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Criminal Law - Mail Fraud - Mail Fraud Statute Restricted to the Protection of Property Rights and Doesn Not Extend to the Protection of the Intangible Right to Honest and Impartial State Government Case Note.

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CASENOTE

CRIMINAL LAW—Mail Fraud—Mail Fraud Statute Restricted To The Protection Of Property Rights And Does Not Extend To The Protection Of The Intangible Right To Honest And Impartial State Government

McNally v. United States
— U.S. —, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987)

Soon after his 1974 election, Kentucky Governor Julian Carroll empowered his political ally, Howard P. "Sonny" Hunt, with authority to purchase insurance policies for the state.[1] Hunt made a secret agreement with a state-contracted insurance company that the company would retain its contract with the state as long as the company mailed a percentage of its commissions to other agencies chosen by Hunt.[2] Eventually, $851,000 was paid to twenty-one different insurance agencies over a four-year period.[3] One of the agencies chosen was a corporation in which Hunt and two others, James Gray and Charles McNally, had a financial interest.[4]

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1. *See* United States v. Gray, 790 F.2d 1290, 1292 (6th Cir. 1986). Hunt was a politician in the Kentucky Democratic Party which had nominated Carroll for Governor. After Carroll won the governorship, Hunt became the Democratic Party Chairman. *See id.* Whether Hunt's authority to purchase insurance policies was express is unclear from either the appellate or Supreme Court decision. The jury charge allowed the jury to determine Hunt had "de facto control over the award of the workmen's compensation insurance contract." *See* McNally v. United States, — U.S.—, —, 107 S. Ct. 2875, 2879, 97 L. Ed. 2d 292, 299 (1987). Whatever the nature of Hunt's authority, he directed the Insurance Commissioner to award the workmen's compensation policies to the insurance company of Hunt's choice. *See Gray*, 790 F.2d at 1292-93.

2. *See Gray*, 790 F.2d at 1292. The insurance company was the Wombwell Insurance Agency of Lexington, Kentucky, which had sold workmen's compensation insurance to the state since 1971. *See id.* The company's vice-president agreed to "share" all insurance commissions exceeding $50,000 per year with other insurance companies. *See id.*

3. *See id.* at 1292-93.

4. *See id.* at 1293. The corporation, Seton Investments, Inc., received nine checks from Wombwell Insurance totalling $200,000. The government proved that Hunt and Gray were the directors of the investment company and that McNally did not associate with Seton until 1977 or 1978. The money received from Wombwell Insurance Agency was used to buy two

Hunt, Gray and McNally were charged with conspiracy and seven counts of mail fraud.[5] At trial in a federal district court, Gray and McNally were convicted of violating the federal mail fraud statute,[6] which criminalizes use of the mails to carry out fraudulent schemes.[7] The United States Court of Appeals for the Sixth Circuit affirmed their convictions, relying on unanimous appellate authority holding that the mail fraud statute punishes schemes to defraud citizens of their intangible right to impartial state government.[8] The United States Supreme Court granted certiorari to consider

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condominiums and a station wagon. Hunt's son was also given $38,500 in seven checks from Seton Investments. McNally received $77,500 from Wombwell through the Snodgrass Insurance Agency which laundered the payments. *See id.*

5. *See* McNally v. United States, __ U.S. __, __, 107 S. Ct. 2875, 2878, 97 L. Ed. 2d 292, 298 (1987). Six of the mail fraud counts were dismissed because they were based on Seton Investments' tax returns which were not alleged to be false. The convictions of Hunt and Gray were founded on the use of the United States Postal Service by an insurance company to mail a commission check to Wombwell Insurance Agency. This remaining mail fraud count was "that the defendants devised a scheme or artifice to defraud the citizens of the Commonwealth of Kentucky and its governmental departments . . . and employees of their right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud . . . ." *Id.* However,

> [i]t is worth observing as well that it was not alleged that the mail fraud statute would have been violated had Hunt and Gray reported to state officials the fact of their financial gain. The violation asserted is the failure to disclose their financial interests, even if state law did not require it, to other persons in the state government whose actions could have been affected by the disclosure. It was in this way that the indictment charged that the people of Kentucky had been deprived of their right to have the Commonwealth's affairs conducted honestly.

Id. at __, 107 S. Ct. at 2882, 97 L. Ed. 2d at 303.

6. 18 U.S.C. § 1341 (1982).

7. *See id.*; *see also McNally*, __ U.S. at __, 107 S. Ct. at 2878, 97 L. Ed. 2d at 298. Hunt pleaded guilty to one count of mail fraud and was sentenced to prison for three years. To convict the other two defendants of defrauding Kentucky residents and their state government, the prosecution had to first show that Gray and McNally owed the fiduciary duty of loyalty and honesty to the state and the citizenry. Hunt was held to be a public fiduciary, even though he was not a public official nor employed by the state, because he "substantially participated in governmental affairs" and assumed the position of a de facto public official. *See id.* Gray had served in the Governor's Cabinet. *See* United States v. Gray, 790 F.2d 1290, 1295-96 (6th Cir. 1986). McNally, a businessman who had never held public office, was held to be a party to the fraudulent scheme. *See id.*

8. *See, e.g.*, United States v. Barber, 668 F.2d 778, 784 (3d Cir.)(state Alcoholic Beverage Commissioner defrauded citizens of right to honest, faithful government), *cert. denied*, 459 U.S. 829 (1982); United States v. Mandel, 591 F.2d 1347, 1353 (4th Cir. 1979)(Governor convicted of depriving Maryland citizens' right to render unbiased services and honest government), *cert. denied*, 424 U.S. 976 (1983); United States v. Isaacs, 493 F.2d 1124, 1150 (7th Cir.)(ex-Governor and ex-Director of Illinois Department of Revenue defrauded citizens of honest and faithful services), *cert. denied*, 417 U.S. 976 (1974). Strong authority existed for the prosecution of local officials under the mail fraud statute as well. *See, e.g.*, United States v. Keane, 522 F.2d 534, 538 (7th Cir. 1975)(city alderman defrauded citizens of right to consci-

whether the mail fraud statute extends to schemes to defraud citizens of their intangible rights to unbiased and honest state government.[9] Held—*Reversed*.[10] The mail fraud statute is restricted to the protection of property rights and does not extend to the intangible right to honest and impartial state government.[11]

Courts clarify ambiguous statutory law by following well-established canons of construction in resolving the meaning of statutory law.[12] Under these canons, courts must enforce a statute where its meaning is plain and clear without resorting to extrinsic materials to determine its meaning.[13]

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entious, unbiased services, and right to have city business conducted free from deceit), *cert. denied*, 424 U.S. 976 (1976); United States v. States, 488 F.2d 761, 762-63 (8th Cir. 1973)(two candidates for city positions convicted for defrauding residents), *cert. denied*, 417 U.S. 909 (1974); Shushan v. United States, 117 F.2d 110, 115 (5th Cir.)(city board president defrauded public by corruptly influencing Governor), *cert. denied*, 313 U.S. 574 (1941).

9. *See McNally*, __ U.S. at __, 107 S. Ct. at 2881-82, 97 L. Ed. 2d at 302. The majority stated the issue in the narrowest possible terms:

> The issue is thus whether a state officer violates the mail fraud statute if he chooses an insurance agent to provide insurance for the State but specifies that the agent must share its commissions with other named insurance agencies, in one of which the officer has an ownership interest and hence profits when his agency receives part of the commissions.

Id.

10. *See id.* at __, 107 S. Ct. at 2882, 97 L. Ed. 2d at 302-03. The convictions of Hunt and Gray were reversed because they were considered state officers. McNally's conviction was reversed since it was based on the substantive mail fraud count. *See id.*

11. *Id.* at __, 107 S. Ct. at 2881, 97 L. Ed. 2d at 302. "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read Section 1341 as limited in scope to the protection of property rights." *Id.*

12. *See, e.g.*, United States v. Montoya, 827 F.2d 143, 146 (7th Cir. 1987)(statutory interpretation is matter of law for courts); Barragan v. Workers' Compensation Appeals Bd., 240 Cal. Rptr. 811, 819 (Ct. App. 1987)(rules of statutory construction used when statute unclear); Brennan v. Kirby, 529 A.2d 633, 637 (R.I. 1987)(courts are final arbiters on question of construction); Midwest Mut. Ins. Co. v. Nicolazzi, 405 N.W.2d 732, 734 (Wis. Ct. App. 1987)(rules of statutory construction used with ambiguous statute); *see also* Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950)(collecting these judge-made rules). On the inevitable ambiguity of statutes, Justice Marshall remarked, "Condemned to the use of words, we can never expect mathematical certainty from our language." Grayned v. City of Rockford, 408 U.S. 104, 110 (1972). *See generally* J. HURST, DEALING WITH LAWSUITS (1982)(short work on statutory construction); 1 N. SINGER, STATUTES AND STATUTORY CONSTRUCTION (4th ed. 1985)(thorough treatment of judicial interpretation of statutory law); Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 344 (1977)(general introduction to how judges use canons).

13. *See, e.g.*, Catholic Social Servs. Inc. v. Meese, 664 F. Supp. 1378, 1382 (E.D. Cal. 1987)(construction unnecessary and unwarranted where statute clear); Streeter v. Sullivan, 509 So. 2d 268, 271 (Fla. 1987)(inquiry begins only where statute unclear on face); Lawson v. Ford Motor Co., 408 N.W.2d 256, 258 (Neb. 1987)(courts do not resort to interpretation where statutory words plain, direct and clear); State *ex rel.* Mountain States Mut. Casualty Co. v.

However, where a statute's meaning is ambiguous courts will seek to ascertain the intention of legislative bodies in order to achieve an accurate statutory construction.[14] In determining legislative intent, the statute itself will

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KNC, Inc., 740 P.2d 690, 691 (N.M. 1987)(construction proper only in case of ambiguity); Fuller v. Odom, 741 P.2d 449, 451 (Ok. 1987)(rules of construction unnecessary where legislative intent clear); State Bd. for Contractors v. H.B. Sedwick, Jr. Bldg. Supply Co., 360 S.E.2d 169, 173 (Va. 1987)(plain meaning must be accepted and rules of construction not required where statute clear); Marshall-Wisconsin Co. v. Juneau Square Corp., 406 N.W.2d 746, 772 (Wis. 1987)(court prohibited from looking beyond statute when meaning plain).

This canon of giving a statute its "plain meaning" was discussed by the Supreme Court in a case famous for its application of the rule. *See* Caminetti v. United States, 242 U.S. 470 (1917). In *Caminetti*, the defendant was found guilty under the White Slave Traffic Act which prohibits the transportation of a woman across state lines "for the purpose of prostitution or debauchery, or for any other immoral purpose." *Id.* at 488. The defendant was a college student who had transported a willing co-ed from Sacramento, California, to Reno, Nevada, where they intended to have sex. *See id.* at 483. Expounding the virtues of the plain-meaning rule, the majority found that the statutory phrase "for any other immoral purpose" encompassed Caminetti's "immoral" intentions. *Id.* at 484-86. The Court stated

> It is elementary that the meaning of a statute must . . . be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms . . . . Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.

Id. at 485.

While agreeing with the principle of the plain-meaning rule, the dissent concluded that the word "immoral" was such "a very comprehensive word" that the intention of Congress should be determined, or at least consulted, before enforcing the statute. *See id.* at 497. After reviewing the committee reports, reports from the bill's author, and the Attorney General's opinion, the dissent concluded that the statute was really aimed at commercialized vice. *See id.* at 496-99. *See generally* 2 C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46 (4th ed. 1986)(discussing plain meaning rule and pitfalls of literal interpretation); Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U.L.Q. 2, 8-10 (1939)(discussion of *Caminetti* case and argument against literal reading of statutes); Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 381 (1907)(short essay on judge's role in making distinctions in uncertain boundaries between law and morality).

The plain meaning rule has been severely criticized by commentators. *See, e.g.*, Merz, *Meaninglessness of Plain Meaning Rule*, 4 DAYTON L. REV. 31, 31 (1979)(judges use rule as crutch to justify weak interpretations, lighten intellectual workload, and conceal judge's personal conclusions); *Absurdity and Repugnancy of the Plain Meaning Rule of Interpretation*, Penner, 3 MANITOBA L.J. 53, 53 (1969)(plain meaning rule is plain nonsense); Murphy, *Old Statutes Never Die: The "Plain Meaning Rule" and Statutory Interpretation in "Modern" Federal Courts*, 75 COLUM L. REV. 1299, 1299 (1975)(plain meaning rule an excuse to rationalize judicial pronouncements).

14. *See, e.g.*, Maryland Dept. of Human Resources v. United States Dept. of Health & Human Servs., 648 F. Supp. 1017, 1023-24 (D. Md. 1986)(when doubt exists about clarity of language, courts must look to legislative intent); Kneeland v. National Collegiate Athletic Ass'n, 650 F. Supp. 1047, 1058 (W.D. Tex. 1986)(cardinal rule of statutory construction is to determine intent of legislature); Rhodes v. City of Hartford, 513 A.2d 124, 127 (Conn. 1986)(when confronted with ambiguous statute, courts seek legislative intent); Peters v.

be read as a whole by the courts.[15] Where examination of the statutory language fails to clarify the ambiguity, courts may consult committee reports, legislative debates and testimony in order to harmonize their interpretations with legislative intent.[16] One of the maxims peculiar to the

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Weatherwax, 731 P.2d 157, 161 (Haw. 1987)(duty of supreme court in construing statute to ascertain and give effect to intention of legislature); State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co., 513 A.2d 283, 286 (Me. 1986)(only when statute ambiguous must court seek legislative meaning); County of Lancaster v. Mason, 400 N.W.2d 238, 243 (Neb. 1987)(fundamental principle of statutory construction is to attempt to ascertain legislative intent); *Mountain States*, 740 P.2d at 691-92 (ascertainment of legislative intent proper only in cases of ambiguity); State v. Byrd, 398 N.W.2d 747, 749 (S.D. 1986)(purpose of canons to discover true intention of law); State v. Yudichak, 519 A.2d 1150, 1151-52 (Vt. 1986)(primary objective of construction to discover legislative intent).

Courts declare a statute ambiguous if the words in the statute may refer to several objects. *See, e.g., In re* Criminal Investigation No.1-162, 516 A.2d 976, 982 (Md. 1986)(ambiguity of statute exists when fairly read to have more than one meaning); McKay v. Board of Supervisors, 730 P.2d 438, 441 (Nev. 1986)(statute ambiguous when capable of being understood in two or more senses by reasonably informed persons); State *ex rel.* Neelen v. Lucas, 128 N.W.2d 425, 429 (Wis. 1964)(statute ambiguous if reasonable persons could disagree about meaning).

However, ambiguity of statutory meaning may be an inevitable result of the use of human language. As the court in *American Oil Co. v. State Highway* stated: "[S]o long as the meaning of words are not absolutes, so long as the content of words varies according to context, custom and usage, interpretation is implicit whenever a statute is read, even though the interpretation function is unexpressed." 177 A.2d 358, 360 (Vt. 1962).

15. *See, e.g.,* Biesler v. C.I.R., 814 F.2d 1304, 1307 (9th Cir. 1987)(courts must give effect to all words used by Congress); United States v. Jones, 811 F.2d 444, 447 (8th Cir. 1987)(statute must be read as whole to determine legislative intent); Harris Enters., Inc. v. Moore, 735 P.2d 1083, 1088 (Kan. 1987)(entire act must be considered and if possible, given effect); State v. Webster, 726 P.2d 831, 833 (Nev. 1986)(context must be examined to find spirit of law); 1000 Friends of Oregon v. Land Conservation & Dev. Comm'n, 737 P.2d 607, 612-13 (Or. 1987)(courts should harmonize different sections of whole act to give proper effect to legislative will); Stone v. Goulet, 522 A.2d 216, 218 (R.I. 1987)(statute must be considered in entirety).

16. *See, e.g.,* United States v. New Castle County, 642 F. Supp. 1258, 1267 (D. Del. 1986)(floor manager of House bill during floor debate deserves substantial weight in statutory construction); United States v. Vest, 639 F. Supp. 899, 909 (D. Mass. 1986)(legislative history obvious source of potential guidance for statutory construction); Samaritan Health Center v. Heckler, 636 F. Supp. 503, 515 (D.D.C. 1985)(all congressional reports could be considered in discerning legislative intent); Camaj v. S.S. Kresge Co., 393 N.W.2d 875, 879 (Mich. 1986)(statutory headings may be considered in construction); Board of County Comm'rs v. White, 729 P.2d 1347, 1350 (Nev. 1986) (testimony, committee discussions may be consulted for statutory construction purposes). *But see* Kelly v. Robinson, __ U.S. __, __, 107 S. Ct. 353, 361-62, 93 L. Ed. 2d 216, 225 (1986)(no significance attaches to statements in congressional hearings not made by members of Congress or included in official reports); People v. Overstreet, 726 P.2d 1288, 1292-93 (Cal. 1986)(legislator's statements about own understanding of bill not admissible to construe statute); Bradley Real Estate Trust v. Taylor, 515 A.2d 1212, 1216 (N.H. 1986)(personal recollections of draftsman of bill should not be considered in construction); Crawl v. Pennsylvania Hous. Fin. Agency, 511 A.2d 924, 927 n.7 (Pa. Commw. Ct.

interpretation of criminal statutes is that while an ambiguous criminal law must be enforced, the statutory language is to be strictly construed in the defendant's favor.[17] Where the statutory language is so vague that an accused cannot tell what behavior the law penalizes, courts will void the statute on due process grounds.[18]

Federal courts face additional complications in construing federal criminal statutes which the canons of construction cannot resolve.[19] Congress

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1986)(floor debate does not constitute legislative history for statutory construction purposes); Independent Producers Mktg. Corp. v. Cobb, 721 P.2d 1106, 1108-09 (Wyo. 1986)(affidavits of legislators not proper source of legislative history). *See generally* Emerson & Fuller, *How to Find and Use Federal Legislative Materials*, 51 W. VA. L.Q. 169 171-78 (1949)(examining variety of legislative materials); Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U.L.Q. 2, 5-9 (1939)(analyzing use of extrinsic aid in statutory construction).

17. *See, e.g.*, United States v. Gaggi, 811 F.2d 47, 58 (2d Cir.)(ambiguous penal statutes should be construed in favor of lenity), *cert. denied*, __ U.S. __, 107 S. Ct. 3214, 96 L. Ed. 2d 701 (1987); United States v. Cruz, 805 F.2d 1464, 1473 (11th Cir. 1986)(ambiguous criminal statues resolved in defendant's favor), *cert. denied*, __ U.S. __, 107 S. Ct. 1631, 95 L. Ed. 2d 204 (1987); State v. Koplin, 402 N.W.2d 423, 425 (Iowa 1987)(doubts resolved in defendant's favor); State v. Valentin, 519 A.2d 332, 323-24 (N.J. 1987)(penal laws must be construed against State); *cf.* State v. Burke, 408 N.W.2d 239, 246-47 (Neb. 1987)(construction of vague penal statutes requires constitutional considerations).

This canon is generally known as the rule of lenity. *See generally* 3 N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 11 (4th ed. 1986)(analyzes rule of lenity). Chief Justice Marshall remarked: "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." United States v. Wittberger, 18 U.S. (5 Wheat) 76, 95 (1820). For an argument against the strict interpretation of criminal statutes see Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 769-770 (1935) and Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, and Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 211-16, 224-33 (1967)(series of constitutional arguments against liberal interpretation of criminal statutes with emphasis on vagrancy laws).

18. *See* Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)(basic principle of fifth and fourteenth amendment guarantees of due process that statute is void if vague); *see also* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)(standard of vagueness defined); McBoyle v. United States, 283 U.S. 25, 27 (1931)(discussing policy reasons for void-for-vagueness doctrine); United States v. Cohen Grocery Co., 255 U.S. 81, 87 (1920)(statute void for vagueness if deprives accused of sixth amendment right to be informed of nature, cause of accusation in criminal trial). *See generally* 1A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION 136 (4th ed. 1985)(explaining that courts void vague statutes on various constitutional grounds despite no express grant of constitutional authority); Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831, 836-42 (1923)(follows federal courts early attempts at formulating void-for-vagueness doctrine).

19. *See, e.g.*, Evanston Ins. Co. v. Jimco Inc., 664 F. Supp. 1004, 1007 (M.D. La. 1987)(federal court's jurisdiction rests not on mechanical checklist but on careful balancing of important factors in each case); *see also* Frankfurter, *Some Reflections of the Reading of Statutes*, 47 COLUM L. REV. 527, 539-40 (1947)(describing sophisticated role of federal courts and their use of canons of construction).

has broad powers to impose criminal liability which the courts must enforce.[20] However, unlike state courts which may use common law to construe state statutes,[21] federal courts may neither imply nor create crimes out of the ambiguity of a federal statute.[22] Furthermore, prudential concerns of the federal-state relationship may require federal courts to limit the scope of a criminal statute where Congress has invaded legal territory properly reserved to the states.[23] Thus, judicial construction of ambiguous criminal

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20. *See* U.S. CONST. art. I, § 8, cl. 3, 18 (power of Congress to make federal crimes justified by broad interpretation of commerce clause and necessary and proper clause); *see also* Baker, *Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?*, 16 RUTGERS L.J. 495, 559 (1985)(explores wisdom of federalizing criminal behavior). Besides the implied powers, article I, section 8 expressly gives Congress power to punish counterfeiting in clause 6, piracies and felonies at sea in clause 10, and the power to protect federal enclaves in clause 17. *See id.* art. I, § 8, cl. 6, 10, 18. Treason is punishable under article III, section 3. *See id.* art. III, § 3, cl. 1.

21. *See, e.g.*, People v. Berry, 703 P.2d 613, 614 (Colo. Ct. App. 1985)(courts may rely on common law to amplify criminal statutes); Holland v. State, 302 So. 2d 806, 808 (Fla. Dist. Ct. App. 1974)(courts have discretion over crime through common law); Montgomery v. Kentucky, 346 S.W.2d 479, 480 (Ky. 1961)(common law looked to for distinction of crimes); State v. Hayes, 70 N.W.2d 110, 112-13 (Minn. 1955)(common-law concepts used in construction of criminal statutes); Commonwealth v. Abney, 171 A.2d 595, 597 (Pa. Super. Ct. 1961)(common law defined elements of offense); State v. LaPlume, 375 A.2d 938, 941-42 (R.I. 1977)(common law crime of conspiracy held applicable over similar conspiracy statute).

Many state codifications of criminal law expressly preserve common law crime. *See, e.g.*, FLA. STAT. ANN. § 775.01 (West 1976)(English common law crimes in full force in state); KAN. STAT. ANN. § 21-3102 (1982)(where crime undefined by statute, common law definition applied); R.I. GEN. LAWS § 11-1-1 (1981)(common law crime punishable at common law); VA. CODE ANN. § 18.2-16 (1982)(common law offenses punishable); WASH. REV. CODE ANN. § 9A.04.060 (1988)(common law supplements criminal statutes). *But see, e.g.*, COLO. REV. STAT. § 18-1-104 (1986)(common law crimes abolished, but case law may be used as interpretive aid in statutory construction); GA. CODE ANN. § 16-1-4 (1984)(no crime unless described statutorily); N.H. REV. STAT. ANN. § 625:6 (1986)(crime must be defined by statute).

22. *See* United States v. Worrall, 28 Fed. Cas. 774, No. 16,766 (C.C. Pa. 1798)(one of earliest cases to deny existence of federal common law crimes). In *Worrall*, because there was no statute prohibiting the defendant's attempt to bribe a federal government official, the prosecution urged that the court resort to federal common law to punish the defendant. *See id.* at 777. The court declined, concluding that the nature of the federalist system precluded the idea of a federal common law crime. *Id.*; *see also* United States v. Hudson, 2 U.S. (7 Cranch) 5, 7 (1812)(federal courts have no power to exercise criminal jurisdiction in common law cases). *See generally* Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1063-89 (1985)(discussing early controversies over federal power to define crimes); Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 2134-1300 (1985)(analyzing in historical context meaning of federal common law jurisdiction to define crimes).

23. *See* United States v. Kelem, 416 F.2d 346, 347 (9th Cir. 1969)(elementary that federal criminal statutes be strictly construed to avoid extending federal jurisdiction into state matters); Carroll v. City of Prattville, 653 F. Supp. 933, 938-39 (M.D. Ala. 1987)(federal courts must avoid federal-state friction when construing federal statutes); Ganoe v. Lummis, 662 F. Supp. 718, 772-73 (S.D.N.Y. 1987)(federal courts must consider comity between states and national government in statutory construction). *See generally* ADVISORY COMM. ON INTER-

statutes imposes upon federal courts the delicate task of enforcing congressional will without redefining the federal-state legal boundary or creating federal common law crimes.[24]

In 1872, Congress exercised its broad power to create federal crimes by enacting the mail fraud statute,[25] thereby making it a federal crime to use

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GOVERNMENTAL RELATIONS, A FRAMEWORK FOR STUDYING THE CONTROVERSY CONCERNING THE FEDERAL COURTS AND FEDERALISM (1986).

24. *See* Younger v. Harris, 401 U.S. 31, 44 (1971)(describing modern role of federal courts as matter of federal-state policy). The Court stressed that federal courts must be sensitive to and respect the states in the governing of the nation, and outlined why the scope of federal power will always be subject to change:

> This [system of united state governments separate and apart from a limited national government], perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to States' Rights any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect . . . federal interests, always endeavors to do so in ways that will not unduly interefere with the legitimate activities of the States.

Id.; *see also* Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982)(federal courts must consider whether state interests are at stake and respect state processes); Ruiz v. Estelle, 679 F.2d 1115, 1157 (5th Cir.)(federal courts' jurisdiction ultimately question of judicial power), *cert. denied*, 460 U.S. 1042 (1982); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydn, 675 F.2d 1169, 1173-74 (11th Cir. 1982)(federal courts must be sensitive to state court proceedings); Ziegler v. Ziegler, 632 F.2d 535, 539 (5th Cir. 1980)(federal courts should promote harmonious federal state relations); Ahrensfeld v. Stephens, 528 F.2d 193, 196-97 (7th Cir. 1975)(principles of equity, comity and federalism must be applied by federal courts); Torres Torres v. Hernandez Colon, 656 F. Supp. 372, 376 (D. Puerto Rico 1987)(federal courts must consider equitable restraint, comity, respect for federalism and dual sovereignty); Paxton v. Lanvin-Charles of the Ritz, Inc., 434 F. Supp. 612, 615 (S.D.N.Y. 1977)(federal court should hesitate to make federal forum available absent clear statutory directive).

25. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323. As originally passed, the statute read:

> That if any person having devised or intending to devise any scheme or artifice to defraud, or 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, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice (or attempting so to do), place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post-office establishment shall be guilty of a misdemeanor, and shall be punished with a fine of not more than five hundred dollars, with or without such imprisonment, as the court shall direct, not exceeding eighteen calendar months.

the postal service to execute a scheme to defraud.[26] The crime consists of only two elements: use of the mails and a scheme to defraud.[27] While the statute has been amended five times, its essential elements have remained unchanged over its 115-year history.[28] Courts have interpreted the language of the mail fraud statute broadly.[29] In *Durland v. United States*,[30] the Supreme Court concluded that the statute's term "to defraud" was not lim-

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Id. Congressional discussion reveals little about Congress' ultimate purpose. *See* CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870)(bill sponsor's reasoning for enactment).

26. *See* 18 U.S.C. § 1341 (1982). The federal mail fraud statute states in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme . . . [uses the mails] . . . shall be fined not more than $1000 or imprisoned not more than five years, or both.

Id.

27. Pereira v. United States, 347 U.S. 1, 8 (1953). *See generally* Crumbaugh, *Survey of the Law of Mail Fraud*, 1975 U. ILL. L.F. 237 (analyzing mail fraud elements); Note, *A Survey of the Mail Fraud Act*, 8 MEM. ST. U.L. REV. 673 (1978)(general survey of judicial interpretation of mail fraud elements); *see also* F. BAILEY & H. ROTHBLATT, 2 DEFENDING BUSINESS AND WHITE COLLAR CRIMES (1984)(includes tactical caveats for trial work).

28. *See* 18 U.S.C. § 1341 (1982). The Act was first amended in 1889 to specifically outlaw a host of various con games of the day, including the "sawdust swindle" and the circulation of "green cigars." Act of March 2, 1889, ch. 393, § 5480, 25 Stat. 873.

In 1909, the Act was again amended by adding "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" after "any scheme or artifice to defraud." Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130. This was the amendment that the majority found significant in *McNally v. United States*, __ U.S. __, __, 107 S. Ct. 2875, 2880, 97 L. Ed. 2d 292, 300-01 (1987).

The statutory language was revised in 1948 in more modern language, deleting the references to the nineteenth-century schemes. *See* Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 683, 763. The revision was not intended to change the statute's meaning, however. *See* H.R. REP. NO. 304, 80th Cong., 1st Sess. A100 (1949). A year later, the word "or" was replaced with the word "of" after the word "dispose." Act of May 24, 1949, ch. 139, § 34, 63 Stat. 89, 94. A 1970 amendment, Act of August 12, 1970, Pub. L. No. 91-375, ch. 56, § 12 (11), 84 Stat. 719, 778, merely replaced "Post Office Department" with "Postal Service." *See generally* Morano, *The Mail-Fraud Statute: A Procrustean Bed*, 14 J. MARSHALL L. REV. 45, 46-47 (1980)(tracing statute's history and arguing for stricter reading of statute). Views are opposing as to whether the statute should be narrowly or broadly construed. *Compare id. with* Rakoff, *The Federal Mail Fraud Statute*, 18 DUQ. L. REV. 772, 821-22 (1980)(concluding that history supports very broad reading); Comment, *The Intangible Rights Doctrine of Political Corruption; Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562, 567-78 (1980)(legislative history does not support broad meaning of fraud).

29. *See, e.g.*, Weiss v. United States, 122 F.2d 675, 681 (5th Cir.), *cert. denied*, 314 U.S. 687 (1941)("The law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity.") Another frequently quoted construction of the statutory language is found in *Gregory v. United States*: "The aspect of the 'scheme to defraud' is measured by [a] nontechnical standard. It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958); *see also* Hibey, *Application of the Mail and Wire Fraud Statutes to International Bribery: Questionable Prosecutions of Question-*

ited to the meaning under the common law but included "everything designed to defraud by representations to the past or present, or . . . to the future."[31] Shortly after *Durland* was decided, Congress added the clause "or for obtaining money or property" after the words "any scheme or artifice to defraud."[32] Because the legislative history does not disclose the ultimate purpose of the money-or-property clause, the phrase could be interpreted either as modifying the words it follows or as expressing an independent means of violating the mail fraud statute.[33]

While the Court had not construed the money-or-property clause before *McNally*, the Court did define "defraud" in *Hammerschmidt v. United States*[34] to include intangible rights.[35] Left with the task of determining the meaning of the money-or-property phrase, lower federal courts have unanimously decided that since the latter clause refers to the deprivation of tangible rights of property and money, the former phrase protects intangible rights.[36] Once having interpreted the statute to include intangible rights,

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able Payments, 9 GA. J. INT'L & COMP. L. 49, 58-59 (1979)(noting prevalence of broad judicial construction).

30. 161 U.S. 306 (1896).

31. *Id.* at 313-14 (1896)(Supreme Court first interpreted statutory language). Durland, the president of an investment company, was convicted under the mail fraud statute for selling mail bonds which he did not intend to honor. *See id.* Durland argued that the phrase "false pretenses" was limited by the common law definition requiring that a present fact and not a future promise be misrepresented to constitute fraud. *Id.* at 312-13. The Court disagreed. Reminding the defendant of the expansive statutory language "any scheme or artifice to defraud," the Court looked "beyond the letter of the statute" to find that the statute was intended to include "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." *Id.* at 313.

32. *See* Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130; *see also* CONG. REC. 1026 (1908). The following comments were apparently all that the sponsor thought necessary to make:

> MR. HEYBURN. I call attention to one change especially, in the latter part of the section, where the law is amended so as to include matter mailed outside of the United States. In order to avoid the provisions of existing law these fraudulent schemes have resorted to the plan of going outside of the United States to mail their fraudulent matter, and the law is amended so as to meet that condition which has presented itself to defeat the purpose of existing law. I do not think there is any other change, which is not obvious upon the face of the bill, that needs any further explanation.

Id. No one asked for an elaboration and Mr. Heyburn did not explain further. *See id.* (remarks of Rep. Heyburn).

33. *See* McNally v. United States, __ U.S. __, __, 107 S. Ct. 2875, 2880, 97 L. Ed. 2d 292, 301 (1987)(noting alternative statutory interpretations of disjunctive word "or").

34. 265 U.S. 182 (1924).

35. *See id.* at 188 ("defraud" includes interfering with government functions through dishonest means).

36. *See, e.g.*, United States v. Silvano, 812 F.2d 754, 759 (1st Cir. 1987)(schemes to defraud state and its citizens of intangible rights fall within mail fraud statute); United States v. Frankel, 721 F.2d 917, 920 (3d Cir. 1983)(first clause not restricted by 1909 amendment);

courts then brought the intangible right to honest state government under the mail fraud statute's protection.[37]

In *McNally v. United States*,[38] the United States Supreme Court confronted the issue of whether the mail fraud statute should be construed to protect intangible rights to honest and impartial state government.[39] The Court held that the mail fraud statute is limited to the protection of property rights and does not extend to the intangible right to honest and impartial state government.[40] Reviewing the history of the statute, five members of the Court determined that the phrase "or for obtaining money or property by means of false or fraudulent . . . representations . . . ," introduced in the 1909 amendment, limited the open-ended phrase "any scheme or artifice to defraud."[41] The Court reasoned that because the amendment's purpose was to reach future fraudulent schemes involving money or property, the use of the disjunctive "or" had no significance in its statutory construction.[42] Rather, the majority concluded that the amendment evidenced congressional intent to limit the scope of the statute to the protection of money and property rights.[43] The Court also applied the rule of lenity requiring strict inter-

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United States v. Scott, 701 F.2d 1340, 1343-44 (11th Cir. 1983)(phrasing in disjunctive prohibits two separate acts); United States v. Margiotta, 688 F.2d 108, 121 (2d Cir. 1982)(first clause independent of money-or-property clause), *cert. denied*, 461 U.S. 913 (1983); United States v. Halbert, 640 F.2d 1000, 1007 (9th Cir. 1981)(statute specifies several alternative ways to commit mail fraud offense); United States v. Brewer, 528 F.2d 492, 494-95 (4th Cir. 1975)(statute contains no restrictive language); United States v. Isaacs, 493 F.2d 1124, 1149-50 (7th Cir.)(mail fraud statute not restricted to cases of monetary or property loss), *cert. denied*, 417 U.S. 976 (1974); United States v. States, 488 F.2d 761, 764 (8th Cir. 1973)(natural construction of statute is to view phrases independently), *cert. denied*, 417 U.S. 909 (1974).

37. *See, e.g.*, United States v. Mandel, 591 F.2d 1347, 1358-59 (4th Cir. 1979)(mail fraud statute protects intangible rights), *cert. denied*, 445 U.S. 961 (1980); United States v. Keane, 522 F.2d 534, 545 (7th Cir. 1975)(breach of fiduciary duty violates mail fraud statute), *cert. denied*, 424 U.S. 976 (1976); *States*, 488 F.2d at 766 (mail fraud need not involve property or money); Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967)(statute protects accepted moral standards); Gouled v. United States, 273 F. 506, 508 (2d Cir. 1921)(any species of fraud punishable under statute).

38. __ U.S. __, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987).

39. *See id.* at __, 107 S. Ct. at 2881-82, 97 L. Ed. 2d at 302.

40. *See id.* at __, 107 S. Ct. at 2879, 97 L. Ed. 2d at 302. *But see* Carpenter v. United States, __ U.S. __, __, 108 S. Ct. 316, 320, 98 L. Ed. 2d 275, 283 (1987)(*McNally* did not distinguish on basis of tangible-intangible rights).

41. *See McNally*, __ U.S. at __, 107 S. Ct. at 2880, 97 L. Ed. 2d at 301 (concluding that amendment based on *Durland* holding).

42. *See id.*

43. *See id.* at __, 107 S. Ct. at 2880, 97 L. Ed. 2d at 300-01. "Congress codified the holding of *Durland* in 1909 and in so doing gave further indication that the statute's purpose is protecting property rights." *Id.*

pretation of ambiguous criminal statutes.[44] Finally, the Court noted that reading the statute any more broadly would improperly involve the federal government in defining ethical and administrative standards for state governments and their officials.[45]

Joined by Justice O'Connor, Justice Stevens dissented, finding the statutory language self-evidently broad.[46] Stressing that the statute's expansive goal is to cleanse the postal system of "any scheme . . . to defraud," the dissent criticized the majority for reading a money-or-property limitation into the first phrase of the statute without legislative history to support such a construction.[47] Justice Stevens noted that lower federal courts have unanimously agreed that the statute's language protects intangible rights.[48] While the majority declared that the word "defraud" in the mail fraud statute did not include intangible rights, Justice Stevens reminded the Court of the *Hammerschmidt v. United States*[49] decision where the Court construed the word "defraud" in the federal conspiracy statute[50] as encompassing intangi-

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44. *See id.* at __, 107 S. Ct. at 2881, 97 L. Ed. 2d at 302 (Court must choose more lenient reading of criminal statute unless statutory language clear and definite).

45. *See id.*

46. *See id.* at __, 107 S. Ct. at 2884, 97 L. Ed. 2d at 305 (Stevens, J., dissenting). Adding numbered brackets to stress the statute's grammatical structure, Stevens listed the statutory prohibitions as " '[1]*any* scheme or artifice to defraud, [2] *or* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, [3] *or* to sell, dispose of, loan . . . supply, or furnish or procure for any unlawful use any counterfeit or spurious coin . . . .' " *Id.*

For the dissent, the first clause punished all conduct not specified in the other two clauses. Since the other clauses prohibited schemes to defraud citizens of money or property rights, the first, broader phrase prohibited schemes to defraud citizens of intangible rights, such as rights to honest state government. *Id.*

47. *See id.* at __, 107 S. Ct. at 2885, 97 L. Ed. 2d at 306. Since the purpose of the statute is to protect the Postal Service from all fraudulent schemes, Stevens argued, it is an imaginative judicial construction which finds Congress undermining its own anti-fraud statute:

> Can it be that Congress sought to purge the mails of schemes to defraud citizens of money but was willing to tolerate schemes to defraud citizens of their right to an honest government, or to unbiased public officials? Is it at all rational to assume that Congress wanted to ensure that the mails not be used for petty crimes, but did not prohibit election fraud accomplished through mailing fictitious ballots?

Id.

As for the notion that the second clause somehow modified the first, the dissent reminded the majority that they, too, recognized that the phrases were indeed separate: "As we see it, adding the second phrase simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." *Id.* at __, 107 S. Ct. at 2881, 97 L. Ed. 2d at 302 (majority opinion).

48. *See id.* at __ nn.1-3, 107 S. Ct. at 2883 nn.1-3, 97 L. Ed. 2d at 305 nn.1-3 (case citations holding intangible rights protected under statute).

49. 265 U.S. 182 (1924).

50. 18 U.S.C. § 371 (1982). The statute criminalizes any conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose." *Id.*

ble rights.[51] Comparing the inconsistent interpretations of identical statutory terms, Justice Stevens criticized the majority for defining the same word broadly in one statute but narrowly in another.[52] The majority, Justice Stevens challenged, also misapplied the doctrine of strict construction to a statute unambiguously aimed at a crime known for its protean quality.[53] However, Justice Stevens was alone in his concerns both about the decision's impact on the prosecution of fraud crimes and what he concluded was the Court's more favorable treatment of the rights of politically powerful defendants.[54]

As the dissent repeatedly asserted, the majority's construction of the mail fraud statute is difficult to maintain.[55] Both the statute's language and grammatical construction are clear: the broad phrase "any scheme or artifice to defraud" is separated both by a comma and the disjunctive article "or," indicating that the former phrase is independent of the money-or-property clause.[56] Relying on its previous definition of "defraud," the majority

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51. *See* Hammerschmidt v. United States, 265 U.S. 182, 188 (1924). The Court in *Hammerschmidt* concluded that the word "defraud" "means primarily to cheat the Government out of property or money, . . . it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest." *Id.*

52. *See* McNally v. United States, __ U.S. __, __, 107 S. Ct. 2875, 2886, 97 L. Ed. 2d 292, 308 (Stevens, J., dissenting).

53. *See id.* at __, 107 S. Ct. at 2889, 97 L. Ed. at 312. Justice Stevens argued that the rule of strict construction of ambiguous penal laws does not require the courts to disregard legislative intent. *See id.* As for the chameleonic character of fraud crimes, Chief Justice Burger has noted that the varieties of fraud are limited only by the imagination of con artists. *See* United States v. Maze, 414 U.S. 395, 407-08 (1974)(urging that mail fraud statute remain wide in scope).

54. *See McNally*, __ U.S. at __, 107 S. Ct. at 2890, 97 L. Ed. 2d at 313 (Stevens, J., dissenting). Stevens predicted that the majority's opinion will immunize many types of fraud crimes formerly punishable under the mail fraud statute. *See id.* Stevens also had "lingering questions about why a Court that has not been particularly receptive to the rights of criminal defendants in recent years has acted so dramatically to protect the elite class of powerful individuals who will benefit from this decision." *Id.* at __, 107 S. Ct. at 2891, 97 L. Ed. 2d at 313-14.

55. *See id.* at __, 107 S. Ct. at 2882-90, 97 L. Ed. 2d at 303-13 (Stevens, J., dissenting).

56. *See id.* at __, 107 S. Ct. at 2876, 97 L. Ed. 2d at 297 (majority opinion). The majority concedes the point:

> Because the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently and that the money-or-property requirement of the latter phrase does not limit schemes to defraud to those aimed at causing deprivation of money or property.

Id. at __, 107 S. Ct. at 2880, 97 L. Ed. 2d at 301; *see also* Reiter v. Sonotone Corp., 442 U.S. 330, 338-39 (1978)("or" represents independent elements); Knutzen v. Eben Ezer Lutheran Hous. Center, 815 F.2d 1343, 1349 (10th Cir. 1987)(use of disjunctive indicates alternatives, unless context or congressional intent indicates otherwise); State v. Silseth, 339 N.W.2d 868, 870 (N.D. 1987)("or" means alternatives); Sparkman v. McClure, 498 So. 2d 892, 895 (Fla.

declared that the word meant "the deprivation of something of value . . . by deceit . . .," which did not include the deprivation of a right to ethical government.[57] Furthermore, the definition that the majority chose to rely upon is from *Hammerschmidt v. United States*, a case which expressly repudiated the very point which they were advancing—that the word "defraud" is commonly understood to be limited to the deprivation of property rights.[58] Perusing the admittedly "sparse" legislative history, the majority nonetheless found it "unmistakable" that Congress intended the statute to be limited to the protection of property rights.[59] The majority offered no evidence, other than the money-or-property amendment itself, to lend support to this interpretation of congressional intent.[60] Moreover, it is illogical that Congress would have added a money-or-property restriction to a statute which, according to the Court's rationale, already protected money and property rights.[61]

1986)("or" creates alternatives). *See generally* R. Gorrell & C. Laird, MODERN ENGLISH HANDBOOK 23 (1986)(word "or" joins independent elements).

Yet the Court decided that the second phrase somehow modified the broader phrase. *See McNally*, __ U.S. at __, 107 S. Ct. at 2880, 97 L. Ed. at 301. The lack of reasoning and evidence puzzled the dissent who wondered where the restriction came from, if not from the statute's own language. *See id.* at __ U.S. at __, 107 S. Ct. at 2885, 97 L. Ed. 2d at 306 (Stevens, J., dissenting).

57. *See McNally*, __ U.S. at __, 107 S. Ct. at 2880, 97 L. Ed. 2d at 301-02. The majority admitted the weakness of this argument as well, conceding that their judicial construction of fraud in 18 U.S.C. § 371 has never been limited to property interests. *See id.* at __, 107 S. Ct. at 2881, 97 L. Ed. 2d at 301; *see also* Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)(property or pecuniary loss not necessary to constitute crime under statute).

58. *See Hammerschmidt*, 265 U.S. at 188. In *Hammerschmidt*, the Court construed the meaning of the phrase "to defraud the United States, or any agency thereof in any manner or for any purpose" in the federal criminal conspiracy statute, 18 U.S.C. § 371. *See id.* The Court concluded that while "defraud" primarily refers to the deprivation of money and property, the meaning of the word extends to interference with lawful governmental activities in a dishonest way. *Id.*

59. *See McNally*, __ U.S. at __, 107 S. Ct. at 2881, 97 L. Ed. 2d at 302. Justice Stevens argued that the legislation passed by Congress in the late nineteenth century was deliberately written in broad language in order to give the federal courts wide discretion in carrying out congressional intent. *See id.* at __, 107 S. Ct. at 2888, 97 L. Ed. 2d at 310-11 (Stevens, J., dissenting).

60. *See id.* at __, 107 S. Ct. at 2879-80, 97 L. Ed. 2d at 311 (majority opinion). The Court indulges in some confused circular thinking: The statute, the majority asserts, was originally aimed exclusively at the protection of property rights because the 1909 amendment indicates that Congress intended to so limit the statute. The reason that the 1909 amendment is proof of Congress' limited view of the statute is supported by Congress' original purpose in drafting the statute. Neither proposition is supported by any evidence, as the dissent argues: the original statute prohibited any fraudulent schemes and the 1909 amendment simply codified *Durland*'s even broader definition of fraud, supplementing, not changing the original statute. *See id.* at __, 107 S. Ct. at 2888-89, 97 L. Ed. 2d at 311 (Stevens, J., dissenting).

61. *See id.* at __, 107 S. Ct. at 2879-80, 97 L. Ed. 2d at 300-02 (majority opinion). The

Not only did the majority strain the plain-meaning rule, the Court also misused the rule of lenity in a statute whose meaning the Court found unambiguous.[62] The majority devoted a single sentence to the only defensible rationale for its decision, namely that it is offensive to the federalist system for federal prosecutors to set standards of honesty and impartiality for states and their governments.[63] The wide latitude of prosecutorial discretion which broad interpretation of the statute made possible had already troubled federal courts.[64] The courts had become particularly agitated by the continuing expansion of federal authority which threatened to upset traditional notions of federalism.[65]

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question of why Congress would choose to supplement the statute with redundant language is not addressed by the majority opinion. The Court says that the statute "had its origin in the desire to protect individual property rights," and a review of the legislative history does reveal that the protection of property rights was foremost in the minds of the Congressmen. *See* Morano, *The Mail-Fraud Statute: A Procrustean Bed*, 14 J. MARSHALL L. REV. 45, 46-47 (1980)(tracing history of statute). However, the issue is not whether Congress contemplated the protection of property rights, but whether Congress intended the statute *solely* for the protection of property rights and intended to exclude other intangible or non-property interests. *See McNally*, __ U.S. at __, 107 S. Ct. at 2886-87, 97 L. Ed. 2d at 307-09 (Stevens, J., dissenting). As scores of appellate opinions have long since concluded, the phrase "any scheme or artifice to defraud" is unmodified by any express or implied limitations to property rights. *See id.* at __, 107 S. Ct. at 2883-84, 97 L. Ed. 2d at 307.

62. *See id.* at __, 107 S. Ct. at 2889, 97 L. Ed. 2d at 312. The rule of lenity is applied in cases where the statute is unintelligible or so unclear that the prohibited conduct cannot be determined with any reasonable certainty. *See* 3 N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 59 (4th ed. 1986). The mail fraud statute prohibits the use of the mails to further any scheme to defraud. *See* 18 U.S.C. § 1341 (1982). Thus, while the statute is extremely broad, the criminalized conduct is hardly ambiguous. *See id.* Further, even if the statute had been ambiguous, the Court clarified the statute's meaning some time ago with Chief Justice Taft's *Hammerschmidt* opinion. *See McNally*, __ U.S. at __, 107 S. Ct. at 2889-90, 97 L. Ed. 2d at 312 (Stevens, J., dissenting).

63. *See McNally*, __ U.S. at __, 107 S. Ct. at 2881, 97 L. Ed. 2d at 302.

64. *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 502-03 (1985)(Court noting that prosecutorial discretion only restraining influence on inexorable expansion of mail fraud statute); United States v. Weiss, 752 F.2d 777, 791 (2d Cir.)(broad interpretation may permit federal prosecutors to apply prohibitions in imaginative ways), *cert. denied*, 474 U.S. 944 (1985); United States v. Siegel, 717 F.2d 9, 23-24 (2d Cir. 1983)(self-evident danger in creating vast areas of discretion for federal prosecutors); United States v. Margiotta, 688 F.2d 108, 143 (2d Cir. 1982)(freeswinging club of mail fraud statute affords federal prosecutors raw political power through selective prosecution), *cert. denied*, 461 U.S. 913 (1983).

According to a law review article which Justice Stevens cites with approval, federal prosecutors had come to see the statute as "our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law 'darling,' but we always come home to the virtues of 18 U.S.C. Section 1341, with its simplicity, adaptability, and comfortable familiarity. It understands us . . . ." Rakoff, *The Federal Mail Fraud Statute*, 18 DUQ. L. REV. 771, 771 (1980).

65. *See, e.g., Weiss*, 752 F.2d at 791 (extraordinary expansion of mail fraud statute into areas some believe reserved to states); *Siegel*, 717 F.2d at 23-24 (inexorable expansion of mail

If the majority did not elaborate on the nature of federalism, the dissent ignored the considerations of federalism altogether.[66] Instead, the dissent made an equally untenable interpretation of the statute's legislative history.[67] Justice Stevens highlighted the absence of any congressional intent to limit the phrase "any scheme or artifice to defraud" and then deduced that the phrase was meant to include fraudulent schemes to deprive citizens of scrupulous state government.[68] Like the majority conclusion he criticized, Justice Stevens' conclusion is not affirmatively supported by the mail fraud statute's legislative history.[69] For support, the dissent emphasized that the canons of construction have led all lower courts to interpret the statute broadly.[70] However, the lower courts are more constrained in statutory construction than the Supreme Court which alone has the discretionary power to alter its own opinions regarding a statute.[71] In fact, many of the very

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fraud statute results in catch-all federal common law crime); United States v. Mandel, 591 F.2d 1347, 1357 (4th Cir. 1979)(reviewing problems inherent in ever-expanding use of mail fraud statute into exclusive domain of State regulation); United States v. Craig, 573 F.2d 355, 397 (1977)(mail fraud statute's broad interpretation follows pernicious trend improperly expanding federal jurisdiction); United States v. Maze, 468 F.2d 535, 536 (6th Cir. 1972)(federal court jurisdiction limited, should not construe mail fraud statute into areas which states should control), *cert. denied*, 414 U.S. 395 (1973); United States v. Kelem, 416 F.2d 346, 347 (9th Cir. 1969)(mail fraud statute should not extend so far to interfere with state activities). *See generally* Baxter, *Federal Discretion in the Prosecution of Local Political Corruption*, 10 PEPPERDINE L. REV. 321, 345-46, 376 (1983)(decision of federal prosecutors should be controlled and harmonious with traditional notions of federalism); Miner, *Federal Courts, Federal Crimes and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117, 118-21 (1987)(detailing dangers of statute's expansion); Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion*, 13 LAW & CONTEMP. PROBS. 64, 77 (1948)(foreseeing day when broad reading results in prosecutorial discretion becoming political issue).

66. *See McNally*, __ U.S. at __, 107 S. Ct. at 2882-91, 97 L. Ed. 2d at 304-13 (Stevens J., dissenting). Although he did not address the issue of federalism, Stevens did "recognize that there may have been some overly expansive applications of § 1341 in the past." *Id.* at __, 107 S. Ct. at 2890, 97 L. Ed. 2d at 312-13.

67. *See id.* at __, 107 S. Ct. at 2888-89, 97 L. Ed. 2d at 311-12.

68. *See id.*

69. *See* United States v. Barta, 635 F.2d 999, 1005 (2d Cir. 1980)(judicial construction complicated by sparse legislative history and absence of congressional guidance), *cert. denied*, 450 U.S. 998 (1981); United States v. Computer Sciences Corp., 511 F. Supp. 1125, 1133-34 (E.D. Va. 1981)(nothing in legislative history to show whether 1909 amendment was intended to supplement or replace previous meaning of statute), *rev'd on other grounds*, 698 F.2d 1181 (1982), *cert. denied*, 459 U.S. 1105 (1983); *see also* Coffee, *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. 173, 287 (1981)(remarking on lack of legislative history).

70. *See McNally*, __ U.S. at __, 107 S. Ct. at 2883-84, 97 L. Ed. 2d at 301, 304-05 (Stevens, J., dissenting).

71. *See* Durnill v. J.E. Dunn Const. Co., 186 F.2d 27, 29 (8th Cir. 1951)(duty of lower courts to follow court of last resort); Ingbar v. Enzor, 664 F. Supp. 814, 816-18 (S.D.N.Y. 1987)(explaining expansion of statute as result of tacit Supreme Court approval).

courts which the dissent cited have expressed strong apprehension of the mail fraud statute's broad language and have intimated that the Supreme Court should exercise its unique judicial power and limit the statute's reach.[72] Finally, the dissent criticized the majority for limiting the meaning of "defraud" in the instant case while giving it a more expansive definition in the criminal conspiracy statute.[73] Contending that "defraud" should have but one definition, the dissent overlooked the critical distinction between the

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72. *See McNally*, __ U.S. at __, 107 S. Ct. at 2883, 97 L. Ed. 2d at 304 (Stevens, J. dissenting). Stevens cited twelve cases to lend support to his contention that "[t]here is no reason . . . to upset the settled, sensible construction that the federal courts have consistently endorsed." *Id.* at __, 107 S. Ct. at 2886, 97 L. Ed. 2d at 307. Of these twelve cases only one involved a federal official. *See* United States v. Diggs, 613 F.2d 988 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980)(federal congressman). Of the eleven remaining cases, five are decisions from the seventh circuit: *United States v. Holzer*, 816 F.2d 304 (7th Cir. 1987); *United States v. Bush*, 522 F.2d 641 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976); *United States v. Keane*, 522 F.2d 534 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976); *United States v. Staszcuk*, 502 F.2d 875 (7th Cir. 1974), *cert. denied*, 423 U.S. 837 (1975); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). The latest seventh circuit case of mail fraud is the only case cited by the dissent which discusses some of the problems with the statute. *See* United States v. Holzer, 816 F.2d 304, 309 (7th Cir. 1987). While still reading the statute broadly to encompass intangible non-property interests, the court in *Holzer* nevertheless conceded that any greater latitude in judicial construction would allow federal judges to define criminal conduct from the statute's ambiguity. *See id.*

The first circuit case cited by Stevens acknowledged the legitimate criticism of the statute's broad reading but followed the authority of the Supreme Court which had earlier rejected the argument for a narrower reading. *See* United States v. Silvano, 812 F.2d 754, 758-59 (1st Cir. 1987)(rejecting defendant's arguments that broad reading contrary to congressional intent, invaded state jurisdiction, and violated basic notions of federalism). A reading of the second circuit decision which Stevens cited reveals anything but hardy support for the dissent's proposition that the meaning and use of the statute is clear. *See* United States v. Margiotta, 688 F.2d 108, 120 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983). While the majority in *Margiotta* decided to "tread most cautiously" in construing the statute, the dissent was more forthright in its objections to a broad reading of the statutory language. *See id.* at 139-44 (Winter, J., dissenting). Circuit Judge Winter was especially distressed by a "limitless" mail fraud statute which is implicated by accusations of dishonesty in heated political contests. *See id.* at 143 (that every active participant subject to criminal investigation means potential for abuse by federal prosecutors).

Justice Stevens also cited *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1983), which also reviewed the problems inherent in "the ever expanding use of the mail fraud statute to reach activities that heretofore were considered within the exclusive domain of State regulation." *Id.* at 1357.

The remaining cases cited merely follow the mandate of the Supreme Court, or cite no authority at all. *See* United States v. Barber, 668 F.2d 778 (3d Cir.), *cert. denied*, 459 U.S. 829 (1982); United States v. Classic, 35 F. Supp. 457, 457 (E.D. La. 1940). Thus, Justice Stevens' mere listing of case names to support an expansive reading of the statute fails to candidly recognize the federal courts' difficulties and fears of the broad interpretation of the statute to protect rights to good state government.

73. *See McNally*, __ U.S. at __, 107 S. Ct. at 2886-88, 97 L. Ed. 2d at 307 (Stevens, J., dissenting)("fraud" definition in conspiracy statute should be dispositive).

two statutes: the more broadly interpreted conspiracy statute is free of the problems inherent in the mail fraud statute because the former protects only the federal government where the federal-state boundary is clear and undisputed.[74]

While the majority's reasoning in *McNally* was supported by a questionable use of the canons of construction, its conclusion was nevertheless sound. With increasing frequency, federal prosecutors have been imposing federal criminal liability on state officials—from governors to judges to lower-level bureaucrats—solely on the grounds that these state officers failed to meet the United States Attorneys' own notions of good state government. Like the *McNally* defendants, the accused need not have been state officers. Nor were violations of state law prerequisites for federal prosecutors to fine and imprison federal defendants for denying citizens of "honest" state government. All that was otherwise necessary for a successful federal prosecution was a mailing, which in some sense furthered what the federal officers decided was a scheme to deprive citizens of "honest and impartial" state government. This previously unchecked discretion in the hands of federal officials required a limitation in order to reestablish a more reasonable federal-state equilibrium. While the federal government has the undisputed power to regulate the federal postal system, state voters have the undisputed authority over their state governments and thus are the more appropriate arbiters of what does—and does not—constitute honest and impartial state government.

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74. *See id.* at __, 107 S. Ct. at 2886-87, 97 L. Ed. 2d at 307-09. The dissent viewed the majority's distinction between the two statutes this way: "The Court nonetheless suggests that interpreting the two statutes differently can be justified because Section 371 applies exclusively to frauds against the United States, while Section 1341 benefits private individuals." *Id.* at __, 107 S. Ct. at 2886, 97 L. Ed. 2d at 308.

However, the majority simply said "we believe that the broad construction of . . . Section 371 is a statute aimed at protecting the Federal Government alone . . . ." *Id.* at __ n.8, 107 S. Ct. at 2881 n.8, 97 L. Ed. 2d at 302 n.8. In other words, section 371 does not entangle federal prosecutors in defining "good" government for the states. *See id.*