 391.

\(^{363}\) Federalism is a mode of political organization that unites separate polities within an overarching political system in such a way as to allow each to maintain its own fundamental political integrity. 7 ENCYC. BRIT. MAC. 202 (1982). The Court will not want to upset this system of political integrity between the states and the federal government, unless that is the manifest intent of Congress. See Bass, 404 U.S. at 349; see also Rewis v. United States, 401 U.S. 808, 812 (1971) (Court will not be quick to assume Congress meant to effect significant change in sensitive relation between federal-state criminal jurisdiction).

\(^{364}\) See supra notes 332-35 and accompanying text.
Court has followed the rule of lenity in cases in which criminal statutes were challenged for not giving adequate notice that "apparently innocent conduct" was criminal. Similarly, the Court has employed the lenity principle in cases where broad readings of criminal statutes would have resulted in a substantial extension of federal police power.

In United States v. Bass, for example, the Court refused to give a broad interpretation to the Omnibus Crime Control and Safe Streets Act. In that case, the government argued that the Act proscribed possession of a firearm by a convicted felon. The Bass Court, however, stated that the statute was ambiguous. Traditionally, firearm possession had been a matter governed by the state. Consequently, the Court held that before it would read the statute as proscribing firearm possession by a convicted felon, the government would be required to prove that the firearms involved had been possessed "in commerce," thus bringing the matter within federal power. The Bass Court stated:

[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. . . . [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. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of [a] clear statement [by Congress] assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision. . . .

[Here], the legislative history provides scanty basis for conclu-

365. The rule of lenity provides that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis, 401 U.S. at 812; see also supra notes 332-38 and accompanying text.
366. Liparota, 471 U.S. at 426; see also Williams, 458 U.S. at 286. See supra notes 337-42 and accompanying text.
369. Id. at 347 (citing 18 U.S.C. App. § 1202 (a)).
370. Id. at 338.
371. Id. at 346-47.
372. Id. at 339.
373. Id. at 347. The constitutionality of the statute was not in doubt in Bass. Earlier that year, the Court had decided Perez v. United States, 402 U.S. 146 (1971). Perez upheld Congress' power to regulate "loan sharking" activities, in spite of arguments that, to do so, would constitute an exercise of general police power. Id. at 155. Thus, in Bass, the Court was not concerned with whether Congress could regulate "mere possession of firearms," but whether in fact Congress had intended to do so. Bass, 404 U.S. at 339 n.4. See generally Stern, The Commerce Clause Revisited - The Federalization of Intrastate Crime, 15 ARIZ. L. REV. 271 (1973).
ing that Congress faced these serious questions and meant to affect the federal-state balance in the way now claimed by the Government.\textsuperscript{374}

Thus, the \textit{Bass} Court held that when a broad interpretation of a statute would affect the federal-state balance, the Court should opt for a more lenient reading in the absence of clear Congressional intent.

The \textit{McNally} Court did not explicitly state that it was concerned that a broad reading of the mail fraud statute might affect the federal-state balance. However, the Court stated that it refused to "choose the harsher" reading because the statute involved "the Federal Government in setting standards of disclosure and good government for local and state officials."\textsuperscript{375} This comment suggests that the Court was concerned with federalism, and thus tried to avoid federal intrusion into state affairs. The Court implied that the states should be responsible for setting "good government" standards for their officials. Further, the \textit{McNally} holding suggested that the Court believed it is not within the province of the federal government to set "good government" standards unless Congress unequivocally evidences such an intent.\textsuperscript{376}

Additionally, the Court noted that the defendants had not violated state law. The Court remarked that "if state law ... did not forbid a state officer [to engage in a scheme as the defendants did] it would take a much clearer indication than the mail fraud statute evidences to convince us [that the defendants' conduct] defrauds the State and is forbidden under federal law."\textsuperscript{377} This language indicated that the Court requires a clear statement by Congress before the Court holds that conduct by state officials, which is not proscribed by the state itself, constitutes a federal offense. This is consistent with the principle that, absent congressional intent to the contrary, a federal statute should not legislate in a field which the states have traditionally occupied.\textsuperscript{378}

On several occasions at the circuit level, the intangible rights doctrine had been subjected to attack on the grounds that the doctrine conflicted with principles of federalism.\textsuperscript{379} This argument arose most frequently in cases involving public officials who conducted a scheme to defraud by failing to disclose material information, although state law did not impose a duty to disclose.\textsuperscript{380} In \textit{United States v. Mandel},\textsuperscript{381} for

\begin{itemize}
\item \textsuperscript{374} Bass, 404 U.S. at 349-50 (citations omitted).
\item \textsuperscript{375} McNally, 107 S. Ct. at 2881.
\item \textsuperscript{376} Id.
\item \textsuperscript{377} Id. at 2882 n.9.
\item \textsuperscript{378} Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
\item \textsuperscript{379} See, e.g., \textit{Margiotta}, 688 F.2d at 124; \textit{Mandel}, 591 U.S. at 1357; \textit{States}, 488 U.S. at 767.
\item \textsuperscript{380} See, e.g., United States v. Rendini, 738 F.2d 530, 533 (1st Cir. 1984); \textit{Margiotta}, 688
example, the defendants argued that "there was no evidence that any
state or federal law was transgressed by any of the defendants in the
execution of any part of their so-called 'corrupt relationship,' or scheme
to defraud." The defendants asserted that their prosecution was
brought primarily to insure that, in the future, the state would have more
adequate disclosure requirements. As a result, the defendants claimed
that the mail fraud statute was being used to aid the state in achieving a
"more republican and responsible form of government." Thus, the de-
fendants contended that the federal government was attempting to tell
the state what kind of disclosure laws it should adopt for public officials.

In addressing this contention, the Mandel court began with the
premise that the purpose of the mail fraud statute was to protect the
integrity of the post office. Based on this purpose, the court ultimately
rejected the argument that the use of the mail fraud statute constituted
an impermissible federal intrusion into the affairs of the state. Conse-
quently, "the fact that the alleged scheme to defraud involved matters
traditionally of state concern is not a defense to the prosecution." The
Mandel court and other circuits that considered this issue thus have eas-
ily dispensed with the federalism argument. Perhaps their analyses
differed from the McNally Court's because the discussion by these courts
began with the one seminal mail fraud case ignored by the McNally
Court—Badders v. United States.

Badders, decided in 1916, was the first case in which the constitu-
tionality of the mail fraud statute was addressed. The defendant con-
tended that the statute was unconstitutional, arguing that it was outside
the jurisdiction of Congress. In response, Justice Holmes held:

The overt act of putting a letter into the postoffice of the United
States is a matter that Congress may regulate. Whatever the

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382. Id. at 1357.
383. Id.
384. Id. at 1358.
385. Id. at 1359.
386. Id.
387. See, e.g., Margiotta, 688 F.2d at 124; Mandel, 591 U.S. at 1357; States, 488 U.S. at 767.
389. See supra notes 45-52 and accompanying text.
390. Badders, 240 U.S. at 393.
limits to its power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not.\textsuperscript{391}

Thus, the \textit{Badders} Court held that whether or not a particular act fell within Congress' power to regulate, Congress had the power to regulate the act once the mails were used to effectuate that act.

With this proposition as a starting point, the \textit{Mandel} court considered the basic purpose and scope of the mail fraud statute. That purpose, it stated, was to prevent "the post office from being used as an instrument of crime."\textsuperscript{392} The court concluded that:

[I]t is clear that the regulation of the mail fraud statute is on the misuse of the mails, control of which lies with Congress, and not on the substance of the scheme to defraud. Even if the substance of the scheme to defraud involves matters normally within the purview of state control or regulation, once the mails are utilized to effectuate the scheme, the federal government has the right to prosecute the schemer under the mail fraud statute.\textsuperscript{393}

Consequently, it was not a defense to assert that the mail fraud statute was being used to regulate conduct that would ordinarily fall under the state's domain.\textsuperscript{394} Although state law normally governed disclosure requirements for public officials, the mail fraud statute did not impermissibly intrude into the state's realm.\textsuperscript{395} The scheme involved use of the mails, and the mail fraud statute could thus be used to prosecute the scheme.

Congress clearly has the power to regulate the use of the mails.\textsuperscript{396} Consequently, the \textit{Badders} Court held that when the mails are used, any regulation pursuant to that power lies within the federal province.\textsuperscript{397} Further, it is not an issue that the proscribed conduct may traditionally have been within the state's domain, and thus may have been a scheme that the federal government could not otherwise have "forbidden."\textsuperscript{398} Thus, \textit{Badders} puts to rest any federalism concerns by holding that use of the mails to effect a fraudulent scheme brings the scheme within the fed-

\textsuperscript{391} Id. (emphasis added).
\textsuperscript{392} Mandel, 591 F.2d at 1358 (citing Durland v. United States, 161 U.S. 306, 314 (1896)).
\textsuperscript{393} Id.
\textsuperscript{394} Id. at 1359.
\textsuperscript{395} Id. at 1359-62.
\textsuperscript{396} U.S. CONST. art. 1, § 8, cl. 7.
\textsuperscript{397} Badders, 240 U.S. at 393.
\textsuperscript{398} Id.
eral domain. In using Badders as the starting point for their analyses, numerous circuit courts concluded that whether a defendant violated state law was irrelevant to a mail fraud inquiry.

3. Conclusion: vagueness and federalism

The Badders decision constituted much of the foundation for the development of the intangible rights doctrine by addressing two crucial issues. First, as long as the mails are used, Congress may regulate an act whether the act itself comes within Congress' regulatory power. Second, as long as the mails are used, Congress can forbid any acts done in furtherance of a scheme it regards as contrary to public policy. The Badders decision contained no requirement that such a scheme deprive one of money or property. A scheme whereby politicians falsify election results, for example, is undoubtedly a scheme "contrary to public policy." Under the Badders decision, such a scheme is clearly within the scope of the mail fraud statute. There need be no clearer directive from Congress.

The fact that the McNally Court ignored Badders indicates that the Court knew it would face analytical problems in reconciling Badders with McNally. The McNally decision narrowed the scope of the mail fraud statute in a manner inconsistent with how the statute had been

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399. Id; see also States, 488 F.2d at 767, wherein the court stated:

The focus of the [mail fraud] statute is upon the misuse of the Postal Service, not the regulation of state affairs, and Congress clearly has the authority to regulate such misuse of the mails. . . . There are no grounds for dismissing the indictment under the principles of comity or the abstention doctrine or under any other principle of federalism.

Id.

400. See, e.g., Margiotta, 688 F.2d at 124; Von Barta, 635 F.2d at 1007; Mandel, 591 F.2d at 1362; United States v. Williams, 545 F.2d 47, 50 (8th Cir. 1976); McNeive, 536 F.2d at 1247; United States v. Bush, 522 F.2d 641, 646 n.6 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976); Keane, 522 F.2d at 544; States, 488 F.2d at 767; United States v. Edwards, 458 F.2d 875, 880 (5th Cir.), cert. denied, 409 U.S. 891 (1972).

401. Badders, 240 U.S. at 393.

402. Id.

403. Id.

404. Id.


406. A scheme to falsify election results should fall within the mail fraud statute, since such a scheme would "deprive an electoral body of its political rights to fair elections free from dilution from the intentional casting and tabulation of false, fictitious or spurious ballots." Clapps, 732 F.2d at 1153.
interpreted for over 70 years. Prior to *McNally*, circuit courts had "long interpreted the mail fraud statute... as proscribing schemes to defraud citizens of their intangible rights to honest and impartial government." These decisions were based on years of reasoned analysis by learned judges giving careful consideration to legislative intent, judicial precedent, and the language of the statute itself.

As Justice Stevens said in his dissent in *McNally*:

I am at a loss to understand the source or justification for this holding... Perhaps the most distressing aspect of the Court’s action... is its casual—almost summary—rejection of the accumulated wisdom of the many distinguished federal judges who have thoughtfully considered and correctly answered the question this case presents... In the long run, it is not clear how grave the ramifications of [this] decision will be. Congress can, of course, negate it by amending the statute... The possibilities that the decision’s impact will be mitigated do not moderate my conviction that the Court has made a serious mistake. Nor do they erase my lingering questions about why a Court that has not been particularly receptive of the rights of criminal defendants in recent years has acted so dramatically to protect the elite class of powerful individuals who will benefit from this decision.

For years, federal prosecutors had relied on the mail fraud statute to ferret out corruption in state government and ensure that citizens retained their right to honest government. The *McNally* decision dealt them a devastating blow that now can only be corrected by Congress.

Moreover, the intangible rights doctrine did not suffer from vagueness and federalism problems to the degree that the Court perceived. Concededly, the standard for what kind of conduct constituted a scheme to defraud was, as interpreted by some circuits, overly broad. Rather than reject the entire doctrine, however, the Court could have redefined...
the standard so that its outer boundaries were not ambiguous.\textsuperscript{414} Moreover, the federalism concerns were answered more than 70 years earlier in \textit{Badders}, a case the \textit{McNally} Court ignored.\textsuperscript{415} Thus, the Court had no reason to apply the rule of lenity to the mail fraud statute, and interpret the statute as applicable only to schemes involving money or property.

\section*{VI. Prosecuting Public Corruption after \textit{McNally v. United States}}

\textit{McNally v. United States}\textsuperscript{416} immediately generated a great deal of controversy. One article, entitled “Fallout from McNally,”\textsuperscript{417} summarized some of the positions taken in the legal community:

\begin{quote}
[D]ebate over what legislative remedies, if any, should be adopted is going strong in the Department of Justice and among the defense bar.

The positions range from that of a Congressman who is pushing to redefine fraud throughout the U.S. Code to include defrauding of any intangible right or breach of virtually any duty or contract, to that of a group of criminal defense lawyers who applaud the Supreme Court decision and do not want Congress to backtrack over a ruling that they believe has put the brakes on years of unfounded expansion of mail fraud.\textsuperscript{418}
\end{quote}

Still others have commented that “[t]he practical impact of \textit{McNally} on future intangible-rights cases will probably be limited.”\textsuperscript{419} The full extent of \textit{McNally}’s impact on intangible rights cases will, of course, take years to develop. So far, no cohesive direction has emerged in the lower courts. Circuit courts have adopted differing positions on how intangible

\textsuperscript{414} Admittedly, prohibiting a scheme “contrary to public policy” is a problematic standard, in that its perimeters are not clearly defined. However, as Justice Stevens remarked:

With no guidance from this Court, the Courts of Appeal have struggled to define just when conduct which is clearly unethical is also criminal. In some instances, however, such as voting fraud cases, the criminality of the scheme and the fraudulent use of the mails could not be clearer. It is sometimes difficult to define when there has been a scheme to defraud someone of intangible rights. But it is also sometimes difficult to decide when a tangible loss was caused by fraud. The fact that the exercise of judgment is sometimes difficult is no excuse for rejecting an entire doctrine that is both sound and faithful to the intent of Congress.

\textit{McNally}, 107 S. Ct. at 2890 (Stevens, J., dissenting).
\textsuperscript{415} \textit{Badders}, 240 U.S. at 393.
\textsuperscript{416} 107 S. Ct. 2875 (1987).
\textsuperscript{418} \textit{Id}.
\textsuperscript{419} \textit{The Supreme Court, 1986 Term—Leading Cases}, 101 HARV. L. REV. 329, 335 (1987).
rights cases will be prosecuted in the wake of McNally.420

The McNally Court offered some guidelines that suggest how future intangible rights cases may be prosecuted.421 Preliminarily, this section examines those guidelines. Prosecutors arguing cases in the circuit courts decided prior to the McNally decision under the now-defunct intangible rights doctrine were, of course, unaware of the standards to which they had to adhere.422 Following McNally, courts have reconsid-
ered some cases, have applied McNally retroactively, and have overturned convictions that were based on conduct now deemed outside the scope of the mail fraud statute.423 In another line of cases, courts have sustained convictions originally obtained under the intangible rights doctrine under an alternative rationale derived from principles of agency law.424 This section discusses whether the intangible rights doctrine or the “alternative rationale” is still tenable. Finally, the section explores suggestions for legislative change.

A. Guidelines from McNally on Future Intangible Rights Prosecutions

The actual holding of McNally v. United States425 was that the defendants’ convictions had to be reversed because “the jury instruction on the substantive mail fraud count permitted a conviction for conduct not within the reach of [section] 1341.”426 This holding derived from the Court’s decision that “[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government.”427 The jury instructions were faulty because the jury had not been charged, nor were they required to find that in order to convict, the state itself had been defrauded of any money or property.428

Rather, the indictment charged James Gray and Charles McNally with devising a scheme (1) to defraud the citizens of Kentucky “of their

420. See cases cited infra notes 423-24.
424. See, e.g., Runnels, 833 F.2d at 1186; Fagan, 821 F.2d at 1010-11 & n.6.
426. Id. at 2882.
427. Id. at 2879.
428. Id. at 2882.
right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud” and (2) “to obtain . . . money and other things of value, by means of false pretenses . . . .”429 The jury was instructed that a scheme to defraud could be proven by one of two sets of findings.430 The first finding was that Howard Hunt had de facto control over the awarding of insurance policies to Wombwell, and directed payments from Wombwell to Seton without disclosing his ownership interest in Seton to other officials in state government.431 Under this finding, Gray and McNally would have been aiders and abetters in the scheme.432 The second finding sufficient for a conviction alleged that Gray had supervisory authority over the awarding of the state's insurance policies, and that he concealed his ownership interest in Seton; McNally would have been guilty as an aider and abetter under this finding.433

The Court held that these instructions could not support a conviction for mail fraud. The Court stated:

[T]here was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property. It was not charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance. Hunt and Gray received part of the commissions but those commissions were not the Common-

429. Id. at 2878 n.4. Although the instructions were given in the conjunctive, the Court implied that the jury could convict if it found that either of these two elements were satisfied. Id. at 2882. See infra text accompanying notes 474-75 for discussion of conjunctive and disjunctive jury instructions.

430. Id. at 2878-79.

431. Id. at 2879. Howard Hunt was not an elected official; rather, he occupied the appointed position of Chairman of the Democratic Party. See supra text accompanying note 91.

In United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983), the court considered whether “an individual who occupies no official public office but nonetheless participates substantially in the operation of government” could be held to owe a duty to the general citizenry, sufficient to support a charge that he violated their intangible rights. Id. at 121. The court used a “de facto control test,” under which a person who makes government decisions in fact may be held to be a fiduciary of the general citizenry. Id. at 122. In Margiotta, the jury had to find that the “work done by [Margiotta] was in substantial part the business of Government . . . and that the performance of that work was intended by him and relied on by others in Government as part of the business of Government in order to carry forward its affairs as a whole.” Id. at 126. The Margiotta court found the de facto control test satisfied, and affirmed Margiotta's mail fraud convictions. Id. at 128. As Hunt was also not an elected official, the government's theory under this finding was premised on the determination that Hunt had de facto control over the business of government. See generally Note, Mail Fraud and the De Facto Public Official: The Second Circuit Protects Citizens' Rights to Honest Government, 49 BROOKLYN L. REV. 933 (1983).


433. Id. at 2879.
wealth’s money. Nor was the jury charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent.\textsuperscript{434}

Thus, under the majority’s reasoning, neither finding was sufficient to support a conviction under the mail fraud statute, as neither required the jury to find that someone had lost money or property as a result of the defendants’ conduct.

The Court’s holding that the jury instructions were insufficient to support a mail fraud conviction provides a clear lesson for the prosecution of future intangible rights cases. An indictment cannot simply allege that the state’s citizens have been deprived of their right to honest government. Nor can an indictment allege that a scheme to defraud consists of both depriving citizens of the right to honest government and “obtain[ing] ... money and other things of value.”\textsuperscript{435} Instead, the indictment must specifically allege that a victim has been deprived of money or property. Accordingly, jury instructions must charge that a scheme to defraud is proven only if the prosecution has proved a loss of money or property.\textsuperscript{436} The Court offered a blueprint for prosecutors to follow—prosecutors should allege that the state lost money by paying insurance premiums at too high a price, or the “kickbacks” were money that might have gone to the state, or the state was deprived of control over how its money was spent.

If \textit{McNally} is viewed simply as a directive that, in mail fraud cases, jury instructions must allege that the defendants caused a loss of money or property, then the intangible rights doctrine might not be entirely dead. The cure to revive the doctrine appears to be relatively simple—prosecutors must prove money or property loss. One article has suggested that “imaginative prosecutorial and judicial theories might resuscitate the existing mail fraud statute by demonstrating a loss of property or money in cases that would formerly have been brought under the intangible-rights theory.”\textsuperscript{437}

However, the cure to resuscitate the doctrine is not that simple; it is, in fact, problematic in two respects. First, proof of property loss may not be available. In \textit{McNally}, for example, the Court suggested that the government prove that, absent the scheme, the state would have paid lower

\textsuperscript{434} Id. at 2882.

\textsuperscript{435} Id. at 2878. The jury instructions were faulty, as a conviction could have been based on either finding a deprivation of the right to honest government or obtaining money or property. The instructions did not require a finding of money or property loss. \textit{Id.} at 2882.

\textsuperscript{436} Id. at 2882.

\textsuperscript{437} \textit{The Supreme Court, supra} note 419, at 335-36.
premiums. Under this guideline, the government would be required to adduce post hoc declarations by other insurance companies that they would have charged the state less money for identical policies. Admittedly, this might make the government's job more difficult, but such admissions conceivably could be introduced. In other types of cases, however, such as election fraud or bribery of a judicial official, proof of property loss is likely impossible. These kinds of cases may not be "salvageable" under the mail fraud statute, in spite of the McNally Court's directives for proper jury instructions.

The second problem with the proposed "cure" for the mail fraud statute is the suggestion that "imaginative prosecutorial and judicial theories" can be used to demonstrate proof of property loss in cases which might previously have been brought under the intangible rights doctrine. The inference from this suggestion is that fraudulent conduct might be dismissed simply because of the lack of creativity of a government attorney in construing an offense to fit within the mail fraud framework. "Imaginative theories" should not be substituted for sound legal reasoning. Lack of creativity on the part of prosecutors has undoubtedly been responsible for the dismissal of cases in other areas of the law.

439. See United States v. Crispen, 672 F. Supp. 1100, 1101 (N.D. Ill. 1987) ("The mail fraud statute in all probability can no longer serve as the basis for election fraud prosecutions.").

In United States v. Curry, 681 F.2d 406 (5th Cir. 1982), Judge Garwood's concurring opinion suggested that "absentee ballots for the fictitious persons" in an election fraud scheme could be construed as the "tangible items" necessary to satisfy a money or property requirement in the mail fraud statute. Id. at 420 (concurring opinion). Whether this contention could survive judicial scrutiny has not been resolved. In Inger v. Enzor, 664 F. Supp. 814 (S.D.N.Y. 1987), the government argued that a successful election fraud scheme, whereby one was elected based on fraudulent ballots, should be cognizable under the statute even after McNally. Id. at 820. The theory was premised on finding that the elected official defrauded the citizens of money or property by paying him a salary that he would not have received but for the fraudulent ballots. Id. The court, however, found that the salary would have been paid to another "victorious candidate," and thus no money was lost as a result of the scheme. Id. at 822. See infra notes 467-78 and accompanying text for discussion of Inger.

440. See United States v. Holzer, 816 F.2d 304 (7th Cir.), rev'd, 828 F.2d 21 (7th Cir.), vacated, 108 S. Ct. 53 (1987), on remand, 840 F.2d 1343 (7th Cir.), cert. denied, 108 S. Ct. 2022 (1988). Holzer involved the prosecution of a judge who accepted bribes from the attorneys with cases pending before him. In a pre-McNally opinion, the court stated:

It is irrelevant that, so far as it appears, Holzer never ruled differently in a case because of a lawyer's willingness or unwillingness to make him a loan, so that his conduct caused no demonstrable loss either to a litigant or the public at large. How can anyone prove how a judge would have ruled if he had not been bribed?

Id. at 308 (citations omitted). See also Chi. Daily L. Bull., July 1, 1987, at 1, col. 3-4 (charges dropped against circuit judge for accepting bribes to fix drunk driving cases).

441. The Supreme Court, supra note 419, at 335-36.
442. Arguably this dilemma affects many areas of jurisprudence, but such an analysis is
Nevertheless, it is disturbing to construe McNally as a directive from the Court, instructing prosecutors to invent "imaginative" theories to somehow "save" their cases.

Imaginative theories have been used by government attorneys, however, and the McNally Court's suggestion concerning proper jury instructions allowed some cases to be "saved" by alleging property loss. On the other hand, not all cases that were decided prior to McNally survived. In many instances, the cases that did not survive were partially based on the loss of the citizens' right to honest government or an entity's intangible right to "accurate information." Some courts have held that claims based on these kinds of activities are no longer cognizable under the statute after McNally. Under this reasoning, some courts have applied McNally retroactively.

B. Aftermath of McNally: Retroactive Holdings

Following the Court's mandate in McNally that a scheme to defraud must include a loss of money or property, several defendants prosecuted under the intangible rights doctrine sought review. In some of these cases, the jury had been instructed that a scheme to defraud could be based on a finding that the defendants had defrauded citizens "of their

443. See, e.g., id. at 712; Runnels, 833 F.2d at 1186; Fagan, 821 F.2d at 1010-11 & n.6; Crispin, 672 F. Supp. at 1101.
445. See, e.g., Gimbel II, 830 F.2d at 623 (accurate information); Slay, 673 F. Supp. at 338-39 (right to honest government); Mandel II, 672 F. Supp. at 868 (right to honest government).
446. See cases cited infra note 448.
right to the conscientious, loyal, faithful, disinterested and unbiased services, actions and performance of official duties . . . free from bribery, corruption, partiality, willful omission, bias, dishonesty, deceit, official misconduct and fraud."449 Because McNally held that similar instructions permitted conviction for conduct that was not within the reach of the mail fraud statute,450 the question courts subsequent to McNally confronted on review was whether McNally would have retroactive effect on cases in which a defendant had been convicted under this impermissibly type of jury instruction.

One of the first cases decided involving the retroactivity issue was United States v. Mandel.451 Mandel was Governor of Maryland when he was convicted under the mail fraud statute for defrauding citizens of their right to honest government.452 Specifically, Mandel was found to have concealed his interest in the Maryland horse racing industry while legislation affecting that industry was pending.453 The jury found him guilty of fifteen counts of mail fraud and one count of racketeering; the court sentenced him to four years in prison.454 Mandel had already served nineteen months of that sentence with the remainder commuted by the time McNally was decided.455 Consequently, he sought to have his conviction vacated under a writ of error coram nobis.456

Preliminarily, the Mandel court noted that this writ is available when one is convicted and punished for actions that are not considered criminal.457 The court then discussed the holding of McNally and concluded that "it is indisputably settled that the federal mail fraud statute does not now make criminal, nor has it ever made criminal, the use of the mails in furtherance of schemes or artifices to defraud persons of non-

452. Mandel I, 591 F.2d at 1386.
453. Id. at 1354-57.
454. Id. at 1352.
456. Id. at 866. The writ of error coram nobis comes from common law; its purpose is "'[t]o relieve litigants from judicial wrongs for which there was no remedy . . . .'" Id. (citing Annotation, Writ of Error Coram Nobis, 38 A.L.R. FED. 617, 622 (1978)). In United States v. Morgan, 346 U.S. 502 (1954), the Court held that the writ would only be available if an error of the "most fundamental character" had occurred, and there was no other remedy available. Id. at 512. "Where a prisoner has fully served his prison term for a felony conviction, a writ of error coram nobis may issue because, "'[a]lthough the term has been served, the results of the conviction may persist." Mandel II, 672 F. Supp. at 867 (quoting United States v. Morgan, 346 U.S. 502, 512 (1954)).
457. Id. (quoting United States v. Travers, 514 F.2d 1171, 1176 (2d Cir. 1974)).
property rights." Applying this holding to the facts of Mandel, the court stated:

[I]t is clear that intangible rights to good and honest government may not be the target of a criminal scheme to defraud under the federal mail fraud statute . . . . It is similarly clear that the jury charge in Mandel permitted conviction for mail fraud premised on a deprivation of intangible rights, i.e., the right of a state’s citizens to honest and faithful government, explicitly disapproved in McNally . . . . Petitioner[,] thus [was] convicted of using the mails to defraud citizens and public officials of intangible, non-monetary rights—conduct which has never been made criminal by federal statute. This Court, then, has no choice but to grant a writ of error coram nobis . . . .

Therefore, the court vacated Mandel’s conviction, concluding that McNally was to be applied retroactively.

Other courts also reasoned that pre-McNally intangible rights convictions could no longer stand if the jury had not been required to find a loss of money or property. In United States v. Gimbel, the Seventh Circuit considered reversing a mail fraud conviction for a money laundering and tax fraud scheme. Gimbel was originally convicted under the theory that his activity constituted a scheme to defraud the Treasury Department of its right to “accurate and truthful” tax assessment data. On appeal, the government argued that by concealing the information, Gimbel had, in effect, deprived the Treasury of tax revenues. The Seventh Circuit, however, found that “the jury was not required to find that the scheme resulted in the government being deprived of money or property.” The court concluded that the indictment had not stated an offense under the mail fraud statute. Consequently, Gimbel’s conviction was reversed.

Finally, Ingber v. Enzor concerned a petition to vacate the conviction of a defendant indicted under an election fraud scheme. The

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458. Id. at 873.
459. Id. at 875-76.
460. Id. at 876.
462. Gimbel II, 830 F.2d 621 (7th Cir. 1987).
463. Id. at 622.
464. Id. at 626.
465. Id. at 627 (emphasis added).
466. Id.
468. Id. at 815.
indictment alleged that the defendant had defrauded the citizens of Fall-sburg, New York of "their ballots and of their right to a fair and impartial electoral process" essentially by falsifying voting documents, including voter registration forms, applications for absentee ballots, and absentee ballots which were then cast in [defendant's] favor . . . "469 The indictment also charged the defendant "with obtaining the 'salary, powers and privileges' of the office of Supervisor."470 The court found that a scheme to deprive voters of their right to honest elections was not within the reach of the mail fraud statute as defined by McNally, because the scheme did not deprive the voters of anything tangible.471

The Ingber court noted that the jury had been instructed to find "that the fraud had either one of two purposes: (1) to defraud the public of the intangible right to honest elections, or (2) to obtain 'money or property,—specifically, the salary—powers and privileges of the Office of Supervisor . . . ."472 These instructions were similar to those given in McNally;473 the Ingber indictment had alleged fraud based on either depriving the citizens of their right to honest government, or obtaining money or property by means of false pretenses. As with McNally, the Ingber court reasoned that the possibility that the jury verdict was based on the "money or property" finding necessitated reversing the conviction.474

The Ingber court stated two reasons why the conviction could not stand. First, the court noted that there were doubts as to whether the conviction was predicated upon permissible or impermissible grounds, and that doubt must be resolved in the defendant's favor.475 Second, the

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469. Id.
470. Id.
471. Id. at 820.
472. Id.
474. Ingber, 664 F. Supp. at 820-21. Slay also involved a dual jury instruction, whereby a scheme to defraud could be found on either premise. Slay, 673 F. Supp. at 339. The court noted that it was "far from certain that the jury rested its actual decision on a finding that defendants intended to devise a scheme to obtain money or other property . . . ." Id. at 348. As it was impossible to tell which ground the jury selected, the court held that the verdicts must be set aside. Id. at 348-49.
475. Ingber, 664 F. Supp. at 821. The jury instructions in Mandel I also contained a dual charge to the jury—that a scheme to defraud could be found by finding that Mandel deprived the citizens of Maryland of their right to honest government and that he sought to obtain money by false pretenses. Mandel I, 591 F.2d at 1353. This time, the instructions were given in the conjunctive. In addressing the jury instruction, the Mandel II court noted:

Applying the well-settled principle that instructions must be viewed as a whole, rather than in isolated sentences, [the second instruction] does not alter the fact that the instructions as a whole permitted mail fraud convictions to be entered without a finding that any person was deprived of a property right.
court reasoned that, even if the jury had found that the scheme was based on fraudulently obtaining a salary, "the jury was not required to find, that in the absence of the election tampering, the Town of Fallsburg would not have incurred the expense of the Supervisor's salary."476 Employing the McNally reasoning that the insurance commissions would have been paid to someone even in the absence of the defendants’ kickback scheme, the Ingber court stated that the defendant’s salary would have been paid "to some victorious candidate," regardless of the defendant’s scheme.477 Consequently, the court held that McNally applied retroactively and vacated Ingber’s conviction.478

These cases demonstrate that McNally has retroactive effect when a conviction was based on a jury finding that the scheme to defraud involved either a deprivation of intangible rights or a scheme to obtain money or property, but the jury was not required to find a loss of money or property.479 Without a requirement of money or property loss, a jury may have convicted based solely on the deprivation of intangible rights. Thus, the cases applying McNally retroactively reasoned that retroactivity is necessary, following from the principle that "criminal conduct does not offend against the federal government unless it violates an Act of Congress."480 According to this principle, the judiciary cannot enlarge the reach of federal crimes and criminalize that which Congress did not intend to be criminal.481 Therefore, if a deprivation of intangible rights was never intended by Congress to constitute a federal crime under the

Mandel II, 672 F. Supp. at 875 n.8 (citations omitted). In spite of the fact that the instructions were in the conjunctive, the court nonetheless considered that “[t]he charge given here did not require . . . [proof] that the citizens of Maryland . . . suffered any economic loss or injury as a result of [Mandel’s] conduct.” Id. at 875 (emphasis in original).

477. Id. (emphasis in original).
478. Id. at 822-23.

479. Although these courts reasoned that they were legally required to vacate the defendants’ convictions, some courts were clearly not pleased that such a decision was compelled. In Slay, the court stated:

The viewpoint of this Court (which, of course, is of no consequence in view of McNally) is expressed by Justice Stevens in his dissent: “Perhaps the most distressing aspect of the Court’s action today is its casual—almost summary—rejection of the accumulated wisdom of the many distinguished federal judges who have thoughtfully considered and correctly answered the question this case presents.”

Slay, 673 F. Supp. at 352 n.8 (quoting McNally v. United States, 107 S. Ct. 2875, 2890 (1987) (Stevens, J., dissenting)); see also Mandel II, 672 F. Supp. at 878-79, quoted infra note 579. But see Ingber, 664 F. Supp. at 824. In Ingber, the court stated that: “[t]he explosion of intangible rights prosecutions in the last ten years constitutes an inconsistent blip on a century-long timeline of mail fraud prosecutions of wicked city-dwellers who fleece their more gullible countrymen of tangible goods and property.” Id.

480. Mandel II, 672 F. Supp. at 873.
481. Id. (citing Viereck v. United States, 318 U.S. 236, 241 (1943); United States v. Stan-
mail fraud statute, the circuit courts were not empowered to base a conviction on such conduct.\textsuperscript{482} As the Mandel court noted, "'[t]he unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving his conduct may seem.'"\textsuperscript{483}

C. Aftermath of McNally—Sustained Convictions

Courts sustaining convictions following \textit{McNally v. United States},\textsuperscript{484} have relied on two different theories. First, some courts have adopted an agency theory, using principles of agency law to find the required loss of money or property.\textsuperscript{485} Second, other courts have found that, even though the jury was not instructed to find a loss of money or property, such a finding was implicit in the jury's verdict.\textsuperscript{486}

1. The agency theory

Although many courts have held that \textit{McNally} must be applied retroactively, other courts have avoided vacating convictions using principles derived from agency law.\textsuperscript{487} As applied in the mail fraud context, the agency theory states that when an agent appropriates an economic benefit that should properly be the principal's, the elements of mail fraud as dictated by \textit{McNally} are satisfied.\textsuperscript{488} This theory derives from the concept that, if an agent violates his duty to the principal, he is liable to the principal for proceeds received from the violation.\textsuperscript{489} The agency theory has been invoked in cases involving kickback schemes where employees were found to have defrauded employers of their right to honest services.\textsuperscript{490} Arguably, the theory could extend to public officials as well, and might "magically transform" most intangible rights cases to fit within...
McNally’s definition of money or property loss.492

The Sixth Circuit used the agency concept in United States v. Runnels.493 Runnels involved a kickback scheme in which a union official accepted bribes.494 The court reasoned that since Runnels was an agent of the union, the payments that Runnels received did not belong to him; rather they belonged to the union.495 Accordingly, the court held that an agent had appropriated “an economic benefit that properly should be the principal’s.”496 Under this theory, the agent had deprived the principal of money or property. Thus, the elements of mail fraud under McNally were satisfied.

492. Runnels, 833 F.2d at 1186 n.2.
493. Id. at 1186. Fagan also applied the agency principle to an employee kickback scheme. Fagan, 821 F.2d at 1005. Fagan cited support for the theory from Justice Stevens’ dissent in McNally:

"[T]he agent receives anything as a result of his violation of a duty of loyalty to the principal, he is subject to a liability to deliver it, its value, or its proceeds, to the principal." . . . This duty may fulfill the Court’s "money or property" requirement in most kickback schemes.

494. Runnels, 833 F.2d at 1184. In Runnels, Frank Runnels, a union president, and Arnold Shapero, an attorney, appealed their convictions for defrauding the union of its right to honest services and representation. Id. A jury had found that the defendants had contrived a bribery scheme, in which Runnels agreed to take money from Shapero in exchange for referring union members to Shapero’s firm. Id. at 1184-85. The court reasoned that Runnels had a fiduciary duty to the union. As a fiduciary, the court noted that Runnels had a duty to "account to the organization for any profit received . . . in whatever capacity in connection with transactions conducted by him . . . on behalf of the organization." Id. at 1186 (quoting the Labor Management Disclosure Act of 1959, 29 U.S.C. § 501(a)).

495. Runnels, 833 F.2d at 1187. The court stated that “the benefit properly belongs to the entity to whom the fiduciary has a duty.” Id.

496. Id. at 1186. The Runnels court unequivocally stated that the same reasoning could apply to public officials. Id. at 1187. According to the court, "the fiduciary duties of public officials is equally well established." Id. at 1186 n.2. Specifically, the court stated that a public official is an agent of the county or state, which is the principal. The court reasoned that any bribes acquired by an official in his official capacity would belong to the state, under the theory that the official has merely held the money in constructive trust for the government. Id. at 1187-88. The court recognized that this theory would not be applicable to intangible rights cases that did not involve the receipt of some kickback or bribe, as the requisite economic benefit would be absent. Id. at 1188.

Additionally, the court stated that “it has been repeatedly held . . . that public officials and employees serving interests in conflict with those of the United States for their own gain hold the funds they receive, no matter what the source, in constructive trust for the government.” Id. at 1188 (quoting United States v. Podell, 572 F.2d 31, 35 (2d Cir. 1978)).

The constructive trust theory was also argued by the government in Mandel II. United
After finding that the agency or “benefit deprivation” theory provided the necessary deprivation of money or property required under McNally, the Runnels court confronted a second obstacle before it affirmed the convictions. At trial, the jury had been instructed only under an intangible rights theory. The Runnels court, however, did not consider this to be reversible error. The court noted that “appellate courts have affirmed convictions based on an erroneous instruction where the jury’s verdict necessarily demonstrates that it found against the defendants on all the facts necessary to convict on a proper theory or instruction which was also before the jury.”

In Runnels, however, the “proper theory”—the agency theory—was not actually before the jury. The court noted that they were “aware of the dangers of affirming a criminal conviction on a theory not properly advanced at trial.” Nevertheless, the court reasoned that it was justified in affirming the conviction in this case because the jury had necessarily found every fact essential to support the mail fraud count. This determination derived from the court’s assessment that a defendant can be convicted under an intangible rights theory by a finding that the defendant has been suborned. Applying that finding to the facts of Runnels, the court stated:

The jury could only have found Runnels guilty under the intangible rights doctrine by concluding that Runnels, though a fiduciary of [the union], had accepted payments from Shapero. These payments were the only method of subornation presented at the trial. Thus, it is inescapable that the jury concluded that Runnels accepted payments. If Runnels accepted the payments, as the jury necessarily concluded, then he took money which belonged to [the union] as a matter of law, and violated the mail fraud statute under either the intangible rights doctrine or under the benefit deprivation analysis.

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States v. Mandel, 672 F. Supp. 864, 877 (D. Md. 1987). The court refused to consider this theory as it was never presented to the jury. Id. at 878.

The theory was argued in Holzer II, 840 F.2d at 1347 and soundly rejected by the court. See infra text accompanying note 506 for discussion of Holzer.

497. Runnels, 833 F.2d at 1188.
498. Id. at 1189.
499. Id. at 1191.
500. Id. at 1189. “There is no prejudice ... when, in order for the jury to find an essential element of crime based on the erroneous instruction, it must necessarily have found every fact essential to support a finding of the same element based on the alternative, correct charge ... .” Id. (quoting United States v. H & M, Inc., 562 F. Supp. 651, 660 (M.D. Pa. 1983)).
501. Id. at 1191.
502. Id. at 1192. It is not necessarily true that the jury must have “inescapably” concluded
Accordingly, the court found that there was no uncertainty that the jury had found every fact necessary to support a conviction under the benefit deprivation theory. The court, therefore, affirmed Runnels' conviction. 503

The Runnels court distinguished McNally by noting that, in McNally, the Court stated that the insurance proceeds would have been paid to some other agency, if not to Wombwell. 504 "Thus, the money McNally kept was not owned by Kentucky once it was paid to the insurance agency." 505 In contrast, the bribes Runnels kept were owned by the union. The court stated that, absent the kickback scheme, Runnels would not have received the bribe money. Thus, the court reasoned, the bribes that Runnels received were monies held in constructive trust for the union. 506

The distinction the Runnels court drew with McNally, however, ignores the Runnels court's own agency theory. Applying the reasoning of the agency theory to the facts in McNally, Hunt and Gray were arguably fiduciaries of the government. 507 Consequently, as agents of the state, any bribes that they took belonged to the state as principal. 508 Under

that Runnels actually accepted payments. For example, the jury may have found that Runnels deprived the union of its intangible right to honest services by the fact that Runnels referred union clients to Shapero, without disclosing an intent to take money from Shapero in exchange for the referrals. Thus, the jury may not have found that any payments actually exchanged hands, but still concluded that Runnels' failure to disclose the scheme was sufficient to sustain a finding under the intangible rights doctrine.

503. Id. at 1194.
504. Id. at 1192 (citing McNally v. United States, 107 S. Ct. 2875, 2882 (1987)).
505. Id.
506. Id. (referring to discussion at 1186-88). In Holzer II, 840 F.2d 1343, the court disagreed with the Sixth Circuit on the applicability of the constructive trust theory as a way to "save cases that had been brought and tried under the now-discredited 'intangible rights' theory." Id. at 1347. Holzer involved a judge who had taken bribes, in contrast to the attorney in Runnels. The court, however, noted that otherwise, the two cases were not distinguishable, as "constructive-trust principles apply with equal force to public fiduciaries." Id.

The Holzer II court, however, went on to reject the constructive trust theory. The court stated that the bribe money Holzer took could only be deemed the principal's property in "an attenuated and artificial way," since "the State of Illinois does not sell justice." Id. at 1348. Additionally, the court stated that:

A constructive trust [would be] imposed on the bribes not because Holzer intercepted money intended for the state or failed to account for money received on the state's account but in order to deter bribery by depriving the bribed official of the benefit of the bribes. Unless we assume unreasonably that the state wants Holzer to take bribes so that it can recoup them under constructive-trust principles, the state's financial situation is the same whether he takes bribes or doesn't take bribes. Id. Consequently, the court concluded that this case "is an intangible-rights case and only an intangible-rights case." Id. With no way to "save" an intangible rights case in light of McNally, Judge Holzer's conviction was vacated. Id. at 1352.

507. See Runnels, 833 F.2d at 1186 n.2 (fiduciary duties of public officials well established).
508. See supra notes 488-89 and accompanying text.
this theory, it was irrelevant that the insurance proceeds in *McNally* would have been paid anyway. It was the bribes that the *Runnels* court held were the union's money.\(^{509}\) Accordingly, the bribes in *McNally* could be said to be the state's money. The *Runnels* court's attempt to distinguish the two cases missed the point of the court's own agency theory. Therefore, *Runnels* can be viewed as an imaginative effort to turn an employee intangible rights case into an economic deprivation case on facts similar to *McNally*.

2. Implicit proof of money or property loss

Other courts have found ingenious ways to circumvent the *McNally* money or property requirement.\(^{510}\) *United States v. Keane*\(^ {511}\) involved a city Alderman who was convicted under the intangible rights doctrine for defrauding the city of Chicago and its citizens of their right to honest government.\(^ {512}\) Keane had purchased tax-delinquent properties at low prices, and then, through his position in the city council, engineered the city's purchase of these properties without revealing his interest.\(^ {513}\) Many of the properties were improperly zoned, and cost more than twice what the city would normally pay. At trial, the government introduced evidence that Keane and his partners netted profits of $167,471.30 from the sale of the properties to the city.\(^ {514}\)

Following *McNally*, Keane petitioned for a writ of error *coram nobis*, arguing that his conviction under the intangible rights doctrine was void.\(^ {515}\) He specifically objected to a jury instruction wherein the jury was told that to convict, it was not required to find that the citizens of Chicago had been defrauded of any monetary loss.\(^ {516}\) Thus, Keane

\(^{509}\) Id.


\(^{511}\) *Keane I*, 678 F. Supp. 708 (N.D. Ill. 1987), aff'd, 852 F.2d 199 (7th Cir. 1988).

\(^{512}\) *Keane I*, 522 F.2d at 538-39.

\(^{513}\) Id. at 540-41.

\(^{514}\) Id. at 543.

\(^{515}\) *Keane II*, 678 F. Supp. at 709. The indictment accused Keane "of devising and intending to devise a 'scheme and artifice to defraud' ":

The City of Chicago and its citizens and Thomas E. Keane's fellow Aldermen on the Council of the City of Chicago of their right to the conscientious, loyal, faithful, disinterested and unbiased services, decisions, actions and performance of official duties by defendant Thomas E. Keane, in his official capacities as 31st Ward Alderman and as Chairman of the Committee on Finance of the City Council, free from corruption, partiality, wilful omission, bias, dishonesty, official misconduct, conflict of interest and fraud.

\(^{516}\) Id. at 710-11 (citing Trial Transcript at 3420).
argued that, as in *McNally*, the jury had not been instructed to find the requisite money or property loss necessary to convict.

In *Keane II*, the court preliminarily discussed the agency theory advanced in *Runnels*. The court found it unnecessary to reach this issue, however, stating that in this case, "Keane schemed to deceive the citizenry and to deprive it of what is unquestionably property: money and/or confidential government information." The evidence at trial had shown that Keane purchased the properties because he had inside information about a pending urban renewal project, and then bought the properties with the purpose of selling them back to the city. Thus, the court reasoned that Keane misappropriated confidential business information which "deprived the citizenry of property, 'intangible' though it might have been." Further, by pressuring the city to purchase over-priced property, the court reasoned that Keane "deceived the citizenry to deprive it of money."

The *Keane II* court acknowledged that the jury instructions were erroneous, but considered the instructions to be harmless error. The court stated that:

[T]he jury's verdict that Keane violated the citizenry's rights to loyal service necessarily contained an implicit finding that Keane deprived the citizenry of property . . . . The court was careful, both at the outset of the trial and in giving its instructions, to explain the details of the scheme alleged in the indictment . . . . Therefore, the jury necessarily found a deprivation of property suffered by the entity deceived, and this would meet *McNally*'s conception of fraud, as proscribed by the mail fraud statute.

The court determined that, since the jury had implicitly found Keane had defrauded citizens of a tangible property right, the elements of mail fraud under *McNally* were satisfied.

Finally, the court distinguished *McNally* by simply noting that, in *McNally*, the citizenry of Kentucky had not been deprived of any prop-

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517. *Id.* at 712 (citing United States v. Runnels, 833 F.2d 1183 (6th Cir. 1987)). The *Keane II* court also noted that the agency theory had been rejected in *Mandel II*. *Id.* n.5. The *Keane II* court may have avoided addressing the agency issue in light of these conflicting opinions.

518. *Id.* at 712.

519. *Id.* (citing United States v. Keane, 522 F.2d 534, 542-43 (7th Cir. 1975)).

520. *Id.* at 712-13 (citing Carpenter v. United States, 108 S. Ct. 316, 320 (1987)).

521. *Id.* at 712.

522. *Id.* at 714.

523. *Id.* at 713-14 (emphasis in original).
There is some merit to this distinction. The monies Keane received for the sale of the properties were unquestionably paid to him directly by the government.\textsuperscript{525} In contrast, the payments in McNally came from the Wombwell Insurance Company, and not from the government.\textsuperscript{526} Thus, the prosecution in McNally was not able to prove that the scheme directly deprived the government, and thereby the citizens of Kentucky, of any property.

Additionally, Keane II has support for the proposition that "confidential business information" constitutes property within the meaning of the mail fraud statute. The Supreme Court addressed this issue in Carpenter v. United States.\textsuperscript{527} In Carpenter, a writer for the Wall Street Journal was convicted of misappropriating the paper's prepublication confidential information regarding the timing and contents of the paper's "Heard on the Street" column.\textsuperscript{528} The Court stated that "[t]he Journal's business information that it intended to be kept confidential was its property . . . ."\textsuperscript{529} Further, the Court noted that the fact that information is "intangible" "does not make it any less 'property' protected by" the mail fraud statute.\textsuperscript{530}

3. Limitations of the agency theory and implicit finding of loss of money or property

The Carpenter Court suggested that some cases which might have been prosecuted under an intangible rights theory might still be viable if the government can prove that the scheme involved a deprivation of confidential information.\textsuperscript{531} However, Carpenter arose in a business setting,\textsuperscript{532} where the monetary value of a corporation's information is more apparent. The information misappropriated in Carpenter belonged to the Wall Street Journal; it was acquired by an employee who obtained it

\textsuperscript{524} Id. at 711.
\textsuperscript{525} Keane I, 522 F.2d at 540-44.
\textsuperscript{526} McNally, 107 S. Ct. at 2877.
\textsuperscript{527} 108 S. Ct. 316 (1987).
\textsuperscript{528} Id. at 319. The author was also convicted of violating rule 10b-5 of the Securities Exchange Act of 1934. On appeal, the Court was evenly divided over the securities convictions. As a result, those convictions were upheld. Id. at 320.
\textsuperscript{529} Id. at 321-22. Additionally, the Court stated: "[c]onfidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect . . . ." Id. at 320 (citing 3 W. Fletcher, CYCLOPEDIA OF LAW OF PRIVATE CORPORATIONS § 857.1, at 260 (rev. ed. 1986) (footnote omitted)).
\textsuperscript{530} Id.
\textsuperscript{531} Id. at 321.
\textsuperscript{532} Id. at 318-19.
pursuant to his position at the paper. Additionally, the information about the contents and timing of the column qualified as property, since it had tangible value to the newspaper. In contrast, when a public official fails to disclose a bribe, he has not “taken” any tangible information wrongfully obtained by his position. Rather, when an official fails to disclose a bribe, he has simply refrained from revealing an act of misconduct.

Failing to disclose an act of misconduct is not the same as giving away a company’s valuable business information, as the information about the misconduct does not in itself have a tangible value. Therefore, although Carpenter expanded the reach of the mail fraud statute, its application may be limited to the business sector. Although Keane II suggested applying the Carpenter theory to a case involving a public official, Keane II specifically involved the misappropriation of information. Thus, Keane II does support the theory that misappropriation of confidential information may satisfy the McNally property requirement in the public corruption context. However, the confidential information theory might be limited to cases in which the government can specifically prove that an official took tangible information. The theory might not work if the official only fails to disclose bribes, since, in that case, no information with monetary value has been appropriated. In that case, the McNally property requirement would not be satisfied.

The agency theory used in Runnels does suggest an “alternative rationale” for cases previously prosecuted under the intangible rights doctrine. Even if this theory is upheld by the Supreme Court, its application will be limited to kickback and bribery schemes where the agent has taken the principal’s money. The Runnels court admitted that “situations can be hypothesized in which a fiduciary who knowingly breaches his duty by accepting a bribe or kickback arguably does not

533. Id.
534. In describing the tangible value of the contents and timing of the column, the Carpenter Court stated:

News matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise.

Id. at 321 (quoting International News Service v. Associated Press, 248 U.S. 215, 236 (1918)). Accordingly, the Court held that “[t]he Journal had a property right in keeping confidential and making exclusive use, prior to publication, of the schedule and contents of the ‘Heard’ column.” Id. at 320-21.

536. Runnels, 833 F.2d at 1186-88.
537. If the reasoning of Holzer II is followed, the agency or constructive trust theory may not even be applied to kickback or bribery schemes. See Holzer II, 840 F.2d at 1348.
deprive the principal of an economic benefit, as would have been the case if Runnels had not pocketed the payments... but... had spent all of the payments on furnishings for the union hall.538 Additionally, the theory can have no viability in election fraud schemes when no money is involved. Therefore, although these inventive theories tend to resuscitate the mail fraud statute, they will not cover all cases involving a deprivation of intangible rights.

VII. PROPOSALS FOR LEGISLATIVE CHANGE

_McNally v. United States_539 left the future ability to prosecute public corruption in doubt. Fraudulent schemes often do not violate any state law, making federal law the sole remedy.540 Moreover, even if a state statute did proscribe the fraudulent behavior, states do not have the same resources to prosecute as the federal government.541 For example, the federal government is able to coordinate investigations with various agencies such as the FBI, the IRS and the Postal Inspection Service.542 Additionally, since many public corruption cases involve high ranking state officials, the state may be unable to carry out an effective investigation.543

In addition to the inadequacies of state law to deal effectively with the problem of public corruption, federal law often provides no specific statute under which to obtain an indictment.544 This difficulty was explained by Daniel Hurson, former Assistant United States Attorney for the District of Maryland:

By the time [the investigation] process reaches the indictment stage, agents and prosecutors may find themselves with facts accumulated through the course of their investigation that amount to some sort of improper or dishonest activity but do not fit the traditional criteria for a federal offense. For example, there may be no evidence of interstate activity to promote

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538. Runnels, 833 F.2d at 1188.
540. See id. at 2882 n.9.
541. See generally Hurson, _Limiting the Federal Mail Fraud Statute—A Legislative Approach_, 20 AM. CRIM. L. REV. 423 (1983). For example, federal prosecutors have nationwide subpoena power over witnesses and documents. _Id._ at 433.
542. _Id._ at 432.
544. Hurson, _supra_ note 541, at 433-34.
gambling, extortion, or bribery such as might invoke the provisions of the Travel Act. Or there may be no extortion, either through fear or under color of official right, which could trigger application of the Hobbs Act. Quite often mail fraud is the only federal criminal charge available to bring against a private individual or a nonfederal public official involved in corrupt activity.\footnote{Id.}

Thus, if the mail fraud statute is no longer available to prosecute public corruption, there may be no statute—either federal or state—under which to prosecute corrupt actions by public officials.

As a result, Congressmen have proposed several bills to amend the mail fraud statute.\footnote{H.R. 3050, 100th Cong., 1st Sess. (1987); H.R. 3089, 100th Cong., 1st Sess. (1987); Letter from Scott Wallace, National Association of Criminal Defense Lawyers (“NACDL”), Legislative Director, to NACDL Members Interested in McNally Legislation (September 10, 1987) (draft of bill by Professor John Coffee, Columbia Law School).} One proposal is drawn in broad language, and suggests amending the definition of fraud to include intangible rights.\footnote{H.R. 3089, 100th Cong., 1st Sess. (1987).} This proposal would have wide ranging effects on both public and private corruption. Another proposal is more narrowly drawn, and directs its focus specifically at public corruption.\footnote{H.R. 3050, 100th Cong., 1st Sess. (1987).} As of this writing, Congress has not passed either of these amendments.

### A. Proposal of Representative Conyers

Representative John Conyers, Jr. introduced a bill that would amend the definition of fraud to include:

- defrauding another of intangible rights of any kind whatsoever in any manner or for any purpose whatsoever; or by using material private information wrongfully stolen, converted, or misappropriated in breach of any statutory, common law, contractual, employment, personal, or other fiduciary relationship.\footnote{H.R. 3089, 100th Cong., 1st Sess. (1987).}

Representative Conyers’ amendment to the definition of fraud does not articulate specific intangible rights that are to be included within the new statute’s scope; every intangible right is included. Additionally, the amendment would cover all misappropriations of material information in breach of any fiduciary duty.

This far-reaching proposal derives from Representative Conyers’ be-
lie that the mail fraud statute never contained any "tangible rights" limitation.\textsuperscript{550} Additionally, he also believes that the statute must be read broadly to implement its remedial purpose.\textsuperscript{551} Representative Conyers' principal concern is that "[a]buse of trust in an interdependent society—whether of governmental character or otherwise—is far more threatening to our most basic and important values."\textsuperscript{552} He expressed his view most aptly through the words of President Theodore Roosevelt:

> There can be no crime more serious than [public corruption]. Under our form of Government all authority is vested in the people and by them delegated to those who represent them in official capacity. There can be no offense heavier than that of him in whom such a sacred trust has been reposed, who sells it for his own gain. . . . He is worse than the thief, for a thief robs the individual, while the corrupt official plunders an entire city or State. He is as wicked as the murderer, for the murderer may only take one life against the law, while the corrupt official . . . aim[s] at the assassination of the commonwealth itself.\textsuperscript{553}

The proposal, therefore, is designed to encompass a wide range of corrupt behavior that might threaten the public trust.

Representative Conyers' proposal would cover not only public corruption, but all private fraudulent activity as well. Specifically, the proposal would make breach of fiduciary duty a federal crime. Suggesting that a federal fiduciary duty exists is "no minor step."\textsuperscript{554} Congress has rejected such a proposition on other occasions, finding that governing private corporate transactions is a matter best suited to state law.\textsuperscript{555} Representative Conyers' proposal, therefore, may be drawn too broadly to overcome congressional resistance to the expansion of a federal intervention in private business.

Further, by failing to define or limit breach of fiduciary duty, Representative Conyers' proposal runs the risk of criminalizing a broad range of apparently innocent conduct. For example, the proposal refers to a

\begin{itemize}
  \item \textsuperscript{550} Cong. Rec. 3240, 3241 (August 4, 1987).
  \item \textsuperscript{551} Id. at 3241.
  \item \textsuperscript{552} Id. at 3242.
  \item \textsuperscript{553} Id. (quoting IX Presidential Messages and State Papers 3048 (M. Muller ed. 1917)).
  \item \textsuperscript{554} See United States v. Siegel, 717 F.2d 9, 23 (2d Cir. 1983) (Winter, J. concurring in part and dissenting in part).
  \item \textsuperscript{555} Judge Winter noted that, although Congress has mandated disclosure through the various securities laws, Congress has generally declined to enact substantive regulations of corporate transactions. Id. at 24. See generally Easterbrook & Fischel, Corporate Control Transactions, 91 Yale L.J. 698, 700-02 (1982); Cary, Federalism and Corporate Law: Reflections on Delaware, 83 Yale L.J. 663 (1974).
\end{itemize}
"personal fiduciary relationship;" the boundaries of this relationship are arguably limitless. Under such a vague standard, the amendment could criminalize "all actions which might offend the Government's sense of personal propriety,"556 or fail to conform with a particular court's notion of "accepted moral standards."557 To achieve some uniformity in courts' decisions, the amendment must delineate more clearly what standard is to be used to determine when such a breach has occurred.

When the mail fraud statute was used to prosecute intangible rights, the statute came under attack as being void for vagueness.558 Although the Supreme Court did not hold that the statute was unconstitutional on that ground, the Court expressed concern that the statute was being construed in a "manner that [left] its outer boundaries ambiguous . . . ."559 Representative Conyers' ambitious proposal suffers from the same defect. It fails to give adequate notice of what conduct would fall within the statute's scope. The amendment therefore, can be attacked on vagueness grounds.

B. Proposal of Representatives Mfume and Synar

A second bill, introduced by Representatives Mfume and Synar is more narrowly focused toward public corruption.560 This bill, borrowing language from intangible rights cases, proposes:

As used in [the mail and wire fraud statutes], the term "de-
fraud" includes the defrauding of the citizens of a body polit-
ic— (1) of their right to the conscientious, loyal, faithful,
disinterested, and unbiased performance of official duties by a
public official thereof; or (2) of their right to have the public
business conducted honestly, impartially, free from bribery,
corruption, bias, dishonesty, deceit, official misconduct, and
fraud.561

This proposal would criminalize official misconduct, without creating a federal fiduciary duty. Most importantly, it would include that which McNally abrogated—the right to honest government.

As President Theodore Roosevelt stated, public corruption is an es-

556. United States v. McNeive, 536 F.2d 1245, 1252 (8th Cir. 1976).
558. See United States v. Bohonus, 628 F.2d 1167 (9th Cir.), cert. denied, 447 U.S. 928
(1980).
561. Id.
especially serious offense.\textsuperscript{562} It destroys the public trust, and threatens the foundations of democratic government. The proposal suggested by Representatives Mfume and Synar is aimed at ensuring that American citizens have a right to honest and impartial government. With this as the goal, there is no need to sweep all private fiduciary breaches within the scope of a federal statute. Therefore, the amendment would protect citizens' right to be free of official corruption, without broadly criminalizing apparently innocent behavior.

C. Author's Comment: Proposals for Legislative Change

The Author believes that the intangible rights doctrine was an effective mechanism for prosecuting public officials charged with kickback and bribery schemes, election fraud, and schemes in which officials failed to provide honest and truthful information pertinent to pending legislation.\textsuperscript{563} On the other hand, however, the doctrine was also used to prosecute private fiduciary breaches in general business as well as conflicts of interest cases.\textsuperscript{564} Arguably, with no limitation on the wording of "scheme to defraud," some of the latter abuses legitimately fell within a broad reading of the statute. In retrospect, making a federal crime of a conflicts of interest case may indeed have carried the scope of the statute beyond its proper boundaries. Although the Court in \textit{Badders v. United States}\textsuperscript{565} held that Congress may forbid any act under the mail fraud statute that it regards as contrary to public policy, as long as the mails are used in furtherance of the scheme,\textsuperscript{566} this language should not be taken literally; it would allow for a limitless reach of federal power. The federal government should not be able to criminalize anything that offends its sense of propriety, without giving adequate notice of the proscribed behavior.\textsuperscript{567}

\textsuperscript{562} See Cong. Rec. 3240, 3242 (August 4, 1987) (quoting IX Presidential Messages and State Papers 3048 (M. Muller ed. 1917)).


\textsuperscript{565} 240 U.S. 391 (1916).

\textsuperscript{566} Id. at 393.

\textsuperscript{567} See Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).
Criminalizing corruption by public officials, however, is neither vague nor an intrusion by the federal government into private business. Public officials must be expected to act honestly, impartially, and free from bias and corruption. Moreover, the federal government should be the authority to ensure that this goal is met. State government may simply be unable to effectively combat the problem, particularly when the corruption pervades the highest ranks of the state. The Mfume and Synar proposal, therefore, clarifies that the mail fraud statute should be the mechanism for prosecuting abuses of the public trust.

The Author additionally suggests, however, that the legislation contain an explicit provision proscribing election fraud. Election fraud may be conducted by one who is not yet a public official, yet should nonetheless be liable under the statute for defrauding citizens of their right to have their affairs conducted honestly. Broadly read, part (2) of the Mfume and Synar proposal would proscribe election abuse. However, in an effort to specify that such conduct falls within the boundaries of this provision, the Author suggests the following language be added to the proposal:

(3) of their right to fair elections free from dilution from the intentional casting and tabulation of false, fictitious or spurious ballots.

With this addendum, the proposal clearly proscribes election fraud by a person who may not be a public official.

As Justice Stevens said in his McNally dissent, "[i]t is sometimes difficult to define when there has been a scheme to defraud someone of their intangible rights." Difficulty in constructing a definition, however, is no excuse for letting fraudulent conduct go unpunished. Fashioning a workable definition for "scheme to defraud" is a task Congress must undertake. The Mfume and Synar bill, with the addition suggested by the Author, would provide Congress with that definition. Moreover, such a definition would ensure that the public trust is not corrupted by those responsible for providing citizens with honest government.

568. See supra notes 540-45 and accompanying text.
570. Id.
VIII. CONCLUSION

In *McNally v. United States*, the Supreme Court held that the mail fraud statute could no longer be used to protect citizens' rights to honest and impartial government. Whether this decision was justified in light of the statute's original purpose and years of precedent is questionable. Nonetheless, the Court has spoken. In doing so, however, it gave a broad hint to Congress that if public corruption is to be punished and citizens' rights protected, it is up to Congress to act. The Author of this Note hopes that Congress takes the suggestion and acts immediately.

In *United States v. Mandel*, on the former governor's petition for a writ of error *coram nobis*, the court determined it was constrained to give *McNally* retroactive effect and vacate Mandel's conviction. Nonetheless, the court articulated the view that there is an inalienable right to good government:

[I]t must be remembered that this Court's action on these petitions has nothing to do with petitioners' guilt or innocence, in any moral sense. The people of Maryland, as a matter of natural law, have and have always had an inalienable right to good government. A jury of twelve citizens found beyond a reasonable doubt that the petitioners had deprived all the citizens of Maryland of that right. This conduct, however, for reasons amply set forth above, cannot sustain a judgment that the defendants were guilty of federal crimes. A final answer to the question of petitioners' guilt or innocence, in any broader sense than that, must await the judgment of history.
If we as citizens have an inalienable right to honest government, we should not have to wait for the judgment of history to be able to enforce that right.

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