

BOSTON COLLEGE LAW REVIEW

VOLUME XXXVI No. 3

MAY 1995

NUMBER 3

MAYBE IT SHOULD JUST BE CALLED FEDERAL FRAUD: THE CHANGING NATURE OF THE MAIL FRAUD STATUTE†

PETER J. HENNING*

Congress has engaged in its biannual, election year exercise of passing an anti-crime statute¹ that addresses a broad array of criminal acts that purportedly require prosecution by the Federal Government, rather than being left to state and local authorities, and increases punishment for offenders.² Although the additions or alterations directed toward economic crimes are often subsumed in politically-charged

† Copyright © 1995, Peter J. Henning.

* Associate Professor, Wayne State University Law School, Detroit, Michigan. B.A. 1978, Loyola Marymount University; M.A. 1980, Fordham University; J.D. 1985, Georgetown University Law Center. The author was a Trial Attorney with the Criminal Division of the United States Department of Justice. The views expressed in the Article do not purport to reflect the position of the Department of Justice. I would like to thank Karen L. McDonald, Scott Mackay, James "Elvis" Candelmo, and Professors Joseph Grano and John Dolan for their valuable assistance.

¹ See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976; Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-332, 108 Stat. 1796. Congress broke its string of passing election-year crime bills in 1992, when a filibuster by Republican senators over gun-control measures prevented a final vote on the legislation before Congress adjourned. See Adam Clymer, *The 1992 Campaign: Congressional Roundup; Key Democratic Bills Killed in Senate*, N.Y. TIMES, Oct. 3, 1992, at A10 (anti-crime measure with "modest gun-control elements" blocked due to insufficient votes to pass cloture motion).

² See, e.g., Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976 (instating Sentencing Commission and bail reform); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1366-1402, 100 Stat. 3207, 3207-35 to 3207-40 (10 year mandatory minimum sentences for certain drug offenses); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7501-7526, 102 Stat. 4181, 4485 (child pornography and obscenity provisions); Crime Control Act of 1990, Pub. L. No. 101-647, title II, 104 Stat. 4789, 4792 (child abuse provisions).

anti-drug or violent crime efforts, these legislative exercises often yield major changes in the scope and application of provisions utilized by prosecutors in combatting white collar crime.³ The latest example of Congress's proclivity to change an important white collar crime provision as part of a broader anti-crime effort is found in the Violent Crime Control and Law Enforcement Act of 1994 ("Violent Crime Act").⁴ In addition to increasing dramatically the number of federal crimes for which the death penalty can be imposed⁵ and financing a number of new crime prevention programs,⁶ the Violent Crime Act contains an unheralded change in the mail fraud statute⁷ that will substantially expand the scope of federal anti-fraud prosecutions.

³ See, e.g., Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1108, 98 Stat. 1837, 2147 (bank fraud statute); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (overturning Supreme Court interpretation of scope of mail fraud statute in *McNally v. United States*); Crime Control Act of 1990, Pub. L. No. 101-647, § 2506, 104 Stat. 4789, 4862 (money laundering). The exception to the election year crime bills is the Financial Institution Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, which Congress passed to combat burgeoning problems related to the near-collapse of the savings and loan industry.

⁴ Pub. L. No. 103-322, 108 Stat. 1796.

⁵ *Id.* title VI, 108 Stat. 1796, 1959 (death penalty). The law permits the imposition of the death penalty for, among other crimes, civil rights murders, child molestation murders, and murder using a weapon of mass destruction.

⁶ *Id.* title III, 108 Stat. 1796, 1836 (crime prevention).

⁷ 18 U.S.C. § 1341 (1988 & Supp. 1993). Prior to the 1994 amendment, the statute provided that:

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, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

Id. Under the Violent Crime Control and Law Enforcement Act of 1994:

Section 1341 of title 18, United States Code, is amended—

(1) by inserting "or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier," after "Postal Service,"; and

(2) by inserting "or such carrier" after "causes to be delivered by mail". [sic].

Pub. L. No. 103-322, § 250006, 108 Stat. 1796, 2087.

The mail fraud statute prohibits fraudulent schemes, and the jurisdiction of the Federal Government has traditionally been premised on the use of the postal service in executing the scheme.⁸ The statute's original purpose was to protect the mails from being used to perpetrate frauds, and that function is maintained through the requirement that the illicit mailing be for the "purpose" of executing the fraudulent scheme.⁹ Over time, the mail fraud statute came to be viewed as a stop-gap provision that provides a "first line of defense" to combat innovative frauds until Congress could enact more specific legislation.¹⁰

That view has now changed, however, as Congress no longer uses the statute for its original purposes. Instead, the mail fraud statute has become the primary provision to extend federal jurisdiction to crimes traditionally prosecuted only at the state and local level. This use of the mail fraud statute raises a substantial question as to whether that expansion is the best use of federal resources in an era of shrinking budgets.¹¹

The appeal of the mail fraud statute is its malleability: federal prosecutors can pursue investigations with the knowledge that, in bringing an indictment, they will not be hampered by technical jurisdictional restrictions often found in other federal criminal statutes.¹² Moreover, mail fraud is a predicate act for money laundering¹³ and RICO,¹⁴ which permits prosecutors, as well as civil litigants under RICO, to use those

⁸ See *United States v. Hannigan*, 27 F.3d 890, 893 (3d Cir. 1994) (reversing mail fraud conviction for failure to introduce circumstantial evidence to show that use of U.S. mails was company's routine practice); Jed S. Rakoff, *The Federal Mail Fraud Statute* (pt. 1), 18 DUQ. L. REV. 771, 783 (1980) (original mail fraud statute can reasonably be read as designed to protect against misuse of the mails). See *infra* text accompanying notes 25-49 for a discussion of the history of the mail fraud statute.

⁹ See *infra* text accompanying notes 25-35 (reviewing early history of the mail fraud statute).

¹⁰ *United States v. Maze*, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting).

¹¹ See *infra* text accompanying notes 152-54 (discussing federalism problems with extending the mail fraud statute).

¹² Other broad federal criminal law provisions require proof of specific activities as an element of the offense, in addition to proof of the underlying harm. For example, the Travel Act, 18 U.S.C. § 1952 (1988 & Supp. 1993), requires evidence of interstate activity to promote gambling, extortion, or bribery; the Hobbs Act, 18 U.S.C. § 1951 (1988), requires proof of extortion by a threat of violence or under color of official right that obstructs interstate commerce. See Daniel J. Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 432 (1983) (arguing that broad mail fraud statute permits prosecutors and investigators to "entmesh themselves in lengthy, complex investigations with hardly a thought as to what statute may ultimately be used to indict") (footnote omitted).

¹³ 18 U.S.C. §§ 1956-1957 (1988 & Supp. 1993).

¹⁴ 18 U.S.C. §§ 1961-1968 (1988 & Supp. 1993).

powerful statutes against individuals and businesses that fall within the mail fraud statute's applicability to a wide variety of business conduct.

The broad reach of the mail fraud statute, and its companion, the wire fraud statute,¹⁵ has been attributed to the willingness of courts to impose few restrictions on the application of the "scheme and artifice to defraud" element of the crime.¹⁶ Over the past two decades, as federal prosecutors devoted increased attention to white collar crime,¹⁷ use of the mail fraud statute shifted away from its traditional application of protecting against misuse of the mails, and even as a stop-gap provision. The statute became a strategic tool in fighting political corruption and increasingly sophisticated economic misconduct that in some way employed the postal service, almost regardless of the mailing's relationship to the underlying scheme.¹⁸ The Supreme Court, in *McNally v. United States*,¹⁹ tried to prohibit use of the statute in

¹⁵ 18 U.S.C. § 1343 (1988 & Supp. 1993) provides:

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, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

Courts apply the same analysis to schemes charged under the mail fraud and wire fraud statutes. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis.").

¹⁶ See John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 126 ("courts have refused to define 'scheme to defraud' in terms of any objectively verifiable set of facts or circumstances"); Hurson, *supra* note 12, at 425 (courts "repeatedly have declined to articulate any bright line boundaries of the concept of fraud").

¹⁷ See Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 408 (1993) ("Beginning in the mid-1970s, in the aftermath of the Watergate and foreign government bribery scandals, the federal government began targeting white collar crime as a high-priority prosecutorial area.").

¹⁸ Courts developed the "intangible rights" doctrine to prosecute both private parties and public officials whose acts involved a breach of fiduciary duty that deprived either the public, an employer, or others owed a fiduciary duty, of the intangible right to honest and faithful services. See, e.g., *United States v. Clapps*, 732 F.2d 1148, 1153 (3d Cir.) (scheme to deprive citizens of right to fair election through casting of "false, fictitious, or spurious ballots"), *cert. denied*, 469 U.S. 1085 (1984); *United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981) (affirming conviction of lawyer who breached duty to client of law firm by advising competing company in a matter that involved a conflict of interest), *cert. denied*, 456 U.S. 915 (1982). See generally Project, *Ninth Survey of White Collar Crime—Mail and Wire Fraud*, 31 AM. CRIM. L. REV. 703, 708-11 (1994) [hereinafter *White Collar Crime Survey*] (thoroughly reviewing intangible rights doctrine). See *infra* text accompanying notes 127-54 for a discussion of the intangible rights doctrine.

¹⁹ 483 U.S. 350, 360 (1987). The Court held that the mail fraud statute only protects property rights. The case involved a state official's participation in an insurance kickback scheme.

prosecution of crimes involving non-property rights, such as the right to honest service by public officials, which had long been subject to state and local prosecution. Congress reacted quickly to *McNally*, however, by passing legislation reinstating the "right of honest services" as a basis for a conviction under the mail fraud statute.²⁰

The use of the mails has been a substantive limitation on the scope of the mail fraud statute because the mailing must be "for the purpose of executing such scheme," and therefore not every mailing tangentially related to the fraud will be sufficient for federal criminal liability.²¹ Congress, however, enlarged the jurisdictional scope of the mail fraud statute in the Violent Crime Act by extending its reach, through an amendment, to any parcel that is "sent or delivered by any private or commercial interstate carrier."²² The statute no longer covers just use of the postal service to execute a fraudulent scheme, and instead brings a broader array of methods of delivery into the reach of federal criminal authorities. By expanding the statute, Congress has again enhanced what is rapidly becoming the primary weapon for federal prosecutors to combat white collar crime.²³

Congress's decision to overturn *McNally*'s restrictive interpretation of the scope of the provision signaled its view of the mail fraud statute as more than merely a stop-gap that would suffice until it could adopt more specific legislation to deal with a particular form of criminal activity. The expansion of the statute's applicability in the Violent Crime Act represents a further effort to change the nature of the mail fraud provision into the primary federal law enforcement tool to combat economic crimes. The most recent legislation demonstrates that Congress has expanded the statute beyond the traditional view of a provision designed to protect the postal service and, coincidentally, as a fall-back provision for federal prosecutors, to the paradigm for federal prosecution of white collar crime.²⁴

²⁰ 18 U.S.C. § 1346 (1988). Congress enacted the provision as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508.

²¹ See *United States v. Maze*, 414 U.S. 395 (1974); *United States v. Haynes*, 620 F. Supp. 474 (M.D. Tenn. 1985).

²² Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-332, § 250006, 108 Stat. 1796, 2087.

²³ See Hurson, *supra* note 12, at 423 (mail fraud statute has emerged as the "premier weapon" in the battle against white collar crime). Mr. Hurson, along with Professor Coffee, advocated cutting back on the scope of the mail fraud statute, which has expanded due to the breadth of judicial interpretations of the scheme to defraud element. See *id.* at 457-58 (proposing a statutory definition of scheme to defraud); John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White Collar Crime*, 21 AM. CRIM. L. REV. 1, 4 (1983) (enforcement of mail fraud statute permits government to police invasions of privacy).

²⁴ The bank fraud statute, 18 U.S.C. § 1344 (1988 & Supp. 1993), enacted as part of the

This Article will review the history of the mail fraud statute and discuss its early relationship to protecting the mails from misuse. It will then analyze the Supreme Court's contradictory opinions that attempt to define the degree of relationship between the fraudulent scheme and the mailing. The Article will evaluate the effect of Congress's two most recent amendments to the statute, the first that in large part overturned the Supreme Court's restrictive interpretation in *McNally* of the scheme to defraud element, and the second in the Violent Crime Act that sheds the last vestige of limitation on the mail fraud statute to protect the integrity of the mails. The Article will address important interpretive issues that courts will consider in determining how far Congress intended to extend federal jurisdiction over fraudulent schemes. It will suggest a proper scope of federal jurisdiction for fraudulent schemes involving the use of interstate carriers that comports with the language chosen by Congress in expanding the statute. The Article also notes that the Violent Crime Act amendment has the effect of utilizing the mail fraud statute as a means for Congress to avoid writing comprehensive criminal laws that address specific activities worthy of criminal punishment. Instead, Congress has effectively enacted the Federal Fraud Statute without debate or even consideration of the need for such a provision.

Crime Control Act of 1984, Pub. L. No. 98-473, § 1108(a), 98 Stat. 1837, 2147 (1984), was the first instance in which Congress based an anti-fraud provision on the mail fraud statute. The Senate Report on the bank fraud statute notes that "[t]he proposed bank fraud statute is modeled on the present wire and mail fraud statutes which have been construed by the courts to reach a wide range of fraudulent activity." S. REP. NO. 225, 98th Cong., 2d Sess. 378 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3519. Unlike the mail fraud statute, however, the bank fraud statute grounds federal jurisdiction on the status of the victim as a "financial institution" (as defined in 18 U.S.C. § 20 (1988 & Supp. 1993)) subject to the regulation of the Federal Government, rather than use of the mails or interstate carriers.

Recent proposals to reform the nation's health care system included a provision for increased punishment for any "health care provider" who is convicted under the mail fraud and wire fraud statutes for conduct in connection with the provision of or reimbursement for health care services. *See* H.R. 1884, 103d Cong., 1st Sess. § 102 (1993).

Similarly, the Bankruptcy Reform Act of 1994 creates a new bankruptcy fraud statute that incorporates the scheme to defraud element from the mail fraud statute. Pub. L. No. 103-394, § 312, 108 Stat. 4106, 4140 (to be codified at 18 U.S.C. § 157).

Senator Metzenbaum, the sponsor of the new criminal provision, stated, "The bankruptcy fraud section, which is modeled after the mail and wire fraud statutes, sets out criminal penalties for any person who knowingly uses the filing of a bankruptcy petition or document to defraud others." 140 CONG. REC. S14,597 (daily ed. Oct. 7, 1994) (statement of Sen. Metzenbaum); *see also* 140 CONG. REC. H10,772 (daily ed. Oct. 4, 1994) (statement of Rep. Berman) (citing a Department of Justice memorandum which states that the bankruptcy fraud provision was patterned after the mail fraud statute and incorporates the requirement of proof of specific intent to defraud).

I. ORIGINS OF THE MAIL FRAUD STATUTE

For a statute of such wide-ranging application and expanding utility for federal prosecutors,²⁵ the mail fraud statute descended from quite modest origins.²⁶ In its most recent form prior to the Violent Crime Act amendment, the statute stated in pertinent part as follows:

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 so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing . . . shall be fined not more than \$1,000 or imprisoned not more than five years, or both.²⁷

Under this version of the statute, the Government had to prove that the defendant participated in a scheme to defraud with the requisite intent, and the foreseeable use of the mails was in furtherance of the scheme.²⁸ The essential structure of the statute has remained consistent since its enactment in 1872.

A. *The Early Statutes*

In 1868, Congress enacted legislation to prohibit use of the mails to send letters or circulars for lotteries.²⁹ Four years later, as part of a

²⁵ Mr. Rakoff, a former federal economic crimes prosecutor, waxed eloquent over a decade ago when, before its recent enhancements, he described the mail fraud statute as "our Stradivarius, our Colt []45, our Louisville Slugger, our Cuisinart—and our true love." Rakoff, *supra* note 8, at 771.

²⁶ See Hurson, *supra* note 12, at 423 (statute was a "seemingly innocuous provision[] in a mundane revision of the postal code"). As an historical matter, the post-Civil War period involved a rapid expansion of federal power, especially of the criminal law, into areas traditionally governed by the states. Rakoff, *supra* note 8, at 779–81. A prime example of the new federal criminal provisions enacted during the Reconstruction Period is the Civil Rights Act of 1866. Act of April 9, 1866, ch. 31, § 2, 14 Stat. 27 (1866) (codified as amended at 18 U.S.C. § 242). It was not anomalous, therefore, for Congress to address an issue that had traditionally been regulated by the states.

²⁷ 18 U.S.C. § 1341 (1988 & Supp. 1993).

²⁸ See *Pereira v. United States*, 347 U.S. 1, 8 (1954) (describing elements of mail fraud); *United States v. Burks*, 867 F.2d 795, 797 (3d Cir. 1989) (same). The Government is not required to prove that the mailings were effective or that the scheme was successful. See *United States v. Durland*, 161 U.S. 306, 315 (1896).

²⁹ Act of July 27, 1868, ch. 246, § 13, 15 Stat. 194, 196, stated: "[I]t shall not be lawful to

broad revision of the postal code, Congress adopted a new provision creating a misdemeanor for "any person having devised or intending to devise any scheme or artifice to defraud, or [sic] be effected by either opening or intending to open correspondence or communication with any other person . . . by means of the post-office establishment of the United States"³⁰

No legislative history concerning the scope of the 1872 criminal mail fraud statute or the relation of the use of the mails to the underlying fraud exists to aid interpretation of the statute.³¹ The language of the original mail fraud statute, however, appears designed to protect the post office from being abused as part of a fraudulent scheme. The provision states that "such person, so misusing the post-office establishment, shall be guilty of a misdemeanor"³² Congress gave the courts the power to proportion the punishment based on "the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device."³³

The House sponsor of the legislation stated that the provision was designed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rascallions generally, for the purposes of deceiving and fleecing the innocent people of the country."³⁴ It appears highly unlikely, however, that Congress in 1872 believed that the Federal Government should prosecute traditional state matters that did not involve directly the federal post office. Potential constitutional problems arising from interference with an area traditionally regulated solely by the state governments may have been the principal motivating factor behind Congress's limiting the anti-fraud provision

deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever."

As part of the general revision of statutes relating to the post office in 1872, Congress also expanded the lottery law to prohibit use of the mail "concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses" Act of June 8, 1872, ch. 335, § 149, 17 Stat. 283, 302. See Rakoff, *supra* note 8, at 782-83 (discussing history of the lottery provisions).

³⁰ Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323.

³¹ See Rakoff, *supra* note 8, at 779 ("In view of the novelty and breadth of this section, it is surprising that it generated no congressional debate or other legislative history explaining its origins and purpose.").

³² Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323 (1872) (emphasis supplied).

³³ *Id.* The caption for the new provision was "Penalty for Misusing the Post-Office Establishment."

³⁴ CONG. GLOBE, 41st Cong., 3d Sess. 35, (1870) (statement of Rep. Farnsworth). Representative Farnsworth's statement concerned a bill similar to the mail fraud statute introduced but not passed by the preceding Congress. See Hurson, *supra* note 12, at 424 n.8.

to schemes which directly exploit the post office as a necessary element for conviction.³⁵

Six years after the enactment of the mail fraud statute, the Supreme Court considered the constitutionality of the 1868 lottery law in *Ex parte Jackson*.³⁶ The Government argued that Congress's exclusive power to regulate the mails, provided in Article I, § 8 of the Constitution, authorizes enactment of a criminal statute punishing misuse of the post office.³⁷ The Court had no trouble agreeing with the Government, holding that "[t]he power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded."³⁸ The Court relied on this holding in *In re Rapier*³⁹ to reject an argument that Congress lacked the power to regulate acts involving the post office that traditionally had been subject to state criminal laws.⁴⁰ Thus, at least in the Supreme Court's view in 1878, the constitutionality of the expansion of federal jurisdiction over what had been state crimes was tied directly to Congress's power to regulate the post office.

Although *Ex parte Jackson* eliminated most doubts as to the constitutionality of the mail fraud statute, defendants challenged the nature of the schemes charged in indictments as falling outside the scope of the statute because of their attenuated relation to the post office.⁴¹

³⁵ See Rakoff, *supra* note 8, at 786 & n.65 ("It should not be forgotten that at the time of the enactment of the original mail fraud statute in 1872, doubts of its constitutionality would have been far from idle.").

³⁶ 96 U.S. 727 (1878).

³⁷ See *Ex parte Jackson*, 96 U.S. at 729-32 (1878) (summarizing arguments of parties). The defendant, convicted in federal court in New York for depositing into the mail a circular advertising lottery prizes, challenged the constitutionality of the lottery statute in a habeas corpus petition to the Supreme Court. *Id.* at 728-29.

³⁸ *Id.* at 732. The Court distinguished the lottery statute from regulations that interfere with First Amendment privileges, such as the freedom of the press, and Fourth Amendment protections from warrantless searches and seizures. "All that Congress meant by this Act was, that the mail should not be used to transport such corrupting publications and articles, and that anyone who attempted to use it for that purpose should be punished." *Id.* at 737.

After *Jackson*, only one reported decision discussed the constitutionality of the mail fraud statute. See *United States v. Loring*, 91 F. 881 (N.D. Ill. 1884); see also Rakoff, *supra* note 8, at 788 (*Jackson* resolved any doubts about the constitutionality of the mail fraud statute).

³⁹ 143 U.S. 110 (1892).

⁴⁰ *Id.* at 134. "It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality." In reaching this conclusion, the Court expressly reaffirmed its holding in *Jackson*. *Id.* at 133, 135.

⁴¹ See *United States v. Clark*, 121 F. 190, 190-91 (M.D. Pa. 1903) ("It is not every fraudulent scheme in which the mails may happen to be employed that is made an offense against the federal law, but only such as are 'to be effected' through that medium as an essential part."); *United*

An early example of the limiting effect of requiring proof of misuse of the post office to support a federal prosecution is *United States v. Owens*.⁴² In that case, the district court dismissed an indictment charging mail fraud for a scheme by which the defendant sought to mislead a distillery into believing he had sent \$162.50 through the mail when in fact he only sent \$.50. The court found the effort to encompass within federal jurisdiction an individual dispute between a debtor and creditor repugnant, stating that such a broad approach "may draw within federal cognizance nearly all the commercial correspondence of the country as to disputed demands and the value of remittances."⁴³ As the basis for its decision to limit the scope of the mail fraud statute, the court noted "the degree in which the abuse of the post-office establishment enters as an instrument into the fraudulent scheme."⁴⁴

Other courts concluding that the underlying scheme constituted a fraud punishable under the statute noted that the key element was the relationship of the mailing to the scheme. In *United States v. Jones*,⁴⁵ the court stated that "the gist of the offence consists in the abuse of the mail. The *corpus delicti* was the mailing of the letter in execution of the unlawful scheme."⁴⁶ Similarly, the district court in *United States*

States v. Smith, 45 F. 561, 562 (E.D. Wis. 1891) (fraudulent drug scheme advertised in newspapers sent through post office not covered by the mail fraud statute); *United States v. Mitchell*, 36 F. 492, 493 (W.D. Pa. 1888) (scheme to defraud insurance company through mailing of premium after accident and altering date on postage stamp not covered by statute because "something more is necessary than the mere sending through the mail of a letter forming part, or designed to aid in the perpetration, of a fraud"); *cf. United States v. Jones*, 10 F. 469, 470 (C.C.S.D.N.Y. 1882) (rejecting defendant's new trial motion and holding that counterfeit currency distribution ("green article") scheme was covered by the mail fraud statute when "the letter itself showed its unlawful character").

⁴² 17 F. 72 (E.D. Mo. 1883).

⁴³ *Id.* at 74.

⁴⁴ *Id.* (quoting Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323). Mr. Rakoff argues that during the thirty years after Congress enacted the mail fraud statute the lower courts were split between "strict" and "broad" constructions regarding the relation of the scheme to the use of the mails. Rakoff, *supra* note 8, at 790-806. He uses this analysis to support his conclusion that "continued emphasis upon the mailing aspects in interpreting the mail fraud statute is misplaced and serves no useful function." *Id.* at 822. The language of the statute and the Supreme Court's interpretations of it, however, recognize the relationship between the mailing and the scheme as a substantive limitation on the scope of the statute. See *United States v. Maze*, 414 U.S. 395 (1974) (mailings after completion of fraudulent scheme insufficient to support prosecution under mail fraud statute); *Parr v. United States*, 363 U.S. 370 (1960) (routine mailings that would have occurred in the absence of the scheme insufficient); *Kann v. United States*, 323 U.S. 88 (1944) (mailings made after scheme came to fruition insufficient).

⁴⁵ 10 F. 469 (C.C.S.D.N.Y. 1882).

⁴⁶ *Id.* at 470. The defendant mailed a letter offering to sell counterfeit money at a low price, the currency then to be used by the purchaser. This type of fraud was known as a "green article" scheme. See Rakoff, *supra* note 8, at 797.

*v. Loring*⁴⁷ stated that "[t]he gist of this offense does not consist in the fraudulent scheme alone, but in using the post-office establishment of the United States for the purpose of executing a fraud."⁴⁸ The thrust of the early decisions under the mail fraud statute was to require a clear link between the fraudulent scheme and the misuse of the post office as the predicate for federal prosecution.⁴⁹ Thus, insistence on a relationship between the scheme and the misuse of the post office constituted a substantive limitation on the Federal Government's power to prosecute crimes that had traditionally been within the sole power of the states.

B. *Defining the Elements of Mail Fraud*

Over the thirty years after *Ex parte Jackson* upheld the constitutionality of the mail fraud statute, both Congress and the Supreme Court have viewed the mailing requirement as a substantive limitation, rather than just a jurisdictional element, on the exercise of federal prosecutorial powers. Congress first amended the statute in 1889, and provided expressly that the statute included fraudulent schemes that involved

any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person . . . or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle," or "counterfeit money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles . . .⁵⁰

There is no legislative history for the amendment, so it is not entirely clear whether Congress was reacting to restrictive lower court decisions by identifying the specific types of fraud covered by the statute or was providing additional guidance to law enforcement authori-

⁴⁷ 91 F. 881 (N.D. Ill. 1884).

⁴⁸ *Id.* at 885. The scheme sought to induce investors to send money to a commodities speculation fund which defendants would divert to their own use. *Id.*

⁴⁹ *But see Rakoff, supra* note 8, at 795-806 (arguing that courts were split between strict and broad construction of the meaning of scheme to defraud through their interpretation of the mailing element).

⁵⁰ Act of March 2, 1889, ch. 393, § 1, 25 Stat. 873.

ties and courts as to the schemes it contemplated being punished in federal courts. After the amendment, however, one lower court held that the specificity of the enumerated schemes meant that the "general language of the act must be limited to such schemes and artifices as are ejusdem generis with those named."⁵¹ The district court noted that the term "scheme to defraud" might have covered the acts for which the defendant was indicted, but because they were not similar to those described in the amended mail fraud statute the indictment had to be dismissed.⁵²

In *Stokes v. United States*,⁵³ the Supreme Court rejected such a restrictive reading of the statute. Instead, the Court found that a violation of the mail fraud statute requires proof of three elements:

- (1) That the persons charged must have devised a scheme or artifice to defraud. (2) That they must have intended to effect this scheme, by opening or intending to open correspondence with some other person through the post office establishment, or by inciting such other person to open communication with them. (3) And that, in carrying out such scheme, such person must have either deposited a letter or packet in the post office, or taken or received one therefrom.⁵⁴

In *Durland v. United States*,⁵⁵ decided one year later, the Court reaffirmed its analysis in *Stokes*, and enlarged the scope of the statute by reading the fraudulent scheme element broadly. In *Durland*, the defendant mailed advertisements to purchase bonds that misstated the expected investment return. The Supreme Court read the phrase "scheme to defraud" more broadly than the common law crime of false pretenses, which only involves a misrepresentation of past or present facts, but not statements about future events.⁵⁶ The Court stated:

⁵¹ *United States v. Beach*, 71 F. 160, 161 (D. Colo. 1895).

⁵² *Id.* at 160-61. In *Culp v. United States*, 82 F. 990, 991 (3d Cir. 1897), however, the circuit court stated that "the purpose of the amendment was not to restrict, but to extend, the operation of the statute." Compare *Milby v. United States*, 120 F. 1, 4 (6th Cir. 1903) (effect of amendment was to extend statute, "and not to diminish the force of its original terms not in conflict with the amendment") with *Stockton v. United States*, 205 F. 462, 467-68 (7th Cir. 1913) (rejecting *Milby's* analysis of the effect of the 1889 amendment).

⁵³ 157 U.S. 187 (1895).

⁵⁴ *Id.* at 188-89.

⁵⁵ 161 U.S. 306 (1896).

⁵⁶ *Id.* at 313; see ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 369 (1982) ("Only what exists now or has existed in the past is a *fact*, at least insofar as this term is used in the law. Hence any statement which refers solely to the future is not a misrepresentation of *fact*.").

It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that the statute was passed; and it would strip it of value to confine it to such cases as disclosed an actual misrepresentation as to some existing fact, and exclude those in which is only the allurements of a specious and glittering promise. This, which is the principal contention of counsel, must be overruled.⁵⁷

The Court went on to consider the nature of the proof necessary for the mailing element of the offense: "We do not wish to be understood as intimating that in order to constitute the offense it must be shown that the letters so mailed were of a nature calculated to be effective in carrying out the fraudulent scheme."⁵⁸ It was sufficient if the defendant deposited letters in the post office that he believed "may assist" in effecting the scheme.⁵⁹

In *Durland*, the Court shifted the intent inquiry to the scheme to defraud element. That is, the defendant's misstatements as to future value were covered by the statute because he intended to mislead investors. The mailing element was a component of the execution, but the Court was unwilling to require proof of a separate intent to use the mails in addition to the intent to execute the fraudulent scheme. Nevertheless, the Court states clearly that the purpose of the statute is to "prevent the post office from being used to carry" out fraudulent schemes.⁶⁰

Congress amended the mail fraud statute again in 1909 and made essentially three changes.⁶¹ First, Congress incorporated the Supreme Court's holding in *Durland* that the scope of punishable activities included acts "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."⁶² Second, the statute dispensed with an element of the offense, as interpreted by the Supreme Court in *Stokes*, by eliminating the language requiring proof that the scheme would be "effected by either opening or intending to open correspondence or communication with any other person . . . by means of the post-office establishment of the United States . . ."⁶³ In

⁵⁷ *Durland*, 161 U.S. at 314 (emphasis added).

⁵⁸ *Id.* at 315.

⁵⁹ *Id.*

⁶⁰ *Id.* at 314.

⁶¹ Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130.

⁶² *Id.* See Michael C. Bennett, Note, *Borre v. United States: An Improper Interpretation of Property Rights*, 42 DEPAUL L. REV. 1499, 1506 (1993).

⁶³ Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323.

its place, Congress substituted language requiring that the mails be used "for the purpose of executing such scheme or artifice or attempting so to do."⁶⁴ *Durland* had effectively limited part of the mailing element already by only requiring that the mailing "assist" in the completion of the fraud. The amended provision reflected congressional agreement with the Court's most recent interpretation of the statute.

Third, Congress streamlined the language and removed unnecessary verbiage. Much of the language in the earlier versions of the statute amounted to surplus beyond the requirement that the Government prove that the defendant mailed or caused a mailing for the purpose of completing the scheme. Specific references to misuse of the post office and conditioning the punishment on an ephemeral estimate of the degree of such misuse were unnecessary to a clear description of the crime.

Commentators have argued that the 1909 changes reduced the mailing element to merely a jurisdictional requirement, in that use of the mails no longer served as a substantive limitation on federal prosecution.⁶⁵ The language of the statute, however, does not indicate that Congress understood the 1909 changes to be so drastic. The amended mail fraud statute did not completely eliminate the required nexus between the scheme to defraud and the mailing element, nor did it explicitly reduce the use of the mails to a mere predicate for federal jurisdiction.

Legislative history to the 1909 amendment to the mail fraud statute does not exist, but *Durland* and *Stokes* make it clear that the Supreme Court considered the mailing element to be a substantive limitation on the scope of the crime. To the extent that the 1909 amendment incorporated *Durland's* more expansive understanding of "scheme to defraud," that does not demonstrate that Congress also sought to expand the statute even further by making the mailing element simply a jurisdictional requirement, thereby overruling the analysis in *Durland* and *Stokes*. Rather, given Congress's general approval of *Durland*, the better conclusion is that Congress adopted the

⁶⁴ Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130.

⁶⁵ See Rakoff, *supra* note 8, at 817 ("the mailing requirement functioned as nothing more than a simple 'jurisdictional element' plus 'overt act'—the conduct minimally necessary to permit the exercise of federal sovereignty and to distinguish the crime of mail fraud from one of pure intent"); Jeffrey J. Dean & Doye E. Green, Jr., Note, *McNally v. United States and Its Effect on the Federal Mail Fraud Statute: Will White Collar Criminals Get a Break?*, 39 MERCER L. REV. 697, 702 (1988) (removal of mailing language in amendment "leaves the statute so bare that it can only be seen as a tool to fight corruption and not as a means of protecting the integrity of the mails").

Supreme Court's consistent view of the mailing element as a substantive limitation on the scope of the statute.⁶⁶

After the 1909 amendment of the mail fraud statute, the Supreme Court shed little light on the degree of interdependence required between the scheme to defraud and the use of the mails. In *United States v. Young*,⁶⁷ the Court noted that the recently amended mail fraud statute required proof of two elements, not the three elements described in the earlier versions of the statute. The Court acknowledged that the defendant need not intend that the post office be used, as was earlier required.⁶⁸ The Court did not, however, discuss how the second element, that the mailing be for the purpose of executing the scheme, should be understood. The lower court had dismissed the indictment because it appeared to have read the statute too narrowly, requiring, among other things, that the Government prove that the false statements actually induced the victim of the fraud to purchase worthless notes offered by the defendant.⁶⁹ *Young* gave little guidance on the relationship between the statutory elements created in the 1909 amendment beyond its acknowledgment, in reversing the district court's dismissal of the indictment, that Congress had streamlined the elements of the offense.⁷⁰

⁶⁶ Compare Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. Rev. 223, 240 (1992) ("it is without doubt that the statute requires some relationship between the mailing and the scheme to defraud") with Rakoff, *supra* note 8, at 819 ("The truth, however, is that at least since the 1909 amendment, the sole genuine purpose of the mail fraud statute has been to prosecute fraud and the mailing has served primarily as a basis for invoking federal jurisdiction.").

The analysis in *Ex parte Jackson*, 96 U.S. 727 (1878), and *In re Rapier*, 143 U.S. 110 (1892), concerning the constitutionality of the lottery laws shows that the Supreme Court interpreted Congress's power to regulate the mails to include "the right to determine what shall be excluded." *Jackson*, 96 U.S. at 732. The single reference in the 1909 amendment to the use of the mails for the purpose of executing the scheme may be attributed to the fact that Congress was not as reticent, due to constitutional concerns, to write a broad statute as it was when it first passed the mail fraud statute in 1872.

⁶⁷ 232 U.S. 155 (1914).

⁶⁸ *Id.* at 161.

⁶⁹ *Id.* at 162. The defendant sent financial statements that inflated the value of his company to a brokerage firm that in turn attempted to sell the company's bonds to other investors. *Id.* at 156-57.

⁷⁰ Mr. Rakoff argues that after *Young*, narrow interpretations of the scope of the mail fraud statute based on the mailing element are "built like sandcastles upon the infirmities of the language of the prior statute, [and] come tumbling down now that supporting language has been washed away." Rakoff, *supra* note 8, at 817. That analysis, however, appears to read too much into *Young*. The district court in that case imposed a number of burdens on the Government that could not be supported by any reasonable reading of the statute, including proof of actual reliance by the victim. *Young*, 232 U.S. at 162. The Supreme Court did not specify which among a number of errors rendered the district court's opinion erroneous, stating only, "In this the [district] court was in error." *Id.*

The 1909 amendment to the mail fraud statute was the last significant change until 1988, when Congress, after the Supreme Court's decision in *McNally*, added a new provision extending the reach of the scheme to defraud element to include schemes to deprive victims of the "right of honest services."⁷¹ Although the wording of the statute remained essentially unchanged over the next 80 years, the Supreme Court has been unable to agree on a clear analysis of the connection required between the mailing element and the execution of the fraud.

II. THE SUPREME COURT STRUGGLES WITH THE MAILING ELEMENT

The mail fraud statute is cryptic about the relationship between the scheme and the mailing, requiring that the Government prove beyond a reasonable doubt that the use of the mails be "for the purpose of executing such scheme."⁷² Although the Supreme Court's decisions in the nineteenth century make clear that protection of the post office underpins the statute, and therefore that the mailing element was not merely jurisdictional, the requisite degree of interdependence between the two elements was never clear. For example, the Court held in *Pereira v. United States*⁷³ that the mailing need not be "an essential part of the scheme,"⁷⁴ while in *Badders v. United States* it stated that the mailing could suffice "if it is a step in a plot."⁷⁵ The use of the mails had to be foreseeable, but the defendant need not personally make or receive the charged mailing to be prosecuted.⁷⁶ Mailings that were routine or otherwise required by law might be insufficient to

The procedural posture of *Young* may explain the Court's peremptory treatment of the scope of the amended statute. The case reached the Court on direct appeal, under the Criminal Appeals Act of 1907, ch. 2564, 34 Stat. 1246 (codified at 28 U.S.C. § 3731), as amended by Act of Jan. 2, 1971, Pub. L. No. 91-644, § 14(a), 84 Stat. 1890, which permitted the United States to bring direct appeals to the Supreme Court challenging, among other things, dismissal of an indictment before jeopardy attaches. The defendant did not enter an appearance before the Court. The opinion contains no real legal analysis, simply reiterating the statements of the district court in dismissing the indictment and the Solicitor General's argument on the scope of the statute. *Young* does not support an expansive reading of the mail fraud statute that reduces the mailing element to a jurisdictional requirement only, especially when that reading is not supported by any explicit statement by Congress to that effect when it amended the mail fraud statute.

⁷¹ 18 U.S.C. § 1346 (1988). See discussion *infra*, text accompanying notes 126-69, of recent amendments to the mail fraud statute.

⁷² 18 U.S.C. § 1341 (1988).

⁷³ 347 U.S. 1 (1954).

⁷⁴ *Id.* at 8.

⁷⁵ 240 U.S. 391, 394 (1916).

⁷⁶ See *Pereira*, 347 U.S. at 8-9 ("Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used."). Compare *United States v. Koen*, 982 F.2d 1101, 1107 (7th Cir. 1992) (fact that defendant did not mail item

support a mail fraud prosecution,⁷⁷ and they had to occur during the course of the fraud and not as a subsequent byproduct of the underlying transactions.⁷⁸ There was no simple means to discern the relationship between the elements, and the Supreme Court struggled to articulate a consistent analysis for describing the requisite degree of "purpose" necessary for conduct to fall within the statute.⁷⁹

A. A First Attempt to Delineate Purpose

In *Kann v. United States*,⁸⁰ the Supreme Court first overturned a conviction based on the remoteness of the mailing element to the fraudulent scheme. The defendant, president of a munitions company, challenged his mail fraud conviction based on diverting funds due to his company under a government contract. One of the defendant's co-conspirators cashed a check at a bank for a portion of the diverted proceeds, and the mailing charged in the indictment was made by the depository bank to the drawee bank. The Court held that "[i]t was immaterial to [defendant], or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank."⁸¹ The mail fraud statute does not reach all frauds, according to the Court, "but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."⁸² Four Justices dissented, arguing that the mailing was part of a continuing venture.⁸³

irrelevant where use of mails was foreseeable) *with* *United States v. Smith*, 934 F.2d 270, 273 (11th Cir. 1991) (mailings by bank insufficient to support prosecution where defendant did not know insurer's administrative procedure and its use of the mails was not common knowledge).

⁷⁷ See *Parr v. United States*, 363 U.S. 370, 391 (1960) ("we think it cannot be said that mailings made or caused to be made under the imperative command of duty imposed by state law are criminal under the federal mail fraud statute, even though some of those who are so required to do the mailing for the District plan to steal, when or after received, some indefinite part of its moneys"). But see *United States v. Freitag*, 768 F.2d 240, 244 (upholding mail fraud conviction where mailings related to a legitimate business purpose).

⁷⁸ See *United States v. Maze*, 414 U.S. 395, 402 (1974) (defendant's scheme reached fruition before the mailings occurred); *Kann v. United States*, 323 U.S. 88, 94 (1944) (mailing after completion of fraud); *United States v. Manarite*, 44 F.2d 1407, 1413 (9th Cir. 1995) (scheme to obtain casino gambling chips through false credit application filed on a weekend insufficient to support a conspiracy to commit mail fraud charge when "the scheme was completed upon receipt of the \$5,000 credit advance and the cashing of the chips").

⁷⁹ *Parr*, 363 U.S. at 397 (Frankfurter, J., dissenting) ("The adequate degree of relationship between a mailing which occurs during the life of a scheme and the scheme is of course not a matter susceptible of geometric determination.").

⁸⁰ 323 U.S. 88 (1944).

⁸¹ *Id.* at 94.

⁸² *Id.*

⁸³ *Id.* at 96 (Douglas, J., dissenting).

While the majority called the mailing "merely incidental and collateral," the dissent termed it "crucial to the total success of the fraudulent project."⁸⁴

A decade later, in *Pereira v. United States*,⁸⁵ the Supreme Court considered the issue of the foreseeability of the mailing, rather than whether the mailings were part of the fraudulent scheme. The defendants engaged in a classic amorous confidence game with an older widow, concocting an elaborate story about investments in a hotel and oil fields. After her marriage to one of the defendants, the victim gave money to the defendants to "purchase" a hotel in Texas.⁸⁶ One defendant, the meretricious husband, received a \$35,000 check from the victim drawn on a California bank, which he deposited in a bank in Texas; the Texas bank mailed the check to the California bank, and after it cleared the defendant withdrew the funds and disappeared.⁸⁷ The defendants argued that they did not foresee the Texas bank's mailing, and therefore they could not be convicted under the mail fraud statute. The Court's cursory analysis of the mailing issue did not include any reference to *Kann*. The principal holding was that mailings in the ordinary course of business are "foreseeable," but the Court did not discuss the degree to which the mailings served the purpose of executing the scheme.⁸⁸

The distinguishing characteristic between the mailings in *Kann* and *Pereira* is that in the former case the defendant received the funds upon cashing the check, and the depositary bank became the "owner" of the instrument.⁸⁹ In *Pereira*, the defendants had to wait until the check had cleared after the mailing from the Texas bank (depositary) to the California bank (drawee) before they could withdraw the funds.⁹⁰ The willingness of one institution to honor a check by paying or

⁸⁴ *Id.* at 95, 96 (Douglas, J., dissenting).

⁸⁵ 347 U.S. 1 (1954).

⁸⁶ *Id.* at 3-5. The Court went into enormous detail about the scheme, probably to ensure that the defendants would not generate a shred of sympathy.

⁸⁷ *Id.* at 5.

⁸⁸ *Id.* at 8-9. The only reference to the "purpose" element is the conclusory statement that "the scheme to defraud is established, and the mailing of the check by the bank, incident to an essential part of the scheme, is established." *Id.* at 8. The defendants do not appear to have relied on *Kann* in making their argument to overturn the conviction. See Brief for Petitioners, 98 L. Ed. 435, 438 (1954).

⁸⁹ *Kann*, 323 U.S. at 94. The Court noted its reliance on the commercial law of negotiable instruments.

⁹⁰ *Pereira*, 347 U.S. at 8. The Court does not go into detail about the commercial practices involved, but the timing of the withdrawal after the mailing of the check from the Texas bank to the California bank appears to be the basis for treating *Pereira* differently from *Kann*. The Fifth Circuit based its analysis of the mail fraud count on the delay between deposit in Texas and honoring in California. See *Pereira*, 202 F.2d at 836.

crediting it immediately while another provides only a provisional credit until it determines that the check will not be dishonored seems an odd line to draw in deciding whether or not a mailing is for the purpose of executing a fraudulent scheme. This is especially the case when the defendant is completely divorced from the depository bank's decision of what type of credit it will extend to the defendant on the check. While each case clearly involved fraudulent conduct, the distinction between *Kann* and *Pereira* is one based on commercial law and the happenstance of internal bank procedure, rather than a principled analysis of the relationship of the mailing to the underlying scheme.

B. *Timing in Life Is Not Everything*

In *Parr v. United States*,⁹¹ the Supreme Court once again considered the meaning of the mailing element, this time asking whether routine mailings that would otherwise take place could form the basis for a mail fraud conviction. The individual defendants were members of a school board who diverted public moneys collected through tax assessments for their own purposes.⁹² The mailings charged in the indictment were the tax assessments, tax statements, checks, and receipts issued for taxes paid that were sent by the school board.⁹³ The Court quoted *Durland* that the purpose of the mail fraud statute was "to prevent the post office from being used to carry [such schemes] into effect."⁹⁴ The status of the mailings governed the Court's analysis, leading it to note that

it cannot be said that mailings made or caused to be made under the imperative command of duty imposed by state law are criminal under the federal mail fraud statute, even though some of those who are so required to do the mailing for the District plan to steal, when or after received, some indefinite part of its moneys.⁹⁵

⁹¹ 363 U.S. 370 (1960).

⁹² *Id.* at 374-75.

⁹³ *Id.* at 385. The Court noted: "It is clear and undisputed that the School Board was under an express constitutional mandate to levy and collect taxes for the acquisition of facilities for, and to maintain and operate, the schools of the District . . . and was required by statute to issue statements for such taxes and to deliver receipts upon payment." *Id.* at 387.

⁹⁴ *Id.* at 389 (quoting *Durland v. United States*, 161 U.S. 306, 314 (1896)). Justice Frankfurter in his dissent noted that "[w]hile the Mail Fraud Act is directed against the utilization of the mails in carrying out a fraudulent scheme, the penal prohibition of the use of the mails for a fraud does not turn on the niceties of the common-law offense of obtaining money or goods under false pretenses . . ." *Id.* at 400 (citing *Durland*).

⁹⁵ *Id.* at 391.

The Court did not explain why mailings required by law cannot constitute mail fraud, but the opinion does note that the defendants did not increase the taxes assessed or otherwise impose illegal taxes as part of their scheme.⁹⁶

Parr makes clear that, at least for a scheme involving a required mailing, the timing or the necessity of the mailing for the scheme to move forward does not constitute the use of the mails for the "purpose" of executing the fraud required by the statute. Justice Frankfurter dissented, stating that "[f]or the purposes of the statute, the significance of the relationship between scheme and mailing depends on the interconnection of the parts in a particular scheme."⁹⁷ Justice Frankfurter argued that the majority's interpretation "artificially and unreasonably contracted" the statute because the defendants embodied the school district that made the mailings charged in the indictment.⁹⁸ Under the analysis proposed by Justice Frankfurter, the timing of the mailings is crucial to the scope of the statute, and when they occur during the course of the scheme's execution, the mail fraud statute applies to the illegal conduct.

The Court returned to the timing issue two years later in *United States v. Sampson*,⁹⁹ a case that involved a fraudulent "advance fee" loan scheme. In that case, the defendants took fees and loan applications from small businesses for the purpose of arranging loans and then sent "accepted" applications back to the businesses with a letter stating that the loans were in process.¹⁰⁰ The Court rejected the defendant's argument that under *Kann* and *Parr*, a mailing after the victim's money or property has been secured cannot support a charge under the mail fraud statute.¹⁰¹ The Court held that mailings "for the purpose of lulling [victims] by assurances that the promised services would be performed" were "for the purpose of executing" a fraudulent scheme.¹⁰²

The mailings, however, appear to be superfluous to the scheme. Once the defendants obtained their "advance fees" from the busi-

⁹⁶ *Parr*, 363 U.S. at 391. The Court pointed out that this was a "unique" case, and the defendants' scheme did not involve "taxes assessed and collected [that] were in excess of the District's needs or that they were 'padded' or in any way unlawful."

⁹⁷ *Id.* at 398 (Frankfurter, J., dissenting). Justices Harlan and Stewart joined the dissent. *Id.* at 394.

⁹⁸ *Id.* at 401 (Frankfurter, J., dissenting).

⁹⁹ 371 U.S. 75 (1962).

¹⁰⁰ *Id.* at 77-78. The Court noted that, according to the allegations, "these defendants were not mere small-time, sporadic swindlers but rather they have deliberately planned and devised a well-integrated, long-range, and effective scheme for the use of propaganda, salesmen, and other techniques to soften up and then cheat their victims one by one." *Id.* at 77.

¹⁰¹ *Id.* at 80.

¹⁰² *Id.* at 81.

nesses, the fraud was complete. The Court described the mailings as "lulling" acts, but that does not change the nature of the scheme charged in the indictment, unless the mailings somehow altered the fraudulent scheme to incorporate both payment of the fees and continuing contacts with the victims. Justice Douglas' dissent in *Sampson* asserted that the use of the mails was weaker than that in *Parr*, in which the Court reversed the conviction, because of the absence of any real possibility that the victims in *Sampson* could be defrauded again by the defendants.¹⁰³ He also bemoaned the use of the mail fraud statute to prosecute crimes federally "in fields that are essentially local."¹⁰⁴ Indeed, the lulling effect of the mailings, the basis for federal jurisdiction, is a generalized act by any con artist to maintain the facade of normalcy, but is otherwise unrelated to the conduct of the scheme.¹⁰⁵

As the Court had in the earlier pairing of *Kann* and *Pereira*, its decisions in *Parr* and *Sampson* provide no guidance on how to interpret the relationship of the mailing to the fraudulent scheme. The Court avoided a timing test, such as that proposed by Justice Frankfurter in *Parr*, apparently because it would unduly restrict the flexibility of the statute in reaching schemes that intentionally used mailings occurring after the completion of the scheme. That the defendants in *Sampson* clearly contemplated the mailings, and were directly responsible for them, seems to have influenced the Court to find that the mailings were for the purpose of executing the scheme, despite its completion upon receipt of the fees. The flip side of the timing rule would be to make any mailing during the course of a scheme sufficient for the mailing element, even if it were as inevitable as the taxes in *Parr*.

C. Maintaining Inconsistency

1. Post-Scheme Mailings

In *United States v. Maze*,¹⁰⁶ the Supreme Court considered whether a mailing that the defendant knowingly "caused" was sufficiently related to the underlying fraud to fall within the mail fraud statute. The

¹⁰³ *Id.* at 82-83 (Douglas, J., dissenting). Justice Douglas contrasted the use of the mail to "tranquilize" the victims in *Sampson* with the goal in *Parr* to continue the scheme, concluding that *Sampson* was "a much weaker case than *Parr*."

¹⁰⁴ *Sampson*, 371 U.S. at 83 (Douglas, J., dissenting).

¹⁰⁵ Even after the scheme is accomplished, one may wish to pull the scam again on another victim rather than admitting the acts were fraudulent. If the Court's decision in *Sampson* means that any mailing after the effective completion of the scheme that is not inculpatory is "lulling," and therefore extends the life of the scheme, then the mailing limitation loses virtually all substantive meaning.

¹⁰⁶ 414 U.S. 395 (1974).

defendant took his roommate's credit card and car, and, signing the roommate's name to the charge vouchers, obtained food and lodging during an extended sojourn.¹⁰⁷ Each of the merchants who furnished goods and services to the defendant mailed the invoices to a bank in Louisville, Kentucky, which formed the basis for the mail fraud counts.¹⁰⁸ The indictment specifically charged that the delay in mailing the invoices and the billing to the roommate "would enable [Maze] to continue purchasing goods and services for an appreciable period of time,"¹⁰⁹ an attempt to bring the mailings within the holding in *Sampson*.

The Court rejected the argument that the mailings were designed to permit the scheme to continue, holding that the defendant's "scheme reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss."¹¹⁰ The Court noted that sending the invoices to Kentucky was not meant to "lull" the victims in any way, as distinguished from the mailings in *Sampson*.

The Court stated that "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this"¹¹¹ The Court refused to read the mailing element as merely a jurisdictional requirement for federal prosecution, instead stating that the mailings were not for the purpose of executing the fraudulent scheme. As a consequence, the Court failed to explain the degree of interdependence necessary for a conviction. Although the Court declined to expand the boundaries of the mail fraud statute, it did nothing to improve the understanding of an imprecise element of a federal crime.¹¹²

¹⁰⁷ *Id.* at 396. The defendant incurred charges in California, Florida, and Louisiana after his "fancy lightly turned to thoughts of the sunny Southland." *Id.*

¹⁰⁸ *Id.* The indictment charged four counts of mail fraud and one count of transporting a stolen vehicle under 18 U.S.C. § 2312 (1988).

¹⁰⁹ *Maze*, 414 U.S. at 397.

¹¹⁰ *Id.* at 402.

¹¹¹ *Id.* at 405 (footnote omitted).

¹¹² Justice White dissented, arguing that the scheme had not reached fruition because the fraud was perpetrated on the owner of the credit card, and therefore the mailings were part of the execution of the scheme. *Id.* at 411-13 (White, J., dissenting). His analysis focused principally on the timing of the mailings by more broadly defining the fraudulent scheme so as to permit the mailings to be incorporated as part of the scheme's execution. It is not clear, however, that simply defining the scope of the fraud more broadly means that any mailing becomes a mailing for the purpose of executing the scheme, especially in light of the conclusion in *Parr* that routine mailings will not support a mail fraud prosecution.

2. Mail Fraud as a Stop-Gap Provision

The vagueness of the mailing element, even after *Maze*, meant that little prevented an expansive application of the statute to an ever wider variety of conduct. The fraud element of the statute had always been interpreted quite broadly, based on the classic definition that actions that deviate from standards of "moral uprightness, of fundamental honesty, fair play and right dealing in the general business life of members of society" can form the basis of a prosecution.¹¹³ The historical limitation that the mails be used for the "purpose of executing the scheme" could provide at least some check on the application of federal power. Yet the mail fraud statute was assuming increased importance as a means to extend jurisdiction to activities that had not been subject to federal prosecution.

Chief Justice Burger argued in his dissent in *Maze* that the mail fraud statute required an expansive definition to permit federal prosecutors to reach activities until Congress passed more definitive legislation to address the problem.¹¹⁴ The stop-gap nature of the mail fraud statute is apparent in *Maze*, in which a recently enacted credit card fraud provision had been passed by Congress after the defendant's adventure, and therefore the mail fraud statute provided the only means to reach the misuse of the stolen charge cards.¹¹⁵ Yet, Chief Justice Burger also argued that even after passage of a more specific statute "the federal mail fraud statute should have a place in dealing with fraudulent credit card use."¹¹⁶ Under this interpretation the breadth of the mail fraud statute presents a temptation to rely on the creativity of prosecutors to apply it to a wider range of questionable conduct. That approach allows Congress to avoid the more cumbersome task of writing specific laws that will address an identified area of criminal activity that requires the application of federal, rather than just state or local, resources.

3. Expanding the Scope of the Scheme to Include the Mailings

Rather than use the mailing element as a means to limit federal prosecutions, the Court in *Schmuck v. United States*¹¹⁷ once again re-

¹¹³ *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958).

¹¹⁴ *Maze*, 414 U.S. at 405-07 (Burger, C.J., dissenting).

¹¹⁵ 15 U.S.C. § 1644 (1988) (original version at Pub. L. No. 91-508, § 502(a), 84 Stat. 1114, 1127 (1970)).

¹¹⁶ *Maze*, 414 U.S. at 407 (Burger, C.J., dissenting).

¹¹⁷ 489 U.S. 705 (1989).

versed field on the use of the mails, finding that mailings at best tangentially related to the underlying fraud could support a mail fraud prosecution. In *Schmuck*, the defendant sold to auto dealers used cars in which he had rolled back the odometers to inflate the vehicle's value. The auto dealers sent title application forms to the state department of transportation to register the cars after the dealers sold them to individual purchasers.¹¹⁸ The Court held that the ultimate sales of the vehicles

naturally depended on the successful passage of title among the various parties. Thus, although the registration-form mailing may not have contributed directly to the duping of either the retail dealers or the customers, they were necessary to the passage of title, which in turn was essential to the perpetuation of *Schmuck's* scheme.¹¹⁹

The Court distinguished *Kann*, *Parr*, and *Maze* on the ground that the mailings related to a key step in the process, the passage of title upon the ultimate sale of the vehicle, and that the defendant needed to maintain the continuing trust and goodwill of the dealers to whom he sold cars. The Court effectively adopted a subjective test or the purpose element, stating that the relevant question is whether the "mailing is part of the execution of the scheme as conceived by the perpetrator at the time."¹²⁰

The Court's analysis in *Schmuck* effectively reduces the mailing element to a mere jurisdictional requirement. The mailings underpinning the prosecution bore no relation to the odometer tampering at the root of the fraud. The mailings, a happenstance of the state's registration system, were completely unaffected by the defendant's actions. Unlike *Maze*, where the mailings would not have occurred "but for" the misuse of the stolen credit card, the use of the mails for the registration forms was a purely ministerial act that would occur regardless of the defendant's fraudulent conduct. Indeed, the Court had to incorporate the defendant's need to maintain goodwill with the auto dealers to argue plausibly that the mailings were for the purpose of executing the scheme. Otherwise, the fraud came to fruition upon the transfer of the vehicles to the dealers, a point well before any mailings

¹¹⁸ *Id.* at 707-08.

¹¹⁹ *Id.* at 712.

¹²⁰ *Id.* at 715; see Podgor, *supra* note 66, at 257-58 ("The majority in *Schmuck* chose to proceed with a subjective examination of the scheme as a totality, as opposed to an objective inquiry into whether the mailings were after the fact.").

occurred.¹²¹ Justice Scalia, in dissent, attacked the breadth of the majority opinion, arguing that "it is mail fraud, not mail and fraud, that incurs liability. This federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur"¹²²

Given the Supreme Court's alternating pattern of narrow and broad readings of the mailing element, the requirement that the mails be used for the purpose of executing the scheme should retain some vitality as a substantive limitation on the mail fraud statute. The Court, however, has failed to provide any real guidance as to the degree or the nature of the interrelationship between the two elements required for a conviction.¹²³ Interpreting the mailing element as solely a jurisdictional requirement, combined with the breadth of the fraud element, could create a federal statute of almost unlimited application, constrained solely by the prosecutor's ability to find some mailing that can be used as the basis for federal jurisdiction. If *Schmuck* is taken at face value as the definitive interpretation of the mailing element, then the mail fraud statute appears a virtually unlimited grant of power to federal prosecutors to define an activity as fraudulent and to search for any mailing that is some part of the scheme, no matter how trivial. If *Schmuck* is the final word, then the mailing element is little more than a nuisance that the Government may prove almost as an afterthought in its case.

The approach taken in *Schmuck* is at odds with both the historical basis of the mail fraud statute discussed above, and with the approach taken by courts in interpreting other federal criminal provisions. As a comparison, the bank fraud statute, consciously patterned after the mail fraud statute,¹²⁴ requires that a federally insured financial institution be the victim of the scheme. Every use of a bank as part of a

¹²¹ See Podgor, *supra* note 66, at 262 (after *Schmuck*, "mail fraud convictions may turn on the distastefulness of the fraud, as opposed to whether the mailing actually served to further the fraudulent scheme").

¹²² *Schmuck*, 489 U.S. at 723 (Scalia, J., dissenting). The plausibility of the majority's analysis becomes all the more questionable when juxtaposed to *Sampson*, in which the defendants were directly responsible for the mailings that could have maintained the facade they had erected. In *Schmuck*, however, the mailings were one transaction away from the defendant's fraud and possibly weeks or months removed from the odometer tampering. Under *Schmuck*, any mailing traceable to the original fraudulent transaction, save perhaps an inculpatory statement, will support federal prosecution.

¹²³ See Podgor, *supra* note 66, at 269 ("despite legal scholars being unable to predict the future interpretation of the mail fraud statute, people are being sent to jail for violation of the statute").

¹²⁴ See H. REP. NO. 1030, 98th Cong., 2d Sess. 378 (1984), reprinted in 1984 U.S.C.A.N. 3182, 3519 ("The proposed bank fraud statute is modeled on the present wire and mail fraud statutes which have been construed by the courts to reach a wide range of fraudulent activity.").

broad fraud does not constitute a violation of the bank fraud statute because the courts have interpreted the requirement that the scheme be "to defraud a financial institution" to mean that the facilities of a bank cannot be just an incidental aspect of the course of conduct.¹²⁵ Just as the bank fraud statute requires a direct correlation between the scheme and a financial institution, so should the mail fraud statute require an equally direct correlation between the scheme and use of the mails. Rather than serve as a tangential element, use of the mails should be central to the fraudulent scheme before the statute will allow a federal prosecution of any given fraud.

III. THE FEDERAL FRAUD STATUTE: CONGRESS BROADENS THE HORIZONS OF 18 U.S.C. § 1341

Congress has expanded the scope of the mail fraud statute twice in recent years, making the provision the preeminent criminal statute for federal prosecutors. The statute had remained essentially unchanged since the codification in 1909 of *Durland's* holding that the fraud element encompassed misstatements of future value.¹²⁶ Moreover, the changes enacted by Congress reflect an evolving view of the mail fraud statute as a substantive provision to combat fraud rather than just a stopgap measure that may suffice until more specific legislation can be drafted to deal with the conduct. This new approach makes the mailing element of the statute all the more important because it is the only real limitation on the power of the Federal Government to prosecute the broad array of behavior that can be categorized as "fraud."

A. *The Fall and Rise of the Intangible Rights Doctrine*

1. *McNally* and the Limits of a Scheme to Defraud

Beginning in the 1970s, federal prosecutors began using the mail fraud statute to attack political corruption at the federal, state, and

¹²⁵ 18 U.S.C. § 1344 (1988 & Supp. 1993); see *United States v. Briggs*, 939 F.2d 222, 225 (5th Cir. 1991) (theft of funds from employer's bank account is not a scheme to defraud a financial institution); *United States v. Blackmon*, 839 F.2d 900, 904-05 (2d Cir. 1988) (funds legally withdrawn from a bank by victim of fraudulent scheme insufficient to support prosecution under bank fraud statute).

¹²⁶ *McNally v. United States*, 483 U.S. 350, 357 n.6 (1988). Congress amended the statute in 1948 to eliminate the language specifying various fraudulent schemes, e.g., "green article" scams, that had been added in 1889. Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 683, 763. Congress also substituted the phrase "postal service" for "post office department" to reflect the reorganization of the postal service in 1970 as a quasi-independent corporation rather than a cabinet-level department. Act of August 12, 1970, Pub. L. No. 91-375, § (6)(j)(11), 84 Stat. 719, 778.

local level.¹²⁷ The theory of prosecution was that governmental officials who received kickbacks or other gratuities in connection with their offices or duties engaged in a scheme to defraud the citizenry of its right to honest and faithful services.¹²⁸ The deprivation was of an intangible right, not a property right, and the scheme involved the official's breach of a fiduciary duty by failing to disclose the corrupt activity.¹²⁹ Courts expanded the intangible rights doctrine to reach breaches of fiduciary duties by employees¹³⁰ and professionals who owe clients a duty of loyalty and candor.¹³¹ The intangible rights doctrine was strongly criticized by commentators,¹³² but the circuit courts

¹²⁷ See Hurson, *supra* note 12, at 429-30 (reviewing development of the intangible rights doctrine).

¹²⁸ The first published opinion to adopt this analysis was *Shushan v. United States*, 117 F.2d 110, 114-15 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941), in which the defendants were convicted under the mail fraud statute for a scheme to bribe commissioners of a levee district to adopt the defendants' plan for refunding bonds. See Bennett, *supra* note 62, at 1508 & n. 70.

¹²⁹ See, e.g., *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982) (local Republican party leader), *cert. denied*, 461 U.S. 913 (1983); *United States v. Diggs*, 613 F.2d 988 (D.C. Cir. 1979) (Detroit-area Congressman), *cert. denied*, 446 U.S. 982 (1980); *United States v. Mandel*, 591 F.2d 1347 (4th Cir.) (Maryland Governor), *different results reached on reh'g. en banc, by an equally divided court*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *United States v. Rauhoff*, 525 F.2d 1170 (7th Cir. 1975) (bribery of state Secretary of State); *United States v. Keane*, 522 F.2d 534 (7th Cir. 1975) (Chicago city Alderman), *cert. denied*, 424 U.S. 746 (1976).

¹³⁰ See, e.g., *United States v. Weiss*, 752 F.2d 777 (2d Cir.) (corporate officer), *cert. denied*, 474 U.S. 944 (1985); *United States v. Von Barta*, 635 F.2d 999 (2d Cir. 1980) (securities trader), *cert. denied*, 450 U.S. 998 (1981); *United States v. Bryza*, 522 F.2d 414 (7th Cir. 1975) (purchasing agent), *cert. denied*, 426 U.S. 912 (1976); *United States v. George*, 477 F.2d 508 (7th Cir.) (purchasing agent), *cert. denied*, 414 U.S. 827 (1973). See generally *White Collar Crime Survey*, *supra* note 18, at 709-11 (reviewing scope of intangible rights doctrine). One of the first decisions applying intangible rights theory in the private sector was *United States v. Proctor & Gamble Co.*, 47 F. Supp. 676 (D. Mass. 1942), in which a company was indicted under the mail fraud statute for paying bribes to a competitor's employees in order to obtain confidential business information. The district court stated that the charged scheme sought to defraud the competitor of its employees' "honest and loyal" services. *Id.* at 678.

¹³¹ Perhaps the most famous case involving the expansive use of the intangible rights theory as applied to an outside professional is *United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). The defendant, an attorney and New York state Senator, was convicted of mail fraud for giving legal advice to a personal client when his firm was representing another client competing for a city contract with the defendant's client. *Id.* at 922-23. The breach of fiduciary duty involved solely the attorney's conflict of interest, as there was no allegation that he misused privileged information. *Id.* at 927. See Coffee, *supra* note 16, at 130-39 (strongly criticizing the expansive application of mail fraud statute in *Bronston*).

¹³² See Coffee, *supra* note 16, at 126-30 (intangible rights doctrine has overcriminalized torts); Hurson, *supra* note 12, at 456-60 (suggesting revision of statute to specify scheme to defraud); Ralph E. Loomis, Comment, *Federal Prosecution of Elected Officials for Mail Fraud: Creative Prosecution or an Affront to Federalism?*, 28 AM. U. L. REV. 63, 66 (1978) (through broad construction of mail fraud statute, "courts have failed to consider when and where such federal intervention is appropriate").

unanimously accepted it as a proper application of the mail fraud statute.¹³³

Nevertheless, in *McNally v. United States*,¹³⁴ the Supreme Court placed the first real constraint on federal prosecutorial power under the mail fraud statute by rejecting the intangible rights theory. The Court announced that the "scheme to defraud" element simply does not include intangible non-property rights: "The mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government."¹³⁵ The Court noted that the 1909 statute incorporated *Durland v. United States*, which held that the statute reached only those attempts to defraud that involved money or property.¹³⁶

Although the statutory language encompasses "any scheme or artifice to defraud, or for obtaining money or property" by false statements, the Court read the "common understanding" of the statute as interpreted in *Durland* to apply the property requirement to both fraudulent schemes and false statements to obtain money or property.¹³⁷ In rejecting the broad interpretation adopted by the lower courts to apply the intangible rights theory, the Supreme Court stated, "If Congress desires to go further, it must speak more clearly than it has."¹³⁸

McNally brought the intangible rights theory to a sudden and unexpected, albeit short-lived, halt.¹³⁹ One immediate effect of the decision was to permit defendants to challenge convictions based on

¹³³ *McNally v. United States*, 483 U.S. 350, 365 (1987) (Stevens, J., dissenting) (every court that has considered intangible rights theory has upheld its application).

¹³⁴ 483 U.S. 350 (1987).

¹³⁵ *Id.* at 356. The defendants were charged with mail fraud in connection with a kickback scheme involving insurance commissions related to a state workers compensation policy. One of the defendants was a Kentucky state official who agreed to continue the policy with the agency paying the kickbacks. *Id.* at 353. The defendants were charged with depriving the citizens of Kentucky of their right to have the State's affairs conducted honestly. *Id.* at 354.

¹³⁶ *Id.* at 357-60 (citing *Durland v. United States*, 161 U.S. 306, 312-13 (1896)).

¹³⁷ *Id.* at 358-59 ("The codification of the holding in *Durland* in 1909 does not indicate that Congress was departing from this common understanding.").

¹³⁸ *Id.* at 360. The Court's statement echoes its statement in *Maze*, where it noted with regard to the scope of the mailing requirement, "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this . . ." *United States v. Maze*, 414 U.S. 395, 405 (1974).

Justice Stevens dissented in *McNally*, attacking the "crabbed construction" of the statute and noting that "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 these cases present." 483 U.S. at 374, 376.

¹³⁹ See Podgor, *supra* note 66, at 233 (intangible rights theory "came to a screeching halt").

schemes that involved only non-property rights.¹⁴⁰ The most notable case involved former Maryland Governor Marvin Mandel, in which the United States Court of Appeals for the Fourth Circuit held that the defendant was entitled to have his conviction vacated under *McNally* because otherwise "petitioners, who contested their guilt at each stage of the proceeding, would face the remainder of their lives branded as criminals simply because their federal trial occurred before rather than after the Supreme Court's ruling in *McNally*."¹⁴¹

2. *McNally* Rejected: The Right of Honest Services as a Basis for Mail Fraud Prosecutions

Congress reacted swiftly to *McNally* by taking up the Court's challenge to amend the statute if it wished to reach fraudulent deprivations of non-property rights. As part of the Anti-Drug Abuse Act of 1988,¹⁴² Congress added to Title 18 a new section 1346 which states in its entirety, "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."¹⁴³ As with other amendments to the mail fraud statute, the legislative history of this provision is sparse, although one sponsor stated that Congress intended to restore the law to its pre-*McNally* state.¹⁴⁴

¹⁴⁰ The two means to vacate a federal conviction are a writ of error *coram nobis* for defendants who had already served their sentences, see *United States v. Morgan*, 346 U.S. 502, 506-11 & n.6 (1954) (federal courts have authority under All Writs Act, 28 U.S.C. § 1651(a) (1988), to grant writ of error *coram nobis* to vacate conviction), or a writ of *habeas corpus*, 28 U.S.C. § 2255 (1988), for defendants in custody.

¹⁴¹ *United States v. Mandel*, 862 F.2d 1067, 1075 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1989); see also *United States v. Walgren*, 885 F.2d 1417 (9th Cir. 1989) (granting writ of error *coram nobis* reversing conviction of former state legislator convicted under intangible rights theory).

The Supreme Court blunted some of the effect of its restrictive reading of the fraud element by upholding mail and wire fraud convictions in *Carpenter v. United States*, 484 U.S. 19 (1987), on the grounds that the principal defendant had breached a fiduciary duty by depriving his employer of non-tangible property rights. *Id.* at 25. R. Foster Winans, a reporter for the *Wall Street Journal*, leaked information to friends about upcoming stories that would affect the price of the stock of companies mentioned in the articles. *Id.* at 23. The Court held that Winans breached a fiduciary duty to his employer by using the information for personal gain, thereby defrauding the *Wall Street Journal* of its intangible property right in the information. *Id.* at 28.

¹⁴² Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508.

¹⁴³ 18 U.S.C. § 1346 (1988). See Donna M. Maus, Comment, *License Procurement and the Federal Mail Fraud Statute*, 58 U. CHI. L. REV. 1125, 1129 (1991) (reviewing bills introduced in Congress to overturn *McNally*).

¹⁴⁴ See 134 CONG. REC. H11,251 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers); Podgor, *supra* note 66, at 236 (drafters intended to reverse *McNally*).

The legislation does not define what the "right of honest services" encompasses. To the extent that the intangible rights theory permits the government to define the scope of the statute by identifying new or broader constituencies with a claim to "honest services," the mail fraud statute will continue to expand in scope.¹⁴⁵ More importantly, congressional enactment of section 1346 signals a new method by which the Federal Government will police arguably illegal conduct. Rather than use the mail fraud statute as the "first line of defense" described by Chief Justice Burger in *Maze*,¹⁴⁶ Congress relies on a broad provision to attack problems without writing more explicit legislation that clearly describes the scope of the perceived harm and the nature of the acts that will subject a person or entity to federal criminal prosecution.¹⁴⁷

If Congress feared that political corruption, the underlying wrong in *McNally*, would not be prosecuted, it could have adopted an anti-corruption or kickback statute that would apply to state and local officials. The bribery and conflict of interest statute for federal officials¹⁴⁸ or the employee benefit plan kickback statute¹⁴⁹ could have provided Congress with models. The problem with the specific anti-corruption statutes is that they require proof of elements not found in the mail fraud statute, such as acceptance of the compensation in relation to the person's duties¹⁵⁰ or an intent to be influenced.¹⁵¹

The appeal of the mail fraud statute is that the prosecution must only prove a scheme to defraud that involves some degree of dishonesty and a use of the mails related to the scheme, but not specific intent to receive or demand an item of value. Moreover, the mail fraud statute casts a wider net because it reaches any participant in a scheme involving breaches of both public and private fiduciary duties. The right of

¹⁴⁵ See Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. LEGIS. 153, 171 (1994) ("The statutory right to honest services, intended by Congress to mean a right to good government, is an undefined, amorphous right with uncertain boundaries.").

¹⁴⁶ *United States v. Maze*, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting).

¹⁴⁷ See Moohr, *supra* note 145, at 188 (arguing that § 1346 is unconstitutional due to vagueness in failure to define "honest services"); Podgor, *supra* note 66, at 239 (Congress should define the specific conduct that constitutes dishonesty).

¹⁴⁸ See 18 U.S.C. §§ 201 (bribery), 203 & 205 (conflict of interest), 207 (post-employment lobbying and representation), 208 (participation in activities with a financial interest), 209 (accepting outside salary) (1988 & Supp. 1993).

¹⁴⁹ 18 U.S.C. § 1954 (1988).

¹⁵⁰ See, e.g., 18 U.S.C. § 203(b) (1988 & Supp. 1993) ("Whoever, otherwise than as provided by law for the proper discharge of official duties . . .").

¹⁵¹ See 18 U.S.C. § 1954 (1988) ("because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties").

honest services does not require specific proof of the relationship of the acts to the defendant's duties, i.e., a *quid pro quo*, but only that the activity was dishonest. Rather than write specific legislation addressing particular forms of corruption or dishonesty, Congress relied on a very broad statute to reach conduct that is arguably criminal because that route was more expedient both for itself and for the prosecutors who will enforce the law.

Expanding the mail fraud statute also allows Congress to avoid confronting the issue of federalism, implicated through congressional extension of the power of the Federal Government into an area that is traditionally reserved for the states.¹⁵² The very breadth of the intangible rights theory permits Congress to throw to the executive branch the issue of whether, and under what circumstances, the Federal Government's power should be used to prosecute what are essentially local crimes.¹⁵³ By not defining the scope of the statute, Congress can hide behind a general legislative grant of authority to prosecutors to "call them as they see them." More specific legislation would, of course, raise the question of whether Congress should federalize crimes traditionally handled at the state and local level, and whether that is the best use of scarce federal resources.¹⁵⁴

McNally was the first real limitation imposed by the Supreme Court on the mail fraud statute, and Congress overturned that deci-

¹⁵² There is no question that the Federal Government has the power to enact criminal laws that can extend to virtually any crime, the Tenth Amendment to the Constitution notwithstanding. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Perez v. United States*, 402 U.S. 146 (1971); William Van Alstyne, *Dual Sovereignty, Federalism and National Criminal Law: Modernist Constitutional Doctrine and the Nonrole of the Supreme Court*, 26 AM. CRIM. L. REV. 1740, 1748 (1989) (no constitutional limits on Congress's power to regulate acts through criminal laws). In *United States v. Johnson*, 22 F.3d 106 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit reversed a lower court ruling that the federal carjacking statute, 18 U.S.C. § 2119 (1988), was unconstitutional on the ground that there was not a sufficient nexus between the criminal act and interstate commerce. The circuit court noted that "[i]t may well be that the carjacking statute is unwise and encroaches on traditional views of federalism . . . but it is not unconstitutional under current Commerce Clause doctrine." *Johnson*, 22 F.3d at 109. Professor Van Alstyne distinguishes between constitutional federalism, which incorporates legal limits on Congress's power, and political federalism, under which "it is for Congress to decide to what extent it desires to make national law, whether civil or criminal, and that is that." Van Alstyne, *supra*, at 1740. It is the latter form of federalism to which this Article refers.

¹⁵³ See Moohr, *supra* note 145, at 177 ("When combined with the intangible rights doctrine, broad prosecutorial discretion means that prosecutors decide whom to charge, and more significantly for our purposes, what behavior is defined as criminal.").

¹⁵⁴ See Coffee, *supra* note 23, at 21 (use of federal prosecutors for lower level business crimes through mail fraud statute is "a gross misallocation of resources and an abdication of responsibility"); Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117, 126 (1987) ("Federal prosecution should be limited to misconduct affecting clearly defined national interests.").

sion, permitting continued expansion of the statute, rather than deciding what acts should be illegal. What started as a limitation on the mail fraud statute served as the catalyst for Congress to expand the provision through direct legislation. Section 1346 signals the congressional transformation of the mail fraud statute from a provision designed to protect the postal service, and secondarily as a stopgap measure for prosecutors until the legislature can draft more specific legislation, to the primary engine of federal prosecution. Where the statute had once been a prototype for more specific provisions, such as the bank fraud statute, it is now a means in and of itself for expanding federal prosecutions.

B. *The Interstate Carrier Expansion of the Mail Fraud Statute*

1. The Initial Effort to Expand Federal Jurisdiction

When Congress enacted the first mail fraud statute, the post office provided the primary means to transport a small item, such as a letter, printed material, or merchandise, to another locality.¹⁵⁵ The post office was among the largest departments in the Federal Government in the post-Civil War era, and probably was the primary direct contact most individuals had with federal authorities.¹⁵⁶ The past twenty years have seen the creation and growth of private delivery companies akin to the postal service that can deliver a package to any address throughout the United States, and even most parts of the world. The mail fraud statute, however, remained tied to the use of the postal service as the predicate for federal jurisdiction over an offense.¹⁵⁷

The first effort to expand the mailing element came in the aftermath of *McNally*. Senator Joseph Biden, the chair of the Senate Judiciary

¹⁵⁵ See MARSHALL CUSHING, *THE STORY OF OUR POST OFFICE* 24 (A.M. Thayer & Co. 1893) (inland mail service in 1892 contained approximately 30,000 mail routes).

¹⁵⁶ See *id.* at 11 (post office employees, totaling 229,435 in 1892, were "the bulk of the army of public servants in this country").

¹⁵⁷ See *United States v. Hannigan*, 27 F.3d 890, 895 (3d Cir. 1994) (reversing mail fraud conviction for Government's failure to introduce evidence concerning mailing practices of insurance company when disbursing checks); *United States v. Burks*, 867 F.2d 795, 797 (3d Cir. 1989) (reversing mail fraud conviction for failure to prove use of mails where secretary and representative testified that mails were used "99%" of the time, but sometimes private delivery service used, and there was no testimony about the particular mailing to defendant); *White Collar Crime Survey*, *supra* note 18, at 718-19 ("use of the mails will not be established where evidence exists that shows both public mailings and private mailing services (e.g., Federal Express) were used in the office"); cf. *Utz v. Correa*, 631 F. Supp. 592, 596 (S.D.N.Y. 1986) (delivery of draft letter by messenger and intrastate telephone calls insufficient for violation of mail and wire fraud statutes as predicates for civil RICO claim).

Committee, introduced the Anti-Corruption Act of 1989 ("Anti-Corruption Act"),¹⁵⁸ a comprehensive statute to prosecute public corruption cases that had been brought under the intangible rights theory prior to the Supreme Court's rejection of that approach.¹⁵⁹ The proposed statute was an example of congressional consideration of a specific provision that would supplant the mail fraud statute for a particular type of criminal activity. In addition, though, one provision of the bill would have amended the wire fraud statute to permit prosecutions of any fraudulent scheme executed through the use of "any facility of interstate or foreign commerce."¹⁶⁰ The proposal would have extended federal jurisdiction beyond use of the mails or an interstate wire "to include corrupt schemes which involve the use of . . . a Federal highway, or affect interstate or foreign commerce."¹⁶¹ The rationale for expanding the statute by making it coextensive with Congress's power to regulate interstate commerce was to reach cases that involve "new technologies or commercial express mail carriers used to facilitate a corrupt scheme."¹⁶²

The proposed Anti-Corruption Act would have altered the structure of the federal fraud statutes by making jurisdiction under the wire fraud statute dependent solely on the use of the means of interstate commerce, a broad basis that would permit federal prosecutors to reach virtually any transaction.¹⁶³ The requirement to prove the "purpose" of the wire for executing the scheme would have been eliminated from the wire fraud statute, and the only substantive element that the Government would have had to prove would be that the defendant engaged in a scheme to defraud with the requisite intent.

If enacted, this provision would have made the mail fraud statute superfluous because the Federal Government could prosecute any fraud that had an effect on interstate commerce, regardless of whether it involved a mailing. Coupled with the enactment of section 1346's reinstatement of the intangible rights doctrine, the Federal Government's power to prosecute any act of alleged dishonesty would have been unchecked. Congress did not pass the Anti-Corruption Act, but in the Department of Justice appropriations bill for fiscal year 1990, it directed the Department to provide recommended statutory language

¹⁵⁸ S. 327, 101st Cong., 1st Sess., *reprinted in* 135 CONG. REC. S1064 (daily ed. Feb. 2, 1989).

¹⁵⁹ See 135 CONG. REC. S1063 (daily ed. Feb. 2, 1989) (statement of Sen. Biden).

¹⁶⁰ S. 327, 101st Cong., 1st Sess., § 2, *reprinted in* 135 CONG. REC. S1064 (daily ed. Feb. 2, 1989). The legislation would have deleted the interstate wire element.

¹⁶¹ 135 CONG. REC. S1066-67 (daily ed. Feb. 2, 1989) (statement of Sen. Thurmond).

¹⁶² *Id.* at S1067.

¹⁶³ *Perez v. United States*, 402 U.S. 146 (1971).

for "[e]xpanding the Federal mail fraud statute to include commercial mail couriers and facsimile machines."¹⁶⁴

2. Genesis of the Interstate Carrier Amendment

Two years later, Congress again returned to the mail fraud statute, in the proposed Omnibus Crime Control Act of 1991.¹⁶⁵ The proposed legislation contained an amendment expanding the mailing element to include both the use of the postal service or "any private or commercial interstate carrier."¹⁶⁶ Although Congress did not pass the crime bill during that session, the provision signaled Congress's determination to expand the mail fraud statute to address the use of means other than the postal service to engage in fraudulent schemes. Proposed amendments to the mail fraud statute surfaced again in the next legislative session, when the Senate passed the Senior Citizens Against Marketing Scams Act ("SCAMS") of 1993 to address fraudulent telemarketing schemes that target the elderly. This bill incorporated the identical provision from the 1991 crime bill to expand the scope of the mail fraud statute.¹⁶⁷ The House of Representatives incorporated SCAMS into the broader Violent Crime Control and Law Enforcement Act of 1994, which Congress passed on September 13, 1994.¹⁶⁸

Congressional hearings on SCAMS identified schemes in which sellers of nonexistent or overpriced goods used private delivery serv-

¹⁶⁴ H. REP. NO. 909, 101st Cong., 2d Sess. (1990), *reprinted in* 136 CONG. REC. H10,877 (daily ed. Oct. 20, 1990). A second direction was for language to amend the wire fraud statute "to prohibit illegal activities which affect interstate commerce," *id.*, which is essentially the same approach as the changes proposed in the Anti-Corruption Act of 1989.

¹⁶⁵ H.R. 3371, 102d Cong., 1st Sess. (1991).

¹⁶⁶ *Id.* § 1301. The amendment states:

Sec. 1301. MAIL FRAUD

Section 1341 of title 18, United States Code, is amended—

(1) by inserting "or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier," after "Postal Service,"; and

(2) by inserting "or such carrier" after "causes to be delivered by mail".

The mail fraud amendment was also added to other legislation as part of an effort to attach some of the less controversial elements of the crime bill, which was stalled by filibuster in the Senate, to legislation with a better chance of enactment. *See* 138 CONG. REC. S6115 (daily ed. May 6, 1992) (amendment to Telephone Privacy Act); 138 CONG. REC. S6745 (daily ed. May 14, 1992) (National Voter Registration Act); 138 CONG. REC. S8003 (daily ed. June 11, 1992) (Workplace Fairness Act); 138 CONG. REC. S16,360 (daily ed. October 2, 1992) (Public Health Service Act Amendments of 1992); 138 CONG. REC. S16,526 (daily ed. Oct. 3, 1992) (Health Care Fraud Prosecution Act of 1992).

¹⁶⁷ S. 557, 103d Cong., 1st Sess. § 4 (1993). The bill passed the Senate by a voice vote on July 30, 1993. 139 CONG. REC. S10,015, S10,017 (daily ed. July 30, 1993).

¹⁶⁸ Pub. L. No. 103-332, §§ 250001-250008, 108 Stat. 1796, 2081-88.

ices to send the items, and directed purchasers to remit their payments by private carriers rather than the postal service, to avoid falling under the mail fraud statute.¹⁶⁹ The expansion of the mail fraud statute is part of an effort to combat con artists who prey on individuals through sophisticated programs involving high pressure sales tactics, but the amendment is not limited to such schemes. Instead, Congress has augmented an already powerful provision by expanding federal jurisdiction over any fraudulent scheme, not just telemarketing frauds, that use the postal service or any private or commercial interstate carrier.

3. The Expanding Scope of Federal Jurisdiction

The question remains how the courts should interpret the expansion of the mail fraud statute. The phrase "private or commercial interstate carrier" could mean that the item must be transported interstate, and not just intrastate, before it falls under the mail fraud statute. A second interpretation would look to the nature of the carrier, and not what in fact happened in the transportation of the item, to determine jurisdiction. Under a third approach, the reference to "interstate" carriers would mean that Congress has extended the mail fraud statute to any fraudulent scheme that affects interstate commerce. The second interpretation is the best analysis of the scope of the statute, based on the development of the provision and its relation to other federal statutes that take differing approaches to the interstate commerce element of the offense.

In *Perez v. United States*,¹⁷⁰ the Supreme Court stated that the Commerce Clause grants Congress the power to reach three categories of activity: first, the use of the channels of interstate commerce; second, protection of the instrumentalities of interstate commerce; and, third, activities affecting interstate commerce.¹⁷¹ Courts require proof of one

¹⁶⁹ See *Mail Fraud: Hearings Before the Subcomm. on Postal Operations and Services of the House Comm. on Post Office and Civil Service*, 103d Cong., 1st Sess. 246-300 (Oct. 6, 1993) (statement of Richard A. Barton, Senior Vice President, Government Affairs, Direct Marketing Association, and statement of Thomas Caiazza, Managing Director, Customer Service, Eastern Region, Federal Express Corp.); *International Consumer Fraud: Can Consumers be Protected: Hearings Before the Subcomm. on Regulation and Government Information of the Senate Comm. on Governmental Affairs*, 103d Cong., 1st Sess. 12-22, 50-59 (Oct. 15, 1993) (testimony of John F. Barker, Director, National Fraud Information Center) (telemarketing boiler rooms avoid federal jurisdiction "by being careful—they used private mail carriers instead of the U.S. mail," *id.* at 52).

¹⁷⁰ 402 U.S. 146 (1971).

¹⁷¹ *Id.* at 150. The defendant challenged his conviction for loan sharking under the Consumer Credit Protection Act, 18 U.S.C. §§ 891-896 (1988), arguing that his activities involved only intrastate commerce, and therefore were beyond the constitutional power of Congress to regulate. *Perez*, 402 U.S. at 146-49.

of these three varying levels of involvement in interstate commerce, depending on the wording in different statutes, as the prerequisite for federal jurisdiction.¹⁷²

An example of the first category of the required relationship to interstate commerce for federal prosecution is the National Stolen Property Act,¹⁷³ which reaches any person who "transports, transmits, or transfers *in* interstate or foreign commerce any goods, wares, merchandise, securities or money . . . knowing the same to have been stolen, converted or taken by fraud."¹⁷⁴ The statute requires the Government to plead and prove that the stolen article was actually transported to another state or outside the country,¹⁷⁵ but it need not prove that the transportation of the items was an essential part of the fraud.¹⁷⁶ Similarly, the wire fraud statute, which is a companion to the mail fraud statute, requires proof that the wire communication was interstate and not just intrastate, in addition to being for the purpose of executing the scheme.¹⁷⁷ Examples of other statutes that require proof of trans-

¹⁷² See, e.g., *McLain v. Real Estate Bd.*, 444 U.S. 232, 241-42 (1980) ("The conceptual distinction between activities 'in' interstate commerce and those which 'affect' interstate commerce has been preserved in the cases, for Congress has seen fit to preserve that distinction in the antitrust and related laws by limiting the applicability of certain provisions to activities demonstrably 'in commerce.'"). Where Congress has not expressly required proof of some nexus between the charged act and interstate commerce in the statute, the Government must allege the necessary nexus in its indictment. *Russell v. United States*, 369 U.S. 749, 763-66 (1962); *Stirone v. United States*, 361 U.S. 212, 216-18 (1960). Although Congress is not required to make explicit findings about the relationship of the proscribed activity and the Commerce Clause, statutes that intrude upon the power and prerogatives of the states should include clear expressions of congressional intent to use the commerce power to usurp state authority. See *Pennsylvania v. Union Gas*, 491 U.S. 1, 7 (1989) (plurality opinion) (abrogation of state sovereign immunity by federal statute permitted only if intent is "unmistakably clear"). In *United States v. Lopez*, 2 F.3d 1342, 1367-68 (5th Cir. 1993), *cert. granted*, 114 S. Ct. 1536 (1994), the United States Court of Appeals for the Fifth Circuit held that the Gun-Free School Zones Act, 18 U.S.C. § 922(q) (1988), was unconstitutional as beyond Congress's power under the Commerce Clause, when there were no congressional findings or legislative history to support the usurpation of authority traditionally reserved to the states.

¹⁷³ 18 U.S.C. § 2314 (Supp. 1993).

¹⁷⁴ *Id.* (emphasis added).

¹⁷⁵ See *United States v. Bruun*, 809 F.2d 397, 405 (7th Cir. 1987) (reversing conviction where there was no proof that defendant transported or caused another to transport stolen securities into the state); *United States v. Tannuzzo*, 174 F.2d 177, 180 (2d Cir. 1949) (Government must show that defendant knew goods were stolen and that they were in fact transported in interstate commerce), *cert. denied*, 388 U.S. 815 (1949).

¹⁷⁶ *United States v. Sheridan*, 329 U.S. 379, 385 (1946).

¹⁷⁷ 18 U.S.C. § 1343 (1988 & Supp. 1993), provides:

Whoever, having devised . . . any scheme or artifice to defraud . . . transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined . . . or imprisoned . . . or both.

portation in interstate commerce are section 17(a) of the Securities Act of 1933¹⁷⁸ and the Mann Act.¹⁷⁹

The second category of statutes are those that premise federal jurisdiction on the use of an instrumentality of interstate commerce, but do not require separate proof of interstate transportation in connection with the criminal act. Section 10 of the Securities Exchange Act, a broad anti-fraud provision, prohibits acts "by use of any means or instrumentality of interstate commerce or of the mails"¹⁸⁰ A similar approach is taken in the statute governing destruction of aircraft and motor vehicles, which cover any civil aircraft or motor vehicle "used, operated, or employed in interstate, overseas, or foreign commerce."¹⁸¹ These statutes are similar to the mail fraud statute before its most recent amendment, in that Congress is using the status of the facility used in the crime as the basis for federal jurisdiction rather than requiring proof that the item actually moved in interstate commerce.

The third category of statutes implicates Congress's broadest application of its power under the Commerce Clause by reaching any activity that affects interstate commerce. The Supreme Court defined the scope of Congressional power in *Wickard v. Filburn*,¹⁸² which stated, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."¹⁸³ The focus on the class of activities, and not the individual instances that may be prosecuted under the statute, determines whether Congress has the power to regulate the acts covered by the statute.¹⁸⁴

See, e.g., *United States v. Davila*, 592 F.2d 1261, 1263-64 (5th Cir. 1979) (wire communications within one state sufficient if routed through another state).

¹⁷⁸The Securities Act of 1933, § 17(a), 15 U.S.C. § 77q(a) (1988), provides:

It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement

¹⁷⁹The Mann Act, 18 U.S.C. § 2421 (1988), provides: "Whoever knowingly transports any individual in interstate or foreign commerce . . . with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined . . . or imprisoned . . . or both."

¹⁸⁰15 U.S.C. § 78k (1988). The act defines "Interstate Commerce" to include "intrastate use of (A) any facility of a national securities exchange or of a telephone or other interstate means of communication, or (B) any other interstate instrumentality." 15 U.S.C. § 78c(17) (1988).

¹⁸¹18 U.S.C. §§ 32(a)(1), 33 (1988).

¹⁸²317 U.S. 111 (1942).

¹⁸³*Id.* at 125.

¹⁸⁴See *Perez v. United States*, 402 U.S. 146, 154 (1971) ("Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise,

RICO¹⁸⁵ and the Hobbs Act¹⁸⁶ are both premised on acts that affect interstate commerce without requiring proof that the article used for federal jurisdiction actually moved in interstate commerce.¹⁸⁷ With regard to the Hobbs Act, the Supreme Court stated that the statutory language shows the purpose "to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence."¹⁸⁸

The Violent Crime Act amendment to the mail fraud statute is similar to the second category of statutes, requiring proof that an instrumentality of interstate commerce is used for the purpose of executing the fraudulent scheme. The provision is comparable to section 10 of the Securities Exchange Act of 1934, which reaches any instrumentality of interstate commerce, while the expanded mail fraud statute reaches a specified instrument of interstate commerce in addition to the mails.¹⁸⁹ The Violent Crime Act avoids using the language of the wire fraud statute, the companion to the mail fraud statute, and other more restrictive provisions requiring proof that the article be "in" interstate commerce.

It is doubtful that Congress would have imposed a requirement that the Government prove that the item shipped by an interstate carrier actually travelled between two states. That interpretation would narrow the scope of an amendment meant to reach fraudulent schemes previously beyond federal jurisdiction. The "private or commercial interstate carriers" are identical to the postal service as a mode of

as trivial, individual instances' of the class.") (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)).

¹⁸⁵ 18 U.S.C. §§ 1961-1965 (1988 & Supp. 1993).

¹⁸⁶ 18 U.S.C. §§ 1951-1961 (1988 & Supp. 1993).

¹⁸⁷ See 18 U.S.C. § 1962(b) (1988) (RICO provision prohibiting acquiring or maintaining control of an enterprise "which is engaged in, or the activities of which affect, interstate or foreign commerce"); 18 U.S.C. § 1951(a) (1988) (Hobbs Act provision prohibiting violence or threat thereof that "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce"); *United States v. Robertson*, 15 F.3d 862, 868 (9th Cir. 1994) (Government failed to establish that RICO enterprise "had anything more than an incidental effect on interstate commerce"), *cert. granted*, 115 S. Ct. 354 (1994); *United States v. Pascucci*, 943 F.2d 1032, 1035 (9th Cir. 1991) (sufficient effect on interstate commerce where blackmail scheme would have an impact on target's employer, which engaged in interstate commerce).

¹⁸⁸ *Stirone v. United States*, 361 U.S. 212, 215 (1960). Even the broadest application of congressional power to regulate interstate commerce does not mean that any item necessarily affects interstate commerce to permit federal jurisdiction. In *United States v. Levine*, 41 F.3d 607, 613-14 (10th Cir. 1994), the United States Court of Appeals for the Tenth Circuit held that under 18 U.S.C. § 1365, which prohibits tampering with consumer products which affect interstate commerce, requires the Government to prove that the tampering had the requisite effect on interstate commerce, not merely that the product had such an effect before the criminal activity.

¹⁸⁹ Securities Exchange Act of 1934, § 10, 15 U.S.C. § 78j (1988).

transportation by which a scheme is executed, and therefore the fact of passage in interstate commerce is irrelevant to the acts Congress is reaching in the statute. Interpreting the amendment to require proof of interstate movement violates the tenor of the statute by importing an interstate transportation requirement that has applied traditionally for this type of crime only to the wire fraud statute.

The amendment also does not reflect Congress using the extent of its power under the Commerce Clause to reach any activity that may affect interstate commerce. The language does not exhibit an attempt to reach a class of activities, as interpreted in *Perez*, that may have a substantial effect on interstate commerce.¹⁹⁰ The Violent Crime Act amendment takes a more restrictive approach than the Anti-Corruption Act proposal, which invoked Congress's full power under the Commerce Clause by covering any facility of interstate commerce and not just interstate carriers. Moreover, carriers have the requisite effect on interstate commerce, and therefore Congress could have used the broadest jurisdictional means to reach virtually any shipment by any carrier engaged in commerce. The language chosen by Congress, however, shows that "interstate" modifies "carrier," and should not be interpreted as a statement by Congress that the mail fraud statute reaches any activity that may have an impact on commerce.

4. What is an "Interstate Carrier"

Although the amendment is best understood as requiring an instrumentality of interstate commerce, the question remains how courts should interpret the scope of "interstate carrier." Prosecutors can now bring cases based on either use of the mails or shipment by an interstate carrier, but neither the statute nor the legislative history define the latter term. The large delivery service companies, such as Federal Express and United Parcel Service, are clearly interstate carriers, but small entities, such as local messenger services, are not as easily categorized. The local carrier may provide delivery services in-town while also delivering packages to an interstate carrier, or it may be able to identify only isolated instances in which it transported a package to another state. That company may be very similar to one that operates

¹⁹⁰ If the class of activities analysis applies to the amendment, it follows that the entire fraudulent scheme, and not just the use of the mails or the post office, may be reviewed to determine whether there is a substantial effect on interstate commerce. Such an approach may limit the statute; for example, some political corruption schemes, such as absentee voter frauds, might not be covered under the statute because they have, at best, only a minimal impact on interstate commerce.

in a metropolitan area, such as New York City or Washington, D.C., where it will cross state lines with some regularity but is not otherwise an interstate carrier.

If courts take a broad commerce clause approach, they could construe the term "interstate" as similar to the "affecting commerce" approach to federal jurisdiction, that a carrier with any substantial effect on interstate commerce satisfies the statutory requirement.¹⁹¹ That analysis avoids any review of the movement of the item at issue or the actual extent of interstate shipments by the carrier. Instead, the designation of interstate carrier would depend on the size of the operation, whether it is significant enough to have an impact on interstate commerce, regardless of whether the company ever delivered an item between the states.

The weakness in this analysis is that it divorces the jurisdictional means, i.e., the use of an interstate carrier, from proof that the use of that carrier was for the purpose of executing the scheme. Even after the Violent Crime Act amendment, the Government must still prove that the use of an interstate carrier was for the purpose of executing the scheme. It would be anomalous to interpret the character of the means of transportation as broadly as permissible for jurisdictional reasons without reference to the underlying act charged in the indictment, when that act must also be shown to be for the purpose of executing the scheme. Congress is protecting against misuse of the postal service and interstate carriers, not just any local bike-messenger service that may be used to pick-up or deliver an item. Moreover, if courts adopt an "affecting commerce" analysis to define whether an entity constitutes an interstate carrier, then that merely incorporates the broadest Commerce Clause interpretation into the statute to permit the use of virtually any delivery service to support a federal prosecution.

The better interpretation of the interstate carrier amendment is that the Government must prove that the business of the company used for the purpose of executing the scheme involves significant interstate shipments, and not just that the general business has an effect on interstate commerce. This approach comports with the language Congress adopted, which does not support the broadest possible application of federal jurisdiction under the Commerce Clause.

The focus should be on the nature of the business involving significant interstate shipments to permit a finding that the defendant

¹⁹¹ See *United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 279-80 (1975) (Commerce Clause power extends to "all activity substantially affecting interstate commerce").

caused an item to be transported by an interstate carrier in execution of a fraudulent scheme. If a company is primarily local, and any interstate shipment is only incidental to its business, then the mail fraud statute should not apply. On the other hand, if the defendant uses a national carrier with an economically significant share of its business involving interstate transportation of items, then the happenstance of local delivery without crossing state lines should not defeat jurisdiction.

The fact that a particular delivery did not cross state lines should not defeat federal jurisdiction because, as discussed above, the statute does not require proof that the item was "in" interstate commerce. Defeating federal jurisdiction solely because the interstate carrier did not move the item across state lines would read into the provision a requirement that Congress in this area has only expressly imposed under the wire fraud statute, the companion to the mail fraud statute.

Under the latest version of the statute, for schemes that use the postal service, the Government need only introduce evidence of the use of the mails. The interstate carrier provision requires the Government to prove the nature of the carrier's business, to permit the jury to determine beyond a reasonable doubt that the company is an interstate carrier and not merely a local delivery service. Under either jurisdictional prong of the amended statute, the Government must further prove the substantive element that the interstate carrier or the mails were used for the purpose of executing the scheme.

The expansion of the statute will complicate the prosecution's case by requiring the Government to introduce competent evidence of the business of the carrier to permit the jury to find that the company has the requisite interstate character. The net effect, however, will be to expand the number of prosecutions that may be brought and could ultimately simplify the Government's proof of the transportation element. The bulk of the cases that had escaped prosecution because of conscious avoidance of the postal service probably involved one of the major delivery services. These companies are invariably interstate carriers, in that a significant share of their business involves interstate shipments, and they maintain records of pick-up and delivery, unlike the postal service. The proof of the use of the interstate carrier will involve the introduction of business records and the appearance of a corporate witness who can testify as to the carrier's interstate nature. The relevant records should be readily accessible, a benefit some delivery services have extolled in advertisements.

The use of interstate carriers is not limited to telemarketers who prey on seniors or other unsophisticated investors. The amendment to

the mail fraud statute is not targeted at only a narrow category of articles, and is not tied to use of the telephone or schemes to sell goods or services at inflated prices. Instead, Congress has used the mail fraud statute as the primary weapon to attack both telemarketing and any other fraudulent scheme that uses either the postal service or an interstate carrier. Congress has broadened the reach of the statute to cover a gap that had developed with the advent of private delivery services that have to some degree supplanted the postal service.

IV. CONCLUSION

The amended statute has, in one sense, restored the law to the position it was in when first enacted over 120 years ago, covering the most pervasive means of communicating with individuals through the direct delivery of letters, documents and merchandise. The Supreme Court's expansive application of the mailing element in *Schmuck*, however, shows that the mail fraud statute is no longer a narrowly targeted statute, as was the provision enacted in 1872 to protect the integrity of the mails. The difference between the original mail fraud statute and its current state is that the definition of fraud has been expanded far beyond any conception of the scope of the statute in the nineteenth century. Today, the mailing element seemingly provides federal prosecutors with carte blanche to prosecute virtually any activity to which the mail or a shipment by interstate carrier can be linked, no matter how tangential.

Section 1346, coupled with the interstate carrier amendment, gives federal prosecutors arguably the broadest statute they can apply to acts of dishonesty, whether political, economic, or personal. It is doubtful that many fraudulent schemes, as now defined by the expanded jurisdictional scope of the statute and section 1346, can escape prosecution because the Government cannot prove federal jurisdiction or a deprivation of the right of honest services. The only real limitation is the purpose element, that the use of the mails or an interstate carrier have a relationship to the execution of the scheme. After *Schmuck*, however, the strength of that element as a check on the Government's power to prosecute is questionable.

The mail fraud statute came into existence almost as an afterthought, and was long treated as a harmless stepchild by Congress when it enacted changes, with no evidence of legislative intent as to the extent to which it sought to expand federal power or the meaning of its changes. The Supreme Court has treated the statute with very little respect, refusing to define the meaning of the purpose element

and repeatedly issuing obtuse, even contradictory opinions that provide no real guidance about the scope of the mailing provision. The Court's only attempt to limit the meaning of fraud ignored unanimous lower court interpretations of the mail fraud statute and brought a swift rebuke from Congress.

Rather than relying on the provision as a stopgap, Congress now views the mail fraud statute as the principal measure to prosecute dishonest and fraudulent activities, without having to bother with drafting more specific criminal statutes to address the issue. The trend toward federalizing activities traditionally left to state and local authorities continues unabated with the latest addition to the mail fraud statute. The interstate carrier amendment has severed the provision from its roots as a means to protect the integrity of the post office. Section 1341 is no longer just a mail fraud statute, but has moved beyond that to become the Federal Fraud Statute.