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Defining Federal Crimes – Chapters 2-4

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Defining Federal Crimes
(chapters 2-4)

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Chapter 2
Jurisdiction: Federal Criminal Law and the Commerce Power

The Framers of the Constitution did not envision that the federal government would play much of a role in criminal enforcement. To the extent that they contemplated substantive federal criminal law at all, their discussions centered on piracy, crimes against the law of nations, treason, and counterfeiting. The document they produced made no effort to give the federal government general police powers of the sort that states exercised. By one count, only 426 criminal cases were brought in federal courts between 1789 and 1801, a large fraction of which related to the Whiskey Rebellion. *See* Dwight F. Henderson, *Congress, Courts, and Criminals: The Development of Federal Criminal Law, 1801-1829* at 13 (1985). In the absence of relevant federal statutes, Federalist judges simply invoked federal common law and looked to state law to try and punish the rebels. *See* Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815*, 417-18 (2009).

Congress was not eager to address crime even in areas where it clearly had constitutional jurisdiction to do so. In 1818, the Supreme Court threw out the conviction in a case where a marine had murdered a cook's mate on board the *U.S.S. Independence* while it was anchored in Boston Harbor. *United States v. Bevens*, 16 U.S. (3 Wheat.) 336 (1818) (see also *infra* p. x [Chapter 3]). Writing for the Court, Chief Justice John Marshall explained that while Congress could have passed a murder statute covering federal warships, it had not, and the matter was thus left to Massachusetts's exclusive jurisdiction. Indeed, exclusive state jurisdiction over criminal matters was very much the rule during most of the nineteenth century. When Congress did pass penal legislation, it generally targeted activities that injured or interfered with federal property (*see* Art. IV, sec. 3, cl. 2) or interfered with the function of the federal government itself, particularly its ability to collect taxes.

In the last quarter of the nineteenth century, federal criminal law began to take on a new role. No longer was it primarily a means of self-protection. Rather, it became part of a more general (albeit fitful) state-building effort. For a classic account of this general turn, see Stephen Skowronek, *Building a New American State: The Expansion of National Administrative*

Capacities, 1877-1920 (1982). Congress could have relied—and in time did rely—on any number of constitutional jurisdictional grants to spin its thickening web of federal criminal law. In Chapter 4, we will see how the Postal Power supported an ever-growing body of mail fraud law. Chapter 6 will show the Spending Power to be a potent weapon against state and local corruption, and Chapter 7 will consider the increasing recourse to the Reconstruction Amendments as a basis for right-deprivation prosecutions. Yet, it is the Commerce Clause that has provided the basis for the vast majority of federal criminal laws enacted by Congress since the post-Reconstruction period. We therefore begin with this fountainhead of federal criminal jurisdiction. Section A explores that part of Commerce Clause jurisdiction on which Congress has chiefly relied: the power to regulate “commerce . . . among the several states.” Section B considers the part to which Congress has given increasing attention in recent years: the related power to regulate “commerce with foreign nations.”

A. “COMMERCE . . . AMONG THE SEVERAL STATES”

1. Historical Development

There is no evidence that any of the Constitution’s Framers thought about criminal law when drafting the Commerce Clause. The commerce power later became a useful source of criminal jurisdiction not because commerce and crime were so obviously connected, but because there was so much commerce. In the late nineteenth and early twentieth centuries—the period of the first great upsurge in federal criminal law—the United States had the fastest-growing and, soon, the largest economy in the world. Both immigrant labor and investment dollars flowed into the country in massive amounts. The United States also had, by a large margin, the most railroads serving the most people across the largest distances of any country in the world. Movement of goods and people across state borders was exploding.

The crimes that members of Congress were chiefly interested in prohibiting were commercial in character, though the “commerce” was of a different sort than Madison and his friends imagined when they penned the clause. The late nineteenth and early twentieth centuries were an era of anti-vice crusades—crusades against gambling, prostitution, drugs, and, the biggest crusade of all, liquor. These goods and services are bought and sold in markets, and the relevant markets require the interstate movement of merchandise and/or people. At the same time, with respect to each of these vices, most transactions were (and remain) local: both buyer

and seller reside and do business in the same state, usually the same city.

The following propositions set patterns for federal criminal law that still hold today. First, the federal government had power only over *interstate* commerce, and thus could not forbid all markets relating to the vices in question. When, for example, Prohibitionists sought a nationwide ban of the manufacture and sale of alcoholic beverages, they assumed that they needed a constitutional amendment to enact it. The second proposition followed from the first: the federal criminal law of vice would have to coexist with and overlap state law. Federal criminal law would cover territory that states covered as well, rather than dealing with offenses that the states could not touch. Third, the jurisdictional justification for federal vice laws, regulating the interstate movement of goods and people, had little to do with the *substantive* justification for those laws—that is, the desire to ban the relevant vice. Thus, the jurisdictional “hooks” for the wave of federal vice statutes passed beginning in the 1880s were just that—hooks, not reasons for the criminal prohibitions. *See* Louis B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors’ Discretion*, 13 *Law & Contemp. Probs.* 64, 79-80 (1948) (discussing how courts tend to focus on jurisdictional problems at the expense of focusing on substantive issues of criminality).

One more proposition—an intensely practical one—is crucial to understanding the historical evolution of the commerce power and its effect on federal criminal justice. Throughout the nineteenth century, the federal law enforcement bureaucracy remained very small. Agents of the postal service protected the mails; United States marshals protected judges and performed sundry other duties; treasury personnel fought smuggling; and, after its creation in 1865, the Secret Service targeted counterfeiting. There were, however, very few agents and prosecutors available to enforce the broad federal crimes of which Congress soon grew fond. Though the office of the Attorney General dates back to the Founding, there was no Justice Department prior to 1870. Until then, the United States Attorneys brought prosecutions in their respective federal districts, but with little national coordination and with little control over the how federal law enforcement personnel were deployed. Even after its creation, the Justice Department had scant resources, and initially had to rely on the Treasury’s Secret Service agents or Pinkerton Detective Agency operatives for investigative support. The justice system that *enforced* the law grew much more slowly than the *laws* that required enforcing.

The following case marks a critical stage in the growth of federal Commerce Clause authority. By the end of the nineteenth century, it was clear that Congress could use its plenary authority to exclude things it did not like—*e.g.*, pornography, lottery tickets, and contraceptive

devices—from the U.S. mails. *See, e.g.*, *Ex parte Jackson*, 96 U.S. 727 (1877) (upholding conviction for mailing of lottery circular); Donna Dennis, *Licentious Gotham: Erotic Publishing and Its Prosecution in Nineteenth-Century New York* 258-63 (2009). But canny traffickers in such items turned to private express services; could Congress use the Commerce Clause to reach these transactions as well? In a 5-4 decision, the Supreme Court held that lottery tickets were subject to Congressional regulation. Consider how the Court attempts to define the “instrumentalities of commerce” over which Congress has power. How might the logic in this case apply well or poorly to other vices that Congress might wish to police? We will see that this decision did not resolve debates about the extent of Congress’s commerce power; many of Chief Justice Fuller’s concerns appear in subsequent Supreme Court opinions (though usually again in dissent).

CHAMPION v. AMES (The Lottery Case)
188 U.S. 321 (1903)

Mr. Justice Harlan delivered the opinion of the Court: . . .

The appellant insists that the carrying of lottery tickets from one state to another state by an express company engaged in carrying freight and packages from state to state [sic] . . . does not constitute, and cannot by any act of Congress be legally made to constitute, commerce among the States within the meaning of the clause of the Constitution of the United States providing that Congress shall have power “to regulate commerce with foreign nations, and among the several States, and with the Indian tribes;” consequently, that Congress cannot make it an offence to cause such tickets to be carried from one state to another.

The government insists that express companies . . . engaged . . . in the business of transportation from one state to another are instrumentalities of commerce among the states; that the carrying of lottery tickets from one state to another is commerce which Congress may regulate; and that as a means of executing the power to regulate interstate commerce Congress may make it an offence against the United States to cause lottery tickets to be carried from one state to another. . . .

What is the import of the word “commerce” as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one state to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the

several states include something more? Does not the carrying from one state to another . . . of lottery tickets that entitle the holder to the payment of a certain amount of money . . . also constitute commerce among the States? . . .

It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Asuncion, Paraguay. Money was placed on deposit in different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. . . . Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. . . .

We are of opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers, is a regulation of commerce among the several states.

But it is said that the statute in question does not regulate the carrying of lottery tickets from state to state, but by punishing those who cause them to be so carried Congress in effect prohibits such carrying; that in respect of the carrying from one state to another of articles or things that are . . . the subjects of commerce, the authority given Congress was not to *prohibit*, but only to *regulate*. . . .

[T]he Constitution does not define what is to be deemed a legitimate regulation of interstate commerce. In *Gibbons v. Ogden*, [9 Wheat. 1 (1824)], it was said that the power to regulate such commerce is the power to prescribe the rule by which it is to be governed. But this general observation leaves it to be determined, when the question comes before the court, whether Congress in prescribing a particular rule has exceeded its power under the Constitution. While our Government must be acknowledged by all to be one of enumerated powers, *McCulloch v. Maryland*, 4 Wheat. 316, 405, 407 (1819), the Constitution does not attempt to set forth all the means by which such powers may be carried into execution. It leaves to Congress a large discretion as to the means that may be employed in executing a given power. . . .

We have said that the carrying from state to state of lottery tickets constitutes interstate

commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is, in effect, a *prohibition* of the carriage of such articles from state to state is not a fit or appropriate mode for the regulation of that particular kind of commerce? If lottery traffic, carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the states, and under the power to regulate interstate commerce, devise such means . . . as will drive that traffic out of commerce among the States?

. . . In *Phalen v. Virginia*, 8 How. 163, 168 (1850), after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of Government, this court said: “Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.” In other cases we have adjudged that authority given by legislative enactment to carry on a lottery, although based upon a consideration in money, was not protected by the contract clause of the Constitution; this, for the reason that no state may bargain away its power to protect the public morals. . . .

If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by the carrying of lottery tickets from one state to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the states . . . is subject to no limitations except such as may be found in the Constitution. . . .

. . . As a state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the “widespread pestilence of lotteries” and to protect the commerce which concerns all the states, may prohibit the carrying of lottery tickets from one state to another. . . . We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. . . .

The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state to another is therefore interstate commerce; that under its power to regulate commerce among the several states Congress . . . has plenary authority over such commerce, and may prohibit the carriage of such tickets from state to state; and that legislation to that end . . . is not inconsistent with any . . . restriction imposed upon the exercise of the powers granted to Congress. . . .

Mr. Chief Justice Fuller, with whom concur Mr. Justice Brewer, Mr. Justice Shiras and Mr. Justice Peckham, dissenting:

Although the first section of the Act of March 2, 1895, 28 Stat. 963, c. 191, is inartfully drawn, I accept the contention of the Government that it makes it an offence (1) to bring lottery matter from abroad into the United States; (2) to cause such matter to be deposited in or carried by the mails of the United States; (3) to cause such matter to be carried from one state to another in the United States; and further, to cause any advertisement of a lottery or similar enterprise to be brought into the United States, or be deposited or carried by the mails, or transferred from one state to another. . . .

The power of the state to impose restraints and burdens on persons and property in conservation and promotion of the public health, good order and prosperity is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive, and the suppression of lotteries as a harmful business falls within this power. . . .

It is urged, however, that because Congress is empowered to regulate commerce between the several states, it, therefore, may suppress lotteries by prohibiting the carriage of lottery matter. Congress may indeed make all laws necessary and proper for carrying the powers granted to it into execution, and doubtless an act prohibiting the carriage of lottery matter would be necessary and proper to the execution of a power to suppress lotteries; but that power belongs to the states and not to Congress. To hold that Congress has general police power would be to hold that it may accomplish objects not entrusted to the general government, and to defeat the operation of the 10th Amendment. . . .

[A]part from the question of bona fides, this act cannot be brought within the power to

regulate commerce among the several states, unless lottery tickets are articles of commerce, and, therefore, when carried across state lines, of interstate commerce; or unless the power to regulate interstate commerce includes the absolute and exclusive power to prohibit the transportation of anything or anybody from one state to another. . . .

Is the carriage of lottery tickets from one State to another commercial intercourse?

The lottery ticket purports to create contractual relations and to furnish the means of enforcing a contract right.

This is true of insurance policies, and both are contingent in their nature. Yet this court has held that the issuing of fire, marine, and life insurance policies, in one state, and sending them to another, to be there delivered to the insured on payment of premium, is not interstate commerce. *Paul v. Virginia*, 8 Wall. 168 (1869); *Hooper v. California*, 155 U.S. 648 (1895). . . .

If a lottery ticket is not an article of commerce, how can it become so when placed in an envelope or box or other covering, and transported by an express company? To say that the mere carrying of an article which is not an article of commerce in and of itself nevertheless becomes such the moment it is to be transported from one state to another, is to transform a non-commercial article into a commercial one simply because it is transported. I cannot conceive that any such result can properly follow.

It would be to say that everything is an article of commerce the moment it is taken to be transported from place to place, and of interstate commerce if from state to state.

An invitation to dine, or to take a drive, or a note of introduction, all become articles of commerce under the ruling in this case, by being deposited with an express company for transportation. This in effect breaks down all the differences between that which is, and that which is not, an article of commerce, and the necessary consequence is to take from the states all jurisdiction over the subject so far as interstate communication is concerned. It is a long step in the direction of wiping out all traces of state lines, and the creation of a centralized government.

Does the grant to Congress of the power to regulate interstate commerce impart the absolute power to prohibit it?

It was said in *Gibbons v. Ogden*, [22 U.S. 1 (1824),] that the right of intercourse between state and state was derived from “those laws whose authority is acknowledged by civilized man throughout the world;” but under the Articles of Confederation the states might have interdicted interstate trade, yet when they surrendered the power to deal with commerce as between themselves to the general government it was undoubtedly in order to form a more perfect union by freeing such commerce from state discrimination, and not to transfer the power of restriction.

...
It will not do to say . . . that state laws have been found to be ineffective for the suppression of lotteries, and therefore Congress should interfere. The scope of the [C]ommerce [C]ause of the Constitution cannot be enlarged because of present views of public interest. . . .

“To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?” asked Marshall, in *Marbury v. Madison*, [1 Cranch, 137, 176 (1803)]. . . .

Notes and Questions

1. In *Hoke v. United States*, 227 U.S. 308 (1913), the Supreme Court upheld the 1910 Mann Act, ch. 395, 36 Stat. 825 (1910), also known as the “White Slavery Act,” against a Commerce Clause challenge. The Act provided:

That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain . . . any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce . . . in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby such woman or girl shall be transported in interstate or foreign commerce . . . shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

Writing for the Court, Justice McKenna noted:

Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions, and surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls.

Hoke, 227 U.S. at 322.

Decisions like *Ames* and *Hoke* certainly left Congress free to flex its Commerce Clause muscles with statutes like the National Motor Vehicle Theft Act of 1919 (also known as the Dyer Act), Pub. L. No. 66-70, ch. 89, 41 Stat. 324, which made it a federal offense to transport a stolen motor vehicle across state lines. Yet Congress often relied on other constitutional provisions. For instance, Congress drew on its taxation authority in 1914 when it passed the Harrison Narcotic Drug Act, ch. 1, 38 Stat. 785, establishing a comprehensive regulatory scheme for narcotic drugs, backed with criminal sanctions, based on Congress's taxing power. *See* *United States v. Doremus*, 249 U.S. 86 (1919) (upholding the Act over the dissent of four Justices who thought it was "a mere attempt by Congress to exert a power not delegated, that is, the reserved police power of the States"). And the ratification of the Eighteenth Amendment, along with the passage of the Volstead Act (National Prohibition Act), ch. 85, 41 Stat. 305 (1919), soon sent federal agents against bootleggers and moonshiners.

A snapshot of federal enforcement in 1930 is instructive. Of the 87,305 total federal prosecutions in 1930, very few resulted from Congress's exercise of its Commerce Clause powers. About 57,000 were for prohibition violations; 8000 were District of Columbia cases; 7000 were immigration cases; and 3500 were drug cases. Of the 4345 convictions obtained in cases investigated by the 400 agents of the Bureau of Investigation in 1930, 2452 were for violations of the National Motor Theft Act, and 516 were for Mann Act prosecutions. Daniel Richman, *The Past, Present and Future of Violent Crime Federalism*, 34 *Crime & Just.* 377, 385 (2006). Do these statistics support or oppose Chief Justice Fuller's concern in *Ames* that the Commerce Clause would give the federal government too much opportunity to prosecute

conduct traditionally handled by the states?

2. We have already discussed how criminal enforcement became a critical part of FDR's New Deal agenda in the 1930s. See *supra* p. xx [Chapter 1]. But more statutory development was to come. A conference on organized crime convened by Attorney General J. Howard McGrath in 1950 and the hearings of the Senate Investigating Committee headed by Estes Kefauver in the early 1950s marked the new (or renewed) interest of federal executive and legislative officials in organized crime. The flames were fanned by hearings held in 1958 and 1959 by the Senate Select Committee on Improper Activities in the Labor and Management Field, headed by John McClellan (with special counsel Robert Kennedy). These efforts, coupled with the 1957 discovery by local police of the high-level mob meeting in Apalachin, New York, put organized crime at the top of the Kennedy Administration's (and Attorney General Robert Kennedy's) criminal justice agenda. See Herbert J. Miller, Jr., *A Federal Viewpoint on Combating Organized Crime*, 347 *Ann. Am. Acad. Pol. & Soc. Sci.* 93 (1963).

Among the new weapons against organized crime were the Travel Act and RICO, both of which greatly expanded federal jurisdiction over crimes traditionally prosecuted by state or local authorities. See *supra* p. xx [Chapter 1]. The Supreme Court acknowledged that the Travel Act "reflect[ed] a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement," *Perrin v. United States*, 444 U.S. 37, 40 (1979), and that RICO, too, "would entail prosecutions involving acts of racketeering that are also crimes under state law," *United States v. Turkette*, 452 U.S. 576, 587 (1981). But because both Acts demanded the showing of an interstate nexus, they easily passed constitutional muster.

3. What might well be the highpoint of Supreme Court deference to broad congressional assertions of federal criminal jurisdiction under the Commerce Clause had come a decade earlier, in a case involving a statute that has no jurisdictional element. In *Perez v. United States* the Supreme Court upheld the constitutionality of Title II of the Consumer Credit Protection Act of 1964, 18 U.S.C. §891 *et seq.* in an 8-1 decision. Consider the materials that the Court cites to show that loan-sharking, although generally perceived as an intrastate activity, can be understood by Congress as an illegal activity with a large national impact requiring federal attention.

PEREZ v. UNITED STATES
402 U.S. 146 (1971)

Mr. Justice DOUGLAS delivered the opinion of the Court.

The question in this case is whether Title II of the Consumer Credit Protection Act, 82 Stat. 159, 18 U.S.C. § 891 *et seq.*, as construed and applied to petitioner, is a permissible exercise by Congress of its powers under the Commerce Clause of the Constitution. . . . [Petitioner was convicted under 18 U.S.C. 894(a), which prohibits using “extortionate means to collect or attempt to collect any extension of credit.”]

Petitioner is one of the species commonly known as “loan sharks” which Congress found are in large part under the control of “organized crime.” “Extortionate credit transactions” are defined as those characterized by the use or threat of the use of “violence or other criminal means” in enforcement.² There was ample evidence showing petitioner was a “loan shark” who used the threat of violence as a method of collection. He loaned money to one Miranda, owner of a new butcher shop, making a \$1,000 advance to be repaid in installments of \$105 per week for 14 weeks. After paying at this rate for six or eight weeks, petitioner increased the weekly payment to \$130. In two months Miranda asked for an additional loan of \$2,000 which was made, the agreement being that Miranda was to pay \$205 a week. In a few weeks petitioner increased the weekly payment to \$330. When Miranda objected, petitioner told him about a customer who refused to pay and ended up in a hospital. So Miranda paid. In a few months petitioner increased his demands to \$500 weekly which Miranda paid, only to be advised that at the end of the week petitioner would need \$1,000. Miranda made that payment by not paying his suppliers; but, faced with a \$1,000 payment the next week, he sold his butcher shop. Petitioner pursued Miranda, first making threats to Miranda’s wife and then telling Miranda he could have him castrated. When Miranda did not make more payments, petitioner said he was turning over his collections to people who would not be nice but who would put him in the hospital if he did not pay. Negotiations went on, Miranda finally saying he could only pay \$25 a week. Petitioner said that was not enough, that Miranda should steal or sell drugs if necessary to get the money to

² Section 891 of 18 U.S.C. provides in part:

“(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.”

pay the loan, and that if he went to jail it would be better than going to a hospital with a broken back or legs. He added, "I could have sent you to the hospital, you and your family, any moment I want with my people."

Petitioner's arrest followed. Miranda, his wife, and an employee gave the evidence against petitioner who did not testify or call any witnesses. Petitioner's attack was on the constitutionality of the Act, starting with a motion to dismiss the indictment.

The constitutional question is a substantial one. . . .

The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods (18 U.S.C. §§ 2312-2315) or of persons who have been kidnaped [sic] (18 U.S.C. § 1201). Second, protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft (18 U.S.C. § 32), or persons or things in commerce, as, for example, thefts from interstate shipments (18 U.S.C. § 659). Third, those activities affecting commerce. It is with this last category that we are here concerned. . . .

Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce. In an analogous situation, Mr. Justice Holmes, speaking for a unanimous Court, said: "When it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so." *Westfall v. United States*, 274 U.S. 256, 259 (1927). In that case an officer of a state bank which was a member of the Federal Reserve System issued a fraudulent certificate of deposit and paid it from the funds of the state bank. It was argued that there was no loss to the Reserve Bank. Mr. Justice Holmes replied, "But every fraud like the one before us weakens the member bank and therefore weakens the System." *Id.* at 259. In the setting of the present case there is a tie-in between local loan sharks and interstate crime.

The findings by Congress are quite adequate on that ground. . . . [The bill] grew out of a "profound study of organized crime, its ramifications and its implications" undertaken by some 22 Congressmen in 1966-1967. 114 CONG. REC. 14391. The results of that study were included in a report, *The Urban Poor and Organized Crime*, submitted to the House on August 29, 1967, which revealed that "organized crime takes over \$350 million a year from America's poor through loan-sharking alone." See 113 CONG. REC. 24460-24464. [The bill's sponsors] also relied on *The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice* (February 1967), which stated that loan sharking was "the second largest source of revenue for organized crime," *id.* at 189, and is one way by

which the underworld obtains control of legitimate businesses. *Id.* at 190. . . .

The essence of [] these reports and hearings was summarized and embodied in formal congressional findings. They supplied Congress with the knowledge that the loan shark racket provides organized crime with its second most lucrative source of revenue, exacts millions from the pockets of people, coerces its victims into the commission of crimes against property, and causes the takeover by racketeers of legitimate businesses.

We have mentioned in detail the economic, financial, and social setting of the problem as revealed to Congress. We do so not to infer that Congress need make particularized findings in order to legislate. We relate the history of the Act in detail to answer the impassioned plea of petitioner that all that is involved in loan sharking is a traditionally local activity. It appears, instead, that loan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations. . . .

Mr. Justice STEWART, dissenting.

. . . [U]nder the statute before us a man can be convicted without any proof of interstate movement, of the use of the facilities of interstate commerce, or of facts showing that his conduct affected interstate commerce. I think the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws.

In order to sustain this law we would, in my view, have to be able at the least to say that Congress could rationally have concluded that loan sharking is an activity with interstate attributes that distinguish it in some substantial respect from other local crime. But it is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.

Because I am unable to discern any rational distinction between loan sharking and other local crime, I cannot escape the conclusion that this statute was beyond the power of Congress to enact. The definition and prosecution of local, intrastate crime are reserved to the States under the Ninth and Tenth Amendments.

Notes and Questions

1. Do you agree with the dissent that there is not a rational basis linking loan sharking with commerce, beyond the argument that any crime in general stands to affect commerce? Is it significant that loan sharking is directly related to the exchange of money? Is the effect on interstate commerce in this case greater or less than the connection between the particular fraud in *Westfall* and the health of the Federal Reserve?

2. The majority opinion, while noting Congress's findings about the impact of loan sharking on the national economy, stated that it was not necessary for Congress to "make particularized findings in order to legislate." By not requiring empirical substantiation for the link between an apparently local activity and interstate commerce, does the Court give Congress carte blanche to legislate based on intuition alone?

3. During this period, any limits the Supreme Court put on the expansion of federal criminal jurisdiction tended to be more formal than substantive. Thus, when interpreting 1968 legislation making it illegal for a convicted felon to possess a firearm, the Court read a demand for "some interstate commerce nexus" into the statute, noting that "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *United States v. Bass*, 404 U.S. 336, 349 (1971). But the Court soon clarified the limited nature of the government's burden in the following 7-1 opinion (Rehnquist, J., took no part in the consideration or decision of the case):

SCARBOROUGH v. UNITED STATES

431 U.S. 563 (1977)

Mr. Justice MARSHALL delivered the opinion of the Court.

Petitioner was convicted of possessing a firearm in violation of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. App. §§ 1201-1203. The statute provides, in pertinent part:

"Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony. . .

and who receives, possesses, or transports in commerce or affecting commerce . . . any

firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.” 18 U.S.C. App. § 1202(a).

The issue in this case is whether proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy the statutorily required nexus between the possession of a firearm by a convicted felon and commerce.

I

In 1972 petitioner pleaded guilty in the Circuit Court of Fairfax County, Va., to the felony of possession of narcotics with intent to distribute. A year later, in August 1973, law enforcement officials, in the execution of a search warrant for narcotics, seized four firearms from petitioner’s bedroom. Petitioner was subsequently charged with both receipt and possession of the four firearms in violation of 18 U.S.C. App. § 1202(a)(1).

In a jury trial in the Eastern District of Virginia, the Government offered evidence to show that all of the seized weapons had traveled in interstate commerce. All the dates established for such interstate travel were prior to the date petitioner became a convicted felon.² The Government made no attempt to prove that the petitioner acquired these weapons after his conviction.³ Holding such proof necessary for a receipt conviction, the judge, at the close of the Government’s case, granted petitioner’s motion for a judgment of acquittal on that part of the indictment charging receipt.

Petitioner’s defense to the possession charge was twofold. As a matter of fact, he contended that by the time of his conviction he no longer possessed the firearms. His claim was that, to avoid violating this statute, he had transferred these guns to his wife prior to pleading guilty to the narcotics felony. Secondly, he argued that, as a matter of law, proof that the guns

² The Government’s evidence showed that the Colt revolver was shipped from Connecticut to North Carolina in 1969 and entered Virginia by unknown means, that the Universal Enforcer came from Florida to Virginia in 1969 and was purchased by petitioner in 1970, that the M-1 carbine rifle was sent to Maryland from Illinois in 1966, coming to Virginia by unknown means, and that the St. Etienne Ordinance revolver was manufactured in France in the 19th century and was somehow later brought into Virginia.

³ The Government showed that petitioner bought the Enforcer in 1970. The only evidence regarding acquisition of the other weapons came from petitioner. He claimed he purchased the Colt revolver in 1970, and the M-1 rifle in 1968. The French revolver, he claimed, was left in his house shortly before the state conviction but he was not sure by whom.

had at some time traveled in interstate commerce did not provide an adequate nexus between the possession and commerce. . . . The judge rejected this [argument]. . . .

Petitioner was found guilty and he appealed. The Court of Appeals for the Fourth Circuit affirmed. . . .

II

Our first encounter with Title VII of the Omnibus Crime Control Act came in *United States v. Bass*, 404 U.S. 336 (1971). There we had to decide whether the statutory phrase “in commerce or affecting commerce” in § 1202(a) applied to “possesses” and “receives” as well as to “transports.” We noted that the statute was not a model of clarity. On the one hand, we found “significant support” in the legislative history for the contention that the statute “reaches the mere possession of guns without any showing of an interstate commerce nexus” in individual cases. On the other hand, we could not ignore Congress’ inserting the phrase “in commerce or affecting commerce” in the statute. The phrase clearly modified “transport” and we could find no sensible explanation for requiring a nexus only for transport. Faced with this ambiguity, the Court adopted the narrower reading that the phrase modified all three offenses. . . . Since “[absent] proof of some interstate commerce nexus in each case § 1202(a) dramatically intrudes upon traditional state criminal jurisdiction,” we were unwilling to conclude, without a “clearer statement of intention,” *id.* at 350, that Congress meant to dispense entirely with a nexus requirement in individual cases.

It was unnecessary in *Bass* for us to decide what would constitute an adequate nexus with commerce as the Government had made no attempt to show any nexus at all. . . .

The Government’s position is that to establish a nexus with interstate commerce it need prove only that the firearm possessed by the convicted felon traveled at some time in interstate commerce. The petitioner contends, however, that the nexus must be “contemporaneous” with the possession, that the statute proscribes “only crimes with a present connection to commerce.” He suggests that at the time of the offense the possessor must be engaging in commerce or must be carrying the gun at an interstate facility. At oral argument he suggested an alternative theory that one can be convicted for possession without any proof of a present connection with commerce so long as the firearm was acquired after conviction. . . .

. . . In the findings at the beginning of Title VII, Congress expressly declared that “the receipt, possession, or transportation of a firearm by felons . . . constitutes . . . a burden on commerce or threat affecting the free flow of commerce,” 18 U.S.C. App. § 1201(1). It then

implemented those findings by prohibiting possessions “in commerce and affecting commerce.” As we have previously observed, Congress is aware of the “distinction between legislation limited to activities ‘in commerce’ and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce.” *United States v. American Bldg. Maintenance Industries*, 422 U.S. 271, 280 (1975). Indeed, that awareness was explicitly demonstrated here. In arguing that Congress could, consistent with the Constitution, “outlaw the mere possession of weapons,” Senator Long, in introducing Title VII, pointed to the fact that “many of the items and transactions reached by the broad swath of the Civil Rights Act of 1964 were reached by virtue of the power of Congress to regulate matters affecting commerce, not just to regulate interstate commerce itself.” 114 CONG. REC. 13868 (1968). He advised a similar reliance on the power to regulate matters affecting commerce and urged that “Congress simply [find] that the possession of these weapons by the wrong kind of people is either a burden on commerce or a threat that affects the free flow of commerce.” . . . [I]t does seem apparent that in implementing these findings by prohibiting both possessions in commerce and those affecting commerce, Congress must have meant more than to outlaw simply those possessions that occur in commerce or in interstate facilities. And we see no basis for contending that a weapon acquired after a conviction affects commerce differently from one acquired before and retained. . .

[W]e note our difficulty in fully comprehending petitioner’s conception of a nexus with commerce. In his view, if an individual purchases a gun before his conviction, the fact that the gun once traveled in commerce does not provide an adequate nexus. It is necessary, in addition, that the person also carry it in an interstate facility. If, however, one purchases the same gun from the same dealer one day after the conviction as opposed to one day before, somehow the nexus magically appears, regardless of whether the purchaser carries the gun in any particular place. Such an interpretation strains credulity. We find no evidence in either the language or the legislative history for such a construction.

More significantly, these theories create serious loopholes in the congressional plan to “make it unlawful for a firearm . . . to be in the possession of a convicted felon.” 114 CONG. REC. 14773 (1968). A person who obtained a firearm prior to his conviction can retain it forever so long as he is not caught with it in an interstate facility. Indeed, petitioner’s interpretation allows an individual to go out in the period between his arrest and conviction and purchase and stockpile weapons with impunity. In addition, petitioner’s theories would significantly impede enforcement efforts. Those who do acquire guns after their conviction obviously do so

surreptitiously and, as petitioner concedes, it is very difficult as a practical matter to prove that such possession began after the possessor's felony conviction.

Petitioner responds that the Government's reading of the statute fails to give effect to all three terms of the statute — receive, possess, transport. He argues that someone guilty of receipt or transport will necessarily be guilty of possession and that, therefore, there was no need to include the other two offenses in the statute. While this contention is not frivolous, the fact is that petitioner's theory is similarly vulnerable. By his proposed definitions, there are essentially only two crimes — receipt and transport. The possessor who acquires the weapon after his conviction is guilty of receipt and the one who is carrying the gun in commerce or at an interstate facility presumably is guilty of transporting. Thus, the definitions offered by both sides fail to give real substance to all three terms. The difference, however, is that the Government's definition captures the essence of Congress' intent, striking at the possession of weapons by people “who have no business possessing [them].” 114 CONG. REC. 13869 (1968). Petitioner's version, on the other hand, fails completely to fulfill the congressional purpose. It virtually eliminates the one offense on which Congress focused in enacting the law.

Finally, petitioner seeks to invoke the two principles of statutory construction relied on in *Bass* — lenity in construing criminal statutes and caution where the federal-state balance is implicated. Petitioner, however, overlooks the fact that we did not turn to these guides in *Bass* until we had concluded that “[after] ‘seizing everything from which aid can be derived,’ . . . we are left with an ambiguous statute.” 404 U.S. at 347. The principles are applicable only when we are uncertain about the statute's meaning and are not to be used “in complete disregard of the purpose of the legislature.” *United States v. Bramblett*, 348 U.S. 503, 510 (1955). Here, the intent of Congress is clear. . . .

Notes and Questions

1. *Scarborough* held that to obtain a conviction under 18 U.S.C. App. §1202(a)—a provision now codified at 18 U.S.C. § 922(g)—the Government need only prove that “the firearm possessed by the convicted felon traveled at some time in interstate commerce.” Given that virtually every firearm has traveled in commerce at some point, the “commerce” element has generally become a mere formality in most federal firearms trials. The extent of federal enforcement activity in this area, licensed by cases like *Scarborough* and championed to various degrees by every administration since the late 1980s, is detailed in a section from an April 2000

report for the Administrative Office of the U.S. Courts by Patrick Walker & Pragati Patrick, Trends in Firearms Cases From Fiscal Year 1989 Through 1998, and the Workload Implications for the U.S. District Courts (March 2000) (unpublished manuscript) (on file with the Statistics Division of the Administrative Office of the United States Courts). Walker & Patrick note that “[f]rom 1989 to 1998, the number of firearms cases filed in the U.S. district courts increased 61 percent from 2256 to 3641,” and that during this period, many “defendants who previously would have been prosecuted at the state or local level were prosecuted in federal court to ensure that violent offenders received the maximum sentences available.” Moreover, “[i]n comparison to 1989, a firearms case filed in 1998 was more likely to involve multiple defendants, more likely to take longer between filing and disposition of the case, more likely than other types of crimes to result in a jury trial, and more likely to result in a longer prison sentence for the defendant(s).”

By 2009, the number of federal firearms cases had risen to 8243—an increase of 126 percent since 1998. Almost half of these cases (4087) involved a convicted felon who illegally possessed a firearm. U.S. Sent’g Comm’n, Overview of Federal Criminal Cases: Fiscal Year 2009, at 2 (2010), *available at* http://www.uscourts.gov/Research/Publications/2010/20101230_FY09_Overview_Federal_Criminal_Cases.pdf.

Would it trouble you if a prior felon were charged under § 922(g) for possessing a firearm sold to him by undercover federal agents who purposely selected a “prop gun” that satisfied the statute’s interstate commerce element? See *United States v. Sarraj*, 665 F.3d 916 (7th Cir. 2012) (untroubled).

2. Although the next case, *United States v. Lopez*, is often (and quite properly) seen as marking the rise of a more conservative notion of federal authority, it also ought to be read against the backdrop of the federal firearms enforcement activity just described. By the mid-1990s, a federal firearm case might have been the result of an arrest by local police officers (as in *Lopez*) and a prosecution handled by local prosecutors deputized to act as Special Assistant United States Attorneys. But the judges were always federal district judges, many of whom looked askance at the transformation of their courts into “local police courts.”

UNITED STATES v. LOPEZ

514 U.S. 549 (1995)

Chief Justice REHNQUIST delivered the opinion of the Court.

In the Gun-Free School Zones Act of 1990, Congress made it a federal offense “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.” 18 U.S.C. § 922(q)(1)(A). The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress “to regulate Commerce . . . among the several States . . .” U.S. CONST. art. I, § 8, cl. 3.

On March 10, 1992, respondent, who was then a 12th-grade student, arrived at Edison High School in San Antonio, Texas, carrying a concealed .38 caliber handgun and five bullets. Acting upon an anonymous tip, school authorities confronted respondent, who admitted that he was carrying the weapon. He was arrested and charged under Texas law with firearm possession on school premises. The next day, the state charges were dismissed after federal agents charged respondent by complaint with violating the Gun-Free School Zones Act of 1990. 18 U.S.C. § 922(q)(1)(A).¹

A federal grand jury indicted respondent on one count of knowing possession of a firearm at a school zone, in violation of § 922(q). . . . The District Court conducted a bench trial, found him guilty of violating § 922(q), and sentenced him to six months’ imprisonment and two years’ supervised release.

On appeal, respondent challenged his conviction based on his claim that § 922(q) exceeded Congress’ power to legislate under the Commerce Clause. The Court of Appeals for the Fifth Circuit agreed and reversed respondent’s conviction. It held that, in light of what it characterized as insufficient congressional findings and legislative history, “section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause.” Because of the importance of the issue, we granted certiorari, and we now affirm. . . .

Jones & Laughlin Steel, [301 U.S. 1 (1937),] *Darby*, [312 U.S. 100 (1941),] and *Wickard*, [317 U.S. 111 (1942)] ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases

¹The term “school zone” is defined as “in, or on the grounds of, a public, parochial or private school” or “within a distance of 1,000 feet from the grounds of a public, parochial or private school.” § 921(a)(25).

artificially had constrained the authority of Congress to regulate interstate commerce.

But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. . . . Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. . . . First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

Within this final category, admittedly, our case law has not been clear whether an activity must “affect” or “substantially affect” interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity “substantially affects” interstate commerce.

We now turn to consider the power of Congress, in the light of this framework, to enact § 922(q). The first two categories of authority may be quickly disposed of: § 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce. . . .

Section 922(q) is a criminal statute that by its terms has nothing to do with “commerce” or any sort of economic enterprise, however broadly one might define those terms.³ Section

³Under our federal system, the “States possess primary authority for defining and enforcing the criminal law.” *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *see also Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion) (“Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States”). When Congress criminalizes conduct already denounced as criminal by the States, it effects a “change in the sensitive relation between federal

922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Second, § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. . . .

Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, . . . the Government concedes that “[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.” We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here. . . .

. . . The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation’s economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.

We pause to consider the implications of the Government’s arguments. The Government admits, under its “costs of crime” reasoning, that Congress could regulate not only all violent

and state criminal jurisdiction.” *United States v. Enmons*, 410 U.S. 396, 411-12 (1973). The Government acknowledges that § 922(q) “displace[s] state policy choices in . . . that its prohibitions apply even in States that have chosen not to outlaw the conduct in question.” Brief for United States 29, n. 18. . . .

crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government’s “national productivity” reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate. . . .

For instance, if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, a fortiori, it also can regulate the educational process directly. Congress could determine that a school’s curriculum has a “significant” effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant “effect on classroom learning,” and that, in turn, has a substantial effect on interstate commerce. . . .

. . . The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do. . . .

[Justice Kennedy’s concurring opinion, which Justice O’Connor joined, and Justice Thomas’s concurring opinion are omitted, as are dissenting opinions by Justices Souter and Stevens]

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

The issue in this case is whether the Commerce Clause authorizes Congress to enact a statute that makes it a crime to possess a gun in, or near, a school. 18 U.S.C. § 922(q)(1)(A). In my view, the statute falls well within the scope of the commerce power as this Court has understood that power over the last half century.

In reaching this conclusion, I apply three basic principles of Commerce Clause interpretation. First, the power to “regulate Commerce . . . among the several States,” U.S. CONST. art. I, § 8, cl. 3, encompasses the power to regulate local activities insofar as they significantly affect interstate commerce. . . .

Second, in determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act (a single instance of gun possession), but rather the cumulative effect of all similar instances (*i.e.*, the effect of all guns possessed in or near schools). . . .

Third, the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words “rational basis” capture this leeway. . . .

Applying these principles to the case at hand, we must ask whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce. . . . [T]he answer to this question must be yes. Numerous reports and studies—generated both inside and outside government—make clear that Congress could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts.

For one thing, reports, hearings, and other readily available literature make clear that the problem of guns in and around schools is widespread and extremely serious. These materials report, for example, that four percent of American high school students (and six percent of inner-city high school students) carry a gun to school at least occasionally, that 12 percent of urban high school students have had guns fired at them, that 20 percent of those students have been

threatened with guns, and that, in any 6-month period, several hundred thousand schoolchildren are victims of violent crimes in or near their schools. And, they report that this widespread violence in schools throughout the Nation significantly interferes with the quality of education in those schools. . . . Congress could therefore have found a substantial educational problem—teachers unable to teach, students unable to learn—and concluded that guns near schools contribute substantially to the size and scope of that problem.

Having found that guns in schools significantly undermine the quality of education in our Nation’s classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as a human, problem. Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation’s economy. . . . Scholars on the subject report that technological changes and innovations in management techniques have altered the nature of the workplace so that more jobs now demand greater educational skills. . . .

Increasing global competition also has made primary and secondary education economically more important. . . . [M]ore than 70 percent of American-made goods now compete with imports. Yet, lagging worker productivity has contributed to negative trade balances and to real hourly compensation that has fallen below wages in 10 other industrialized nations. At least some significant part of this serious productivity problem is attributable to students who emerge from classrooms without the reading or mathematical skills necessary to compete with their European or Asian counterparts. . . .

Finally, there is evidence that, today more than ever, many firms base their location decisions upon the presence, or absence, of a work force with a basic education. . . .

The economic links I have just sketched seem fairly obvious. Why then is it not equally obvious, in light of those links, that a widespread, serious, and substantial physical threat to teaching and learning *also* substantially threatens the commerce to which that teaching and learning is inextricably tied? . . . [G]uns in the hands of six percent of inner-city high school students and gun-related violence throughout a city’s schools must threaten the trade and commerce that those schools support. The only question, then, is whether the latter threat is (to use the majority’s terminology) “substantial.” The evidence of (1) the *extent* of the gun-related violence problem, (2) the *extent* of the resulting negative effect on classroom learning, (3) the *extent* of the consequent negative commercial effects, when taken together, indicate a threat to trade and commerce that is “substantial.” . . .

To hold this statute constitutional is not to “obliterate” the “distinction between what is

national and what is local,” nor is it to hold that the Commerce Clause permits the Federal Government to “regulate any activity that it found was related to the economic productivity of individual citizens,” to regulate “marriage, divorce, and child custody,” or to regulate any and all aspects of education. First, this statute is aimed at curbing a particularly acute threat to the educational process—the possession (and use) of life-threatening firearms in, or near, the classroom. . . . Second, the immediacy of the connection between education and the national economic well-being is documented by scholars and accepted by society at large in a way and to a degree that may not hold true for other social institutions. It must surely be the rare case, then, that a statute strikes at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce. . . .

In sum, to find this legislation within the scope of the Commerce Clause would permit “Congress . . . to act in terms of economic . . . realities.” . . . Upholding this legislation would do no more than simply recognize that Congress had a “rational basis” for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce they threaten. For these reasons, I would reverse the judgment of the Court of Appeals. Respectfully, I dissent.

Notes and Questions

1. Justice Breyer cites “increasing global competition” as a reason why preventing firearms in schools could be seen as sufficiently affecting commerce under Commerce Clause jurisprudence. What is the limiting principle that protects state control of criminal justice if education’s ties to global competition are deemed to sufficiently “affect commerce”? Does Congress recognize such limits, at least when it comes to primary and secondary education? Note that when Congress legislates regarding these policy issues in the educational context, it uses its “spending power”—see, for example, the No Child Left Behind Act of 2001, 20 U.S.C. §§6301-7941.

2. Do you agree with Justice Breyer’s use of the aggregation approach—that the correct inquiry for Commerce Clause jurisprudence is not whether an individual’s behavior affects commerce, but rather whether similar behavior in aggregate would affect commerce? What are the benefits and limitations to such an approach for regulating crime?

3. Congress responded quickly to *Lopez* by revising 18 U.S.C. §922(q). As you consider these provisions, compare the operative language in (2)(A) below with the previous language,

which is quoted in *Lopez* at *supra* p. xx. Ask yourself why this legislation is so much more detailed (and contains more exemptions) than the legislation struck down in *Lopez*.

Gun-Free School Zones Act of 1995 (enacted 1996)

18 U.S.C. §922(q)

(q) (1) The Congress finds and declares that—

(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;

(B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;

(C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools;

(D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;

(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;

(F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;

(G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;

(H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves—even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and

(I) the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

(2) (A) It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.

(B) Subparagraph (A) does not apply to the possession of a firearm—

- (i) on private property not part of school grounds;
- (ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;
- (iii) that is—
 - (I) not loaded; and
 - (II) in a locked container, or a locked firearms rack that is on a motor vehicle;
- (iv) by an individual for use in a program approved by a school in the school zone;
- (v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;
- (vi) by a law enforcement officer acting in his or her official capacity; or
- (vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.

(3) (A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the person knows is a school zone.

(B) Subparagraph (A) does not apply to the discharge of a firearm—

- (i) on private property not part of school grounds;
- (ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program;
- (iii) by an individual in accordance with a contract entered into between a school in a school zone and the individual or an employer of the individual; or
- (iv) by a law enforcement officer acting in his or her official capacity.

(4) Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun free school zones as provided in this subsection.

In *United States v. Dorsey*, 418 F.3d 1038, 1046 (9th Cir. 2005), the Ninth Circuit noted: “This new version of § 922(q) resolves the shortcomings that the *Lopez* Court found in the prior version of this statute because it incorporates a ‘jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.’ (citing *Lopez*). This jurisdictional element saves § 922(q) from the infirmity that defeated it in *Lopez*.” Do you agree with the Ninth Circuit on this score?

4. In *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court, in another 5-4 decision, extended the *Lopez* analysis to strike down a provision of the Violence Against Women Act of 1994 that created a federal civil right of action for victims of gender-motivated violence. Writing for the Court, Chief Justice Rehnquist noted, *id.* at 615:

If accepted, [defenders of the statute’s] reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Morrison took pains not to question the constitutionality of the criminal provision of the Violence Against Women Act, which (in contrast to the civil provision) had an explicit Commerce Clause jurisdictional element. *See* 18 U.S.C. §2261(a)(1) (“A person who travels

across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b).”). The Court in *Morrison* noted: “The Courts of Appeals have uniformly upheld this criminal sanction as an appropriate exercise of Congress’ Commerce Clause authority, reasoning that the provision properly falls within the first of *Lopez*’s categories as it regulates the use of channels of interstate commerce—i.e., ‘the use of the interstate transportation routes through which persons and goods move.’ *United States v. Lankford*, 196 F.3d 563, 571-72 (5th Cir. 1999) (collecting cases) (internal quotation marks omitted).” 529 U.S. at 613 n.5.

2. The Present

The precedential status of *Lopez* and *Morrison* turns to a large extent on how one reads *Gonzales v. Raich*—a 6-3 decision from 2005 upholding Congress’ constitutional authority to criminalize personal possession of marijuana for medicinal purposes in the face of a California law that allowed such marijuana use.

GONZALES v. RAICH 545 U.S. 1 (2005)

Justice STEVENS delivered the opinion of the Court.

California is one of at least nine States that authorize the use of marijuana for medicinal purposes.¹ The question presented in this case is whether the power vested in Congress by Article I, § 8, of the Constitution “[t]o make all Laws which shall be necessary and proper for carrying into Execution” its authority to “regulate Commerce with foreign Nations, and among the several States” includes the power to prohibit the local cultivation and use of marijuana in

¹[citing provisions from Alaska, Colorado, Hawaii, Maine, Nevada, Oregon, Vermont, and Washington]; *see also* ARIZ. REV. STAT. ANN. § 13-3412.01 (West Supp. 2004) (voter initiative permitting physicians to prescribe Schedule I substances for medical purposes that was purportedly repealed in 1997, but the repeal was rejected by voters in 1998). In November 2004, Montana voters approved Initiative 148, adding to the number of States authorizing the use of marijuana for medical purposes.

compliance with California law.

I.

California has been a pioneer in the regulation of marijuana. In 1913, California was one of the first States to prohibit the sale and possession of marijuana, and at the end of the century, California became the first State to authorize limited use of the drug for medicinal purposes. In 1996, California voters passed Proposition 215, now codified as the Compassionate Use Act of 1996. The proposition was designed to ensure that “seriously ill” residents of the State have access to marijuana for medical purposes, and to encourage Federal and State Governments to take steps towards ensuring the safe and affordable distribution of the drug to patients in need. The Act creates an exemption from criminal prosecution for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician. A “primary caregiver” is a person who has consistently assumed responsibility for the housing, health, or safety of the patient.

Respondents Angel Raich and Diane Monson are California residents who suffer from a variety of serious medical conditions and have sought to avail themselves of medical marijuana pursuant to the terms of the Compassionate Use Act. They are being treated by licensed, board-certified family practitioners, who have concluded, after prescribing a host of conventional medicines to treat respondents’ conditions and to alleviate their associated symptoms, that marijuana is the only drug available that provides effective treatment. Both women have been using marijuana as a medication for several years pursuant to their doctors’ recommendation, and both rely heavily on cannabis to function on a daily basis. Indeed, Raich’s physician believes that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal.

Respondent Monson cultivates her own marijuana, and ingests the drug in a variety of ways including smoking and using a vaporizer. Respondent Raich, by contrast, is unable to cultivate her own, and thus relies on two caregivers, litigating as “John Does,” to provide her with locally grown marijuana at no charge. These caregivers also process the cannabis into hashish or keif, and Raich herself processes some of the marijuana into oils, balms, and foods for consumption.

On August 15, 2002, county deputy sheriffs and agents from the federal Drug Enforcement Administration (DEA) came to Monson’s home. After a thorough investigation, the county officials concluded that her use of marijuana was entirely lawful as a matter of California

law. Nevertheless, after a 3-hour standoff, the federal agents seized and destroyed all six of her cannabis plants.

Respondents thereafter brought this action against the Attorney General of the United States and the head of the DEA seeking injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act (CSA), 84 Stat. 1242, 21 U.S.C. § 801 *et seq.*, to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. In their complaint and supporting affidavits, Raich and Monson described the severity of their afflictions, their repeatedly futile attempts to obtain relief with conventional medications, and the opinions of their doctors concerning their need to use marijuana. Respondents claimed that enforcing the CSA against them would violate the Commerce Clause, the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments of the Constitution, and the doctrine of medical necessity.

The District Court denied respondents' motion for a preliminary injunction. Although the court found that the federal enforcement interests "wane[d]" when compared to the harm that California residents would suffer if denied access to medically necessary marijuana, it concluded that respondents could not demonstrate a likelihood of success on the merits of their legal claims.

A divided panel of the Court of Appeals for the Ninth Circuit reversed and ordered the District Court to enter a preliminary injunction. *Raich v. Ashcroft*, 352 F.3d 1222 (2003). The court found that respondents had "demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress' Commerce Clause authority." *Id.* at 1227. The Court of Appeals distinguished prior Circuit cases upholding the CSA in the face of Commerce Clause challenges by focusing on what it deemed to be the "separate and distinct class of activities" at issue in this case: "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law." *Id.* at 1228. The court found the latter class of activities "different in kind from drug trafficking" because interposing a physician's recommendation raises different health and safety concerns, and because "this limited use is clearly distinct from the broader illicit drug market—as well as any broader commercial market for medicinal marijuana—insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce." *Ibid.*

The majority placed heavy reliance on our decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), as interpreted by recent Circuit precedent, to hold that this separate class of purely local activities was beyond the reach of

federal power. . . .

The obvious importance of the case prompted our grant of certiorari. The case is made difficult by respondents' strong arguments that they will suffer irreparable harm because, despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes. The question before us, however, is not whether it is wise to enforce the statute in these circumstances; rather, it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally. Well-settled law controls our answer. The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case. We accordingly vacate the judgment of the Court of Appeals.

II

. . . [A]s early as 1906 Congress enacted federal legislation imposing labeling regulations on medications and prohibiting the manufacture or shipment of any adulterated or misbranded drug traveling in interstate commerce. Aside from these labeling restrictions, most domestic drug regulations prior to 1970 generally came in the guise of revenue laws, with the Department of the Treasury serving as the Federal Government's primary enforcer. For example, the primary drug control law, before being repealed by the passage of the CSA, was the Harrison Narcotics Act of 1914, 38 Stat. 785 (repealed 1970). The Harrison Act sought to exert control over the possession and sale of narcotics, specifically cocaine and opiates, by requiring producers, distributors, and purchasers to register with the Federal Government, by assessing taxes against parties so registered, and by regulating the issuance of prescriptions.

Marijuana itself was not significantly regulated by the Federal Government until 1937. . . . Like the Harrison Act, the Marihuana [sic] Tax Act did not outlaw the possession or sale of marijuana outright. Rather, it imposed registration and reporting requirements for all individuals importing, producing, selling, or dealing in marijuana, and required the payment of annual taxes in addition to transfer taxes whenever the drug changed hands. Moreover, doctors wishing to prescribe marijuana for medical purposes were required to comply with rather burdensome administrative requirements. Noncompliance exposed traffickers to severe federal penalties, whereas compliance would often subject them to prosecution under state law. . . .

Then in 1970, after declaration of the national "war on drugs," federal drug policy underwent a significant transformation. . . . [P]rompted by a perceived need to consolidate the growing number of piecemeal drug laws and to enhance federal drug enforcement powers,

Congress enacted the Comprehensive Drug Abuse Prevention and Control Act.

Title II of that Act, the CSA, repealed most of the earlier antidrug laws in favor of a comprehensive regime to combat the international and interstate traffic in illicit drugs. The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.²⁰ Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels.

To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. The CSA categorizes all controlled substances into five schedules. § 812. The drugs are grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body. §§ 811, 812. Each schedule is associated with a distinct set of controls regarding the manufacture, distribution, and

²⁰ In particular, Congress made the following findings:

(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.

(2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—(A) after manufacture, many controlled substances are transported in interstate commerce, (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic. 21 U.S.C. §§ 801(1)-(6).

use of the substances listed therein. The CSA and its implementing regulations set forth strict requirements regarding registration, labeling and packaging, production quotas, drug security, and recordkeeping.

In enacting the CSA, Congress classified marijuana as a Schedule I drug. 21 U.S.C. § 812(c). This preliminary classification was based, in part, on the recommendation of the Assistant Secretary of HEW “that marihuana [sic] be retained within schedule I at least until the completion of certain studies now underway.” Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. § 812(b)(1). These three factors, in varying gradations, are also used to categorize drugs in the other four schedules. For example, Schedule II substances also have a high potential for abuse which may lead to severe psychological or physical dependence, but unlike Schedule I drugs, they have a currently accepted medical use. § 812(b)(2). By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study. §§ 823(f), 841(a)(1), 844(a); *see also United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483, 490 (2001).

The CSA provides for the periodic updating of schedules and delegates authority to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between schedules. § 811. Despite considerable efforts to reschedule marijuana, it remains a Schedule I drug.

III

. . . The Commerce Clause emerged as the Framers’ response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation. For the first century of our history, the primary use of the Clause was to preclude the kind of discriminatory state legislation that had once been permissible. Then, in response to rapid industrial development and an increasingly interdependent national economy, Congress “ushered in a new era of federal regulation under the commerce power,” [*Lopez*, 514 U.S. at 554,] beginning with the enactment of the Interstate Commerce Act in 1887, 24 Stat. 379, and the Sherman Antitrust Act in 1890, 26 Stat. 209, as amended, 15 U.S.C. § 2 *et seq.*

Cases decided during that “new era,” which now spans more than a century, have identified three general categories of regulation in which Congress is authorized to engage under

its commerce power. First, Congress can regulate the channels of interstate commerce. *Perez v. United States*, 402 U.S. 146, 150 (1971). Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. *Ibid.* Third, Congress has the power to regulate activities that substantially affect interstate commerce. *Ibid.*; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). Only the third category is implicated in the case at hand.

Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. See, e.g., *Perez*, 402 U.S. at 151; *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942). As we stated in *Wickard*, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.* at 125. We have never required Congress to legislate with scientific exactitude. When Congress decides that the "total incidence" of a practice poses a threat to a national market, it may regulate the entire class. See *Perez*, 402 U.S. at 154-55. In this vein, we have reiterated that when "a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." E.g., *Lopez*, 514 U.S. at 558 (emphasis deleted).

Our decision in *Wickard*, 317 U.S. 111, is of particular relevance. In *Wickard*, we upheld the application of regulations promulgated under the Agricultural Adjustment Act of 1938, 52 Stat. 31, which were designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices. . . . *Wickard* . . . establishes that Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.

The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . ." and consequently control the market price, *id.* at 115, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here

too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

. . . While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.

Nonetheless, respondents suggest that *Wickard* differs from this case in three respects: (1) the Agricultural Adjustment Act, unlike the CSA, exempted small farming operations; (2) *Wickard* involved a “quintessential economic activity”—a commercial farm—whereas respondents do not sell marijuana; and (3) the *Wickard* record made it clear that the aggregate production of wheat for use on farms had a significant impact on market prices. Those differences, though factually accurate, do not diminish the precedential force of this Court's reasoning.

The fact that Filburn's own impact on the market was “trivial by itself” was not a sufficient reason for removing him from the scope of federal regulation. That the Secretary of Agriculture elected to exempt even smaller farms from regulation does not speak to his power to regulate all those whose aggregated production was significant, nor did that fact play any role in the Court's analysis. Moreover, even though Filburn was indeed a commercial farmer, the activity he was engaged in—the cultivation of wheat for home consumption—was not treated by the Court as part of his commercial farming operation. And while it is true that the record in the *Wickard* case itself established the causal connection between the production for local use and the national market, we have before us findings by Congress to the same effect.

. . . Respondents nonetheless insist that the CSA cannot be constitutionally applied to their activities because Congress did not make a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market. Be that as it may, we have never required Congress to make particularized findings in order to legislate, absent a special concern such as the protection of free speech. While congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident, and while we will consider congressional findings in our

analysis when they are available, the absence of particularized findings does not call into question Congress' authority to legislate.

In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. . . . Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U.S.C. § 801(5), and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to "make all Laws which shall be necessary and proper" to "regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8. That the regulation ensnares some purely intrastate activity is of no moment. . . .

IV

. . . At issue in *Lopez*, 514 U.S. 549, was the validity of the Gun-Free School Zones Act of 1990, which was a brief, single-subject statute making it a crime for an individual to possess a gun in a school zone. 104 Stat. 4844-4845, 18 U.S.C. § 922(q)(1)(A). The Act did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity. . . . The statutory scheme that the Government is defending in this litigation is at the opposite end of the regulatory spectrum. As explained above, the CSA . . . was a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of "controlled substances." Most of those substances—those listed in Schedules II through V—"have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people." 21 U.S.C. § 801(1). The regulatory scheme is designed to foster the beneficial use of those medications, to prevent their misuse, and to prohibit entirely the possession or use of substances listed in Schedule I, except as a part of a strictly controlled research project.

While the statute provided for the periodic updating of the five schedules, Congress itself made the initial classifications. It identified 42 opiates, 22 opium derivatives, and 17 hallucinogenic substances as Schedule I drugs. 84 Stat. 1248. Marijuana was listed as the 10th

item in the third subcategory. That classification, unlike the discrete prohibition established by the Gun-Free School Zones Act of 1990, was merely one of many “essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.” *Lopez*, 514 U.S. at 561. Our opinion in *Lopez* casts no doubt on the validity of such a program. . . .

Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. . . . The CSA . . . regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market. Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality. . . .

The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market.⁴¹ The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients’ medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious. . . . Taking into account the fact that California is only one of at least nine States to have authorized the medical use of marijuana, . . . Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial. . . .

⁴¹The state policy allows patients to possess up to eight ounces of dried marijuana, and to cultivate up to 6 mature or 12 immature plants. CAL. HEALTH & SAFETY CODE ANN. § 11362.77(a). However, the quantity limitations serve only as a floor. Based on a doctor’s recommendation, a patient can possess whatever quantity is necessary to satisfy his medical needs, and cities and counties are given *carte blanche* to establish more generous limits. Indeed, several cities and counties have done just that. For example, patients residing in the cities of Oakland and Santa Cruz and in the counties of Sonoma and Tehama are permitted to possess up to 3 pounds of processed marijuana. Putting that quantity in perspective, 3 pounds of marijuana yields roughly 3,000 joints or cigarettes. Executive Office of the President, Office of National Drug Control Policy, *What America’s Users Spend on Illegal Drugs* 24 (Dec. 2001). And the street price for that amount can range anywhere from \$900 to \$24,000. DEA, *Illegal Drug Price and Purity Report* (Apr. 2003) (DEA-02058).

Justice SCALIA, concurring in the judgment. . . .

Since *Perez v. United States*, 402 U.S. 146 (1971), our cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that “substantially affect” interstate commerce. The first two categories are self-evident, since they are the ingredients of interstate commerce itself. The third category, however, is different in kind, and its recitation without explanation is misleading and incomplete.

It is *misleading* because, unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as this Court has acknowledged since at least *United States v. Coombs*, 37 U.S. 72 (1838), Congress’ regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. And the category of “activities that substantially affect interstate commerce,” [*United States v. Lopez*, 514 U.S. 549, 559 (1995)], is *incomplete* because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce. . . . [T]he commerce power permits Congress not only to devise rules for the governance of commerce between States but also to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants. That is why the Court has repeatedly sustained congressional legislation on the ground that the regulated activities had a substantial effect on interstate commerce. . . .

Although this power “to make . . . regulation effective” commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce,² and may

² *Wickard v. Filburn*, 317 U.S. 111 (1942), presented such a case. Because the unregulated production of wheat for personal consumption diminished demand in the regulated wheat market, the Court said, it carried with it the potential to disrupt Congress’s price regulation by driving down prices in the market. This potential disruption of Congress’s interstate regulation, and not only the effect that personal consumption of wheat had on interstate

in some cases have been confused with that authority, the two are distinct. The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself “substantially affect” interstate commerce. Moreover . . . Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. *See Lopez, supra*, at 561. The relevant question is simply whether the means chosen are “reasonably adapted” to the attainment of a legitimate end under the commerce power. *See [United States v. Darby, 312 U.S. 100, 121 (1941)]. . . .*

. . . Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective. As *Lopez* itself states, and the Court affirms today, Congress may regulate noneconomic intrastate activities only where the failure to do so “could . . . undercut” its regulation of interstate commerce. *See Lopez, supra*, at 561. This is not a power that threatens to obliterate the line between “what is truly national and what is truly local.” *Lopez, supra*, at 567-68.

Lopez and [*United States v. Morrison, 529 U.S. 598 (2000)*] affirm that Congress may not regulate certain “purely local” activity within the States based solely on the attenuated effect that such activity may have in the interstate market. But those decisions do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government. Neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation. . . .

And there are other restraints upon the Necessary and Proper Clause authority. As Chief Justice Marshall wrote in *McCulloch v. Maryland*, [17 U.S. 316 (1819)], even when the end is constitutional and legitimate, the means must be “appropriate” and “plainly adapted” to that end. Moreover, they may not be otherwise “prohibited” and must be “consistent with the letter and spirit of the constitution.” These phrases are not merely hortatory. . . .

The application of these principles to the case before us is straightforward. In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The Commerce Clause unquestionably permits this. The power to regulate

commerce, justified Congress’s regulation of that conduct.

interstate commerce “extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it.” *Darby*, 312 U.S. at 113; *see also* [*Champion v. Ames*,] 188 U.S. 321, 354 (1903). To effectuate its objective, Congress has prohibited almost all intrastate activities related to Schedule I substances—both economic activities (manufacture, distribution, possession with the intent to distribute) and noneconomic activities (simple possession). *See* 21 U.S.C. §§ 841(a), 844(a). That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation. Rather, Congress’ authority to enact all of these prohibitions of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce.

By this measure, I think the regulation must be sustained. Not only is it impossible to distinguish “controlled substances manufactured and distributed intrastate” from “controlled substances manufactured and distributed interstate,” but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities. As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market—and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State.³ Congress need not accept on faith that state law will be effective in maintaining a strict division between a lawful market for “medical” marijuana and the more general marijuana market. . . .

Justice O’CONNOR, with whom THE CHIEF JUSTICE and Justice THOMAS join as to all but [the final two paragraphs], dissenting.

We enforce the “outer limits” of Congress’ Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. One of federalism’s chief virtues, of course, is that it promotes innovation by

³The principal dissent claims that, if this is sufficient to sustain the regulation at issue in this case, then it should also have been sufficient to sustain the regulation at issue in *Lopez*. This claim founders upon the shoals of *Lopez* itself, which made clear that the statute there at issue was “*not* an essential part of a larger regulation of economic activity.” *Lopez, supra*, at 561 (emphasis added). On the dissent’s view of things, that statement is inexplicable. Of course it is in addition difficult to imagine what intelligible scheme of regulation of the interstate market in guns could have as an appropriate means of effectuation the prohibition of guns within 1000 feet of schools (and nowhere else). . . .

allowing for the possibility that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

This case exemplifies the role of States as laboratories. The States’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation. . . .

What is the relevant conduct subject to Commerce Clause analysis in this case? . . . The Court’s decision rests on two facts about the CSA: (1) Congress chose to enact a single statute providing a comprehensive prohibition on the production, distribution, and possession of all controlled substances, and (2) Congress did not distinguish between various forms of intrastate noncommercial cultivation, possession, and use of marijuana. *See* 21 U.S.C. §§ 841(a)(1), 844(a). Today’s decision suggests that the federal regulation of local activity is immune to Commerce Clause challenge because Congress chose to act with an ambitious, all-encompassing statute, rather than piecemeal. In my view, allowing Congress to set the terms of the constitutional debate in this way, *i.e.*, by packaging regulation of local activity in broader schemes, is tantamount to removing meaningful limits on the Commerce Clause. . . .

. . . I agree with the Court that we must look beyond respondents’ own activities. Otherwise, individual litigants could always exempt themselves from Commerce Clause regulation merely by pointing to the obvious—that their personal activities do not have a substantial effect on interstate commerce. The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis). The analysis may not be the same in every case, for it depends on the regulatory scheme at issue and the federalism concerns implicated.

A number of objective markers are available to confine the scope of constitutional review here. Both federal and state legislation—including the CSA itself, the California Compassionate Use Act, and other state medical marijuana legislation—recognize that medical and nonmedical

(*i.e.*, recreational) uses of drugs are realistically distinct and can be segregated, and regulate them differently. *See* 21 U.S.C. § 812; CAL. HEALTH & SAFETY CODE ANN. § 11362.5. Respondents challenge only the application of the CSA to medicinal use of marijuana. Moreover, because fundamental structural concerns about dual sovereignty animate our Commerce Clause cases, it is relevant that this case involves the interplay of federal and state regulation in areas of criminal law and social policy, where “States lay claim by right of history and expertise.” *Lopez, supra*, at 583 (Kennedy, J., concurring). California, like other States, has drawn on its reserved powers to distinguish the regulation of medicinal marijuana. To ascertain whether Congress’ encroachment is constitutionally justified in this case, then, I would focus here on the personal cultivation, possession, and use of marijuana for medicinal purposes.

Having thus defined the relevant conduct, we must determine whether, under our precedents, the conduct is economic and, in the aggregate, substantially affects interstate commerce. Even if intrastate cultivation and possession of marijuana for one’s own medicinal use can properly be characterized as economic, and I question whether it can, it has not been shown that such activity substantially affects interstate commerce. Similarly, it is neither self-evident nor demonstrated that regulating such activity is necessary to the interstate drug control scheme. . . .

Even assuming that economic activity is at issue in this case, the Government has made no showing in fact that the possession and use of homegrown marijuana for medical purposes, in California or elsewhere, has a substantial effect on interstate commerce. Similarly, the Government has not shown that regulating such activity is necessary to an interstate regulatory scheme. . . .

Relying on Congress’ abstract assertions, the Court has endorsed making it a federal crime to grow small amounts of marijuana in one’s own home for one’s own medicinal use. This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently. If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California’s experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case. For these reasons I dissent.

Justice THOMAS, dissenting.

Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers. . . .

Even the majority does not argue that respondents' conduct is itself "Commerce among the several States." [U.S. CONST.] art. I, § 8, cl. 3. Monson and Raich neither buy nor sell the marijuana that they consume. They cultivate their cannabis entirely in the State of California—it never crosses state lines, much less as part of a commercial transaction. Certainly no evidence from the founding suggests that "commerce" included the mere possession of a good or some purely personal activity that did not involve trade or exchange for value. . . .

More difficult, however, is whether the CSA is a valid exercise of Congress' power to enact laws that are "necessary and proper for carrying into Execution" its power to regulate interstate commerce. [U.S. CONST.] art. I, § 8, cl. 18. The Necessary and Proper Clause is not a warrant to Congress to enact any law that bears some conceivable connection to the exercise of an enumerated power. Nor is it, however, a command to Congress to enact only laws that are absolutely indispensable to the exercise of an enumerated power.

In *McCulloch v. Maryland*, 17 U.S. 316 (1819), this Court, speaking through Chief Justice Marshall, set forth a test for determining when an Act of Congress is permissible under the Necessary and Proper Clause:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421.

To act under the Necessary and Proper Clause, then, Congress must select a means that is "appropriate" and "plainly adapted" to executing an enumerated power; the means cannot be otherwise "prohibited" by the Constitution; and the means cannot be inconsistent with "the letter and spirit of the [C]onstitution." *Ibid.*; D. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888*, at 163-64 (1985). The CSA, as applied to respondents' conduct, is not a valid exercise of Congress' power under the Necessary and Proper Clause. . . .

On its face, a ban on the intrastate cultivation, possession and distribution of marijuana may be plainly adapted to stopping the interstate flow of marijuana. Unregulated local growers

and users could swell both the supply and the demand sides of the interstate marijuana market, making the market more difficult to regulate. But respondents do not challenge the CSA on its face. Instead, they challenge it as applied to their conduct. The question is thus whether the intrastate ban is “necessary and proper” as applied to medical marijuana users like respondents.

Respondents are not regulable simply because they belong to a large class (local growers and users of marijuana) that Congress might need to reach, if they also belong to a distinct and separable subclass (local growers and users of state-authorized, medical marijuana) that does not undermine the CSA’s interstate ban. The Court of Appeals found that respondents’ “limited use is distinct from the broader illicit drug market,” because “th[eir] medicinal marijuana . . . is not intended for, nor does it enter, the stream of commerce.” If that is generally true of individuals who grow and use marijuana for medical purposes under state law, then even assuming Congress has “obvious” and “plain” reasons why regulating intrastate cultivation and possession is necessary to regulating the interstate drug trade, none of those reasons applies to medical marijuana patients like Monson and Raich. . . .

Here, Congress has encroached on States’ traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens.⁵ Further, the Government’s rationale—that it may regulate the production or possession of any commodity for which there is an interstate market—threatens to remove the remaining vestiges of States’ traditional police powers. This would convert the Necessary and Proper Clause into precisely what Chief Justice Marshall did not envision, a “pretext . . . for the accomplishment of objects not intrusted to the government.” *McCulloch, supra*, at 423. . . .

The majority prevents States like California from devising drug policies that they have concluded provide much-needed respite to the seriously ill. It does so without any serious inquiry

⁵In fact, the Anti-Federalists objected that the Necessary and Proper Clause would allow Congress, inter alia, to “*constitute new Crimes*, . . . and extend [its] Power as far as [it] shall think proper; so that the State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights.” Mason, *Objections to the Constitution Formed by the Convention* (1787), in 2 THE COMPLETE ANTI-FEDERALIST 11, 12-13 (H. Storing ed. 1981) (emphasis added). Hamilton responded that these objections were gross “misrepresentation[s].” THE FEDERALIST NO. 33, at 204. He termed the Clause “perfectly harmless,” for it merely confirmed Congress’ implied authority to enact laws in exercising its enumerated powers. *Id.* at 205. According to Hamilton, the Clause was needed only “to guard against cavilling refinements” by those seeking to cripple federal power. THE FEDERALIST NO. 33, at 205; *id.* No. 44, at 303-04 (J. Madison).

into the necessity for federal regulation or the propriety of “displac[ing] state regulation in areas of traditional state concern.” The majority’s rush to embrace federal power “is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union.” *United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483, 502 (2001) (Stevens, J., concurring in judgment). Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of their citizens. I would affirm the judgment of the Court of Appeals. I respectfully dissent.

Notes and Questions

1. Lower courts have relied on *Raich* when rejecting Commerce Clause challenges to child pornography statutes. Under the Child Protection and Obscenity Enforcement Act of 1988, 18 U.S.C. §2251(a):

Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

In *United States v. Blum*, 534 F.3d 608 (7th Cir. 2008), the Seventh Circuit rejected the Commerce Clause challenge of a defendant who manufactured child pornography “at his home in Wisconsin, for his private viewing and possession.” *Id.* at 609. The court noted: “The only movement in interstate commerce that is alleged is that the mini-DV tapes were manufactured outside the state of Wisconsin.” *Id.* at 609. In upholding the statute, the court observed:

As was the case in *Raich*, the high demand for child pornography in the interstate market presented the real danger that purely-intrastate child pornography would find its way to that market. Similarly, the same difficulty in distinguishing between locally-produced marijuana and interstate marijuana for enforcement purposes is problematic with respect to child pornography as well. Given those substantial concerns, and additionally considering the Congressional determination that the manufacture and possession of any child pornography itself feeds the market and increases demand for it, we hold that Congress rationally could conclude that Blum's actions, taken in aggregation with others engaged in similar activities, substantially affects interstate commerce. We therefore join our sister circuits in rejecting the *Commerce Clause* challenge to the application of the statute to intrastate child pornography.

Id. at 611-12.

2. In *United States v. Stewart*, 451 F.3d 1071 (9th Cir. 2006), the possessor of a homemade machine gun raised a Commerce Clause challenge to his prosecution under a statute that broadly makes it “unlawful for any person to transfer or possess a machinegun.” 18 U.S.C. §922(o)(1). Initially, he prevailed, but then *Raich* came down and the Ninth Circuit reversed course in an opinion by Judge Kozinski:

In our earlier opinion, we concluded that section 922(o) was quite similar to the statute at issue in *Lopez*. But *Raich* forces us to reconsider. Like the possession regulation in the Controlled Substances Act, the machinegun possession ban fits within a larger scheme for the regulation of interstate commerce in firearms. Guns, like drugs, are regulated by a detailed and comprehensive statutory regime designed to protect individual firearm ownership while supporting “Federal, State and local law enforcement officials in their fight against crime and violence.” Gun Control Act of 1968, Pub. L. No. 90-618, § 101, 82 Stat. 1213, 1213. Just as the CSA classifies substances in five different categories, placing different controls on each class based on a combination of its legitimate uses, potential for abuse and effects on the body, the federal firearms statutory regime classifies weapons for differential treatment as well: Some firearms are freely transferrable, others must be registered and, still others (like machineguns) are largely banned.

Nevertheless, there is one major difference between the possession ban in the

CSA and section 922(o): The machinegun ban was enacted almost twenty years after the statute establishing the current federal firearms regulatory regime. *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, § 102(9), 100 Stat. 449, 452-53 (1986) (codified at 18 U.S.C. § 922(o)). Nevertheless, we don't read *Raich* as requiring us to consider section 922(o) as standalone legislation like that in *Morrison* and *Lopez*. *Raich* stands for the proposition that Congress can ban possession of an object where it has a rational basis for concluding that object might bleed into the interstate market and affect supply and demand, especially in an area where Congress regulates comprehensively. . . . That Congress took a wait-and-see approach when it created the regime doesn't matter. The Commerce Clause does not prevent Congress from correcting deficiencies in its regulatory scheme in piecemeal fashion. To conclude otherwise would eliminate Congress' ability to regulate with a light touch in the first instance and tinker at the margins in light of experience. *Raich*'s deferential review of comprehensive federal regulatory schemes ensures that Congress retains as much discretion to adjust the details of its regulatory scheme as it had when it created the regime. Therefore, the fact that section 922(o) was passed long after the Gun Control Act is not of constitutional significance. . . .

It doesn't matter, as the amici would have us believe, that the machineguns Stewart manufactured were unique. One of the amici argues that "[b]ecause Mr. Stewart's gun is unique, homemade, and hand-tooled, it does not 'overhang' the market, and threaten to enter the market, and affect prices and demand in the same way as wheat or marijuana." But at some level, everything is unique; fungibility is a matter of degree. One of the motivating concerns underlying the blanket prohibition on possession of marijuana under the CSA is that those in a state of drug-induced euphoria care not a whit whether their marijuana has ever crossed state borders. Similarly, those seeking machineguns care only whether the guns work effectively-whether they discharge large amounts of ammunition with a single trigger pull. To the extent that homemade machineguns function like commercial machineguns, it doesn't matter whether they do so in a unique way; as economic substitutes, they are interchangeable.

451 F.3d at 1076-78.

3. Stewart also raised a Second Amendment claim, which the Ninth Circuit summarily rejected, *id.* at 1078. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court

held that a D.C. law banning usable handguns in homes violates the Second Amendment to the Constitution. Justice Scalia wrote in the majority 5-4 opinion, *id.* at 628-29:

[T]he inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of “arms” that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,” would fail constitutional muster.

The *Heller* majority could not accept the interest-balancing test proposed in Justice Breyer’s dissent because “[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.” *Id.* at 634.

Is *Stewart* still good law after *Heller*, considering that “the enshrinement of constitutional rights necessarily” removes from the table “the absolute prohibition on handguns held and used for self-defense in the home”? *Id.* at 636. *Stewart*, after all, possessed his handmade machinegun in his home. It would, however, seem that *Stewart* is still good law because *Heller* looked to how a “traditional militia” would arm itself: “[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right.” *Id.* at 625. Moreover, the Court qualified its opinion by saying, “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-27.

Not surprisingly, *Heller* has thus not affected many of the gun laws at issue in Commerce Clause jurisprudence. Laws banning firearm possession by felons, drug addicts, and illegal aliens have all been upheld, as have laws prohibiting certain types of weapons. *See, e.g.*, *United States v. Booker*, 570 F. Supp. 2d 161 (D. Me. 2008) (upholding law prohibiting firearm possession by a person convicted of a misdemeanor crime of domestic violence); *United States v. Marzzarella*,

595 F. Supp. 2d 596 (W.D. Pa. 2009) (upholding law prohibiting individuals from possessing a firearm knowing that its serial number had been obliterated, removed or altered); *United States v. McRobie*, No. 08-4632, 2009 U.S. App. LEXIS 617 (4th Cir. Jan. 14, 2009) (per curiam) (upholding conviction for possession of a firearm by a person committed to a mental institution); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc) (rejecting constitutional challenge to 18 U.S.C. §922(g)(9), which prohibits possession of a firearm by a person convicted of a misdemeanor crime of domestic violence), cert. denied, 131 S.Ct. 1674 (2011). *But see* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J. L. & Pub. Pol'y 695, 735 (2009) (suggesting that “wherever the constitutional line may be” after *Heller*, “it is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968”).

Where a statute requires proof of a commerce nexus, need the offense have been part of a larger statutory scheme, as in *Raich*, or will proof of the legislatively specified nexus, however minimal, be sufficient? Put differently, is *Scarborough* still good law? Consider the following case, which gives a sense of decisions around the country:

UNITED STATES v. ALDERMAN
565 F.3d 641 (9th Cir. 2009)

McKEOWN, Circuit Judge:

This case of first impression in the Ninth Circuit requires us to consider whether Congress has the authority under the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, to criminalize the possession by a felon of body armor that has been “sold or offered for sale in interstate commerce.” 18 U.S.C. §§ 931 and 921(a)(35). Put another way, the issue is whether the sale of body armor in interstate commerce creates a sufficient nexus between possession of the body armor and commerce to allow for federal regulation under Congress's Commerce Clause authority.

In recent years, the Supreme Court has significantly altered the landscape of congressional power under the Commerce Clause. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000) (striking down statute that provided a federal civil remedy for victims of gender-motivated violence); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down federal statute regulating possession of guns in school zones). Nonetheless, the resolution to this case is found in Supreme Court and Ninth Circuit precedent that addresses a jurisdictional element nearly

identical to the one that applies to § 931. *See Scarborough v. United States*, 431 U.S. 563, 575, 577 (1977) (concluding that, in the context of Title VII of the Omnibus Crime Control Act, proof that a firearm traveled in interstate commerce satisfies the required nexus between possession of the firearm and commerce); *United States v. Cortes*, 299 F.3d 1030, 1037 n.2 (9th Cir. 2002) (upholding carjacking statute and stating that “the vitality of *Scarborough* engenders significant debate,” but “[u]ntil the Supreme Court tells us otherwise . . . we follow *Scarborough* unwaveringly.”). We conclude that we are bound by this precedent—absent the Supreme Court or our en banc court telling us otherwise—and that the felon-in-possession of body armor statute passes muster.

Background

Cedrick Alderman was arrested in 2005 during a sting operation involving an attempted controlled purchase of cocaine. Officers were aware that Alderman had been previously convicted of felony robbery. The arresting officer discovered that Alderman was wearing a bulletproof vest. Alderman was booked for possession of the vest and for violating the conditions of his supervision.

Because Washington state law does not criminalize felon possession of body armor, the matter was referred to the federal authorities. Alderman was indicted under 18 U.S.C. § 931(a), which makes it unlawful for a person convicted of a felony involving a "crime of violence" to possess body armor. *See James Guelff and Chris McCurley Body Armor Act of 2002*, § 11009(e)(2)(A), 18 U.S.C. § 931 (criminalizing the possession of body armor by felons as of Nov. 2, 2002).

. . . Alderman entered a conditional guilty plea. Under the plea agreement, Alderman preserved for appeal the disputed constitutionality of § 931. As part of the factual basis for the plea, the plea agreement included Alderman’s admission that the vest had crossed state lines. Specifically, the vest was sold by the manufacturer in California to a distributor in Washington state. The distributor then sold the vest to the Washington State Department of Corrections. Nothing in the record reveals how the vest left the Department of Corrections, but it is undisputed that the vest subsequently came into Alderman’s possession. The stipulation and factual recitation were designed to ensure that the jurisdictional element of the statute was met. *See* 18 U.S.C. § 921(a)(35) (limiting the applicability of § 931 to vests that have been “sold or offered for sale, in interstate or foreign commerce”).

Analysis

I. THE STATUTE

. . . Under 18 U.S.C. § 931, it is a crime for a person who has been convicted of a violent felony to “purchase, own, or possess body armor.” Unlike the statutes at issue in *Lopez and Morrison*, § 931 is limited by an express jurisdictional condition -- the jurisdictional hook limits the reach of § 931 to “body armor” that has been “sold or offered for sale, in interstate or foreign commerce. . . .” 18 U.S.C. § 921(a)(35).

Congress enacted § 931 in response to a spate of violent clashes involving heavily armored assailants and comparatively unprotected police officers. . . .

Confronted with the reality that “nationally, police officers and ordinary citizens are facing increased danger as criminals use more deadly weaponry, body armor, and other sophisticated assault gear,” Congress concluded that a “serious threat to community safety [is] posed by criminals who wear body armor during the commission of a violent crime.” [H.R. Rep. 107-193, pt. 1, at 2]. Congress further found that “crime at the local level is exacerbated by the interstate movement of body armor and other assault gear” and “existing Federal controls over [interstate] traffic [in body armor] do not adequately enable the States to control this traffic within their own borders.” *Id.* In other words, as with guns and domestic strife, Congress determined that felons and body armor “are a potentially deadly combination nationwide.” *U.S. v. Hayes*, 129 S. Ct. 1079 (2009). To address this threat, Congress elected to forbid violent felons from possessing body armor that had been sold through interstate channels.

Alderman argues that Congress exceeded its authority under the Commerce Clause when it enacted this legislation. We disagree. The Supreme Court has cautioned us that “[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.” *Morrison*, 529 U.S. at 607. No such showing has been made here. We opt to follow the Supreme Court’s lead in *Scarborough*.

II. UNITED STATES V. SCARBOROUGH AND RELATED CIRCUIT CASES

We are guided in our analysis first and foremost by the Supreme Court’s decision in *Scarborough*. . . . [A]lthough the Court did not address the statute from a constitutional perspective, it implicitly assumed the constitutionality of the “in commerce” requirement. It is difficult to distinguish our case from *Scarborough*.

In considering the continuing vitality of *Scarborough*, we have consistently upheld similar felon-in-possession statutes. *See, e.g., United States v. Jones*, 231 F.3d 508, 514 (9th Cir. 2000) (upholding statute criminalizing felon’s possession of a firearm because the jurisdictional hook in the statute “insures on a case-by-case basis that the defendant’s actions implicate interstate commerce to a constitutionally adequate degree.”); *United States v. Hanna*, 55 F.3d 1456, 1462 (9th Cir. 1995) (quoting *Scarborough*, 431 U.S. at 575, and stating that *Scarborough* requires “only ‘the minimal nexus that the firearm have been, at some time, in interstate commerce.’”); *see also Cortes*, 299 F.3d at 1037 (upholding federal carjacking statute because, taken together, the context of the statute, congressional findings, and the requirement that the car affected have been transported in interstate commerce “ensure that carjackings covered by 18 U.S.C. § 2119 substantially affect interstate commerce.”).

We are not alone in adhering to *Scarborough*. In *United States v. Patton*, the Tenth Circuit recently considered § 931 in light of *Scarborough* and the Supreme Court’s post-*Lopez* Commerce Clause jurisprudence. 451 F.3d 615 (10th Cir. 2006). After conducting an exhaustive review of Supreme Court and circuit precedent, the Tenth Circuit pointed out that “[o]ther circuits have similarly continued to follow *Scarborough*” and concluded that “[a]lthough the body armor statute does not fit within any of the *Lopez* categories, it is supported by the pre-*Lopez* precedent of *Scarborough v. United States*.” *Id.* at 634. . . .

Other circuits have similarly endorsed the continuing vitality of *Scarborough*, albeit sometimes with skepticism, in decisions dealing with a variety of felon firearm statutes. *See, e.g., United States v. Lemons*, 302 F.3d 769, 772-73 (7th Cir. 2002) (noting that because “*Scarborough* suggested that prior movement of the firearm in interstate commerce would suffice to meet [the jurisdictional element], we have, in the wake of *Lopez*, repeatedly rejected *Commerce Clause* challenges to application of the felon-in-possession statute”; as to any conflict with *Lopez*, “it is for the Supreme Court to so hold.”); *United States v. Smith*, 101 F.3d 202, 215 (1st Cir. 1996) (deciding that *Scarborough*, rather than *Lopez*, applied because of the jurisdictional hook in the statute); *United States v. Chesney*, 86 F.3d 564, 571 (6th Cir. 1996) (adhering to *Scarborough*). Although these decisions dealt with the possession of firearms rather than body armor, we agree with the Tenth Circuit that the “prohibition on possessing body armor cannot be distinguished from the prohibitions on possessing firearms that we have upheld.” *Patton*, 451 F.3d at 635.

We decline to create a circuit split on this issue or to deviate from binding precedent. The congressional findings, the nature of the body armor statute, and the express requirement of a

sale in interstate commerce, considered in combination, provide a sufficient nexus to and effect on interstate commerce to uphold § 931.

III. RECENT COMMERCE CLAUSE JURISPRUDENCE

Although we consider *Scarborough* as the defining case, we cannot ignore the Supreme Court's shifting emphasis in its *Commerce Clause* jurisprudence over the past decade. Alderman posits that *Scarborough* has been overruled by the Court's recent *Commerce Clause* cases. Our review of those authorities does not support this view—*Scarborough* has not been discarded. . . .

Unlike the statutes at issue in *Lopez* and *Morrison*, § 931 is limited by an express jurisdictional provision. Specifically, the statute regulates body armor “sold or offered for sale, in interstate or foreign commerce.” *Cf. Cortes*, 299 F.3d at 1036 (concluding that a carjacking statute contained an express jurisdictional hook because it was limited to vehicles “transported, shipped, or received in interstate or foreign commerce”). . . .

. . . Thus, for example, homemade body armor or body armor produced intra-state would not be caught within the sweep of the statute. *Cf. Polanco*, 93 F.3d at 563 (holding that a jurisdictional element “requiring the government to prove that the defendant shipped, transported, or possessed a firearm in interstate commerce, or received a firearm that had been shipped or transported in interstate commerce . . . insures, on a case-by-case basis, that a defendant's actions implicate interstate commerce to a constitutionally adequate degree.”).

We recognize that a jurisdictional hook is not always “a talisman that wards off constitutional challenges.” *Patton*, 451 F.3d at 632. As we have explained,

[t]he Supreme Court’s decisions in *Lopez* and *Morrison* [], reject the view that a jurisdictional element, standing alone, serves to shield a statute from constitutional infirmities under the *Commerce Clause*. At most, the Court has noted that such an element “*may* establish that the enactment is in pursuance of Congress’ regulation of interstate commerce,” or that it may “lend support” to this conclusion.

McCoy, 323 F.3d at 1125 (quoting *Morrison*, 529 U.S. at 612-13). Consequently, when traveling in uncharted waters, we must consider the jurisdictional hook together with additional factors, such as congressional findings. *Id.* Here, we are confronted by the unique situation where a nearly identical jurisdictional hook has been blessed by the Supreme Court. Therefore, we need not engage in the careful parsing of post-*Lopez* case law that would otherwise be required.

Rather, we recognize that this determination is controlled by the Court's analysis in *Scarborough*, and that “[u]ntil the Supreme Court tells us otherwise . . . we [must] follow *Scarborough* unwaveringly.” *Cortes*, 299 F.3d at 1037 n.2. . . .

PAEZ, Circuit Judge, dissenting:

I respectfully dissent.

In my view, felon-possession of body armor does not have a substantial effect on interstate commerce; its prohibition under 18 U.S.C. § 931 neither regulates commerce or any sort of economic enterprise nor regulates intrastate, non-economic activity that is essential to a comprehensive federal regulatory scheme. We should not overlook these substantial failings and nevertheless affirm Alderman's conviction under § 931 by enlarging the pre-*United States v. Lopez* precedent of *Scarborough v. United States*, 431 U.S. 563 (1977), merely because a jurisdictional element is present. The majority's approach, in my view, effectively renders the Supreme Court's three-part Commerce Clause analysis superfluous and permits Congress, through the use of a jurisdictional element of any stripe, to “convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *Lopez*, 514 U.S. at 567. . . .

Here, [] there is no evidence that § 931's prohibition of felon possession of body armor was either itself “a general regulatory statute [that] bears a substantial relation to commerce,” or an “essential part” of some other regulatory scheme. *Lopez*, 514 U.S. at 558, 561 (quotation marks and emphasis omitted). To the contrary, § 931 is like the statute struck down in *Lopez*: a “brief, single-subject statute making it a crime for [a felon] to possess [body armor].” *Raich*, 545 U.S. at 23. Further, it is unrelated to any broader attempt to control or suppress the market in body armor. Congress has not regulated the manufacture, distribution, sale, possession, or use of body armor. Moreover, the statute does not control *any* aspect of the commercial marketplace for body armor; it is perfectly legal, for example, to sell body armor to a felon or to buy body armor from a felon. The statute—which prohibits *felon* possession, ownership, and purchase—criminalizes certain conduct by felons rather than regulating interstate commerce in body armor. Where it is perfectly legal to sell body armor to felons, and the entire legitimate market in body armor—manufacture, distribution, and sale—is untouched by § 931 or any related legislation, there is no rational basis for concluding that criminalizing felon possession would have a discernable, let alone substantial, effect on interstate commerce. Significantly, Congress itself

estimated that the statute would effect [sic] fewer than ten cases per year. *See* H.R. Rep. No. 107-193, pt. 1, at 7 (2001). . . .

Here, even when *Lopez*'s and *Morrison*'s instructions are read in the light most favorable to exercise of congressional power, any potential effect on commerce of Alderman's possession of body armor is both spare and particularly attenuated. The possession subject to regulation under § 931 need not be coupled with possession of a weapon or connected with the commission of a federal crime, circumstances which might fairly be said to substantially affect the national economy. In this case, Alderman's possession of body armor posed no danger; he was walking down a street, unarmed, his vest invisible beneath his shirt. His conduct had no adverse economic or commercial impact whatsoever and, in the absence of any further, affirmative criminal or other activity, it had no potential for such an impact. Even conceding that Alderman's possession of body armor might facilitate criminal conduct nonetheless, *Lopez* and *Morrison* patently reject the argument that because an object facilitates crime, possession of that object can be regulated under Congress's commerce power. . . .

. . . Here, the possession at issue is, by statutory design, attenuated both from the interstate market in body armor and any use of that body armor during an activity that might affect interstate commerce. Consequently, the jurisdictional element does not serve its required purpose of limiting the statute to felon-possession that have a direct and substantial effect on interstate commerce. . . .

In particular, § 931's jurisdictional element does nothing to prevent Congress from claiming the general police power that the Constitution "denied the National Government and reposed in the States." *Morrison*, 529 U.S. at 618. While the use of a broad jurisdictional element does not invalidate a statute that otherwise "substantially affects . . . commerce," *Cortes*, 299 F.3d at 1036, such an element cannot save a statute that otherwise lacks the required effect.

Notes and Questions

1. The Ninth Circuit's request for Supreme Court guidance has so far fallen on deaf ears. Dissenting from the denial of certiorari in *Alderman*, Justice Thomas (joined by Justice Scalia) complained:

[T]he lower courts' reading of *Scarborough*, by trumping the *Lopez* framework, could very well remove any limit on the commerce power. The Ninth Circuit's interpretation of

Scarborough seems to permit Congress to regulate or ban possession of any item that has ever been offered for sale or crossed state lines. Congress arguably could outlaw “the theft of a Hershey kiss from a corner store in Youngstown, Ohio, by a neighborhood juvenile on the basis that the candy once traveled . . . to the store from Hershey, Pennsylvania.” *United States v. Bishop*, 66 F.3d 569, 596 (CA3 1995) (Becker, J., concurring in part and dissenting in part). The Government actually conceded at oral argument in the Ninth Circuit that Congress could ban possession of french fries that have been offered for sale in interstate commerce.

Alderman v. United States, 131 S.Ct. 700 (2011) (Thomas, J., dissenting). While you are considering whether Justice Thomas is correct, keep in mind the jurisdictional cases that regularly arise in Hobbs Act prosecutions.

2. The Hobbs Act, 18 U.S.C. §1951, criminalizes robbery or extortion that “in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce.” Consider the following Hobbs Act decisions on the scope and application of that statute’s jurisdictional element:

a. In *United States v. Peterson*, 236 F.3d 848, 853 (7th Cir. 2001), where gang members were charged with robbing a drug dealer of \$18,000 in cash, the Seventh Circuit held that the fact that the money had been printed out-of-state was insufficient to establish an interstate commerce nexus; otherwise, there would automatically be federal jurisdiction over robberies of currency in every state except Texas, the only place besides Washington, D.C. where currency is printed.

b. In *United States v. McCormack*, 371 F.3d 22 (1st Cir. 2004), McCormack and others kidnapped Carter, a former drug dealer, and “threatened to kill and torture him unless they were paid a million dollars. When Carter pleaded that he only possessed about \$300,000 in mutual funds and other non-liquid assets, the kidnappers agreed to release him and told him to liquidate his mutual funds in small increments until he could pay them \$100,000.” On appeal, McCormack argued that his prosecution exceeded the scope of Congress’s power under the Commerce Clause. The First Circuit affirmed his conviction, noting:

The commerce element of a § 1951(a) offense extends to the limit of Congress’s Commerce Clause authority. It reaches all conduct that creates a “realistic probability of a de minimis effect on interstate commerce.” . . . Importantly, the de minimis test under the

Hobbs Act remains applicable after the Supreme Court's Commerce Clause decisions in *United States v. Lopez*, and *United States v. Morrison*.

The government contends that the kidnappers' extortionate demand of \$100,000, standing alone, is sufficient to satisfy the Hobbs Act's commerce element under the de minimis effects test. It argues that any reasonable factfinder would conclude that, in order to satisfy such an exorbitant demand, the victim would need to liquidate assets in a manner affecting interstate commerce.

We decline to adopt any bright-line rule that an extortionate demand of a certain sum from an individual can automatically satisfy the commerce element of the Hobbs Act. Determining whether an act has a reasonable probability of having a "de minimis effect" on interstate commerce inherently requires a multifaceted and case-specific inquiry. Moreover, it is far from clear that, as the government asserts, a \$100,000 demand would necessarily require transactions affecting interstate commerce in every case: many people would simply have no way of gathering \$100,000 together, whereas those specifically targeted because of their access to money may well be able to satisfy such a demand without resort to large financial transactions affecting interstate commerce. Finally, the government's proposed standard does not adequately distinguish between the extortion or robbery of a business and that of an individual.

McCormack . . . seizes on this last point to argue that the evidence is too attenuated here because the victim was an individual rather than a business or institution and was targeted because he was believed to have cash on hand. He correctly points out that the victim's connection to a business entity is an important, though not dispositive, consideration in determining whether the commerce element of a Hobbs Act violation can be met. *Cf. United States v. Perrotta*, 313 F.3d 33, 36 (2d Cir. 2002) (there is a significant distinction between "the extortion of an individual and the extortion of a business for the purposes of establishing Hobbs Act jurisdiction"). Because criminal acts that are directed at individuals rather than at businesses normally have a less substantial effect on interstate commerce, courts have often required a heightened showing of an effect on commerce to sustain such Hobbs Act convictions.

The evidence here satisfies this heightened standard. A reasonable jury could have concluded that there was a "realistic probability" that the kidnapping would have a de minimis effect on interstate commerce. Here, the kidnappers *specifically instructed* Carter to liquidate \$100,000 of his mutual funds after they learned that he could not meet a one

million dollar demand. These funds, both parties agree, were managed by companies in interstate commerce and were themselves traded in interstate commerce; if Carter had sold them, as the kidnapers had demanded, both parties agree that “the sale would have reduced the value of the companies that managed the funds and the mutual funds themselves.” Numerous courts have opined that the extortion of an individual can satisfy the commerce element of the Hobbs Act when it “causes or creates the likelihood that the individual will deplete the assets of an entity engaged in interstate commerce.” *United States v. Collins*, 40 F.3d 95, 100 (5th Cir. 1994). The kidnapers’ demand did just that.

Further, the kidnapers told Carter to liquidate his mutual funds slowly, in increments under \$10,000. A rational jury could have concluded that the purpose of this instruction was to evade federal regulatory oversight of large financial transactions. *Cf.* 31 U.S.C. § 5313; 31 C.F.R. § 103.22 (requiring many financial institutions to file currency reports when they participate in a transaction involving currency of more than \$10,000). The jury could have concluded that the kidnapers’ instruction to Carter directly undermined the federal regulation of substantial monetary transactions, and thus affected interstate commerce. This possibility, taken in conjunction with the instruction to liquidate appreciable sums from mutual funds that were traded in interstate commerce, gave the jury more than sufficient evidence to conclude rationally that there was a reasonable probability that McCormack’s criminal activity, if successful, would have had a de minimis effect on interstate commerce.

371 F.3d at 27-29.

3. Does *McCormack* essentially abolish any interstate nexus requirement in cases where cash is involved? Indeed, when the alleged crime has any economic effect, courts seem willing to find the interstate effect required by the Hobbs Act. In *United States v. Jimenez-Torres*, 435 F.3d 3 (1st Cir. 2006), the defendant’s Hobbs Act conviction arose out of his participation in a home invasion, robbery, and murder of Flores, a gas station owner in Puerto Rico. Rejecting the claim that there was “insufficient evidence that the robbery of Flores’ home affected interstate commerce—a prerequisite to conviction under the Hobbs Act,” the court noted:

. . . For the government to successfully prove a violation of the Hobbs Act, it must demonstrate that the robbery had an effect on interstate commerce. . . . Given the statute’s broad sweep, even a de minimis effect will suffice to meet the commerce element.

Where, as in this case, the crime concerns the robbery of a home rather than of a business, we approach the task of applying the de minimis standard with some caution, lest every robbery (which by definition has some economic component) become a federal crime.

The government offered two ways in which the robbery of Flores' home affected interstate commerce. First, Flores' murder led to the closing of the gas station, a business which had been engaged in interstate commerce. Second, the robbery depleted the assets available to the gas station to participate in interstate commerce. . . .

The government may demonstrate an effect on commerce by proving that a robbery resulted in the closing of a business engaged in interstate commerce. *See United States v. Vega Molina*, 407 F.3d 511, 527 (1st Cir. 2005) (sustaining Hobbs Act conviction where the evidence showed that the defendants' action caused a business operating in interstate commerce to shut down temporarily); *United States v. Cruz-Rivera*, 357 F.3d 10, 14 (1st Cir. 2004) (doubting "that there is any serious claim of a constitutionally insufficient interstate commerce connection where a robbery directly results in the shutting down of an interstate business"); *see also United States v. Nguyen*, 155 F.3d 1219, 1225 (10th Cir. 1998) (holding that effect on commerce in Hobbs Act prosecution was established where, after robbery, business steadily declined and eventually closed). This [is] so even if the robbery is of a business owner rather than the business itself. *United States v. Diaz*, 248 F.3d 1065, 1088 (11th Cir. 2001).

To demonstrate this effect on commerce, the government had to show that the gas station was engaged in interstate commerce and that Flores' murder caused the station to close. The evidence that the gas station participated in interstate commerce was straightforward. The Texaco general manager for the area in which Flores' gas station operated testified that, in the two months preceding Flores' murder, the station had purchased approximately 40,000 gallons of gasoline, all of which originated from a refinery located in the United States Virgin Islands. This evidence was sufficient to establish that the gas station engaged in interstate commerce. *See United States v. Diaz*, 248 F.3d 1065, 1091 (11th Cir. 2001) (holding that evidence that gas station purchased gasoline from out of state established sufficient connection to commerce).

To establish that Flores' murder was the cause of the gas station's closing, the government offered the testimony of Flores' employee, Alex Lugo-Rodriguez. Lugo testified that he worked at the gas station the day before the murder and that, when he

arrived for work the next day, the gas station was closed and he learned that “something had happened” to Flores. According to Lugo, the gas station did not subsequently reopen.

...

The government also presented adequate evidence to prove that the robbery depleted the gas station’s assets. Depletion of the assets of a business engaged in interstate commerce is a common method for demonstrating that a robbery had an effect on interstate commerce. This is so even if the business’s assets were stolen from a home. There was testimony that the stolen money consisted of the gas station’s daily receipts which, as was his custom, Flores stored in his kitchen cabinet. From this testimony, the jury could have reasonably determined that the robbery reduced the gas station’s revenue by \$600, thereby depleting the assets that station had available to participate in interstate commerce. *See United States v. Devin*, 918 F.2d 280, 293-94 (1st Cir. 1990) (Hobbs Act jurisdiction was established where money was stolen from the personal funds of a business owner because the jury could infer that the depletion of the owner’s assets would ultimately deplete the assets of the business). While the amount stolen was relatively small, it was adequate to support a Hobbs Act conviction. *See United States v. Brennick*, 405 F.3d 96, 100 (1st Cir. 2005) (stating that theft of \$522 from a large business engaged in interstate commerce had sufficient effect on commerce to support a Hobbs Act conviction).

Moreover, even if one of the government’s effect on commerce theories was inadequate to independently trigger the Hobbs Act, the effects taken together suffice to establish federal jurisdiction. The government proved that, as a result of Jiménez’s conduct, the assets of a business engaged in interstate commerce were depleted and the business was forced to close permanently. *See United States v. Molina*, 407 F.3d 511 (1st Cir. 2005) (aggregating effects on commerce to conclude that the government established Hobbs Act violation). Jiménez may not have intended to cause these effects but his intent is irrelevant to establishing the commerce element of a Hobbs Act offense. In sum, whether the government’s theories are considered individually or in tandem, there was sufficient proof that the robbery affected interstate commerce.

435 F.3d at 7-10. Judge Torruella wrote a separate concurrence:

I write separately, because although both the majority and I are required to affirm

Jiménez's conviction by reason of binding circuit precedent, I believe that this precedent is based on an interpretation of the Hobbs Act, 18 U.S.C. § 1951(a), that extends Congress' power to regulate interstate commerce beyond what is authorized by the Constitution. . . .

We are not faced here with the robbery of decedent's local *gas station*. . . . Nor is this a case of Jiménez waylaying the decedent on his way to the bank with the proceeds of interstate sales. It is not even a case of the robbers intercepting decedent and forcibly depriving him of the local gas station's receipts while he was on the way home. Although all of these scenarios would cause me to hesitate as to the impact of such criminal activity on interstate commerce, certainly those examples would be closer to providing the required constitutional jurisdictional nexus [than] the present case. Here, all criminal activity took place in decedent's *home*, the stolen funds had come to rest in decedent's *kitchen*, and there is no evidence that Jiménez or his cohorts even knew of their existence before decedent's *home* was fortuitously picked to be burglarized. There was in fact no connection between the perpetrators of the robbery and decedent's business.

. . . [P]erhaps the day will come when the federal government will see fit to prosecute the robbery of a child's roadside lemonade stand because the lemons came from California, the sugar was refined in Philadelphia, and the paper cups were manufactured in China.

I cannot agree that the federal government has the constitutional power to prosecute Jiménez for a violation of the Hobbs Act given the facts proven in this case. However, because precedent binds me until such time as the Supreme Court puts an end to the fictions that allow the apparently limitless aggrandizement of federal power into areas reserved to the states by the Constitution, I have no choice but to concur in the affirmance of Jiménez's conviction.

435 F.3d at 13-15 (Torruella, J., concurring).

What do you make of this case-by-case inquiry (required by the Hobbs Act) into whether a particular home burglary, bank robbery, or murder had affected interstate commerce? Do you think this inquiry can be answered in a principled way, with a reasonable and predictable distinction between behavior that does and does not affect commerce? Is this a superior approach to asking, when a statute does not require proof of a specific effect on commerce, whether a particular crime in aggregate has the potential to affect commerce, irrespective of whether it does

in any specific instance? After all, inasmuch as any robbery that leads to murder might take a person out of commerce, could not any murder be subject to federal criminalization under the Hobbs Act, especially considering that even a de minimis effect on commerce would suffice? Should we worry that when the feds want to decline prosecution they can always cite federalism concerns, but when interested they doubtless will find some jurisdictional basis?

Finally, how worried should we be about the breadth and malleability of the Hobbs Act's commerce element? In *United States v. Needham*, 604 F.3d. 673 (2d Cir. 2010), Judge Cabranes argued that a case involving the robbery of marijuana proceeds could easily be resolved irrespective of the fact that the marijuana (unlike cocaine and heroin) could have been grown in-state. He reasoned that since, under *Raich*, "Congress's authority under the Commerce Clause includes the power to regulate marijuana that is grown, processed, and sold entirely within a single state . . . , the term 'commerce' in the Hobbs Act—whose 'reach' is 'coextensive' with the Commerce Clause—includes purely 'homegrown' marijuana." *Id.* at 686 (Cabranes, J., dissenting in part). The majority rejected this argument, noting that "by the dissent's logic, if Congress has the authority to regulate a product writ large, then any robbery involving that product affects interstate commerce per se, and the jury should be so instructed. A robbery targeting \$100 from the sale of wheat, gravel, or prescription drugs would all but automatically meet the Hobbs Act's jurisdictional element, even if the products at issue originated entirely in-state." *Id.* at 689 n.7 (Cabranes, J., dissenting in part). Unfazed, Judge Cabranes rejoined:

It is . . . highly improbable that a federal prosecutor would ever bring a Hobbs Act prosecution based on a robbery of \$100 in gravel proceeds. The majority does not seem to understand that, given the extremely low showing required to demonstrate "commerce" for purposes of the Hobbs Act (even under the majority's constrained reading of our case law), it is mainly *the discretion of federal prosecutors* (and a lack of federal resources) that prevents countless petty robberies from being prosecuted as federal crimes.

Id. at 690 n. 7 (Cabranes, J., dissenting in part).

4. The extent to which the Commerce Clause authorizes Congress to regulate and criminalize what private individuals do (or refuse to do) remains a matter of hot contestation. Just read the Supreme Court's recent decision on the constitutionality of the Affordable Care Act of 2010 ("ACA"). See *National Federation of Independent Business v. Sebelius*, __ U.S. __ (2012) The

concern of those who worry about cases like *Alderman* is that the constitutional scrutiny courts give to wholesale extensions of federal authority over classes of activities – as occurred in *Lopez*, *Raich*, and the ACA case--gets relaxed, indeed virtually disappears, where the extension of Commerce Clause authority is done at the retail level, with juries asked to consider the Commerce nexus on a case-by-case basis.

Does this concern have a factual basis? Is there something peculiar to criminal statutes that makes retail power extensions a useful legislative strategy? Should we embrace or regret the discretionary ability that such statutes give enforcers to “make a federal case” out of conduct that is not intrinsically of federal concern.

B. “COMMERCE WITH FOREIGN NATIONS”

While a great deal of ink has been spilled concerning how to apply the reach of Congress’s Commerce power within the boundaries of the United States, far less time has been spent considering Congress’s power over foreign commerce and, in particular, on the limits Congress faces when criminalizing behavior that takes place outside the territorial limits of the United States, as in the following case. Note that the complex federalism issues that arise in the domestic context are not present in the foreign context, but that issues of both foreign policy and international law may be implicated.

UNITED STATES v. CLARK 435 F.3d 1100 (9th Cir. 2006)

McKEOWN, Circuit Judge:

In this appeal we are confronted with a question of first impression regarding the scope of Congress’s power under the Foreign Commerce Clause. At issue is whether Congress exceeded its authority “to regulate Commerce with foreign Nations,” U.S. CONST. art. I, § 8, cl. 3, in enacting a statute that makes it a felony for any U.S. citizen who travels in “foreign commerce,” i.e. to a foreign country, to then engage in an illegal commercial sex act with a minor. 18 U.S.C. § 2423(c). We hold that Congress acted within the bounds of its constitutional authority.

Congressional invocation of the Foreign Commerce Clause comes as no surprise in light of growing concern about U.S. citizens traveling abroad who engage in sex acts with children. The United States reiterated its commitment to quelling sexual abuse abroad by signing The

Yokohama Global Commitment 2001, which was concluded at the Second World Congress Against the Commercial Sexual Exploitation of Children. The Commitment welcomes “new laws to criminalize [child prostitution], including provisions with extra-territorial effect.” . . .

Under the Commerce Clause, Congress has power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” This seemingly simple grant of authority has been the source of much dispute, although very little of the controversy surrounds the “foreign Nations” prong of the clause. Cases involving the reach of the Foreign Commerce Clause vis-a-vis congressional authority to regulate our citizens’ conduct abroad are few and far between. It is not so much that the contours of the Foreign Commerce Clause are crystal clear, but rather that their scope has yet to be subjected to judicial scrutiny.

The Supreme Court has long adhered to a framework for domestic commerce comprised of “three general categories of regulation in which Congress is authorized to engage under its commerce power,” *Gonzales v. Raich*, 545 U.S. 1 (2005): (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. This framework developed in response to the unique federalism concerns that define congressional authority in the interstate context. No analogous framework exists for foreign commerce.

Further distinguishing the two spheres “is evidence that the Founders intended the scope of the foreign commerce power to be . . . greater” as compared with interstate commerce. This expansive latitude given to Congress over foreign commerce is sensible given that “Congress’ power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty,” whereas “[i]t has never been suggested that Congress’ power to regulate foreign commerce could be so limited.”

Adapting the interstate commerce categories to foreign commerce in specific contexts is not an insurmountable task. At times, however, this undertaking can feel like jamming a square peg into a round hole. Instead of slavishly marching down the path of grafting the interstate commerce framework onto foreign commerce, we step back and take a global, commonsense approach to the circumstance presented here: The illicit sexual conduct reached by the statute expressly includes commercial sex acts performed by a U.S. citizen on foreign soil. This conduct might be immoral and criminal, but it is also commercial. Where, as in this appeal, the defendant travels in foreign commerce to a foreign country and offers to pay a child to engage in sex acts, his conduct falls under the broad umbrella of foreign commerce and consequently within congressional authority under the Foreign Commerce Clause.

BACKGROUND

Michael Lewis Clark, a seventy-one year old U.S. citizen and military veteran, primarily resided in Cambodia from 1998 until his extradition in 2003. He typically took annual trips back to the United States and he also maintained real estate, bank accounts, investment accounts, a driver's license, and a mailing address in this country. Following a family visit in May 2003, Clark left Seattle and flew to Cambodia via Japan, Thailand, and Malaysia. He was traveling on a business visa that he renewed on an annual basis.

While in Cambodia, Clark came to the attention of Action Pour Les Enfants, a non-governmental organization whose mission is to rescue minor boys who have been sexually molested by non-Cambodians. Clark came under suspicion when street kids reported to social workers that he was molesting young boys on a regular basis. The organization in turn reported him to the Cambodian National Police. In late June 2003, the Cambodian police arrested Clark after discovering him in a Phnom Penh guesthouse engaging in sex acts with two boys who were approximately ten and thirteen years old. He was charged with debauchery. The United States government received permission from the Cambodian government to take jurisdiction over Clark.

U.S. officials—assisted by the Cambodian National Police and the Australian Federal Police—conducted an investigation that led to Clark's confession and extradition to the United States. As part of the investigation, the younger boy told authorities that he had engaged in sex acts with Clark because he needed money to buy food for his brother and sister. The older boy stated that Clark had hired him in the past to perform sex acts, on one occasion paying five dollars. Other young boys whom Clark had molested reported that they were paid about two dollars, and Clark stated that he routinely paid this amount. Clark acknowledged that he had been a pedophile since at least 1996, "maybe longer," and had been involved in sexual activity with approximately 40-50 children since he began traveling in 1996.

Upon his return to the United States, Clark was indicted under the provisions of the newly-enacted Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub. L. No. 108-21, 117 Stat. 650 (2003). . . .

On appeal, Clark's challenge centers on the constitutionality of [18 U.S.C.] § 2423(c). Adopted in 2003 as part of the PROTECT Act, § 2423(c) provides as follows:

(c) Engaging in illicit sexual conduct in foreign places. Any United States citizen or

alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

This provision was first proposed as part of the Sex Tourism Prohibition Improvement Act of 2002, H.R. Rep. No. 107-525 (2002). The “Constitutional Authority Statement” in the Report accompanying this Act expressly identified the Commerce Clause, article I, section 8 of the Constitution, as the authority for the legislation. *Id.* at 5. The purpose of the bill was “to make it a crime for a U.S. citizen to travel to another country and engage in illicit sexual conduct with minors.” *Id.* The provision was not enacted, however, until it was added to the PROTECT Act the following year. This section was incorporated verbatim into the 2003 legislation but the Report on the PROTECT Act does not include the prior reference to constitutional authority.

Before the PROTECT Act became law in 2003, § 2423(b) required the government to prove that the defendant “travel[ed] in foreign commerce, or conspire[d] to do so, for the *purpose of engaging in*” specified sexual conduct with a person under eighteen years of age. The PROTECT Act replaced this single section with new subsections (b) through (g), with the new subsection (b) remaining substantively the same as the former subsection (b). Subsection (c) is an entirely new section which deletes the “for the purpose of” language. The conference report accompanying the PROTECT Act explains that Congress removed the intent requirement from § 2423(c) so that “the government would only have to prove that the defendant engaged in illicit sexual conduct with a minor while in a foreign country.” Consequently, for § 2423(c) to apply, the two key determinations are whether the defendant “travel[ed] in foreign commerce” and “engages in any illicit sexual conduct.”

The statute defines “illicit sexual conduct” in two ways: First, the definition includes “a sexual act (as defined in [18 U.S.C. § 2246]) with a person under 18 years of age that would be in violation of chapter 109A [18 U.S.C. §§ 2241 *et seq.*] if the sexual act occurred in the special maritime and territorial jurisdiction of the United States.” 18 U.S.C. § 2423(f)(1). Chapter 109A, in turn, criminalizes various forms of sexual abuse including, for example, aggravated sexual abuse by force, threat, or other means, 18 U.S.C. § 2241(a)-(b); sexual abuse by threatening or placing that other person in fear, 18 U.S.C. § 2242; and sexual abuse of a minor or ward, 18 U.S.C. § 2243. These violations share the common characteristic that there is no economic component to the crime. In other words, they are non-commercial sex acts.

In contrast, the second prong of the definition covers “any commercial sex act (as defined

in section 1591 [18 U.S.C. § 1591]) with a person under 18 years of age.” 18 U.S.C. § 2423(f)(2). “Commercial sex act,” in turn, is defined as “any sex act, on account of which anything of value is given to or received by any person.” 18 U.S.C. § 1591(c)(1). Clark acknowledges that his conduct qualifies as illicit sexual conduct, and he admitted in his plea agreement that he “intended to pay each of the boys and each of the boys expected such payment in exchange for the sexual encounter.” Accordingly, it is this second “commercial sex act” prong that is at issue in Clark’s appeal.

ANALYSIS

Clark does not dispute that he traveled in “foreign commerce,” nor does he dispute that he engaged in illicit commercial sexual conduct. The challenge he raises is to congressional authority to regulate this conduct. In addition to his Commerce Clause challenge, Clark attacks his conviction on international law, statutory construction, and Due Process grounds. In recognition of the principle that courts have a “strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration,” we begin our analysis with Clark’s non-constitutional claims.

I. SECTION 2423(C) COMPORTS WITH THE PRINCIPLES OF INTERNATIONAL LAW

We start with Clark’s argument that extraterritorial application of § 2423(c) violates principles of international law.⁷ On de novo review, we hold that extraterritorial application is proper based on the nationality principle.

The legal presumption that Congress ordinarily intends federal statutes to have only domestic application, *see Small v. United States*, 544 U.S. 385 (2005), is easily overcome in Clark’s case because the text of § 2423(c) is explicit as to its application outside the United States. *See* 18 U.S.C. § 2423(c) (titled “Engaging in illicit sexual conduct in foreign places” and reaching people “who travel[] in foreign commerce”). By its terms, the provision is exclusively targeted at extraterritorial conduct.

Having addressed this threshold issue, we ask whether the exercise of extraterritorial

⁷Clark’s challenge is distinct from the more common scenario where a party challenges only the extraterritorial reach of a statute without contesting congressional authority to enact the statute. *See, e.g., Small v. United States*, 544 U.S. 385 (2005) (holding that the phrase “convicted in any court” in a statute criminalizing firearm possession by a convicted felon, 18 U.S.C. § 922(g)(1), does not apply to extraterritorial convictions).

jurisdiction in this case comports with principles of international law. Of the five general principles that permit extraterritorial criminal jurisdiction,⁸ the nationality principle most clearly applies to Clark's case. The nationality principle "permits a country to apply its statutes to extraterritorial acts of its own nationals." *United States v. Hill*, 279 F.3d 731, 740 (9th Cir. 2002). Jurisdiction based solely on the defendant's status as a U.S. citizen is firmly established by our precedent. Clark's U.S. citizenship is uncontested. Accordingly, extraterritorial application of § 2423(c) to Clark's conduct is proper based on the nationality principle. . . .

III. NO DUE PROCESS VIOLATION

The next question is whether extraterritorial application of § 2423(c) violates the Due Process Clause of the Fifth Amendment because there is an insufficient nexus between Clark's conduct and the United States. We hold that, based on Clark's U.S. citizenship, application of § 2423(c) to his extra-territorial conduct is neither "arbitrary [n]or fundamentally unfair." *Davis v. United States*, 905 F.2d 245, 249 (9th Cir. 1990).

Clark is correct that to comply with the Due Process Clause of the Fifth Amendment, extraterritorial application of federal criminal statutes requires the government to demonstrate a sufficient nexus between the defendant and the United States "so that such application would not be arbitrary or fundamentally unfair." *Davis*, 905 F.2d at 248-49. Indeed, "even resort to the Commerce Clause can[not] defy the standards of due process." *Sec'y of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 616 (1950).

In *Blackmer v. United States*, 284 U.S. 421 (1932), the Supreme Court explained that the extraterritorial application of U.S. law to its citizens abroad did not violate the Fifth Amendment. The Court declared that despite moving his residence to France, the U.S.-citizen defendant "continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country." *Id.* at 436. This longstanding principle that citizenship alone is sufficient to satisfy Due Process concerns still has force. . . .

Clark is a U.S. citizen, a bond that "implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other." *Luria v. United States*, 231 U.S. 9, 22 (1913). Predicated on

⁸The five jurisdictional bases are territorial, national, protective, universal, and passive personality. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987); *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002) (listing the five principles).

this imputed allegiance, application of § 2423(c) to Clark’s extraterritorial conduct does not violate the Due Process Clause. . . .

IV. CONGRESS’S FOREIGN COMMERCE CLAUSE POWER EXTENDS TO REGULATING COMMERCIAL SEX ACTS ABROAD

In considering whether Congress exceeded its power under the Foreign Commerce Clause in enacting § 2423(c), we ground our analysis in the fundamental principle that “[i]t is an essential attribute of [Congress’s power over foreign commerce] that it is exclusive and plenary.” *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48 (1933). We are further mindful of the Supreme Court’s caution that “[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.” *United States v. Morrison*, 529 U.S. 598, 607 (2000). No plain showing has been made here. In light of Congress’s sweeping powers over foreign commerce, we conclude that Congress acted within its constitutional bounds in criminalizing commercial sex acts committed by U.S. citizens who travel abroad in foreign commerce.

At the outset, we highlight that § 2423(c) contemplates two types of “illicit sexual conduct”: non-commercial and commercial. Clark’s conduct falls squarely under the second prong of the definition, which criminalizes “any commercial sex act . . . with a person under 18 years of age.” 18 U.S.C. § 2423(f)(2). In view of this factual posture, we abide by the rule that courts have a “strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration,” and limit our holding to § 2423(c)’s regulation of commercial sex acts.

A. THE COMMERCE CLAUSE: STRUCTURE AND HISTORY

Chief Justice Marshall observed long ago that “[t]he objects, to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian Tribes. When forming this article, the convention considered them as entirely distinct.” *Cherokee Nation v. Georgia*, 30 U.S. 1, 18 (1831). Looking to the text, the single clause indeed embodies three subclauses for which distinct prepositional language is used: “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

Among legal scholars there has been considerable debate over the intrasentence unity—

or disunity, as the case may be—of the three subclauses, considering that they share the common language “[t]o regulate Commerce.” Some commentators take the view that Congress’s powers over commerce with foreign nations and Indian tribes are broader than over interstate commerce.

Other scholars maintain that Congress has coextensive powers under the Commerce Clause’s subdivisions. Despite the long-running lively debate among scholars, no definitive view emerges regarding the relationship among the three subclauses. Nonetheless, Supreme Court precedent points to the conclusion that the Foreign Commerce Clause *is* different than the Interstate Commerce Clause.

Regardless of how separate the three subclauses may be in theory, the reality is that they have been subject to markedly divergent treatment by the courts. This approach is not surprising given the considerably different interests at stake when Congress regulates in the various arenas. Most notably, regardless of whether the subject matter is drugs, gender-motivated violence, or gun possession, a prominent theme runs throughout the interstate commerce cases: concern for state sovereignty and federalism. On the other hand, “[t]he principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce.” This distinction provides a crucial touchstone in applying the Foreign Commerce Clause, for which Congress’s authority to regulate has not been defined with the precision set forth by *Lopez* and *Morrison* in the interstate context. . . .

As with the Indian Commerce Clause, the Foreign Commerce Clause has followed its own distinct evolutionary path. Born largely from a desire for uniform rules governing commercial relations with foreign countries, the Supreme Court has read the Foreign Commerce Clause as granting Congress sweeping powers. This view was laid down nearly two centuries ago when Chief Justice Marshall stated that “[i]t has, we believe, been universally admitted, that [the words of the Commerce Clause] comprehend every species of commercial intercourse between the United States and foreign nations.” *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 193 (1824).

The Court has been unwavering in reading Congress’s power over foreign commerce broadly. There is no counterpart to *Lopez* or *Morrison* in the foreign commerce realm that would signal a retreat from the Court’s expansive reading of the Foreign Commerce Clause. In fact, the Supreme Court has never struck down an act of Congress as exceeding its powers to regulate foreign commerce.

Federalism and state sovereignty concerns do not restrict Congress’s power over foreign commerce, and the need for federal uniformity “is no less paramount” in assessing the so-called

“dormant” implications of congressional power under the Foreign Commerce Clause. By contrast, under the dormant Interstate Commerce Clause, “reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved.”

Clark’s case illustrates the predominance of national interests and the absence of state sovereignty concerns in Foreign Commerce Clause jurisprudence. No state has voiced an interest in the proceedings nor is there an indication of any state interest at stake in determining the constitutionality of § 2423(c). Because this case is divorced from the common federal/state interplay seen in the Interstate Commerce Clause cases, we find ourselves in sparsely charted waters. We thus look to the text of § 2423(c) to discern whether it has a constitutionally tenable nexus with foreign commerce.

B. SECTION 2423(C)’S REGULATION OF COMMERCIAL SEX ACTS IS A VALID EXERCISE OF CONGRESS’S FOREIGN COMMERCE CLAUSE POWERS

Taking a page from *Raich*, we review the statute under the traditional rational basis standard. The question we pose is whether the statute bears a rational relationship to Congress’s authority under the Foreign Commerce Clause.

Although it is important to view the statute as a whole, parsing its elements illustrates why the statute fairly relates to foreign commerce. The elements that the government must prove under § 2423(c)’s commercial sex acts prong are straightforward. First, the defendant must “travel[] in foreign commerce.” 18 U.S.C. § 2423(c). Second, the defendant must “engage[] in any illicit sexual conduct with another person,” *id.*, which in this case contemplates “any commercial sex act . . . with a person under 18 years of age.” 18 U.S.C. § 2423(f)(2). We hold that § 2423(c)’s combination of requiring travel in foreign commerce, coupled with engagement in a commercial transaction while abroad, implicates foreign commerce to a constitutionally adequate degree.

Beginning with the first element, the phrase “travels in foreign commerce” unequivocally establishes that Congress specifically invoked the Foreign Commerce Clause. The defendant must therefore have moved in foreign commerce at some point to trigger the statute. In Clark’s case, he traveled from the United States to Cambodia.

“Foreign commerce” has been defined broadly for purposes of Title 18 of the U.S. Code, with the statutory definition reading, in full: “The term ‘foreign commerce’, as used in this title, includes commerce with a foreign country.” 18 U.S.C. § 10. Admittedly, this definition is not

particularly helpful given its rearrangement of the words being defined in the definition itself. Courts have understandably taken the broad wording to have an expansive reach. We likewise see no basis on which to impose a constrained reading of “foreign commerce” under § 2423(c). Clark got on a plane in the United States and journeyed to Cambodia. This act is sufficient to satisfy the “travels in foreign commerce” element of § 2423(c).

Once in Cambodia, the second element of § 2423(c) was also met, namely, “engage[ment] in any illicit sexual conduct with another person,” 18 U.S.C. § 2423(c), which in this case was commercial sex under § 2423(f)(2). As the Supreme Court recognized centuries ago, the Commerce Clause “comprehend[s] every species of commercial intercourse between the United States and foreign nations.” *Gibbons*, 22 U.S. at 193. Section 2423(c) regulates a pernicious “species of commercial intercourse”: commercial sex acts with minors.

The statute expressly includes an economic component by defining “illicit sexual conduct,” in pertinent part, as “any commercial sex act . . . with a person under 18 years of age.” 18 U.S.C. § 2423(f)(2). “Commercial sex act” is defined as “any sex act, on account of which anything of value is given to or received by any person.” 18 U.S.C. § 1591(c)(1). Thus, in the most sterile terms, the statute covers the situation where a U.S. citizen engages in a commercial transaction through which money is exchanged for sex acts.

The essential economic character of the commercial sex acts regulated by § 2423(c) stands in contrast to the non-economic activities regulated by the statutes at issue in *Lopez* and *Morrison*. . . . Like the statute regulating illicit drugs at issue in *Raich*, the activity regulated by the commercial sex prong of § 2423(c) is “quintessentially economic,”¹⁷ 125 S. Ct. at 2211, and thus falls within foreign trade and commerce.¹⁸

¹⁷The evolving definition of “economics” presents a slight quirk to the analysis. Although the definition in the 1966 Webster’s Third New International Dictionary cited by the Supreme Court in *Raich* only refers to “the production, distribution, and consumption of commodities,” more recent versions of Webster’s have added “services” to the definition. *See, e.g.*, MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 364 (10th ed. 1993) (defining “economics” as the social science concerned with “the production, distribution, and consumption of goods and services”); Merriam-Webster Online Dictionary, *available at* www.m-w.com (same) (last visited Dec. 29, 2005).

¹⁸It is now universally acknowledged that foreign trade or commerce includes both goods and services. *See, e.g.*, Agreement Establishing the Multilateral Trade Organization [World Trade Organization], Dec. 15, 1993, 33 I.L.M. 13, pmb1. (“Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to . . . expanding the production and trade in goods and services”); General Agreement on Trade in Services, Dec. 15,

As in *Raich*, the fact that § 2423(c) has a criminal as well as an economic component does not put it beyond Congress’s reach under the Foreign Commerce Clause. Indeed, § 2423(c) is far from unique in using the Foreign Commerce Clause to regulate crimes with an economic facet. *See, e.g., United States v. Kay*, 359 F.3d 738, 741 (5th Cir. 2004) (describing “particular instrumentalities of interstate and foreign commerce that defendants used or caused to be used in carrying out the purported bribery” in violation of the Foreign Corrupt Practices Act); *United States v. Hsu*, 155 F.3d 189, 195-96 (3rd Cir. 1998) (discussing statute enacted as part of the Economic Espionage Act of 1996 that criminalizes the theft of trade secrets related to products “produced for or placed in interstate or foreign commerce”); *United States v. Gertz*, 249 F.2d 662, 666-67 (9th Cir. 1957) (explaining that statute criminalizing the forging or counterfeiting of foreign currency is based on the Foreign Commerce Clause).

The combination of Clark’s travel in foreign commerce and his conduct of an illicit commercial sex act in Cambodia shortly thereafter puts the statute squarely within Congress’s Foreign Commerce Clause authority. In reaching this conclusion, we view the Foreign Commerce Clause independently from its domestic brethren. . . .

At times, forcing foreign commerce cases into the domestic commerce rubric is a bit like one of the stepsisters trying to don Cinderella’s glass slipper; nonetheless, there is a good argument that, as found by the district court, § 2423(c) can also be viewed as a valid regulation of the “channels of commerce.” Our previous decisions have recognized that Congress legitimately exercises its authority to regulate the channels of commerce where a crime committed on foreign soil is necessarily tied to travel in foreign commerce, even where the actual use of the channels has ceased. . . .

In sum, Clark has failed to demonstrate “a plain showing that Congress . . . exceeded its constitutional bounds,” *Morrison*, 529 U.S. at 607, in enacting §§ 2423(c) and (f)(2). Traveling to a foreign country and paying a child to engage in sex acts are indispensable ingredients of the

1993, 33 I.L.M. 44, pmb1. (“Recognizing the growing importance of trade in services for the growth and development of the world economy”); *cf. Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 195 (1974) (holding that, under the Interstate Commerce Clause, the “in commerce’ language of the Clayton and Robinson-Patman Act provisions . . . appears to denote only persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of *goods and services* for interstate markets and their transport and distribution to the consumer.”). . . .

crime to which Clark pled guilty. The fact that §§ 2423(c) and (f)(2) meld these economic and criminal components into a single statute does not put the conduct beyond Congress’s reach under the Foreign Commerce Clause. The rational nexus requirement is met to a constitutionally sufficient degree. Congress did not exceed its power “to regulate Commerce with foreign Nations,” U.S. CONST. art. I, § 8, cl. 3, in criminalizing commercial sex acts with minors committed by U.S. citizens abroad.

FERGUSON, Circuit Judge, dissenting:

The Constitution cannot be interpreted according to the principle that the end justifies the means. The sexual abuse of children abroad is despicable, but we should not, and need not, refashion our Constitution to address it. . . .

The Constitution authorizes Congress “[t]o regulate Commerce with foreign Nations.” [U.S. CONST.] art. I, § 8, cl. 3. The activity regulated by 18 U.S.C. § 2423(c), illicit sexual conduct, does not in any sense of the phrase relate to commerce *with foreign nations*. Rather, § 2423(c) is a criminal statute that punishes private conduct fundamentally divorced from foreign commerce. Article I, section 8, clause 3, while giving Congress broad authority over our commercial relations with other nations, is not a grant of international police power. I respectfully dissent from the majority’s assertion that the Commerce Clause authorizes Congress to regulate an activity with a bare economic component, as long as that activity occurs subsequent to some form of international travel. I also note that the conduct in this case will not go unpunished, as the reasonable course of action remains of recognizing Cambodia’s authority to prosecute Clark under its own criminal laws.

I.

. . . Through a long line of cases, the Supreme Court has developed a tri-category framework that helps courts ascertain these outer limits, and whether a particular enactment exceeds them. *See, e.g., Gonzales v. Raich*, 545 U.S. 1 (2005). In the foreign commerce context, the majority would replace this time-tested framework with its own broad standard: whether a statute “has a constitutionally tenable nexus with foreign commerce.” The majority views the foreign commerce prong of the Commerce Clause “independently from its domestic brethren,” though Congress’s authority in both spheres is governed by the same constitutional language: “[t]o regulate Commerce,” [U.S. CONST.] art. I, § 8, cl. 3. In so doing, the majority goes farther than our precedent counsels and dispenses with the tri-category framework that has grounded

Commerce Clause analysis in the modern era.

The majority portrays the *raison d'être* of the tri-category framework as addressing “unique federalism concerns that define congressional authority in the *interstate* context.” It is thus able to conclude that this framework is generally inapplicable to foreign commerce cases. A fairer understanding of the tri-category framework is that it has evolved not only in response to federalism concerns that courts have read into Congress’s Interstate Commerce power, but also to give content to what it means generally “[t]o regulate Commerce,” [U.S. CONST.] art. I, § 8, cl. 3. While Congress’s authority to regulate foreign commerce may well be broader than its authority to regulate interstate commerce, its authority in the foreign sphere is not different in kind. In both spheres, Congress is only authorized “[t]o regulate Commerce,” [U.S. CONST.] art. I, § 8, cl. 3, and not those activities that are fundamentally divorced from commerce. So while the majority correctly notes that “[f]ederalism and state sovereignty concerns do not restrict Congress’s power over foreign commerce,” it fails properly to consider the restrictions on the scope of Congress’s Foreign Commerce power that emanate from the constitutional text itself, which the tri-category framework also helps elucidate.

II.

Under the tri-category framework, and contrary to the District Court’s conclusion, § 2423(c) is not a regulation of the channels of foreign commerce. Section 2423(c) lacks any of the tangible links to the channels of commerce that would justify upholding it under Congress’s Foreign Commerce power.

The Supreme Court has held that Congress’s authority to regulate the channels of commerce encompasses keeping those channels “free from immoral and injurious uses.” Thus, Congress has the authority to criminalize the international transport of children for the purpose of sexual exploitation in the U.S. because such transport is an immoral and injurious use of the channels of commerce. *Cf. United States v. Hersh*, 297 F.3d 1233, 1238 (11th Cir. 2002) (upholding the conviction of a defendant who transported a Honduran boy to Florida to engage in sexual relations). Congress also has the authority to criminalize travel “for the purpose” of engaging in illicit sexual conduct, since travel with such harmful intent constitutes an injurious use of the channels of foreign commerce. . . .

Under this rubric, the current 18 U.S.C. § 2423(b) contains a defensible link to the channels of foreign commerce, as it covers people who “[t]ravel with intent to engage in illicit sexual conduct.” *See, e.g., Nick Madigan, Man, 86, Convicted Under New Law Against*

Americans Who Go Abroad to Molest Minors, N.Y. TIMES, Nov. 20, 2004, at A12 (defendant was arrested at Los Angeles International Airport with “dozens of pornographic photographs of himself with Filipino girls, sex toys and 100 pounds of chocolate and candy”). The activity regulated by § 2423(b), intention to engage in illicit sexual conduct, is at least tangibly related to the channels of commerce in that the defendant engages in travel *with illegitimate ends*. The person indicted under § 2423(b) has a plane ticket in hand, has paid a travel agent to set up the trip, or has otherwise committed an act that is both wrongful (because of the criminal intent) and tangibly related to the channels of commerce.

By contrast, § 2423(c) neither punishes the act of traveling in foreign commerce, or the wrongful use or impediment of use of the channels of foreign commerce. Rather, it punishes future conduct in a foreign country entirely divorced from the act of traveling except for the fact that the travel occurs at some point prior to the regulated conduct. The statute does not require any wrongful intent at the time the channel is being used, nor does it require a temporal link between the “travel[] in foreign commerce,” 18 U.S.C. § 2423(c), and the underlying regulated activity.

The majority suggests that § 2423(c) “can [] be viewed as a valid regulation of the ‘channels of commerce,’” because Congress’s channels of commerce authority extends to regulating crimes committed abroad that are “necessarily tied to travel in foreign commerce.” But . . . § 2423(c) regulates an activity that is in no way connected to the wrongful use, or impediment of use, of the channels of foreign commerce. Section 2423(c) only requires that the regulated conduct occur *at some point* subsequent—perhaps even years subsequent—to international travel. The travel may well be lawful—the statute does not require any criminal intent during travel, nor does it otherwise connect the regulated activity to an abuse of the channels of commerce.

The mere act of boarding an international flight, without more, is insufficient to bring all of Clark’s downstream activities that involve an exchange of value within the ambit of Congress’s Foreign Commerce power. On some level, every act by a U.S. citizen abroad takes place subsequent to an international flight or some form of “travel[] in foreign commerce.” 18 U.S.C. § 2423(c). This cannot mean that every act with a bare economic component that occurs downstream from that travel is subject to regulation by the United States under its Foreign Commerce power, or the Commerce Clause will have been converted into a general grant of police power. It is telling to note that, theoretically, the only U.S. citizens who could fall outside the reach of § 2423(c) if they engage in illicit sexual conduct abroad are those who never set foot

in the United States (i.e., U.S. citizens by virtue of their parent’s citizenship), and thus never travel in “Commerce with foreign Nations.” [U.S. CONST.] art. I, § 8, cl. 3. In short, § 2423(c) is divorced from its asserted Commerce Clause underpinnings. The statute does not set another “guidepost” regarding Congress’s Foreign Commerce power—it exceeds it.

III.

Rather than engaging in a losing “channels of commerce” analysis, the majority applies a general “rational nexus” standard in this case, and strains to find more foreign commerce in § 2423(c) than the act of boarding an international flight. Specifically, the majority characterizes the crime regulated by § 2423(c), illicit sexual conduct, as sufficiently related to “Commerce with foreign Nations,” [U.S. CONST.] art. I, § 8, cl. 3, to bring it under Congress’s Foreign Commerce authority.

First, the underlying regulated activity is not “quintessentially economic,” simply because it has a bare economic aspect. Just as “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity,” *Morrison*, 529 U.S. at 613, neither is “illicit sexual conduct.” The plain purpose of § 2423(c) is to regulate criminal conduct, not commerce. As the Supreme Court cautioned in *Lopez*, “depending on the level of generality, any activity can be looked upon as commercial.” 514 U.S. at 565.

Further, the underlying act, even if considered economic or commercial, is certainly not a presence of commerce *with foreign nations*. In the most sterile terms, an act of paid sex with a minor that takes place overseas is not an act of commerce with other nations. Under the interpretation of the majority, the purchase of a lunch in France by an American citizen who traveled there by airplane would constitute a constitutional act of engaging in foreign commerce. Under such an interpretation, Congress could have the power to regulate the overseas activities of U.S. citizens many months or years after they had concluded their travel in foreign commerce, as long as the activities involved some sort of exchange of value—even if the partner in exchange was a U.S. entity that funneled the value back into the American economy. Analogously, the statute here does not even facially limit its application to sex with foreign minors in an effort to create a tenable link to “Commerce with foreign Nations.” [U.S. CONST.] art. I, § 8, cl. 3. This observation may seem slightly absurd, but so is the task of trying to show how sexual abuse of a minor overseas by a U.S. citizen constitutes an act of “Commerce with foreign Nations.” . . .

Notes and Questions on Federal Extraterritorial Jurisdiction

1. What about prosecutions of *noncommercial* illicit sexual conduct under 18 U.S.C. § 2423(c)? In *United States v. Pendleton*, 658 F.3d 299 (3d Cir. 2011), the defendant – who previously had served prison time in New Jersey and Latvia for sex crimes against children -- flew from New York to Hamburg, Germany, and, six months later, sexually molested a fifteen-year-old. Arrested by German authorities, he served nineteen months in a German prison and was arrested by federal authorities on his return to the US. Upholding his conviction, the Third Circuit declined to adopt the Ninth Circuit’s reasoning in *Clark*, but found § 2423(c) to pass muster under more restrictive *Lopez/Morrison* analysis, since its “jurisdictional element has an ‘express connection’ to the channels of foreign commerce.” *Id.* at 311 (citing *Morrison*, 529 U.S. at 612). Referring to precedents upholding provisions of the Sex Offender Registration and Notification Act (SORNA) that make it illegal for a sex offender to fail to register after traveling in interstate commerce, the Third Circuit reasoned:

Congress enacted [§ 2423\(c\)](#) to regulate persons who use the channels of commerce to circumvent local laws that criminalize child abuse and molestation. And just as Congress may cast a wide net to stop sex offenders from traveling in interstate commerce to evade state registration requirements, so too may it attempt to prevent sex tourists from using the channels of foreign commerce to abuse children.

Look for more opinions along these lines as the Justice Department intensifies its focus on foreign sex tourism. See also *United States v. Flath*, 2012 U.S. LEXIS 4468 (E.D.Wisc. 2012) (following *Pendleton*).

2. Even as the Ninth Circuit upheld the commercial sex prong of §2423(c) as a valid exercise of Congressional power under the Foreign Commerce Clause, it “acknowledge[d] that Congress’s plenary authority over foreign affairs may also provide a sufficient basis for § 2423(c).” *Clark*, 435 F.3d at 1109 n.14. In *United States v. Frank*, 486 F. Supp. 2d 1353 (S.D. Fla. 2007), which also involved an American citizen charged with improper commercial sex acts with minors in Cambodia, the district court went in the opposite direction to reach the same result. Asserting that “Congress had the authority to enact § 2423(c) under the Necessary and Proper Clause to implement a treaty which the Senate had ratified,” the district court in *Frank* declined to rule on whether the statute is also valid under the Foreign Commerce Clause. 486 F. Supp. 2d at 1355.

Does it matter which constitutional provision authorizes the statute? Not under the facts of *Clark* and *Frank*. But what if a defendant is charged with committing a *non*-commercial sex act with a minor in Cambodia? *Clark* did not resolve whether the Foreign Commerce Clause justifies the non-commercial acts prong of §2423(c), although presumably a non-commercial act would have a weaker connection to “commerce.” On the other hand, a court relying on the Necessary and Proper Clause, or any Constitutional provision related to the Treaty Power, would not need to change its analysis based on whether a sex act was commercial. But centering an extraterritorial criminal jurisdiction statute on a Treaty Power may restrict Congress in other ways. For example, would *Frank* have reached the same result if Cambodia had not signed the Optional Protocol? *See* Comment, Ninth Circuit Holds that Congress Can Regulate Sex Crimes Committed by U.S. Citizens Abroad, 119 Harv. L. Rev. 2612, 2619 (2006) (“While reliance on the Treaty Clause would allow Congress to regulate American pedophilic activity in Cambodia, it would not allow regulation of cannabis use in Amsterdam because there is no international agreement or intergovernmental cooperation with the Dutch pertaining to this activity.”).

Once conduct—however local—becomes a fit subject for an international treaty, any restraints on federal criminal jurisdiction seem to melt away. *United States v. Lue*, 134 F.3d 79 (2d Cir. 1997), involved a prosecution under the Hostage Taking Act, passed to effectuate the International Convention Against the Taking of Hostages, Dec. 18, 1979, T.I.A.S. No. 11,081. The Act provides:

- (a) Except as provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.
...
- (b)(2) It is not an offense under this section if the conduct required for the offense occurred inside the United States, each alleged offender and each person seized or detained are nationals of the United States, and each alleged offender is found in the United States, unless the governmental organization sought to be compelled is the Government of the United States.

18 U.S.C. §1203. Judge Walker first considered whether the Executive could properly enter into the Treaty, and noted the scant limitations on that authority:

. . . In *Asakura* [*v. City of Seattle*, 265 U.S. 332 (1924)], the Court held that the executive’s treaty power “extend[s] to all *proper subjects* of negotiation between our government and other nations.” *Asakura*, 265 U.S. at 341. Invoking this standard simply begs the question: What is a “proper subject” of negotiation between governments? Admittedly, there must be certain outer limits, as yet undefined, beyond which the executive’s treaty power is constitutionally invalid. See, e.g., Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1261 n.133 (1995) (noting that the Treaty Power is subject to certain structural limitations and offering as an example of such limitations: “The President and the Senate could not . . . create a fully operating national health care system in the United States by treaty with Canada”); Louis Henkin, *Foreign Affairs and the United States Constitution*, 184-85, 196-98 (2d ed. 1996). But within such generous limits, it is not the province of the judiciary to impinge upon the Executive's prerogative in matters pertaining to foreign affairs.

134 F.3d at 83. The court then quoted the Restatement (Third) of the Foreign Relations Law of the United States §302, ct. c (1986):

Contrary to what was once suggested, the Constitution does not require that an international agreement deal only with “matters of international concern.” The references in the Constitution presumably incorporate the concept of treaty and of other agreements in international law. International law knows no limitations on the purpose or subject matter of international agreements, other than that they may not conflict with a peremptory norm of international law. States may enter into an agreement on any matter of concern to them, and international law does not look behind their motives or purposes in doing so. Thus, the United States may make an agreement on any subject suggested by its national interests in relations with other nations.

Id. The court concluded: “Whatever the potential outer limit on the treaty power of the

Executive, the Hostage Taking Convention does not transgress it.” *Id.*

The court went on to determine that the Hostage Taking Act was rationally related to the Treaty, and thus within Congress’s authority under the Necessary and Proper Clause. In rejecting defendant’s Tenth Amendment argument that the Act improperly intruded on state powers, Judge Walker relied on *Missouri v. Holland*, 252 U.S. 416 (1920), a landmark case rejecting the claim that the Migratory Bird Treaty Act of 1918—regulating the killing, capturing, or selling of certain migratory birds, pursuant to a treaty entered into between the United States and Great Britain (on behalf of Canada)—was an unconstitutional interference with the rights reserved to the states. The Eleventh Circuit adopted a similar analysis in *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010), where it upheld the first prosecution under the Torture Act, passed to implement the United Nations Convention Against Torture.

Note, though, that a criminal defendant *does* have *standing* to complain that a treaty-based enactment is an unconstitutional intrusion into state affairs. In a recent case, the Third Circuit held that a defendant charged with using a chemical weapon—she had put caustic substances all around the home of her husband’s lover—lacked standing to raise a Tenth Amendment challenge to 18 U.S.C. §229 (a statute that criminalized chemical weapon use pursuant to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction). When the Solicitor General refused to defend the Third Circuit’s ruling, the Supreme Court appointed an *amicus curiae* to do so, and then reversed the decision. *Bond v. United States*, 131 S.Ct. 2355 (2011). While questioning the government’s decision to use the statute on these facts, that Third Circuit thereafter upheld the provision as an appropriate exercise of Congress’s Treaty Power. *United States v. Bond*, 2012 U.S. App. LEXIS 9057 (3d Cir. 2012).

2. In addition to finding that the Foreign Commerce Clause provides sufficient Article I authority for Congress to enact §2423(c), *Clark* addressed two further questions. The first of these presented another constitutional issue: whether the application of extraterritorial jurisdiction against Clark violated the Due Process Clause of the Fifth Amendment. Stating the question as whether jurisdiction would be “arbitrary or fundamentally unfair,” the court upheld the prosecution of Clark, holding that, as a United States citizen, he should be aware that he is subject to U.S. law. In what situations would jurisdiction over a *foreign national* who has never set foot in the United States be justified under this standard? Note that §2423(a), unlike §2423(c), is not limited to “United States citizen[s] or alien[s] admitted for permanent residence”; without any stated limitation as to the citizenship status of those bound by the

prohibition, §2423(a) prohibits transporting a minor in interstate or foreign commerce for the purpose of prostitution.

Conversely, could Congress enact the domestic equivalent of §2423(c), making it a crime to travel in interstate commerce and engage in sex with a minor? Note that the statute as written only applies to international travel. Given the lack of any *mens rea* requirement, the domestic equivalent would essentially make it a federal crime to engage in sex with a minor if one has ever crossed a state line! Should the absurd implications of this hypothetical domestic analogue call into question the integrity of §2423(c) itself? Note that the older provision, §2423(b), for all its breadth, is functionally equivalent to the Mann Act, discussed *supra* p. xx, which criminalized transporting persons across state lines with intent to engage in prostitution.

In a recent Second Circuit case, *United States v. Weingarten*, 632 F.3d 60 (2011), the court explicitly limited the territorial reach of §2423(b). The court's reasoning apparently applies not only to the other sections of §2423, but also to the extraterritorial application of other "transportation" crimes. In *Weingarten*, one of the counts of conviction was based on the defendant's travel from Belgium to Israel, where he engaged in sexual abuse of a minor. In reversing this conviction, the court explained that "[a]lthough we hold that § 2423(b) is applicable to conduct occurring outside the United States," jurisdiction under the statute "does not extend to travel occurring wholly between foreign nations and without any territorial nexus to the United States." This holding, the court noted, "appropriately avoids the necessity of addressing whether such an exercise of congressional power would comport with the Constitution." *Id.* at 70-71.

3. *Clark* also considered whether jurisdiction was consistent with international law. The court said yes, holding that because Clark was a U.S. citizen, jurisdiction was proper under the "nationality principle." Similarly, in *United States v. Frank*, 599 F.3d 1221 (11th Cir. 2010), the court of appeals held that the extraterritorial application of 18 U.S.C. §2251A(b) (prohibiting taking custody of a minor knowing that "the minor will be portrayed in a visual depiction engaging in . . . sexually explicit conduct") was proper under this principle of international law because Frank was a U.S. citizen.

Suppose, however, that the court in any of these cases had come to a different conclusion—that jurisdiction was not proper under international law. What would the remedy be? Typically, it is understood that international law does not bind Congress or the courts. Although courts will often consider whether applying jurisdiction comports with international law, and will avoid interpretations of statutes that violate international law, *Murray v. The*

Schooner *Charming Betsy*, 6 U.S. 64 (1804), they ultimately must give effect to a statute even if it violates international law. *See* *United States v. Yousef*, 327 F.3d 56, 86 (2nd Cir. 2003); *see also* *United States v. Davis*, 905 F.2d 245, 248 n.1 (“International law principles, standing on their own, do not create substantive rights or affirmative defenses for litigants in United States courts”). In any event, as several of these cases note, it is unlikely that a prosecution that violated international law would pass muster under the Due Process Clause.

In Chapter 9 we will return to the constitutional basis for extraterritorial jurisdiction (and related questions relating to due process and international law) in the context of the Maritime Drug Law Enforcement Act of 1980, which provides for extraterritorial criminal jurisdiction over narcotics trafficking aboard vessels in international waters—even when the vessel and its owners are foreign and the trafficking occurs between two foreign countries. The Act arguably pushes extraterritorial jurisdiction to the limits of constitutional and international law. Here, as elsewhere throughout this book, you will see that such constitutional law and international law concerns can affect the terms of federal criminal statutes, the interpretation of those statutes by prosecutors and courts, and federal law enforcement strategies.

In part because of new prosecutorial priorities, the Foreign Commerce Clause is fast emerging as a new focal point for judicial inquiries into the breadth of federal criminal enforcement authority. For a nice introduction, see Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 Va. L. Rev. 949 (2010). Colangelo argues that the different wording of the two clauses—Congress has power to regulate commerce “among” the states but “with” foreign nations—gives Congress less power to regulate activity abroad. Are there institutional constraints that should make us more worried about increasing federal legislative and enforcement forays in this transnational context? Less worried?

Chapter 3
The Separation of Powers:
Interpreting Federal Criminal Statutes

American criminal law, state and federal, is a statutory field. There are no common-law crimes in the United States; judges lack the authority to create or recognize new offenses at the suggestion of enterprising prosecutors. To be sure, judges must construe the statutes they apply, thereby making law around the edges of the field. But that power operates around the edges; the key actors in defining crime are, and have long been, legislators.

The forgoing is the conventional wisdom, but it isn't quite right. The truth is both more complex and more interesting. Begin with state law. Early state criminal codes were more like Restatements than codes—nineteenth-century state legislators codified the common law of crimes, often using language straight out of volume four of Blackstone's Commentaries. Long after codification, judges in many states continued to treat criminal law much the way they treated other common-law fields, and consequently enjoyed significant leeway in interpreting and applying criminal statutes. As a practical matter, judges—not state legislators—defined state crimes. Over the course of the twentieth century (especially the century's latter half), statutes became much more prominent in state cases, probably because core state-law crimes have been the subject of repeated legislation. Today, crimes like rape, robbery, and burglary are not defined in three or four cursory lines, as in Blackstone. Instead, the norm is a long list of multiple overlapping offenses, with detailed definitions of contested terms. Judges have less room to make law; on a host of subjects, legislators have beaten them to the punch. While state criminal law began as a species of common law and remained so for much longer than is commonly believed, legislation now dominates the field.

Federal criminal law followed the opposite path: it began with legislation and then became more common law-like over time. Thanks to *United States v. Hudson & Goodwin*, 11 U.S. 32 (1812), and its less famous but equally important successor, *United States v. Bevens*, 16 U.S. 336 (1818), the common law of crimes never applied in federal court. So federal criminal statutes did not codify preexisting common-law crimes; instead, federal statutes established *new* crimes. Congress, not courts, defined the field's subject matter.

Often, though, federal criminal legislation left large gaps—gaps that federal judges felt compelled, or at least permitted, to fill. The filling (or not) of those gaps is the subject of this

chapter. There are two key sets of questions: First, under what circumstances may federal judges make common law today? That is, how closely must judges stick to the text of federal criminal statutes? Second, what is the status of existing common-law doctrines—for example, the doctrines that define most federal defenses? On what basis do federal judges—with lifetime appointments—get to devise doctrines that limit the reach of the federal criminal offenses defined by the elected legislature? The separation of powers is a small factor in state criminal law. Yet, in federal criminal law, it looms large.

The remainder of the chapter is divided into four sections. The first is brief—it deals with the longstanding ban on federal common-law crimes; *Hudson & Goodwin* is the sole main case. Section B addresses the definition of criminal conduct; the main case is *Brogan*, a 1998 decision rejecting a common-law exception to federal liability for false statements. Section C looks at the definition of criminal defenses; the main case is a 2006 decision in which the Justices accepted common-law defenses to federal crimes, but could not agree why they did so. Section D examines an area of law where federal judges have been especially open to common lawmaking: the definition of criminal intent. In the late twentieth century, federal judges—despite Congressional resistance—crafted a remarkably broad excuse for legal ignorance that was founded on neither common-law precedent nor clear statutory direction. The boundaries of that excuse have narrowed, but it remains one of the most doctrinally distinctive characteristics of federal criminal law.

As you read these cases, keep the following questions in mind: What is a judge’s proper role in deciding issues of this sort? How closely should judges stick to the text of federal criminal statutes? What limits, if any, should be read into laws that on their face sweep in a variety of common behaviors? Where are the sources of federal criminal law?

A. THE BAN ON COMMON LAW CRIMES

UNITED STATES v. HUDSON & GOODWIN 11 U.S. 32 (1812)

[*Editors’ Note:* Barzillai Hudson and George Goodwin were Federalist newspaper editors who had accused then-President Thomas Jefferson of bribing Napoleon’s government to arrange a favorable treaty with Spain (which, at the time, was ruled by a puppet government under Napoleon’s control). Urged on by a federal judge who was a member of Jefferson’s Republican

party, a federal grand jury in Connecticut indicted Hudson and Goodwin for seditious libel: meaning, basically, unfair criticism of government officials. In large measure, the prosecution was political payback. Connecticut had been under Federalist control for most of the nation's history to this point, and the state's Federalists had prosecuted a number of Republican newspapermen and pamphleteers for seditious libel for criticizing Federalist officials. When the Republicans attained power, they were eager to return the favor. . . .

Since the Sedition Act of 1798 had been repealed, seditious libel prosecutions in federal court had only one possible legal basis: the common law of crimes. Federalist judges had regularly held that the common law applied in federal court as in state court; Presidents Jefferson and Madison, along with the Republican party they led, viewed those decisions as illegitimate. By the time *Hudson & Goodwin* reached the Supreme Court, the Court had a Republican majority, which delivered a decidedly Republican opinion on the limits of federal judicial power.]

[T]he following opinion was delivered . . . by JOHNSON, J.

The only question which this case presents is, whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases. . . .

Although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shews the prevalence of opinion in favor of the negative of the proposition.

The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions—that power is to be exercised by Courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all of Courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer.

It is not necessary to inquire whether the general Government, in any and what extent,

possesses the power of conferring on its Courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act. . . .

The only ground on which it has ever been contended that this jurisdiction could be maintained is, that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it. But, without examining how far this consideration is applicable to the peculiar character of our constitution, it may be remarked that it is a principle by no means peculiar to the common law. It is coeval, probably, with the first formation of a limited Government; belongs to a system of universal law, and may as well support the assumption of many other powers as those more peculiarly acknowledged by the common law of England.

But if admitted as applicable to the state of things in this country, the consequence would not result from it which is here contended for. If it may communicate certain implied powers to the general Government, it would not follow that the Courts of that Government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.

Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers.

Notes and Questions

1. Bruce Ackerman portrays John Marshall as heartbroken by *Hudson & Goodwin*—the bitterest pill Marshall had to swallow in his 34-year reign as Chief Justice. See Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* 233-40 (2005). Marshall would surely have dissented, Ackerman writes, save for his desire to preserve the appearance of judicial consensus.

Perhaps so: Ackerman is an excellent historian. But if it *is* so, the pill went down better than might be expected, judging from the unanimous decision in *United States v. Bevens*, 16

U.S. (3 Wheat.) 336 (1818), which was authored by none other than Chief Justice Marshall. *Bevans* arose when a marine murdered a cook's mate while on board the *U.S.S. Independence*, which was then anchored in Boston Harbor. *Bevans* was indicted for murder in federal court. Article I, section 8 of the Constitution expressly gave Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas," and "[t]o establish and maintain a Navy." Article III gave federal courts power to hear "all Cases of admiralty or maritime Jurisdiction." *Hudson & Goodwin* was easily distinguishable: no clause of the Constitution gave Congress or the federal judiciary power to hear sedition cases; on the contrary, the First Amendment appeared to have taken that (arguably nonexistent) power off the table. Marshall nevertheless held that, because no federal statute expressly authorized the charge, federal courts lacked power to hear the case.

2. Taken together, *Hudson & Goodwin* and *Bevans* ensured that federal criminal law would look very different from its state-law counterparts. These cases held that the ordinary crimes that were (and are) the staples of state-court criminal dockets were not federal crimes even when committed by or against federal officials or federal property. At least not unless Congress says so—and for a long time, Congress *didn't* say so. When John F. Kennedy was assassinated in 1963, the Dallas police ran the initial investigation because, incredibly, no federal crime had been committed; the murder of the President of the United States was a state-law offense. By the time John Hinckley shot Ronald Reagan, it was a different story. *See* 18 U.S.C. §1751.

So instead of murder, rape, robbery, and burglary, federal prosecution focused on different kinds of crimes: criminal violations of ex-slaves' civil rights, interstate transportation of lottery tickets, Mann Act violations, Prohibition cases, mail fraud cases, and so on. These crimes often had no clear counterparts at common law; where they did, the law was still developing, still in flux. While state judges construed state criminal statutes according to the principles expounded by Blackstone, Coke, and Hale, federal judges had to craft different principles. This often led to even more extensive judicial lawmaking than in state cases. Call it *Hudson & Goodwin's* revenge: federal courts wound up exercising more power than if the field had been a part of the common law from the beginning, as John Marshall—the great defender of federal judicial power—allegedly wanted.

3. For one famous example of this dynamic in action, see *Durland v. United States*, 161 U.S. 306 (1896) (*Durland* is considered again in Chapter 4, at *infra* p. xx.). The defendants in *Durland* were late-nineteenth-century con artists who used the mails to advertise "bonds" that

would return profits of 50% in six months, with no intention of paying even the principal, much less any interest. To twenty-first-century readers, it may seem surprising that the common law of fraud did not cover such conduct. The common-law offense of “false pretences” (the most nearly analogous common-law offense) required proof of false statements of material fact; false promises of future performance—such as Durland’s promise to pay interest on the bonds in question—did not suffice. The government nevertheless prosecuted Durland and his colleagues for mail fraud, and the Supreme Court concluded that the mail fraud statute extended farther than the common law:

. . . [B]eyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning. It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all.

In the light of this the statute must be read, and, so read, it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose. . . .

161 U.S. at 313. *Hudson & Goodwin* and *Bevans* seemed to assume that the common law was a source of federal power. *Durland* shows that the common law, by providing definitions through which to interpret statutory provisions, might also serve as a limit on federal power—a means of placing boundaries on otherwise unbounded criminal offenses. Perhaps the absence of those common-law boundaries explains the breadth of the federal criminal code.

4. Though *Durland* remains good law, present-day federal courts are quicker to rely on the common law when construing criminal statutes—at least when those statutes use common-law terminology. The defendant in *Neder v. United States*, 527 U.S. 1 (1999), was charged with mail, wire, and bank fraud; the issue in the case was whether his various falsehoods had to be “material” (meaning, roughly, significant or important to the relevant transactions) in order to violate those statutes. The word “material” did not appear in the statutes at issue, but materiality was an element of common-law fraud. *Durland* suggested that common-law definitions don’t matter, at least when fraud is the term being defined. *Neder* suggests otherwise:

. . . [T]he Government is correct that the fraud statutes did not incorporate *all* the

elements of common-law fraud. The common-law requirements of “justifiable reliance” and “damages,” for example, plainly have no place in the federal fraud statutes. By prohibiting the “scheme to defraud,” rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted. But while the language of the fraud statutes is incompatible with these requirements, the Government has failed to show that this language is inconsistent with a materiality requirement.

Accordingly, we hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes. . . .

527 U.S. at 24-25. It is hard to square *Durland* and *Neder*. The bottom line seems to be that common-law definitions are sometimes controlling, and sometimes not.

5. What about common-law methods? Often, the issue is not whether to apply some common-law definition or doctrine, but whether judges should make legal doctrine in order to deal with some problem that the text of the relevant criminal statute doesn’t address. Consider the next case.

B. THE DEFINITION OF CRIMINAL CONDUCT

BROGAN v. UNITED STATES 522 U.S. 398 (1998)

Justice SCALIA delivered the opinion of the Court.

This case presents the question whether there is an exception to criminal liability under 18 U.S.C. § 1001 for a false statement that consists of the mere denial of wrongdoing, the so-called “exculpatory no.”

I

While acting as a union officer during 1987 and 1988, petitioner James Brogan accepted cash payments from JRD Management Corporation, a real estate company whose employees were represented by the union. On October 4, 1993, federal agents from the Department of Labor and the Internal Revenue Service visited petitioner at his home. The agents identified themselves and explained that they were seeking petitioner’s cooperation in an investigation of JRD and

various individuals. They told petitioner that if he wished to cooperate, he should have an attorney contact the U.S. Attorney's Office, and that if he could not afford an attorney, one could be appointed for him.

The agents then asked petitioner if he would answer some questions, and he agreed. One question was whether he had received any cash or gifts from JRD when he was a union officer. Petitioner's response was "no." At that point, the agents disclosed that a search of JRD headquarters had produced company records showing the contrary. They also told petitioner that lying to federal agents in the course of an investigation was a crime. Petitioner did not modify his answers, and the interview ended shortly thereafter.

Petitioner was indicted for accepting unlawful cash payments from an employer in violation of 29 U.S.C. §§ 186(b)(1), (a)(2) and (d)(2), and making a false statement within the jurisdiction of a federal agency in violation of 18 U.S.C. § 1001. He was tried, along with several co-defendants, before a jury in the United States District Court for the Southern District of New York, and was found guilty. The United States Court of Appeals for the Second Circuit affirmed the convictions. . . .

II

At the time petitioner falsely replied "no" to the Government investigators' question, 18 U.S.C. § 1001 (1988 ed.) provided:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

By its terms, 18 U.S.C. § 1001 covers "any" false statement. . . . The word "no" in response to a question assuredly makes a "statement," and petitioner does not contest that his utterance was false or that it was made "knowingly and willfully." In fact, petitioner concedes that under a "literal reading" of the statute he loses. Brief for Petitioner 5.

Petitioner asks us, however, to depart from the literal text that Congress has enacted, and to approve the doctrine adopted by many Circuits which excludes from the scope of § 1001 the

“exculpatory no.” The central feature of this doctrine is that a simple denial of guilt does not come within the statute. There is considerable variation among the Circuits concerning, among other things, what degree of elaborated tale-telling carries a statement beyond simple denial. In the present case, however, the Second Circuit agreed with petitioner that his statement would constitute a “true ‘exculpatory no’ as recognized in other circuits,” [*United States v. Wiener*, 96 F.3d 35, 37 (2d Cir. 1996),] but aligned itself with the Fifth Circuit in categorically rejecting the doctrine.

Petitioner’s argument in support of the “exculpatory no” doctrine proceeds from the major premise that § 1001 criminalizes only those statements to Government investigators that “pervert governmental functions”; to the minor premise that simple denials of guilt to government investigators do not pervert governmental functions; to the conclusion that § 1001 does not criminalize simple denials of guilt to Government investigators. Both premises seem to us mistaken. As to the minor: We cannot imagine how it could be true that falsely denying guilt in a Government investigation does not pervert a governmental function. Certainly the investigation of wrongdoing is a proper governmental function; and since it is the very *purpose* of an investigation to uncover the truth, any falsehood relating to the subject of the investigation perverts that function. It could be argued, perhaps, that a *disbelieved* falsehood does not pervert an investigation. But making the existence of this crime turn upon the credulousness of the federal investigator (or the persuasiveness of the liar) would be exceedingly strange; such a defense to the analogous crime of perjury is certainly unheard of. Moreover, as we shall see, the only support for the “perversion of governmental functions” limitation is a statement of this Court referring to the *possibility* (as opposed to the certainty) of perversion of function—a possibility that exists whenever investigators are told a falsehood relevant to their task.

In any event, we find no basis for the major premise that only those falsehoods that pervert governmental functions are covered by § 1001. Petitioner derives this premise from a comment we made in *United States v. Gilliland*, 312 U.S. 86 (1941), a case involving the predecessor to § 1001. That earlier version of the statute subjected to criminal liability

whoever shall knowingly and willfully . . . make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States

The defendant in *Gilliland* . . . argued that the statute should be read to apply only to matters in which the Government has a financial or proprietary interest. In rejecting that argument, we noted that Congress had specifically amended the statute to cover “any matter within the jurisdiction of any department or agency of the United States,” thereby indicating “the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described.” *Id.*, at 93. Petitioner would elevate this statement to a holding that § 1001 does not apply where a perversion of governmental functions does not exist. But it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself. . . .

Petitioner repeats the argument made by many supporters of the “exculpatory no,” that the doctrine is necessary to eliminate the grave risk that § 1001 will become an instrument of prosecutorial abuse. The supposed danger is that overzealous prosecutors will use this provision as a means of “piling on” offenses—sometimes punishing the denial of wrongdoing more severely than the wrongdoing itself. The objectors’ principal grievance on this score, however, lies not with the hypothetical prosecutors but with Congress itself, which has decreed the obstruction of a legitimate investigation to be a separate offense, and a serious one. It is not for us to revise that judgment. . . . [F]inally, if there is a problem of supposed “overreaching” it is hard to see how the doctrine of the “exculpatory no” could solve it. It is easy enough for an interrogator to press the liar from the initial simple denial to a more detailed fabrication that would not qualify for the exemption.

III

A brief word in response to the dissent’s assertion that the Court may interpret a criminal statute more narrowly than it is written: Some of the cases it cites for that proposition represent instances in which the Court . . . applied what it thought to be a background interpretive principle of general application. *Staples v. United States*, 511 U.S. 600, 619 (1994) (construing statute to contain common-law requirement of *mens rea*); *Sorrells v. United States*, 287 U.S. 435, 446 (1932) (construing statute not to cover violations produced by entrapment); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (construing statute not to apply extraterritorially to noncitizens). Also into this last category falls the dissent’s correct assertion that the present

statute does not “mak[e] it a crime for an undercover narcotics agent to make a false statement to a drug peddler.” Criminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law. See, *e.g.*, 2 P. Robinson, *Criminal Law Defenses* § 142(a), at 121 (1984) (“Every American jurisdiction recognizes some form of law enforcement authority justification”).

It is one thing to acknowledge and accept such well defined (or even newly enunciated), generally applicable, background principles of assumed legislative intent. It is quite another to espouse the broad proposition that criminal statutes do not have to be read as broadly as they are written, but are subject to case-by-case exceptions. The problem with adopting such an expansive, user-friendly judicial rule is that there is no way of knowing when, or how, the rule is to be invoked. As to the when: The only reason Justice STEVENS adduces for invoking it here is that a felony conviction for this offense seems to him harsh. Which it may well be. But the instances in which courts may ignore harsh penalties are set forth in the Constitution, see Art. 1, § 9; Art. III, § 3; Amdt. 8; Amdt. 14, § 1; and to go beyond them will surely leave us at sea. And as to the how: There is no reason in principle why the dissent chooses to mitigate the harshness by saying that § 1001 does not embrace the “exculpatory no,” rather than by saying that § 1001 has no application unless the defendant has been warned of the consequences of lying, or indeed unless the defendant has been put under oath. We are again at sea. . . .

In sum, we find nothing to support the “exculpatory no” doctrine except the many Court of Appeals decisions that have embraced it. . . . Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread. Because the plain language of § 1001 admits of no exception for an “exculpatory no,” we affirm the judgment of the Court of Appeals.

Justice SOUTER, concurring in part and concurring in the judgment.

I join the opinion of the Court except for its response to petitioner’s argument premised on the potential for prosecutorial abuse of 18 U.S.C. § 1001 as now written. On that point I have joined Justice GINSBURG’s opinion espousing congressional attention to the risks inherent in the statute’s current breadth.

Justice GINSBURG, with whom Justice SOUTER joins, concurring in the judgment.

Because a false denial fits the unqualified language of 18 U.S.C. § 1001, I concur in the affirmance of Brogan’s conviction. I write separately, however, to call attention to the

extraordinary authority Congress, perhaps unwittingly, has conferred on prosecutors to manufacture crimes. . . .

I

At the time of Brogan's offense, § 1001 made it a felony "knowingly and willfully" to make "any false, fictitious or fraudulent statements or representations" in "any matter within the jurisdiction of any department or agency of the United States." That encompassing formulation arms Government agents with authority not simply to apprehend lawbreakers, but to generate felonies, crimes of a kind that only a Government officer could prompt.

This case is illustrative. Two federal investigators paid an unannounced visit one evening to James Brogan's home. The investigators already possessed records indicating that Brogan, a union officer, had received cash from a company that employed members of the union Brogan served. (The agents gave no advance warning, one later testified, because they wanted to retain the element of surprise.) When the agents asked Brogan whether he had received any money or gifts from the company, Brogan responded "No." The agents asked no further questions. *After* Brogan just said "No," however, the agents told him: (1) the Government had in hand the records indicating that his answer was false; and (2) lying to federal agents in the course of an investigation is a crime. Had counsel appeared on the spot, Brogan likely would have received and followed advice to amend his answer, to say immediately: "Strike that; I plead not guilty." But no counsel attended the unannounced interview, and Brogan divulged nothing more. Thus, when the interview ended, a federal offense had been completed—even though, for all we can tell, Brogan's unadorned denial misled no one.

A further illustration. In *United States v. Tabor*, 788 F.2d 714 (11th Cir. 1986), an Internal Revenue Service agent discovered that Tabor, a notary public, had violated Florida law by notarizing a deed even though two signatories had not personally appeared before her (one had died five weeks before the document was signed). With this knowledge in hand, and without "warn[ing] Tabor of the possible consequences of her statements," the agent went to her home with a deputy sheriff and questioned her about the transaction. When Tabor, regrettably but humanly, denied wrongdoing, the Government prosecuted her under § 1001. An IRS agent thus turned a violation of state law into a federal felony by eliciting a lie that misled no one. (The Eleventh Circuit reversed the § 1001 conviction, relying on the "exculpatory no" doctrine.)

As these not altogether uncommon episodes show,² § 1001 may apply to encounters between agents and their targets “under extremely informal circumstances which do not sufficiently alert the person interviewed to the danger that false statements may lead to a felony conviction.” *United States v. Ehrlichman*, 379 F. Supp. 291, 292 (D.D.C. 1974). . . . Unlike proceedings in which a false statement can be prosecuted as perjury, there may be no oath, no pause to concentrate the speaker’s mind on the importance of his or her answers. As in Brogan’s case, the target may not be informed that a false “No” is a criminal offense until *after* he speaks.

At oral argument, the Solicitor General forthrightly observed that § 1001 could even be used to “escalate completely innocent conduct into a felony.” . . . If the statute of limitations has run on an offense—as it had on four of the five payments Brogan was accused of accepting—the prosecutor can endeavor to revive the case by instructing an investigator to elicit a fresh denial of guilt. Prosecution in these circumstances is not an instance of Government “punishing the denial of wrongdoing more severely than the wrongdoing itself”; it is, instead, Government generation of a crime when the underlying suspected wrongdoing is or has become nonpunishable. . . .

. . . Thus, the prospect remains that an overzealous prosecutor or investigator—aware that a person has committed some suspicious acts, but unable to make a criminal case—will create a crime by surprising the suspect, asking about those acts, and receiving a false denial. Congress alone can provide the appropriate instruction.

Congress has been alert to our decisions in this area. . . . [A]fter today’s decision, Congress may advert to the “exculpatory no” doctrine and the problem that prompted its formulation. . . .

Justice STEVENS, with whom Justice BREYER joins, dissenting. . . .

² See, e.g., *United States v. Stoffey*, 279 F.2d 924, 927 (CA7 1960) (defendant prosecuted for falsely denying, while effectively detained by agents, that he participated in illegal gambling; court concluded that “purpose of the agents was not to investigate or to obtain information, but to obtain admissions,” and that “they were not thereafter diverted from their course by alleged false statements of defendant”); *United States v. Dempsey*, 740 F. Supp. 1299, 1306 (N.D.Ill.1990) (after determining what charges would be brought against defendants, agents visited them “with the purpose of obtaining incriminating statements”; when the agents “received denials from certain defendants rather than admissions,” Government brought § 1001 charges); see also *United States v. Goldfine*, 538 F.2d 815, 820 (CA9 1976) (agents asked defendant had he made any out-of-state purchases, investigators already knew he had, he stated he had not; . . . defendant was prosecuted for violating § 1001).

The mere fact that a false denial fits within the unqualified language of 18 U.S.C. § 1001 is not, in my opinion, a sufficient reason for rejecting a well-settled interpretation of that statute. It is not at all unusual for this Court to conclude that the literal text of a criminal statute is broader than the coverage intended by Congress. *See, e.g., Staples v. United States*, 511 U.S. 600, 605, 619 (1994); *Williams v. United States*, 458 U.S. 279, 286 (1982) (holding that statute prohibiting the making of false statements to a bank was inapplicable to depositing of a “bad check” because “the Government’s interpretation . . . would make a surprisingly broad range of unremarkable conduct a violation of federal law”); *Sorrells v. United States*, 287 U.S. 435, 448 (1932) (“We are unable to conclude that it was the intention of the Congress in enacting [a Prohibition Act] statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them”); *United States v. Palmer*, 16 U.S. 610, 3 Wheat. 610, 631 (1818) (opinion of Marshall, C.J.) (holding that although “words ‘any person or persons,’ [in maritime robbery statute] are broad enough to comprehend every human being[,] . . . general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them”). Although the text of § 1001, read literally, makes it a crime for an undercover narcotics agent to make a false statement to a drug peddler, I am confident that Congress did not intend any such result. . . .

Accordingly, I respectfully dissent.

Notes and Questions

1. Perhaps the central issue in contemporary American law and legal theory is the degree to which judges—especially federal judges—should apply “the literal text” of statutes and constitutional provisions, even when there is a strong argument for a common-law doctrine like the one that, before *Brogan* (and in most circuits), exempted an “exculpatory no” from the coverage of the federal false statements statute. Justice Scalia, author of the *Brogan* majority opinion, is the leading judicial proponent of the textualist side of that debate. *See Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law* (1998). Justice Stevens, author of the *Brogan* dissent, has been among the leading proponents of a looser style of statutory and constitutional texts; in recent years, Justice Breyer has taken up that role. *See Stephen G. Breyer, Active Liberty: Interpreting Our Democratic Constitution* (2006).

Which position seems more persuasive in *Brogan*? On the one hand, the “exculpatory no”

doctrine seems more a rewriting of the false statements than an interpretation of it. If judges have the authority to rewrite statutes (and, even more so, constitutional provisions), judicial power will be broad indeed. On the other hand, if a simple “no” that misled no one constitutes a federal felony, federal criminal liability will be broad indeed. Which danger is greater? Which one(s) should judges worry about?

2. Justice Ginsburg’s opinion seems, at first blush, an attractive way to split the difference between the majority and the dissent: Ginsburg accepts the majority’s textualist analysis, but seeks to persuade Congress to adopt some form of “exculpatory no” doctrine by statute. In fact, Congress did no such thing, and *Brogan* remains good law today. This may indicate that the Congress of the late 1990s agreed with the result in *Brogan*. Why do you suppose Congress has never adopted the “exculpatory no” doctrine?

3. The argument in *Brogan* is played out again and again, with curiously inconsistent results. Take, for example, two cases handed down by the Supreme Court on the same day: *Small v. United States*, 544 U.S. 385 (2005), and *Pasquantino v. United States*, 544 U.S. 349 (2005).

a. Here are the facts in *Small*:

In December 1992, Small shipped a 19-gallon electric water heater from the United States to Okinawa, Japan, ostensibly as a present for someone in Okinawa. Small had sent two other water heaters to Japan that same year. Thinking it unusual for a person to ship a water tank from overseas as a present, Japanese customs officials searched the heater and discovered 2 rifles, 8 semiautomatic pistols, and 410 rounds of ammunition.

The Japanese Government indicted Small on multiple counts of violating Japan’s weapons-control and customs laws. [He was convicted on all counts in 1994, sentenced to prison in Japan, and paroled in November 1996.] A week after completing parole for his Japanese convictions, on June 2, 1998, Small purchased a 9-millimeter SWD Cobray pistol from a firearms dealer in Pennsylvania. Some time later, a search of his residence, business premises, and automobile revealed a .380 caliber Browning pistol and more than 300 rounds of ammunition. . . .

544 U.S. at 395-96 (Thomas, J., dissenting). Small was prosecuted under the felon-in-possession statute, 18 U.S.C. §922(g)(1), which makes it “unlawful for any person . . . who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year . . .

to . . . possess . . . any firearm.” The question was whether Small’s conviction in Japan counts as a “convict[ion]” under that statute.

Based on *Brogan*, one might reasonably conclude that “any” means what it says, that the Japanese conviction therefore counts, and that Small loses. Justice Thomas’s dissent, which was joined by Justices Kennedy and Scalia, took that position. Justice Breyer and four of his colleagues came to a different conclusion, based on some un-*Brogan*-like reasoning:

The question before us is whether the statutory reference “convicted in *any* court” includes a conviction entered in a *foreign* court. The word “any” considered alone cannot answer this question. In ordinary life, a speaker who says, “I’ll see any film,” may or may not mean to include films shown in another city. In law, a legislature that uses the statutory phrase “ ‘any person’ ” may or may not mean to include “ ‘persons’ ” outside “the jurisdiction of the state.” See, e.g., *United States v. Palmer*, 16 U.S. 610, 631 (1818) (Marshall, C. J.). . . .

In determining the scope of the statutory phrase we find help in the “commonsense notion that Congress generally legislates with domestic concerns in mind.” *Smith v. United States*, 507 U.S. 197, 204, n. 5 (1993). This notion has led the Court to adopt the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application. . . . [A]lthough the presumption against extraterritorial application does not apply directly to this case, we believe a similar assumption is appropriate when [considering] the scope of the phrase “convicted in any court” here.

. . . [C]onsidered as a group, foreign convictions differ from domestic convictions in important ways. Past foreign convictions for crimes punishable by more than one year’s imprisonment may include a conviction for conduct that domestic laws would permit, for example, for engaging in economic conduct that our society might encourage. See, e.g., Art. 153 of the Criminal Code of the Russian Soviet Federated Socialist Republic, in *Soviet Criminal Law and Procedure* 171 (H. Berman & J. Spindler trans. 2d ed. 1972) (criminalizing “Private Entrepreneurial Activity”); cf. e.g., *Gaceta Oficial de la Republica de Cuba*, ch. II, Art. 103, p. 68 (Dec. 30, 1987) (provision of Cuban criminal code forbidding propaganda that incites against the social order, international solidarity, or the Communist State). They would include a conviction from a legal system that is inconsistent with an American understanding of fairness. And they would include a

conviction for conduct that domestic law punishes far less severely. See, *e.g.*, Singapore Vandalism Act, ch. 108, §§ 2, 3, III Statutes of Republic of Singapore, pp. 257-258 (imprisonment for up to three years for an act of vandalism). Thus, the key statutory phrase “convicted in any court of, a crime punishable by imprisonment for a term exceeding one year” somewhat less reliably identifies dangerous individuals for the purposes of U.S. law where foreign convictions, rather than domestic convictions, are at issue. . . .

. . . We consequently assume a congressional intent that the phrase “convicted in any court” applies domestically, not extraterritorially. . . .

544 U.S. at 388-91. Note that the Court said “assume” a Congressional intent, not “find” one. Justice Breyer went on to explain that the government had prosecuted no more than a dozen cases in which a foreign conviction served as the predicate for a felon-in-possession case. From that fact, Breyer inferred that “Congress . . . paid no attention to the matter,” and it was thus up to the Court to decide.

b. The Court decided differently in *Pasquantino*, where three defendants smuggled a large quantity of liquor into Canada without paying that nation’s customs duties. This scheme to defraud Canada’s tax collectors was planned, in part, over American phone lines, leading to a federal wire fraud prosecution. The defendants argued that American fraud laws should not be used to enforce Canadian tax laws. In light of the Court’s decision in *Small*, it seems a strong argument. The *Pasquantino* majority—authored by Justice Thomas, who wrote the dissent in *Small*—thought otherwise. This time, the opinion *did* read like *Brogan*:

. . . The statute prohibits using interstate wires to effect “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” 18 U.S.C. § 1343. Two elements of this crime, and the only two that petitioners dispute here, are that the defendant engage in a “scheme or artifice to defraud,” and that the “object of the fraud . . . be ‘[money or] property’ in the victim’s hands,” *Cleveland v. United States*, 531 U.S. 12, 26 (2000). Petitioners’ smuggling operation satisfies both elements.

Taking the latter element first, Canada’s right to uncollected excise taxes on the liquor petitioners imported into Canada is “property” in its hands. This right is an entitlement to collect money from petitioners, the possession of which is “something of

value” to the Government of Canada. *McNally v. United States*, 483 U.S. 350, 358 (1987). Valuable entitlements like these are “property” as that term ordinarily is employed. . . .

Turning to the second element at issue here, petitioners’ plot was a “scheme or artifice to defraud” Canada of its valuable entitlement to tax revenue. The evidence showed that petitioners routinely concealed imported liquor from Canadian officials and failed to declare those goods on customs forms. By this conduct, they represented to Canadian customs officials that their drivers had no goods to declare. This, then, was a scheme “designed to defraud by representations,” *Durland v. United States*, 161 U.S. 306, 313 (1896), and therefore a “scheme or artifice to defraud” Canada of taxes due on the smuggled goods.

544 U.S. at 355-57. Justice Thomas went on to explain that the longstanding common-law revenue rule, which held that American law does not enforce another country’s tax laws, is consistent with the *Pasquantino* prosecution because the defendants were being prosecuted for fraud, not for Canadian tax violations, and such a prosecution was not, according to Justice Thomas, inconsistent with cases that had applied the common-law revenue rule. The argument was largely formal.

Justice Ginsburg wrote the dissent; she was joined by Justices Scalia, Souter, and Breyer—an unusual combination, but unusual combinations seem common in this field. Justices Ginsburg and Breyer argued for function over form, asserting that the presumption against extraterritoriality should govern, just as it governed in *Small*. *See id.* at 375-81 (Ginsburg, J., dissenting). All four dissenters argued that the fraud charge was, in function, a means of enforcing Canadian tax law, which was both bad policy and in conflict with the revenue rule. *Id.* at 381-83.

Which side was right in *Small*? In *Pasquantino*? Are the two cases distinguishable? Are they consistent with *Brogan*? Note that Justice Scalia, the author of the *Brogan* majority opinion, dissented in both *Small* and *Pasquantino*.

c. One of the defense arguments in *Pasquantino* rested on the federal anti-smuggling statute, 18 U.S.C. §546. According to the defendants, the existence of a statute specifically targeting smuggling from the United States into foreign countries suggested that Congress did not mean to cover such conduct with the general language of the wire fraud statute. In most regulatory fields, that argument would carry the day. But Justice Thomas quickly dismissed this

interpretive argument in *Pasquantino* in a footnote, noting that “[t]he Federal Criminal Code is replete with provisions that criminalize overlapping conduct,” and concluding that “[t]he mere fact that two federal criminal statutes criminalize similar conduct says little about the scope of either.” 544 U.S. at 358 n.4.

That might sound surprising, but it is the conventional approach to interpreting federal criminal statutes, as *United States v. Wells*, 519 U.S. 482 (1997), illustrates. The defendant in *Wells* was charged with lying on a loan application. The question before the Supreme Court was whether the relevant federal statute required proof that the defendant’s misrepresentation was material. The statute did not include the word “material,” so the Court held that proof of materiality was not required; the majority opinion reads a good deal like Justice Scalia’s majority opinion in *Brogan*. As in *Brogan*, Justice Stevens dissented in *Wells*. The heart of Justice Stevens’ dissent was a passage in which he listed 96 fraud and misrepresentation statutes—some of which contained the word “material,” and others of which did not:

[A]t least 100 federal false statement statutes may be found in the United States Code. About 42 of them contain an express materiality requirement; approximately 54 do not. The kinds of false statements found in the first category⁹ are, to my eyes at least, indistinguishable from those in the second category.¹⁰ Nor is there any obvious

⁹See [*United States v. Gaudin*, 28 F.3d 943 (9th Cir. 1994) (Kozinski, J.)] at 959, n. 3 (“ . . . 18 U.S.C. § 1919 (maximum one year prison term for false statement of material fact knowingly made to obtain unemployment compensation for federal service); . . . 20 U.S.C. § 1097(b) (maximum one year prison term for knowingly and willfully concealing material information in connection with assignment of federally insured student loan); . . . 42 U.S.C. § 1383a(a)(1) (maximum one year prison term for knowingly and willfully making false statement of material fact in application for Supplemental Security Income benefits); . . . 46 U.S.C.App. § 839 (maximum five year prison term for knowingly making false statement of material fact to secure required approval of Secretary of Transportation). . . .”).

¹⁰See [*Gaudin*, 28 F.3d] at 960, n. 4 (“ . . . 18 U.S.C. §287 (penalizing false claims against U.S. government); . . . 18 U.S.C. § 1014 (penalizing false statement to influence federal loan or credit agency); . . . 18 U.S.C. § 1920 (penalizing false statement to obtain Federal employees’ compensation); . . . 42 U.S.C. § 408 (penalizing false statement to obtain social security benefits); . . . 45 U.S.C. § 359(a) (penalizing knowing false statement to obtain unemployment insurance); . . . 49 U.S.C. App. § 2216 (penalizing U.S. officials who knowingly make false statement regarding projects submitted for approval of Secretary of Transportation). . . .”).

distinction between the range of punishments authorized by the two different groups of statutes. . . . It seems farfetched that Congress made a deliberate decision to include or to omit a materiality requirement every time it created a false statement offense. Far more likely, in my view, Congress simply assumed . . . that the materiality requirement would be implied wherever it was not explicit.

519 U.S. at 505-09 & nn.9-10 (Stevens, J., dissenting).

As the statutes cited in Justice Stevens' *Wells* dissent demonstrate, members of Congress write criminal statutes one by one, often failing to consider the relationships among them. The consequence is that title 18 of the U.S. Code contains many doctrinal lines that do not conform to any rational theory. What, if anything, should federal judges do about this? Should they strive to make the definition of criminal conduct more rational? More fair? Or should judges just stick to statutory texts, and let Congress worry about whether these texts make sense?

4. In criminal law, as elsewhere, inertia is the single strongest force in the legislative process. The response to *Lopez* was the exception, not the rule. Because passing legislation is difficult, whatever interpretation the courts adopt tends to remain in place, whether or not a Congressional majority agrees with it. Moreover, when Congress does act, it is more likely to do so in response to judicial decisions that favor defendants (as it did post-*Lopez*). Between 1978 and 1984, the Supreme Court decided 34 cases interpreting statutes unfavorably to criminal defendants. Congress overturned just one of those 34 decisions. During the same six years, Congress overturned 5 of 24 statutory interpretation decisions that were unfavorable to the federal government. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 348 tbl. 7, 351 tbl. 9 (1991). What conclusion do you draw from those data?

Notes on the “So-Called Rule of Lenity”

1. The rule of lenity holds that ambiguities in criminal statutes should be resolved in the defendant's favor. This principle would seem to resolve cases like *Brogan*, *Pasquantino*, *Wells*, and *Small*, in which Supreme Court Justices disagreed about the meaning of the relevant criminal

statute (a fair indication that those statutes are ambiguous, or so one might think). But three of those four cases were decided in the government's favor, and in the fourth—*Small*—the Court ignored the rule. That is no surprise; the Court often ignores the rule of lenity. So do lower federal courts. Increasingly, federal judges put the word “rule” in quotes, or label the doctrine the “so-called rule of lenity.” For representative uses of the latter phrase, see, for example, *Moskal v. United States*, 498 U.S. 103, 131 (1990) (Scalia, J., dissenting); *United States v. Ketchum*, 201 F.3d 928, 934 (7th Cir. 2000); *United States v. Workinger*, 90 F.3d 1409, 1419 (9th Cir. 1996) (Kozinski, J., concurring); and *United States v. Garrett*, 984 F.2d 1402, 1411 (5th Cir. 1993). What is the rationale for this alleged rule, and why is it an “alleged” rule?

2. *United States v. Bass*, 404 U.S. 336, 347-48 (1971), contains the best statement of the rule and its rationale:

[A]s we have recently reaffirmed, “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Rewis v. United States*, 401 U.S. 808, 812 (1971). In various ways over the years, we have stated that “when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.” *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952). This principle is founded on two policies that have long been part of our tradition. First, “a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.” *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies “the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.” H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 196, 209 (1967). Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

Noble words, and persuasive ones.

3. Then why is the rule only “so-called”? The doctrinal answer is that the rule applies only when the statutory ambiguity cannot be resolved one way or the other. Consider *Muscarello*

v. *United States*, 524 U.S. 125 (1998). The defendants in *Muscarello* were charged under a federal statute that applies to anyone who “uses or carries a firearm” “during and in relation to” a “drug trafficking offense.” 18 U.S.C. §924(c)(1). The defendants drove their respective vehicles to the site of the relevant drug transactions, where they were arrested and searched. One defendant had a handgun in the locked glove compartment of his pickup truck. Two other defendants had a bag filled with guns in the trunk of their car. The question was whether these three defendants were “carr[ying]” the guns at the time of the drug sales. The Court split five to four on the meaning of “carries”: the majority held that one “carries” a weapon when it is reasonably accessible in a nearby vehicle; the dissenters argued that one “carries” only the items on one’s person. Both Justice Breyer’s majority opinion and Justice Ginsburg’s dissent cited dictionaries, usage guides, and the Bible for their preferred interpretations—powerful evidence that the issue was a close one, since the conventional sources offered such divided counsel. Even so, the *Muscarello* majority did not find it a close call:

Finally, petitioners and the dissent invoke the “rule of lenity.” The simple existence of some statutory ambiguity, however, is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree. “ ‘The rule of lenity applies only if, “after seizing everything from which aid can be derived,” . . . we can make “no more than a guess as to what Congress intended.” ’ ” *United States v. Wells*, 519 U.S. 482, 499 (1997). To invoke the rule, we must conclude that there is “ ‘a grievous ambiguity or uncertainty” ’ in the statute.” *Staples v. United States*, 511 U.S. 600, 619 n. 17 (1994). Certainly, our decision today is based on much more than “a guess as to what Congress intended,” and there is no “grievous ambiguity” here. The problem of statutory interpretation in this case is indeed no different from that in many of the criminal cases that confront us. Yet, this Court has never held that the rule of lenity automatically permits a defendant to win.

524 U.S. at 138-39. Few cases show the “grievous ambiguity” required to trigger the rule.

4. There is also a psychological answer to the question why this alleged rule rarely does much work in practice. The answer begins with this fact: The rule of lenity is irrelevant in cases in which the court decides the defendant has the better statutory argument—even without it, the defendant wins such cases. The rule matters only when judges conclude *both* (1) that all things considered, the best interpretation is the government’s, *and* (2) that the case is close enough to

trigger the rule. Those conclusions sit uncomfortably together. Most people find it awkward to conclude that their conclusions are suspect, and federal judges are probably less self-critical than most people (though perhaps more self-critical than law professors). So, with rare exceptions, the rule of lenity is a throwaway argument—sometimes cited when statutory ambiguities are resolved in defendants’ favor, and ignored when they aren’t. It isn’t clear whether this “so-called rule” actually changes any case outcomes. Should it? Should courts give criminal defendants the benefit of the doubt when evaluating statutory interpretation arguments? Did Brogan deserve the benefit of the doubt?

5. When we turn to specific statutory areas, like mail fraud and extortion, you will wonder how much bite *Hudson & Goodwin* has. But the bar on federal criminal common lawmaking has consequences. Consider the law on attempts. Noting the absence of a general federal “attempt” statute, the Ninth Circuit summarized the rule that applies across circuits:

A defendant therefore can only be found guilty of an attempt to commit a federal offense if the statute defining the offense also expressly proscribes an attempt." [*United States v. Hopkins*, 703 F.2d 1102, 1104 \(9th Cir. 1983\)](#); see also [*United States v. Joe*, 452 F.2d 653, 654 \(10th Cir. 1972\)](#) ("[I]t is well settled that the only attempts to commit crimes which are made Federal crimes are those specifically so proscribed by Federal law."); [*United States v. Padilla*, 374 F.2d 782, 787 n.7 \(2d Cir. 1967\)](#) ("[U]nlike many state criminal codes, federal criminal statutes contain no general attempt provision. An attempt to commit a federal crime is punishable only where the section defining the crime specifically includes an attempt within its proscription."

United States v. Chi Tong Kuok, 671 F.3d 931, 941 (9th Cir. 2012) (vacating conviction for attempting to cause an export of defense articles without a licence).

C. CRIMINAL DEFENSES

Defenses to federal crimes are almost all non-statutory. How can this be, given *Hudson & Goodwin*? What is the status in federal court of common-law defenses to crime? In the case below, the Court discusses which side bears the burden of proving or disproving duress when this defense is invoked by the defendant. As you read this case, ask yourself: What is the role of common-law principles in interpreting recently enacted statutes? To what degree should courts

expect Congress to be cognizant of principles of common law when enacting legislation? How should courts interpret Congressional silence on important legal issues? What is the relationship between *mens rea* elements and defenses?

DIXON v. UNITED STATES
548 U.S. 1 (2006)

Justice STEVENS delivered the opinion of the Court.

In January 2003, petitioner Keshia Dixon purchased multiple firearms at two gun shows, during the course of which she provided an incorrect address and falsely stated that she was not under indictment for a felony. As a result of these illegal acts, petitioner was indicted and convicted on one count of receiving a firearm while under indictment in violation of 18 U.S.C. § 922(n) and eight counts of making false statements in connection with the acquisition of a firearm in violation of § 922(a)(6). At trial, petitioner admitted that she knew she was under indictment when she made the purchases and that she knew doing so was a crime; her defense was that she acted under duress because her boyfriend threatened to kill her or hurt her daughters if she did not buy the guns for him.

Petitioner contends that the trial judge's instructions to the jury erroneously required her to prove duress by a preponderance of the evidence instead of requiring the Government to prove beyond a reasonable doubt that she did not act under duress. The Court of Appeals rejected petitioner's contention, 413 F.3d 520 (C.A.5. 2005); given contrary treatment of the issue by other federal courts,¹ we granted certiorari.

I

At trial, in her request for jury instructions on her defense of duress, petitioner contended that she "should have the burden of production, and then that the Government should be required to disprove beyond a reasonable doubt the duress." . . . [T]he judge's instructions to the jury

¹Cf., e.g., *United States v. Talbott*, 78 F.3d 1183, 1186 (C.A.7 1996) (*per curiam*); *United States v. Riffe*, 28 F.3d 565, 568, n.2 (C.A.6 1994); *United States v. Simpson*, 979 F.2d 1282, 1287 (C.A.8 1992).

defined the elements of the duress defense² and stated that petitioner has “the burden of proof to establish the defense of duress by a preponderance of the evidence.”

Petitioner argues here, as she did in the District Court and the Court of Appeals, that federal law requires the Government to bear the burden of disproving her defense beyond a reasonable doubt and that the trial court’s erroneous instruction on this point entitles her to a new trial. . . .

II

The crimes for which petitioner was convicted require that she have acted “knowingly” or “willfully.” As we have explained, “unless the text of the statute dictates a different result, the term ‘knowingly’ merely requires proof of knowledge of the facts that constitute the offense.” *Bryan v. United States*, 524 U.S. 184, 193 (1998). And the term “willfully” in § 924(a)(1)(D) requires a defendant to have “acted with knowledge that his conduct was unlawful.” *Ibid*. In this case, then, the Government bore the burden of proving beyond a reasonable doubt that petitioner knew she was making false statements in connection with the acquisition of firearms and that she knew she was breaking the law when she acquired a firearm while under indictment. See *In re Winship*, 397 U.S. 358, 364 (1970). . . . [T]he Government . . . clearly met its burden when petitioner testified that she knowingly committed certain acts—she put a false address on the forms she completed to purchase the firearms, falsely claimed that she was the actual buyer of the firearms, and falsely stated that she was not under indictment at the time of the purchase—and when she testified that she knew she was breaking the law when, as an individual under indictment at the time, she purchased a firearm.

Petitioner contends, however, that she cannot have formed the necessary *mens rea* for these crimes because she did not freely choose to commit the acts in question. But even if we

²There is no federal statute defining the elements of the duress defense. We have not specified the elements of the defense, see, e.g., *United States v. Bailey*, 444 U.S. 394, 409-10 (1980), and need not do so today. Instead, we presume the accuracy of the District Court’s description of these elements: (1) The defendant was under an unlawful and imminent threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury; (2) the defendant had not recklessly or negligently placed herself in a situation in which it was probable that she would be forced to perform the criminal conduct; (3) the defendant had no reasonable, legal alternative to violating the law, that is, a chance both to refuse to perform the criminal act and also to avoid the threatened harm; and, (4) that a direct causal relationship may be reasonably anticipated between the criminal act and the avoidance of the threatened harm.

assume that petitioner's will was overborne by the threats made against her and her daughters, she still *knew* that she was making false statements and *knew* that she was breaking the law by buying a firearm. The duress defense, like the defense of necessity that we considered in *United States v. Bailey*, 444 U.S. 394, 409-10 (1980), may excuse conduct that would otherwise be punishable, but the existence of duress normally does not controvert any of the elements of the offense itself.⁴ As we explained in *Bailey*, “[c]riminal liability is normally based upon the concurrence of two factors, ‘an evil-meaning mind [and] and evil-doing hand [sic]’” *Id.*, at 402. Like the defense of necessity, the defense of duress does not negate a defendant’s criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully; instead, it allows the defendant to “avoid liability . . . because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present.” [*Ibid.*]

. . . Congress defined the crimes at issue to punish defendants who act “knowingly,” § 922(a)(6), or “willfully,” § 924(a)(1)(D). It is these specific mental states, rather than some vague “evil mind” or “‘criminal’ intent” that the Government is required to prove beyond a reasonable doubt. The jury instructions in this case were consistent with this requirement and, as such, did not run afoul of the Due Process Clause when they placed the burden on petitioner to establish the existence of duress by a preponderance of the evidence.

III

. . . [U]ntil the end of the 19th century, common-law courts generally adhered to the rule that “the proponent of an issue bears the burden of persuasion on the factual premises for applying the rule.” Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 *Yale L.J.* 880, 898 (1967-1968). In petitioner’s view, however, two important developments have established a contrary common-law rule that now prevails in federal courts: this Court’s decision in *Davis v. United States*, 160 U.S. 469 (1895), which placed the burden on the Government to prove a defendant’s sanity, and the publication of the Model Penal Code in 1962. . . .

⁴As the Government recognized at oral argument, there may be crimes where the nature of the *mens rea* would require the Government to disprove the existence of duress beyond a reasonable doubt. See Tr. of Oral Arg. 26-27; see also, e.g., 1 W. LAFAYETTE, *SUBSTANTIVE CRIMINAL LAW* § 5.1, p 333 (2d ed. 2003) explaining that some common-law crimes require that the crime be done “‘maliciously’ ”; Black’s Law Dictionary 968 (7th ed. 1999) (defining malice as “[t]he intent, without justification or excuse, to commit a wrongful act”).

Davis . . . does not support petitioner’s position. In that case, we reviewed a defendant’s conviction for having committed murder “feloniously, wilfully, and of his malice aforethought.” 160 U.S., at 474. It was undisputed that the prosecution’s evidence, “if alone considered, made it the duty of the jury to return a verdict of guilty of the crime charged”; the defendant, however, adduced evidence at trial tending to show that he did not have the mental capacity to form the requisite intent. *Id.*, at 475. At issue before the Court was the correctness of the trial judge’s instruction to the jury that the law “ ‘presumes every man is sane, and the burden of showing it is not true is upon the party who asserts it.’ ” *Id.*, at 476. . . .

In reversing the defendant’s conviction, we found ourselves “unable to assent to the doctrine that *in a prosecution for murder* . . . it is the duty of the jury to convict where the evidence is equally balanced on the issue as to the sanity of the accused at the time of the killing.” *Id.*, at 484 (emphasis added). . . . Our opinion focused on the “definition of murder,” explaining that “it is of the very essence of that heinous crime that it be committed by a person of ‘sound memory and discretion,’ and with ‘malice aforethought.’ ” *Ibid.* . . .

. . . *Davis* [] interpreted a defendant’s sanity to controvert the necessary *mens rea* for the crime of murder committed “feloniously, wilfully, and of his malice aforethought,” *id.*, at 474, as “[o]ne who takes human life cannot be said to be actuated by malice aforethought, or to have deliberately intended to take life, or to have ‘a wicked, depraved, and malignant heart,’ . . . unless at the time he had sufficient mind to comprehend the criminality or the right and wrong of such an act,” *id.*, at 485. . . . [T]his reasoning . . . does not help petitioner: The evidence of duress she adduced at trial does not contradict or tend to disprove any element of the statutory offenses that she committed. . . .

. . . [P]etitioner’s reliance on *Davis* ignores the fact that federal crimes “are solely creatures of statute,” [*Liparota v. United States*, 471 U.S. 419, 424 (1985)], and therefore that we are required to effectuate the duress defense as Congress “may have contemplated” it in the context of these specific offenses, *United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483, 491, n. 3 (2001). The offenses at issue in this case were created by statute in 1968, when Congress enacted the Omnibus Crime Control and Safe Streets Act. See 82 Stat. 197. There is no evidence in the Act’s structure or history that Congress actually considered the question of how the duress defense should work in this context. . . . Assuming that a defense of duress is available to the statutory crimes at issue, then, we must determine what that defense would look like as Congress “may have contemplated” it.

As discussed above, the common law long required the defendant to bear the burden of

proving the existence of duress. Similarly, even where Congress has enacted an affirmative defense in the proviso of a statute, the “settled rule . . . [is] that it is incumbent on one who relies on such an exception to set it up and establish it.” *McKelvey v. United States*, 260 U.S. 353, 357 (1922). Even though the Safe Streets Act does not mention the defense of duress, we can safely assume that the 1968 Congress was familiar with both the long-established common-law rule and the rule applied in *McKelvey* and that it would have expected federal courts to apply a similar approach to any affirmative defense that might be asserted as a justification or excuse for violating the new law.

. . . Petitioner cites only one federal case decided before 1968 for the proposition that it has been well established in federal law that the Government bears the burden of disproving duress beyond a reasonable doubt. But that case involved a defendant’s claim that he “lacked the specific intent to defraud required by the statute for the reason that he committed the offense under duress and coercion.” *Johnson v. United States*, 291 F.2d 150, 152 (C.A.8 1961). Thus, when the Court of Appeals explained that “there is no burden upon the defendant to prove his defense of coercion,” *id.*, at 155, that statement is best understood in context as a corollary to the by-then-unremarkable proposition that “the burden of proof rests upon the Government to prove the defendant’s guilt beyond a reasonable doubt,” *ibid.* Properly understood, *Johnson* provides petitioner little help. . . .

. . . [F]or us [to accept petitioner’s argument], we would need to find an overwhelming consensus among federal courts that it is the Government’s burden to disprove the existence of duress beyond a reasonable doubt. The existence today of disagreement among the Federal Courts of Appeals on this issue . . . demonstrates that no such consensus has ever existed. Also undermining petitioner’s argument is the fact that, in 1970, the National Commission on Reform of Federal Criminal Laws proposed that a defendant prove the existence of duress by a preponderance of the evidence. See [NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS,] 1 Working Papers 278 [(1970)]. . . .

It is for a similar reason that we give no weight to the publication of the Model Penal Code in 1962. As petitioner notes, the Code would place the burden on the government to disprove the existence of duress beyond a reasonable doubt. See ALI, Model Penal Code § 1.12 (stating that each element of an offense must be proved beyond a reasonable doubt); § 1.13(9)(c) (defining as an element anything that negatives an excuse for the conduct at issue); § 2.09 (establishing affirmative defense of duress). . . . [E]ven if we assume Congress’ familiarity with the Code and the rule it would establish, there is no evidence that Congress endorsed the Code’s

views or incorporated them into the Safe Streets Act.

In fact, the Act itself provides evidence to the contrary. Despite the Code’s careful delineation of mental states, see Model Penal Code § 2.02, the Safe Streets Act attached no explicit *mens rea* requirement to the crime of receiving a firearm while under indictment, § 924(a), 82 Stat. 233 (“Whoever violates any provision of this chapter . . . shall be fined not more than \$5,000 or imprisoned not more than five years, or both”). And when Congress amended the Act to impose a *mens rea* requirement, it punished people who “willfully” violate the statute, see 100 Stat. 456, a mental state that has not been embraced by the Code

IV

Congress can, if it chooses, enact a duress defense that places the burden on the Government to disprove duress beyond a reasonable doubt. In light of Congress’ silence on the issue, however, it is up to the federal courts to effectuate the affirmative defense of duress as Congress “may have contemplated” it in an offense-specific context. In the context of the firearms offenses at issue—as will usually be the case, given the long-established common-law rule—we presume that Congress intended the petitioner to bear the burden of proving the defense of duress by a preponderance of the evidence. Accordingly, the judgment of the Court of Appeals is affirmed.

Justice KENNEDY, concurring. . . .

When issues of congressional intent with respect to the nature, extent, and definition of federal crimes arise, we assume Congress acted against certain background understandings set forth in judicial decisions in the Anglo-American legal tradition. Those decisions, in turn, consult sources such as legal treatises and the American Legal Institute’s Model Penal Code. All of these sources rely upon the insight gained over time. . . . Absent some contrary indication in the statute, we can assume that Congress would not want to foreclose the courts from consulting these newer sources and considering innovative arguments in resolving issues not confronted in the statute and not within the likely purview of Congress. . . .

While the Court looks to the state of the law at the time the statute was enacted, the better reading of the Court’s opinion is that isolated authorities or writings do not control unless they were indicative of guiding principles upon which Congress likely would have relied. Otherwise, it seems altogether a fiction to attribute to Congress any intent one way or the other in assigning the burden of proof. It seems unlikely, moreover, that Congress would have wanted the burden of

proof for duress to vary from statute to statute depending upon the date of enactment. Consistent with these propositions, the Court looks not only to our precedents and common-law traditions, but also to the treatment of the insanity defense in a 1984 statute and a proposal of the National Commission on Reform of Federal Criminal Laws, even though they both postdated the passage of the [Omnibus Crime Control and Safe Streets Act].

As there is no reason to suppose that Congress wanted to depart from the traditional principles for allocating the burden of proof, the proper approach is simply to apply these principles to the context of duress. The facts needed to prove or disprove the defense “lie peculiarly in the knowledge of” the defendant. 2 K. Broun, *McCormick on Evidence* § 337, p. 475 (6th ed.2006). The claim of duress in most instances depends upon conduct that takes place before the criminal act; and, as the person who allegedly coerced the defendant is often unwilling to come forward and testify, the prosecution may be without any practical means of disproving the defendant’s allegations. There is good reason, then, to maintain the usual rule of placing the burden of production and persuasion together on the party raising the issue. The analysis may come to a different result, of course, for other defenses.

With these observations, I join the Court’s opinion.

Justice ALITO, with whom Justice SCALIA joins, concurring.

I join the opinion of the Court with the understanding that it does not hold that the allocation of the burden of persuasion on the defense of duress may vary from one federal criminal statute to another.

Duress was an established defense at common law. See 4 W. Blackstone, *Commentaries on the Laws of England* 30 (1769). When Congress began to enact federal criminal statutes, it presumptively intended for those offenses to be subject to this defense. Moreover, Congress presumptively intended for the burdens of production and persuasion to be placed, as they were at common law, on the defendant. Although Congress is certainly free to alter this pattern and place one or both burdens on the prosecution, either for all or selected federal crimes, Congress has not done so but instead has continued to revise the federal criminal laws and to create new federal crimes without addressing the issue of duress. Under these circumstances, I believe that the burdens remain where they were when Congress began enacting federal criminal statutes.

I do not assume that Congress makes a new, implicit judgment about the allocation of these burdens whenever it creates a new federal crime or, for that matter, whenever it substantially revises an existing criminal statute. It is unrealistic to assume that on every such

occasion Congress surveys the allocation of the burdens of proof on duress under the existing federal case law and under the law of the States and tacitly adopts whatever the predominant position happens to be at the time. . . . If the allocation differed for different offenses, there might be federal criminal cases in which the trial judge would be forced to instruct the jury that the defendant bears the burden of persuasion on this defense for some of the offenses charged in the indictment and that the prosecution bears the burden on others.

I would also not assume, as Justice BREYER does, that Congress has implicitly delegated to the federal courts the task of deciding in the manner of a common-law court where the burden of persuasion should be allocated. The allocation of this burden is a debatable policy question with an important empirical component. In the absence of specific direction from Congress, I would not assume that Congress has conferred this authority on the Judiciary.

Justice BREYER, with whom Justice SOUTER joins, dissenting.

Courts have long recognized that “duress” constitutes a defense to a criminal charge. Historically, that defense “excuse[d] criminal conduct” if (1) a “threat of imminent death or serious bodily injury” led the defendant to commit the crime, (2) the defendant had no reasonable, legal alternative to breaking the law, and (3) the defendant was not responsible for creating the threat. *United States v. Bailey*, 444 U.S. 394, 409-10 (1980); see also 2 W. LaFare, *Substantive Criminal Law* § 9.7(b), pp. 74-82 (2003). The Court decides today in respect to *federal* crimes that the defense must bear the burden of both producing evidence of duress and persuading the jury. I agree with the majority that the burden of production lies on the defendant, that here the burden of persuasion issue is not constitutional, and that Congress may allocate that burden as it sees fit. But I also believe that, in the absence of any indication of a different congressional intent, the burden of persuading the jury beyond a reasonable doubt should lie where such burdens normally lie in criminal cases, upon the prosecution.

I

My disagreement with the majority in part reflects my different view about how we should determine the relevant congressional intent. Where Congress speaks about burdens of proof, we must, of course, follow what it says. But suppose, as is normally the case, that the relevant federal statute is silent. The majority proceeds on the assumption that Congress wished courts to fill the gap by examining judicial practice *at the time that Congress enacted the particular criminal statute in question*. I would not follow that approach.

To believe Congress intended the placement of such burdens to vary from statute to statute and time to time is both unrealistic and risks unnecessary complexity, jury confusion, and unfairness. It is unrealistic because the silence could well mean only that Congress did not specifically consider the “burden of persuasion” in respect to a duress defense. . . . Had it done so, would Congress have wanted courts to freeze current practice statute by statute? Would it have wanted to impose different burden-of-proof requirements where claims of duress are identical, where statutes are similar, where the *only* relevant difference is the time of enactment? Why? Indeed, individual instances of criminal conduct often violate several statutes. In a trial for those violations, is the judge to instruct the jury to apply different standards of proof to a duress defense depending upon when Congress enacted the particular statute in question? . . .

I would assume instead that Congress’ silence typically means that Congress expected the courts to develop [burden of proof] rules governing affirmative defenses as they have done in the past, by beginning with the common law and taking full account of the subsequent need for that law to evolve through judicial practice informed by reason and experience. That approach would produce uniform federal practice across different affirmative defenses, as well as across statutes passed at different points in time.

II

My approach leads me to conclude that in federal criminal cases, the prosecution should bear the duress defense burden of persuasion. The issue is a close one. In Blackstone’s time the accused bore the burden of proof for all affirmative defenses. See 4 W. Blackstone, Commentaries *201. And 20th-century experts have taken different positions on the matter. The Model Penal Code, for example, recommends placing the burden of persuasion on the prosecution. The Brown Commission recommends placing it upon the defendant. 1 National Commission on Reform of Federal Criminal Laws, 1 Working Papers 278 (1970). And the proposed revision of the federal criminal code, agnostically, would have turned the matter over to the courts for decision. S. 1722, 96th Cong., 1st Sess., § 501 (1979). Moreover, there is a practical argument that favors the Government’s position here, namely that defendants should bear the burden of persuasion because defendants often have superior access to the relevant proof.

Nonetheless, several factors favor placing the burden on the prosecution. For one thing, in certain respects the question of duress resembles that of *mens rea*, an issue that is always for the prosecution to prove beyond a reasonable doubt. . . .

. . . [W]here a defendant acts under duress, she lacks any semblance of a meaningful choice. . . . As Blackstone wrote, the criminal law punishes “abuse[s] of th[e] free will”; hence “it is highly just and equitable that a man should be excused for those acts, which are done through unavoidable force and compulsion.” 4 Commentaries *27. And it is in this “force and compulsion,” acting upon the will, that the resemblance to lack of *mens rea* lies. *Davis v. United States*, [160 U.S. 469 (1895),] allocated the federal insanity defense burden to the Government partly for these reasons. That case, read in light of *Leland v. Oregon*, 343 U.S. 790, 797 (1952), suggests that, even if insanity does not always show the absence of *mens rea*, it does show the absence of a “‘vicious will.’” *Davis, supra*, at 484 (citing Blackstone; emphasis added).

For another thing, federal courts . . . have imposed the federal-crime burden of persuasion upon the prosecution in respect to self-defense, insanity, and entrapment, which resemble the duress defense in certain relevant ways. In respect to both duress and self-defense, for example, the defendant’s illegal act is voluntary . . . but the circumstances deprive the defendant of any meaningful ability or opportunity to act otherwise, depriving the defendant of a choice that is free. Insanity . . . may involve circumstances that resemble, but are not identical to, a lack of *mens rea*. And entrapment requires the prosecution to prove that the defendant was “predisposed” to commit the crime—a matter sometimes best known to the defendant. . . .

It is particularly difficult to see a practical distinction between this affirmative defense and, say, self-defense. The Government says that the prosecution may “be unable to call the witness most likely to have information bearing on the point,” namely, the defendant. Brief for United States 21. But what is the difference in this respect between the defendant here, who says her boyfriend threatened to kill her, and a battered woman who says that she killed her husband in self-defense, where the husband’s evidence is certainly unavailable? Regardless, unless the defendant testifies, it could prove difficult to satisfy the defendant’s burden of *production*; and, of course, once the defendant testifies, cross-examination is possible.

In a word, I cannot evaluate the claim of practicality without somewhat more systematic evidence of the existence of a problem, say, in those Circuits that for many years have imposed the burden on the prosecutor. And, of course, if I am wrong about the Government’s practical need (and were my views to prevail), the Government would remain free to ask Congress to reallocate the burden.

Finally, there is a virtue in uniformity, in treating the federal statutory burden of persuasion similarly in respect to *actus reus*, *mens rea*, mistake, self-defense, entrapment, and duress. The Second Circuit, when imposing the burden of persuasion for duress on the

prosecution, wrote that differences in this respect create “a grave possibility of juror confusion.” *United States v. Mitchell*, 725 F.2d 832, 836 (1983) (Newman, J., joined by Feinberg, C. J., and Friendly, J.). They risk unfairness as well.

For these reasons I believe that, in the absence of an indication of congressional intent to the contrary, federal criminal law should place the burden of persuasion in respect to the duress defense upon the prosecution, which, as is now common in respect to many affirmative defenses, it must prove beyond a reasonable doubt. With respect, I dissent.

Notes on the Federal Law of Defenses

1. The narrow issue in *Dixon* concerns the burden of persuasion with respect to duress claims in federal cases. But our chief concern is the broader issue: the legal status of the federal common law of defenses.

2. None of the Justices in *Dixon* doubted the existence of a duress defense, even though it has never been codified by Congress. Nevertheless, in *Dixon*, there are three distinct interpretive positions, none of which appears to have the allegiance of a majority of the Court. First, Justice Stevens and at least some of his colleagues take the view that the existence of such a defense, and its appropriate contours, is to be determined statute by statute. Second, Justices Kennedy, Breyer, and Souter employ common-law reasoning to define the bounds of duress and other criminal defenses that they maintain apply to the entirety of federal criminal law. Justices Alito and Scalia take a third approach: they accept the existence of the duress defense not because state legislatures and state and federal judges adopt and apply it *now*, but because it existed at common law “[w]hen Congress began to enact federal criminal statutes.”

Which of these positions seems most consistent with Congressional intent? Which represents the wisest exercise of judicial power? Are your answers the same?

3. Two issues divide the Justices in *Dixon*. The first concerns the scope of judicial power over federal criminal law. The second is less obvious, but no less important: the Justices disagree about which doctrines are appropriately seen as *trans-substantive*—*i.e.*, which doctrines should apply across the board to all federal crimes, or at least to all save for a small number of exceptions. Historically, the law of defenses, including the burden of proof that applies to duress claims, has been trans-substantive. Should it be? Different intent standards apply to different crimes—why not make different defenses available for different criminal charges? In effect, that is what the “exculpatory no” doctrine did: it established a limited defense for federal

misrepresentation cases.

4. Congress has by statute defined one trans-substantive defense—the insanity defense. Congress acted to narrow this common-law federal defense in the wake of John Hinckley’s acquittal for shooting then-President Reagan. Post-*Hinckley*, federal criminal defendants claiming insanity must prove the defense by clear and convincing evidence. 18 U.S.C. §17. The same federal statute also removed the portion of the insanity defense based on irresistible impulses, and added a required showing that the defendant’s “mental disease or defect” is “severe.” *Id.* Do these legislative moves affect your view of *Dixon*?

5. Congress has not exactly been loath to define new federal crimes. Why has it been so slow to define defenses?

6. The definition of duress used in footnote 2 of Justice Stevens’ opinion in *Dixon* is widely cited by lower federal courts. It appears to be the dominant formula not only for duress, but also for self-defense and necessity. These three doctrines are often lumped together in judicial opinions as aspects of a general federal defense of justification. Judging by the reported opinions, such claims are fairly common—though almost never successful. In an opinion (written before *Dixon*) rejecting one such claim, Richard Posner explained why:

Perez’s felony, conviction of which deprived him of the right to possess a gun, was for drug offenses, and he was suspected of having resumed the drug trade after his release from prison. The DEA decided to conduct a surveillance of Perez. Three agents, in two unmarked cars, watched his apartment from various vantage points in the street and alley next to the apartment building. Perez saw them from the window of his apartment one afternoon and he contends . . . that he thought they were crooks planning to rob him. As it happened, he wanted to go to the bank that afternoon and deposit \$600 in cash and checks. Fearful of being robbed when he left the apartment and got into his car, Perez took his girlfriend’s pistol from the bedroom dresser of the apartment (which they shared) and slipped it into his waistband before leaving. The agents had just learned that there was an outstanding warrant for Perez’s arrest, so when they saw him get into his Cadillac and start to drive off they arrested him. . . .

Even crediting fully Perez’s assertion that he genuinely believed the men in the cars would try to rob him when he left the apartment, he has not come close to satisfying the elements of the defense of necessity. If ex-felons who feel endangered can carry guns, felon-in-possession laws will be dead letters. Upon release from prison most felons return

to their accustomed haunts. . . . Many of them will not go straight, but will return to dangerous activities such as the drug trade. Every drug dealer has a well-grounded fear of being robbed or assaulted, so that if Perez's defense were accepted felon-in-possession laws would as a practical matter not apply to drug dealers.

The defense of necessity will rarely lie in a felon-in-possession case. . . . Rarely does not mean never; for a pertinent illustration, see *United States v. Panter*, 688 F.2d 268, 271-72 (5th Cir. 1982). But only in the most extraordinary circumstances, illustrated by *United States v. Gomez*, [92 F.3d 770] (9th Cir. 1996), where the defendant had sought protection from the authorities without success, will the defense entitle the ex-felon to arm himself in advance of the crisis merely because he fears, however sincerely and reasonably, that he is in serious danger of deadly harm. More often than not the basis of his fear will be his own involvement in illegal activities; and when the danger that gives rise to the fear results from engaging in such activities—from “looking for trouble”—the defense is barred.

United States v. Perez, 86 F.3d 735, 736-37 (7th Cir. 1996). For two recent decisions taking that tack, see *United States v. Butler*, 485 F.3d 569 (10th Cir. 2007); *United States v. Leahy*, 473 F.3d 401 (1st Cir. 2007). Both *Butler* and *Leahy* were felon-in-possession cases in which the defendants claimed they needed the weapons for self-defense.

7. The two cases Judge Posner cited in the opinion above have fairly extreme facts; if they are representative of the cases in which defendants have valid justification defenses, such cases will be very rare indeed. In *Panter*, the defendant shot an assailant who had already stabbed him, though the government claimed he possessed the weapon before that threat materialized. In *Gomez*, the defendant had volunteered to serve as a government informant in an attempted murder-for-hire case. After the government disclosed his identity (with no warning), the man on whom Gomez informed put a contract on his life. Gomez asked to be placed in protective custody but the government refused, whereupon he obtained a shotgun. Two days later, he was arrested for violating his parole and was subsequently charged under the federal felon-in-possession statute (he had been previously convicted of a state felony).

Gomez claimed he acted out of necessity and in self-defense; the government contended that those defenses do not apply to the felon-in-possession statute, and the district court appears to have bought the government's argument. The Ninth Circuit reversed and held that these defenses are available in felon-in-possession cases.

8. *Perez* and *Gomez* assumed that common-law defenses to federal crimes exist; the question at issue in those cases was whether the defenses were applicable under the relevant circumstances. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001), suggested that common-law defenses, or at least the defense of necessity, may not exist. The Cooperative was a non-profit organization, staffed by doctors and nurses, that provided marijuana to cancer patients. Federal officials sought and obtained an injunction ordering the Cooperative to cease its activities. The Cooperative violated the injunction, was charged with contempt, and asserted a defense of “medical necessity.” The district court denied the defense; the Ninth Circuit reversed, and the Supreme Court—as is its recent pattern—reversed the Ninth Circuit, unanimously. Justice Thomas wrote the majority opinion:

As an initial matter, we note that it is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute. A necessity defense “traditionally covered the situation where physical forces beyond the actor’s control rendered illegal conduct the lesser of two evils.” *United States v. Bailey*, 444 U.S. 394, 410 (1980). Even at common law, the defense of necessity was somewhat controversial. See, e.g., *Queen v. Dudley & Stephens*, 14 Q.B. 273 (1884). And under our constitutional system, in which federal crimes are defined by statute rather than by common law, see *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812), it is especially so. As we have stated: “Whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference.” *United States v. Rutherford*, 442 U.S. 544, 559 (1979). Nonetheless, we recognize that this Court has discussed the possibility of a necessity defense without altogether rejecting it. See, e.g., *Bailey, supra*, at 415.³

³The Cooperative is incorrect to suggest that *Bailey* has settled the question whether federal courts have authority to recognize a necessity defense not provided by statute. There, the Court rejected the necessity defense of a prisoner who contended that adverse prison conditions justified his prison escape. The Court held that the necessity defense is unavailable to prisoners, like Bailey, who fail to present evidence of a bona fide effort to surrender as soon as the claimed necessity had lost its coercive force. 444 U.S. at 415. It was not argued, and so there was no occasion to consider, whether the statute might be unable to bear any necessity defense at all. And although the Court noted that Congress “legislates against a background of Anglo-Saxon common law” and thus “may” have contemplated a necessity defense, the Court refused to “balanc[e] [the] harms,” explaining that “we are construing an Act of Congress, not drafting it.”

We need not decide, however, whether necessity can ever be a defense when the federal statute does not expressly provide for it. In this case, to resolve the question presented, we need only recognize that a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act. The statute, to be sure, does not explicitly abrogate the defense.⁴ But its provisions leave no doubt that the defense is unavailable.

. . . [The Controlled Substances Act] divides drugs into five schedules, depending in part on whether the particular drug has a currently accepted medical use. The Act then imposes restrictions on the manufacture and distribution of the substance according to the schedule in which it has been placed. Schedule I is the most restrictive schedule. The Attorney General can include a drug in schedule I only if the drug “has no currently accepted medical use in treatment in the United States,” “has a high potential for abuse,” and has “a lack of accepted safety for use . . . under medical supervision.” §§ 812(b)(1)(A)-(C). . . .

The Cooperative points out, however, that the Attorney General did not place marijuana into schedule I. Congress put it there, and Congress was not required to find that a drug lacks an accepted medical use before including the drug in schedule I. We are not persuaded that this distinction has any significance. . . . Under the Cooperative’s logic, drugs that Congress places in schedule I could be distributed when medically necessary whereas drugs that the Attorney General places in schedule I could not. Nothing in the statute, however, suggests that there are two tiers of schedule I narcotics, with drugs in one tier more readily available than drugs in the other. On the contrary, the statute consistently treats all schedule I drugs alike. . . .

The Cooperative further argues that use of schedule I drugs generally—whether placed in schedule I by Congress or the Attorney General—can be medically necessary, notwithstanding that they have “no currently accepted medical use.” According to the

Id., at 415, n. 11.

⁴We reject the Cooperative’s intimation that elimination of the defense requires an “explici[t]” statement. Brief for Respondents 21. Considering that we have never held necessity to be a viable justification for violating a federal statute, and that such a defense would entail a social balancing that is better left to Congress, we decline to set the bar so high.

Cooperative, a drug may not yet have achieved general acceptance as a medical treatment but may nonetheless have medical benefits to a particular patient or class of patients. We decline to parse the statute in this manner. . . .

For these reasons, we hold that medical necessity is not a defense to manufacturing and distributing marijuana.⁷ . . .

532 U.S. at 490-94. Justice Stevens joined the judgment in *Oakland Cannabis Buyers*, but objected to the language casting doubt on the common-law defenses of necessity in federal cases:

. . . [T]he Court takes two unwarranted and unfortunate excursions that prevent me from joining its opinion. First, the Court reaches beyond its holding, and beyond the facts of the case, by suggesting that the defense of necessity is unavailable for anyone under the Controlled Substances Act. Because necessity was raised in this case as a defense to distribution, the Court need not venture an opinion on whether the defense is available to anyone other than distributors. Most notably, whether the defense might be available to a seriously ill patient for whom there is no alternative means of avoiding starvation or extraordinary suffering is a difficult issue that is not presented here.

Second, the Court gratuitously casts doubt on “whether necessity can ever be a defense” to *any* federal statute that does not explicitly provide for it, calling [the existence of] such a defense . . . an “open question.” By contrast, our precedent has expressed no doubt about the viability of the common-law defense. . . . See, e.g., *United States v. Bailey*, 444 U.S. 394, 415 (1980) (“We therefore hold that, where a criminal defendant is charged with escape and claims that he is entitled to an instruction on the theory of duress or necessity, he must proffer evidence of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force”); *id.*, at 416, n. 11 (“Our principal difference with the dissent, therefore, is not as to the *existence* of such a defense but as to the importance of surrender as an element of it” (emphasis added)). . . .

⁷Lest there be any confusion, we clarify that nothing in our analysis, or the statute, suggests that a distinction should be drawn between the prohibitions on manufacturing and distributing and the other prohibitions in the Controlled Substances Act. Furthermore, the very point of our holding is that there is no medical necessity exception to the prohibitions at issue, even when the patient is “seriously ill” and lacks alternative avenues for relief. . . .

532 U.S. at 500-01 (Stevens, J., concurring in the judgment). Justices Ginsburg and Souter agreed with Justice Stevens; Justice Breyer took no part in the case. *Oakland Cannabis Buyers* may not be squarely at odds with *Dixon*, but the two cases are surely in tension. Has *Dixon* answered the questions raised by Justice Thomas in the earlier case? Or might the common-law defense of necessity have a less secure legal status in federal court than that of duress? For more on the current state of these defenses, see Monu Bedi, *Excusing Behavior: Reclassifying the Federal Common Law Defenses of Duress and Necessity Relying on the Victim's Role*, 101 J. Crim. L. & Crim. 575 (2011).

9. The defense of entrapment finds its origins not in federal common law but rather in a muscular species of statutory interpretation. In *Sorrells v. United States*, 287 U.S. 435 (1932), where a prohibition agent had badgered the defendant into selling him some whiskey, the Court overturned the conviction, explaining: "We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." *Id.* at 448. Later Courts have continued to read a similar lack of congressional intent into every criminal statute at issue in every entrapment case. See, e.g. *Jacobson v. United States*, 503 U.S. 540, 553-54 (1992); see Dru Stevenson, *Entrapment and the Problem of Detering Police Misconduct*, 37 Conn L. Rev. 67 (2004). Why do you think the Court analyzes entrapment as a matter of statutory interpretation, rather than constitutional law or federal common law?

The defense of entrapment--which must be presented to the jury, and requires inquiry not just into the government's actions but into the defendant's "predisposition"--should not be confused with the "defense" of "outrageous government conduct," which invokes a court's supervisory powers or the Due Process Clause and is a matter for the court. The Circuits are divided on whether the latter remains a valid avenue for relief, but even courts that recognize that avenue are averse to letting defendants walk on it. See *United States v. Augustin*, 661 F.3d 1105, 1122 (11th Cir. 2011); *United States v. Lakhani*, 480 F.3d 171, 180-82 (3d Cir. 2007); *United States v. Cromitie*, 781 F.Supp. 2d 211 (2011).

D. CRIMINAL INTENT

If the law of defenses has been shaped by common-law doctrines, the same is true of the

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law of criminal intent in federal cases. Congress often fails to mention the defendant’s state of mind in criminal statutes—and when *mens rea* is mentioned, it is often “defined” only by a single vague term, leaving courts to flesh out the term’s meaning. Unless the field is to consist of strict liability crimes and crimes as to which *mens rea* is basically undefined—see subsection 1, below—common-law *mens rea* terms appear to be the only viable options.

On the other hand, many federal offenses do have statutory *mens rea* terms, so the law of criminal intent is bound to be more statutory—more of a mix between common law and statutory text—than the law of defenses. What will the mix look like? How is the balance between judicial and legislative power to be struck? The three subsections below tell the tale, in rough outline. Subsection 1 deals with a great debate in mid-twentieth-century federal criminal law between judicial supporters of strict liability and judicial proponents of the proposition that the government must prove some kind of wrongful intent, at least in cases not involving the prosecution of large businesses. The latter side of that debate ultimately prevailed—a fact that shapes the law discussed in subsections 2 and 3. Subsection 2 concerns the kind and amount of factual knowledge that the government must prove in order to convict. Subsection 3 explores a more hotly contested issue: the kind and amount of *legal* knowledge that the government must prove in order to convict.

1. The Historical Debate

UNITED STATES v. DOTTERWEICH 320 U.S. 277 (1943)

Mr. Justice FRANKFURTER delivered the opinion of the Court.

This was a prosecution begun by two informations, consolidated for trial, charging Buffalo Pharmacal Company, Inc., and Dotterweich, its president and general manager, with violations of the Act of Congress of June 25, 1938, 52 Stat. 1040, 21 U.S.C. §§ 301-392, known as the Federal Food, Drug, and Cosmetic Act. The Company, a jobber in drugs, purchased them from their manufacturers and shipped them, repacked under its own label, in interstate commerce. . . . The informations were based on § 301 of that Act, 21 U.S.C. § 331, paragraph (a) of which prohibits “The introduction or delivery for introduction into interstate commerce of any . . . drug . . . that is adulterated or misbranded.” “Any person” violating this provision is, by paragraph (a) of § 303, 21 U.S.C. § 333, made “guilty of a misdemeanor.” Three counts went to

the jury—two, for shipping misbranded drugs in interstate commerce, and a third, for so shipping an adulterated drug. The jury disagreed as to the corporation and found Dotterweich guilty on all three counts. . . .

. . . The Circuit Court of Appeals . . . reversed the conviction on the ground that only the corporation was the “person” subject to prosecution. . . .

. . . The Food and Drugs Act of 1906 was an exertion by Congress of its power to keep impure and adulterated food and drugs out of the channels of commerce. By the Act of 1938, Congress extended the range of its control over illicit and noxious articles and stiffened the penalties for disobedience. The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government. . . . The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. *United States v. Balint*, 258 U.S. 250. And so it is clear that shipments like those now in issue are “punished by the statute if the article is misbranded [or adulterated], and that the article may be misbranded [or adulterated] without any conscious fraud at all. It was natural enough to throw this risk on shippers with regard to the identity of their wares. . . .” *United States v. Johnson*, 221 U.S. 488, 497-98.

. . . Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

It would be too treacherous to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation. To attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering a transaction forbidden by an Act of Congress, to wit, to send illicit goods across state lines, would be mischievous futility. In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted. Our system of criminal justice necessarily depends on “conscience and circumspection in prosecuting officers,” *Nash v. United*

States, 229 U.S. 373, 378, even when the consequences are far more drastic than they are under the provision of law before us. See *United States v. Balint, supra* (involving a maximum sentence of five years). For present purpose it suffices to say that . . . the District Court properly left the question of the responsibility of Dotterweich for the shipment to the jury, and there was sufficient evidence to support its verdict. . . .

Mr. Justice MURPHY, dissenting.

. . . There is no evidence in this case of any personal guilt on the part of the respondent. There is no proof or claim that he ever knew of the introduction into commerce of the adulterated drugs in question, much less that he actively participated in their introduction. Guilt is imputed to the respondent solely on the basis of his authority and responsibility as president and general manager of the corporation.

It is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who, like the respondent, has no evil intention or consciousness of wrongdoing. It may be proper to charge him with responsibility to the corporation and the stockholders for negligence and mismanagement. But in the absence of clear statutory authorization it is inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal knowledge. Before we place the stigma of a criminal conviction upon any such citizen the legislative mandate must be clear and unambiguous. . . .

. . . To erect standards of responsibility is a difficult legislative task and the opinion of this Court admits that it is “too treacherous” and a “mischievous futility” for us to engage in such pursuits. But the only alternative is a blind resort to “the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries.” Yet that situation is precisely what our constitutional system sought to avoid. . . . The legislative power to restrain the liberty and to imperil the good reputation of citizens must not rest upon the variable attitudes and opinions of those charged with the duties of interpreting and enforcing the mandates of the law. I therefore cannot approve the decision of the Court in this case.

Mr. Justice ROBERTS, Mr. Justice REED, and Mr. Justice RUTLEDGE join in this dissent.

Notes and Questions

1. Had the law required the government to prove that Dotterweich knew the drugs were adulterated, Dotterweich and a host of similarly regulated actors would have been unconvictable. If the law *didn't* require proof of knowledge, criminal punishment would have been imposed even in cases with “no evidence . . . of any personal guilt.” Both results seem problematic: The government has a strong interest in requiring that drugs be safe, but individual defendants have a strong interest in avoiding prison sentences for merely negligent conduct. Is there a way out of this box? Of course there is. The law can regulate the conduct of people like Dotterweich without criminally punishing them. Civil regulations that impose strict liability and hefty fines for violators—including, perhaps, individual violators like Dotterweich—can ensure reasonably high levels of safety without the need for criminal prosecutions. Criminal law can require substantial proof of criminal intent without disabling the regulatory state.

2. That proposition seems obvious today—but to the New Deal generation, it was anything but. Today, criminal punishment is seen as a special form of government power, limited in special ways. That understanding was less common in 1943. Most of the New Deal's core statutes included provisions criminalizing violations. Pro-New Deal politicians and judges (like Felix Frankfurter, author of the majority opinion in *Dotterweich*, former Alabama Senator Hugo Black, and former Securities and Exchange Commission Chair William O. Douglas; note that Black and Douglas joined Frankfurter's opinion) feared that if the law restricted criminal prosecution too much, the regulatory state would be unable to regulate effectively. For their part, anti-New Deal politicians and judges often embraced restrictions on criminal prosecution and punishment because they sought to limit government power generally—and hoped to limit the authority of the many government agencies that FDR and his followers created.

3. Though *Dotterweich* was the product of New Deal-era debates, it is more than a historical curiosity. The defendant in *United States v. Hong*, 242 F.3d 528 (4th Cir. 2001), ran a company called Avion Environmental Group; the company in turn ran a wastewater treatment facility in Richmond, Virginia. The company purchased an inadequate filtration system that Hong was told could not handle the amount of waste the facility processed. The system soon became clogged, leading some of Avion's employees to dump untreated waste into Richmond's sewer system, in violation of Avion's permit and the Clean Water Act. Hong was charged and convicted of 13 counts of illegal discharge of waste under the Act; he was fined \$300,000 and sentenced to three years in prison. The Fourth Circuit affirmed the conviction and sentence, citing *Dotterweich* for the proposition that Hong was a “responsible corporate officer” and consequently could be held liable for illegal discharges that he neither committed nor supervised:

“Under the [Clean Water Act], a person is a ‘responsible corporate officer’ if the person has authority to exercise control . . . over the activity that is causing the discharges.” 242 F.3d at 531. “The government may satisfy its burden of proof by introducing ‘evidence sufficient to warrant a finding . . . that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.’” *Id.* We consider the “responsible corporate officer” doctrine at greater length in Chapter 11.

4. Was Hong fairly treated? Was Dotterweich? When, if ever, is it appropriate to punish defendants who lack culpable intent? See the next case.

MORISSETTE v. UNITED STATES
342 U.S. 246 (1952)

Mr. Justice JACKSON delivered the opinion of the Court.

This would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted to the jury as to raise questions both fundamental and far-reaching in federal criminal law, for which reason we granted certiorari.

On a large tract of uninhabited and untilled land in a wooded and sparsely populated area of Michigan, the Government established a practice bombing range over which the Air Force dropped simulated bombs at ground targets. These bombs consisted of a metal cylinder about forty inches long and eight inches across, filled with sand and enough black powder to cause a smoke puff by which the strike could be located. At various places about the range signs read “Danger—Keep Out—Bombing Range.” Nevertheless, the range was known as good deer country and was extensively hunted.

Spent bomb casings were cleared from the targets and thrown into piles “so that they will be out of the way.” They were not stacked or piled in any order but were dumped in heaps, some of which had been accumulating for four years or upwards, were exposed to the weather and rusting away.

Morissette, in December of 1948, went hunting in this area but did not get a deer. He thought to meet expenses of the trip by salvaging some of these casings. He loaded three tons of them on his truck and took them to a nearby farm, where they were flattened by driving a tractor over them. After expending this labor and trucking them to market in Flint, he realized \$84.

Morissette, by occupation, is a fruit stand operator in summer and a trucker and scrap

iron collector in winter. An honorably discharged veteran of World War II, he enjoys a good name among his neighbors and has had no blemish on his record more disreputable than a conviction for reckless driving.

The loading, crushing and transporting of these casings were all in broad daylight, in full view of passers-by, without the slightest effort at concealment. When an investigation was started, Morissette voluntarily, promptly and candidly told the whole story to the authorities, saying that he had no intention of stealing but thought the property was abandoned, unwanted and considered of no value to the Government. He was indicted, however, on the charge that he “did unlawfully, wilfully and knowingly steal and convert” property of the United States of the value of \$84, in violation of 18 U.S.C. § 641, which provides that “whoever embezzles, steals, purloins, or knowingly converts” government property is punishable by fine and imprisonment.² Morissette was convicted and sentenced to imprisonment for two months or to pay a fine of \$200. The Court of Appeals affirmed. . . .

On his trial, Morissette, as he had at all times told investigating officers, testified that from appearances he believed the casings were cast-off and abandoned, that he did not intend to steal the property, and took it with no wrongful or criminal intent. The trial court, however, was unimpressed, and ruled: “[H]e took it because he thought it was abandoned and he knew he was on government property. . . . That is no defense. . . . I don’t think anybody can have the defense they thought the property was abandoned on another man’s piece of property.” The court stated: “I will not permit you to show this man thought it was abandoned. . . . I hold in this case that there is no question of abandoned property.” The court refused to submit or to allow counsel to argue to the jury whether Morissette acted with innocent intention. It charged: “And I instruct you that if you believe the testimony of the government in this case, he intended to take it. . . . He had no right to take this property. . . . [A]nd it is no defense to claim that it was abandoned,

²18 U.S.C. § 641, so far as pertinent, reads:

“Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; . . .

“Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.”

because it was on private property. . . . And I instruct you to this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty. . . . The question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty.” Petitioner’s counsel contended, “But the taking must have been with a felonious intent.” The court ruled, however: “That is presumed by his own act.”

The Court of Appeals [affirmed] . . . This conclusion was thought to be required by . . . this Court’s decisions in *United States v. Behrman*, 258 U.S. 280 [1922], and *United States v. Balint*, 258 U.S. 250 [1922].

I.

In those cases this Court did construe mere omission from a criminal enactment of any mention of criminal intent as dispensing with it. If they be deemed precedents for principles of construction generally applicable to federal penal statutes, they authorize this conviction. Indeed, such adoption of the literal reasoning announced in those cases would do this and more—it would sweep out of all federal crimes, except when expressly preserved, the ancient requirement of a culpable state of mind. We think a résumé of their historical background is convincing that an effect has been ascribed to them more comprehensive than was contemplated and one inconsistent with our philosophy of criminal law.

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child’s familiar exculpatory “But I didn’t mean to,” and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.⁵

⁵In *Williams v. People of State of New York*, 337 U.S. 241, 248 [1949], we observed that “Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.” We also there referred to “. . . a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.” *Id.*, at 247. Such ends would seem illusory if there were

Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will." Common-law commentators of the Nineteenth Century early pronounced the same principle. . . .

Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law. The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "wilfulness," "*scienter*," to denote guilty knowledge, or "*mens rea*," to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.

However, the Balint and Behrman offenses belong to a category of another character, with very different antecedents and origins. The crimes there involved depend on no mental element but consist only of forbidden acts or omissions. This, while not expressed by the Court, is made clear from examination of a century-old but accelerating tendency, discernible both here and in England, to call into existence new duties and crimes which disregard any ingredient of intent. The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. . . . Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink,

no mental element in crime.

drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.

While many of these duties are sanctioned by a more strict civil liability, lawmakers, whether wisely or not, have sought to make such regulations more effective by invoking criminal sanctions. . . . This has confronted the courts with a multitude of prosecutions . . . for what have been aptly called “public welfare offenses.” These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order. . . . Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect. . . . Also, penalties commonly are relatively small, and conviction does no grave damage to an offender’s reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it. . . .

. . . In overruling a contention that there can be no conviction on an indictment which makes no charge of criminal intent but alleges only making of a sale of a narcotic forbidden by law, Chief Justice Taft, wrote: “While the general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it . . . , there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the court. . . .” *United States v. Balint, supra*, 251-252.

He referred, however, to “regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*,” and drew his

citation of supporting authority chiefly from state court cases dealing with regulatory offenses. *Id.*, at 252.

On the same day, the Court determined that an offense under the Narcotic Drug Act does not require intent, saying, “If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent.” *United States v. Behrman*, *supra*, at 288.

Of course, the purpose of every statute would be “obstructed” by requiring a finding of intent, if we assume that it had a purpose to convict without it. . . . And since no federal crime can exist except by force of statute, the reasoning of the *Behrman* opinion, if read literally, would work far-reaching changes in the composition of all federal crimes. . . .

It was not until recently that the Court took occasion more explicitly to relate abandonment of the ingredient of intent . . . with the peculiar nature and quality of the offense. We referred to “. . . a now familiar type of legislation whereby penalties serve as effective means of regulation”, and continued, “such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.” But we warned: “Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting.” *United States v. Dotterweich*, 320 U.S. 277, 280-281, 284.

Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static. The conclusion reached in the *Balint* and *Behrman* cases has our approval and adherence for the circumstances to which it was there applied. A quite different question [] is whether we will expand the doctrine of crimes without intent to include those charged here.

Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation; they are invasions of rights of property which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved, the infamy is that of a felony, which, says Maitland, is “. . . as bad a word as you can give to man or thing.” State courts of last resort, on whom fall the heaviest burden of interpreting criminal law in this country, have consistently retained the requirement of intent in larceny-type offenses. . . .

Congress, therefore, omitted any express prescription of criminal intent from the enactment before us in the light of an unbroken course of judicial decision in all constituent states of the Union holding intent inherent in this class of offense, even when not expressed in a statute. Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act. Because the offenses before this Court in the *Balint* and *Behrman* cases were of this latter class, we cannot accept them as authority for eliminating intent from offenses incorporated from the common law. . . .

The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly²² admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken. . . . In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them. . . .

We hold that mere omission from § 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced.

II.

It is suggested, however, that the history and purposes of § 641 imply . . . elimination of intent from at least one of the offenses charged under it in this case. The argument does not contest that criminal intent is retained in the offenses of embezzlement, stealing and purloining, as incorporated into this section. But it is urged that Congress joined with those, as a new, separate and distinct offense, knowingly to convert government property, under circumstances which imply that it is an offense in which the mental element of intent is not necessary. . . .

Congress, by the language of this section, has been at pains to incriminate only “knowing” conversions. . . .

Had the statute applied to conversions without qualification, it would have made crimes

²² *United States v. Hudson and Goodwin*, 7 Cranch 32.

of all unwitting, inadvertent and unintended conversions. Knowledge, of course, is not identical with intent and may not have been the most apt words of limitation. But knowing conversion requires more than knowledge that defendant was taking the property into his possession. He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion. In the case before us, whether the mental element that Congress required be spoken of as knowledge or as intent, would not seem to alter its bearing on guilt. For it is not apparent how Morissette could have knowingly or intentionally converted property that he did not know could be converted, as would be the case if it was in fact abandoned or if he truly believed it to be abandoned and unwanted property.

It is said, and at first blush the claim has plausibility, that, if we construe the statute to require a mental element as part of criminal conversion, it becomes a meaningless duplication of the offense of stealing, and that conversion can be given meaning only by interpreting it to disregard intention. But here again a broader view of the evolution of these crimes throws a different light on the legislation.

It is not surprising if there is considerable overlapping in the embezzlement, stealing, purloining and knowing conversion grouped in this statute. What has concerned codifiers of the larceny-type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches. The books contain a surfeit of cases drawing fine distinctions between slightly different circumstances under which one may obtain wrongful advantages from another's property. The codifiers wanted to reach all such instances. Probably every stealing is a conversion, but certainly not every knowing conversion is a stealing. "To steal means to *take away from one* in lawful possession without right with the *intention to keep wrongfully*." *Irving Trust Co. v. Leff*, 253 N. Y. 359, 364, 171 N. E. 569, 571. Conversion, however, may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. . . . Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact. . . . Knowing conversion adds significantly to the range of protection of government property without interpreting it to punish unwitting conversions. . . .

We find no grounds for inferring any affirmative instruction from Congress to eliminate intent from any offense with which this defendant was charged.

III.

As we read the record, this case was tried on the theory that even if criminal intent were essential its presence (a) should be decided by the court (b) as a presumption of law, apparently conclusive, (c) predicated upon the isolated act of taking rather than upon all of the circumstances. In each of these respects we believe the trial court was in error. . . .

. . . The court thought the only question was, “Did he intend to take the property?” That the removal of them was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find [] criminal intent . . . wrongfully to deprive another of possession of property. Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defendant’s testimony and all of the surrounding circumstances.

Of course, the jury, considering Morissette’s awareness that these casings were on government property, his failure to seek any permission for their removal and his self-interest as a witness, might have disbelieved his profession of innocent intent and concluded that his assertion of a belief that the casings were abandoned was an afterthought. Had the jury convicted on proper instructions it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges. They might have concluded that the heaps of spent casings left in the hinterland to rust away presented an appearance of unwanted and abandoned junk, and that lack of any conscious deprivation of property or intentional injury was indicated by Morissette’s good character, the openness of the taking, crushing and transporting of the casings, and the candor with which it was all admitted. They might have refused to brand Morissette as a thief. Had they done so, that too would have been the end of the matter. . . .

Mr. Justice DOUGLAS concurs in the result.

Notes and Questions

1. Exactly what mental state must the prosecution prove to convict Morissette? The question is hard to answer precisely. Justice Jackson’s opinion says that a properly instructed jury might have found that Morissette was not guilty of “any conscious deprivation of property or intentional injury,” and thus was not guilty of stealing government property. But Jackson also says that the jury “might have refused to brand Morissette as a thief”—without specifying the conditions that would support such a refusal. Why so much imprecision? Recall Justice

Frankfurter's majority opinion in *Dotterweich*, which held that the food and drug legislation at issue in that case "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing." Apparently, *Morissette* applies that allegedly "conventional requirement" to the case at hand. Why the difference between the two decisions?

2. In fact, proof of "awareness of some wrongdoing" is *not* part of conventional *mens rea* doctrine in the United States—at least not when state law is at issue. State law crimes ordinarily require proof of either general intent or specific intent. A defendant acted with general intent if he intended to engage in the conduct that constituted the crime. A defendant acted with specific intent if she additionally intended to bring about some legally forbidden result. *Morissette* may well have been guilty under either standard. (For what it's worth, most theft offenses require proof of specific intent.) But it seems plain that he acted without "awareness of some wrongdoing." Is that a sufficient reason to exempt him from criminal liability? Why might federal and state law deal differently with defendants like *Morissette*—*Dotterweich* too, for that matter?

3. Why did the government prosecute *Morissette*? Consider that at the close of World War II in August 1945, nearly ten million Americans were in the Army, Navy, and Air Force. American industry was churning out weapons and equipment to supply all of those soldiers, sailors, and airmen. Three years later, half a million Americans were in uniform, and most of them were overseas. Massive numbers of jeeps, tanks, planes, and guns were scattered across the many military bases that had sprung up during the war, with few soldiers around to guard them. Spent bomb casings were unimportant. Rifles and jeeps, however, were another matter, and they too might plausibly seem "abandoned" to local residents tempted to help themselves to leftover equipment. From the government's point of view, *Morissette* was meant to send a message—military equipment stored on government land is off limits, period. Is that a legitimate message to send? Was prosecuting *Morissette* a legitimate way to send it? If not, what should the government have done differently?

4. Before the Harrison Narcotics Act (the legislation at issue in *Balint* and *Behrman*—cases cited and discussed in *Morissette*), the use of various opium products was both legal and common in many parts of the United States. Doctors often prescribed such drugs. Unsurprisingly, the use and sale of these drugs did not immediately cease when the Act took effect. It takes time for ordinary people to understand that the rules have changed and that previously acceptable conduct is now impermissible. Also unsurprisingly, the government tried to speed that process along, by prosecuting doctors who prescribed such drugs and otherwise

legitimate businesses that sold them without the requisite permission. How should such cases be resolved? Defendants claim, justifiably, that they cannot be expected to know about every legal change that might govern their conduct. Prosecutors contend, also justifiably, that if defendants can excuse their violations by claiming ignorance of the law, new legal rules will be unenforceable and federal criminal law will be unable to change and adapt to new circumstances. Is there a way out of this dilemma? If not, which side should prevail?

2. Factual Knowledge

STAPLES v. UNITED STATES 511 U.S. 600 (1994)

Justice THOMAS delivered the opinion of the Court.

The National Firearms Act makes it unlawful for any person to possess a machinegun that is not properly registered with the Federal Government. Petitioner contends that, to convict him under the Act, the Government should have been required to prove beyond a reasonable doubt that he knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun. We agree and accordingly reverse the judgment of the Court of Appeals.

I

The National Firearms Act (Act), 26 U.S.C. §§ 5801-5872, imposes strict registration requirements on statutorily defined “firearms.” The Act includes within the term “firearm” a machinegun, § 5845(a)(6), and further defines a machinegun as “any weapon which shoots, . . . or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger,” § 5845(b). Thus, any fully automatic weapon is a “firearm” within the meaning of the Act. Under the Act, all firearms must be registered in the National Firearms Registration and Transfer Record maintained by the Secretary of the Treasury. § 5841. Section 5861(d) makes it a crime, punishable by up to 10 years in prison, see § 5871, for any person to possess a firearm that is not properly registered.

Upon executing a search warrant at petitioner’s home, local police and agents of the Bureau of Alcohol, Tobacco and Firearms (BATF) recovered, among other things, an AR-15 rifle. The AR-15 is the civilian version of the military’s M-16 rifle, and is, unless modified, a

semiautomatic weapon. The M-16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire. Many M-16 parts are interchangeable with those in the AR-15 and can be used to convert the AR-15 into an automatic weapon. No doubt to inhibit such conversions, the AR-15 is manufactured with a metal stop on its receiver that will prevent an M-16 selector switch, if installed, from rotating to the fully automatic position. The metal stop on petitioner's rifle, however, had been filed away, and the rifle had been assembled with an M-16 selector switch and several other M-16 internal parts, including a hammer, disconnecter, and trigger. Suspecting that the AR-15 had been modified to be capable of fully automatic fire, BATF agents seized the weapon. Petitioner subsequently was indicted for unlawful possession of an unregistered machinegun in violation of § 5861(d).

At trial, BATF agents testified that when the AR-15 was tested, it fired more than one shot with a single pull of the trigger. It was undisputed that the weapon was not registered as required by § 5861(d). Petitioner testified that the rifle had never fired automatically when it was in his possession. He insisted that the AR-15 had operated only semiautomatically, and even then imperfectly, often requiring manual ejection of the spent casing and chambering of the next round. According to petitioner, his alleged ignorance of any automatic firing capability should have shielded him from criminal liability for his failure to register the weapon. He requested the District Court to instruct the jury that, to establish a violation of § 5861(d), the Government must prove beyond a reasonable doubt that the defendant "knew that the gun would fire fully automatically."

The District Court rejected petitioner's proposed instruction and instead charged the jury as follows:

"The Government need not prove the defendant knows he's dealing with a weapon possessing every last characteristic [which subjects it] to the regulation. It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation." Tr. 465.

Petitioner was convicted and sentenced to five years' probation and a \$5,000 fine.

The Court of Appeals affirmed. . . .

II

Whether or not § 5861(d) requires proof that a defendant knew of the characteristics of his weapon that made it a "firearm" under the Act is a question of statutory construction. As we observed in *Liparota v. United States*, 471 U.S. 419 (1985), "[t]he definition of the elements of a

criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.” *Id.*, at 424. . . . [D]etermining the mental state required for commission of a federal crime requires “construction of the statute and . . . inference of the intent of Congress.” *United States v. Balint*, 258 U.S. 250, 253 (1922).

The language of the statute, the starting place in our inquiry, provides little explicit guidance in this case. Section 5861(d) is silent concerning the *mens rea* required for a violation. It states simply that “[i]t shall be unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.” 26 U.S.C. § 5861(d). Nevertheless, silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal. See *Balint*, *supra*, at 251 (stating that traditionally, “*scienter*” was a necessary element in every crime). On the contrary, we must construe the statute in light of the background rules of the common law, in which the requirement of some *mens rea* . . . is firmly embedded. . . .

According to the Government, however, the nature and purpose of the Act suggest that the presumption favoring *mens rea* does not apply to this case. The Government argues that Congress intended the Act to regulate and restrict the circulation of dangerous weapons. Consequently, in the Government’s view, this case fits in a line of precedent concerning what we have termed “public welfare” or “regulatory” offenses, in which we have understood Congress to impose a form of strict criminal liability. . . .

For example, in *Balint*, we concluded that the Narcotic Act of 1914, which was intended in part to minimize the spread of addictive drugs by criminalizing undocumented sales of certain narcotics, required proof only that the defendant knew that he was selling drugs, not that he knew the specific items he had sold were “narcotics” within the ambit of the statute. See *Balint*, *supra*, at 254. Cf. *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) (stating in dicta that a statute criminalizing the shipment of adulterated or misbranded drugs did not require knowledge that the items were misbranded or adulterated). As we explained in *Dotterweich*, *Balint* dealt with “a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing.” 320 U.S. at 280-281.

. . . Typically, our cases recognizing such offenses involve statutes that regulate potentially harmful or injurious items. In such situations, we have reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him “in

responsible relation to a public danger,” *Dotterweich, supra*, at 281, he should be alerted to the probability of strict regulation. . . .

The Government argues that § 5861(d) defines precisely the sort of regulatory offense described in *Balint*. In this view, all guns, whether or not they are statutory “firearms,” are dangerous devices that put gun owners on notice that they must determine . . . whether their weapons come within the scope of the Act. On this understanding, the District Court’s instruction in this case was correct, because a conviction can rest simply on proof that a defendant knew he possessed a “firearm” in the ordinary sense of the term.

The Government seeks support for its position from our decision in *United States v. Freed*, 401 U.S. 601 (1971), which involved a prosecution for possession of unregistered grenades under § 5861(d). The defendant knew that the items in his possession were grenades, and we concluded that § 5861(d) did not require the Government to prove the defendant also knew that the grenades were unregistered. *Id.*, at 609. To be sure, in deciding that *mens rea* was not required with respect to that element of the offense, we suggested that the Act “is a regulatory measure in the interest of the public safety, which may well be premised on the theory that . . . possession of hand grenades is not an innocent act.” *Ibid.* Grenades, we explained, “are highly dangerous offensive weapons, no less dangerous than the narcotics involved in *United States v. Balint*.” *Ibid.* But that reasoning provides little support for dispensing with *mens rea* in this case.

As the Government concedes, *Freed* did not address the issue presented here. In *Freed*, we decided only that § 5861(d) does not require proof of knowledge that a firearm is *unregistered*. The question presented by a defendant who possesses a weapon that is a “firearm” for purposes of the Act, but who knows only that he has a “firearm” in the general sense of the term, was not raised or considered. . . . Moreover, our analysis in *Freed* likening the Act to the public welfare statute in *Balint* rested entirely on the assumption that the defendant knew that he was dealing with hand grenades—that is, that he knew he possessed a particularly dangerous type of weapon (one within the statutory definition of a “firearm”), possession of which was not entirely “innocent” in and of itself. 401 U.S. at 609. . . .

Notwithstanding these distinctions, the Government urges that *Freed*’s logic applies because guns, no less than grenades, are highly dangerous devices that should alert their owners to the probability of regulation. But the gap between *Freed* and this case is too wide to bridge. In glossing over the distinction between grenades and guns, the Government ignores the particular care we have taken to avoid construing a statute to dispense with *mens rea* where doing so would

“criminalize a broad range of apparently innocent conduct.” *Liparota*, 471 U.S. at 426. In *Liparota*, we considered a statute that made unlawful the unauthorized acquisition or possession of food stamps. We determined that the statute required proof that the defendant knew his possession of food stamps was unauthorized. . . . Our conclusion that the statute should not be treated as defining a public welfare offense rested on the commonsense distinction that a “food stamp can hardly be compared to a hand grenade.” *Id.*, at 433.

Neither, in our view, can all guns be compared to hand grenades. . . . [T]here is a long tradition of widespread lawful gun ownership by private individuals in this country. Such a tradition did not apply to the possession of hand grenades in *Freed* or to the selling of dangerous drugs that we considered in *Balint*. . . . [I]n *Freed* we construed § 5861(d) under the assumption that “one would hardly be surprised to learn that possession of hand grenades is not an innocent act.” *Freed, supra*, at 609. Here, the Government essentially suggests that we should interpret the section under the altogether different assumption that “one would hardly be surprised to learn that owning a gun is not an innocent act.” That proposition is simply not supported by common experience. Guns in general are not “deleterious devices or products or obnoxious waste materials,” [*United States v. International Minerals and Chemical Corp.*, 402 U.S. 558, 565 (1971),] that put their owners on notice that they stand “in responsible relation to a public danger,” *Dotterweich*, 320 U.S. at 281.

The Government protests that guns, unlike food stamps, but like grenades and narcotics, are potentially harmful devices. . . . But that an item is “dangerous” in some general sense does not necessarily suggest, as the Government seems to assume, that it is not also entirely innocent. Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation. . . . [D]espite their potential for harm, guns generally can be owned in perfect innocence. Of course, we might surely classify certain categories of guns—no doubt including the machineguns, sawed-off shotguns, and artillery pieces that Congress has subjected to regulation—as items the ownership of which would have the same quasi-suspect character we attributed to owning hand grenades in *Freed*. But precisely because guns falling outside those categories traditionally have been widely accepted as lawful possessions, their destructive potential . . . [does not] put gun owners sufficiently on notice of the likelihood of regulation to justify interpreting § 5861(d) as not requiring proof of knowledge of a weapon’s characteristics.

On a slightly different tack, the Government suggests that guns are subject to an array of regulations at the federal, state, and local levels that put gun owners on notice that they must

determine the characteristics of their weapons and comply with all legal requirements. But regulation in itself is not sufficient to place gun ownership in the category of the sale of narcotics in *Balint*. The food stamps at issue in *Liparota* were subject to comprehensive regulations, yet we did not understand the statute there to dispense with a *mens rea* requirement. Moreover, . . . we question whether regulations on guns are sufficiently intrusive that they impinge upon the common experience that owning a gun is usually licit and blameless conduct. Roughly 50 percent of American homes contain at least one firearm of some sort, and in the vast majority of States, buying a shotgun or rifle is a simple transaction that would not alert a person to regulation any more than would buying a car.

If we were to accept as a general rule the Government's suggestion . . . , we would undoubtedly reach some untoward results. Automobiles, for example, might also be termed "dangerous" devices and are highly regulated at both the state and federal levels. Congress might see fit to criminalize the violation of certain regulations concerning automobiles, and thus might make it a crime to operate a vehicle without a properly functioning emission control system. . . . [W]e [] would hesitate to conclude . . . that Congress intended a prison term to apply to a car owner whose vehicle's emissions levels, wholly unbeknownst to him, began to exceed legal limits between regular inspection dates.

Here, there can be little doubt that, as in *Liparota*, the Government's construction of the statute potentially would impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of weapons in their possession—makes their actions entirely innocent. The Government does not dispute the contention that virtually any semiautomatic weapon may be converted, either by internal modification or, in some cases, simply by wear and tear, into a machinegun. . . . Such a gun may give no externally visible indication that it is fully automatic. But in the government's view, any person who has purchased what he believes to be a semiautomatic rifle or handgun, or who simply has inherited a gun from a relative and left it untouched in an attic or basement, can be subject to imprisonment, despite absolute ignorance of the gun's firing capabilities, if the gun turns out to be an automatic. . . .

The potentially harsh penalty attached to violation of § 5861(d)—up to 10 years' imprisonment—confirms our reading of the Act. Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*. Certainly, the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary. . . .

. . . [The label “public welfare offense”] . . . hardly seems apt, however, for a crime that is a felony, as is violation of § 5861(d). After all, “felony” is, as we noted in distinguishing certain common-law crimes from public welfare offenses, “ ‘as bad a word as you can give to man or thing.’ ” *Id.*, at 260 (quoting 2 F. Pollock & F. Maitland, *History of English Law* 465 (2d ed. 1899)). Close adherence to the early cases described above might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense. In this view, absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*.

We need not adopt such a definitive rule of construction to decide this case, however. Instead, we note only that where, as here, dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty . . . [tends] to suggest that Congress did not intend to eliminate a *mens rea* requirement. In such a case, the usual presumption that a defendant must know the facts that make his conduct illegal should apply. . . .

We emphasize that our holding is a narrow one. As in our prior cases, our reasoning depends upon a commonsense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectations that individuals may legitimately have in dealing with the regulated items. In addition, we think that the penalty attached to § 5861(d) suggests that Congress did not intend to eliminate a *mens rea* requirement for violation of the section. . . . [I]f Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect. . . .

Justice GINSBURG, with whom Justice O’CONNOR joins, concurring in the judgment.

The statute petitioner Harold E. Staples is charged with violating . . . makes it a crime for any person to “receive or possess a firearm which is not registered to him.” Although the word “knowingly” does not appear in the statute’s text, courts generally assume that Congress, absent a contrary indication, means to retain a *mens rea* requirement. See *Liparota v. United States*, 471 U.S. 419, 426 (1985). Thus, our holding in *United States v. Freed*, 401 U.S. 601 (1971), that § 5861(d) does not require proof of knowledge that the firearm is unregistered, rested on the premise that the defendant indeed knew the items he possessed were hand grenades. *Id.*, at 607; *id.*, at 612 (Brennan, J., concurring in judgment) (“The Government and the Court agree that the prosecutor must prove knowing possession of the items and also knowledge that the items

possessed were hand grenades.”).

Conviction under § 5861(d), the Government accordingly concedes, requires proof that Staples “knowingly” possessed the machinegun. Brief for United States 23. The question before us is not *whether* knowledge of possession is required, but what level of knowledge suffices: (1) knowledge simply of possession of the object; (2) knowledge, in addition, that the object is a dangerous weapon; (3) knowledge, beyond dangerousness, of the characteristics that render the object subject to regulation, for example, awareness that the weapon is a machinegun.

Recognizing that the first reading effectively dispenses with *mens rea*, the Government adopts the second, contending that it avoids criminalizing “apparently innocent conduct,” *Liparota, supra*, at 426, because under the second reading, “a defendant who possessed what he thought was a toy or a violin case, but which in fact was a machinegun, could not be convicted.” Brief for United States 23. The Government, however, does not take adequate account of the “widespread lawful gun ownership” Congress and the States have allowed to persist in this country. See *United States v. Harris*, 959 F.2d 246, 261 (D.C. Cir. 1992) (*per curiam*). . . .

The Nation’s legislators chose to place under a registration requirement only a very limited class of firearms, those they considered especially dangerous. The generally “dangerous” character of all guns, the Court therefore observes, did not suffice to give individuals in Staples’ situation cause to inquire about the need for registration. Only the third reading, then, suits the purpose of the *mens rea* requirement—to shield people against punishment for apparently innocent activity.

The indictment in Staples’ case charges that he “knowingly received and possessed firearms.” “Firearms” has a circumscribed statutory definition. See 26 U.S.C. § 5845(a). The “firear[m]” the Government contends Staples possessed in violation of § 5861(d) is a machinegun. See § 5845(a)(6). The indictment thus effectively charged that Staples *knowingly possessed a machinegun*. “Knowingly possessed” logically means “possessed and knew that he possessed.” The Government can reconcile the jury instruction with the indictment only on the implausible assumption that the term “firear[m]” has two different meanings when used once in the same charge—simply “gun” when referring to what petitioner knew, and “machinegun” when referring to what he possessed.

For these reasons, I conclude that conviction under § 5861(d) requires proof that the defendant knew he possessed not simply a gun, but a machinegun. The indictment in this case, but not the jury instruction, properly described this knowledge requirement. I therefore concur in the Court’s judgment.

Justice STEVENS, with whom Justice BLACKMUN joins, dissenting.

To avoid a slight possibility of injustice to unsophisticated owners of machineguns and sawed-off shotguns, the Court has substituted its views of sound policy for the judgment Congress made when it enacted the National Firearms Act. . . .

. . . The relevant section of the Act makes it “unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.” 26 U.S.C. § 5861(d). Significantly, the section contains no knowledge requirement, nor does it describe a common-law crime.

The common law generally did not condemn acts as criminal unless the actor had “an evil purpose or mental culpability,” *Morrisette v. United States*, 342 U.S. 246, 252 (1952), and was aware of all the facts that made the conduct unlawful, *United States v. Balint*, 258 U.S. 250, 251-252 (1922). In interpreting statutes that codified traditional common-law offenses, courts usually followed this rule, even when the text of the statute contained no such requirement. Because the offense involved in this case is entirely a creature of statute, however, . . . different rules of construction apply. . . .

. . . Although the lack of an express knowledge requirement in § 5861(d) is not dispositive, its absence suggests that Congress did not intend to require proof that the defendant knew all of the facts that made his conduct illegal. . . .

The provision’s place in the overall statutory scheme confirms this intention. In 1934, when Congress originally enacted the statute, it limited the coverage of the 1934 Act to a relatively narrow category of weapons such as submachineguns and sawed-off shotguns—weapons characteristically used only by professional gangsters like Al Capone, Pretty Boy Floyd, and their henchmen. At the time, the Act would have had little application to guns used by hunters or guns kept at home as protection against unwelcome intruders. Congress therefore could reasonably presume that a person found in possession of an unregistered machinegun or sawed-off shotgun intended to use it for criminal purposes. . . .

. . . An examination of § 5861(d) in light of our precedent dictates that the crime of possession of an unregistered machinegun is in a category of offenses described as “public welfare” crimes. Our decisions interpreting such offenses clearly require affirmance of petitioner’s conviction.

“Public welfare” offenses share certain characteristics: (1) they regulate “dangerous or deleterious devices or products or obnoxious waste materials,” see *United States v. International*

Minerals & Chemical Corp., 402 U.S. 558, 565 (1971); (2) they “heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare,” *Morissette*, 342 U.S., at 254; and (3) they “depend on no mental element but consist only of forbidden acts or omissions,” *id.*, at 252-253. Examples of such offenses include Congress’ exertion of its power to keep dangerous narcotics,¹⁰ hazardous substances,¹¹ and impure and adulterated foods and drugs¹² out of the channels of commerce. . . .

The National Firearms Act unquestionably is a public welfare statute. *United States v. Freed*, 401 U.S. 601, 609 (1971) (holding that this statute “is a regulatory measure in the interest of the public safety”). Congress fashioned a legislative scheme to regulate the commerce and possession of certain types of dangerous devices, including specific kinds of weapons, to protect the health and welfare of the citizenry. To enforce this scheme, Congress created criminal penalties for certain acts and omissions. The text of some of these offenses—including the one at issue here—contains no knowledge requirement. . . .

Both the Court and Justice GINSBURG erroneously rely upon the “tradition[al]” innocence of gun ownership to find that Congress must have intended the Government to prove knowledge of all the characteristics that make a weapon a statutory “firearm.” We held in *Freed*, however, that a § 5861(d) offense may be committed by one with no awareness of either wrongdoing or of all the facts that constitute the offense. 401 U.S. at 607-610. Nevertheless, the Court, asserting that the Government “gloss[es] over the distinction between grenades and guns,” determines that “the gap between *Freed* and this case is too wide to bridge.” As such, the Court instead reaches the rather surprising conclusion that guns are more analogous to food stamps than to hand grenades. Even if one accepts that dubious proposition, the Court finds it upon a faulty premise: its mischaracterization of the Government’s submission as one contending that “all guns . . . are dangerous devices that put gun owners on notice. . . .” (emphasis added). Accurately identified, the Government’s position presents the question whether guns such as the one possessed by petitioner “‘are highly dangerous offensive weapons, no less dangerous than the narcotics’ ” in *Balint* or the hand grenades in *Freed* (quoting *Freed*, 401 U.S. at 609).

Thus, even assuming that the Court is correct that the mere possession of an ordinary rifle

¹⁰See *United States v. Balint*, 258 U.S. 250 (1922).

¹¹See *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971).

¹²See *United States v. Dotterweich*, 320 U.S. 277 (1943).

or pistol does not entail sufficient danger to alert one to the possibility of regulation, that conclusion does not resolve this case. Petitioner knowingly possessed a semiautomatic weapon that was readily convertible into a machinegun. The “ ‘character and nature’ ” of such a weapon is sufficiently hazardous to place the possessor on notice of the possibility of regulation. No significant difference exists between imposing upon the possessor a duty to determine whether such a weapon is registered, *Freed*, 401 U.S. at 607-610, and imposing a duty to determine whether that weapon has been converted into a machinegun. . . .

. . . I would affirm the judgment of the Court of Appeals.

Notes and Questions

1. Contrary to Justice Thomas’ opinion, the common law did not “require that the defendant know [all] the facts that make his conduct illegal.” On the other hand, the common law did, at least as a general matter, require enough proof of intent to ensure that only culpable defendants were criminally punished. That is evidently Justice Thomas’ goal in *Staples*. Why not say so—and admit that the Court is crafting a new intent doctrine adapted to the particular circumstances of federal criminal law?

2. In a portion of his dissenting opinion that is not excerpted above, Justice Stevens states that “only about 15 percent of all the guns in the United States are semiautomatic.” Which side in *Staples* does that statistic support?

3. The National Firearms Act of 1934 was a New Deal-era regulatory statute. But the regulated actors were very different from those in many of the regulatory regimes initiated in that era, such as the Securities Act of 1933, the Securities and Exchange Act of 1934, and the Food, Drug, and Cosmetic Act of 1938. The regulated actors that Congress sought to punish under the National Firearms Act were, as Justice Stevens put it in *Staples*, “professional gangsters like Al Capone, Pretty Boy Floyd, and their henchmen.” Notice two things about the Firearms Act. First, the Act targeted criminals, not crimes. Second, the criminals in question were traditionally the responsibility of local police and local prosecutors, not FBI agents and United States Attorneys. The New Dealers didn’t try to displace those local officials or the state laws they enforced, but instead sought to supplement them—and, along the way, to grab some political credit for fighting crime. Is that a legitimate goal? Is it fair to criminalize easily provable misconduct in order to punish harder-to-prove crimes indirectly? Do these goals bear on the *mens rea* issue in *Staples*?

4. Shortly after *Staples* was decided, the Court again had to interpret the *mens rea*

requirement of a federal criminal law, this one touching on First Amendment values. The defendant in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), shipped pornographic videos showing an underage actress (Traci Lords) to a federal undercover agent. The defendant was charged under the Protection of Children Against Sexual Exploitation Act of 1977; the relevant provision read as follows:

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction . . . that has been mailed, or has been shipped or transported in . . . interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution . . . in interstate or foreign commerce . . . or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; . . .

shall be punished as provided in subsection (b) of this section.

18 U.S.C. §2252(a). In a decision issued a few months after *Staples*, the Supreme Court held that, in order to convict under this statute, the government must prove knowledge that at least one of the actors in the video was a minor:

. . . The critical determination . . . is whether the term “knowingly” in subsections (1) and (2) modifies the phrase “the use of a minor” in subsections (1)(A) and (2)(A). The most natural grammatical reading, adopted by the Ninth Circuit, suggests that the term “knowingly” modifies only the surrounding verbs: transports, ships, receives, distributes, or reproduces. . . . But we do not think this is the end of the matter. . . .

. . . If we were to conclude that “knowingly” only modifies the relevant verbs in §

2252, we would sweep within the ambit of the statute actors who had no idea that they were even dealing with sexually explicit material. For instance, a retail druggist who returns an uninspected roll of developed film to a customer “knowingly distributes” a visual depiction and would be criminally liable if it were later discovered that the visual depiction contained images of children engaged in sexually explicit conduct. Or, a new resident of an apartment might receive mail for the prior resident and store the mail unopened. If the prior tenant had requested delivery of materials covered by § 2252, his residential successor could be prosecuted for “knowing receipt” of such materials. Similarly, a Federal Express courier who delivers a box in which the shipper has declared the contents to be “film” “knowingly transports” such film. We do not assume that Congress . . . intended such results. . . .

Our reluctance to simply follow the most grammatical reading of the statute is heightened by our cases interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them. . . .

Liparota v. United States, 471 U.S. 419 (1985), posed a challenge to a federal statute prohibiting certain actions with respect to food stamps. The statute’s use of “knowingly” could be read only to modify “uses, transfers, acquires, alters, or possesses” or it could be read also to modify “in any manner not authorized by [the statute].” . . . [T]he Court was concerned with the broader reading which would “criminalize a broad range of apparently innocent conduct.” 471 U.S. at 426. . . .

The same analysis drove the recent conclusion in *Staples v. United States*, 511 U.S. 600 (1994), that to be criminally liable a defendant must know that his weapon possessed automatic firing capability so as to make it a machine-gun as defined by the National Firearms Act. Congress had not expressly imposed any *mens rea* requirement in the provision criminalizing the possession of a firearm in the absence of proper registration. 26 U.S.C. § 5861(d). The Court first rejected the argument that the statute described a public welfare offense, traditionally excepted from the background principle favoring scienter. The Court then expressed concern with a statutory reading that would criminalize behavior that a defendant believed fell within “a long tradition of widespread lawful gun ownership by private individuals.” *Staples*, 511 U.S. at 610. The Court also emphasized the harsh penalties attaching to violations of the statute as a “significant consideration in determining whether the statute should be construed as dispensing with *mens rea*.” *Id.*, at 616.

Applying these principles, we think the Ninth Circuit’s plain language reading of § 2252 is not so plain. First, § 2252 is not a public welfare offense. Persons do not harbor settled expectations that the contents of magazines and film are generally subject to stringent public regulation. In fact, First Amendment constraints presuppose the opposite view. Rather, the statute is more akin to the common-law offenses against the “state, the person, property, or public morals,” [*Morissette v. United States*, 342 U.S. 246, 255 (1952),] that presume a scienter requirement in the absence of express contrary intent. Second, *Staples*’ concern with harsh penalties looms equally large respecting § 2252: Violations are punishable by up to 10 years in prison as well as substantial fines and forfeiture. . . .

513 U.S. at 68-72.

5. Compare *X-Citement Video* with *United States v. Jones*, 471 F.3d 535 (4th Cir. 2006). Jones was convicted of transporting an underage girl across state lines “to act as a prostitute at a truck stop.” The relevant federal statute applies to:

[Any] person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense. . . .

18 U.S.C. §2423(a). Writing for a unanimous panel, Judge Wilkinson decided that “knowingly” modifies only “transports”:

. . . Adverbs generally modify verbs, and the thought that they would typically modify the infinite hereafters of statutory sentences would cause grammarians to recoil. We see nothing on the face of this statute to suggest that the modifying force of “knowingly” extends beyond the verb to other components of the offense. . . .

The defendant’s interpretation, meanwhile, would strip the statute of its clear purpose: the protection of minors. If the prosecution were required to prove knowledge with regard to the victim’s age, it would be the rare defendant who would not claim to have mistaken the victim for an adult. Imposing such a mens rea requirement would be tantamount to permitting adults to prey upon minors so long as they cultivate ignorance

of their victims' age. But "the statute is intended to protect young persons who are transported for illicit purposes, and not transporters who remain ignorant of the age of those whom they transport." [*United States v. Taylor*, 239 F.3d 994, 996 (9th Cir. 2001)]. It would be nonsensical to require proof of knowledge of the victim's age when the statute exists to provide special protection for all minors, including, if not especially, those who could too easily be mistaken for adults. . . .

471 F.3d at 539-40. So far, *Jones* sounds squarely at odds with *Staples* and *X-Citement Video*. But Judge Wilkinson found those cases easily distinguishable:

In this case, the reasoning of *X-Citement Video* and *Staples* is inapposite. . . . [Those cases were] "directed at awareness of the elements that define circumstances upon which criminality turns," [*United States v. Bostic*, 168 F.3d 718, 723 [(4th Cir. 1999)]. But in § 2423(a), the minority of the victim is hardly a factor that distinguishes the defendant's actions from "innocent conduct." *X-Citement Video*, 513 U.S. at 72. To the contrary, "the transportation of *any* individual for purposes of prostitution or other criminal sexual activity is already unlawful under federal law." *Taylor*, 239 F.3d at 997.

471 F.3d at 541. Is *Jones* rightly decided? Is it consistent with *Staples* and *X-Citement Video*? When should federal judges pay attention to statutory grammar and plain language, and when should they focus on arguments about *mens rea* policy?

6. *Jones* may no longer be good law. The defendant in *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009), was charged with aggravated identity theft. Justice Breyer's majority opinion described the relevant statute as follows:

The statutory provision in question references a set of predicate crimes, including, for example, theft of government property, fraud, or engaging in various unlawful activities related to passports, visas, and immigration. [18 U.S.C.] § 1028A(c). It then provides that if any person who commits any of those other crimes (in doing so) "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person," the judge must add two years' imprisonment to the offender's underlying sentence. § 1028A(a)(1). All parties agree that the provision applies only where the offender knows that he is transferring, possessing, or using *something*. And the Government reluctantly

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concedes that the offender likely must know that he is transferring, possessing, or using that *something* without lawful authority. But they do not agree whether the provision requires that a defendant also know that the *something* he has unlawfully transferred is, for example, a real ID belonging to another person rather than, say, a fake ID (*i.e.*, a group of numbers that does not correspond to any real Social Security number).

129 S. Ct. at 1889-90. In an opinion that emphasized grammar and ordinary speech patterns, the Court concluded that the adverb “knowingly,” when it appears in federal criminal statutes, ordinarily modifies *all* elements of those statutes:

. . . As a matter of ordinary English grammar, it seems natural to read the statute’s word “knowingly” as applying to all the subsequently listed elements of the crime. The Government cannot easily claim that the word “knowingly” applies only to the statute’s first four words, or even its first seven. It makes little sense to read the provision’s language as heavily penalizing a person who “transfers, possesses, or uses, without lawful authority” a *something*, but does not know, at the very least, that the “something” (perhaps inside a box) is a “means of identification.” Would we apply a statute that makes it unlawful “*knowingly* to possess drugs” to a person who steals a passenger’s bag without knowing that the bag has drugs inside?

Id. at 1890. That bottom line, the Court reasoned, was consistent with *X-Citement Video*. In that case,

we had to interpret a statute that penalizes “[a]ny person who—(1) knowingly transports or ships using any means or facility of interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct.” 18 U.S.C. § 2252(a)(1)(A); *X-Citement Video*, *supra*. In issue was whether the term “knowingly” in paragraph (1) modified the phrase “the use of a minor” in subparagraph (A). *Id.*, at 69. The language in issue in *X-Citement Video* . . . was more ambiguous than the language here not only because the phrase “the use of a minor” was not the direct object of the verbs modified by “knowingly,” but also because it appeared in a different subsection. 513 U.S., at 68-69. Moreover, the fact that many sex crimes involving minors

do not ordinarily require that a perpetrator know that his victim is a minor supported the Government's position. Nonetheless, we again found that the intent element applied to "the use of a minor." *Id.*, at 72.

129 S. Ct. at 1891. Notice the similarity between the holdings in *Flores-Figueroa* and *Staples*—even though the identity theft statute contained the term "knowingly" and the gun law at issue in *Staples* contained no intent term. How much does statutory language matter in this area?

7. Consider *United States v. Yermian*, 468 U.S. 63 (1984). Esmail Yermian lied on a security questionnaire he filled out when applying for a job with a defense contractor. He failed to disclose a prior fraud conviction in response to one question, and stated that he previously held two jobs that in fact he had never held in response to another. Yermian was charged with three counts of violating the federal false statements statute, 18 U.S.C. §1001. That statute applies to anyone who, "in any matter within the jurisdiction of any department or agency of the United States, "knowingly and willfully . . . makes any false . . . statements or representations." Yermian argued that although he may have known his statements were false, he *didn't* know that he made them on a matter within the jurisdiction of a government agency. The Court said it didn't matter because Congress placed the jurisdictional clause before "knowingly and willfully":

Respondent argues that absent proof of actual knowledge of federal agency jurisdiction, § 1001 becomes a "trap for the unwary," imposing criminal sanctions on "wholly innocent conduct." Whether or not respondent fairly may characterize the intentional and deliberate lies prohibited by the statute . . . as "wholly innocent conduct," this argument is not sufficient to overcome the express statutory language of § 1001. Respondent does not argue that Congress lacks the power to impose criminal sanctions for deliberately false statements submitted to a federal agency, regardless of whether the person who made such statements actually knew that they were being submitted to the Federal Government. That is precisely what Congress has done here. In the unlikely event that § 1001 could be the basis for imposing an unduly harsh result on those who intentionally make false statements to the Federal Government, it is for Congress and not this Court to amend the criminal statute. . . .

468 U.S. at 74-75. The Court added in a footnote that "[i]n the context of this case, respondent's

argument that §1001 is a ‘trap for the unwary’ is particularly misplaced. It is worth noting that the jury was instructed, without objection from the prosecution, that the Government must prove that respondent ‘knew or should have known’ that his false statements were made within the jurisdiction of a federal agency.’ *Id.* at 75 n. 14. What level of intent should the government have to prove with respect to the jurisdictional fact in *Yermian*?

8. In Chapter 8, you will see that the “knowledge” required by a statute can usually be satisfied by evidence that the defendant “consciously avoided” having such knowledge. As you might expect, this doctrine can considerably lighten the prosecution’s burden of proof.

3. Legal Knowledge

One of the most familiar criminal-law doctrines stems from the adage “ignorance of the law is no excuse.” In other words, the fact that a defendant did not realize his conduct was criminal is ordinarily no defense to a criminal charge. Yet we see some form of this defense is indeed available in the following trio of cases.

1. The defendant in *Liparota v. United States*, 471 U.S. 419 (1985), was prosecuted for food stamp fraud, under a statute providing that “whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations” is subject to a fine and imprisonment. 7 U.S.C. §2024(b)(1). The facts were as follows:

Petitioner Frank Liparota was the co-owner with his brother of Moon’s Sandwich Shop in Chicago, Illinois. He was indicted for acquiring and possessing food stamps in violation of § 2024(b)(1). The Department of Agriculture had not authorized petitioner’s restaurant to accept food stamps.² At trial, the Government proved that petitioner on three occasions purchased food stamps from an undercover Department of Agriculture agent for substantially less than their face value. On the first occasion, the agent informed

²Food stamps are provided by the Government to those who meet certain need-related criteria. See 7 U.S.C. §§ 2014(a), 2014(c). They generally may be used only to purchase food in retail food stores. 7 U.S.C. § 2016(b). If a restaurant receives proper authorization from the Department of Agriculture, it may receive food stamps as payment for meals under certain special circumstances not relevant here.

petitioner that she had \$195 worth of food stamps to sell. The agent then accepted petitioner's offer of \$150 and consummated the transaction in a back room of the restaurant with petitioner's brother. A similar transaction occurred one week later, in which the agent sold \$500 worth of coupons for \$350. Approximately one month later, petitioner bought \$500 worth of food stamps from the agent for \$300.

471 U.S. at 421-22. Liparota could not claim that he didn't know he was buying food stamps. Instead, he argued that he didn't know his conduct was "not authorized by" the governing statute and regulations.

The Supreme Court bought Liparota's legal argument—though not necessarily his application of that argument to the facts:

Absent indication of contrary purpose in the language or legislative history of the statute, we believe that § 2024(b)(1) requires a showing that the defendant knew his conduct to be unauthorized by statute or regulations. "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." [*Morrisette v. United States*, 342 U.S. 246, 250 (1952)]. . . . [T]he failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law.

This construction is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct. For instance, § 2024(b)(1) declares it criminal to use, transfer, acquire, alter, or possess food stamps in any manner not authorized by statute or regulations. The statute provides further that "[c]oupons issued to eligible households shall be used by them only to purchase food in retail food stores which have been approved for participation in the food stamp program *at prices prevailing in such stores.*" 7 U.S.C. § 2016(b) (emphasis added). This seems to be the *only* authorized use. A strict reading of the statute with no knowledge-of-illegality requirement would thus render criminal a food stamp recipient who, for example, used stamps to purchase food from a store that, unknown to him, charged higher than normal prices to food stamp program participants. Such a reading would also render criminal a nonrecipient of food stamps who "possessed" stamps

because he was mistakenly sent them through the mail due to administrative error, “altered” them by tearing them up, and “transferred” them by throwing them away. . . . [W]e are reluctant to adopt such a sweeping interpretation. . . .

. . . [T]he Government contends that the § 2024(b)(1) offense is a “public welfare” offense, which the Court defined in *Morissette v. United States*, 342 U.S., at 252-253, to “depend on no mental element but consist only of forbidden acts or omissions.” Yet the offense at issue here differs substantially from those “public welfare offenses” we have previously recognized. In most previous instances, Congress has rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety. Thus, in *United States v. Freed*, 401 U.S. 601 (1971), we examined the federal statute making it illegal to receive or possess an unregistered firearm. In holding that the Government did not have to prove that the recipient of unregistered hand grenades knew that they were unregistered, we noted that “one would hardly be surprised to learn that possession of hand grenades is not an innocent act.” *Id.*, at 609. Similarly, in *United States v. Dotterweich*, 320 U.S. 277, 284 (1943), the Court held that a corporate officer could violate the Food, Drug, and Cosmetic Act when his firm shipped adulterated and misbranded drugs, even “though consciousness of wrongdoing be totally wanting.” See also *United States v. Balint*, 258 U.S. 250 (1922). The distinctions between these cases and the instant case are clear. A food stamp can hardly be compared to a hand grenade, see *Freed*, nor can the unauthorized acquisition or possession of food stamps be compared to the selling of adulterated drugs, as in *Dotterweich*.

We hold that in a prosecution for violation of § 2024(b)(1), the Government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations. This holding does not put an unduly heavy burden on the Government in prosecuting violators of § 2024(b)(1). To prove that petitioner knew that his acquisition or possession of food stamps was unauthorized, for example, the Government need not show that he had knowledge of specific regulations governing food stamp acquisition or possession. Nor must the Government introduce any extraordinary evidence that would conclusively demonstrate petitioner’s state of mind. Rather, as in any other criminal prosecution requiring *mens rea*, the Government may prove by reference to facts and circumstances surrounding the case that petitioner knew

that his conduct was unauthorized or illegal.¹⁷ . . .

471 U.S. at 425-34. Reread footnote 17. How much of a victory did Liparota win?

2. John Cheek was a tax protester who regularly failed to file income tax returns. When charged with willfully failing to pay his taxes, Cheek claimed, among other things, that his non-payment was not “willful” because he honestly believed (1) that ordinary wages were not taxable “income,” and (2) that the tax laws were unconstitutional. *Cheek v. United States*, 498 U.S. 192 (1991). At Cheek’s trial, the district judge told jurors that negligent misunderstandings of the law amounted to willfulness. The Supreme Court disagreed:

The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to . . . comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption [that every person knows the law] by making specific intent to violate the law an element of certain federal criminal tax offenses. . . .

. . . In *United States v. Bishop*, 412 U.S. 346, 360 (1973), we described the term “willfully” [as used in federal criminal tax statutes] as connoting “a voluntary, intentional violation of a known legal duty”. . . .

Willfulness, as construed by our prior decisions in criminal tax cases, [thus] requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty. . . .

In this case, if Cheek asserted that he truly believed that the Internal Revenue Code did not purport to treat wages as income, and the jury believed him, the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such a belief. . . .

¹⁷In this case, for instance, the Government introduced evidence that petitioner bought food stamps at a substantial discount from face value and that he conducted part of the transaction in a back room of his restaurant to avoid the presence of the other patrons. Moreover, the Government asserts that food stamps themselves are stamped “nontransferable.” A jury could have inferred from this evidence that petitioner knew that his acquisition and possession of the stamps were unauthorized.

498 U.S. at 200-02. With respect to Cheek’s constitutional misunderstandings, the Court was less generous:

Claims that some of the provisions of the tax code are unconstitutional are submissions of a different order. They do not arise from innocent mistakes caused by the complexity of the Internal Revenue Code. Rather, they reveal full knowledge of the provisions at issue and a studied conclusion, however wrong, that those provisions are invalid. . . . [I]n this case, Cheek paid his taxes for years, but after attending various seminars and based on his own study, he concluded that the income tax laws could not constitutionally require him to pay a tax.

We do not believe that Congress contemplated that such a taxpayer, without risking criminal prosecution, could ignore the duties imposed upon him by the Internal Revenue Code. . . . Cheek . . . was free to pay the tax that the law purported to require, file for a refund and, if denied, present his claims of [constitutional] invalidity . . . to the courts. See 26 U.S.C. § 7422. Also, without paying the tax, he could have challenged claims of tax deficiencies in the Tax Court, § 6213, with the right to appeal to a higher court if unsuccessful. § 7482(a)(1). Cheek took neither course in some years, and when he did was unwilling to accept the outcome. As we see it, he is in no position to claim that his good-faith belief about the validity of the Internal Revenue Code negates willfulness or provides a defense to criminal prosecution under §§ 7201 and 7203. Of course, Cheek was free in this very case to present his claims of invalidity and have them adjudicated, but like defendants in criminal cases in other contexts, who “willfully” refuse to comply with the duties placed upon them by the law, he must take the risk of being wrong.

Id. at 205-06. Justice Scalia concurred in the judgment in *Cheek*; he agreed with the Court that even negligent errors about the meaning of “income” negated willfulness—but he went farther, arguing that Cheek’s claim that the tax code is unconstitutional likewise negates *mens rea*.

3. *Cheek* is generally seen as binding only in tax cases. The same cannot be said of *Ratzlaf v. United States*, 510 U.S. 135 (1994):

On the evening of October 20, 1988, defendant-petitioner Waldemar Ratzlaf ran up a debt of \$160,000 playing blackjack at the High Sierra Casino in Reno, Nevada. The

casino gave him one week to pay. On the due date, Ratzlaf returned to the casino with cash of \$100,000 in hand. A casino official informed Ratzlaf that all transactions involving more than \$10,000 in cash had to be reported to state and federal authorities. The official added that the casino could accept a cashier's check for the full amount due without triggering any reporting requirement. The casino helpfully placed a limousine at Ratzlaf's disposal, and assigned an employee to accompany him to banks in the vicinity. Informed that banks, too, are required to report cash transactions in excess of \$10,000, Ratzlaf purchased cashier's checks, each for less than \$10,000 and each from a different bank. He delivered these checks to the High Sierra Casino.

Based on this endeavor, Ratzlaf was charged with "structuring transactions" to evade the banks' obligation to report cash transactions exceeding \$10,000; this conduct, the indictment alleged, violated 31 U.S.C. §§ 5322(a) and 5324(3). The trial judge instructed the jury that the Government had to prove defendant's knowledge of the banks' reporting obligation and his attempt to evade that obligation, but did not have to prove defendant knew the structuring was unlawful. Ratzlaf was convicted, fined, and sentenced to prison.

Ratzlaf maintained on appeal that he could not be convicted of "willfully violating" the antistructuring law solely on the basis of his knowledge that a financial institution must report currency transactions in excess of \$10,000 and his intention to avoid such reporting. To gain a conviction for "willful" conduct, he asserted, the Government must prove he was aware of the illegality of the "structuring" in which he engaged. . . .

510 U.S. at 137-38. Ratzlaf's argument depended on three federal statutes. 31 U.S.C. §5313 and associated federal regulations establish the \$10,000 reporting requirement about which the casino advised Ratzlaf. The second provision, 31 U.S.C. §5324, read this way at the time of *Ratzlaf*:

No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction— . . .

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

Finally, 31 U.S.C. §5322(a) stated that "[a] person willfully violating this subchapter, or a

regulation prescribed under this subchapter . . . shall be fined not more than \$250,000 or [imprisoned for] not more than five years, or both.”

By a vote of five to four, the Supreme Court bought Ratzlaf’s argument. The key passage in Justice Ginsburg’s majority opinion reads as follows:

Section 5324 forbids structuring transactions with a “purpose of evading the reporting requirements of section 5313(a).” Ratzlaf admits that he structured cash transactions, and that he did so with knowledge of, and a purpose to avoid, the banks’ duty to report currency transactions in excess of \$10,000. The statutory formulation (§ 5322) under which Ratzlaf was prosecuted, however, calls for proof of “willful[ness]” on the actor’s part. The trial judge in Ratzlaf’s case, with the Ninth Circuit’s approbation, treated § 5322(a)’s “willfulness” requirement essentially as surplusage—as words of no consequence. Judges should hesitate so to treat statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense. . . .

The United States urges, however, that § 5324 violators, by their very conduct, exhibit a purpose to do wrong, which suffices to show “willfulness”. . . .

Undoubtedly there are bad men who attempt to elude official reporting requirements in order to hide from Government inspectors such criminal activity as laundering drug money or tax evasion. But currency structuring is not inevitably nefarious. Consider, for example, the small business operator who knows that reports filed under 31 U.S.C. § 5313(a) are available to the Internal Revenue Service. To reduce the risk of an IRS audit, she brings \$9,500 in cash to the bank twice each week, in lieu of transporting over \$10,000 once each week. That person, if the United States is right, has committed a criminal offense, because she structured cash transactions “for the specific purpose of depriving the Government of the information that Section 5313(a) is designed to obtain.” Brief for United States 28-29. Nor is a person who structures a currency transaction invariably motivated by a desire to keep the Government in the dark. But under the Government’s construction an individual would commit a felony against the United States by making cash deposits in small doses, fearful that the bank’s reports would increase the likelihood of burglary, or in an endeavor to keep a former spouse unaware of his wealth. . . .

In light of these examples, we are unpersuaded by the argument that structuring is

so obviously “evil” or inherently “bad” that the “willfulness” requirement is satisfied irrespective of the defendant’s knowledge of the illegality of structuring. . . .

510 U.S. at 140-46.

Consider this discussion of *Ratzlaf*, penned shortly after the decision was issued:

Justice Ginsburg’s opinion for the Court maintained that if this alternative interpretation were accepted, the enforcement provision’s “willfulness” requirement would be superfluous. . . . But the Court is frequently willing to read a statute in a way that renders some language . . . superfluous if the superfluity is an apparent drafting oversight. It seems likely that Congress . . . was simply inattentive to possible superfluities. In dropping the anti-structuring provision into the Act by its 1986 amendment, Congress focused only on filling a regulatory gap, and was apparently unaware that the new anti-structuring provision was the only one in the revised statutory scheme that had a separate scienter requirement.

William N. Eskridge, Jr. & Philip Frickey, Foreword: Law as Equilibrium, 108 Harv. L. Rev. 26, 58-59 (1994). Recall Justice Stevens’ dissent in *United States v. Wells*, 519 U.S. 482 (1997), discussed at *supra* p. xx. As that dissent noted, approximately 42 federal misrepresentation statutes include the term “material,” while roughly 54 do not. Justice Stevens contended that courts should read a materiality term into the latter category of statutes. If Professors Eskridge and Frickey are right, perhaps courts should read the term *out of* the statutes that include it. Should courts decide which terms in statutes are and are not superfluous? If so, how are these decisions to be made?

Justice Blackmun, joined by Chief Justice Rehnquist and Justices O’Connor and Thomas, closed his *Ratzlaf* dissent with these words: “Now Congress must try again to fill a hole it rightly felt it had filled before.” These words proved to be prophetic: Within a few months of the Court’s decision, Congress revised the anti-structuring statute and eliminated the willfulness term. Thus, *Ratzlaf* is no longer good law for crimes like those of the defendant in that case.

What about other federal crimes? The next case discusses this question in the context of federal gun registration regulations, and further elaborates on the current significance of the traditional maxim “ignorance of the law is no excuse.”

BRYAN v. UNITED STATES
524 U.S. 184 (1998)

Justice STEVENS delivered the opinion of the Court.

Petitioner was convicted of “willfully” dealing in firearms without a federal license. The question presented is whether the term “willfully” in 18 U.S.C. § 924(a)(1)(D) requires proof that the defendant knew that his conduct was unlawful, or whether it also requires proof that he knew of the federal licensing requirement.

In 1968 Congress enacted the Omnibus Crime Control and Safe Streets Act. In Title IV of that Act Congress made findings concerning the impact of the traffic in firearms on the prevalence of lawlessness and violent crime in the United States and amended the Criminal Code to include detailed provisions regulating the use and sale of firearms. As amended, 18 U.S.C. § 922 defined a number of “unlawful acts”; subsection (a)(1) made it unlawful for any person except a licensed dealer to engage in the business of dealing in firearms.² Section 923 established the federal licensing program and repeated the prohibition against dealing in firearms without a license, and § 924 specified the penalties for violating “any provision of this chapter.” Read literally, § 924 authorized the imposition of a fine of up to \$5,000 or a prison sentence of not more than five years, “or both,” on any person who dealt in firearms without a license even if that person believed that he or she was acting lawfully. . . . The 1968 Act also omitted any definition of the term “engaged in the business” even though that conduct was an element of the unlawful act prohibited by § 922(a)(1). . . .

In 1986 Congress enacted the Firearms Owners’ Protection Act (FOPA), in part, to cure these omissions. The findings in that statute explained that additional legislation was necessary to protect law-abiding citizens with respect to the acquisition, possession, or use of firearms for lawful purposes. FOPA therefore amended § 921 to include a definition of the term “engaged in

²82 Stat. 228. The current version of this provision, which is substantially the same as the 1968 version, is codified at 18 U.S.C. § 922(a)(1)(A). It states:

“(a) It shall be unlawful (1) for any person (A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce.”

the business,”⁵ and amended § 924 to add a scienter requirement as a condition to the imposition of penalties for most of the unlawful acts defined in § 922. For three categories of offenses the intent required is that the defendant acted “knowingly;” for the fourth category, which includes “any other provision of this chapter,” the required intent is that the defendant acted “willfully.”⁶ The § 922(a)(1)(A) offense at issue in this case is an “other provision” in the “willfully” category.

The jury having found petitioner guilty, we accept the Government’s version of the evidence. That evidence proved that petitioner did not have a federal license to deal in firearms; that he used so-called “straw purchasers” in Ohio to acquire pistols that he could not have purchased himself; that the straw purchasers made false statements when purchasing the guns; that petitioner assured the straw purchasers that he would file the serial numbers off the guns; and that he resold the guns on Brooklyn street corners known for drug dealing. The evidence was unquestionably adequate to prove that petitioner was dealing in firearms, and that he knew that

⁵ “Section 921 of title 18, United States Code, is amended—

“ (21) The term ‘engaged in the business’ means—

“(C) as applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms. . . .” 100 Stat. 449-450.

⁶Title 18 U.S.C. § 924(a)(1) currently provides:

“Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever—

“(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

“(B) knowingly violates subsection (a)(4), (f), (k), (r), (v), or (w) of section 922;

“(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

“(D) willfully violates any other provision of this chapter,

“ shall be fined under this title, imprisoned not more than five years, or both.”

his conduct was unlawful. There was, however, no evidence that he was aware of the federal law that prohibits dealing in firearms without a federal license.

Petitioner was charged with a conspiracy to violate 18 U.S.C. § 922(a)(1)(A), by willfully engaging in the business of dealing in firearms, and with a substantive violation of that provision. After the close of evidence, petitioner requested that the trial judge instruct the jury that petitioner could be convicted only if he knew of the federal licensing requirement, but the judge rejected this request. Instead, the trial judge gave this explanation of the term “willfully:”

“A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids.”

Petitioner was found guilty on both counts. On appeal he argued that the evidence was insufficient because there was no proof that he had knowledge of the federal licensing requirement, and that the trial judge had erred by failing to instruct the jury that such knowledge was an essential element of the offense. The Court of Appeals affirmed. It concluded that the instructions were proper and that the Government had elicited “ample proof” that petitioner had acted willfully. . . .

The word “willfully” is sometimes said to be “a word of many meanings” whose construction is often dependent on the context in which it appears. Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. . . . As a general matter, when used in the criminal context, a “willful” act is one undertaken with a “bad purpose.” [Thus], in order to establish a “willful” violation of a statute, “the Government must prove that the defendant acted with knowledge that his conduct was unlawful.” *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994). . . .

With respect to the three categories of conduct that are made punishable by § 924 if performed “knowingly,” the background presumption that every citizen knows the law makes it unnecessary to adduce specific evidence to prove that “an evil-meaning mind” directed the “evil-doing hand.”¹⁶ More is required, however, with respect to the conduct in the fourth category that is only criminal when done “willfully.” The jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was

¹⁶Justice Jackson’s translation of the terms *mens rea* and *actus reus* is found in his opinion for the Court in *Morissette v. United States*, 342 U.S. 246, 251 (1952).

unlawful.

Petitioner [] argues that we must read § 924(a)(1)(D) to require knowledge of the law because of our interpretation of “willfully” in two other contexts. In certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating. See, *e.g.*, *Cheek v. United States*, 498 U.S. 192, 201 (1991). Similarly, in order to satisfy a willful violation in *Ratzlaf*, we concluded that the jury had to find that the defendant knew that his structuring of cash transactions to avoid a reporting requirement was unlawful. See 510 U.S. at 138, 149. Those cases, however, are readily distinguishable. Both the tax cases and *Ratzlaf* involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct. As a result, we held that these statutes “carv[e] out an exception to the traditional rule” that ignorance of the law is no excuse and require that the defendant have knowledge of the law. The danger of convicting individuals engaged in apparently innocent activity that motivated our decisions in the tax cases and *Ratzlaf* is not present here because the jury found that this petitioner knew that his conduct was unlawful.

Thus, the willfulness requirement of § 924(a)(1)(D) does not carve out an exception to the traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is required. . . .

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice GINSBURG join, dissenting.

Petitioner Sillasse Bryan was convicted of “willfully” violating the federal licensing requirement for firearms dealers. The jury apparently found, and the evidence clearly shows, that Bryan was aware in a general way that some aspect of his conduct was unlawful. The issue is whether that general knowledge of illegality is enough to sustain the conviction, or whether a “willful” violation of the licensing provision requires proof that the defendant knew that his conduct was unlawful specifically because he lacked the necessary license. On that point the statute is, in my view, genuinely ambiguous. Most of the Court’s opinion is devoted to confirming half of that ambiguity by refuting Bryan’s various arguments that the statute clearly requires specific knowledge of the licensing requirement. The Court offers no real justification for its implicit conclusion that either (1) the statute unambiguously requires only general knowledge of illegality, or (2) ambiguously requiring only general knowledge is enough. Instead, the Court curiously falls back on “the traditional rule that ignorance of the law is no excuse” to conclude that “knowledge that the conduct is unlawful is all that is required.” In my view, this

case calls for the application of a different canon—“the familiar rule that, ‘where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.’ ” *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-285 (1978), quoting *United States v. Bass*, 404 U.S. 336, 348 (1971).

Title 18 U.S.C. § 922(a)(1)(A) makes it unlawful for any person to engage in the business of dealing in firearms without a federal license. That provision is enforced criminally through § 924(a)(1)(D), which imposes criminal penalties on whoever “willfully violates any other provision of this chapter.” The word “willfully” has a wide range of meanings, and “ ‘its construction [is] often . . . influenced by its context.’ ” *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994). In some contexts it connotes nothing more than “an act which is intentional, or knowing, or voluntary, as distinguished from accidental.” *United States v. Murdock*, 290 U.S. 389, 394 (1933). In the present context, however, inasmuch as the preceding three subparagraphs of § 924 specify a *mens rea* of “knowingly” for *other* firearms offenses, see §§ 924(a)(1)(A)-(C), a “willful” violation under § 924(a)(1)(D) must require some mental state more culpable than mere intent to perform the forbidden act. The United States concedes (and the Court apparently agrees) that the violation is not “willful” unless the defendant knows in a general way that his conduct is unlawful.

That concession takes this case beyond any useful application of the maxim that ignorance of the law is no excuse. Everyone agrees that § 924(a)(1)(D) requires some knowledge of the law; the only real question is *which* law? The Court’s answer is that knowledge of *any* law is enough—or, put another way, that the defendant must be ignorant of *every* law violated by his course of conduct to be innocent of willfully violating the licensing requirement. The Court points to no textual basis for that conclusion other than the notoriously malleable word “willfully” itself. Instead, it seems to fall back on a presumption (apparently derived from the rule that ignorance of the law is no excuse) that even where ignorance of the law is an excuse, that excuse should be construed as narrowly as the statutory language permits.

I do not believe that the Court’s approach makes sense of the statute that Congress enacted. I have no quarrel with the Court’s assertion that “willfully” in § 924(a)(1)(D) requires only “general” knowledge of illegality—in the sense that the defendant need not be able to recite chapter and verse from Title 18 of the United States Code. It is enough, in my view, if the defendant is generally aware that the *actus reus* punished by the statute—dealing in firearms without a license—is illegal. But the Court is willing to accept a *mens rea* so “general” that it is entirely divorced from the *actus reus* this statute was enacted to punish. That approach turns §

924(a)(1)(D) into a strange and unlikely creature. Bryan would be guilty of “willfully” dealing in firearms without a federal license even if, for example, he had never heard of the licensing requirement but was aware that he had violated the law by using straw purchasers or filing the serial numbers off the pistols. The Court does not even limit (for there is no rational basis to limit) the universe of relevant laws to federal *firearms* statutes. Bryan would also be “act[ing] with an evil-meaning mind,” and hence presumably be guilty of “willfully” dealing in firearms without a license, if he knew that his street-corner transactions violated New York City’s business licensing or sales tax ordinances. (For that matter, it ought to suffice if Bryan knew that the car out of which he sold the guns was illegally double-parked, or if, in order to meet the appointed time for the sale, he intentionally violated Pennsylvania’s speed limit on the drive back from the gun purchase in Ohio.) Once we stop focusing on the conduct the defendant is actually charged with (*i.e.*, selling guns without a license), I see no principled way to determine what law the defendant must be conscious of violating.

Congress is free, of course, to make criminal liability under one statute turn on knowledge of another, to use its firearms dealer statutes to encourage compliance with New York City’s tax collection efforts, and to put judges and juries through the kind of mental gymnastics described above. But these are strange results, and I would not lightly assume that Congress intended to make liability under a federal criminal statute depend so heavily upon the vagaries of local law—particularly local law dealing with completely unrelated subjects. If we must have a presumption in cases like this one, I think it would be more reasonable to presume that, when Congress makes ignorance of the law a defense to a criminal prohibition, it ordinarily means ignorance of the unlawfulness of the specific conduct punished *by that criminal prohibition*. . . .

Notes and Questions

1. In the majority opinion in *Bryan*, Justice Stevens states that “the willfulness requirement of §924(a)(1)(D) does not carve out an exception to the traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is required.” 524 U.S. at 196. What is he saying? Is legal ignorance an excuse or not?

2. Is *Bryan* consistent with *Morissette*? Justice Jackson’s opinion relies on the need to ensure that *Morissette*’s conviction is fair; Jackson also treats the law of *mens rea* as a species of common law that judges should craft according to their best judgment. The result in *Bryan* seems

to be tied to the use of the word “willfully”—which doesn’t sound much like an exercise of common-law reasoning. What explains the difference between these two cases? How would Jackson have resolved *Bryan*?

3. To what cases does *Bryan* apply? The defendant in *United States v. George*, 386 F.3d 383 (2d Cir. 2004), was convicted of “willfully and knowingly” making a false statement in a passport application, in violation of 18 U.S.C. §1542. The court, in an opinion by then-Judge Sotomayor, held that §1542 “requires that a defendant provide in a passport application information he or she knows to be false and does not mandate that the defendant act with a specific purpose to make false statements or to violate the law, either generally or § 1542 specifically.” 386 F.3d at 389. Is *George* consistent with *Bryan*? With *Ratzlaf*?

4. During the course of Carlton Wilson’s divorce proceedings, an Illinois judge issued a protective order barring Wilson from contacting his soon-to-be-ex-wife. While subject to that order, Wilson was arrested for another offense—a search incident to arrest turned up a shotgun. Wilson was then charged and convicted of violating 18 U.S.C. §922(g)(8), which bars possession of firearms by persons subject to protective orders. (Under §924(a)(2), the government had to prove that Wilson “knowingly” violated §922(g)(8).) Wilson conceded that he knew he possessed the gun, but claimed he did *not* know that doing so was a crime, and so lacked the intent necessary for conviction. In an opinion issued shortly after *Bryan* was decided, a Seventh Circuit panel rejected the argument:

To the extent that Wilson is arguing that he was unaware of the law and that his conviction therefore cannot stand, he is also incorrect. The traditional rule in American jurisprudence is that ignorance of the law is no defense to a criminal prosecution. *Cheek v. United States*, 498 U.S. 192, 199 (1991); *Lambert v. People of the State of California*, 355 U.S. 225, 228 (1957) (rule that “ignorance of the law will not excuse” is deeply rooted in American law). Wilson has not shown that the present statute falls into an exception to this general rule, see [*Bryan v. United States*, 524 U.S. 184, 194 (1998)] (noting exception for “highly technical statutes that present [] the danger of ensnaring individuals engaged in apparently innocent conduct”), and *Lambert*, 355 U.S. at 228 (notice required when penalty may be exacted for failing to act), and the fact that he was unaware of the existence of § 922(g)(8) does not render his conviction erroneous.

United States v. Wilson, 159 F.3d 280, 288-89 (7th Cir. 1998). Judge Posner authored a vigorous

dissent:

Congress created, and the Department of Justice sprang, a trap on Carlton Wilson as a result of which he will serve more than three years in federal prison for an act (actually an omission to act) that he could not have suspected was a crime. . . . We can release him from the trap by interpreting the statute under which he was convicted to require the government to prove that the violator knew that he was committing a crime. This is the standard device by which the courts avoid having to explore the outer boundaries of the constitutional requirement of fair notice of potential criminal liability. See, e.g., *Ratzlaf v. United States*, 510 U.S. 135 (1994). . . .

[Section 922(g)(8)] was enacted in 1994 and the number of prosecutions for violating it has been minuscule (perhaps fewer than 10, though I have not been able to discover the exact number, which is not a reported statistic) in relation to the probable number of violations. I estimate that every year the law has been in effect almost one hundred *thousand* restraining orders against domestic violence have been issued (estimated from Patricia Tjaden & Nancy Thoenes, *Stalking in America: Findings From the National Violence Against Women Survey* 3, 6, 12 (1998)). Since 40 percent of U.S. households own guns, there can be very little doubt that a large percentage of those orders were issued against gun owners.

How many of these gun owners, when they got notice of the restraining order, dispossessed themselves of their guns? I doubt that any did. The law is *malum prohibitum*, not *malum in se*; that is, it is not the kind of law that a lay person would intuit existed because the conduct it forbade was contrary to the moral code of his society. Compare *United States v. Robinson*, 137 F.3d 652, 654 (1st Cir. 1998) (“child pornography offends the moral sensibility of the community at large”), with *United States v. Grigsby*, 111 F.3d 806, 816-21 (11th Cir. 1997) (importation of ivory in violation of the African Elephant Conservation Act not criminal without knowledge of the Act). Yet the Department of Justice took no steps to publicize the existence of the law until long after Wilson violated it. . . .

The federal criminal code contains thousands of separate prohibitions, many ridiculously obscure, such as the one against using the coat of arms of Switzerland in advertising, 18 U.S.C. § 708, or using “Johnny Horizon” as a trade name without the authorization of the Department of the Interior. 18 U.S.C. § 714. The prohibition in

section 922(g)(8) is one of the most obscure. A person owns a hunting rifle. He knows or should know that if he is convicted of a felony he will have to get rid of the gun; if he doesn't know, the judge or the probation service will tell him. But should he be made subject to a restraining order telling him to keep away from his ex-wife, whom he has *not* ever threatened with his hunting rifle . . . , it will not occur to him that he must give up the gun unless the judge issuing the order tells him. The judge didn't tell Wilson; so far as appears, the judge was unaware of the law. . . . No one told him. And there is no reason that he should have guessed, for while he had beaten his wife and threatened to kill her, there is no indication that guns played any part in the beating or the threats. . . .

When a defendant is morally culpable for failing to know or guess that he is violating *some* law . . . , we rely on conscience to provide all the notice that is required. Sometimes the existence of the law is common knowledge, as in the case of laws forbidding people to own hand grenades (see *United States v. Freed*, 401 U.S. 601, 609 (1971)), forbidding convicted felons to own any firearms, and requiring a license to carry a handgun. And sometimes, though the law is obscure to the population at large and nonintuitive, the defendant had a reasonable opportunity to learn about it, as in the case of persons engaged in the shipment of pharmaceuticals who run afoul of the criminal prohibitions in the federal food and drug laws. See *United States v. Dotterweich*, 320 U.S. 277 (1943). . . . If none of the conditions that make it reasonable to dispense with proof of knowledge of the law is present, then to intone "ignorance of the law is no defense" is to condone a violation of fundamental principles for the sake of a modest economy in the administration of criminal justice. . . .

We thus have an example of those "highly technical statutes that present . . . the danger of ensnaring individuals engaged in apparently innocent conduct" of which the Supreme Court spoke in *Bryan v. United States*, 524 U.S. 184, 194 (1998). This case differs from *Bryan* because the statute here is easy to understand; but it is hard to discover, and that comes to the same thing, as we know from *Lambert v. California*, 355 U.S. 225 (1957). The law challenged in that case required a felon to register with the police. Lambert, a felon, failed to do so. She "had no actual knowledge of the requirement"; there was no showing of "the probability of such knowledge"; "violation of [the law's] provisions [was] unaccompanied by any activity whatever"; and "circumstances which might move one to inquire as to the necessity of registration [were] completely lacking." *Id.* at 227-29. The Court voided Lambert's conviction. We should

do the same for Wilson's conviction.

159 F.3d at 293-96 (Posner, C.J., dissenting). Is Judge Posner right? Note the tossed-off reference to the fact that Wilson "had beaten his wife and threatened to kill her." Does that change your view of *Wilson*? Does it make Wilson's subsequent gun possession culpable?

5. Perhaps *Wilson* is best seen as a federal prosecution for a state-law crime: in that case, domestic violence. Federal gun laws are often used to subject violent felons guilty of crimes like armed robbery to tougher federal sentencing rules. That was the idea behind Project Exile, a joint federal-local task force that aimed to reduce criminal violence in Richmond, Virginia; the approach has been widely copied and has spawned a large literature. *See, e.g.*, Daniel C. Richman, "Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 *Ariz. L. Rev.* 369 (2001). Is that an appropriate use of federal criminal law? How does it bear on the *mens rea* issue presented in *Bryan* and *Wilson*?

6. *Bryan*, *Liparota*, *Cheek*, and *Ratzlaf* are all written as statutory interpretation decisions. But their reasoning depends on the proposition that the intent standards applied in those cases were necessary in order to ensure that the law punishes only those defendants who had fair notice that their conduct might get them in trouble. Fair notice is a constitutional value, not just a statutory one—the vagueness doctrine rests on it, as does *Lambert v. California*, 355 U.S. 225 (1957), the due process case discussed in *Wilson*. For an argument that at least some of the decisions excerpted above represent an emerging law of "constitutional innocence," see Alan Michaels, *Constitutional Innocence*, 112 *Harv. L. Rev.* 828 (1999). Is Michaels right? Is *Morrisette* best seen as a piece of constitutional law or as a part of the federal law of theft? What about *Bryan*? Should Congress be permitted to overturn decisions like these? Who should define the law of criminal intent? As you read the next case, ask yourself whether the *mens rea* requirement has been defined by Congress, by the Supreme Court, or by both.

ARTHUR ANDERSEN LLP v. UNITED STATES
125 S.Ct. 2129 (2005)

Chief Justice REHNQUIST delivered the opinion of the Court.

As Enron Corporation's financial difficulties became public in 2001, petitioner Arthur Andersen LLP, Enron's auditor, instructed its employees to destroy documents pursuant to its document retention policy. A jury found that this action made petitioner guilty of violating 18

U.S.C. §§ 1512(b)(2)(A) and (B). These sections make it a crime to “knowingly us[e] intimidation or physical force, threate[n], or corruptly persuad[e] another person . . . with intent to . . . cause” that person to “withhold” documents from, or “alter” documents for use in, an “official proceeding.” The Court of Appeals for the Fifth Circuit affirmed. We hold that the jury instructions failed to convey properly the elements of a “corrup[t] persua[sion]” conviction under § 1512(b), and therefore reverse.

Enron Corporation, during the 1990’s, switched its business from operation of natural gas pipelines to an energy conglomerate, a move that was accompanied by aggressive accounting practices and rapid growth. Petitioner audited Enron’s publicly filed financial statements and provided internal audit and consulting services to it. Petitioner’s “engagement team” for Enron was headed by David Duncan. Beginning in 2000, Enron’s financial performance began to suffer, and, as 2001 wore on, worsened. On August 14, 2001, Jeffrey Skilling, Enron’s Chief Executive Officer (CEO), unexpectedly resigned. Within days, Sherron Watkins, a senior accountant at Enron, warned Kenneth Lay, Enron’s newly reappointed CEO, that Enron could “implode in a wave of accounting scandals.” Brief for United States 2. She likewise informed Duncan and Michael Odom, one of petitioner’s partners who had supervisory responsibility over Duncan, of the looming problems.

On August 28, an article in the Wall Street Journal suggested improprieties at Enron, and the SEC opened an informal investigation. By early September, petitioner had formed an Enron “crisis-response” team, which included Nancy Temple, an in-house counsel. On October 8, petitioner retained outside counsel to represent it in any litigation that might arise from the Enron matter. The next day, Temple discussed Enron with other in-house counsel. Her notes from that meeting reflect that “some SEC investigation” is “highly probable.”

On October 10, Odom spoke at a general training meeting attended by 89 employees, including 10 from the Enron engagement team. Odom urged everyone to comply with the firm’s document retention policy.⁴ He added: “ [I]f it’s destroyed in the course of [the] normal

⁴The firm’s policy . . . stated that, “[i]n cases of threatened litigation, . . . no related information will be destroyed.” It also separately provided that, if petitioner is “advised of litigation or subpoenas regarding a particular engagement, the related information should not be destroyed. See Policy Statement No. 780—Notification of Litigation.” Policy Statement No. 780 set forth “notification” procedures for whenever “professional practice litigation against [petitioner] or any of its personnel has been commenced, has been threatened or is judged likely to occur, or when governmental or professional investigations that may involve [petitioner] or

policy and litigation is filed the next day, that's great. . . . [W]e've followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable.' ” On October 12, Temple entered the Enron matter into her computer, designating the “Type of Potential Claim” as “Professional Practice—Government/Regulatory Inv[estigation].” Temple also e-mailed Odom, suggesting that he “ ‘remin[d] the engagement team of our documentation and retention policy.’ ”

On October 16, Enron announced its third quarter results. That release disclosed a \$1.01 billion charge to earnings. The following day, the SEC notified Enron by letter that it had opened an investigation in August and requested certain information and documents. On October 19, Enron forwarded a copy of that letter to petitioner.

On the same day, Temple also sent an e-mail to a member of petitioner's internal team of accounting experts and attached a copy of the document policy. On October 20, the Enron crisis-response team held a conference call, during which Temple instructed everyone to “[m]ake sure to follow the [document] policy.” Brief for United States 7 (brackets in original). On October 23, Enron CEO Lay declined to answer questions during a call with analysts because of “potential lawsuits, as well as the SEC inquiry.” *Ibid.* After the call, Duncan met with other Andersen partners on the Enron engagement team and told them that they should ensure team members were complying with the document policy. Another meeting for all team members followed, during which Duncan distributed the policy and told everyone to comply. These, and other smaller meetings, were followed by substantial destruction of paper and electronic documents.

On October 26, one of petitioner's senior partners circulated a New York Times article discussing the SEC's response to Enron. His e-mail commented that “the problems are just beginning and we will be in the cross hairs. The marketplace is going to keep the pressure on this and is going to force the SEC to be tough.” *Id.*, at 8. On October 30, the SEC opened a formal investigation and sent Enron a letter that requested accounting documents.

Throughout this time period, the document destruction continued, despite reservations by some of petitioner's managers. On November 8, Enron announced that it would issue a comprehensive restatement of its earnings and assets. Also on November 8, the SEC served Enron and petitioner with subpoenas for records. On November 9, Duncan's secretary sent an e-

any of its personnel have been commenced or are judged likely.”

mail that stated: “Per Dave—No more shredding. . . . We have been officially served for our documents.” *Id.*, at 10. Enron filed for bankruptcy less than a month later. Duncan was fired and later pleaded guilty to witness tampering.

In March 2002, petitioner was indicted in the Southern District of Texas on one count of violating §§ 1512(b)(2)(A) and (B). The indictment alleged that, between October 10 and November 9, 2001, petitioner “did knowingly, intentionally and corruptly persuade . . . other persons, to wit: [petitioner’s] employees, with intent to cause” them to withhold documents from, and alter documents for use in, “official proceedings, namely: regulatory and criminal proceedings and investigations.” A jury trial followed. . . . [After ten days of deliberation, the jury convicted.] . . .

The Court of Appeals for the Fifth Circuit affirmed. 374 F.3d, at 284. It held that the jury instructions properly conveyed the meaning of “corruptly persuades” and “official proceeding”; that the jury need not find any consciousness of wrongdoing; and that there was no reversible error. . . . [W]e granted certiorari.

Chapter 73 of Title 18 of the United States Code provides criminal sanctions for those who obstruct justice. Sections 1512(b)(2)(A) and (B), part of the witness tampering provisions, provide in relevant part:

“Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . cause or induce any person to . . . withhold testimony, or withhold a record, document, or other object, from an official proceeding [or] alter, destroy, mutilate, or conceal an object with intent to impair the object’s integrity or availability for use in an official proceeding . . . shall be fined under this title or imprisoned not more than ten years, or both.”

In this case, our attention is focused on what it means to “knowingly . . . corruptly persuad[e]” another person “with intent to . . . cause” that person to “withhold” documents from, or “alter” documents for use in, an “official proceeding.” . . .

. . . [R]estraint is particularly appropriate here, where the act underlying the conviction—“persua[sion]”—is by itself innocuous. Indeed, “persuad[ing]” a person “with intent to . . . cause” that person to “withhold” testimony or documents from a Government proceeding or Government official is not inherently malign. Consider, for instance, a mother who suggests to her son that he invoke his right against compelled self-incrimination, or a wife who persuades her husband not to disclose marital confidences.

Nor is it necessarily corrupt for an attorney to “persuad[e]” a client “with intent to . . . cause” that client to “withhold” documents from the Government. In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), for example, we held that Upjohn was justified in withholding documents that were covered by the attorney-client privilege from the Internal Revenue Service. See *id.*, at 395. No one would suggest that an attorney who “persuade[d]” Upjohn to take that step acted wrongfully, even though he surely intended that his client keep those documents out of the IRS’ hands.

“Document retention policies,” which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.

Acknowledging this point, the parties have largely focused their attention on the word “corruptly” as the key to what may or may not lawfully be done in the situation presented here. Section 1512(b) punishes not just “corruptly persuad[ing]” another, but “*knowingly* . . . corruptly persuad[ing]” another. (Emphasis added.) The Government suggests that “knowingly” does not modify “corruptly persuades,” but that is not how the statute most naturally reads. It provides the *mens rea*—“knowingly”—and then a list of acts—“uses intimidation or physical force, threatens, or corruptly persuades.” We have recognized with regard to similar statutory language that the *mens rea* at least applies to the acts that immediately follow, if not to other elements down the statutory chain. See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994) (recognizing that the “most natural grammatical reading” of 18 U.S.C. §§ 2252(a)(1) and (2) “suggests that the term ‘knowingly’ modifies only the surrounding verbs: transports, ships, receives, distributes, or reproduces”); see also *Liparota v. United States*, 471 U.S. 419 (1985). The Government suggests that it is “questionable whether Congress would employ such an inelegant formulation as ‘knowingly . . . corruptly persuades.’ ” Brief for United States 35, n.18. Long experience has not taught us to share the Government’s doubts on this score, and we must simply interpret the statute as written.

The parties have not pointed us to another interpretation of “knowingly . . . corruptly” to guide us here.⁹ In any event, the natural meaning of these terms provides a clear answer. “[K]nowledge” and “knowingly” are normally associated with awareness, understanding, or

⁹ The parties have pointed us to two other obstruction provisions, 18 U.S.C. §§ 1503 and 1505, which contain the word “corruptly.” But these provisions lack the modifier “knowingly,” making any analogy inexact.

consciousness. “Corrupt” and “corruptly” are normally associated with wrongful, immoral, depraved, or evil. Joining these meanings together here makes sense both linguistically and in the statutory scheme. Only persons conscious of wrongdoing can be said to “knowingly . . . corruptly persuad[e].” And limiting criminality to persuaders conscious of their wrongdoing sensibly allows § 1512(b) to reach only those with the level of “culpability . . . we usually require in order to impose criminal liability.” *United States v. Aguilar*, 515 U.S. 593, 602 (1995).

The outer limits of this element need not be explored here because the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing. Indeed, it is striking how little culpability the instructions required. For example, the jury was told that, “even if [petitioner] honestly and sincerely believed that its conduct was lawful, you may find [petitioner] guilty.” . . .

The parties vigorously disputed how the jury would be instructed on “corruptly.” The District Court based its instruction on the definition of that term found in the Fifth Circuit Pattern Jury Instruction for § 1503. This pattern instruction defined “corruptly” as “ ‘knowingly and dishonestly, with the specific intent to subvert or undermine the integrity’ ” of a proceeding. Brief for Petitioner 3, n. 3 (emphasis deleted). The Government, however, insisted on excluding “dishonestly” and adding the term “impede” to the phrase “subvert or undermine.” *Ibid.* The District Court agreed over petitioner’s objections, and the jury was told to convict if it found petitioner intended to “subvert, undermine, or impede” governmental factfinding by suggesting to its employees that they enforce the document retention policy.

These changes were significant. No longer was any type of “dishonest[y]” necessary to a finding of guilt, and it was enough for petitioner to have simply “impede[d]” the Government’s factfinding ability. As the Government conceded at oral argument, “ ‘[i]mpede’ ” has broader connotations than “ ‘subvert’ ” or even “ ‘[u]ndermine,’ ” and many of these connotations do not incorporate any “corrupt[ness]” at all. [Webster’s] dictionary defines “impede” as “to interfere with or get in the way of the progress of” or “hold up” or “detract from.” By definition, anyone who innocently persuades another to withhold information from the Government “get[s] in the way of the progress of” the Government. With regard to such innocent conduct, the “corruptly” instructions did no limiting work whatsoever.

The instructions also were infirm for another reason. They led the jury to believe that it did not have to find *any* nexus between the “persua[sion]” to destroy documents and any particular proceeding. In resisting any type of nexus element, the Government relies heavily on § 1512(e)(1), which states that an official proceeding “need not be pending or about to be instituted

at the time of the offense.” It is, however, one thing to say that a proceeding “need not be pending or about to be instituted at the time of the offense,” and quite another to say a proceeding need not even be foreseen. A “knowingly . . . corrup[t] persuade[r]” cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.

We faced a similar situation in *Aguilar*, [515 U.S. 593]. Respondent Aguilar lied to a Federal Bureau of Investigation agent in the course of an investigation and was convicted of “‘corruptly endeavor[ing] to influence, obstruct, and impede [a] . . . grand jury investigation’ ” under § 1503. 515 U.S., at 599. All the Government had shown was that Aguilar had uttered false statements to an investigating agent “who might or might not testify before a grand jury.” *Id.*, at 600. We held that § 1503 required something more—specifically, a “nexus” between the obstructive act and the proceeding. *Id.*, at 599-600. “[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding,” we explained, “he lacks the requisite intent to obstruct.” *Id.*, at 599.

For these reasons, the jury instructions here were flawed in important respects. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Notes and Questions

1. As a matter of statutory interpretation, *Arthur Andersen* seems more persuasive than *Bryan*, does it not? The combination of “knowingly” and “corruptly” suggests, at the least, that the defendants must have known that their conduct was improper. And, as Chief Justice Rehnquist suggested, destroying documents is not always improper—often, it is a routine business practice. It would appear to follow that, in order to be held liable, defendants must have known that their conduct was illegal.

2. Assuming the result in *Arthur Andersen* is legally correct, is it also fair? On the one hand, it is hard to know exactly where the legal line falls, and it seems unfair to punish defendants for guessing wrong about the scope of vague criminal statutes. On the other hand—under the usual rule that the court of appeals draws all reasonable factual inferences in favor of the jury verdict—these defendants plainly knew that they faced potentially serious legal liability (both civil and criminal), and clearly tried to limit the scope of the evidence that could be used

against them in any subsequent litigation. Why isn't that sufficiently "corrupt"? Why isn't it sufficiently "knowing"?

3. Reread Justice Jackson's opinion in *Morissette* and compare it to Chief Justice Rehnquist's opinion in *Arthur Andersen*. The opinions read very differently: Jackson's focuses on the general principles that underlie criminal law, while Rehnquist's sticks to the language of the particular criminal statute at issue. Rehnquist was Jackson's law clerk a year after *Morissette* was decided, and he often expressed admiration for his former boss. Yet the two Justices took quite different approaches to writing opinions on the meaning of criminal intent. Why the difference? Which approach seems better to you?

Chapter 4
Mail and Wire Fraud

Although there is no general federal fraud statute, the mail fraud statute, 18 U.S.C. §1341, and the wire fraud statute, 18 U.S.C. §1343, are among the most flexible weapons in the federal prosecutorial arsenal.

§1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

Note that the above version of the statute reflects the extension of the “mailing” element to include “any private or commercial interstate carrier.”

§1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television

communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

Until recently, the maximum penalty for violation of §§1341 or 1343 was five years imprisonment. The current twenty-year maximum penalties for these offenses are the product of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, which also added a separate conspiracy provision, codified at 18 U.S.C. §1349, making fraud conspiracies punishable by twenty years, instead of the usual five years set by the general conspiracy provision, 18 U.S.C. §371.

Most prosecutions under the mail and wire fraud statutes are not particularly controversial—or particularly interesting. A typical case might involve an advertisement, through the mails or on the internet, for “gold bars” that the buyer learns, after payment that cannot be retrieved, are only gold-plated. Here, the elements of a mail or wire fraud offense will easily be found: (1) the use of either mail or wire communications in the foreseeable furtherance (2) of a scheme to defraud (3) involving a material deception (4) with the intent to deprive another of (5) property. See Charles Doyle, Congressional Research Service, *Mail and Wire Fraud: A Brief Overview of Federal Criminal Law* (July 21, 2011), available at www.fas.org/sgp/crs/misc/R41930.pdf

These kinds of cases, which occupy the heartland of criminal fraud, are not the focus of this Chapter. Rather, our focus is on the reach of the mail and wire fraud statutes; you will see that federal prosecutors have used these laws to attack a wide variety of forms of dishonesty in both commercial and governmental settings. In Section A of this Chapter, we consider an important early case that endorsed a broad interpretation of the mail fraud statute and consider more generally what constitutes “fraud” under §§1341 and 1343 (cases addressing the meaning of “fraud” rely on the two provisions interchangeably). The deprivations in Section A, however, are simply of money. Next we consider how fraud doctrine has come to encompass a variety of non-monetary deprivations. The deprivations considered by Section B are of intangible forms of property—an area of increasing growth as prosecutors and courts explore the various “sticks” that constitute property rights. Section C looks at an area of even greater doctrinal growth, then contraction, then growth, and now maybe contraction: prosecutions of “honest services fraud,” which have been the subject of considerable attention from Congress and the Supreme Court in

recent years. In Section D, we will consider the degree to which the “postal” or “wire” nexus required by these provisions limits federal fraud prosecutions. Finally, after having visited the special modified common law world of mail fraud, Section E includes a critique, by Professor Dan Kahan, of this and similar projects.

A. SCHEME TO DEFRAUD

In the early days of the mail fraud statute, some courts were wary of its potential reach and sought to confine its scope to frauds necessarily dependent on the mails. *See, e.g.*, *United States v. Owens*, 17 F. 72 (E.D. Mo. 1883) (quashing the mail fraud indictment of a defendant who mailed 50 cents to a business creditor but claimed in the accompanying letter to be enclosing his entire debt of \$162.50). Over time, however, courts, including the Supreme Court, interpreted the statute far more expansively. Recall the facts of *Durland v. United States*, 161 U.S. 306 (1896), discussed briefly in Chapter 3. Durland and his co-defendants were con artists who used the mails to advertise “bonds” that would return profits of 50% in six months—but they had no intention of paying the principal, much less any interest. The government prosecuted Durland under the mail fraud statute originally enacted in 1872, which prohibited using or causing the use of the mails in attempted execution of any “scheme or artifice to defraud.” Strangely enough, however, the common law crime of fraud did not cover their conduct. And the most closely analogous common law offense, false pretences, required proof of false statements of material fact; it did not cover—as Durland argued in challenging his indictment—“the mere intention not to carry out a contract in the future.” *Id.* at 313. Nevertheless, the Supreme Court upheld Durland’s conviction, concluding that the statute extended further than the common law.

DURLAND v. UNITED STATES 161 U.S. 306 (1896)

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the Court.

Inasmuch as the testimony has not been preserved, we must assume that it was sufficient to substantiate the charges in the indictments; that this was a scheme and artifice to defraud, and that the defendant did not intend that the bonds should mature, or that although money was received, any should be returned, but that it should be appropriated to his own use. In other words, he was trying to entrap the unwary, and to secure money from them on the faith of a

scheme glittering and attractive in form, yet unreal and deceptive in fact, and known to him to be such. So far as the moral element is concerned it must be taken that the defendant's guilt was established.

But the contention on his part is that the statute reaches only such cases as, at common law, would come within the definition of "false pretences," in order to make out which there must be a misrepresentation as to some existing fact and not a mere promise as to the future. It is urged that there was no misrepresentation as to the existence or solvency of the corporation, the Provident Bond and Investment Company, or as to its modes of doing business, no suggestion that it failed to issue its bonds to any and every one advancing the required dues, or that its promise of payment according to the conditions named in the bond was not a valid and binding promise. . . .

. . . The statute is broader than is claimed. Its letter shows this: "Any scheme or artifice to defraud." Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud. Punishment because of the fraudulent purpose is no new thing. As said by Mr. Justice Brown, in *Evans v. United States*, 153 U.S. 584, 592 [1894], "if a person buy goods on credit in good faith, knowing that he is unable to pay for them at the time, but believing that he will be able to pay for them at the maturity of the bill, he is guilty of no offence even if he be disappointed in making such payment. But if he purchases them, knowing that he will not be able to pay for them, and with an intent to cheat the vendor, this is a plain fraud, and made punishable as such by statutes in many of the States."

But beyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning. It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all.

In the light of this the statute must be read, and so read it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose. . . . If the testimony had shown that this Provident company, and the defendant, as its president, had entered in good faith upon that business, believing that out of the moneys received they could by investment or otherwise make enough to justify the promised returns, no conviction could be sustained, no matter how visionary might seem the scheme. The charge is that in putting forth this scheme it was not the intent of the

defendant to make an honest effort for its success, but that he resorted to this form and pretence of a bond without a thought that he or the company would ever make good its promises. It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed; and it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurements of a specious and glittering promise. . . .

Notes and Questions

1. When Congress recodified much of criminal law in 1909, it incorporated the judicial gloss *Durland* put on the mail fraud statute, expanding it to reach schemes “for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” For an insightful history of the mail fraud statute from its origins in 1872 through *Durland v. United States*, and the 1909 amendments to the statute, see Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 *Duquesne L. Rev.* 771 (1980).

Thereafter, the mail fraud statute has had a full and active life, with frequent use against garden variety frauds involving money and property—that is, against defendants like *Durland*. See generally Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928* (2001). The extent of enforcement zeal in this era and decades thereafter reflected private as well as public interest. Particularly in the 1920s, private anti-fraud groups, funded by the “better” sort of commercial enterprises, would hire ex-prosecutors and postal inspectors to develop cases and present them to state and federal prosecutors. As inevitably happens when interest groups provide such assistance, some voiced concerns about skewed enforcement priorities: the anti-fraud units, it was alleged, were tools of the elite, targeting peripheral economic players, particularly immigrants, and were blind to the seamier practices of the financial institutions on which the units relied for support. See Edward Balleisen, *Private Cops on the Fraud Beat: The Limits of American Business Self-Regulation, 1895-1932*, 83 *Business Hist. Rev.* 113 (2009).

2. Fraudulent schemes like *Durland*’s have existed as long as commerce and finance have existed. If markets function more efficiently when cheating is discouraged, then a broad criminal law of fraud should pose a more effective deterrent. For arguments favoring broad statutory coverage in this area, see two articles by Samuel W. Buell, *Novel Criminal Fraud*, 81 *N.Y.U. L.*

Rev. 1971 (2006), and *The Upside of Overbreadth*, 83 N.Y.U. L. Rev. 1491 (2008). Yet the common law in this area was extraordinarily narrow. Why?

One possible answer goes like this: The line between cheats like Durland and simple breaches of contract is often unclear. Extravagant promises that go unfulfilled could signal either fraud or foolish business practices, with the latter better handled by the civil justice system than by criminal prosecution. An important point follows: Criminal prohibitions broad enough to catch all instances of core dishonesty and fraud may also cover a wide range of marginal misconduct. We have seen this phenomenon previously in some of the statutes at issue in Chapter 3 (remember, for instance, *Staples v. United States*, 511 U.S. 600 (1994), *supra* pp. xx-xx). Even more than other areas of criminal law, the law of fraud faces a choice between criminalizing too little and criminalizing too much. As you read this section, consider not only what actions are being criminalized, but which decision-makers shape the doctrine.

3. The common law of crimes—the body of law that didn’t cover *Durland*—was created as an adjunct to the law of tort. Crime victims often prosecuted criminal cases, but no centralized gatekeeper controlled access to criminal litigation as government prosecutors do now. It seems more than coincidental that the law of white collar fraud expanded *after* the rise of professional prosecutors with the discretion not to pursue cases they deemed mere commercial disputes.

4. By 1980, the Fifth Circuit could broadly declare regarding the mail fraud statute:

The statute does not forbid merely the use of the mails to perpetrate an act made criminal by state or federal law; it reaches any plan, consummated by the use of the mails, in which artifice or deceit is employed to obtain something of value with the intention of depriving the owner of his property. The scheme is to be measured by a non-technical standard; the measure of fraud is its departure from moral uprightness, fundamental honesty, fair play and candid dealings in the general life of members of society.

However, the statute does not reject all business practices that do not fulfill expectations, nor does it taint every breach of a business contract. Its condemnation of a “scheme or artifice to defraud” implicates only plans calculated to deceive. The government must prove not only that there was fraudulent activity but also that the defendant had a “conscious knowing intent to defraud.” *United States v. Kyle*, 257 F.2d 559, 564 (2d Cir. 1958).

United States v. Kreimer, 609 F.2d 126, 128 (5th Cir. 1980).

The statute covers certain omissions as well as affirmative misrepresentations. Yet defining the precise range of covered omissions has been a challenge. As the First Circuit noted in the context of a civil RICO suit:

. . . A defendant's failure to disclose information, without more, cannot make out a violation of the mail and wire fraud statutes. [Citations omitted.] The authorities are less uniform on what "more" must be shown to transform a non-actionable nondisclosure into fraud in this context. Some courts have required a duty to disclose, triggered by an independent statutory scheme, the relationship between the parties, or the defendant's "partial or ambiguous statements that require further disclosure in order to avoid being misleading," *Autuori*, 212 F.3d at 119, while others have held that withholding information with the intent to deceive is enough, *see, e.g., Gray*, 405 F.3d at 235-36; *Emery*, 71 F.3d at 1348.

We considered the issue in *Bonilla v. Volvo Car Corp.*, 150 F.3d 62 (1st Cir. 1998). There, we took the view that, without "a legal, professional or contractual duty" to disclose, the failure to do so generally cannot support a mail or wire fraud claim, though we acknowledged the existence of a "shadowy area" where nondisclosures in the absence of such a duty, if deliberate, could arguably "be treated as artifices to defraud under the federal statutes." *Id.* at 70. We nevertheless observed that "[i]t would be a truly revolutionary change to make a criminal out of every salesman (assuming the use of the mails or telephone) who did not take the initiative to reveal negative information about the product and who—a jury might find—secretly harbored in his heart the hope that the buyer would never ask." *Id.*

Sanchez v. Triple-S Management, Corp., 492 F.3d 1, 10 (1st Cir. 2007).

5. In *United States v. Svete*, 556 F.3d 1157 (11th Cir. 2009) (en banc), the Eleventh Circuit considered whether the mail fraud statute "requires proof that the scheme be capable of deceiving a reasonably prudent person or whether schemes aimed at the gullible or improvident are also prohibited." Defendants sold "financial interests in viatical settlements, which are financial products based on agreements with persons (known as viators) who have terminal illnesses and sell their life insurance policies to third parties for less than the mature value of the policies to benefit from the proceeds while alive." Charged with misleading investors about the life expectancies of viators—who were not terminally ill—and the risks associated with the

investments, defendants pointed to the place in the contracts where investors acknowledged that they had not relied on any representations outside the contract. “The contracts also contained acknowledgments that the investors were sophisticated in financial matters and had sought or had access to professional advice and that the projected demise dates were only estimates.”

Overruling its own (outlier) precedent in the process, the Eleventh Circuit made short work of defendants’ claim that these contractual provisions vitiated any allegation of fraud:

Although the common law crime of cheat applied only to frauds that would deceive a person of ordinary prudence, by the time Congress enacted the prohibition of mail fraud, statutes that prohibited false pretenses had remedied this deficiency in the common law. 2 Francis Wharton, *A Treatise on the Criminal Law of the United States* §§ 2056, 2128 at 514, 560 (7th ed., Philadelphia, Kay & Brother, 1874). As a commentator explained, “It was in part to meet this difficulty that the statute of false pretenses was passed, and under this statute it has been repeatedly held that it matters not how patent the falsity of a pretence may be, if it succeeds in defrauding.” *Id.* § 2128, at 560. The trend of case law in the 1870s and 1880s was that statutes against false pretenses protected both the gullible and the savvy. . . .

Congress has never used any language that would limit the coverage of the mail fraud statute to schemes that would deceive only prudent persons. To the contrary, the sponsor of the original statute explained that its purpose was “to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rascallions generally, for the purpose of deceiving and fleecing the innocent people in the country.” *McNally [v. United States]*, 483 U.S. 350, 356 (1987) (quoting Cong. Globe, 41 Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth during debate in previous Congress)). When the statute was amended in 1889 to prohibit schemes to sell counterfeit money, the Senate report reiterated a concern for the ignorant and naive:

A certain class of persons . . . send out circulars through the United States mails which appeal to the cupidity of the ignorant and hold out to the unfortunate the temptation to try to better their fortunes . . . Farmers and country merchants and country postmasters are constantly plied with these circulars, . . . and plain as the fraud is upon its face, these men reap a golden harvest. The city papers frequently contain notices of the ignorant

victims who venture to the cities and are relieved of their money; but there is no notice of the many smaller dupes who send their money through the mails in answer to these advertisements and pocket their losses This bill . . . will, if properly enforced, put an end to this infamous business.

S. Rep. No. 50-2566, at 2 (1889). When the statute was amended in 1909 to “codify the holding of *Durland*,” *McNally*, 483 U.S. at 357, by adding the words “or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises” after the phrase “any scheme or artifice to defraud,” a wealth of case law explained that the crime of false pretenses did not have a reasonable victim requirement and that a contrary rule was against “the great weight of authority.” *State v. Phelps*, 41 Wash. 470, 84 P. 24, 26 (Wash. 1906)

Because the focus of the mail fraud statute, like any criminal statute, is on the violator, the purpose of the element of materiality is to ensure that a defendant actually intended to create a scheme to defraud. Proof that a defendant created a scheme to deceive reasonable people is sufficient evidence that the defendant intended to deceive, but a defendant who intends to deceive the ignorant or gullible by preying on their infirmities is no less guilty. Either way, the defendant has criminal intent.

Neder [v. United States, 527 U.S. 1 (1999)], instructs us to reject the elements of the common law that “would clearly be inconsistent with the statutes Congress enacted,” 527 U.S. at 25, and whatever role, if any, a victim’s negligence plays as a bar to civil recovery, it makes little sense as a defense under a criminal statute that embraces “any scheme or artifice to defraud.” 18 U.S.C. § 1341 (emphasis added). A perpetrator of fraud is no less guilty of fraud because his victim is also guilty of negligence. *See Keeton et al., supra*, § 108, at 751. . . .

Despite the plain text of the statute and longstanding precedents of the Supreme Court, in [*United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996)] we held that mail fraud requires proof of a scheme to defraud that is objectively reliable unless the defendant is a fiduciary of the intended victim. We reversed convictions of defendants who had “approved and promoted lies about the investment potential” of real estate in Florida because the prospective investors in those homes could have discovered the truth from “readily available external sources.” *Id.* at 1558-60. We held that “federal criminal fraud requires proof that a person of ordinary prudence would rely on a representation or a

deception[,]” *id.* at 1558, and concluded that a person of ordinary prudence would have investigated the value of Florida real estate instead of relying on the misrepresentations by the defendants, *id.* at 1561. . . .

Because *Brown* is inconsistent with both the broadly worded text of the mail fraud statute, 18 U.S.C. § 1341, and the interpretation of that statute by the Supreme Court, *Neder*, 527 U.S. at 25; *Durland*, 161 U.S. at 313, we overrule our holding in *Brown* that the offense of mail fraud requires proof of a scheme calculated to deceive a person of ordinary prudence. . . .

Svete, 556 F.3d at 1162-66.

B. PROSECUTORIAL INNOVATIONS AND JUDICIAL CONSTRAINTS IN MAIL AND WIRE FRAUD

Notwithstanding the broad definition of “fraudulent scheme” in *Durland*, the mail fraud statute was not clearly suited for the two new jobs that federal prosecutors in the early 1970s began to give it: as a tool for prosecuting (1) public sector corruption cases and (2) private sector kickbacks and bribes. Suppose a sum of money passes from a regulated business to a government official, who then grants some regulatory favor or lucrative government contract in exchange. The party from whom the official obtains money was not defrauded. The parties who *were* defrauded—the voters (or is it the taxpayers, or the “public” more generally?)—may not have lost any money (or the loss may be difficult to prove), depending on the nature of the regulation or contract. A bribery statute might capture the conduct in question, but the federal bribery statute (18 U.S.C. §666, which bars the gift or receipt of bribes by anyone administering a program that receives \$10,000 or more in federal aid) did not exist until 1984. Before then, no federal statute plainly criminalized corruption by state and local officials. Nor was it obvious that the mail fraud statute covered the payment of kickbacks to private employees.

In the early 1970s, prosecutors began deploying the mail fraud statute in both of these situations, alleging that the corrupt official had deprived the citizenry (or the corrupt employee had deprived his employer) of “the intangible right of honest services.” *See United States v. States*, 488 F.2d 761, 766 (8th Cir. 1973) (upholding a conviction for election fraud under the mail fraud statute despite the absence of allegations that election authorities or anyone else were deprived of money or property). In time, through some combination of prosecutorial selection

and judicial accommodation, a considerable body of law had developed in the lower courts. *See* Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 *Geo. L.J.* 1171 (1977). Then, to federal prosecutors' chagrin, the Supreme Court put an end to this cottage industry in *McNally v. United States*. As you read *McNally*, consider the basis, or lack thereof, for the lower court decisions. Also consider why the Supreme Court might have come down so hard on a theory that lower federal courts found so easy to accept. Is this the kind of case the federal government should be prosecuting? Who (if anyone) was deprived of property by the fraudulent scheme in question?

McNALLY v. UNITED STATES
483 U.S. 350 (1987)

JUSTICE WHITE delivered the opinion of the Court.

This action involves the prosecution of petitioner Gray, a former public official of the Commonwealth of Kentucky, and petitioner McNally, a private individual, for alleged violation of the federal mail fraud statute, 18 U.S.C. § 1341. The prosecution's principal theory of the case, which was accepted by the courts below, was that petitioners' participation in a self-dealing patronage scheme defrauded the citizens and government of Kentucky of certain "intangible rights," such as the right to have the Commonwealth's affairs conducted honestly. We must consider whether the jury charge permitted a conviction for conduct not within the scope of the mail fraud statute.

We accept for the sake of argument the Government's view of the evidence, as follows. Petitioners and a third individual, Howard P. "Sonny" Hunt, were politically active in the Democratic Party in the Commonwealth of Kentucky during the 1970's. After Democrat Julian Carroll was elected Governor of Kentucky in 1974, Hunt was made chairman of the state Democratic Party and given *de facto* control over selecting the insurance agencies from which the Commonwealth would purchase its policies. In 1975, the Wombwell Insurance Company of Lexington, Kentucky (Wombwell), which since 1971 had acted as the Commonwealth's agent for securing a workmen's compensation policy, agreed with Hunt that in exchange for a continued agency relationship it would share any resulting commissions in excess of \$50,000 a year with other insurance agencies specified by him. The commissions in question were paid to Wombwell by the large insurance companies from which it secured coverage for the Commonwealth.

From 1975 to 1979, Wombwell funneled \$851,000 in commissions to 21 separate insurance agencies designated by Hunt. Among the recipients of these payments was Seton Investments, Inc. (Seton), a company controlled by Hunt and petitioner Gray and nominally owned and operated by petitioner McNally.

Gray served as Secretary of Public Protection and Regulation from 1976 to 1978 and also as Secretary of the Governor's Cabinet from 1977 to 1979. Prior to his 1976 appointment, he and Hunt established Seton for the sole purpose of sharing in the commissions distributed by Wombwell. Wombwell paid some \$200,000 to Seton between 1975 and 1979, and the money was used to benefit Gray and Hunt. Pursuant to Hunt's direction, Wombwell also made excess commission payments to the Snodgrass Insurance Agency, which in turn gave the money to McNally.

On account of the foregoing activities, Hunt was charged with and pleaded guilty to mail and tax fraud and was sentenced to three years' imprisonment. Petitioners were charged with one count of conspiracy and seven counts of mail fraud, six of which were dismissed before trial. The remaining mail fraud count was based on the mailing of a commission check to Wombwell by the insurance company from which it had secured coverage for the State. This count alleged that petitioners had devised a scheme (1) to defraud the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly, and (2) to obtain, directly and indirectly, money and other things of value by means of false pretenses and the concealment of material facts. The conspiracy count alleged that petitioners had (1) conspired to violate the mail fraud statute through the scheme just described and (2) conspired to defraud the United States by obstructing the collection of federal taxes. . . .

The jury convicted petitioners on both the mail fraud and conspiracy counts, and the Court of Appeals affirmed the convictions. . . .

We granted certiorari, and now reverse.

The mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government. As first enacted in 1872, as part of a recodification of the postal laws, the statute contained a general proscription against using the mails to initiate correspondence in furtherance of "any scheme or artifice to defraud." The sponsor of the recodification stated, in apparent reference to the antifraud provision, that measures were needed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapsallions generally, for the purpose of deceiving and fleecing the innocent people in the country." Insofar as the sparse legislative history reveals anything, it indicates that the original

impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property.

Durland v. United States, 161 U.S. 306 (1896), the first case in which this Court construed the meaning of the phrase “any scheme or artifice to defraud,” held that the phrase is to be interpreted broadly insofar as property rights are concerned, but did not indicate that the statute had a more extensive reach. . . .

Congress codified the holding of *Durland* in 1909, and in doing so gave further indication that the statute’s purpose is protecting property rights. The amendment added the words “or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises” after the original phrase “any scheme or artifice to defraud.” Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130. The new language is based on the statement in *Durland* that the statute reaches “everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.” However, instead of the phrase “everything designed to defraud” Congress used the words “[any scheme or artifice] for obtaining money or property.”

After 1909, therefore, the mail fraud statute criminalized schemes or artifices “to defraud” or “for obtaining money or property by means of false or fraudulent pretenses, representation, or promises” 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. This is the approach that has been taken by each of the Courts of Appeals that has addressed the issue: schemes to defraud include those designed to deprive individuals, the people, or the government of intangible rights, such as the right to have public officials perform their duties honestly.

As the Court long ago stated, however, the words “to defraud” commonly refer “to wronging one in his property rights by dishonest methods or schemes,” and “usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.” *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924).⁸ The codification of the holding in *Durland* in 1909

⁸*Hammerschmidt* concerned the scope of the predecessor of 18 U.S.C. § 371, which makes criminal any conspiracy “to defraud the United States, or any agency thereof in any manner or for any purpose.” *Hammerschmidt* indicates, in regard to that statute, that while “to conspire to defraud the United States 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

does not indicate that Congress was departing from this common understanding. 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.

We believe that Congress' intent in passing the mail fraud statute was to prevent the use of the mails in furtherance of such schemes. The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. As the Court said in a mail fraud case years ago: "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." *Fasulo v. United States*, 272 U.S. 620, 629 (1926). 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 § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.

For purposes of this action, we assume that Hunt, as well as Gray, was a state officer. 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. We note that as the action comes to us, there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property. It was not charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better

by deceit, craft or trickery, or at least by means that are dishonest." 265 U.S. 182, at 188. Other cases have held that § 371 reaches conspiracies other than those directed at property interests. *See, e.g., Haas v. Henkel*, 216 U.S. 462 (1910) (predecessor of § 371 reaches conspiracy to defraud the Government by bribing a Government official to make an advance disclosure of a cotton crop report); *Glasser v. United States*, 315 U.S. 60 (1942) (predecessor of § 371 reaches conspiracy to defraud the United States by bribing a United States attorney). However, we believe that this broad construction of § 371 is based on a consideration not applicable to the mail fraud statute.

. . . Section 371 is a statute aimed at protecting the Federal Government alone; however, the mail fraud statute, as we have indicated, had its origin in the desire to protect individual property rights, and any benefit which the Government derives from the statute must be limited to the Government's interests as property holder.

insurance. Hunt and Gray received part of the commissions but those commissions were not the Commonwealth's money. Nor was the jury charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent. Indeed, the premium for insurance would have been paid to some agency, and what Hunt and Gray did was to assert control that the Commonwealth might not otherwise have made over the commissions paid by the insurance company to its agent.⁹ Although the Government now relies in part on the assertion that petitioners obtained property by means of false representations to Wombwell, there was nothing in the jury charge that required such a finding. We hold, therefore, that the jury instruction on the substantive mail fraud count permitted a conviction for conduct not within the reach of § 1341. . . .

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE O'CONNOR joins as to Parts I, II, and III, dissenting.

Congress has broadly prohibited the use of the United States mails to carry out "any scheme or artifice to defraud." 18 U.S.C. § 1341. The question presented is whether that prohibition is restricted to fraudulent schemes to deprive others of money or property, or whether it also includes fraudulent schemes to deprive individuals of other rights to which they are entitled. Specifically, we must decide whether the statute's prohibition embraces a secret agreement by state officials to place the State's workmen's compensation insurance with a particular agency in exchange for that company's agreement to share a major portion of its commissions with a list of agents provided by the officials, including sham agencies under the

⁹ JUSTICE STEVENS would affirm the convictions even though it was not charged that requiring the Wombwell agency to share commissions violated state law. We should assume that it did not. For the same reason we should assume that it was not illegal under state law for Hunt and Gray to own one of the agencies sharing in the commissions and hence to profit from the arrangement, whether or not they disclosed it to others in the state government. It 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 interest, even if state law did not require it, to other persons in the state government whose actions could have been affected by the disclosure. 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. . . .

control of the officials themselves.

The same question of statutory construction has arisen in a variety of contexts over the past few decades. In the public sector, judges, State Governors, chairmen of state political parties, state cabinet officers, city aldermen, Congressmen and many other state and federal officials have been convicted of defrauding citizens of their right to the honest services of their governmental officials. In most of these cases, the officials have secretly made governmental decisions with the objective of benefiting themselves or promoting their own interests, instead of fulfilling their legal commitment to provide the citizens of the State or local government with their loyal service and honest government. Similarly, many elected officials and their campaign workers have been convicted of mail fraud when they have used the mails to falsify votes, thus defrauding the citizenry of its right to an honest election. In the private sector, purchasing agents, brokers, union leaders, and others with clear fiduciary duties to their employers or unions have been found guilty of defrauding their employers or unions by accepting kickbacks or selling confidential information. In other cases, defendants have been found guilty of using the mails to defraud individuals of their rights to privacy and other nonmonetary rights. All of these cases have something in common—they involved what the Court now refers to as “intangible rights.” They also share something else in common. The many federal courts that have confronted the question whether these sorts of schemes constitute a “scheme or artifice to defraud” have uniformly and consistently read the statute in the same, sensible way. . . .

II

The cases discussed above demonstrate that the construction the courts have consistently given the statute is consistent with the common understanding of the term “fraud,” and Congress’ intent in enacting the statute. It is also consistent with the manner in which the term has been interpreted in an analogous federal statute; the way the term was interpreted at the time of this statute’s enactment; and the statute’s scant legislative history. There is no reason, therefore, to upset the settled, sensible construction that the federal courts have consistently endorsed.

The term “defraud” is not unique to § 1341. Another federal statute, 18 U.S.C. § 371, uses the identical term in prohibiting conspiracies to “defraud the United States,” and the construction we have given to that statute should be virtually dispositive here.[Cases interpreting § 371 make] clear that a conspiracy to defraud the United States does not require any evidence that the Government has suffered any property or pecuniary loss.

There is no basis for concluding that the term “defraud” means something different in § 1341 (first enacted in 1872) than what it means in § 371 (first enacted in 1867). . . .

The Court nonetheless suggests that interpreting the two statutes differently can be justified because § 371 applies exclusively to frauds against the United States, while § 1341 benefits private individuals. This argument is wide of the mark. The purpose of § 1341 is to protect the integrity of the United States Postal Service, and, as I have explained, it is ludicrous to think that a Congress intent on preserving the integrity of the Postal Service would have used the term “defraud” in a narrow sense so as to allow mailings whose purpose was merely to defraud citizens of rights other than money or property. . . .

The general definition of the term “defraud” does not support, much less compel, today’s decision.

Even if there were historical evidence of a limited definition of “fraud,” the Court’s holding would reflect a strange interpretation of legislation enacted by the Congress in the 19th century. Statutes like the Sherman Act, the civil rights legislation, and the mail fraud statute were written in broad general language on the understanding that the courts would have wide latitude in construing them to achieve the remedial purposes that Congress had identified. The wide open spaces in statutes such as these are most appropriately interpreted as implicit delegations of authority to the courts to fill in the gaps in the common-law tradition of case-by-case adjudication. The notion that the meaning of the words “any scheme or artifice to defraud” was frozen by a special conception of the term recognized by Congress in 1872 is manifestly untenable. . . .

Finally, there is nothing in the legislative history of the mail fraud statute that suggests that Congress intended the word “fraud” to have a narrower meaning in that statute than its common meaning and the meaning that it has in § 371. . . .

III

To support its crabbed construction of the Act, the Court makes a straightforward but unpersuasive argument. Since there is no explicit, unambiguous evidence that Congress actually contemplated “intangible rights” when it enacted the mail fraud statute in 1872, the Court explains, any ambiguity in the meaning of the criminal statute should be resolved in favor of lenity. The doctrine of lenity is, of course, sound, for the citizen is entitled to fair notice of what sort of conduct may give rise to punishment. But the Court’s reliance on that doctrine in this case is misplaced for several reasons.

To begin with, “although criminal statutes are to be construed strictly . . . this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature.” *McElroy v. United States*, 455 U.S. 642, 658 (1982). Especially in light of the statutory purpose, I believe that § 1341 unambiguously prohibits all schemes to defraud that use the United States mails—whether or not they involve money or property.

In any event, this asserted ambiguity in the meaning of the word “defraud,” if it ever existed, was removed by judicial construction long ago. . . .

Notes and Questions

1. Note the striking difference between the ways that Justice White and Justice Stevens enunciate the role of the Supreme Court (or federal courts more generally) in construing federal statutes. Justice White and the majority are not prepared to interpret the statute in a way that “involves the Federal Government in setting standards of disclosure and good government for local and state officials.” But for Justice Stevens, Article III courts must be open to novel prosecutions under broadly worded statutes (“Statutes like . . . the mail fraud statute were written in broad general language on the understanding that the courts would have wide latitude in construing them to achieve the remedial purposes that Congress had identified.”). The majority challenged Congress, if it wanted a broader statute, to “speak more clearly than it has.” Congress accepted the challenge. After *McNally*, Congress amended the mail and wire fraud statutes as follows:

§1346. Definition of “scheme or artifice to defraud”

For the purposes of this chapter, the term “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services.

This provision, part of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, left lower courts (without, as yet, much help from the Supreme Court) to figure out what it means to “deprive another” of such a right. We consider cases under §1346 in Sections C and D of this Chapter. However, before we tackle the issue of “honest services” fraud, we first explore deprivations of “intangible property.”

2. In *McNally*, the Court briefly (see note 1) put an end to attempts by prosecutors and

lower courts to use §§1341 and 1343 to reach certain types of intangible deprivations. This closed off, at least until Congress responded, one potential avenue for the prosecution of corrupt public officials or dishonest employees. One question that remained, however, was the extent to which the Court's analysis precluded mail fraud theories based on the deprivation of intangible *property* (as opposed to intangible *rights*). The answer came six months later, in *Carpenter v. United States*, when all nine members of the Supreme Court (in an opinion by the author of *McNally*) approved a different but equally creative use of the mail and wire fraud statutes. Before returning to the fate of "honest services" fraud, we will look at *Carpenter* and other cases involving new property theories that suddenly became more attractive to prosecutors in the wake of *McNally*.

CARPENTER v. UNITED STATES
484 U.S. 19 (1987)

JUSTICE WHITE delivered the opinion of the Court.

Petitioners Kenneth Felis and R. Foster Winans were convicted of violating § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5. They were also found guilty of violating the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, and were convicted for conspiracy under U.S.C. § 371. Petitioner David Carpenter, Winans' roommate, was convicted for aiding and abetting. . . .

I

In 1981, Winans became a reporter for the Wall Street Journal (the Journal) and in the summer of 1982 became one of the two writers of a daily column, "Heard on the Street." That column discussed selected stocks or groups of stocks, giving positive and negative information about those stocks and taking "a point of view with respect to investment in the stocks that it reviews." Winans regularly interviewed corporate executives to put together interesting perspectives on the stocks that would be highlighted in upcoming columns, but, at least for the columns at issue here, none contained corporate inside information or any "hold for release" information. Because of the "Heard" column's perceived quality and integrity, it had the potential of affecting the price of the stocks which it examined. The District Court concluded on the basis of testimony presented at trial that the "Heard" column "does have an impact on the market, difficult though it may be to quantify in any particular case. . . ."

The official policy and practice at the Journal was that prior to publication, the contents of the column were the Journal's confidential information. Despite the rule, with which Winans was familiar, he entered into a scheme in October 1983 with Peter Brant and petitioner Felis, both connected with the Kidder Peabody brokerage firm in New York City, to give them advance information as to the timing and contents of the "Heard" column. This permitted Brant and Felis and another conspirator, David Clark, a client of Brant, to buy or sell based on the probable impact of the column on the market. Profits were to be shared. The conspirators agreed that the scheme would not affect the journalistic purity of the "Heard" column, and the District Court did not find that the contents of any of the articles were altered to further the profit potential of petitioners' stock-trading scheme. Over a 4-month period, the brokers made prepublication trades on the basis of information given them by Winans about the contents of some 27 "Heard" columns. The net profits from these trades were about \$690,000.

In November 1983, correlations between the "Heard" articles and trading in the Clark and Felis accounts were noted at Kidder Peabody and inquiries began. Brant and Felis denied knowing anyone at the Journal and took steps to conceal the trades. Later, the Securities and Exchange Commission began an investigation. Questions were met by denials both by the brokers at Kidder Peabody and by Winans at the Journal. As the investigation progressed, the conspirators quarreled, and on March 29, 1984, Winans and Carpenter went to the SEC and revealed the entire scheme. This indictment and a bench trial followed. Brant, who had pleaded guilty under a plea agreement, was a witness for the Government. . . .

The Court is evenly divided with respect to the convictions under the securities laws and for that reason affirms the judgment below on those counts. For the reasons that follow, we also affirm the judgment with respect to the mail and wire fraud convictions.

II

Petitioners assert that their activities were not a scheme to defraud the Journal within the meaning of the mail and wire fraud statutes; and that in any event, they did not obtain any "money or property" from the Journal, which is a necessary element of the crime under our decision last Term in *McNally v. United States*, 483 U.S. 350 (1987). We are unpersuaded by either submission and address the latter first.

We held in *McNally* that the mail fraud statute does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government," *id.* at 355, and that the statute is "limited in scope to the protection of property rights." *Id.* at 360. Petitioners argue that

the *Journal's* interest in prepublication confidentiality for the “Heard” columns is no more than an intangible consideration outside the reach of § 1341; nor does that law, it is urged, protect against mere injury to reputation. This is not a case like *McNally*, however. The Journal, as Winans’ employer, was defrauded of much more than its contractual right to his honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute, which “had its origin in the desire to protect individual property rights.” *McNally, supra*, at 359 n. 8. Here, the object of the scheme was to take the Journal’s confidential business information—the publication schedule and contents of the “Heard” column—and its intangible nature does not make it any less “property” protected by the mail and wire fraud statutes. *McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights.

. . . Confidential business information has long been recognized as property. “Confidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy.” 3 W. Fletcher, *Cyclopedia of Law of Private Corporations* § 857.1, at 260 (rev. ed. 1986). The Journal had a property right in keeping confidential and making exclusive use, prior to publication, of the schedule and contents of the “Heard” column. As the Court has observed before:

[N]ews matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise.” *International News Service v. Associated Press*, 248 U.S. 215, 236 (1918).

Petitioners’ arguments that they did not interfere with the Journal’s use of the information or did not publicize it and deprive the Journal of the first public use of it miss the point. The confidential information was generated from the business, and the business had a right to decide how to use it prior to disclosing it to the public. Petitioners cannot successfully contend based on *Associated Press* that a scheme to defraud requires a monetary loss, such as giving the information to a competitor; it is sufficient that the Journal has been deprived of its right to exclusive use of the information, for exclusivity is an important aspect of confidential business information and most private property for that matter.

We cannot accept petitioners' further argument that Winans' conduct in revealing prepublication information was no more than a violation of workplace rules and did not amount to fraudulent activity that is proscribed by the mail fraud statute. Sections 1341 and 1343 reach any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises. . . . The concept of "fraud" includes the act of embezzlement, which is "the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another." *Grin v. Shine*, 187 U.S. 181, 189 (1902).

The District Court found that Winans' undertaking at the Journal was not to reveal prepublication information about his column, a promise that became a sham when in violation of his duty he passed along to his co-conspirators confidential information belonging to the Journal, pursuant to an ongoing scheme to share profits from trading in anticipation of the "Heard" column's impact on the stock market. In *Snepp v. United States*, 444 U.S. 507, 515, n.11 (1980). . . we noted the similar prohibitions of the common law, that "even in the absence of a written contract, an employee has a fiduciary obligation to protect confidential information obtained during the course of his employment." As the New York courts have recognized: "It is well established, as a general proposition, that a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit but must account to his principal for any profits derived therefrom." *Diamond v. Oreamuno*, 24 N.Y. 2d 494, 497, 248 N.E. 2d 910, 912 (1969); see also Restatement (Second) of Agency §§ 388, Comment c, 396(c) (1958). . . .

Lastly, we reject the submission that using the wires and the mail to print and send the Journal to its customers did not satisfy the requirement that those mediums be used to execute the scheme at issue. The courts below were quite right in observing that circulation of the "Heard" column was not only anticipated but an essential part of the scheme. Had the column not been made available to Journal customers, there would have been no effect on stock prices and no likelihood of profiting from the information leaked by Winans.

The judgment below is

Affirmed.

Notes and Questions

1. *Carpenter* unanimously affirmed the mail and wire fraud convictions, holding that confidential business information constitutes "property" for the purposes of the mail and wire

fraud statutes, and that misappropriation of that property for private gain constitutes a scheme to defraud. At the same time, the Court split four-four on whether the charged insider trading also violated Section 10(b) of the Securities Exchange Act—an issue that would not be resolved until *United States v. O’Hagan*, 521 U.S. 642 (1997) (holding that criminal liability under §10(b) of the Securities Exchange Act may be predicated on misappropriation of confidential information). See *infra* at XXX.

2. What is the difference between an intangible property right, like the one protected in *Carpenter*, and an intangible right to “honest services,” like the one left unprotected after *McNally*? The Court says that “honest services” are more “ethereal,” and farther from the traditional center of the mail fraud statute—protecting tangible property. Is this persuasive? Can prosecutors get around *McNally* by alleging, in what would otherwise be an “honest services” case, a deprivation of intangible property? We take up this question at *infra* p. xxx.

3. One issue that arose after *Carpenter* was whether the mail fraud statute reached fraudulent efforts to obtain licenses from a government licensing authority. In *Cleveland v. United States*, 531 U.S. 12 (2000), the Supreme Court resolved the issue by holding that state and municipal licenses did not rank as property for purposes of §1341. The following case explores both the holding in *Cleveland* and, more generally, what intangible interests can be protected through mail fraud prosecutions.

UNITED STATES v. AL HEDAITHY
392 F.3d 580 (3d Cir. 2004)

STAPLETON, Circuit Judge:

. . . Al-Aiban and Al Hedaithy (collectively, “Defendants”) are two of approximately sixty foreign nationals of Arab and/or Middle Eastern descent who were charged in the United States District Court for the District of New Jersey for allegedly participating in a scheme by which imposters were paid to sit for the Test of English as a Foreign Language (“TOEFL”), a standardized test administered by the Educational Testing Service (“ETS”). The purpose of the scheme was allegedly to create the false appearance that Defendants, among others, had taken and achieved an acceptable score on the TOEFL exam so that they could remain eligible to live in the United States under a student visa. . . .

. . . ETS is in the business of designing and administering certain standardized tests. One of those tests, TOEFL, is commonly used by educational institutions in the United States when considering a student for admission to its academic program. Certain schools require foreign students, as a condition of admission, to achieve a minimum score on the TOEFL exam in order to demonstrate proficiency in the English language. Full-time enrollment at a federally approved school, college, or university is, in turn, a requirement for foreign nationals to obtain a student visa and thus reside legally in the United States.

According to the Government, ETS possesses, and attempts to maintain, goodwill that it has accumulated based upon the integrity of its TOEFL product. ETS has also endeavored to keep its TOEFL exam exclusive, secure, and confidential. It owns registered trademarks in the terms “Educational Testing Service,” “ETS,” and “TOEFL.” It uses these trademarks on its TOEFL examinations and the score reports that it generates for each applicant who takes TOEFL. ETS also owns copyrights in the TOEFL examination itself and in the questions used on each exam. Furthermore, the company restricts access to, and use of, its copyrighted TOEFL exam and questions, its trademarked score reports, and its test administration and scoring services.

When an applicant applies to take the TOEFL exam and pays the required fee, he is provided with an appointment number. The applicant must then appear at a designated test center, provide proof of identity, provide the appointment number, and sign a confidentiality statement. Pursuant to the confidentiality statement, the applicant promises to preserve the confidentiality of the examination. By signing the statement, the applicant also certifies that he is the same person whose name and address was used in completing the application. The applicant must then have his photograph taken in order to ensure that someone else did not take the exam for the applicant. The photograph subsequently appears on the applicant’s score report. Applicants who do not comply with the conditions set by ETS are not permitted to sit for the exam.

Once the TOEFL exam is completed, the exam results are wired from the test center to a company in Baltimore, Maryland, which in turn transmits the results by wire to ETS for processing. ETS then mails each score report to the location designated by the applicant.

In 1999, the Government became aware of a scheme in which Defendants, both Saudi Arabian nationals, and numerous other foreign nationals of Arab and/or Middle Eastern descent, paid an imposter to take and pass the TOEFL exam for them. The purpose of the scheme was to create the false appearance that Defendants themselves had taken and achieved an acceptable

score on the TOEFL exam. In furtherance of this scheme, each Defendant applied to take the exam, and then paid money to an imposter to appear at the designated test center and falsely identify himself as the respective Defendant. The imposter then signed the confidentiality statement, had his photograph taken, sat for the TOEFL exam using the respective Defendant's name, and directed that his exam results be mailed to a California address under the control of one Mahmoud Firas. ETS then processed the exam, and the results were mailed to the pre-designated location in California. There, Firas or one of his associates substituted each Defendant's photograph in place of the imposter's photograph. This doctored score report was then sent to legitimate educational institutions in a phony envelope bearing ETS's trademark...

[The superseding indictments charged defendants with mail fraud and described the subject of the fraud:]

ETS had property interests in its TOEFL product, including (i) materials bearing its trademarks, such as the TOEFL exam and score report, (ii) its copyrighted materials, such as the TOEFL exam and its questions, (iii) the ETS-specified test administration and scoring services for the TOEFL exam, and (iv) the value of ETS's goodwill, which is an asset of ETS and is based in part on maintaining the integrity of the testing process.

Each superseding indictment further alleged that:

As part of this conspiracy, the Conspirators defrauded ETS of the property described [above]. They did so by obtaining access to and use of ETS's trademarked materials, copyrighted materials, and services, by obtaining ETS's official score report, and by obtaining the benefit of, and undermining, ETS's goodwill and the value of its trademark and copyright. . . .

A

"To prove mail or wire fraud, the evidence must establish beyond a reasonable doubt (1) the defendant's knowing and willful participation in a scheme or artifice to defraud, (2) with the specific intent to defraud, and (3) the use of the mails or interstate wire communications in furtherance of the scheme." *United States v. Antico*, 275 F.3d 245, 261 (3d Cir. 2001). . . . Additionally, the object of the alleged scheme or artifice to defraud must be a traditionally

recognized property right. . . . This rule is embodied in a trilogy of Supreme Court cases that, each party agrees, governs the outcome of this appeal: *McNally v. United States*, 483 U.S. 350 (1987), *Carpenter v. United States*, 484 U.S. 19 (1988), and, most recently, *Cleveland v. United States*, 531 U.S. 12 (2000). We agree that these three decisions must frame our analysis, and we review each in turn.

. . . [In *McNally*,] the Supreme Court decided that § 1341 must be read “as limited in scope to the protection of property rights.” [483 U.S.] at 360. As such, the Court held that a scheme to deprive the Commonwealth of Kentucky of “honest services” was not within the scope of § 1341 and therefore reversed the defendants’ convictions. *Id.* at 361. . . .

The Supreme Court next addressed the mail fraud statute in *Carpenter*, in which the defendant was alleged to have violated that statute by defrauding the Wall Street Journal (the “Journal”) of “confidential business information.” . . .

Finally, in *Cleveland*, the defendant was charged and convicted of violating the mail fraud statute by making false statements in applying to the Louisiana State Police for a license to operate video poker machines. The question addressed by the Supreme Court was whether the Louisiana video poker license qualified as “property” within the scope of § 1341. In deciding this issue, the Court held that “it does not suffice . . . that the object of the fraud may become property in the recipient’s hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim.” [531 U.S.] at 15. Accordingly, the Supreme Court went on to consider “whether a government regulator parts with ‘property’ when it issues a license.” *Id.* at 20. In analyzing this issue, the Court first noted that Louisiana’s “core concern” in issuing licenses was regulatory, and, as such, Louisiana law established a typical regulatory program for issuing video poker licenses. *Id.* at 20-21. The function of this regulatory scheme, according to the Court, resembled other licensing schemes that have long been characterized as the exercise of state police powers.

The Court rejected the assertion that Louisiana had a property interest in its licenses merely because of the substantial sums of money it receives in exchange for each license. The Court acknowledged that Louisiana had a substantial economic stake in the video poker industry, but also noted that the lion’s share of fees received by the state with respect to the licenses is received only after the license is issued; not pre-issuance. Moreover, the Court reasoned that: “[w]ere an entitlement of this order sufficient to establish a state property right, one could scarcely avoid the conclusion that States have property rights in any license or permit requiring an upfront fee, including drivers’ licenses, medical licenses, and fishing and hunting licenses.”

Id. at 22.

The Court also rejected the assertion that the licenses were property because of the state's significant control over the issuance, renewal, suspension, and revocation of the licenses. According to the Court, "Louisiana's right to choose the persons to whom it issues video poker licenses" was not an interest long recognized as property. Rather, such "intangible rights of allocation, exclusion, and control amount to no more and no less than Louisiana's sovereign power to regulate. . . . Even when tied to an expected stream of revenue, the State's right of control does not create a property interest any more than a law licensing liquor sales in a State that levies a sales tax on liquor. Such regulations are paradigmatic exercises of the States' traditional police powers." *Id.* at 23.

The Court further rejected the Government's assertion that Louisiana's licensing power was no different than a franchisor's right to select its franchisees. The crucial difference between these two rights, the Court stated, is that "a franchisor's right to select its franchisees typically derives from its ownership of a trademark, brand name, business strategy, or other product that it may trade or sell in the open market." Louisiana's authority, on the other hand, rested not upon any such asset but upon the state's "sovereign right to exclude applicants deemed unsuitable to run video poker operations." *Id.* at 24.

Because the Court concluded that the video poker license at issue was not property in the hands of the State of Louisiana, it held that the defendant's conduct did not fall within the scope of the mail fraud statute, and therefore reversed the defendant's conviction.

B

According to the Government, the superseding indictments advance theories of mail fraud liability that comport with the Supreme Court's decisions in *McNally*, *Carpenter*, and *Cleveland*. The Government argues, *inter alia*, that the superseding indictments properly allege that ETS was defrauded of at least two traditionally recognized property interests: (1) its confidential business information, and (2) its tangible score reports. We address each of these theories below.

As noted above, the superseding indictments alleged that ETS possesses a property interest in the materials bearing its trademarks and its copyrighted materials, "such as the TOEFL exam and its questions." The superseding indictments sufficiently alleged, according to the Government, that the TOEFL exam and its questions constituted the confidential business

information of ETS. The Government contends that this case is like *Carpenter* inasmuch as the superseding indictments allege that the Defendants' scheme required the hired test-takers to make a misrepresentation to ETS in order to gain access to, and sit for, the TOEFL exam. We agree with the Government's analysis.

“Confidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit.” *Carpenter*, 484 U.S. at 26 (quoting 3 W. Fletcher, *Cyclopedia of Law of Private Corporations*, § 857.1, at 260) (rev. ed. 1986)). Such information includes trade secrets, which are defined as “any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” *Ruckelshaus [v. Monsanto Co.]*, 467 U.S. 986, 1001 [(1984)]. In our case, ETS's TOEFL exam satisfies this definition. According to the indictments, ETS is in the business of preparing and administering the TOEFL exam. The examination provided ETS with a competitive advantage over others in the business of test administration insofar as performance on the exam, according to the indictments, was the yardstick by which educational institutions measured English proficiency in their admissions processes. The indictments also indicate that ETS therefore goes to great lengths to protect the confidentiality and exclusivity of its exam. No person is permitted access to sit for the TOEFL exam unless he pays a fee, promises to preserve the confidentiality of the exam, and represents to ETS that he is the person whose name and address were used in applying to sit for the exam. The facts alleged in the superseding indictment are therefore sufficient to conclude that the TOEFL exam and its questions were confidential business information. The only question remaining with respect to this theory of mail fraud liability is whether Defendants engaged in a scheme “to defraud” ETS of such property. . . .

Carpenter dictates that ETS “had a property right in keeping confidential and making exclusive use” of its confidential business information. 484 U.S. at 26. *Carpenter* further instructs that the Government need not allege that ETS suffered a monetary loss. Rather, for purposes of showing a mail fraud violation, it is sufficient to allege that ETS “has been deprived of its right to exclusive use of the [confidential business] information.” *Id.* at 26-27. Such deprivation was clearly set forth in the superseding indictments.

According to the indictments, ETS assiduously protected the exclusivity of its TOEFL exam, allowing access only to those persons who agreed to keep the exam confidential and who provided a representation as to their identity. Defendants' alleged scheme, however, required hired test-takers to gain access to ETS's TOEFL exam on terms other than those prescribed by

ETS. The indictments allege that ETS would not have allowed the hired test-takers to sit for the exam had it known that they were not actually the Defendants, and had it known that they did not actually agree to preserve the exam's confidentiality. Accordingly, it was sufficiently alleged that ETS was deprived of a recognized property interest: the "right to decide how to use" its confidential business information, *i.e.*, the TOEFL exam.

Finally, the scheme alleged in the superseding indictments required hired test-takers to falsely identify themselves as each Defendant, thereby misrepresenting to ETS their true identities. The scheme further required the hired test-takers to sign ETS's confidentiality statement in the name of each Defendant, giving ETS the false impression that the signatories had agreed to preserve the confidentiality of the TOEFL exam. We therefore have little trouble concluding that the superseding indictments sufficiently alleged that the deprivation of ETS's property right was accomplished through deceit, trickery, chicanery, or other fraudulent means. . .

The Government also contends that the superseding indictments clearly alleged that ETS was defrauded of tangible property. As we noted above, the indictments alleged that ETS possesses a property interest in the "materials bearing its trademarks, such as the TOEFL . . . score report." The same misrepresentations that the hired test-takers made in order to gain access to the TOEFL exam, the Government claims, were also used to fraudulently obtain tangible documents from ETS. In accordance with the alleged scheme, these documents bore the name of each Defendant, but in fact reflected both the photograph of, and the exam score achieved by, the hired test-taker. Defendants do not dispute that the scheme alleged in the indictments involved obtaining the TOEFL score reports through misrepresentations. Rather, they contend that these documents cannot be considered property cognizable under the mail fraud statute. While Defendants' argument merits some discussion, we conclude that it is ultimately unavailing.

As Defendants suggest, *Cleveland* dictates that, in order to be cognizable under the mail fraud statute, the score reports must be considered property in the hands of ETS. Defendants insist, however, that a score report does not exist except to be given to the test-taker, that ETS cannot use it for any other purpose, and that ETS cannot sell one person's score report to any other person. Rather, according to Defendants, it is nothing more than the embodiment of the services that ETS provides, and that the paper and ink used to create a score report does not make it property. Defendants also argue that, because *Cleveland* clearly holds that a such a score report would not be property if it was issued by a governmental entity, to hold that ETS's score report is property in the hands of ETS would create a serious anomaly whereby the Defendants'

alleged scheme would not be considered mail fraud if it related to a state licensing examination, such as a bar exam or a medical licensing exam, but would be considered mail fraud with respect to the TOEFL exam, the Scholastic Aptitude Test, the Law School Admissions Test, or any other privately administered standardized test.

As to Defendants' first contention—that the score reports are not property in the hands of ETS—we disagree. ETS is alleged to be in the business of administering the TOEFL exam and issuing score reports. While it is true that the score reports represent the end result of the services provided by ETS, they are nonetheless tangible items produced by ETS, and ETS reserves the right to convey these items only to those individuals who meet its prescribed conditions. We do not think it credible for Defendants to contend that tangible items, held in the physical possession of a private entity, are not property. To the extent that Defendants pursue this argument, we construe it as a contention that the mail fraud statute does not apply to property with *de minimis* value.

In support of a *de minimis* exception to the mail fraud statute, Defendants cite to *United States v. Schwartz*, 924 F.2d 410, 417-18 (2d Cir. 1991), and *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990). Both *Schwartz* and *Granberry* addressed the question of whether unissued licenses were property in the hands of a governmental entity for purposes of the federal fraud statutes. Correctly foretelling the outcome in *Cleveland*, both Courts held that such unissued licenses were not property. *Schwartz* and *Granberry* also addressed the Government's argument that the licenses were nonetheless property by virtue of the paper they were printed on. In rejecting this argument, the Second Circuit stated:

This proposition is patently absurd. In the present instance, the [governmental entity] was not in the paper and ink business, it is a regulatory agency with the power to grant or withhold a license. The paper licenses given appellants were merely the expression of its regulatory imprimatur, and they had no other effect as "property" beyond their role as representatives of this regulatory grant. . . . Further, the value of the paper, ink and seal at issue is plainly inconsequential and — as *McNally* held that "to defraud" meant depriving individuals or the government of something of value — must be deemed *de minimis* as a matter of law. . . .

Schwartz and *Granberry* are, of course, both distinguishable from the case before us in that ETS is not a governmental licensing entity. . . . Nevertheless, it is also possible to read

Schwartz and *Granberry* as recognizing a *de minimis* exception to the mail fraud statute regardless of whether the victim is a governmental licensing entity. Even if we read *Schwartz* and *Granberry* in the manner suggested by Defendants, however, we must reject their arguments because our recognition of a generally applicable *de minimis* exception would conflict with a prior decision of this Court [*United States v. Martinez*, 905 F.2d 709 (3d Cir. 1990)]. . . .

The D.C. Circuit Court of Appeals' decision in *United States v. DeFries*, 43 F.3d 707, 707-08 (D.C. Cir. 1995), is also persuasive on this issue. In *DeFries*, several union officials were charged with mail fraud for the alleged theft, alteration, and destruction of ballots in a 1988 union merger referendum. The District Court dismissed the indictment on the ground that the theft of ballots did not constitute significant enough deprivations and thus, under *McNally*, were not cognizable under § 1341. In defending that dismissal on appeal, the defendants conceded that the ballots were the tangible property of the union, but argued that they were of such *de minimis* value—worth no more than the paper or ink used in their printing—that they failed to meet some threshold standard of significance implicit in the mail fraud statute. . . . [T]he D.C. Circuit . . . expressed significant doubts regarding the *de minimis* exception recognized in *Schwartz* and *Granberry*. Nonetheless, the Court concluded that it need not decide the issue because the ballots in question had more than *de minimis* value:

Here the tangible property taken was not only substantially greater in scale than the single sheets of paper at issue in the two *de minimis* cases, but was also the sole physical embodiment of valuable information about member preferences, information that was costly to produce and would be at least as costly to recreate. That this information was of more than *de minimis* value to the union is made clear by the organization's willingness to commit substantial resources to gathering it: as detailed in the indictment, the merger election involved the printing, national distribution, collection, and processing of thousands of official ballots at significant union expense. . . . The defendants' alleged theft, alteration, and destruction of some of those ballots invalidated the entire enterprise and undid the union's investment. Indeed, even if it were actually proven at trial that the defendants tampered with fewer ballots than necessary to turn the election, the theft would nevertheless undermine the election's credibility—and thus the value of the union's entire investment in the process—if accompanied by evidence of a risk of broader wrongdoing.

[43 F.3d] at 710. The D.C. Circuit also went on to address the defendants' argument that the ballots merely represent the union's interest in democratic self-governance, which was found inadequate in *McNally*. The Court rejected this argument, reasoning that it confused means and ends: "[a] piece of property does not lose its status as such, nor is its value any less substantial, simply because it is held for ends that are abstract and that thereby seem non-property-like." *Id.* at 710-11. Accordingly, the Court reinstated the indictment, finding that the referendum ballots and the information that they embodied indeed constituted property under § 1341.

We are confronted with circumstances nearly identical to *DeFries*, and we find the D.C. Circuit's analysis persuasive. Here, even assuming the existence of a *de minimis* exception under the mail fraud statute, the superseding indictments sufficiently allege that the score reports obtained under Defendants' scheme were valuable. Like the ballots in *DeFries*, ETS's score reports are the sole physical embodiment of substantial and valuable services that ETS provides. Moreover, even though the Defendants' scheme allegedly defrauded ETS of only approximately sixty score reports, the fraud allegedly perpetrated on ETS (like the theft of union ballots in *DeFries*) undermined its credibility, "and thus the value of [its] entire investment in the process." *Id.* Insofar as the superseding indictments allege that ETS has developed substantial goodwill due to the integrity of its TOEFL testing process, we conclude that such goodwill makes ETS's score reports valuable, exceeding any potential *de minimis* threshold that may be required by the mail fraud statute.

As to Defendants' second contention—that finding ETS's score report to constitute property would lead to a result inconsistent with *Cleveland*—such an argument misunderstands the fundamental basis of the Supreme Court's reasoning in that case. As we explained above, the result in *Cleveland* was based upon the conclusion that the issuance of government licenses is an exercise of a state's police powers to regulate. Because the issuance of such a license is a component of the state's regulatory scheme, the license was held not to be "property" in the hands of the regulator. Such reasoning is wholly inapplicable in this case. Here, ETS is a private business that provides a service and reports test results in pursuit of a profit-seeking endeavor. Unlike a state, ETS has no sovereign power to regulate. . . .

In accordance with the foregoing, we hold that the superseding indictments sufficiently alleged that Defendants engaged in a scheme to defraud ETS of traditionally recognized property interests in its confidential business information and TOEFL score reports.

Notes and Questions

1. In addition to challenging the government's legal theory, the two defendants in *Al Hedaithy*, who were among the approximately sixty Middle Eastern males arrested in May 2002 for this cheating scheme, also raised a selective prosecution claim. The Third Circuit, however, found that they had not met the demanding standard of *United States v. Armstrong*, 517 U.S. 456 (1996), for discovery on their claim. (Under *Armstrong*, before a defendant is entitled to discover government materials that might support a selective prosecution claim, he must make a threshold showing that similarly situated defendants of other races could have been prosecuted but were not.) Both defendants in the case became ineligible to remain in the United States as a result of their convictions.

2. Consider the discussion of de minimis cases in *Al Hedaithy*. When should courts consider barring such cases as a matter of law, as opposed to trusting in prosecutorial discretion? For better or worse, federal fraud statutes are regularly violated under circumstances in which most reasonable people would deem a federal felony prosecution inappropriate. Should judges be crafting doctrines to capture any such consensus? How should Congress's inaction on this issue be viewed by courts? By prosecutors?

3. *Al Hedaithy* highlights—and finds *Cleveland* but a slight impediment to—the richness of the mail fraud “property” deprivation law that developed parallel (and in response) to the twists and turns in “intangible rights” deprivation doctrine—twists and turns that we address in the next Section of this Chapter. As the Second Circuit recently noted: “While the interests protected by the mail and wire fraud statutes do not generally extend to intangible rights (except as modified by 18 U.S.C. §1346), they do extend to all kinds of property interests, both tangible and intangible.” *United States v. Carlo*, 507 F.3d 799, 801-02 (2d Cir. 2007) (citing *Carpenter v. United States*, 484 U.S. 19, 25 (1987)). Thus, prosecutors have charged and lower courts sustained mail fraud charges where the “property” the defendant fraudulently obtained was the victim's “right to control its assets,” *Carlo*, 507 F.3d at 802; the victim's “right to control the disposition of its assets,” *United States v. Gray*, 405 F.3d 227, 234 (4th Cir. 2005); and the victim's “right to control its risk of loss,” *United States v. Catalfo*, 64 F.3d 1070, 1077 (7th Cir. 1995). See also *United States v. Welch*, 327 F.3d 1081 (10th Cir. 2003), which upheld property deprivation charges against executives of the Salt Lake City Bid Committee [“SLBC”] for the 2002 Winter Olympics for allegedly making unauthorized payments of SLBC funds to members of the International Olympic Committee. In reinstating the indictment, which the district court had dismissed, the 10th Circuit noted:

Just as a borrower still commits bank fraud if he knowingly provides or withholds from a bank materially false information to induce a loan and then repays it, . . . one still may commit mail or wire fraud if he knowingly provides or withholds materially false information which imposes a substantial risk of loss on another (in this case for example, the SLBC's possible loss of donors, tax-exempt status, or even the Games) even if the risk does not materialize.

Id. at 1108.

Do government units also have a “property right” to control how their money is spent? Several circuits have upheld the convictions of contractors charged with depriving local government entities of “property” by falsely claiming to have complied with the entities’ requirement that some work be performed by socially and economically disadvantaged companies. *See* *United States v. Maxwell*, 579 F.3d 1282 (11th Cir. 2009); *United States v. Leahy*, 464 F.3d 773 (7th Cir. 2005); *United States v. Tulio*, 263 Fed. Appx. 258 (3d Cir. 2008) (unpublished); *United States v. Brothers Construction Company*, 219 F.3d 300 (4th Cir. 2000). These cases can be distinguished from *Cleveland* because they involve the state seeking to further a stated public interest in the course of paying money. Does this distinction between simply regulating and regulating while spending make sense?

4. Distinctions between public and private expenditures also play a critical role in the following case.

UNITED STATES v. RATCLIFF
488 F.3d 639 (5th Cir. 2007)

KING, Circuit Judge:

Defendant-appellee-cross-appellant Barney Dewey Ratcliff, Jr. was charged by indictment with fourteen counts of mail fraud, in violation of 18 U.S.C. § 1341, based on alleged activities involving election fraud in Louisiana. The district court granted Ratcliff’s motion to dismiss the counts, concluding that the indictment did not allege a scheme to defraud anyone of money or property, thereby failing to state the offense of mail fraud under § 1341. The United States now appeals, arguing that a scheme to obtain the salary and employment benefits of elected office through election fraud satisfies the requirements of the mail fraud statute. We

AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

Livingston Parish, Louisiana, operates under a home rule charter providing that its citizens elect a parish president for a four-year term. *See* LA. CONST. art. VI, § 5; LIVINGSTON PARISH HOME RULE CHARTER § 3-02. In 1999, Ratcliff was the incumbent Livingston Parish president and a candidate for reelection.

Candidates for public office in Louisiana must abide by the provisions of Louisiana's Campaign Finance Disclosure Act ("CFDA"), LA. REV. STAT. ANN. §§ 18:1481-:1532. The CFDA prohibits any candidate for parishwide elective office, including the parish presidency, from receiving contributions, loans, or loan guarantees in excess of \$ 2500 from any individual. *Id.* §§ 18:1483(7)(b), :1505.2(H). Candidates must also file campaign finance disclosure reports with the Louisiana Board of Ethics (the "Board" or "Board of Ethics"). *Id.* § 18:1484. The reports are to detail all campaign contributions, loans, loan guarantors, and expenditures. *Id.* § 18:1495.5.

According to the indictment, Ratcliff obtained several loans violative of the CFDA from September to November 1999. On September 23, 1999, Ratcliff obtained a \$50,000 bank loan for the purpose of financing his reelection campaign. Ratcliff had insufficient income and assets to qualify for the loan, and a local businessman with sufficient assets served as cosigner. One week later, on October 7, Ratcliff obtained another \$50,000 loan with the same businessman as cosigner. The cosigner also assigned a \$50,000 certificate of deposit as collateral.

On October 12, Ratcliff filed with the Board of Ethics a campaign finance disclosure report in which he disclosed the first loan and the businessman's guarantee of that loan. On October 19, a staff member of the Board advised Ratcliff that the businessman's guarantee possibly violated the CFDA. In response, Ratcliff informed the Board that he had instructed the bank to prepare new loan documents for his signature alone.

On October 22, Ratcliff obtained two new loans to pay off the loans that had been improperly guaranteed by the businessman. The indictment charges that the new loans were secured by a pledge of \$99,000 in cash, supplied by one of Ratcliff's wealthy supporters who had a financial interest in the transfer of a permit for operation of a landfill in Livingston Parish to Waste Management, Inc. ("Waste Management"). The transfer, which was allegedly supported by Ratcliff, was a major election issue. Ratcliff obtained another \$50,000 loan on November 3, allegedly secured by a pledge of \$ 55,000 in cash supplied by the same wealthy supporter. The

indictment asserts that Ratcliff knew that his receipt of the cash for all three loans violated the \$2500 individual loan limitation and that he did not report it in his campaign finance disclosure reports.

Ratcliff was reelected as parish president on November 20. During the course of the campaign, Ratcliff had contracted with a political consultant to help with his reelection bid, and by the time of the election, Ratcliff owed the consultant over \$57,000. On November 22, a Waste Management lobbyist allegedly gave Ratcliff approximately \$44,000 in cash for Ratcliff's political consultant to hold as collateral until Ratcliff paid the consultant the money owed. The indictment alleges that Ratcliff knew that his use of the cash to secure a campaign debt violated the \$2500 statutory limitation and that Ratcliff did not disclose the illegal loan in his campaign finance disclosure reports.

In addition to Ratcliff's failure to report the amount and source of certain cash and loans he received, he allegedly misled the Board of Ethics during its investigation of his activities. Specifically, the indictment alleges that Ratcliff falsely represented that he had the creditworthiness to obtain the original loans on September 23 and October 7, 1999, without a cosigner and that the replacement loans were obtained on the basis of his independent creditworthiness. . . .

After Ratcliff's reelection as parish president, Ratcliff served in office from January 10, 2000, to January 12, 2004. During this term, Ratcliff allegedly received over \$300,000 in salary and employment benefits from the parish.

On November 3, 2004, Ratcliff was charged by indictment with fourteen counts of mail fraud and one count of making a false statement to a financial institution. With regard to the mail fraud counts, the Government alleged that Ratcliff used the mails in a scheme to defraud Livingston Parish of the salary and employment benefits of elected office through misrepresentations he made to the Board of Ethics concerning the financing of his campaign. According to the Government, Ratcliff secured his reelection as parish president by obtaining the illegal funding and concealing his violations from the Board of Ethics. . . .

II. DISCUSSION

The Government contends that Ratcliff's indictment sufficiently charged the offense of mail fraud because the salary and employment benefits of elected office constitute "money or property" under the mail fraud statute and because fraudulent job procurement can constitute mail fraud in the election context just as it can in the typical hiring context. Ratcliff counters that

any misrepresentations he allegedly made to the Board of Ethics, which is a state entity, were unrelated to the salary and benefits paid as a matter of course by Livingston Parish, which is a distinct, local entity. . . .

We do not dispute the Government’s contention that a salary and other financial employment benefits can constitute “money or property” under the statute; as the Eighth Circuit put it when discussing a scheme to defraud an employer of wages, “[m]oney is money, and ‘money’ is specifically mentioned in the statutory words.” *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990); *see also Pasquantino v. United States*, 544 U.S. 349, 356-57 (2005) (recognizing that money in the public treasury is the government’s “money” for purposes of the mail fraud statute). But the real question before us is whether the indictment alleges a scheme to defraud the alleged victim—Livingston Parish—of that money. As the Supreme Court has explained, “the words ‘to defraud’ commonly refer ‘to wronging one in his property rights by dishonest methods or schemes,’ and ‘usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching.’” *McNally v. United States*, 483 U.S. 350, 359 (1987). Accordingly, in determining whether the indictment alleges a scheme to defraud Livingston Parish of money or property, we must look to whether the alleged scheme is one to deprive the parish of money or property through misrepresentations, thereby wronging the parish’s property rights. . . .

Applying these principles, it is evident that Ratcliff’s indictment does not allege a scheme to defraud Livingston Parish of any money or property. According to the indictment, Ratcliff devised a scheme (1) to conceal campaign finance violations from the Board of Ethics, which would (2) deceive the voting public about the campaign contributions he received, which would (3) secure his reelection to office, which would (4) cause Livingston Parish to pay him the salary and other financial benefits budgeted for the parish president. Although the charged scheme involves Ratcliff ultimately receiving money from the parish, it cannot be said that the parish would be deprived of this money by means of Ratcliff’s misrepresentations, as the financial benefits budgeted for the parish president go to the winning candidate regardless of who that person is. Nor would the parish be deprived of its control over the money by means of Ratcliff’s fraud, as the parish has no such control other than ensuring that the benefits are paid to the duly elected candidate. There are no allegations, for example, that the parish was deceived into paying the parish president’s salary to someone who did not win the election or to someone who failed to meet the parish’s minimum requirements for office. Indeed, there are no allegations that the parish would be deceived, either directly or indirectly, into taking any action at all; rather, the

indictment alleges a scheme to deceive the Board of Ethics and the voters. Though the misrepresentations in a mail fraud scheme need not be made directly to the scheme's victim, the alleged scheme must nevertheless be one to defraud the victim. Ratcliff's indictment provides no basis to find a scheme to defraud Livingston Parish through misrepresentations made to the Board of Ethics. The misrepresentations simply did not implicate the parish's property rights.

The Sixth Circuit recently reached a similar result in *United States v. Turner*, 465 F.3d 667 (6th Cir. 2006). In that case, Turner was indicted on charges that, *inter alia*, he engaged in a scheme to violate state campaign finance laws and to mail false campaign finance reports to the state in order to cover up the violations, thereby assisting the election of two state officials who received salaries from the state while in office. . . . Looking to the merits of the theory, the court determined that in the election fraud context, "the government and citizens have not been deprived of any money or property because the relevant salary would be paid to someone regardless of the fraud. In such a case, the citizens have simply lost the intangible right to elect the official who will receive the salary." *Id.* at 680. The court further decided that the allegedly defrauded state had "no control over the appropriation of the salary beyond ensuring payment to the duly elected official," and that "[a]lthough the salary comes from the public fisc, there is no discretion regarding either whether or to whom it is paid." *Id.* at 682. Accordingly, the court concluded that "there is no resulting property deprivation" from the alleged scheme. *Id.*

The Government makes several arguments seeking to avoid this conclusion here. First, the Government contends that several courts in other circuits have embraced the so-called "salary theory," under which a mail fraud charge can be supported by a scheme to use deceit to obtain a job and the salary that comes with it. Yet even if the salary theory were to be accepted in this circuit, the cases discussing and accepting the theory involve situations in which a job applicant falsely represented his qualifications or skills in order to obtain a job, deceiving the employer into hiring or promoting someone that he would not have otherwise hired or promoted. In *United States v. Granberry*, for example, the defendant obtained the job of school-bus driver by concealing a murder conviction, which would have prevented his hiring if known to the school district. The Eighth Circuit reversed the district court's dismissal of the indictment, holding that the defendant's alleged scheme deprived the school district of money because the district did not get what it paid for—a school-bus driver who had not been convicted of a felony. The court also concluded that the scheme deprived the school district of the property right to choose the person to whom it transferred money. Similarly, the defendants in *United States v. Doherty* were Boston policemen who schemed to steal copies of civil service examinations and

sell them to other policemen so that they could cheat and obtain promotions. 867 F.2d 47, 51 (1st Cir. 1989). The First Circuit held that such a scheme fell within the prohibition of the mail fraud statute because it deprived the employer “of control over how its money was spent.” *Id.* at 60 (quoting *McNally*, 483 U.S. at 360). Unlike these situations, Ratcliff’s charged conduct posed no harm to any of Livingston Parish’s property rights: the parish does not bargain for elected officials of a particular quality such that Ratcliff’s fraud could have denied it the value for which it paid, and the parish does not have control over the recipient of the parish president’s salary such that Ratcliff’s misrepresentations deprived it of that control. As the Sixth Circuit summarized when distinguishing these cases, “these examples, which address the government’s role as employer, where job qualifications can be economically quantified, are not analogous to an election fraud case, where the government’s role is purely administrative and the public’s role is a political one.” *Turner*, 465 F.3d at 682.

Responding to these distinctions, the Government contends that if a job procurement theory can successfully support a charge of mail fraud when a government employer is making the hiring decision itself, the result should not change merely because the parish has effectively delegated its hiring decision to the electorate. We disagree, however, with the notion that the electoral process constitutes an effective delegation of hiring authority from the parish government to the voters. The power to select the parish president does not originate from the parish government, but rather is vested in the electorate under the Louisiana Constitution and Livingston Parish’s Home Rule Charter. *See* LA. CONST. art. 6, § 11 (“The electors of each local governmental subdivision shall have the exclusive right to elect their governing authority.”); LIVINGSTON PARISH HOME RULE CHARTER § 3-02 (“The president shall be elected at large by the qualified voters of the parish according to the election laws of the state for a four (4) year term.”). Although the parish government is obligated to pay whichever candidate the voters elect, it has no discretion in the matter; its role is purely administrative, “implicat[ing] the [g]overnment’s role as sovereign, not as property holder.” *Cleveland*, 531 U.S. at 23-24. There is thus no basis to view the electorate as an agent of the government such that false statements influencing the voters could be viewed as a fraud on the parish.

Finally, the Government contends that the scheme alleged in this case is no different than fraudulent contract procurement schemes, in that courts have allowed mail fraud charges to be brought in such situations without any actual financial loss to the victim. But the cases cited by the Government do not address the scope of the mail fraud statute, instead discussing whether fraudulently procured contracts can cause a financial loss to the victim for sentencing purposes if

the contracts were properly performed by the perpetrator of the fraud. . . . We have not suggested that a mail fraud scheme must actually cause a financial loss to the victim; merely that a scheme to defraud a victim of money or property, if successful, must wrong the victim's property rights in some way. Unlike fraudulent contract procurement schemes in which the employer is deprived of value for which it contracted or control over its money, the scheme alleged in the indictment implicates none of Livingston Parish's property rights.

Our analysis in this appeal also takes into account federalism concerns, and on this front we are informed by the Supreme Court's decision in *Cleveland v. United States*, 531 U.S. 12 (2000). The defendant in *Cleveland* was charged with mail fraud for obtaining a license to operate video poker machines by means of false statements to a state licensing board. The Court held that such a license does not constitute "property" in the hands of the deceived state, as it is without value before being issued, and therefore cannot support a charge of mail fraud. The Court further recognized that the state's core concern in issuing video poker licenses is regulatory rather than proprietary and that accepting the indictment's theory of mail fraud would broadly expand federal criminal jurisdiction to cover a wide range of conduct that has traditionally been regulated by state and local governments, which the Court declined to do in the absence of a clear statement by Congress.

In construing the meaning of the terms of the mail fraud statute, we are similarly guided by the principle that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." *Jones v. United States*, 529 U.S. 848, 858 (2000). Like the poker licensing system at issue in *Cleveland*, Louisiana law establishes a comprehensive regulatory system governing campaign contributions and finance disclosures for state and local elections, with state civil and criminal penalties in place for making misrepresentations on campaign finance disclosure reports. LA. REV. STAT. ANN. §§ 18:1505.4-:1505.6. And like the Court in *Cleveland*, "[w]e resist the Government's reading of § 1341 . . . because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." 531 U.S. at 24. Finding a scheme to defraud a governmental entity of the salary of elected office based on misrepresentations made during a campaign would "subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities." *Id.* In practice, the Government's theory in this case would extend far beyond the context of campaign finance disclosures to any misrepresentations that seek to influence the voters in order to gain office, bringing state election fraud fully within the province of the federal fraud statutes. The mail fraud statute does not

evinced any clear statement conveying such a purpose, and the terms of the statute, as interpreted by Supreme Court precedent, simply do not proscribe the conduct for which Ratcliff was indicted. *See Turner*, 465 F.3d at 683. . . .

Notes and Questions

1. Would the Fifth Circuit have sustained the indictment if it had alleged that the defendant schemed to defraud the voters (or the taxpayers) of Livingston Parish, rather than the parish itself? If not, why not? If so, why wasn't the scheme charged this way?

2. The appeals court reasoned that "the parish does not bargain for elected officials of a particular quality such that Ratcliff's fraud could have denied it the value for which it paid." 488 F.3d at 647. Do you agree? Didn't the parish "bargain" for an elected official who followed Louisiana's Campaign Finance Disclosure Act? Explain in your own words why the salary that a private employee obtains after misrepresenting his qualifications can qualify as a "property" deprivation but the salary that an elected official obtained cannot, or at least did not in this case. Might the court's real concern be with transforming a civil violation of local election law into a federal felony?

3. As you read the next section, ask yourself why Ratcliff wasn't charged with honest services fraud. Is the answer that a candidate for office, as opposed to an elected official, does not owe anyone his or her honest services?

C. HONEST SERVICES FRAUD

As noted above at p.xx, Congress overturned the Supreme Court's decision in *McNally v. United States* less than a year later by enacting 18 U.S.C. §1346, which provides that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." *McNally* had tried to end several decades of what it held to be misbegotten lawmaking by lower courts. Congress's legislative response was to demand that courts return to the fray. Yet the statutory language it chose would turn out to be of limited help, and the legislative history was virtually non-existent. Section 1346 makes it clear enough that there needs to be some legal relationship between the defendant and the victim that creates a "right" to honesty. After all, Kant is not the law, and ordinary citizens do not owe each other a duty of candor. But precisely *when* does such a right arise? And what does it take to violate such

a right? Between 1988 and 2010, when the Supreme Court intervened in *Skilling v. United States*, 130 S. Ct. 2896 (2010), the lower courts developed two interacting lines of cases—with inevitable variation across circuits—one for public sector deprivations, one for private.

Notes on Interpretive Strategies between *McNally* and *Skilling*

1. Shortly before *Skilling*, the Third Circuit canvassed some of the case law that had developed since the passage of §1346, giving a sense both of the facts on which prosecutors had deployed that provision and of the doctrinal moves that courts had used to limit its ostensible breadth:

In our three principal honest services fraud cases decided after *McNally*—*United States v. Antico*, 275 F.3d 245 (3d Cir. 2001); *United States v. Panarella*, 277 F.3d 678 (3d Cir. 2002); and *United States v. Murphy*, 323 F.3d 102 (3d Cir. 2003)—the “honest services” at issue were allegedly owed not by private individuals but by either a public official or, in the case of *Murphy*, a county political party chairman alleged to have attained the status of a de facto public official by his participation in the county's political system.

The defendant in *Antico* was an official in Philadelphia's Department of Licenses and Inspections who failed to disclose a variety of improper financial arrangements, including one in which he regularly referred individuals who were willing to pay for assistance in completing licensing and permit applications to the mother of his child as a means to avoid his obligation to make direct child support payments. We concluded that Antico's obligation to disclose his personal interest in the official business he was handling arose by virtue of both state and local laws. . . . [Antico violated not just these statutory conflict of interest provisions but also] “the fiduciary relationship between a public servant charged with disinterested decision-making and the public he serves.” [274 F.3d] at 264. This fiduciary relationship, we explained, imposed upon the official a duty “to disclose material information affecting an official's impartial decision-making and to recuse himself. . . regardless of a state or local law.” *Id.* Because Antico's intentional concealment of his conflict of interest violated both state and local law, as well as his fiduciary duty to the public, we concluded that there was sufficient evidence to uphold Antico's conviction for honest services fraud under §§ 1341, 1343, and 1346.

In *Panarella*, [where a state senator was alleged to have concealed a financial interest in a tax collection business contrary to Pennsylvania’s disclosure statute, the circuit court held] that “where a public official takes discretionary action that the official knows will directly benefit a financial interest that the official has concealed in violation of a state criminal law, that official has deprived the public of his honest services under 18 U.S.C. § 1346.” [277 F.3d.] at 691.

In rejecting Panarella's argument, we reasoned that the determination of whether a public official had misused his office for personal gain was an ambiguous standard. *Id.* at 692-93. The violation of Pennsylvania's disclosure statute served as a “better limiting principle for purposes of determining when an official's failure to disclose a conflict of interest amounts to honest services fraud.” *Id.* The state statute at issue in *Panarella* provided clear notice for purposes of the rule of lenity that nondisclosure of the official's conflict of interest was criminal. *Id.* at 693. In addition, “the intrusion into state autonomy is significantly muted, since the conduct that amounts to honest services fraud is conduct that the state itself has chosen to criminalize.” *Id.* at 694. . . .

In contrast to the status of the actors in *Antico* and *Panarella*, the defendant in *Murphy* . . . served as the chairman of a county political party. 323 F.3d at 104. We reversed Murphy's conviction for honest services fraud because the Government failed to identify “any clearly established fiduciary relationship or legal duty in either federal or state law between Murphy and Passaic County or its citizens.” *Id.* at 117. . . .

United States v. McGeehan, 584 F.3d 560, 566-67 (3rd Cir. 2009). The *McGeehan* court then noted that *Antico* and *Panarella* had similarly used collateral state laws to limit the scope of honest services fraud. As *McGeehan* explained, these cases required “the anchor of a fiduciary relationship established by state or federal law.” *Id.* at 567.

The trilogy of cases discussed in *McGeehan* illustrates the difficulties courts face in identifying the source and scope of honest services fraud. *Antico* and *Panarella* both dealt with the duties of public officials; *Murphy* discussed the duties of a political party official who the Government argued should be treated as a de facto public official. The theory of honest services fraud as applied to public officials

. . . holds that a public official stands in a fiduciary relationship with the public, and can commit honest services fraud by breaching fiduciary duties in the course of that

relationship, such as by theft, accepting a bribe, or concealing a financial conflict of interest. In close cases we have not been unmindful of the potential for overreaching when prosecutors pursue this theory. Most prominently, in *Murphy* we deployed a “limiting principle” to guard against that potential in the public official context: we “endorse[d] . . . the decisions of other Courts of Appeals that have interpreted § 1346 more stringently and required a state law limiting principle,” 323 F.3d at 116, namely “that state law must provide the specific honest services owed by the defendant in a fiduciary relationship,” *id.* at 116 n.5 (citing *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997)). . . .

McGeehan, 584 F.3d at 568. The Third Circuit then explained why all of this interpretive maneuvering was necessary. The next paragraph highlights the court’s key concern: federalism, and, in particular, the ways that federalism complicates notice. As the court noted:

One purpose of the limiting principle we identified is to avoid placing federal prosecutors and courts in the role of regulating state and local politics, which might risk subverting the delicate relationship between state and federal governance. But there is another reason to require a limiting principle or principles: the exercise of interpreting a malleable term in a criminal statute which applies to a wide variety of activity may generate nebulous standards that are not discernable to people of ordinary intelligence. The latter problem is not confined to cases involving public officials. Defining the scope of the statute in its application to business relationships, like those at issue here, is also important. The federalization under the criminal law of the law of contracts and other business transactions—quintessential matters for state regulation—is a real concern. All of these considerations give pause to an expansive judicial interpretation of § 1346.

Id. at 569. The court then discussed honest services fraud in the private sector. None of the court’s prior §1346 cases dealt with purely private actors, and, as noted by the court,

“The classic application of the intangible right to honest services doctrine has been to a corrupt public servant who has deprived the public of his honest services.” *United States v. Frost*, 125 F.3d 346, 365 (6th Cir. 1997). As one of our sister circuits has opined, “[t]he right of the public to the honest services of its officials derives at least in

part from the concept that corruption and denigration of the common good violates 'the essence of the political contract.'" *Id.* (quoting *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996)). Although "the literal language of § 1346 extends to private sector schemes," *Jain*, 93 F.3d at 441, "[e]nforcement of an intangible right to honest services in the private sector" arguably has a "weaker justification because relationships in the private sector generally rest upon concerns and expectations less ethereal and more economic than the abstract satisfaction of receiving 'honest services' for their own sake." *Frost*, 125 F.3d at 365.

Nonetheless, caselaw supports the conclusion that private actors can owe "honest services" under § 1346. As we have noted, because "commentary and judicial reflection indicate that [§ 1346] was enacted to overturn *McNally* and restore the evolution of mail and wire fraud to its *pre-McNally* status," *Antico*, 275 F.3d at 262, in construing § 1346 we look to "*pre-McNally* cases interpreting § 1341 and § 1343 for guidance." *Panarella*, 277 F.3d at 690 []. As these cases show, honest services fraud has been found to encompass "purchasing agents, brokers, union leaders, and others with clear fiduciary duties to their employers or unions [who defrauded] their employers or unions by accepting kickbacks or selling confidential information," as well as private actors who have "us[ed] the mails to defraud individuals of their rights to privacy and other nonmonetary rights." *McNally*, 483 U.S. at 363 & nn.3 & 4 (Stevens, J., dissenting) (listing cases). . . .

McGeehan, 584 F.3d at 568-70.

2. While, in *McGeehan*, the Third Circuit found no clear fiduciary duty alleged or proved, the Sixth Circuit, in *United States v. Frost*, 125 F.3d 346 (6th Cir.1997), found the "axiomatic" duty of an employee to protect the property of his employer at the core of the honest services deprivation committed by two professors, Frost and Turner. In *Frost*, the court found that the two professors had defrauded the University of Tennessee Space Institute by allowing certain students to pass off material written by others as their own theses or dissertations, and then concealed from the other members of the oral examination committees that the thesis or dissertation under review was not the student's own work. (The students were government employees who could steer contracts to the professors' consulting firm.) The court explained:

Ultimately, a university is a business: in return for tuition money and scholarly effort, it

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agrees to provide an education and a degree. The number of degrees which a university may award is finite, and the decision to award a degree is in part a business decision. Awarding degrees to inept students, or to students who have not earned them, will decrease the value of degrees in general. More specifically, it will hurt the reputation of the school and thereby impair its ability to attract other students willing to pay tuition, as well as its ability to raise money. The University of Tennessee therefore has a property right in its unissued degrees, and Frost and Turner had a fiduciary duty to the University when exerting their considerable influence over whether the school would give a degree to a student.

Id. at 367. Under this analysis, would a professor who secretly violated a university's non-fraternization policy by dating a student also be guilty of honest services mail fraud? Which negative reputation would hurt a school more: one for degrees obtainable via plagiarism or one for sexually predatory faculty members?

3. That the Supreme Court would eventually step in to address the considerable variation in the circuits seemed over-determined. Perhaps the bigger question is why the Court waited so long to address the circuit variations in honest services doctrine that were so widely noted and decried. To what should we attribute this passivity?

Chief Judge Jacobs of the Second Circuit graphically set out the doctrinal disarray in *United States v. Rybicki*, 354 F.3d 124 (2d Cir.2003) (en banc). The case involved a prosecution of personal injury lawyers for paying kickbacks to claims adjustors employed by insurance companies in order to expedite the settlement of client claims. Chief Judge Jacobs used his dissent in the case as an occasion to note the "wide disagreement among the circuits as to the elements of the 'honest services' offense":

- What *mens rea* must be proved by the government? The majority follows Second Circuit precedent in holding that an intent to cause economic harm is not required—a defendant need only have intended to deprive another of the "intangible right of honest services." However, in the Seventh Circuit, an intent to achieve personal gain is an element of the offense. See *United States v. Bloom*, 149 F.3d 649, 656-57 (7th Cir. 1998). The Eighth Circuit describes the mens rea element as "causing or intending to cause actual harm or injury, and in most business contexts, that means financial or economic harm." See *United States v. Pennington*, 168 F.3d 1060, 1065

- (8th Cir. 1999). One circuit has held that, to secure an honest services conviction, “the prosecution must prove that the employee intended to breach a fiduciary duty.” *Frost*, 125 F.3d at 368. Other circuits merely require a showing of “fraudulent intent.” See *United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997); *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996).
- Must the defendant have caused actual tangible harm? Compare *Jain*, 93 F.3d at 442 (“When there is no tangible harm to the victim of a private scheme, it is hard to discern what intangible ‘rights’ have been violated.”), with *Frost* (“[A] defendant accused of scheming to deprive another of honest services does not have to intend to inflict an economic harm upon the victim.”). Some circuits have required that the misrepresentation be material, i.e., that the employee have reason to believe that the information would lead a reasonable employer to change its business conduct. *Cochran*, 109 F.3d at 667 & n.3; *United States v. Gray*, 96 F.3d 769, 775 (5th Cir. 1996). Other circuits only require a showing that it was reasonably foreseeable for the victim to suffer economic harm. *Frost*, 125 F.3d at 368. . . . We adopted this last requirement in the *Rybicki* panel opinion, and now abandon it.
 - What is the duty that must be breached to violate section 1346? The majority holds that it is the duty owed by an employee to an employer, or by “a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers” (whatever that means). Some circuits only allow prosecutions for breach of an employee’s duty to an employer. See, e.g., *United States v. Brumley*, 116 F.3d 728, 735 (5th Cir. 1997) (en banc). Other circuits require the breach of a fiduciary duty. See *Frost*, 125 F.3d at 366.
 - Is the source of that duty state or federal law? The majority does not say, and other circuits are split. Compare *Frost*, 125 F.3d at 366 (“Federal law governs the existence of fiduciary duty under the mail fraud statute.”), with *Brumley*, 116 F.3d at 735 (“We have held that services under § 1346 are those an employee must provide the employer under state law.”).
 - Did section 1346 revive pre-McNally case law; if so must each circuit look to its own governing precedent or to some set of rules distilled from the whole body of pre-McNally cases? See *Brumley*, 116 F.3d at 733-34 (looking to “plain language” of a statute to discern its “meaning” because “before *McNally* the doctrine of honest services was not a unified set of rules and Congress could not have intended to bless

each and every pre-*McNally* lower court ‘honest services’ opinion”); *Frost*, 125 F.3d at 364, 365 (holding that § 1346 has restored the mail fraud statute to its pre-*McNally* scope”). . . .

In sum, the circuits are fractured on the basic issues: (1) the requisite mens rea to commit the crime, (2) whether the defendant must cause actual tangible harm, (3) the duty that must be breached, (4) the source of that duty, and (5) which body of law informs us of the statute’s meaning. This lack of coherence has created “a truly extraordinary statute, in which the substantive force of the statute varies in each judicial circuit.” *Brumley*, 116 F.3d at 743 n.7 (Jolly, J., dissenting).

Rybicki, 354 F.3d at 162-64 (Jacobs, C.J., dissenting). The widespread disagreement described by Judge Jacobs highlights some of the doctrinal difficulties of honest services fraud—but note that these difficulties are potentially applicable to an even broader spectrum of crimes. At least the first two interpretive questions (that is, *mens rea* and tangible harm) could just as well apply to all mail fraud.

Finally, in October Term 2009, the Court took under consideration three cases in which defendants challenged their honest services fraud convictions on the grounds that the statute was unconstitutionally vague. While the Court rejected that claim, it did narrow the scope of what constitutes deprivation of honest services. Interestingly, the Court did not use any of the interpretive strategies used by the courts of appeals—such as requiring an underlying violation of state law (see the *McGeehan* discussion, *supra*), or the violation of a fiduciary duty in federal or state law (see *Frost*, *supra*), or imposing limits on honest services fraud to material misrepresentations or reasonably foreseeable economic harm (see the discussion in the *Rybicki* dissent, *supra*). Justice Ginsburg’s opinion for the Court does reference these strategies (see footnote 36, *infra*), but the Court found a way to reverse the convictions before it on yet another theory.

SKILLING v. UNITED STATES
130 S.Ct. 2896 (U.S. 2010)

Justice GINSBURG delivered the opinion of the Court.

In 2001, Enron Corporation, then the seventh highest-revenue-grossing company in America, crashed into bankruptcy. We consider in this opinion two questions arising from the

prosecution of Jeffrey Skilling, a longtime Enron executive, for crimes committed before the corporation's collapse. First, did pretrial publicity and community prejudice prevent Skilling from obtaining a fair trial? Second, did the jury improperly convict Skilling of conspiracy to commit "honest-services" wire fraud, 18 U.S.C. §§ 371, 1343, 1346?

Answering no to both questions, the Fifth Circuit affirmed Skilling's convictions. We conclude, in common with the Court of Appeals, that Skilling's fair-trial argument fails But we disagree with the Fifth Circuit's honest-services ruling. In proscribing fraudulent deprivations of "the intangible right of honest services," § 1346, Congress intended at least to reach schemes to defraud involving bribes and kickbacks. Construing the honest-services statute to extend beyond that core meaning, we conclude, would encounter a vagueness shoal. We therefore hold that § 1346 covers only bribery and kickback schemes. Because Skilling's alleged misconduct entailed no bribe or kickback, it does not fall within § 1346's proscription. We therefore affirm in part and vacate in part.

I

Founded in 1985, Enron Corporation grew from its headquarters in Houston, Texas, into one of the world's leading energy companies. Skilling launched his career there in 1990 when Kenneth Lay, the company's founder, hired him to head an Enron subsidiary. Skilling steadily rose through the corporation's ranks, serving as president and chief operating officer, and then, beginning in February 2001, as chief executive officer. Six months later, on August 14, 2001, Skilling resigned from Enron.

Less than four months after Skilling's departure, Enron spiraled into bankruptcy. The company's stock, which had traded at \$90 per share in August 2000, plummeted to pennies per share in late 2001. Attempting to comprehend what caused the corporation's collapse, the U.S. Department of Justice formed an Enron Task Force, comprising prosecutors and FBI agents from around the Nation. The Government's investigation uncovered an elaborate conspiracy to prop up Enron's short-run stock prices by overstating the company's financial well-being. In the years following Enron's bankruptcy, the Government prosecuted dozens of Enron employees who participated in the scheme. In time, the Government worked its way up the corporation's chain of command: On July 7, 2004, a grand jury indicted Skilling, Lay, and Richard Causey, Enron's former chief accounting officer.

These three defendants, the indictment alleged,

“engaged in a wide-ranging scheme to deceive the investing public, including Enron’s shareholders, . . . about the true performance of Enron’s businesses by: (a) manipulating Enron’s publicly reported financial results; and (b) making public statements and representations about Enron’s financial performance and results that were false and misleading.”

Skilling and his co-conspirators, the indictment continued, “enriched themselves as a result of the scheme through salary, bonuses, grants of stock and stock options, other profits, and prestige.”

Count 1 of the indictment charged Skilling with conspiracy to commit securities and wire fraud; in particular, it alleged that Skilling had sought to “depriv[e] Enron and its shareholders of the intangible right of [his] honest services.” The indictment further charged Skilling with more than 25 substantive counts of securities fraud, wire fraud, making false representations to Enron’s auditors, and insider trading. . . .

Following a 4-month trial and nearly five days of deliberation, the jury found Skilling guilty of 19 counts, including the honest-services-fraud conspiracy charge, and not guilty of 9 insider-trading counts. The District Court sentenced Skilling to 292 months’ imprisonment, 3 years’ supervised release, and \$45 million in restitution. . . .

[On appeal, the Fifth Circuit] rejected Skilling’s claim that his conduct did not indicate any conspiracy to commit honest-services fraud. “[T]he jury was entitled to convict Skilling,” the court stated, “on these elements”: “(1) a material breach of a fiduciary duty . . . (2) that results in a detriment to the employer,” including one occasioned by an employee’s decision to “withhold material information, i.e., information that he had reason to believe would lead a reasonable employer to change its conduct.” [554 F.3d 529, 547 (5th Cir. 2009)]. The Fifth Circuit did not address Skilling’s argument that the honest-services statute, if not interpreted to exclude his actions, should be invalidated as unconstitutionally vague. . . .

[We omit the portion of the Court’s opinion rejecting Skilling’s argument that the publicity that attended Enron’s collapse and the subsequent prosecutions prevented him from receiving a fair trial by an impartial jury.]

III

We next consider whether Skilling’s conspiracy conviction was premised on an improper theory of honest-services wire fraud. The honest-services statute, § 1346, Skilling maintains, is

unconstitutionally vague. Alternatively, he contends that his conduct does not fall within the statute's compass.

A

Enacted in 1872, the original mail-fraud provision, the predecessor of the modern-day mail- and wire-fraud laws, proscribed, without further elaboration, use of the mails to advance “any scheme or artifice to defraud.” See *McNally v. United States*, 483 U.S. 350, 356 (1987). In 1909, Congress amended the statute to prohibit, as it does today, “any scheme or artifice to defraud, *or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.*” § 1341 (emphasis added). Emphasizing Congress’ disjunctive phrasing, the Courts of Appeals, one after the other, interpreted the term “scheme or artifice to defraud” to include deprivations not only of money or property, but also of intangible rights.

In an opinion credited with first presenting the intangible-rights theory, *Shushan v. United States*, 117 F.2d 110 (1941), the Fifth Circuit reviewed the mail-fraud prosecution of a public official who allegedly accepted bribes from entrepreneurs in exchange for urging city action beneficial to the bribe payers. “It is not true that because the [city] was to make and did make a saving by the operations there could not have been an intent to defraud,” the Court of Appeals maintained. *Id.* at 119. “A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official,” the court observed, “would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public.” *Id.* at 115.

The Fifth Circuit’s opinion in *Shushan* stimulated the development of an “honest-services” doctrine. Unlike fraud in which the victim’s loss of money or property supplied the defendant’s gain, with one the mirror image of the other, the honest-services theory targeted corruption that lacked similar symmetry. While the offender profited, the betrayed party suffered no deprivation of money or property; instead, a third party, who had not been deceived, provided the enrichment. For example, if a city mayor (the offender) accepted a bribe from a third party in exchange for awarding that party a city contract, yet the contract terms were the same as any that could have been negotiated at arm’s length, the city (the betrayed party) would suffer no tangible loss. Even if the scheme occasioned a money or property *gain* for the betrayed party, courts reasoned, actionable harm lay in the denial of that party’s right to the offender’s “honest services.” See, e.g., *United States v. Dixon*, 536 F.2d 1388, 1400 (C.A. 2 1976).

“Most often these cases . . . involved bribery of public officials,” *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980), but courts also recognized private-sector honest-services fraud. In perhaps the earliest application of the theory to private actors, a District Court, reviewing a bribery scheme, explained:

“When one tampers with [the employer-employee] relationship for the purpose of causing the employee to breach his duty [to his employer,] he in effect is defrauding the employer of a lawful right. The actual deception that is practised is in the continued representation of the employee to the employer that he is honest and loyal to the employer’s interests.” *United States v. Procter & Gamble Co.*, 47 F. Supp. 676, 678 (Mass. 1942).

Over time, “[a]n increasing number of courts” recognized that “a recreant employee”—public or private—“c[ould] be prosecuted under [the mail-fraud statute] if he breache[d] his allegiance to his employer by accepting bribes or kickbacks in the course of his employment,” *United States v. McNeive*, 536 F.2d 1245, 1249 (8th Cir. 1976); by 1982, all Courts of Appeals had embraced the honest-services theory of fraud.

In 1987, this Court, in *McNally v. United States*, stopped the development of the intangible-rights doctrine in its tracks. *McNally* involved a state officer who, in selecting Kentucky’s insurance agent, arranged to procure a share of the agent’s commissions via kickbacks paid to companies the official partially controlled. 483 U.S., at 360. The prosecutor did not charge that, “in the absence of the alleged scheme[,] the Commonwealth would have paid a lower premium or secured better insurance.” *Ibid.* Instead, the prosecutor maintained that the kickback scheme “defraud[ed] the citizens and government of Kentucky of their right to have the Commonwealth’s affairs conducted honestly.” *Id.* at 353.

We held that the scheme did not qualify as mail fraud. “Rather than constru[ing] 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 the statute “as limited in scope to the protection of property rights.” *Id.*, at 360. “If Congress desires to go further,” we stated, “it must speak more clearly.” *Ibid.*

Congress responded swiftly. The following year, it enacted a new statute “specifically to cover . . . ‘the intangible right of honest services.’” *Cleveland v. United States*, 531 U.S. 12, 19-20 (2000). In full, the honest-services statute stated:

“For the purposes of th[e] chapter [of the United States Code that prohibits, *inter alia*, mail fraud, § 1341, and wire fraud, § 1343], the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” § 1346.

B

Congress, Skilling charges, reacted quickly but not clearly: He asserts that § 1346 is unconstitutionally vague. To satisfy due process, “a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). . . .

According to Skilling, § 1346 meets neither of the two due process essentials. First, the phrase “the intangible right of honest services,” he contends, does not adequately define what behavior it bars. Brief for Petitioner 38-39. Second, he alleges, § 1346’s “standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections,” thereby “facilitat[ing] opportunistic and arbitrary prosecutions.” *Id.* at 44 (quoting *Kolender*, 461 U.S., at 358).

In urging invalidation of § 1346, Skilling swims against our case law’s current, which requires us, if we can, to construe, not condemn, Congress’ enactments. See also *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963) (stressing, in response to a vagueness challenge, “[t]he strong presumptive validity that attaches to an Act of Congress”). Alert to § 1346’s potential breadth, the Courts of Appeals have divided on how best to interpret the statute.³⁶ Uniformly, however, they have declined to throw out the statute as irremediably vague.

³⁶ Courts have disagreed about whether § 1346 prosecutions must be based on a violation of state law, compare, e.g., *United States v. Brumley*, 116 F.3d 728, 734-735 (C.a. 5 1997) (en banc), with, e.g., *United States v. Weyhrauch*, 548 F. 3d 1237, 1245-1246 (C.A.9 2008), vacated and remanded [today]; whether a defendant must contemplate that the victim suffer economic harm, compare, e.g., *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 973 (C.A.D.C. 1998), with, e.g., *United States v. Black*, 530 F.3d 596, 600-602 (C.A. 7 2008), vacated and remanded [today]; and whether the defendant must act in pursuit of private gain, compare, e.g., *United States v. Bloom*, 149 F.3d 649, 655 (C.A. 7 1998), with, e.g., *United States*

We agree that § 1346 should be construed rather than invalidated. First, we look to the doctrine developed in pre-*McNally* cases in an endeavor to ascertain the meaning of the phrase “the intangible right of honest services.” Second, to preserve what Congress certainly intended the statute to cover, we pare that body of precedent down to its core: In the main, the pre-*McNally* cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived. Confined to these paramount applications, § 1346 presents no vagueness problem.

1

There is no doubt that Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Court of Appeals’ decisions before *McNally* derailed the intangible-rights theory of fraud. . . . Congress enacted § 1346 on the heels of *McNally* and drafted the statute using that decision’s terminology. See 483 U.S. at 355 (“intangible righ[t]”); *id.* at 362 (Stevens, J., dissenting) (“right to . . . honest services”). As the Second Circuit observed in its leading analysis of § 1346:

“The definite article ‘the’ suggests that ‘intangible right of honest services’ had a specific meaning to Congress when it enacted the statute—Congress was recriminalizing mail- and wire-fraud schemes to deprive others of *that* ‘intangible right of honest services,’ which had been protected before *McNally*, not *all* intangible rights of honest services whatever they might be thought to be.” *United States v. Rybicki*, 354 F.3d 124, 137-138 (2003) (en banc).

2

Satisfied that Congress, by enacting § 1346, “meant to reinstate the body of pre-*McNally* honest-services law,” 130 S. Ct., at 2938-39 (opinion of Scalia, J.), we have surveyed that case law. In parsing the Courts of Appeals decisions, we acknowledge that *Skilling*’s vagueness challenge has force, for honest-services decisions preceding *McNally* were not models of clarity or consistency. While the honest-services cases preceding *McNally* dominantly and consistently applied the fraud statute to bribery and kickback schemes—schemes that were the basis of most

v. Panarella, 277 F.3d 678, 692 (C.A. 3 2002).

honest-services prosecutions—there was considerable disarray over the statute’s application to conduct outside that core category. In light of this disarray, Skilling urges us, as he urged the Fifth Circuit, to invalidate the statute *in toto* [as “unconstitutionally vague”].

It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction. *See, e.g., Hooper v. California*, 155 U.S. 648, 657 (1895) (“The elementary rule is that *every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality.” (emphasis added)). We have accordingly instructed “the federal courts . . . to avoid constitutional difficulties by [adopting a limiting interpretation] if such a construction is fairly possible.” [*Boos v. Barry*, 485 U.S. 312, 331 (1988)]. . . .

. . . Although some applications of the pre-*McNally* honest-services doctrine occasioned disagreement among the Courts of Appeals, these cases do not cloud the doctrine’s solid core: The “vast majority” of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes. *United States v. Runnels*, 833 F.2d 1183, 1187 (6th Cir. 1987); see Brief for United States 42, and n. 4 (citing dozens of examples).⁴¹ Indeed, the *McNally* case itself, which spurred Congress to enact § 1346, presented a paradigmatic kickback fact pattern. Congress’ reversal of *McNally* and reinstatement of the honest-services doctrine, we conclude, can and should be salvaged by confining its scope to the core pre-*McNally* applications.

As already noted, the honest-services doctrine had its genesis in prosecutions involving bribery allegations. See *Shushan*, 117 F.2d at 115 (public sector); *Procter & Gamble Co.*, 47 F. Supp., at 678 (private sector). Both before *McNally* and after § 1346’s enactment, Courts of Appeals described schemes involving bribes or kickbacks as “core . . . honest services fraud precedents,” *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997); “paradigm case[s],” *United States v. deVegter*, 198 F.3d 1324, 1327-1328 (11th Cir. 1999); “[t]he most obvious form of honest services fraud,” *United States v. Carbo*, 572 F.3d 112, 115 (3d Cir. 2009); “core misconduct covered by the statute,” *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008); [and] “most [of the] honest services cases,” *United States v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008).

In view of this history, there is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we

a

acknowledge, would raise the due process concerns underlying the vagueness doctrine. To preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.⁴³

3

The Government urges us to go further by locating within § 1346’s compass another category of proscribed conduct: “undisclosed self-dealing by a public official or private employee—*i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty.” [Brief for the United States,] at 43-44. “[T]he theory of liability in *McNally* itself was nondisclosure of a conflicting financial interest,” the Government observes, and “Congress clearly intended to revive th[at] nondisclosure theory.” *Id.* at 44. Moreover, “[a]lthough not as numerous as the bribery and kickback cases,” the Government asserts, “the pre-*McNally* cases involving undisclosed self-dealing were abundant.” *Ibid.*

Neither of these contentions withstands close inspection. *McNally*, as we have already observed, involved a classic kickback scheme: A public official, in exchange for routing Kentucky’s insurance business through a middleman company, arranged for that company to share its commissions with entities in which the official held an interest. This was no mere failure to disclose a conflict of interest; rather, the official conspired with a third party so that both would profit from wealth generated by public contracts. Reading § 1346 to proscribe bribes and kickbacks—and nothing more—satisfies Congress’ undoubted aim to reverse *McNally* on its facts.

Nor are we persuaded that the pre-*McNally* conflict-of-interest cases constitute core applications of the honest-services doctrine. Although the Courts of Appeals upheld honest-

⁴³Justice SCALIA charges that our construction of § 1346 is “not interpretation but invention.” Stating that he “know[s] of no precedent for . . . ‘paring down’” the pre-*McNally* case law to its core, he contends that the Court today “wield[s] a power we long ago abjured: the power to define new federal crimes.” . . . [C]ases “paring down” federal statutes to avoid constitutional shoals are legion. These cases recognize that the Court does not *legislate*, but instead *respects the legislature*, by preserving a statute through a limiting interpretation. See *United States v. Lanier*, 520 U.S. 259, 267-268, n. 6 (1997) (This Court does not “create a common law crime” by adopting a “narrow[ing] constru[ction].”). . . . Only by taking a wrecking ball to a statute that can be salvaged through a reasonable narrowing interpretation would we act out of step with precedent.

services convictions for “some schemes of non-disclosure and concealment of material information,” *Mandel*, 591 F.2d 1347, 1361, they reached no consensus on which schemes qualified. In light of the relative infrequency of conflict-of-interest prosecutions in comparison to bribery and kickback charges, and the inter-circuit inconsistencies they produced, we conclude that a reasonable limiting construction of § 1346 must exclude this amorphous category of cases.

...

In sum, our construction of § 1346 “establish[es] a uniform national standard, define[s] honest services with clarity, reach[es] only seriously culpable conduct, and accomplish[es] Congress’s goal of ‘overruling’ *McNally*.” Brief for Albert W. Alschuler as *Amicus Curiae* in *Weyhrauch v. United States*, O.T. 2009, No. 08-1196, pp. 28-29. “If Congress desires to go further,” we reiterate, “it must speak more clearly than it has.” *McNally*, 483 U.S., at 360.⁴⁴

4

Interpreted to encompass only bribery and kickback schemes, § 1346 is not unconstitutionally vague. Recall that the void-for-vagueness doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions. See *Kolender*, 461 U.S., at 357. A prohibition on fraudulently depriving another of one’s honest services by accepting bribes or kickbacks does not present a problem on either score.

As to fair notice, “whatever the school of thought concerning the scope and meaning of” § 1346, it has always been “as plain as a pikestaff that” bribes and kickbacks constitute honest-services fraud, *Williams v. United States*, 341 U.S. 97, 101 (1951), and the statute’s *mens rea* requirement further blunts any notice concern. . . .

⁴⁴If Congress were to take up the enterprise of criminalizing “undisclosed self-dealing by a public official or private employee,” Brief for United States 43, it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns. The Government proposes a standard that prohibits the “taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty,” so long as the employee acts with a specific intent to deceive and the undisclosed conduct could influence the victim to change its behavior. *Id.*, at 43-44. See also *id.*, at 40-41. That formulation, however, leaves many questions unanswered. How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.

As to arbitrary prosecutions, we perceive no significant risk that the honest-services statute, as we interpret it today, will be stretched out of shape. Its prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes. *See, e.g.*, 18 U.S.C. §§ 201(b), 666(a)(2); 41 U.S.C. § 52(2) (“The term ‘kickback’ means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [enumerated circumstances].”). *See also United States v. Ganim*, 510 F.3d 134, 147-149 (2d Cir. 2007) (Sotomayor, J.) (reviewing honest-services conviction involving bribery in light of elements of bribery under other federal statutes). A criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under § 1346 on vagueness grounds.

C

It remains to determine whether Skilling’s conduct violated § 1346. Skilling’s honest-services prosecution, the Government concedes, was not “prototypical.” Brief for United States 49. The Government charged Skilling with conspiring to defraud Enron’s shareholders by misrepresenting the company’s fiscal health, thereby artificially inflating its stock price. It was the Government’s theory at trial that Skilling “profited from the fraudulent scheme . . . through the receipt of salary and bonuses, . . . and through the sale of approximately \$200 million in Enron stock, which netted him \$89 million.” *Id.* at 51.

The Government did not, at any time, allege that Skilling solicited or accepted side payments from a third party in exchange for making these misrepresentations. It is therefore clear that, as we read § 1346, Skilling did not commit honest-services fraud. . . .

For the foregoing reasons, we affirm the Fifth Circuit’s ruling on Skilling’s fair-trial argument, vacate its ruling on his conspiracy conviction, and remand the case for proceedings consistent with this opinion.

Justice SCALIA, with whom Justice THOMAS joins [as does Justice Kennedy as to the parts here], concurring in part and concurring in the judgment.

I agree with the Court . . . that the decision upholding Skilling’s conviction for so-called “honest-services fraud” must be reversed, but for a different reason. In my view, the specification in 18 U.S.C. § 1346 that “scheme or artifice to defraud” in the mail-fraud and wire-

fraud statutes, §§ 1341 and 1343, includes “a scheme or artifice to deprive another of the intangible right of honest services,” is vague, and therefore violates the Due Process Clause of the Fifth Amendment. The Court strikes a pose of judicial humility in proclaiming that our task is “not to destroy the Act . . . but to construe it,” *ante* at 2930. But in transforming the prohibition of “honest-services fraud” into a prohibition of “bribery and kick-backs” it is wielding a power we long ago abjured: the power to define new federal crimes. See *United States v. Hudson*, 7 Cranch 32, 34 (1812).

I

A criminal statute must clearly define the conduct it proscribes, see *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). . . . Our cases have described vague statutes as failing “to provide a person of ordinary intelligence fair notice of what is prohibited, or [as being] so standardless that [they] authoriz[e] or encourag[e] seriously discriminatory enforcement.” *United States v. Williams*, 553 U.S. 285, 304 (2008). Here, Skilling argues that § 1346 fails to provide fair notice and encourages arbitrary enforcement because it provides no definition of the right of honest services whose deprivation it prohibits. In my view Skilling is correct.

The Court maintains that “the intangible right of honest services” means the right not to have one’s fiduciaries accept “bribes or kickbacks.” Its first step in reaching that conclusion is the assertion that the phrase refers to “the doctrine developed” in cases decided by lower federal courts prior to our decision in *McNally v. United States*, 483 U.S. 350 (1987). . . . I agree that Congress used the novel phrase to adopt the lower-court case law that had been disapproved by *McNally*. . . . The problem is that that doctrine provides no “ascertainable standard of guilt,” *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921), and certainly is not limited to “bribes or kickbacks.”

Investigation into the meaning of “the pre-*McNally* honest-services doctrine” might logically begin with *McNally* itself, which rejected it. That case repudiated the many Court of Appeals holdings that had expanded the meaning of “fraud” in the mail-fraud and wire-fraud statutes beyond deceptive schemes to obtain property. 483 U.S., at 360. If the repudiated cases stood for a prohibition of “bribery and kickbacks,” one would have expected those words to appear in the opinion’s description of the cases. In fact, they do not. *Not at all*. Nor did *McNally* even provide a consistent definition of the pre-existing theory of fraud it rejected. It referred variously to a right of citizens “to have the [State]’s affairs conducted honestly,” *id.* at 353, to “honest and impartial government,” *id.* at 355, to “good government,” *id.* at 356, and “to have

public officials perform their duties honestly,” *id.* at 358. It described prior case law as holding that “a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud,” *id.* at 355.

But the pre-*McNally* Court of Appeals opinions were not limited to fraud by public officials. Some courts had held that those fiduciaries subject to the “honest services” obligation included private individuals who merely participated in public decisions, *see, e.g., United States v. Gray*, 790 F.2d 1290, 1295-1296 (6th Cir. 1986) (citing *United States v. Margiotta*, 688 F.2d 108, 122 (2d Cir. 1982)), and even private employees who had no role in public decisions, *see, e.g., United States v. Lemire*, 720 F.2d 1327, 1335-1336 (D.C. Cir. 1983); *United States v. Von Barta*, 635 F.2d 999, 1007 (2d Cir. 1980). Moreover, “to say that a man is a fiduciary only begins [the] analysis; it gives direction to further inquiry. . . . What obligations does he owe as a fiduciary?” *SEC v. Chenery Corp.*, 318 U.S. 80, 85-86 (1943). None of the “honest services” cases, neither those pertaining to public officials nor those pertaining to private employees, defined the nature and content of the fiduciary duty central to the “fraud” offense.

There was not even universal agreement concerning the *source* of the fiduciary obligation—whether it must be positive state or federal law, *see, e.g., United States v. Rabbitt*, 583 F.2d 1014, 1026 (8th Cir. 1978), or merely general principles, such as the “obligations of loyalty and fidelity” that inhere in the “employment relationship,” *Lemire, supra*, at 1336. The decision *McNally* reversed had grounded the duty in general (not jurisdiction-specific) trust law, *see Gray, supra*, at 1294, . . . Another pre-*McNally* case referred to the general law of agency, *United States v. Ballard*, 663 F.2d 534, 543, n. 22 (5th Cir. 1981), modified on other grounds by 680 F.2d 352 (1982), which imposes duties quite different from those of a trustee.¹ See Restatement (Second) of Agency §§ 377-398 (1957). . . .

The indefiniteness of the fiduciary duty is not all. Many courts held that some *je-ne-sais-quoi* beyond a mere breach of fiduciary duty was needed to establish honest-services fraud. *See, e.g., Von Barta, supra*, at 1006 (collecting cases). [Justice Scalia then noted that there were

¹The Court is untroubled by these divisions because “these debates were rare in bribe and kickback cases,” in which “[t]he existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute,” *ante* at 2930–31, n. 41. This misses the point. The Courts of Appeals may have consistently found unlawful the acceptance of a bribe or kickback by one or another sort of fiduciary, but they have not consistently described (as the statute does not) any test for who is a fiduciary.

disagreements about whether there was some additional requirement, such as actual harm, and how any such requirement might be applied differently in public, rather than private, settings.] . . .

In short, . . . [t]he pre-*McNally* cases provide no clear indication of what constitutes a denial of the right of honest services. The possibilities range from any action that is contrary to public policy or otherwise immoral, to only the disloyalty of a public official or employee to his principal, to only the secret use of a perpetrator's position of trust in order to harm whomever he is beholden to. The duty probably did not have to be rooted in state law, but maybe it did. It might have been more demanding in the case of public officials, but perhaps not. At the time § 1346 was enacted there was no settled criterion for choosing among these options, for conclusively settling what was in and what was out.²

II

The Court is aware of all this. It knows that adopting by reference “the pre-*McNally* honest-services doctrine,” *ante* at 2930, is adopting by reference nothing more precise than the referring term itself (“the intangible right of honest services”). Hence the *deus ex machina*: “[W]e pare that body of precedent down to its core,” *ante* at 2928. Since the honest-services doctrine “had its genesis” in bribery prosecutions, and since several cases and counsel for Skilling referred to bribery and kickback schemes as “core” or “paradigm” or “typical” examples, or “[t]he most obvious form,” of honest-services fraud, *ante* at 2930–31, . . . THEREFORE it must be the case that they are *all* Congress meant by its reference to the honest-services doctrine.

Even if that conclusion followed from its premises, it would not suffice to eliminate the vagueness of the statute. It would solve (perhaps) the indeterminacy of what acts constitute a breach of the “honest services” obligation under the pre-*McNally* law. But it would not solve the most fundamental indeterminacy: the character of the “fiduciary capacity” to which the bribery

²Courts since § 1346's enactment have fared no better, reproducing some of the same disputes that predated *McNally*. See, e.g., *Sorich v. United States*, 129 S.Ct. 1308, (2009) (Scalia, J., dissenting from denial of certiorari) (slip op., at 3-4) (collecting cases). We have previously found important to our vagueness analysis “the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out [a] statute in cases brought before them.” *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). I am at a loss to explain why the Court barely mentions those conflicts today.

and kickback restriction applies. Does it apply only to public officials? Or in addition to private individuals who contract with the public? Or to everyone, including the corporate officer here? The pre-*McNally* case law does not provide an answer. Thus, even with the bribery and kickback limitation the statute does not answer the question “What is the criterion of guilt?”

But that is perhaps beside the point, because it is obvious that mere prohibition of bribery and kickbacks was not the intent of the statute. To say that bribery and kickbacks represented “the core” of the doctrine, or that most cases applying the doctrine involved those offenses, is not to say that they *are* the doctrine. All it proves is that the multifarious versions of the doctrine *overlap* with regard to those offenses. But the doctrine itself is much more. Among all the pre-*McNally* smorgasbord-offerings of varieties of honest-services fraud, *not one* is limited to bribery and kickbacks. That is a dish the Court has cooked up all on its own.

Thus, the Court’s claim to “respec[t] the legislature,” *ante* at 2931-32, n. 44 (emphasis deleted), is false. It is entirely clear (as the Court and I agree) that Congress meant to reinstate the body of pre-*McNally* honest-services law; and entirely clear that that prohibited much more (though precisely what more is uncertain) than bribery and kickbacks. Perhaps it is true that “Congress intended § 1346 to reach *at least* bribes and kickbacks,” *ante* at 2931. That simply does not mean, as the Court now holds, that “§ 1346 criminalizes *only*” bribery and kickbacks, *ibid.*

Arriving at that conclusion requires not interpretation but invention. The Court replaces a vague criminal standard that Congress adopted with a more narrow one (included within the vague one) that can pass constitutional muster. I know of no precedent for such “paring down,” and it seems to me clearly beyond judicial power. This is not . . . simply a matter of adopting a limiting construction in the face of potential unconstitutionality. To do that, our cases have been careful to note, the narrowing construction must be “fairly possible,” *Boos v. Barry*, 485 U.S. 312, 331 (1988), “reasonable,” *Hooper v. California*, 155 U.S. 648, 657 (1895), or not “plainly contrary to the intent of Congress,” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988). As we have seen (and the Court does not contest), *no court* before *McNally* concluded that the “deprivation of honest services” meant *only* the acceptance of bribes or kickbacks. If it were a “fairly possible” or “reasonable” construction, not “contrary to the intent of Congress,” one would think that *some* court would have adopted it. The Court does not even point to a *post-McNally* case that reads § 1346 to cover only bribery and kickbacks, and I am aware of none. . . .

I certainly agree with the Court that we must, “if we can,” uphold, rather than “condemn,” Congress’s enactments, *ante* at 2927-28. But I do not believe we have the power, in order to uphold an enactment, to rewrite it. Congress enacted the entirety of the pre-*McNally* honest-services law, the content of which is (to put it mildly) unclear. . . . I would . . . reverse Skilling’s conviction on the basis that § 1346 provides no “ascertainable standard” for the conduct it condemns, *L. Cohen*, 255 U.S., at 89. Instead, the Court today adds to our functions the prescription of criminal law. . . .

[Justice Alito’s opinion concurring in part and in the judgment, and Justice Sotomayor’s opinion concurring in part and dissenting in part, joined by Justices Breyer and Stevens, are omitted. Each of these Justices subscribed fully to the Court’s analysis on the honest services issue.]

Notes and Questions

1. Consider the statutory interpretation dynamic in this area. When the Supreme Court interpreted the mail fraud statute expansively in *Durland*, Congress thereafter ratified the decision by amending the statute. When, in *McNally*, the Court rejected expansive lower court interpretations of the statute, Congress legislatively overturned its decision. What effect(s) do you think this peculiar inter-branch conversation has had on the Supreme Court, or any court, when it considers mail fraud cases? See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *Yale L.J.* 331 (1991). Now comes *Skilling*. Did the Court read *McNally* and its legislative response fairly? Should we expect Congress to respond now? Certainly, the *Skilling* Court envisioned that possibility and seems to be addressing Congress in footnote 44.

2. Note the enforcement issue: The main reason prosecutors and lower courts were open to conflict of interest theories was that proving the actual giving or taking of bribes can be difficult. The Third Circuit noted in *United States v. Panarella*, 277 F.3d 678 (3d Cir. 2002):

Were it easy to detect and prosecute public officials for bribery, the need for public officials to disclose conflicts of interest would be greatly reduced. As long as a public official does not act on a conflict of interest, the conflict of interest by itself poses little threat to the public. One reason why federal and state law mandates disclosure of conflicts of interest, however, is that it is often

difficult or impossible to know for sure whether a public official has acted on a conflict of interest. . . . The only difference between a public official who accepts a bribe and a public official who receives payments while taking discretionary action that benefits that payor . . . is the existence of a quid pro quo whereby the public official and the payor agree that the discretionary action taken by the public official is in exchange for payment. Recognizing the practical difficulties in proving the existence of such a quid pro quo, disclosure laws permit the public to judge for itself whether an official has acted on a conflict of interest.

To sum up, we reject [the] argument that an allegation of bribery or other misuse of office is necessary to sustain a conviction for honest services wire fraud. Rather, for the reasons discussed above, we hold that if a public official fails to disclose a financial interest in violation of state criminal law and takes discretionary action that the official knows will directly benefit that interest, then that public official has committed honest services fraud.

Id. at 697. As the Ninth Circuit similarly noted: “[I]mposing a *quid pro quo* requirement on all §1346 cases”—*i.e.*, requiring that the government specifically show an official act and the improper benefit that the official obtained in exchange for it—“risks being under-inclusive, because some honest services fraud, such as the failure to disclose a conflict of interest where required, may not confer a direct or easily demonstrated benefit.” *United States v. Kincaid-Chauncey*, 556 F.3d 923, 940–41 (9th Cir. 2009).

After *Skilling*, the government did drop several honest services prosecutions, including *United States v. Wittig*, No. 5:03-cr-40142 (D. Kan. Aug. 20, 2010) (indictment had charged two executives of denying Westar Energy their honest services through undisclosed use of corporate perks); *United States v. Anello*, No. 1:08-cr-321 (W.D.N.Y.) (indictment of a former Niagara Falls mayor dropped when there was no evidence of connection between money he had received and his official actions as mayor).

But such cases may prove to be the exception. A study of 600 published decisions under the honest-services statute “reveals that the overwhelming majority of such cases involved [] allegations of a bribe or kickback, or conduct that was, or could have been, charged as a traditional wire/mail fraud or under other federal statutes such as those prohibiting securities fraud, extortion, and bribery.” Mark J. Stein & Joshua A. Levine, *Skilling: Is it really a game-changer for Mail and Wire Fraud Cases?*, 1831 Corp. L. & Practice Course Handbook 933, 938-

39 (2010). And a number of defendant convicted before *Skilling* by juries that had been instructed that a guilty verdict could be based on the very sort of conflict-of-interest theory that the *Skilling* Court thereafter rejected have found their convictions upheld on a “harmless error” analysis. In *United States v. Demizio*, 2012 U.S. Dist. LEXIS 41146 (E.D.N.Y. 2012), Judge Gleeson, while finding harmless error in a case before him, noted a growing list of

decisions that have held *Skilling* errors were harmless where the trial evidence and arguments focused exclusively on bribery or kickbacks. In these cases, even though jurors were not expressly instructed that honest services fraud is limited to bribery or kickback schemes, there was nothing in the record to suggest that the jury's verdict might have been based on anything else. *See United States v. Barraza*, 655 F.3d 375, 382-83 (5th Cir. 2011) (failure to charge on need for bribery or kickback harmless where arguments and evidence focused on bribery rather than conflict-of-interest theory foreclosed by *Skilling*); *United States v. Botti*, 722 F. Supp. 2d 207, 216-17 (D. Conn. 2010) (since indictment, evidence, jury charge, verdict form and argument did not specify a theory of guilt other than bribery, to conclude that jury found the defendant guilty on some other theory "would require pure speculation on the Court's part, and an assumption that the jury acted in an unreasonable manner in contriving some grounds for conviction other than the obvious one clearly supported by the record") []; *see also United States v. Cantrell*, 617 F.3d 919, 921 (7th Cir. 2010) (because the charged scheme "was clearly a kickback scheme, . . . §1346 — even as pared down by *Skilling* — applies"); *cf. Ryan v. United States*, 645 F.3d 913, 918-19 (7th Cir.) (although jury was not charged that honest services fraud is limited to bribery or kickback schemes, a reasonable jury could have convicted on bribery or kickback theory and the inference that its verdict was premised on such a theory "verges on the inescapable") [].

__ F. Supp.2d at __; *see also United States v. Bruno*, 661 F.3d 733 (2d Cir. 2012) (allowing retrial of state senator who was tried and convicted pre-*Skilling* on undisclosed payments theory because government had presented sufficient evidence for a jury to have found a quid pro quo); *United States v. Urciuloi*, 613 F.3d 11, 18 (1st Cir. 2010) (after convictions were overturned because of *Skilling*, defendants were retried and convicted by a properly instructed jury).

If the effect of *Skilling* is simply to have the government prosecute the same cases with the same evidence but to ask the jury to infer that undisclosed payments were “really” a “bribe”

or “kickback,” how much will have *Skilling* accomplished? Perhaps the point is that undisclosed conflicts of interests usually are undisclosed precisely because they are accompanied by bribes or kickbacks.

3. Chapter 6 will discuss how a quid pro quo requirement has been read into other corruption offenses. For now, however, we simply note some of the questions left for lower courts to work out in the wake of *Skilling*. First, need there have been “fiduciary duty” and, if so, what relationships will this term encompass? Courts seem to agree that there needs to be such a duty, but in *United States v. Milovanovic*, 2012 U.S. App. LEXIS 8216 (9th Cir. 2012) (en banc), the Ninth Circuit found that even an independent contractor could have the requisite relationship. It held that “a fiduciary duty for the purposes of the Mail Fraud Statute is not limited to a formal ‘fiduciary’ relationship well-known in the law, but also extends to a trusting relationship in which one party acts for the benefit of another and induces the trusting party to relax the care and vigilance which it would ordinarily exercise.”

Second, need the government prove precisely what a giver expected to receive in exchange for a bribe or kickback, or is it enough that the payment to the official or employee was contrary to the rules or regulations governing that individual’s conduct and was intended to be as such? Third, what result when the unauthorized payment is a mere gratuity, *i.e.*, not a causal factor in a decision making process but a result of it? See *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997) (en banc) (pre-*Skilling* case holding that bribes in violation of state law can support federal fraud prosecution but illegal gratuity cannot). Finally, must the official benefit in some way from the gratuity or other payment? See, for instance, *United States v. Sorich*, 523 F.3d 702 (7th Cir. 2008) (upholding conviction where beneficiaries were third-party political supporters).

The answers given to these questions, or that legislators expect to be given to such questions, may affect the likelihood and nature of the legislative response to *Skilling*. But regardless, there is no question that undisclosed conflicts of interests, no matter how potentially detrimental to a principal’s interest, cannot by themselves support a federal fraud prosecution anymore. Is that good or bad? iminal.”

4. Prosecutors may respond to *Skilling* the way they responded to *McNally*: by trying to reframe targeted scheme as depriving a victim of “property” rather than honest services. Consider the facts in *United States v. Henry*, 29 F.3d 112 (3^d Cir. 1994):

Between 1986 and 1988, Thomas Henry was the Comptroller of the Delaware River Joint Toll Bridge Commission (the "Commission"). The Commission, a bi-state agency, operates and maintains twenty-one bridges spanning the Delaware River between New Jersey and Pennsylvania. Among these bridges are seven toll bridges that generate more than ten million dollars in revenue annually.

The Commission is governed by ten Commissioners, five of whom are appointed by the Governor of New Jersey and confirmed by the New Jersey Senate and five of whom represent Pennsylvania's Governor, Treasurer, Auditor General and Transportation Secretary. Mowry Mike, Pennsylvania's Executive Deputy Auditor General, served as Auditor General Donald Bailey's representative on the Commission between 1986 and 1988. Mike also was a political operative and campaign fund-raiser for Bailey during his unsuccessful runs in 1986 for the Democratic nomination for the United States Senate and in 1988 for re-election as Auditor General.

The charges in the indictment were based on Henry's and Mike's alleged corruption of the process by which banks were chosen to be the depositories of the Commission's toll bridge revenues. The Commission invested the money in short-term certificates of deposit at banks selected through competitive bidding. As the Commission's Comptroller, Henry was responsible for this process and, according to the indictment, had "a fiduciary obligation to deal with Commission funds and other public money in a forthright and honest fashion." He would notify interested banks that the Commission had money it wished to deposit and that they could submit confidential bids to him in writing or by telephone by a certain deadline. After the deadline passed, the funds would be deposited with the bank meeting the Commission's financial requirements that offered the highest interest rate on the certificates of deposit.

According to the indictment, on ten occasions Henry disclosed bid information to Mike and another individual in the Auditor General's office, who in turn disclosed it to a representative of one bank, Bank A. Bank A was thus allegedly able to narrowly outbid the other banks by offering a slightly higher rate of interest and, as a result, received deposits of \$ 34,278,000 in Commission funds. In return, representatives of Bank A allegedly afforded Mike expedited handling on a \$ 50,000 car loan and contributed more than \$ 10,000 to various political campaigns, including Auditor General Bailey's Senate campaign, in which Mike was involved.

Id. at 112-13.

In the wake of *McNally*, and because the conduct predated the passage of §1346, the government could not charge Henry and Mike with depriving the public of honest services. Were the same scenario to happen now, after *Skilling*, could the government charge them under §1346? In the actual case, the government argued that the defendants had defrauded the banks that competed with Bank A of their property interest in a “fair bidding opportunity.” The Third Circuit rejected this theory, finding that although “each bidding bank's chance of receiving property—the deposits if its bid were accepted—was, at least in part, dependent on the condition that the bidding process would be fair,” this condition was “not a traditionally recognized, enforceable property right.” 29 F.3d at 115. Because it had not been charged in the indictment, the Circuit rejected the government’s argument that “Henry's and Mike's scheme also defrauded the Commission of its confidential business information and the right to control how its money was invested.” *Id.* at 114. Had that theory been charged, would it have been proper then, or now? If prosecutors and lower courts are free to respond along these lines to Supreme Court limitations on mail fraud doctrine, can that Court ever do more than simply channel doctrinal development? For the current state of play, see Note, Brette M. Tennenbaum, Framing the Right: Using Theories of Intangible Property to Target Honest Services After *Skilling*, 112 Colum. L. Rev. 359 (2012).

D. JURISDICTION—MAILINGS AND WIRE COMMUNICATIONS

We have come a long way from the early days of the mail fraud statute, when courts often restricted chargeable frauds to those necessarily dependent on the mails. But the need to prove a mailing or wire element in the offense remains. The following cases illustrate the limited constraint this factor continues to exert, proving how far we have moved toward a general “federal fraud” statute. If appellate courts are not closely supervising the nexus between a fraud and a mailing or telephone call, we should not expect a jury to give the matter much attention in its fact-finding. A defense lawyer will not likely get far with the jury by arguing: “OK, perhaps the evidence against my client does suggest a scheme to defraud. But the important thing, I submit, is that none of the charged mailings has the connection to the scheme that the law requires.”

SCHMUCK v. UNITED STATES
489 U.S. 705 (1988)

JUSTICE BLACKMUN delivered the opinion of the Court.

I

In August 1983, petitioner Wayne T. Schmuck, a used-car distributor, was indicted in the United States District Court for the Western District of Wisconsin on 12 counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 1342.

The alleged fraud was a common and straightforward one. Schmuck purchased used cars, rolled back their odometers, and then sold the automobiles to Wisconsin retail dealers for prices artificially inflated because of the low-mileage readings. These unwitting car dealers, relying on the altered odometer figures, then resold the cars to customers, who in turn paid prices reflecting Schmuck's fraud. To complete the resale of each automobile, the dealer who purchased it from Schmuck would submit a title-application form to the Wisconsin Department of Transportation on behalf of his retail customer. The receipt of a Wisconsin title was a prerequisite for completing the resale; without it, the dealer could not transfer title to the customer and the customer could not obtain Wisconsin tags. The submission of the title-application form supplied the mailing element of each of the alleged mail frauds.

Before trial, Schmuck moved to dismiss the indictment on the ground that the mailings at issue—the submissions of the title-application forms by the automobile dealers—were not in furtherance of the fraudulent scheme and, thus, did not satisfy the mailing element of the crime of mail fraud. . . .

II

“The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.” *Kann v. United States*, 323 U.S. 88, 95 (1944). To be part of the execution of the fraud, however, the use of the mails need not be an essential element of the scheme. *Pereira v. United States*, 347 U.S. 1, 8 (1954). It is sufficient for the mailing to be “incident to an essential part of the scheme,” or “a step in [the] plot.” *Badders v. United States*, 240 U.S. 391, 394 (1916).

Schmuck, relying principally on this Court's decisions in *Kann, supra*, *Parr v. United States*, 363 U.S. 370 (1960), and *United States v. Maze*, 414 U.S. 395 (1974), argues that mail fraud can be predicated only on a mailing that affirmatively assists the perpetrator in carrying out his fraudulent scheme. The mailing element of the offense, he contends, cannot be satisfied by a

mailing, such as those at issue here, that is routine and innocent in and of itself, and that, far from furthering the execution of the fraud, occurs after the fraud has come to fruition, is merely tangentially related to the fraud, and is counterproductive in that it creates a “paper trail” from which the fraud may be discovered. We disagree both with this characterization of the mailings in the present case and with this description of the applicable law.

We begin by considering the scope of Schmuck’s fraudulent scheme. Schmuck was charged with devising and executing a scheme to defraud Wisconsin retail automobile customers who based their decisions to purchase certain automobiles at least in part on the low-mileage readings provided by the tampered odometers. This was a fairly large-scale operation. Evidence at trial indicated that Schmuck had employed a man known only as “Fred” to turn back the odometers on about 150 different cars. Schmuck then marketed these cars to a number of dealers, several of whom he dealt with on a consistent basis over a period of about 15 years. Indeed, of the 12 automobiles that are the subject of the counts of the indictment, 5 were sold to “P and A Sales,” and 4 to “Southside Auto.” Thus, Schmuck’s was not a “one-shot” operation in which he sold a single car to an isolated dealer. His was an ongoing fraudulent venture. A rational jury could have concluded that the success of Schmuck’s venture depended upon his continued harmonious relations with, and good reputation among, retail dealers, which in turn required the smooth flow of cars from the dealers to their Wisconsin customers.

Under these circumstances, we believe that a rational jury could have found that the title-registration mailings were part of the execution of the fraudulent scheme, a scheme which did not reach fruition until the retail dealers resold the cars and effected transfers of title. Schmuck’s scheme would have come to an abrupt halt if the dealers either had lost faith in Schmuck or had not been able to resell the cars obtained from him. These resales and Schmuck’s relationships with the retail dealers naturally depended on the successful passage of title among the various parties. Thus, although the registration-form mailings may not have contributed directly to the duping of either the retail dealers or the customers, they were necessary to the passage of title, which in turn was essential to the perpetuation of Schmuck’s scheme. As noted earlier, a mailing that is “incident to an essential part of the scheme,” satisfies the mailing element of the mail fraud offense. The mailings here fit this description. . . .

Once the full flavor of Schmuck’s scheme is appreciated, the critical distinctions between this case and the three cases in which this Court has delimited the reach of the mail fraud statute—*Kann*, *Parr*, and *Maze*—are readily apparent. The defendants in *Kann* were corporate officers and directors accused of setting up a dummy corporation through which to divert profits

into their own pockets. As part of this fraudulent scheme, the defendants caused the corporation to issue two checks payable to them. The defendants cashed these checks at local banks, which then mailed the checks to the drawee banks for collection. This Court held that the mailing of the cashed checks to the drawee banks could not supply the mailing element of the mail fraud charges. The defendants' fraudulent scheme had reached fruition. "It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank." 323 U.S. at 94.

In *Parr*, several defendants were charged, *inter alia*, with having fraudulently obtained gasoline and a variety of other products and services through the unauthorized use of a credit card issued to the school district which employed them. The mailing element of the mail fraud charges in *Parr* was purportedly satisfied when the oil company which issued the credit card mailed invoices to the school district for payment, and when the district mailed payment in the form of a check. Relying on *Kann*, this Court held that these mailings were not in execution of the scheme as required by the statute because it was immaterial to the defendants how the oil company went about collecting its payment. 363 U.S. at 393.

Later, in *Maze*, the defendant allegedly stole his roommate's credit card, headed south on a winter jaunt, and obtained food and lodging at motels along the route by placing the charges on the stolen card. The mailing element of the mail fraud charge was supplied by the fact that the defendant knew that each motel proprietor would mail an invoice to the bank that had issued the credit card, which in turn would mail a bill to the card owner for payment. The Court found that these mailings could not support mail fraud charges because the defendant's scheme had reached fruition when he checked out of each motel. The success of his scheme in no way depended on the mailings; they merely determined which of his victims would ultimately bear the loss.

The title-registration mailings at issue here served a function different from the mailings in *Kann*, *Parr*, and *Maze*. The intrabank mailings in *Kann* and the credit card invoice mailings in *Parr* and *Maze* involved little more than post-fraud accounting among the potential victims of the various schemes, and the long-term success of the fraud did not turn on which of the potential victims bore the ultimate loss. Here, in contrast, a jury rationally could have found that Schmuck by no means was indifferent to the fact of who bore the loss. The mailing of the title-registration forms was an essential step in the successful passage of title to the retail purchasers. Moreover, a failure of this passage of title would have jeopardized Schmuck's relationship of trust and goodwill with the retail dealers upon whose unwitting cooperation his scheme depended. Schmuck's reliance on our prior cases limiting the reach of the mail fraud statute is simply

misplaced.

To the extent that Schmuck would draw from these previous cases a general rule that routine mailings that are innocent in themselves cannot supply the mailing element of the mail fraud offense, he misapprehends this Court's precedents. . . .

We also reject Schmuck's contention that mailings that someday may contribute to the uncovering of a fraudulent scheme cannot supply the mailing element of the mail fraud offense. The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud. The mail fraud statute includes no guarantee that the use of the mails for the purpose of executing a fraudulent scheme will be risk free. Those who use the mails to defraud proceed at their peril.

For these reasons, we agree with the Court of Appeals that the mailings in this case satisfy the mailing element of the mail fraud offenses. . . .

JUSTICE SCALIA, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE O'CONNOR join, dissenting. . . .

The purpose of the mail fraud statute is "to prevent the post office from being used to carry [fraudulent schemes] into effect." *Durland v. United States*, 161 U.S. 306, 314 (1896); *Parr v. United States*, 363 U.S. 370, 389 (1960). The law does not establish a general federal remedy against fraudulent conduct, with use of the mails as the jurisdictional hook, but reaches only "those limited instances in which the use of the mails is *a part of the execution of the fraud*, leaving all other cases to be dealt with by appropriate state law." *Kann v. United States*, 323 U.S. 88, 95 (1944) (emphasis added). In other words, it is mail fraud, not mail and fraud, that incurs liability. This federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur—nor even by one in which a mailing predictably and necessarily occurs. The mailing must be in furtherance of the fraud. . . .

Nor can the force of our cases be avoided by combining all of the individual transactions into a single scheme, and saying, as the Court does, that if the dealers' mailings obtaining title for each retail purchaser had not occurred then the dealers would have stopped trusting petitioner for future transactions. (That conclusion seems to me a non sequitur, but I accept it for the sake of argument.) This establishes, at most, that the scheme could not technically have been consummated if the mechanical step of the mailings to obtain conveyance of title had not

occurred. But we have held that the indispensability of such mechanical mailings, not strictly in furtherance of the fraud, is not enough to invoke the statute.

Notes and Questions

1. In *Schmuck*, the Court focused on the scope of the defendant's operation. And it distinguished *Maze*—its prior foray into the mailing nexus—by framing the horrible roommate's conduct in the earlier case as a series of discrete schemes, each of which ended when he checked out of each motel. What would the result be were facts like those in *Maze* to arise in a case after *Schmuck*, and were the government to frame the conduct as a single comprehensive scheme to fraudulently stay at motels for free? Would the mailings in this new case still be considered “post-fraud”? Indeed, was the allegation of the scope of the fraud in *Schmuck* simply a purely formalistic way around the holding in *Maze*?

2. *Schmuck* also adopts a subjective standard whereby whether the mailing is in furtherance of the fraud depends on the defendant's expectation regarding events in the future. To what extent does a subjective standard allow the government to pitch to the jury what otherwise might seem a one-shot discrete fraud that involved a post-fraud mailing as actually the beginning of long-term scheme? To what extent does this approach allow the government to charge a fraud that would otherwise be time-barred, by claiming that the scheme encompassed mailings that would occur after the primary goal of the fraud had been completed? *See, e.g., United States v. Boisture*, 563 F.3d 295 (7th Cir. 2009).

3. A sustained fraud might offer prosecutors a large selection of qualifying mailings from which to choose—each of which can form the basis of a mail fraud count and perhaps provide venue. In *United States v. Hebshie*, 549 F.3d 30 (1st Cir. 2008), for example, the First Circuit explained how each letter among the ““criss-cross of mailings that would reasonably be expected when false claims are submitted to insurance companies, are processed, and are ultimately paid”” could satisfy the statutory mailing requirement. *Id.* at 36 (quoting *United States v. Morrow*, 39 F.3d 1228, 1237 (1st Cir. 1994)). See Jack E. Robinson, *The Federal Mail and Wire Fraud Statutes: Correct Standards for Determining Jurisdiction and Venue*, 44 *Willamette L. Rev.* 479, 480 (2008) (“My review of virtually all of the reported Supreme Court and courts of appeals mail and wire fraud decisions spanning the past 60 years leads to the inescapable conclusion that the federal judiciary allows federal prosecutors far too much leeway when it comes to determining whether a mail or wire fraud prosecution even belongs in federal court to begin with or, for that

matter, whether it belongs in a particular district (often chosen by federal prosecutors because it is more convenient for the prosecution team and less convenient—and much more costly—for the defendant).”).

4. Although *Schmuck* has led federal courts to be more flexible as to the nature of the nexus between the fraud and a mailing or wire transmission—see *United States v. Cacho-Bonilla*, 404 F.3d 84, 91 (1st Cir. 2005) (“The courts have generously construed the ‘furtherance’ requirement.”)—there are still reversals, including at least one in a recent high-profile case. See Greg Burns, “Kansas Enron” Case Stirs Wrath; In Topeka Class Warfare Simmers Just Below the Surface as Former Utility Executives Go on Trial, *Chi. Trib.*, June 19, 2005, at C1. In *United States v. Lake*, 472 F.3d 1247 (10th Cir. 2007), the government claimed that two executives from Kansas’s largest public utility, Westar Energy, “had conducted a far-reaching scheme to milk the company for all they could through a pattern of fraud and deceit.” *Id.* at 1249. The Court of Appeals overturned the convictions because the charged mailings (reports to the SEC) were both required by law and accurate. In the course of its opinion, the court discussed an early decision by the Supreme Court, *Parr v. United States*, 363 U.S. 370 (1960), on the necessary relationship between the fraud and the mailing:

The scheme in [*Parr*] was the misappropriation of school-district funds for the personal benefit of the defendants. The mailings, including “letters, tax statements, checks and receipts,” were all “legally compelled mailings” related to the assessment and collection of taxes by the school district. *Id.* at 389. The taxes collected, of course, were the source of the funds that were then misappropriated. There could be no doubt that the collection of tax money was necessary to accomplish the defendants’ scheme; after all, if no taxes were collected, there would be no money to misappropriate. Nevertheless, in setting aside the convictions the Court wrote:

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

472 F.3d at 1256 (quoting *Parr*, 363 U.S. at 391-92). Is there anything in the text or

history of the mail fraud statute that justifies the seemingly outcome-determinative role given to the fact that the mailings in question were required by law to be sent?

5. Before *Skilling*, at least one court suggested that scrutiny of the mailing or wire element may also be a way to rein in “honest services” mail fraud prosecutions. In *United States v. Turner*, 551 F.3d 657 (7th Cir. 2008), an Illinois state official (Turner) responsible for supervising a maintenance staff assisted a group of janitors in their fraudulent scheme to get paid for hours they did not work. The charged wire transmission was the direct deposit of two of the janitors’ inflated paychecks. Turner argued “that this use of the interstate wires was a regular part of the janitors’ employment, unrelated to, and therefore not ‘in furtherance of,’ their fraudulent scheme.” *Id.* at 667. The circuit court rejected the argument, with a caveat:

Turner argues that if the direct deposit of a paycheck can satisfy the use of the wires element of wire fraud, then every employee who commits an act of malfeasance on the job and is paid by direct deposit will be guilty of wire fraud, and the reach of the statute will be unlimited. If the conduct at issue involved an honest services fraud alone—not a money or property fraud—we might share this concern. That is, if a fiduciary breach (or other act of employee dishonesty) plus a paycheck directly deposited (or mailed, for that matter) were enough for liability under § 1346’s alternative definition of “scheme to defraud,” then the federal mail- and wire-fraud statutes would potentially reach a vast array of fiduciary and employee misconduct otherwise governed only by state law.

In contrast, here, as we have noted, the evidence established not a deprivation of honest services only but a theft by fraud of money or property. The whole point of the janitors’ scheme—the “money or property” object of their scheme to defraud—was to obtain falsely inflated salaries. Turner provided the supervisory cover for this money-for-nothing scheme. That some of the fraudulently obtained wages were paid by way of direct deposit supplies the “use of the wires” element necessary to make this a federal wire fraud.

551 F. 3d. at 667-68.

Stricter scrutiny of the nexus between a mailing or wire communication and a fraudulent scheme would obviously provide a way to limit the government’s strategic use

of mailings to create venue, multiply the number of counts in an indictment, and perhaps extend the statute of limitations. To what extent ought such scrutiny be used as a means of limiting the government's ability to pursue certain kinds of frauds, i.e. those in which the charged deprivation is of "honest services"?

6. Can honest services fraud go global? In *United States v. Giffen*, 326 F.Supp. 2d 497 (S.D.N.Y. 2004), the defendant was indicted for violation of Foreign Corrupt Practices Act (FCPA), mail and wire fraud, money laundering, and tax evasion. While allowing the FCPA counts to go forward, the district court dismissed the fraud counts. It explained:

The concept of the Kazakh people's intangible right to honest services by their government officials requires definition. *See United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997) (noting that, under Section 1346, a court must first decide the duty owed by a defendant). The indictment does not allege any facts or law regarding the meaning of honest services by Kazakh officials to the Kazakh people. The Government's argument that "the notion that government officials owe a duty to provide honest services to the public is not so idiosyncratically American as to have no application at all to Kazakhstan" is inapposite and begs the question. In a jarring disconnect, the Government acknowledges that "Kazakhstan has sought to derail the investigation and eventual prosecution of this matter by numerous appeals to officials . . . in the executive branch including . . . [the] Departments of State and Justice." Implicit in the Government's observation is the suggestion that Kazakhstan itself is unable to define "honest services" within its own polity.

In effect, the Government urges that American notions of honesty in public service developed over two centuries be engrafted on Kazakh jurisprudence. "While admittedly some . . . countries do not take their [anti-corruption] responsibilities seriously, the correct answer to such a situation is not the extraterritorial application of United States law but rather cooperation between [the appropriate] home and host country . . . authorities." *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.*, 576 F. Supp. 107, 164 (D. Del. 1983). "An argument in favor of the export of United States law represents not only a form of legal imperialism but also embodies the essence of sanctimonious chauvinism." [*Id.* at] 163. While well intentioned, the Government's suggestion that American

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legal standards be exported to Kazakhstan is simply a bridge too far.

326 F.Supp.2d at 507.

To the extent you agree with the court's reasoning, would you change your position if the Kazakh government had supported the prosecution? What if the case involved bribes paid to officials of a different foreign country?

Notes on Inter- vs. Intra-State Communications

1. In *United States v. Photogrammetric Data Services*, 259 F.3d 229 (4th Cir. 2001), the Fourth Circuit explained how, in the wake of 1994 legislation, the mail fraud statute covers, in addition to mailings through the U.S. Postal Service, use of private interstate delivery services, regardless of whether the items are delivered out of state:

Prior to 1994, the mail fraud statute criminalized the use of the United States Postal Service to execute a fraudulent scheme, but had no application to private or commercial interstate carriers. Then, as now, the statute made no distinction between intrastate and interstate mailings, and it had been extended to both as a proper exercise of the Postal Power.

In 1994, however, Congress broadened the application of the mail fraud statute to also criminalize “depositing or causing to be deposited any matter or thing whatever to be sent or delivered by any *private or commercial interstate carrier*” for the purpose of carrying out a scheme or artifice to defraud. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 250006, 108 Stat. 1796, 2087 (1994). Although the amendment was added pursuant to the Commerce Clause power, and was obviously intended to extend the mail fraud statute to reach those defendants who use commercial interstate carriers such as UPS and Federal Express in lieu of the United States Postal Service, Congress added no distinction which would serve to exempt from the statute's intended reach intrastate mailings handled by such private or commercial interstate carriers.

We believe that the unambiguous language of current § 1341 criminalizes all mailings in furtherance of a fraudulent scheme if the mailings are placed with either the United States Postal Service or with other private or commercial mail

delivery services which operate interstate, regardless of whether any particular mailing actually crosses state lines. Had Congress intended to criminalize only interstate deliveries by such interstate private or commercial carriers, and thereby create a different jurisdictional requirement when such carriers are used in lieu of the United States Postal Service, it could easily have done so. For example, the drafters need only have inserted the words “interstate” or “across state lines” immediately after the phrase “sent or delivered.” Instead, Congress elected to use virtually identical language as that dealing with the use of the United States mail Consequently, we find no indication that Congress, in amending a statute which criminalizes depositing things with the United States Postal Service for delivery, interstate or intrastate, intended to limit the extension to private and commercial interstate carriers for only interstate deliveries. On the contrary, we think it obvious that Congress intended to prohibit the use of private and commercial interstate carriers to further fraudulent activity in the same way such use of the United States mail had long been prohibited.

Do you think that this expansion of the mail fraud statute is within Congress’s powers, presumably its Commerce Clause authority?

2. The analysis appears to be different for wire communications, as the following case explains:

UNITED STATES v. PHILLIPS
376 F. Supp. 2d 6 (D. Mass. 2005)

PONSOR, District Judge. . . .

. . . At trial, the government took the position that, in order to satisfy the elements of this offense, it was *not* necessary to present evidence that the pertinent wire communications themselves actually crossed state lines, as long as the communications (whether interstate or intrastate) traveled via an “instrument of an integrated system of interstate commerce,” such as the interstate phone system. . . .

Having now had time to consider the matter further, the court has concluded that the defendants’ view of the matter presents the more accurate picture of the law. . . .

In reaching this conclusion, the court has relied primarily on three considerations.

First, the plain words of the wire fraud statute, 18 U.S.C. § 1343, extend only to situations where the defendant “transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds” for the purpose of executing an artifice or scheme to defraud. No reference is made in the text to mere “use” of the mechanisms of interstate commerce, as is the case with other statutes. The transmission itself must be “in interstate or foreign commerce.”

Second, Congress on two occasions has considered but declined to enact amendments to 18 U.S.C. § 1343 extending the law to cover simple use of an interstate instrumentality. The Crime Prevention Act of 1989, S. 327, 101st Cong. § 4 (1989) and the Crime Prevention Act of 1995, S. 1495, 104th Cong. § 1102 (1995), both contained amendments that would have changed the language of the statute to include the use of a facility of interstate commerce. Specifically, the bills each would have amended 18 U.S.C. § 1343 by:

striking “transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds” and inserting “uses or causes to be used any facility of interstate or foreign commerce.”

The bills would also have changed the heading of § 1343 from “Fraud by wire, radio, or television” to “Fraud by use of facility of interstate commerce.” Although of course the precise inference to be drawn from Congress’ inaction is not clear, this history seems to suggest that Congress was unwilling to take the step that the government would have the court take in this case.

Third, in *United States v. Darby*, 37 F.3d 1059 (4th Cir. 1994), the Court of Appeals held that a prosecution under 18 U.S.C. § 875(c), for transmitting a threatening communication, requires that the communication actually cross state lines. The court held that under that statute “the Government was required to prove that Darby’s phone call crossed a state line” to meet the “jurisdictional peg on which to hang the federal prosecution.” *Id.* at 1067. The language of § 875(c) requires that the defendant “transmit in interstate or foreign commerce” a communication containing a threat. The text, lacking any reference to “instrumentality” or other similar language, is substantively identical to that of 18 U.S.C. § 1343.

In reaching its conclusion, the court is mindful of the First Circuit’s ruling in *United States v. Gilbert*, 181 F.3d 152 (1st Cir. 1999), relied upon by the government, which held that an intrastate communication sent via an interstate instrumentality was sufficient to support a conviction under 18 U.S.C. § 844 (e). That statute, however—unlike both § 875 (c) and § 1343—makes explicit use of “instrumentality” language, stating: “Whoever, through the use of the mail, telephone, telegraph or other *instrument* of interstate or foreign commerce . . . willfully makes any threat” is guilty of a crime. 18 U.S.C. § 844(e) (emphasis supplied). The contrast in this language to the wire fraud statute underlines the weakness of the government’s position here. . . .

It is obvious that Congress has, at times, chosen to make criminal the mere improper use of an instrumentality of interstate commerce; at other times, it has acted more narrowly, making criminal only actual transmissions that themselves occur in interstate or foreign commerce. Although the issue is not crystal clear, the better view is that, in crafting § 1343, Congress opted for a narrower criminal footprint. As such, the government was required to prove beyond a reasonable doubt that the pertinent wire transmissions actually crossed state lines.

Note on Wire-Fraud Jurisdiction

One can’t help but wonder whether Congress will continue to permit this technical detail to derail wire fraud prosecutions. The issue itself has come up in other contexts, drawing congressional response. For example, under an early version of 18 U.S.C. §2252A, which criminalizes receiving child pornography that has been mailed or transported “in interstate commerce,” most circuit courts presumed that pictures transported over the internet had crossed state lines. Nevertheless, in *United States v. Schaefer*, 501 F.3d 1197 (10th Cir. 2007), the Tenth Circuit rejected that presumption and concluded that the prosecution must prove that the particular image crossed state lines. Congress quickly reacted, amending the statute so that “such an assumption will be tenable in future cases.” *United States v. Swenson*, 335 Fed.Appx. 751, 753 (10th Cir. 2009).

E. AN ALTERNATIVE VISION OF LAW DEVELOPMENT

We have seen several actors playing critical roles in the development of mail and wire fraud law: Congress, which first enacted the statutes and then responded to decisions by the Supreme Court; the Supreme Court, which responded to legislative enactments, and to some

extent lower court decisions; and, of course, the prosecutors who picked the cases and decided to deploy innovative theories. For the last forty years, the rough outline of the game has been: prosecutorial innovation, lower court acceptance, Supreme Court intervention, congressional overturning of the Court's decision. Whether *Skilling* sparks a new cycle remains to be seen. Is there anything wrong with this? The following excerpt from an article by Dan Kahan considers federal criminal law generally; yet it seems particularly pertinent the peculiar legislative dynamic explored in this Chapter.

Dan M. Kahan, Is *Chevron* Relevant to Federal Criminal Law?
110 Harv. L. Rev. 469 (1996)

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Notes and Questions

1. In another part of his article, Kahan writes that he would not allow the Justice Department interpretive lawmaking power when certain federalism values are at stake—in order to limit the Department's ability “to substitute federal for local criminal law.” How broadly does this caveat sweep when it comes to the application of his proposal to mail fraud law? To the extent his proposal does apply to mail fraud law, is it indeed more attractive than the common law case development we've explored?

2. Do you agree with Kahan's diagnosis of the judicial lawmaking problem? To what extent does Kahan's proposal reflect normative views about the balance between federal enforcement zeal and restraint? He seems to assume that Main Justice will better internalize the costs of federal prosecutions. Is that necessarily true? To the extent it is true, is that a good thing? For a critique, see Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 U.C.L.A. L. Rev. 757, 803-05 (1999).

3. Another—and quite different—approach would be to use Main Justice to set limits on novel or questionable criminal prosecutions by requiring internal (Main Justice) approval of certain categories of prosecutions that may be especially susceptible to what Kahan calls “adventurous” legal theories. For instance, by internal regulation, Main Justice already must approve criminal civil rights prosecutions (discussed in Chapter 7) and RICO prosecutions

(discussed in Chapter 8) , and Main Justice originates all antitrust and many tax prosecutions. See Richman, *Federal Criminal Law, supra*, at 804-06 (discussing relative infrequency with which Main Justice approval is required). Perhaps there is an argument to be made that Main Justice should approve all “honest services” fraud prosecutions. But Kahan’s proposal is quite different: He would have the Department spell out in advance what theories it would (and hence would not) use in prosecutions under various broad federal laws. Which route do you think is more likely to result in effective restraint on federal prosecutors: (1) requiring internal, private, Main Justice approval before a particular prosecution can go forward, or (2) a public declaration by Main Justice of non-statutory limitations on future prosecutions? With respect to the latter (Kahan’s) approach, do you think that the Department of Justice is likely to bind its own hands in any significant way?