CRIMINAL LAW—MAIL FRAUD—INTANGIBLE RIGHTS DOCTRINE REJECTED AS CONTRARY TO LEGISLATIVE INTENT—*McNally v. United States*, 107 S. Ct. 2875 (1987).

Increasing public intolerance of impropriety in political affairs within the last several decades has coincided with federal law enforcement efforts to find criminal elements in such conduct.[1] The federal mail fraud statute[2] has been widely employed in this regard.[3] This act proscribes using the mails to further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[4] It is now well-settled that there must be an intentional mailing in furtherance of the plan.[5] However, the requisite objective of the fraudulent scheme within the breadth of the statute's prohibition has been articulated with less certainty by the courts.[6] The relative absence of legislative, constitutional, or judicial limits on the mail fraud act has permitted federal prosecutors to adopt a broad, literalistic reading of the act's language to combat a vast range of deceitful activities otherwise outside

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[1] *See* Baxter, *Federal Discretion in the Prosecution of Local Political Corruption*, 10 PEPPERDINE L. REV. 321, 321-23 (1983) (discussing escalating federal law enforcement efforts to prosecute corrupt local politicians).

[2] 18 U.S.C. § 1341 (1982).

[3] *See* Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 DUQ. L. REV. 771, 771-73 (1980) ("[M]ail fraud has frequently represented the whole instrument of justice that could be wielded against the ever-innovative practitioners of deceit.").

[4] 18 U.S.C. § 1341 (1982) provides 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, or to sell, dispose of, loan, exchange . . . for unlawful use any counterfeit or spurious coin, obligation, security . . . 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 the mail . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Id.

[5] *See, e.g.*, Pereira v. United States, 347 U.S. 1, 8 (1954); United States v. Kaplan, 554 F.2d 958, 965 (9th Cir.), *cert. denied*, 434 U.S. 956 (1977).

[6] *See, e.g.*, Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 425 (1983). The author notes that "[m]eaningful judicial limitation on the statute's growth has been minimal. In short, the courts have approved a functional definition of the statute in terms of the prosecutions the government has brought. They repeatedly have declined to articulate any bright line boundaries of the concept of fraud." *Id.* at 425 (footnote omitted).

the reach of federal jurisdiction.[7] In the area of state and local political corruption, prosecution under the mail fraud statute has occurred despite the lack of tangible injury.[8]

In the presence of extensive lower federal court interpretation of the mail fraud statute,[9] the United States Supreme Court recently examined the parameters of the nebulous "scheme . . . to defraud" language of the act.[10] In *McNally v. United States*,[11] the Court considered whether the statute extends to deceptive schemes in which the participants use the mails for personal advantage, yet do not deprive anyone of tangible property or economic value, but only of "intangible rights," such as the basic right of citizens to honest government.[12] By holding that the mail fraud act reaches only those frauds which result in the deprivation of tangible property, the Court declined to affirm the previous latitude accorded the statute.[13]

McNally involved a patronage scheme through which public officials of the state of Kentucky and their political allies used their influential positions to divert insurance commissions to both themselves and their cronies.[14] After Democrat Julian Carroll became Governor in 1974, he assigned Howard Hunt, state democratic party chairman, de facto control over choosing the agents from whom Kentucky would purchase workmens' compensation insurance.[15] For several years prior to Carroll's election, the Wombwell Insurance Company of Lexington, Kentucky (Wombwell) had performed this function for the state.[16] Pursu-

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7 *See* Rakoff, *supra* note 3, at 772 (listing the various areas of fraud to which the statute has been applied).

8 *See* United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980). *See generally* Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562 (1980) (discrediting previously recognized support for the statute's application to intangible corruption schemes).

9 *See infra* note 32 (citing lower federal court's interpretation of the mail fraud statute).

10 *See* McNally v. United States, 107 S. Ct. 2875 (1987).

11 *Id.*

12 *See id.* at 2877.

13 *Id.* at 2881.

14 *Id.* at 2877.

15 *Id.* While normally this is the responsibility of the state insurance commissioner, the Governor delegated this authority to Hunt. Brief for the United States at 3, McNally v. United States, 107 S. Ct. 2875 (1987) (Nos. 86-234 & 86-286) [hereinafter Brief for the United States].

16 *McNally*, 107 S. Ct. at 2877. The designated agent, acting as a broker, would purchase the insurance policies from a large underwriting insurance company, which subsequently paid the agent commissions on a percentage basis. *See id.*

ant to an agreement between Hunt and Wombwell, the company was permitted to continue functioning as the state's agent, provided it share commissions received from the underwriting insurers in excess of $50,000 per year with various insurance agencies designated by Hunt.[17]

Anticipating the inception of this arrangement, Hunt and petitioner James Gray[18] established Seton Investments, Inc. (Seton), an insurance agency whose sole purpose was to benefit from the commission-sharing scheme.[19] Seton was also ostensibly owned by petitioner Charles McNally, a private citizen and political supporter of Governor Carroll.[20] Seton received a large portion of the diverted commissions during the four years the arrangement was in effect.[21] The money was ultimately used for the personal benefit of Hunt and Gray.[22] Similarly, Wombwell was directed to send payments to another company, the Snodgrass Insurance Agency, which acted as a conduit and passed the money on to McNally for his private use.[23]

In June of 1983, the petitioners were indicted for both mail

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[17] *Id.* At trial it was undisputed that the agencies who received shares of the commission payments were chosen based on political patronage. *See* Brief for Petitioner Gray In No. 86-286, at 4, McNally v. United States, 107 S. Ct. 2875 (1987) (Nos. 86-234 & 86-286) [hereinafter Brief for Petitioner Gray]. In fact, petitioner Gray contended that such commission sharing arrangements are both lawful and common:

> [F]or instance, if a church seeks to obtain a liability insurance policy that requires a large insurer to underwrite it, the church often will choose one parishioner to serve as agent for the purchase of insurance with the understanding that the commission for writing that policy will be split with other parishioners who also are insurance agents. In this way the church avoids having to choose among its members upon whom to confer a particular benefit.

Id. (citations omitted).

[18] Petitioner Gray was a private citizen at the time the agreement was struck. *See* United States v. Gray, 790 F.2d 1290, 1293 (6th Cir. 1986), *rev'd sub nom.* McNally v. United States, 107 S. Ct. 2875 (1987). The court noted, however, that in January, 1976, Gray was appointed by Governor Carroll to the position of Secretary of Public Protection and Regulation. *Gray*, 790 F.2d at 1293. While in this position, "Gray had supervisory authority over [the insurance commissioner]. Gray also served as Secretary of the governor's cabinet from January of 1977 until August of 1978." *Id.*

[19] *See McNally*, 107 S. Ct. at 2877-78. The government pointed out that Seton had "no office, no telephone, and no employees, and engaged in no business activity." Brief for the United States, *supra* note 15, at 4 (citation omitted).

[20] *Gray*, 790 F.2d at 1293.

[21] *McNally*, 107 S. Ct. at 2877-78.

[22] *Gray*, 790 F.2d at 1293. The money was used to purchase two condominiums, in Kentucky and Florida, as well as a station wagon. *Id.* Additionally, $38,500 was turned over to Hunt's son. *Id.*

[23] *Id.*

fraud and conspiracy to commit mail fraud.[24] The United States alleged that Gray and McNally had intended to defraud Kentucky's citizens and government of their "right to have the Commonwealth's business conducted honestly," as well as to "obtain . . . money . . . by means of false and fraudulent pretenses . . . and the concealment of facts."[25] The violation allegedly occurred when the insurance company writing the policies mailed a commission check to Wombwell.[26] The conspiracy charges arose by virtue of the collaborative efforts of the petitioners.[27] The trial court instructed the jury, inter alia, that it was not necessary to find any pecuniary harm to the state to convict; only that, pursuant to a fiduciary duty[28] owed the state and its citizens, the petitioners had effectively schemed to deny those citizens their " 'intangible rights,' such as the right to have [government function] honestly, impartially and free from corruption and official misconduct."[29]

The jury convicted petitioners on both counts,[30] and the United States Court of Appeals for the Sixth Circuit affirmed.[31] Embracing the intangible rights rationale widely accepted by other lower federal courts,[32] the Sixth Circuit concluded that the

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[24] *Id.* at 1293-94. Hunt, also indicted for mail fraud, pleaded guilty and was sentenced to three years in prison. *McNally*, 107 S. Ct. at 2878.

[25] *Gray*, 790 F.2d at 1294. The prosecution argued that the intent to defraud arose through the petitioner's "failure to disclose their financial interest [in the insurance agencies], even if state law did not require it, to other persons in the state government whose actions could have been affected by [it]." *McNally*, 107 S. Ct. at 2882 n.9. The indictment further alleged that because of this non-disclosure, the state and its citizens were defrauded of their right "to be made aware of all relevant . . . facts . . . when . . . expanding [sic] the funds of the Commonwealth." *Gray*, 790 F.2d at 1293.

[26] *Gray*, 790 F.2d at 1294.

[27] *Id.*

[28] The trial judge instructed the jury that this duty and its subsequent breach could be found based on two possible scenarios. *McNally*, 107 S. Ct. at 2878-79. The first required finding that either or both Gray and McNally had aided and abetted Hunt, who had used his authority to direct commissions to a company in which he had an undisclosed ownership interest. *Id.* at 2879. The second possibility was that Gray, in his official government capacity, had supervisory authority over the insurance purchased during the period that Seton, in which he had an undisclosed ownership interest, had received commission payments, with McNally's involvement turning on whether he had aided and abetted Gray in this regard. *Id.*

[29] *Gray*, 790 F.2d at 1294.

[30] *Id.*

[31] *Id.* at 1298.

[32] *See, e.g.*, United States v. Holzer, 816 F.2d 304 (7th Cir. 1987); United States v. Silvano, 812 F.2d 754 (1st Cir. 1987); United States v. Girdner, 754 F.2d 877 (10th Cir. 1985); United States v. Odom, 736 F.2d 104 (4th Cir. 1984); United States v. Scott, 701 F.2d 1340 (11th Cir.), *cert. denied*, 464 U.S. 856 (1983); United

mail fraud statute extends to schemes where no one is divested of tangible property.[33] The court grounded its holding on the perceived inherent fiduciary characteristics of public service.[34] Subsequently, the Supreme Court granted certiorari[35] and reversed the petitioners' convictions, holding that the mail fraud statute protects only tangible property rights.[36]

The original mail fraud statute,[37] enacted during a recodification of the postal laws in 1872, was primarily intended to provide a tool by which the federal government could reach the rapidly increasing number of swindles conducted through the

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States v. Barber, 668 F.2d 778 (4th Cir.), *cert. denied*, 459 U.S. 829 (1982); United States v. Von Barta, 635 F.2d 999 (2d Cir. 1980); United States v. Diggs, 613 F.2d 988 (D.C. Cir. 1979); United States v. Louderman, 576 F.2d 1383 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978); United States v. Brown, 540 F.2d 364 (8th Cir. 1976); Shushan v. United States, 117 F.2d 110 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941).

[33] *Gray*, 790 F.2d at 1295 (citing United States v. Mandel, 591 F.2d 1347, 1364 (4th Cir.), *aff'd en banc in relevant part*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980)).

[34] The court acknowledged the widely accepted principle that only one member of the conspiracy need be a public fiduciary in order to maintain a violation of the statute, and further that this role is implicated even when "an individual who has no formal employment relationship with government . . . substantially participate[s] in government operations so as to assume a fiduciary duty to the general citizenry." *Id.* at 1295 (citing United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983)). This is because once endowed with the trust that accompanies an influential connection with governance, it logically follows that use of such a role for personal advantage is, in essence, a breach of the concomitant duty to perform with integrity and pursue only the best interests of the state and its citizens. *See, e.g.*, United States v. Bush, 522 F.2d 641, 646-48 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976). *See also* Comment, *Federal Prosecution of Elected State Officials for Mail Fraud: Creative Prosecution or an Affront to Federalism?*, 28 AM. U.L. REV. 63, 64-65 (1978). Under these circumstances, tangible harm becomes irrelevant. *See* Shushan v. United States, 117 F.2d 110, 115 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941). *Shushan* was an early case discussing the fiduciary aspect of public office. The court noted:

> A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public. . . . No *trustee* has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an [sic] one must in the federal law be considered a scheme to defraud.

Shushan, 117 F.2d at 115 (emphasis added). The court reasoned that both Gray, by his actual official status, and Hunt, through his assignment of de facto control over the insurance purchases, sufficiently participated in the governmental process to sustain the guilty verdicts. *Gray*, 790 F.2d at 1296.

[35] McNally v. United States, 107 S. Ct. 642 (1986).

[36] McNally v. United States, 107 S. Ct. 2875, 2881 (1987).

[37] Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323 (current version at 18 U.S.C. § 1341 (1982)).

mails during that era.[38] Though containing language which focused primarily on the mailing element of the offense,[39] the initial act proscribed "any scheme or artifice to defraud," as does its modern version, 18 U.S.C. § 1341.[40] Despite being amended five times since its enactment, the substance of the mail fraud statute has nonetheless generally remained the same.[41] The most significant change occurred in 1909, when the language "or for obtaining money or property by means of false or fraudulent

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[38] *See McNally*, 107 S. Ct. at 2879. During debates on the statute, its sponsor, Representative Farnsworth, described a typical mail fraud scheme as follows:

> They send out genuine specimens of fractional currency, and say to their correspondents, "We can sell you so much of this money for so much." In their circulars they may, perhaps, send a genuine twenty-five or fifty cent currency note. The person receiving the circular may not be particularly ignorant, but being somewhat greedy, he shows it to some banker or broker, who, of course, pronounces it to be good money. Thereupon, the countryman immediately sends to the address of the agent, in New York, for instance, ten, fifteen, or twenty dollars, with an order for so much as it may purchase. A box or package is sent to him, perhaps, which upon being opened is found to contain waste paper, sawdust, or may be bogus money. . . . The countryman who has done this finds that through his avariciousness he has been betrayed into doing a very mean thing, and when caught, perhaps, does not like to make any noise about it for fear his neighbors may laugh at him. Thus all through the country thousands of innocent and unsophisticated people, knowing nothing about the ways of these city thieves and robbers, are continually fleeced and robbed, and the mails are made use of for the purpose of aiding them in their nefarious designs.

CONG. GLOBE 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth). *See also* Rakoff, *supra* note 3, at 779-82 (attributing the increase in swindles conducted through the mails to the growth of the national economy after the end of the Civil War).

[39] Originally, in determining the punishment for a violation of the act, the court was required to "proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device." Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323 (current version at 18 U.S.C. § 1341 (1982)).

[40] Section 301 provides in pertinent part:

> That if any person having devised or intending to devise any scheme or artifice to defraud, or be effected . . . by means of the post-office establishment of the United States . . . shall, in and for executing such scheme or artifice . . . place any letter or packet in any such post-office . . . 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 . . . .

Id.

[41] *See* Act of March 2, 1889, ch. 393, § 1, 25 Stat. 873 (amended 1909); Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130 (amended 1948); Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 763 (amended 1949); Act of May 24, 1949, ch. 139, § 34, 63 Stat. 94 (amended 1970); Act of Aug. 12, 1970, Pub. L. No. 91-375, 84 Stat. 719 (current version at 18 U.S.C. § 1341 (1982)).

pretenses, representations, or promises" was added.[42] It is upon this portion of the statute that the intangible rights doctrine is founded.[43] This 1909 amendment was prompted by Congress's desire to codify the first Supreme Court decision broadly construing the statute's prohibition against frauds conducted through the postal service.[44]

In *Durland v. United States*,[45] the Court considered the predecessor to section 1341, and evaluated the defendant's contention that the "scheme . . . to defraud" provision of the statute was limited by the common law definition of fraud, such that the deceit must pertain to a past or present fact, as opposed to promises with respect to the future.[46] The Court declined to limit the provision, explaining that a broad interpretation was warranted in order to further the statute's purpose of prohibiting misuse of the mails and protecting "the public against all such intentional efforts to despoil."[47] Notwithstanding this broad interpretation of the act, no indication of its application beyond tangible property rights was evident in the *Durland* opinion.[48]

Since the codification of *Durland*, the essential elements of the mail fraud statute have continued to be devising a scheme to defraud and using the mails in furtherance of that scheme.[49] Beyond this, the gravamen of the offense in terms of the intent of the criminal scheme within the reach of the federal statute is not as readily gleaned from the wording of the act.[50] The sparse legislative history and disjunctive phrasing of the activities censured by the mail fraud act after the 1909 amendment have permitted wide latitude in interpreting its provisions.[51]

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42 Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130 (current version at 18 U.S.C. § 1341 (1982)).

43 *See* Comment, *supra* note 8, at 569-70.

44 *See* Durland v. United States, 161 U.S. 306 (1896) (the Court's first interpretation of the mail fraud statute). *See also* Comment, *supra* note 8, at 570 (noting that the key language of the decision also appears in the 1909 amendment).

45 161 U.S. 306 (1896).

46 *Id.* at 312. The defendant in *Durland* was convicted of participating in a scheme involving the sale of fraudulent interest-bearing bonds. *Id.*

47 *Id.* at 313-14.

48 *See id.* at 312-15.

49 *See* Pereira v. United States, 347 U.S. 1, 8 (1954); Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958). *See generally* Comment, *Survey of the Law of Mail Fraud*, 1975 U. ILL. L.F. 237 (1975) (outlining general rules applicable to the mail fraud act).

50 *See* Morano, *The Mail Fraud Statute: A Procrustean Bed*, 14 J. MARSHALL L. REV. 45, 55 (1980).

51 *See supra* notes 7-10 and accompanying text.

Lower federal courts have uniformly adopted a broad construction of the mail fraud statute to bring a wide range of schemes involving both public and private individuals within the purview of the statute.[52] In all of these cases, the courts' rationale was premised on the existence of a fraudulent plan in which a fiduciary duty was breached and correlative disloyalty displayed.[53] The courts have achieved these results by finding that the provisions of section 1341 encompass independent, mutually exclusive species of frauds.[54] Those schemes intending to cause economic, "tangible" harm to the victim have been held forbidden by the latter phrase "or for obtaining money, property."[55] Those plans devised to violate individuals "intangible rights, contrary to public policy and fail[ing] to measure up to accepted moral standards and notions of honesty and fair play," have been held to contravene the former, original language of the act.[56]

In the private sector, the courts have found this fiduciary duty implicit in the nature of an employment relationship.[57] For example, in *United States v. Procter & Gamble Co.*,[58] the mail fraud charge was based on a scheme in which a corporate defendant had bribed a competitor's employee to obtain certain trade secrets.[59] Notwithstanding the actual economic harm involved in the case,[60] the court reasoned that because an employment relationship necessarily includes honest and loyal service, it follows that tampering with that relationship is, in effect, "defrauding the employer of a lawful right."[61] As support for this conclusion, the court quoted a much earlier decision which explained, "[i]f it is

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52 *See* Rakoff, *supra* note 3, at 772.

53 *See, e.g.*, United States v. Mandel, 591 F.2d 1347, 1360-63 (4th Cir.), *aff'd en banc in relevant part*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). *See also* Badders v. United States, 240 U.S. 391, 393 (1916) ("Whatever the limits to [Congress'] power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy . . . ."). *Accord* Parr v. United States, 363 U.S. 370, 385 (1960). *But see* Epstein v. United States, 174 F.2d 754, 766 (6th Cir. 1949) (recognizing constructive frauds as outside the scope of the mail fraud act based on an absence of an immoral act).

54 *See* Morano, *supra* note 50, at 48-49.

55 *E.g.*, United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980).

56 *Mandel*, 591 F.2d at 1360.

57 *See* Hurson, *supra* note 6, at 428-29.

58 47 F. Supp. 676 (D. Mass. 1942).

59 *Id.* at 678.

60 *Id.* As a result of this scheme, "certain experimental cakes of soap, secret processes, formulas, facts and figures, etc., belonging to [the employer were] turned over to Procter & Gamble Company." *Id.*

61 *Id.*

said to be a man's duty not to betray . . . his employer, and he is made to do so, that is fraud in the eye of the law."[62]

The Seventh Circuit reached a similar conclusion in *United States v. George*.[63] In *George*, three defendants were convicted of mail fraud for partaking in a scheme regarding the purchase of cabinets for use by the Zenith Radio Corporation (Zenith).[64] A cabinet buyer employed by Zenith solicited from only one bidder and consequently received kickbacks from that supplier.[65] The arrangement was in patent violation of Zenith's express conflict-of-interest policy.[66] The indictment alleged deprivations of both money and property and of the "faithful performance of its employee."[67]

The defendants in *George* argued that since no direct evidence was presented at trial to show that the cost had been passed on to Zenith, nor evidence of any preferential treatment paid to the supplier, no scheme to defraud existed within the scope of the mail fraud act.[68] The Seventh Circuit rejected these arguments.[69] The court explained that no proof of actual injury is necessary under section 1341.[70] Moreover, the court held that intent to deprive the employer of honest and loyal service is sufficient to sustain a violation under the statute.[71] According to the court, this intent was sufficiently evidenced by the undisclosed kickback payments.[72] With respect to the actual fraud charge, the court found that a fraud had been perpetrated on Zenith.[73] While acknowledging that "[n]ot every breach of every fiduciary duty works a criminal fraud," the court nonetheless found that Zenith had suffered "a very real and tangible harm" to the extent it was deprived of the competitive bargaining edge in securing the lowest possible price for needed goods.[74] This injury re-

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62 *Id.* at 678-79 (quoting Roxburgh v. M'Arthur, 3 Scot. Sess. (2d series) 556 (1841)).

63 477 F.2d 508 (7th Cir), *cert. denied*, 414 U.S. 827 (1973).

64 *George*, 477 F.2d at 510.

65 *Id.* The payments were hidden by addressing false commission invoices to the supplier from a third company through which the money was funneled. *Id.* at 510-11.

66 *Id.* at 511.

67 *Id.* at 510.

68 *See id.* at 511-12.

69 *Id.* at 512.

70 *See id.*

71 *See id.* at 513-14.

72 *Id.* at 514.

73 *Id.* at 512.

74 *Id.* at 512-13 (footnote omitted).

sulted from the employee holding himself out as loyal and acting in the best interests of Zenith, while failing to disclose the money paid to him by the supplier.[75]

The mail fraud act has been widely used to combat similar intangible frauds in the public arena.[76] In the seminal case of *United States v. States*,[77] the Eighth Circuit was confronted with appeals from convictions for mail fraud arising out of an intricate enterprise through which the defendants, candidates for election to local office, had used the mails to submit fictitious absentee ballots.[78] Charged with scheming to defraud the public of "certain intangible political and civil rights," the defendants argued that because no money or property was involved in the scheme, no offense cognizable under the mail fraud statute had occurred.[79] This argument was based on a conjunctive reading of the provisions of the mail fraud statute, such that the phrase "scheme . . . to defraud" was modified by "[or] for obtaining money or property."[80] The defendants further maintained that applying section 1341 to schemes of this nature was an intrusion into the domain of state regulation, contravening traditional principles of federalism.[81]

After a thorough examination of the wording of the mail fraud act, as well as the available authority interpreting it, the court concluded that "[t]he more natural construction . . . is to view the two phrases independently."[82] Consequently, the court held that the intent of a forbidden scheme is not limited to the

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75 *See id.* at 514.

76 *See* Rakoff, *supra* note 3. The author, a former United States attorney, extols the virtues of the broad interpretation accorded section 1341, explaining:

> To federal prosecutors of white collar crime, the mail fraud statute is 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. § 1341, with its simplicity, adaptability, and comfortable familiarity. It understands us and, like many a foolish spouse, we like to think we understand it.

Id. at 771 (footnotes omitted).

77 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974).

78 *States*, 488 F.2d at 762.

79 *Id.* at 763-65.

80 *Id.* at 763-64.

81 *See id.* at 766-67. The defendant-appellants argued that such a broad extension of the mail fraud act resulted in federal "policing" of state elections, and that "Congress has never explicitly authorized such widespread intervention into state affairs." *Id.*

82 *Id.* at 764.

acquisition of money or property.[83] As support for this holding, the court explained that the "[l]aw puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of the members of society.' "[84] The court concluded that "any kind or species of scheme or artifice to defraud is punishable in the national courts . . . [provided] the postal establishment is used."[85]

After *States*, the use of section 1341 as a vehicle to obtain convictions of corrupt politicians greatly increased.[86] Often these cases involved high ranking officials and as a result were the subject of much public attention and scrutiny.[87] For example, in *United States v. Mandel*,[88] the Governor of Maryland and others were charged and convicted under section 1341 of "defraud[ing] the citizens of the State of Maryland and her governmental departments . . . of the right to . . . disinterested and honest government through bribery . . . and concealment of material information."[89] The government's evidence showed that Governor Mandel had promoted certain pending racetrack legislation which was favorable to the interests of racetrack investors, his associates and friends, in exchange for "financial and other benefits."[90] The defendants argued that this prosecution was an unconstitutional intrusion into the affairs of the state, and that schemes of this sort, in which no one was deceived into parting with tangible property, were not within the ambit of section 1341.[91]

Addressing the issue of tangible injury, the Fourth Circuit observed that the question of whether bribery of public officials can be prosecuted under this federal statute "has long since been

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83 *See id.*

84 *Id.* (quoting Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967)).

85 *Id.* (quoting Gouled v. United States, 273 F. 506, 508 (2d Cir. 1921)).

86 *See* United States v. Isaacs, 493 F.2d 1124, 1149-52 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). *See also* Comment, *supra* note 8, at 562 n.2.

87 *See generally* Comment, *supra* note 34 (analyzing the propriety of federal jurisdiction under the mail fraud act to prosecute local and state politicians).

88 591 F.2d 1347 (4th Cir.), *aff'd en banc in relevant part*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980).

89 *Mandel*, 591 F.2d at 1359-60 (footnote omitted).

90 *Id.* at 1355-57.

91 *Id.* at 1357. "Appellants cryptically state, '[n]o previous mail fraud prosecution has permitted conviction of a public official to rest upon the slim reed of a federal prosecutor's untutored notion of what the public or the state should expect by way of an ethical and honest performance of a state official's duties.' " *Id.*

answered in the affirmative."[92] The court reasoned that to the extent a bribed government official decides issues in favor of the payor's special interest, the public is deprived of its entitlement to impartial and honest service.[93] Hence, the court of appeals held that the allegations of bribery were prosecutable under the mail fraud statute even absent economic injury.[94] The court further concluded that the federalism argument was without merit, noting the validity of federal jurisdiction over the postal system which had been utilized in the bribery scheme.[95]

By far the broadest expansion of the intangible rights reading of section 1341 was its use in the prosecution of a private citizen in *United States v. Margiotta*.[96] In *Margiotta*, the Second Circuit imposed the same onus of public fiduciary status on a private citizen by virtue of participation tantamount to dominance in the affairs of local government.[97] As a result, the intangible rights doctrine was invoked to support a conviction for mail fraud.[98]

Joseph Margiotta, chairman of the Republican Committee of both Nassau County and Hempstead Township, Long Island, was convicted of mail fraud for pursuit of a kickback scheme involving the purchase of insurance for these public entities.[99] Evidence adduced at trial portrayed Margiotta as a public patriarch with a pervasive influence over the affairs of the local government.[100]

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92 *Id.* at 1362.

93 *Id.* (citing United States v. Brown, 540 F.2d 364, 374 (8th Cir. 1976)). The court traced the logic of this analysis as follows:

> It is clear from . . . many . . . cases that the fraud involved in the bribery of a public official lies in the fact that the public official . . . is not exercising his independent judgment in passing on official matters. A fraud is perpetrated upon the public to whom the official owes fiduciary duties, e.g., honest, faithful and disinterested service. When a public official has been bribed, he breaches his duty of honest, faithful and disinterested service. While outwardly purporting to be exercising independent judgment in passing on official matters, the official has been paid for his decisions, perhaps without even considering the merits of the matter. Thus, the public is not receiving what it expects and is entitled to, the public official's honest and faithful service.

Id. (citation omitted).

94 *See id.* at 1362-63.

95 *See id.* at 1358.

96 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

97 *Margiotta*, 688 F.2d at 121-22.

98 *Id.* at 122.

99 *Id.* at 113.

100 *Id.* at 113-20. The indictment alleged that Margiotta formed a secret arrangement by which he caused a certain insurance agency to be designated the Broker of Record for these bodies in return for the kickback of "a substantial portion of its commissions in accordance with [his] instructions." *Id.* at 120.

He used his position to compel the award of commissions earned on the purchase of public insurance to his political associates.[101] Although this long-time practice was not forbidden by state law,[102] the government nonetheless posited that it was a fraudulent kickback scheme, harmful to the integrity of the postal system.[103] After one jury failed to reach a decision, a second jury convicted Margiotta of use of the postal system to deprive and defraud the town, county, and citizens of their right to have governmental affairs conducted honestly.[104]

Recognizing that the key issue on appeal was one of first impression, a majority of the Second Circuit affirmed the mail fraud convictions of Margiotta and his accomplices.[105] With respect to section 1341, the court cautioned against the dangerous repercussions to the democratic system, with its constant partisan tension, of "prosecut[ing for mail fraud] those who simply participate in the affairs of government in an insubstantial way."[106] Upon examination of the evidence relating to Margiotta's degree of involvement in government, the court concluded that he had indeed stepped over the line of that "important distinction" between partisan affairs and the business of government and thus "dominated governmental affairs as a de facto public leader."[107] In affirming the convictions, the court embraced the intangible rights doctrine as a valid extension of the mail fraud statute to Margiotta.[108] Judge Winter, in an opinion in which he concurred in part and dissented in part, criticized the elastic application of section 1341 as a prophylactic measure to reach "political disingenuousness . . . beyond any colorable claim of Congressional intent."[109] The dissent also explained that the majority's decision may validate random and capricious prosecu-

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101 *Id.*

102 *See id.* at 124. The court explained that, even absent state laws against such activities, "[t]he mail fraud statute was enacted to prohibit the use of the mails for promoting schemes deemed contrary to federal public policy." *Id.*

103 *See id.* at 114-15.

104 *Id.* at 119.

105 *Id.* at 112-13.

106 *Id.* at 120. The court cautioned that "[s]uch a rule would threaten to criminalize a wide range of conduct, from lobbying to political party activities, as to which the public has no right to disinterested service." *Id.* at 122.

107 *Id.* The court plainly stated, "we do not believe that a formal employment relationship, that is, public office, should be a rigid prerequisite to a finding of fiduciary duty in the public sector." *Id.* (citing United States v. Del Toro, 513 F.2d 656, 663-64 n.4 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975)).

108 *See id.* at 123.

109 *Id.* at 139 (Winter, J., concurring in part and dissenting in part).

tions or encourage its use by ambitious prosecutors to gain public recognition and praise.[110]

In response to the trend of expanding the scope of the mail fraud act, the United States Supreme Court recently decided *McNally v. United States*.[111] In an opinion authored by Justice White,[112] the Court unequivocally rejected the intangible rights doctrine as a basis for federal prosecution under the mail fraud act.[113] The Court read the provisions of the act conjunctively, limiting the reach of section 1341 to those schemes involving concrete injury.[114] Initially, Justice White observed that the statute clearly and expressly protects property rights, but makes no reference to other abstract, intangible rights.[115] In an effort to discern which of two plausible constructions of the statute was more in accord with the intent of Congress when the crucial "money or property" language was added,[116] Justice White undertook a classic analysis of the history of the mail fraud statute.[117]

Justice White began his inquiry by looking to the available

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110 *See id.* at 140, 143 (Winter, J., concurring in part and dissenting in part). Judge Winter voiced similar concerns in a later opinion, in which the concept of fiduciary fraud was applied to corporate directors and officers to sustain violations of the analogous wire fraud statute, 18 U.S.C. § 1343. *See* United States v. Siegel, 717 F.2d 9, 10-13 (2d Cir. 1983). The judge noted that "[a]dequate notice to those affected by such elastic concepts is simply not possible," and concluded that, by virtue of the court's decision, "a crime is created which by its nature will be prosecuted infrequently and in a highly selective manner." *Id.* at 24 (Winter, J., concurring in part and dissenting in part). Moreover, Judge Winter posited that "[i]f judges perceive a need for a catch-all federal common law crime, the issue should be addressed explicitly with some recognition of the dangers, rather than continue an inexorable expansion of the mail and wire fraud statutes under the pretense of merely discharging Congress' will." *Id.*

111 107 S. Ct. 2875 (1987).

112 *Id.* at 2877. Chief Justice Rehnquist and Justices Brennan, Marshall, Blackman, Powell, and Scalia joined in the majority opinion. Justice Stevens filed a dissenting opinion, joined in part by Justice O'Connor. *Id.*

113 *See id.* at 2881.

114 *Id.*

115 *Id.* at 2879.

116 *See id.* at 2880.

117 *See id.* at 2879. *See* 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45.05, 20-23 (4th ed. 1984). In an early English case, Lord Blackburn stated the general rule regarding statutory construction as follows:

> In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of the word varies according to the circumstances with respect to which they were used.

legislative history of the mail fraud act.[118] The Justice noted that statements made in the legislative history indicated that the original impetus behind the promulgation of the statute was the need to create a means of protecting the public from postal frauds in which they were swindled out of money or property.[119] Moreover, Justice White concluded that the 1909 amendment to the act implicitly supported this finding of congressional intent.[120] He observed that the amendment was undisputedly a codification of the Supreme Court's *Durland* holding, which explained that the statute should be construed broadly to blanket " 'everything designed to defraud by representations.' "[121] Accordingly, the Court stated that the fact that Congress chose the more specific and limited language of "or for obtaining money or property" logically gives rise to an assumption that these specific tangible interests were what the legislature was addressing.[122] Absent other substantive amendments,[123] however, Justice White acknowledged that it remained tenable that Congress had chosen the disjunctive "or" as a purposeful method of creating two separate, distinct proscriptions, the former unlimited by the material requirement of the latter.[124] The Court, therefore, turned to the common law definition and historical understanding of the term "to defraud" in further efforts to ascertain legislative intent.[125]

Justice White noted that in an earlier case the Court had defined the words "to defraud" as "wronging one in his property

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Id. at 21 (citing River Wear Comm'rs v. Adamson, LR 2 AC 743 (1877)).

Likewise, as early as 1584, Lord Coke explained:

> And it was resolved by them, that for the full and true interpretation of all statutes in general . . . four things are to be discerned and considered:—1st. What was the common law before the making of the act? 2nd. What was the mischief and defect for which the common law did not provide? 3rd. What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth? And 4th. The true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief, advance the remedy, and to suppress subtle invention and evasions for continuance of the mischief . . . and to add force and life to the cure and remedy, according to the true intent of the makers of the act . . . .

Id. (citing Heydon's Case, 3 Co Rep. 72, 76 Eng. Rep. 637 (1584)).

118 *McNally*, 107 S. Ct. at 2879.

119 *Id.*

120 *Id.* at 2880. *See supra* note 42 and accompanying text.

121 *McNally*, 107 S. Ct. at 2880 (quoting Durland v. United States, 161 U.S. 306, 313 (1896)).

122 *See id.*

123 *See id.* at 2880 n.6.

124 *Id.* at 2880.

125 *Id.*

rights . . . usually . . . depriv[ing the victim of] something of value."[126] The Justice also observed that there was no indication of an intended departure from this prevailing understanding of the term of art in the mail fraud act.[127] Accordingly, the majority summarily held the 1909 amendment to be solely an attempt to clarify the fact that fraudulent future promises directed toward the property of another and effectuated through the postal service were also proscribed by the statute.[128]

To further support this essentially novel limitation on federal jurisdiction under the mail fraud act, the Court resorted to longstanding canons of statutory construction.[129] Justice White explained that in cases where two rational readings of a criminal statute are feasible, the more lenient alternative must prevail unless Congress has clearly indicated otherwise.[130] The majority further observed that when presented with statutes such as section 1341, which extend federal jurisdiction into matters usually inaccessible, implications of privacy and state sovereignty make the issue particularly significant.[131] Justice White implicitly recognized federalism concerns by explaining that the broader interpretation of the mail fraud statute "leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials."[132]

The majority's analysis of the mail fraud act concluded with a virtually defensive challenge to Congress, explaining that if it "desires to go further, it must speak more clearly than it has."[133] Turning to the facts presented in the instant case, Justice White carefully reviewed the jury instructions for any reference to the requisite tangible harm.[134] Finding the element of pecuniary injury absent, the Court reversed the petitioners' convictions and remanded the case.[135]

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126 *Id.* at 2880-81 (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)) (footnote omitted).

127 *Id.* at 2881.

128 *Id.*

129 *See id.*

130 *Id.* (citing United States v. Bass, 404 U.S. 336, 347 (1971); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952)).

131 *See generally* Comment, *supra* note 34, at 66 ("analyz[ing] the propriety of escalating federal involvement in state and local political corruption cases").

132 *McNally*, 107 S. Ct. at 2881.

133 *Id.*

134 *Id.* at 2882.

135 *Id.* The majority pointed out that the government's belated assertion on ap-

In a dissenting opinion joined in part by Justice O'Connor,[136] Justice Stevens vehemently opposed the action taken by the majority of the Court.[137] The Justice criticized the majority's decision as incongruent with the abundant judicial opinions which have reached the opposite result.[138] To reinforce this position, Justice Stevens surveyed the various public and private contexts in which there had been successful prosecutions under section 1341, and observed a common reliance on the intangible rights theory.[139]

Addressing the construction of the mail fraud statute adopted by the majority, Justice Stevens found it "senseless" in light of the original purpose of the act.[140] Even if, arguendo, the term "to defraud" was permanently restricted by an originally constrained definition, the dissent could not rationally conclude that Congress had nonetheless remained tolerant of schemes which threatened to taint both the postal service and, in the case of political corruption, the institution of democratic society.[141] Conversely, Justice Stevens interpreted the various amendments to section 1341 as attempts by the legislature to broaden the purview of the statute.[142]

In support of its position, the dissent offered authority for a broad interpretation of the mail fraud act, as well as several definitions of the term "fraud" which differed from those noted in the majority's opinion.[143] The Justice then reviewed 18 U.S.C.

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peal that Wombwell was defrauded of tangible property by the petitioners could not cure the fatally defective charge to the jury. *Id.*

136 *Id.* (Stevens, J., dissenting). Justice O'Connor joined in parts I, II, and III of the dissent. *Id.*

137 *See id.* at 2885 (Stevens, J., dissenting).

138 *See id.* at 2885, 2890 (Stevens, J., dissenting). Justice O'Connor did not join in part IV of the dissent, in which Justice Stevens stated, "[t]he quality of this Court's work is most suspect when it stands alone, or virtually so, against a tide of well-considered opinions . . . [e]ven if I were not so persuaded, I could not join a rejection of such a longstanding, consistent interpretation of a federal statute." *Id.* at 2890 (Stevens, J., dissenting).

139 *Id.* at 2883-84 nn.1-5 (Stevens, J., dissenting).

140 *Id.* at 2886-87 (Stevens, J., dissenting).

141 *Id.*

142 *Id.* at 2889 (Stevens, J., dissenting). The Justice noted, "[d]uring the past century, both Congress and the Supreme Court have repeatedly placed their stamps of approval on expansive use of the mail fraud statute. Indeed, each of the five legislative revisions of the statute has served to enlarge its coverage." *Id.* (citing Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 DUQ. L. REV. 772, 772-73 (1980)).

143 *Id.* at 2887-88 (Stevens, J., dissenting). The Justice observed that "fraud . . . 'applie[s] to every artifice made use of by one person for the purpose of deceiving another . . . any cunning, deception, or artifice used to circumvent, cheat, or

§ 371, an analogous federal statute criminalizing conspiracies against the United States, which also contained the "to defraud" phrase.[144] Justice Stevens surveyed the interpretative history of the statute and found that it had repeatedly been used to redress intangible harms.[145] He observed that the majority opinion summarily distinguished between 18 U.S.C. § 1341 and 18 U.S.C. § 371 in a footnote based on the limited province of section 371 to actions against the United States.[146] According to the dissent, however, this distinction becomes "ludicrous" in light of the similar conduct the legislature addressed in promulgating each statute.[147]

Justice Stevens further maintained that the majority's reliance on the doctrine of lenity was erroneous.[148] He explained that prior judicial decisions have effectively mooted this point by removing any ambiguity in the meaning of the "scheme . . . to defraud" provision.[149] The dissent posited that notwithstanding the possibility of "some overly expansive applications of section 1341 in the past,"[150] the petitioners in *McNally* "knew that it would be unlawful to place Kentucky's insurance coverage with an agent who would secretly make hundreds of thousands of dollars available for the private use of petitioners, their relatives, and their paramours."[151]

The Supreme Court's holding in *McNally* is seemingly a clear and absolute rejection of the theory that violation of the federal criminal law may be based on schemes which make use of the mails to contravene the intangible rights of others.[152] Future allegations of schemes which defraud persons of their "right to honest and faithful government" are effectively precluded by this

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deceive another.' " *Id.* at 2887 (Stevens, J., dissenting) (quoting 1 J. STORY, EQUITY JURISPRUDENCE § 186, 189-90 (1870)). The Justice continued that " '[f]raud in its elementary common law sense of deceit . . . includes the deliberate concealment of material information in a setting of fiduciary obligation.' " *Id.* at 2888 (Stevens, J., dissenting) (quoting United States v. Holzer, 816 F.2d 304, 307-08 (7th Cir. 1987)).

144 *See id.* at 2886. 18 U.S.C. § 371 (1982) provides in pertinent part: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof . . . each shall be fined . . . or imprisoned . . . or both." *Id.*

145 *McNally*, 107 S. Ct. at 2886 (Stevens, J., dissenting).

146 *Id. See also id.* at 2881 n.8.

147 *Id.* at 2886-87 (Stevens, J., dissenting).

148 *Id.* at 2889 (Stevens, J., dissenting).

149 *Id.* at 2889-90 (Stevens, J., dissenting).

150 *Id.* at 2890 (Stevens, J., dissenting).

151 *Id.*

152 *Id.* at 2881.

decision.[153] Several questions left unresolved by the majority opinion, however, may mitigate the apparently comprehensive effects of the *McNally* decision.[154]

One issue that remains unclear from the *McNally* Court's holding pertains to the requisite causation that the government must plead. Because reversal of the convictions in *McNally* turned on the absolute lack of any reference to tangible harm in the jury charge,[155] sufficiency of the evidence was not discussed by the Court. Thus the procedural question remaining is the nature of the tangible injury that must be alleged in future prosecutions to make out a prima facie case of mail fraud. Whether actual, proximate loss of money or property by a principal must be asserted, or if charges of implicit deprivations consonant with traditional principles of agency[156] will suffice, is a pragmatic con-

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153 *Id.* at 2890 (Stevens, J., dissenting).

154 *See, e.g., infra* note 155.

155 *McNally*, 107 S. Ct. at 2882. The Court explains, "there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property. . . . Although the government now relies in part on the assertion petitioners obtained property [fraudulently from Wombwell], there was nothing in the jury charge that required such a finding." *Id.* Similarly, with respect to allegations of more remote injury caused by the fraudulent scheme, the Court noted, "[i]t was not charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium. . . . Nor was the jury charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent." *Id.*

156 *See, e.g.*, United States v. Faser, 303 F. Supp. 380, 383-84 (E.D. La. 1969); United States v. Hoffa, 205 F. Supp. 710, 716 (S.D. Fla. 1962). *See* Morano, *supra* note 50, at 60-64. Professor Morano explains:

> Although the courts generally deny that conviction for fiduciary fraud requires proof of pecuniary or other property loss, they nevertheless find that whenever an employee receives kickbacks, the employer is in fact defrauded to that extent. The argument is that if the party doing business with a company is willing to pay kickbacks to its employee, then this party is willing to enter into an agreement with the company at least as favorable to the firm as a bestowal of the discount on the company itself. Thus, the self-serving employee is unjustly enriched by the kickback.

Id. at 62 (footnotes omitted). Professor Morano noted that Judge Learned Hand had taken a similar position with respect to the mail fraud statute by stating:

> A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the statute is directed.

Id. at 62-63 n.53 (quoting United States v. Rowe, 56 F.2d 747, 749 (2d Cir.), *cert. denied*, 286 U.S. 554 (1932)). *See* M. EISENBERG, AN INTRODUCTION TO AGENCY AND PARTNERSHIP § 388, 24-25 (1987).

cern implicating the ultimate ramifications of the decision.[157] The Court's careful scrutiny of the jury charge for any element of tangible injury sanctions the inference that even the most remote causation of some concrete loss will sustain any resulting convictions.[158] Moreover, whether any money or property was actually divested in a given case presents a fact question for jury resolution.[159]

Another ambiguous issue which arises as a result of the *McNally* decision is the general state of the theory of fiduciary fraud, which has applications outside the rejected mail fraud context.[160] Because of the narrow analysis the Court employs to reach its decision, *McNally* does not necessarily preclude adherence to this principle in other areas of the law.[161] The holding is essentially premised on the Court's finding of likely congressional intent,[162] with collateral reliance on the doctrine of lenity.[163] No universal principal is articulated by the majority regarding other federal criminal statutes. Clearer language or more informative legislative history might mandate a finding that Congress intended to reach those situations in which an influential position is misused and results in unjust enrichments.[164]

Similarly, the Court's presumption, "for the purposes of this action," that Hunt was a state officer rests on the concomitant fiduciary duties transferred through assumption of de facto con-

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157 In his dissenting opinion, Justice Stevens acknowledges that the decision may possibly be mitigated by rules of agency law. *McNally*, 107 S. Ct. at 2890-91 n.10 (Stevens, J., dissenting). The Justice explained:

> When a person is being paid a salary for his loyal services, any breach of that loyalty would appear to carry with it some loss of money to the employer—who is not getting what he paid for. Additionally, "[i]f an agent receives anything as a result of his violation of a duty of loyalty to the principal, he is subject to a liability to deliver it, its value, or its proceeds, to the principal." This duty may fulfill the Court's "money or property" requirement in most kickback schemes.

Id. at 2890 n.10 (Stevens, J., dissenting) (quoting RESTATEMENT (SECOND) OF AGENCY § 403 (1958)).

158 *See supra* note 135.

159 *See id.*

160 *See generally* Baxter, *supra* note 1, at 322 (identifying four federal statutes employed to prosecute local corruption: the Mail Fraud Act, the Hobbs Act, the Travel Act, and the Racketeer Influenced and Corrupt Organizations Act (RICO)).

161 *See McNally*, 107 S. Ct. at 2875.

162 *See id.* at 2881.

163 *See id. See also* United States v. Wiltberger, 18 U.S. (5 Wheat) 76 (1820)(ambiguous criminal statutes construed strictly).

164 *See* United States v. Mandel, 591 F.2d 1347 (4th Cir.), *aff'd en banc in relevant part*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980).

trol of a government function.[165] Admittedly, not discussing an issue does not necessarily imply acquiescence to its present judicial standing; nonetheless, the bypass of a ripe opportunity may provide some insight into the tenor of the Court.[166] It should be acknowledged, however, that doing so might have diluted discussion of the core issue presented, and thus the Court chose to forsake consideration of ancillary issues.

The *McNally* decision rejects convictions for "intangible rights" deprivations in both the public and the private sector,[167] but gives no indication of how these sorts of activities will be discovered and defeated in the future. If taken to its logical extreme by federal courts as imposing strict evidentiary burdens, the decision will preclude federal investigation of any but those schemes in which clear pecuniary harm is evinced.[168] While this is an unlikely result, particularly in the public context, in theory the onus then falls upon Congress and the state legislatures to forbid this type of unethical conduct.[169]

Arguably, state legislatures are best suited to combat local political corruption. The federal interest in protecting the integrity of the postal system, albeit strong, pales in comparison to the interest states have in honest politicians.[170] Furthermore, the

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165 *See McNally*, 107 S. Ct. at 2881.

166 However, a good example of the need to proceed cautiously in this regard is the *McNally* case itself, where years of denial of certiorari led those concerned to infer tacit acquiescence to intangible rights prosecutions for mail fraud on the part of the Supreme Court. *See* Ingber v. Enzor, 664 F. Supp. 814, 821-22 (S.D.N.Y. 1987).

167 *McNally*, 107 S. Ct. at 2881.

168 *See Hurson*, *supra* note 6, at 432-35. The author suggests that the extensive application of section 1341 in the past had been a functional response to the methodology of federal criminal investigations. *Id.* The tangential approach to criminal prosecutions lends some insight into future investigations as a result of *McNally*. *Id.*

169 *Id.*

170 *See* Comment, *supra* note 34, at 67-68. The author explains:

> The federal interest in punishing crime of local concern . . . even where local authorities demonstrably are unwilling or unable to intervene, is . . . tenuous. . . . [T]he conduct "poses no threat to Federal Institutions or operations or to anything for which the Federal government has any special responsibility. . . ."
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> Federal prosecution of elected state officials for mail fraud is a prime example. . . . Even the most cursory examination of cases in this area reveals that the use of the mails, in itself a "neutral activity," is merely the jurisdictional basis upon which federal prosecution has been predicated.

Id. at 67-68 (quoting Abrams, *Consultant's Report of Jurisdiction: Chapter 2*, in 1 WORKING PAPERS OF THE NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS 33, 33 (1970)).

postal system is usually incidental to the success of the fraudulent scheme. A clever conspirator could easily forego the postal service to evade federal jurisdiction altogether. Conversely, open and ethical government officials are of fundamental concern to the individual states, which will presumably take action to fill the void left by the *McNally* decision.[171] Legislators in our democratic representative system are ever alert to the needs of their constituencies, who ultimately suffer the consequences of corrupt politicians. In the private sector, self-policing and civil actions for damages provide alternatives to federal investigations, perhaps the route preferred by companies victimized by unfaithful employees.[172]

The *McNally* decision will undoubtedly prompt critical commentary, particularly for its myopic reliance on legislative intent.[173] Nonetheless, further analysis of several other issues implicated by the intangible rights doctrine compels a similar result. One such issue is the legitimacy of using the criminal justice system as a tool to punish conduct, albeit unethical and immoral, which results in no tangible loss to any verifiable victim.[174] The causation element of convictions for deprivations for the right to honest government is so stretched as to be virtually nonexistent. The victims are often unaware of being any worse off as a result of the scheme. Moreover, viewing the mailing component of the scheme as a perversion of the integrity of the postal service is so obscure as to appear illusory.[175]

Further concerns surrounding the intangible rights reading of section 1341 revolve around constitutional issues.[176] Often those indicted under the intangible rights theory were aware that their activities did not contravene state law, but usually had no knowledge of any violation of federal law. Further, schemes like the ones involved in *Margiotta* and *McNally* were repeatedly sanc-

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171 *See* Comment, *supra* note 34, at 73-74. The author raises several possible detriments to federal intervention into this arena, such as a chilling of "internal state efforts at reform" through increasing reliance on the federal government to police state politics. *Id.*

172 *But see* Hurson, *supra* note 6, at 454 nn.252-53 (outlining the possible risks of self-policing fiduciary breaches in the private sector).

173 *See McNally*, 107 S. Ct. at 2881.

174 *See* Morano, *supra* note 50, at 81-82; Baxter, *supra* note 1, at 343-45.

175 *See* Hurson, *supra* note 6, at 450-53.

176 *See generally* Baxter, *supra* note 1 (identifying several constitutional issues which arise when statutes such as the mail fraud act are construed broadly, leaving great discretion in the hands of federal prosecutors).

tioned by the political party in power.[177] Instances such as these implicate serious questions about the requisite definiteness of the criminal justice system, and the requirements of procedural and substantive due process.[178] Similarly, because the intangible rights doctrine affords the executive branch great discretion to selectively prosecute a vast range of fraudulent schemes, the absence of express congressional authorization poses serious separation of powers considerations.[179] These issues are mooted by the Court's decision in *McNally*, yet the doctrine might have been repudiated on these grounds as well.

The *McNally* decision evinces an intent by the Supreme Court to put an end to the practice of using unclear statutory language to expand the scope of the federal criminal law into areas previously reserved to the individual states.[180] By resoundingly rejecting the intangible rights doctrine, the Court "reestablished the historical limitations Congress had placed on mail fraud prosecutions,"[181] and foreshadowed consistent rulings with regard to other statutes which intrude into the jurisdiction of the states themselves. By limiting the statute to schemes which use the mails to defraud others of their money or tangible property, the Court replaces the sanctions of federal law for misuse of the mails on those clearly entitled to its encumbrance, "thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country."[182]

Sarah E. McCandless

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177 *See* text accompanying *supra* notes 14-23; and 99-104.

178 *See*, Morano, *supra* note 50, at 76-82.

179 *See* Baxter, *supra* note 1, at 334-36.

> [T]he function in construing a statute is to ascertain the meaning of [the] words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. . . . Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration.

Id. at 334 (quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947)).

180 *See McNally*, 107 S. Ct. at 2881.

181 Ingber v. Enzor, 664 F. Supp. 814, 824 (S.D.N.Y. 1987).

182 CONG. GLOBE, 41st Cong., 3d Sess., 35 (1870)(remarks of Rep. Farnsworth). *See McNally*, 107 S. Ct. at 2879.