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Modern Mail Fraud: The Restoration of the Public/Private Distinction

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MODERN MAIL FRAUD: THE RESTORATION OF THE PUBLIC/PRIVATE DISTINCTION

John C. Coffee, Jr.*

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I. INTRODUCTION

Over their long history, the mail and wire fraud statutes have gone through repeated periods of rapid expansion and contraction. The 1970s saw the flowering of the "intangible rights doctrine," an exotic flower that quickly overgrew the legal landscape in the manner of the kudzu vine until by the mid-1980s few ethical or fiduciary breaches seemed beyond its potential reach.[1] That doctrine was

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1. For probably the first suggestion that mail and wire fraud statutes were being utilized to support a general federal common law of fiduciary duty and ethical impropriety, see John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117 (1981).

It is obligatory that all articles on mail fraud begin with a citation to Jed Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771 (1980), which is the definitive treatment of the mail fraud statute's early history. As another prefatory matter, it should be understood that this article will generally not distinguish between

radically pruned by the Supreme Court in 1987 in the *McNally* decision,[2] which held that the federal mail and wire fraud statutes reached only those schemes that intentionally sought to deprive their victims of money or property, but not schemes seeking to deprive them merely of intangible rights. But *McNally* failed to drive a stake through the heart of the doctrine. Later that same year, the Court decided that the same statutes did protect victims from schemes to deprive them of intangible property rights.[3] Then, in 1988 Congress seemingly restored the intangible rights doctrine to its previous full scope by enacting 18 U.S.C. § 1346,[4] which broadly defined the critical term "scheme to defraud" (which appears in both the mail and wire fraud statutes) so that it expressly "includes a scheme or artifice to deprive another of the intangible right of honest services." Clearly intended to reverse *McNally*, this statute seemed to give congressional blessing to a body of law that, prior to *McNally*, had amounted in substance to a judicially created federal common law crime. For some, this re-enactment ended the debate and implied that federal courts now had the power to determine on an *ad hoc* basis when conduct so transgressed contemporary moral standards as to amount to a federal crime.[5]

In truth, however, the ebb and flow in the scope of the federal fraud statutes did not stop with the passage of § 1346 in 1988. Rather, by a variety of techniques, federal courts have steadily chipped away at the expansive reach of § 1346. Contemporaneously, a majority of the Supreme Court (albeit a slim majority) has suggested that it intends to limit national authority in favor of enhanced state and local power. Most notably, in *United States v. Lopez*,[6] for the first time in sixty years,[7] the Court discovered that Congress had exceeded the constitutional limits on the scope of the Commerce Clause, which limits required the invalidation of the

the mail fraud statute (18 U.S.C. § 1341) and the federal wire fraud statute (18 U.S.C. § 1343) because for purposes of the underlying conduct that violates these statutes (as opposed to the jurisdictional means) courts have treated them equivalently. *But see infra* note 10 with regard to the different constitutional status of these two statutes.

2. McNally v. United States, 483 U.S. 350 (1987).

3. In *Carpenter v. United States*, 484 U.S. 19 (1987), the Court held that an employer has a property right in keeping confidential and making exclusive use of the content of newspaper columns written by its employee. The decision says little about the source of this property right, but primarily cites prior federal decisions. *Id.* at 25 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Dirks v. SEC, 463 U.S. 646 (1983), and Board of Trade v. Christine Grain & Stock Co., 198 U.S. 236 (1905)). One New York decision, *Diamond v. Oreamuno*, 248 N.E.2d 910 (N.Y. 1969), is cited with regard to the fiduciary duty owed by an agent or employee to the principal or employer, but the court's declaration that the employer possessed a recognized property right that was infringed seems to rest on federal common law.

4. *See* Anti-Drug Abuse Act of 1988, Pub. L. 100–690, Title VII, § 7603(a), 102 Stat. 4181, 4508.

5. For a pessimistic (and premature) assessment that § 1346 "left to the discretion of federal prosecutors the power to decide what constitutes good government and criminal business practices," see Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137, 138 n.7 (1990).

6. 514 U.S. 549 (1995).

7. *See* Jan Crawford Greenberg, Lopez *Case Ignites Debate on Congress's Law-Passing Limits*, CHI. TRIB., Jan. 4, 1996 at 3.

Gun-Free School Zones Act of 1990.[8] In so doing, it noted that "under our federal system, the 'states possess primary authority for defining and enforcing the criminal law.' "[9] Although the federal mail fraud statute rests on a different constitutional foundation from the Commerce Clause,[10] a Court unwilling to permit Congress to protect school children from guns at the cost of invading the realm of state authority might also discover internal (and external) limits on the scope of Congress's authority under the postal power. Several recent commentators have made this argument,[11] focusing particularly on the prevalence of the use of mail and wire fraud to prosecute state and local officials in public corruption and conflict of interest cases.[12] From a "Neo-Federalist" or "dual sovereignty" perspective, the use of a federal statute to reshape the structure of state governance may be thought to upset the "healthy balance" that *Lopez* said it sought to maintain between the states and the federal government.[13]

Although this prophecy that the Supreme Court will curb the federal fraud statutes may yet prove accurate, that is not the direction in which the lower federal courts have been moving. Rather, their concern, as later discussed, has been less

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8. 18 U.S.C. § 922(g) (1994). It is customary to distinguish between "internal" and "external" constitutional limits on the exercise of a power constitutionally accorded to the federal government. *See* GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 182–89 (3d ed. 1996); Kathleen M. Sullivan, Comment, *Dueling Sovereignties*: U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 79, 105–06 (1995). "External limits" are constraints that have their source in some provision or principle of the Constitution different than the power that Congress seeks to exercise. *See* New York v. United States, 505 U.S. 144 (1992). In contrast, *Lopez* was an "internal limits" case, because the Court believed that the constitutional power delegated to Congress under the Commerce Clause did not extend to the point necessary to justify the national prohibition on guns in school zones there at issue. To date, the Court has placed neither external nor internal limits on the postal power, which is the source of authority for the mail fraud (but not the wire fraud) statute. *See infra* notes 151–55 and accompanying text.

9. *Lopez*, 514 U.S. at 561 n.3 (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)).

10. Here, a distinction needs to be recognized between the mail and wire fraud statutes. The latter cannot rest on the postal power and so is subject in theory to the same internal limits on the Commerce Clause as *Lopez* stressed. In addition, the mail fraud statute was amended in 1994 to reach private mailings (i.e., Federal Express, DHL, etc.). *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, Title XXV, § 250006, 108 Stat. 1796, 2087. For a discussion of this amendment, see Peter Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435 (1995). Although private mailings are now expressly covered, congressional authority to reach these private entrepreneurial services presumably rests upon the Commerce Clause. Nonetheless, some courts have rejected—perhaps too quickly—the argument that *Lopez* has any significance for mail fraud prosecutions, because the mail fraud statute rests on the postal power. *See* United States v. Elliott, 89 F.3d 1360, 1363–64 (8th Cir. 1996).

11. *See* George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-*Lopez *Analysis*, 82 CORNELL L. REV. 225 (1997); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153 (1994). Both these highly intelligent articles were written before the Supreme Court's decisions in *Atherton v. FDIC*, 117 S. Ct. 666 (1997), and *Salinas v. United States*, 118 S. Ct. 469 (1997).

12. That prosecutors place extensive reliance on the mail and wire fraud statutes in public corruption cases has been amply documented by others. *See* Moohr, *supra* note 11, at 154 & n.6 (noting that as of December 31, 1990, some 1561 state and local officials then awaited trial, with mail and wire fraud being the primary charges employed in these cases).

13. *Lopez*, 514 U.S. at 552.

with the public corruption cases (which seem seldom to be overturned[14]) than with the private fiduciary cases (where convictions have been regularly overturned).[15] Only in this latter context have federal appellate courts regularly found that the federal fraud statutes were being overextended. Unnoticed by recent commentators, the ironic fact is that federal courts have proven much less willing to tolerate the criminalization of relatively minor transgressions in the private context than they have in the public context.[16]

This dissonance between academic theory and actual practice is striking. What has proven disturbing to appellate courts is not that a local politician has been prosecuted for the undisclosed receipt of gratuities, but that federal prosecutors have sought to expand the scope of the intangible rights doctrine against private persons by propounding open-ended theories of the scope of § 1346's "right to honest services." Unanchored in any recognizable source of federal, state, or common law, the potential reach of § 1346 has troubled courts and has now been curbed by a string of appellate defeats for the government. Yet, no consistent rationale or clear doctrinal lines emerge from all these decisions taken together. Rather, these are cases still searching in a Pirandello-like fashion for a plot. This Article considers several possibly unifying themes and then recommends one that distinguishes sharply between the public and private contexts.

This Article will make positive, normative, and predictive claims about the recent trends in the mail fraud case law, which arguments will be developed in several distinct stages. Section II will examine the development of the intangible rights doctrine before and after the *McNally* decision and the passage of § 1346. In particular, it will examine several recent federal appellate decisions that have reversed mail and wire fraud convictions because the courts concluded that the underlying conduct did not deprive any victim of a right to honest services (even though this same conduct might have been found to have violated the mail and wire fraud statutes in the years before *McNally*). Section III will examine the doctrinal options available to a court that wishes to curb the reach of the mail and wire fraud statutes to avoid overcriminalization. Section IV will recommend and apply a suggested standard under which, in a private fiduciary case, the deprivation of "honest services" must be actionable (although not necessarily criminal) under

14. *See infra* notes 100-30 and accompanying text.

15. *See infra* notes 44-99 and accompanying text. This Article will recurrently distinguish between "public fiduciary" cases and "private fiduciary" cases. It is therefore important to understand that "public fiduciary" cases include prosecutions of private citizens who have sought to bribe or wrongfully influence public officials and employees. *See, e.g.*, United States v. Sawyer, 85 F.3d 713 (1st Cir. 1996) (prosecution of lobbyist for providing small gratuities to state legislators). Correspondingly, "private fiduciary" cases also include the party offering a bribe or undisclosed side payment and are not limited to persons occupying a formal fiduciary relationship, but include any person occupying a position of trust and confidence that gives rise to a legal duty.

16. *Compare* United States v. Jain, 93 F.2d 436 (8th Cir. 1996) (mail fraud does not reach receipt of side payments of gratuities by a private fiduciary) *with* United States v. Espy, Crim.A. No. 97–0335 (RMU), 1997 U.S. Dist. LEXIS 20772, at *12, 1997 WL 795807, at *6 (D.D.C. Dec. 23, 1997) (receipt of gratuities by Secretary of Agriculture within scope of mail fraud).

applicable state law or an independent federal statute. The basic doctrinal justification for such a limiting standard is that courts today may not look to federal common law in order to explicate an ambiguous concept (such as "right to honest services")—except when congressional intent is clear to recast the balance of federal/state authority. In particular, resort to federal law is disfavored when state legal standards already apply to the same actors. Finally, Section IV will argue that important policy justifications support interpreting and applying the mail and wire fraud statutes more aggressively in the public context than in the private context.

This Article's central doctrinal claim that the "right to honest services" under § 1346 should be defined by state law or an independent federal statute has been suggested by others, but faces a doctrinal obstacle in that several cases have already held that the term is to be defined by federal common law.[17] This Article will suggest that these cases need to be (and can be) reinterpreted. At least since *Atherton v. FDIC*,[18] it now seems clear that federal common law will rarely be permitted by the Supreme Court to supply the applicable rule of decision. Although the legislative history of § 1346 can be read to express an intent to endorse a federal common law rule, this Article will suggest that this intent is limited to the public fiduciary context. In the floor debate leading up to the enactment of § 1346, the most ardent congressional champions of overruling *McNally* focused exclusively on the public fiduciary context and endorsed the then embryonic concept that the Guarantee Clause of the United States Constitution gave Congress the constitutional authority to regulate state and local corruption.[19] At the time, this was a novel idea that had just been articulated in an about-to-be published law review article that they cited.[20] Although it is very debatable indeed whether § 1346 can or should rest on a Guarantee Clause foundation, Congress did make a "clear statement" in § 1346 that it intended to assert federal authority within the public fiduciary context. At present, unless the tide of Neo-Federalism advances still further, this is sufficient to establish federal authority. Thus, it follows that § 1346 should be construed according to federal common law, to the extent necessary to understand and implement this rationale. But this rationale requires that we look to federal common law standard *only in the case of public fiduciaries*. Whether one accepts or rejects the Guarantee Clause thesis, the legislative history still only supports use of federal common law to the extent necessary to purge public corruption.

The point then is that federal common law should override state law in the judicial construction of § 1346 only to the extent necessary to protect the special

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17. *See* United States v. Frost, 125 F.3d 346, 366 (6th Cir. 1997); Morda v. Klein, 865 F.2d 782 (6th Cir. 1989).

18. 117 S. Ct. 666 (1997).

19. See Article IV, Section 4 of the U.S. Constitution, which provides that "the United States shall guarantee to every State in this Union a Republican Form of Government. . . ." The legislative history of § 1346 is reviewed *infra*, text and notes at notes 166-80.

20. *See* Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CALIF. L. REV. 367 (1989).

rights that Congress saw as falling within the Guarantee Clause's protections. Here, that means that the citizenry's right to be protected from public corruption stands on higher ground and can receive a more liberal interpretation. But outside this sphere, the normal principles of statutory construction require the court to look to state law.[21] This is particularly true in connection with the determination of the duties owed by agents, employees, officers, and directors, because the Supreme Court has recurrently stressed that the governance of business organizations is to be determined by state law—unless Congress has clearly and explicitly said otherwise.[22]

In short, this Article's thesis is that § 1346 should be construed according to state law in the case of private fiduciaries, but according to federal common law in the case of public fiduciaries. This is both a positive and a normative claim, as this Article will also argue that such a differential makes sense in terms of the criminal law's traditional concerns about fair notice, selective enforcement, and the separation of powers.

II. THE TRENDS IN THE CASE LAW

Other articles (including by this author) have traced the rise of the "intangible rights" doctrine in both the public and private sectors. For purposes of this survey, it is necessary only to identify the high water mark of that doctrine in order to have a convenient point of comparison against which to measure the recent cases.

A. *The Flood Tide of Intangible Rights: The Pre-*McNally *Case Law*

Two well-known cases, each in the Second Circuit, show the flood tide at its crest: (1) in the private sector, *United States v. Bronston*,[23] and (2) in the public sector, *United States v. Margiotta*.[24] Notably, each decision was also accompanied by a persuasive dissent.

1. *The Private Sector:* United States v. Bronston

In *Bronston*, the defendant was both a state Senator and a partner at a prominent New York law firm. His law firm had recently represented the minority investors

21. In *Atherton v. FDIC*, 117 S. Ct. 666 (1997), the Court reversed a Third Circuit opinion that had looked to federal common law to set the standards under a federal statute (12 U.S.C. § 1821(k)) which held directors of federally insured banks personally liable "for gross negligence [or] similar conduct ... that demonstrates a greater disregard of a duty" (than gross negligence). Holding that state law governs, the Court broadly implied that federal common law is today disfavored. In particular, arguments about the need for uniform standards justifying a federal rule were expressly rejected. *See also* O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994).

22. *See, e.g.*, Kamen v. Kemper Financial Services, Inc., 500 U.S. 90 (1991); Virginia Bankshares v. Sandberg, 501 U.S. 1083 (1991); CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987); Daily Income Fund, Inc. v. Fox, 464 U.S. 523 (1984); Cort v. Ash, 422 U.S. 66 (1975).

23. 658 F.2d 920 (2d Cir. 1981).

24. 688 F.2d 108 (2d Cir. 1982).

in Bus Top Shelters, Inc. ("Bus Top") in the private placement transaction by which the investors had acquired their interests in Bus Top, but the law firm did not otherwise represent Bus Top. As its name suggests, Bus Top held an interim franchise from the City of New York to build and maintain bus shelters. A personal client of Bronston's approached him to represent a rival contender for that franchise, which the client controlled. Bronston asked his firm to take on the representation of this rival contender, Convenience and Safety Corp. ("C&S"), but the firm declined because of its prior representation of the minority investors in Bus Top. Nonetheless, Bronston secretly undertook to advise his client and C&S on a personal basis, working on C&S's bidding and public relations strategy, attending meetings, commenting on draft letters sent by C&S to city officials, and ultimately billing C&S some $12,500 for these efforts (which fee he never shared with his law partners). In addition, whether in his capacity as a state senator or as C&S's attorney, he sent a letter on his official stationery as a state senator to an official in the City Comptroller's office, which argued that "a renewal of [Bus Top's] franchise would not appear to be in the public interest."[25] Although Bronston was privy to information about Bus Top's own bidding strategy, no evidence was presented at trial that he had misappropriated confidential information from Bus Top and communicated it to C&S or others.

At the conclusion of the trial, the court's charge to the jury focused only on Bronston's breach of duty to the Bus Top investors. The court charged the jury that:

> a lawyer . . . owes a duty . . . to the clients of his law firm to act with the utmost good faith and loyalty toward the firm's clients and to fully disclose any participation in a conflicting relationship with . . . mutually exclusive business interests of a competitor of the firm's clients which would in any way injure, impair, interfere with or frustrate the business interests of the client in order to promote the mutually exclusive interests of the competitor.[26]

Read literally, this charge seemingly criminalizes ever representing clients whose interests conflict. For example, if Bronston were a tax lawyer who provided clever (or even pedestrian) tax advice to two competitors, it could be argued that assistance to one side necessarily hurt the other. Moreover, the facts of *Bronston* suggest that even a lack of candor or good faith to a former client, which had been represented only in a one-shot transaction, also violates the federal fraud statutes.

More importantly, Bronston's defense that it was necessary to show some use of the defendant's fiduciary position to establish liability was rejected by both the District Court and the Second Circuit. In *United States v. Dixon*,[27] Judge Henry Friendly had earlier found that "a scheme to *use* a private fiduciary position to

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25. *Bronston*, 658 F.2d at 925.

26. The charge to the jury in *Bronston* is quoted in Coffee, *supra* note 1, at 131–32.

27. 536 F.2d 1388 (2d Cir. 1976).

obtain direct pecuniary gain is within the mail fraud statute,"[28] but then noted that "an effort to avoid disclosure, although a breach of a statutory obligation, was hardly a 'scheme or artifice to defraud.' "[29] Missing was the element of actual or intended harm to the fiduciary. *Bronston* seemed implicitly to overrule *Dixon*'s requirement of actual or intended harm, because the evidence in *Bronston* showed only the fact of a knowing conflict, not any use of fiduciary position or unfair self-dealing (such as a fiduciary transacting business on unfair terms with a client or beneficiary). *Bronston* thus crossed a critical threshold: before it, cases in which there was only a conflict of interests, but neither a transaction between the fiduciary and the client nor any misappropriation of information or property by the fiduciary from the client, had been considered merely "constructive fraud," which did not amount to the type of "actual fraud" that transgressed the federal mail and wire fraud statutes.[30]

After *Bronston*, cases in the Second Circuit quickly expanded the category of fraud to include corporate improprieties that were actually intended to benefit shareholders. For example, in *United States v. Weiss*,[31] a mid-level corporate officer at Warner Communications, Inc. arranged, with the knowledge and consent of his superiors, to create an off-books cash slush fund, which was then used to fund "illicit cash rebates" and for other unstated purposes.[32] No evidence suggested that "cash was misappropriated from Warner,"[33] and the defendant acted pursuant to instructions from corporate superiors. One surmises that the slush fund may have been used for improper purposes but still in order to maximize shareholder wealth. Nonetheless, citing *Bronston* and its progeny, the Second Circuit said that "the statute is violated when a fiduciary fails to disclose material information 'which he is under a duty to disclose to another under circumstances where the non-disclosure *could* or *does* result in harm to another.' "[34] In the panel's view, disclosure had to be made to the shareholders, even though the size of the fund was seemingly immaterial to Warner. This clearly reversed *Dixon*'s earlier emphasis on actual harm or injury. As Judge Ralph Winter has observed in a dissent, this creates a new crime: corporate improprieties.[35]

The bottom of this slippery slope was probably reached with *United States v. Wallach*,[36] in which the principal defendant was convicted of mail fraud for billing

28. *Id.* at 1399 (emphasis added).

29. *Id.* at 1400.

30. *See, e.g.*, United States v. Rabbit, 583 F.2d 1014, 1024–25 (8th Cir. 1978); United States v. McNieve, 536 F.2d 1245 (8th Cir. 1976); Epstein v. United States, 174 F.2d 754, 766 (6th Cir. 1945).

31. 752 F.2d 777 (2d Cir. 1985); *see also* United States v. Siegel, 717 F.2d 9 (2d Cir. 1983).

32. *Weiss*, 752 F.2d at 781.

33. *Id.* at 783.

34. *Id.* at 784 (citing *Siegel*, 717 F.2d at 14).

35. *See Siegel*, 717 F.2d at 24 (Winter, J., dissenting) ("In effect, a new crime—corporate improprieties—which entails neither fraud nor even a victim, has been created.").

36. 935 F.2d 445 (2d Cir. 1991). The conviction was, however, reversed because of perjured testimony and the prosecution's failure to respond to it.

a corporate client for legal work in connection with a public offering of securities (when in fact the work was for lobbying efforts on the company's behalf). This format was requested by the company (which knew full well the nature of the work Wallach had performed on its behalf). Nonetheless, the Second Circuit sustained the prosecution's novel theory that this mischaracterization of the bill deprived the company shareholders of their "intangible 'right to control' how [the company's] money was spent."[37] As the Second Circuit panel in *Wallach* saw it:

> A stockholder's right to monitor and to police the behavior of the corporation and its officers is clearly a property interest .... Indeed ... the right to complete and accurate information is one of the most essential sticks in the bundle of rights that comprise a stockholder's property interest.[38]

Clearly, this statement was an imaginative construct of federal common law, as state law did not provide shareholders with any informational rights that entitled them to receive, or have access to, such records; nor do the federal securities laws generally entitle them to disclosure about immaterial corporate expenditures.[39]

So construed, federal mail fraud became a crime without a clear victim. Even collective self-deceit became arguably a federal crime.

2. *The Public Fiduciary:* United States v. Margiotta[40]

Joseph Margiotta was not in any standard sense a public official. Rather, he was the Chairman of the Republican Committees of both Nassau County and the Town of Hempstead.[41] As such, he was the classic political boss. In that role, he continued a patronage system, begun by his predecessors (in both parties), whereby an insurance broker would be designated "broker of record" for Nassau County and in return would rebate fifty percent of its commissions on county-related business to brokers and others politically allied with Mr. Margiotta. Although Mr. Margiotta himself received some of these apparent kickbacks, neither self-dealing nor personal profit were necessary elements of the government's legal theory. Rather, the government alleged that Margiotta deprived the citizens of Nassau County "(1) of the right to have the affairs of the Town, County and State conducted honestly, free from corruption, fraud and dishonesty, and (2) of the right to Margiotta's honest and faithful participation in the governmental affairs of the Town, County, and State."[42] Under this broader theory, the failure to

37. *Id.* at 461.

38. *Id.* at 463.

39. On somewhat different facts, the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-1 to 78dd-2, 78ff(a) (1994), might well be violated by a false billing scheme, but this statute does not itself require disclosure to shareholders.

40. 688 F.2d 108 (2d Cir. 1982).

41. *Id.* at 112.

42. *Id.* at 114.

disclose a political motive for governmental actions, or indeed any "participation in governmental affairs" for undisclosed self-interested reasons, could be deemed a violation of the mail and wire fraud statutes, even in the absence of any illicit profits or personal gain.

The overreach in this theory seems obvious and invades even the sphere of the First Amendment. For example, Presidents regularly appoint large campaign donors to ambassadorships to small countries, proclaiming them the "best man for the job" (while clearly knowing otherwise). Although common, such an affirmative misrepresentation actually goes beyond Mr. Margiotta's simple failure to disclose his similar motive to obtain campaign funds. At the time, *Margiotta* chiefly attracted notice because it extended the "intangible rights" doctrine from an elected or appointed official to a person holding de facto control over public officials. Less noticed was the fact that the decision at least purported to look to New York State law, not federal common law, in determining that defendant Margiotta was fiduciary to the citizens of his jurisdiction.[43]

In any event, five years after *Margiotta*, the *McNally* case involved essentially similar facts and a similar theory—and was decisively rejected by the Supreme Court. Shortly thereafter, § 1346 was enacted, setting the stage for the subsequent judicial developments discussed below.

B. The New Case Law on Private Fiduciaries

The recent decision that most clearly draws a line between public and private fiduciaries is *United States v. Frost.*[44] The facts in *Frost* involve a diploma mill. Defendant Frost was both the Chairman of the Department of Engineering Science and Mechanics at a University of Tennessee campus and also the owner and president of a private science research firm.[45] Several of Dr. Frost's graduate students worked for NASA or the Department of Defense and were in a position to exercise influence over the awarding of research contracts. The government alleged, and the jury agreed, that Dr. Frost and his co-defendants developed and pursued a "degrees for contracts" scheme pursuant to which they enabled certain students to obtain graduate degrees "through significant plagiarism and with a minimum of effort."[46] In return, each student defendant allegedly "would abuse his or her position with the government to secure ... lucrative government research contracts" for Frost's research firm.[47] In its indictment, the government

43. There is some irony in this point, because the Second Circuit borrowed several decisions from a string citation of cases in an article that this author had written after the district court decision that criticized that holding. These cases were cited to suggest how ineffably broad the common law rule was. Nonetheless, the Second Circuit panel cited them as the prevailing law. *See id.* at 125 (citing Coffee, *supra* note 1, at 147).

44. 125 F.3d 346 (6th Cir. 1997).

45. *Id.* at 352.

46. *Id.* at 353.

47. *Id.*

characterized this arrangement both as a scheme to defraud the federal government (by the NASA and Defense employees who were Dr. Frost's students) and as a scheme by Dr. Frost to defraud the University of Tennessee.

Reviewing the convictions, the Sixth Circuit split the difference, reversing the convictions of the students (on the grounds that insufficient evidence showed that they had caused the government to award contracts to Dr. Frost's firm), but upholding the convictions of the professors for defrauding their University. Noting that § 1346 was intended to reverse *McNally*[48] and agreeing that § 1346 applied to private fiduciaries,[49] the Sixth Circuit found that Frost and his co-employees had breached a duty to the University of Tennessee by deceiving other University employees so as to cause the University to award undeserved academic degrees.[50] This conduct, it found, deprived the University of its intangible right to Frost's honest services. Still, the Sixth Circuit sharply narrowed the standard applicable to § 1346 claims in the case of "non-public officials."[51] Merely depriving the private fiduciary of the employee's honesty was insufficient. Rather, the prosecution must prove "that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach."[52] In formulating this standard, the Sixth Circuit principally relied upon a pre-§ 1346 District of Columbia Circuit case, *United States v. Lemire*,[53] which framed the test as whether "the defendant might reasonably have contemplated some concrete business harm to his employer stemming from his failure to disclose the conflict along with any other information relevant to the transaction."[54] In *Lemire*, the defendant had participated in an outside joint venture, which resulted in a conflict of interest in violation of the employer's express policies. Although the D.C. Circuit upheld the conviction on its facts, it stressed that mere proof of the employer's loss of loyalty or a fiduciary breach alone was insufficient.[55]

The significance of *Lemire* lies largely in the fact that it was a pre-*McNally* case. Because the D.C. Circuit decided *Lemire* at the point when the "intangible rights doctrine" was at its fullest flowering, the case shows that even if § 1346 is deemed simply to reverse *McNally*, it does not follow that there are no limits on the restored intangible rights doctrine. Relying in part on an earlier article by this author,[56] *Lemire* drew an ends/means distinction: if the fiduciary breach was a

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48. *Id.* at 364 (citing McNally v. United States, 483 U.S. 350 (1987)).

49. *Id.* at 364–65.

50. *Id.* at 369.

51. *Id.* at 365–69.

52. *Id.* at 368. Whether the "reasonably should have foreseen" language impermissibly holds a defendant criminally liable for negligence is a separate question and one not really present on the facts of *Frost*.

53. 720 F.2d 1327 (D.C. Cir. 1983).

54. *Id.* at 1337.

55. *Id.* at 1336–37.

56. *Id.* at 1336, n.10 (citing John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the 'Evolution' of a White Collar Crime*, 21 AM. CRIM. L. REV. 1 (1983)).

means to deprive the employer of some benefit or cause it some injury, then the breach would violate the mail fraud statute, but not otherwise.[57] But unless such an end was contemplated, even "an intentional failure to disclose a conflict of interest, without more, is not sufficient evidence of the intent to defraud an employer necessary under the [mail and] wire fraud statutes."[58]

Although both *Frost* and *Lemire* upheld the convictions on their facts, other cases applying the same standard have reversed convictions. Recent appellate cases include:

1. *United States v. DeFries*.[59] Defendants were elected officials of a small union of professionals (the Marine Engineers' Beneficial Association) that merged with a larger, blue collar union (the National Maritime Union). Upon the merger's effectiveness, the officials "received severance payments totaling almost $2 million, even though they immediately assumed roughly equivalent positions in the newly merged union's leadership."[60] The severance plan was approved by the old union's Executive Committee, which received the advice of highly competent outside counsel. The indictment charged that the defendants took steps to conceal from the union membership the adoption, terms, and triggering event of the severance plan, such as not disclosing the plan in the minutes of the Committee's meetings and by instructing others "not to reveal any details of the plan."[61] Following the plan's disclosure after the merger, there was substantial protest within the union, and a contested election ensued at which insurgents unseated the incumbents. According to the evidence at trial, the defendants took a number of steps to resist their ouster over a series of union elections, including (1) soliciting and collecting unmarked and unsealed ballots and voting them in favor of their own interests, and (2) tampering with sealed ballots in order to stuff the ballot box. The District of Columbia Circuit left no doubt that tampering with ballots or "coercively" obtaining ballots from union members would constitute a deprivation of the defendants' "honest services" in violation of § 1346.[62] But it drew the line at the trial court's instruction to the jury, which permitted the jury to consider "soliciting and collecting unsealed ballots and voting them in favor of the defendant's interests" as evidence of a scheme to defraud.[63] Even though it found that this activity violated both the union's constitution and by-laws and also the

57. *Id.*

58. *Id.* at 1337. Of course, this is also what *Dixon* held in the Second Circuit. *See supra* text and notes at notes 28–29.

59. 129 F.3d 1293 (D.C. Cir. 1997).

60. *Id.* at 1297.

61. *Id.* Interestingly, the facts of *DeFries* in the labor context very much parallel the facts of *United States v. Dixon* (discussed *supra* note 27) in the corporate context. *Dixon* inolved undisclosed loans to the CEO that the board had approved and *DeFries* involved undisclosed compensation that the union's executive committee had approved. Both defendants won on appeal.

62. *Id.* at 1304–05.

63. *Id.* at 1305.

civil provisions of the Labor-Management Reporting and Disclosure Act, the District of Columbia Circuit concluded that it did not "amount to a dishonest service."[64] In short, the conduct was assumed to breach defendants' fiduciary duties to union members, but this alone was not enough.[65] Relying on *Lemire* and *Frost*, it distinguished a fiduciary breach from active dishonesty (such as vote tampering) and found the former insufficient where it threatened no loss or harm to the union memebers.[66]

2. *United States v. Cochran.*[67] Defendant Cochran was the head of municipal bond underwriting for a sizable broker-dealer firm. In connection with these transactions in which his firm represented the municipal issuer, he received secret side payments from financial institutions (in one case $489,241 and in another $100,000). The government asserted that the relationship between the issuer and the underwriter was a fiduciary one, thereby entailing a duty to disclose side payments, but the Tenth Circuit panel responded that "the government could not inform us of any statute, regulation, common law or contractual provision that required disclosure of the fee."[68] Because the underwriting transaction had closed before the secret fee was received (which was paid for services in investing the bond proceeds with the financial institution that paid the fee), the Tenth Circuit decision can be defended on the grounds that the two transactions were separable and that Cochran was no longer acting as a fiduciary with regard to the latter transaction. At the least, the decision shows how a court that is sympathetic to a defendant can construe the scope of a fiduciary relationship parsimoniously. Still, even in the absence of a fiduciary relationship, the Tenth Circuit recognized that a misleading omission could be actionable as fraudulent, but only "if it is intended to induce a false belief and resulting action to the advantage of the misleader and the disadvantage of the misled."[69] Although the basis for the Tenth Circuit's resistance to the government's theory is not entirely clear, its core belief seems to have been that the disclosure, even if legally required, would not have made a difference because it was immaterial.[70]

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64. *Id.*

65. *Id.* at 1305–06. Quoting *United States v. Lemire*, 720 F.2d 1327, 1335 (D.C. Cir. 1983), the panel said the breach of fiduciary duty must be " 'accompanied by a misrepresentation or non-disclosure that is intended or is contemplated to deprive the person to whom the duty is owed of some legally significant benefit.' " *Id.* at 1306.

66. *Id.* at 1306 ("Even if it violates appellants' fiduciary obligations under federal law and union rules, proxy-voting, so long as it is not done coercively or against the voters' wishes, is not necessarily 'dishonest.' ").

67. 109 F.3d 660 (10th Cir. 1997).

68. *Id.* at 665. The Court also noted the "lack of public or private regulation concerning reinvestment broker fees during the pertinent time period," *id.*, and characterized the governments disclosure theory as "standardless." *Id.* at 667.

69. *Id.* at 665 (quoting Emery v. American General Finance, Inc., 71 F.3d 1343, 1348 (7th Cir. 1995)).

70. The panel makes this clearest in its statement that a § 1346 prosecution requires a showing of "fraudulent intent and a showing of materiality." *Cochran*, 109 F.3d at 667. A factual problem with this line of defense on the facts of *Cochran* is that a representative of the issuer (Mr. Trent) testified at trial that he expected the underwriter "to work for free on the reinvestment phase." *Id.* at 666.

Although it is possible to read *Cochran* narrowly as saying that side payments received after the main transaction has closed are immaterial, the decision is also susceptible to a broader reading that so long as the parties have agreed to the terms of a transaction, there is no harm in agents receiving additional fees from other persons (at least absent special facts suggesting some unusual harm). As discussed below, this broader interpretation would significantly cut back on the traditional reach of the mail and wire fraud statutes.

3. *United States v. Jain.*[71] The side payment issue is also at the core of the *Jain* case, in which a psychologist and his personal corporation were convicted for receiving payments from a psychiatric hospital for referring patients to that hospital. Reversing the convictions, the Eighth Circuit found that the requisite "scheme to defraud" did not exist where the doctor "provided quality psychological services" and "each hospitalized patient required hospitalization."[72] Thus, it found a lack of "tangible harm."[73]

This theory that there was no tangible harm can easily be disputed. Perhaps if the hospital had not paid a kickback to Dr. Jain, the hospital would have reduced its charges to patients. It might have competed for the patients' business based on price, rather than through covert payments to the patients' agent, the referring doctor.

Underlying the Eighth Circuit's decision is a clear sense that § 1346 should not be applied as strictly in the private sector as in the public sector. Conceding that the "literal language of § 1346 extends to private sector schemes to defraud another of the right to honest services," the panel still warned that "the transition from public to private sector in this context raises troublesome issues."[74] Without even a reference to the legislative history of § 1346, the opinion then stressed the greater injury "when official action is corrupted by secret bribes or kickbacks."[75] When this happens, "the essence of the political contract is violated."[76] But in the private context, the court said that "most relationships are limited to more concrete matters," and hence "actual harm to the victims' tangible interests" must be shown.[77] This comes perilously close to making a legislative judgment about the need for a criminal prohibition. Still, as will be argued later, this may be substantially the judgment that Congress itself made in enacting § 1346.

Yet, even if the private and public contexts should be sharply distinguished, it does not necessarily follow that the line should be drawn at the point that *Jain* draws it. Specifically, side payments do not merit general protection from the law of fraud on the economically dubious rationale that no one was harmed. Indeed,

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71. 93 F.3d 436 (8th Cir. 1996).
72. *Id.* at 441.
73. *Id.*
74. *Id.* at 441–42.
75. *Id.* at 442.
76. *Id.*
77. *Id.*

one of the most traditional mail fraud prosecutions was that of the corporate buying agent who receives a commercial bribe (or side payment) to buy the product of Supplier A instead of that of Supplier B.[78] Often, the two products were priced exactly the same, and hence it might be said in *Jain*'s language that there was no "tangible harm" to the corporation. The practical advantage of the mail fraud statute was that it spared prosecutors from having to prove financial injury by allowing the prosecutor to focus instead on the breach of fiduciary duty. Although both *Cochran* and *Jain* can be distinguished from the case of the corporate employee who receives an undisclosed bribe to effect corporate decision-making, they collectively cast a shadow over the continued ability of the mail fraud statute to reach such side payment cases. Viewed in the aggregate, there is an economic injury in such side payments and kickbacks because the supplier could have alternatively competed for the same business by offering price discounts. Thus, while *Cochran* and *Jain* properly emphasize the difference in contexts, it is not clear that they are drawing the correct line in searching for proof of financial loss.

4. *United States v. Walters*.[79] Norby Walters was a sports agent who sought to (and did) secure the business of some 58 college athletes while they were still enrolled in school by advancing them money and other valuables in return for signing exclusive agency contracts with him. This conduct was in flagrant defiance of NCAA rules, and it caused several universities to pay scholarship funds to athletes who had become ineligible as a result of his agency deals. Noting that Walters' aim was to represent the athletes in legitimate transactions with professional sports teams, the Seventh Circuit found that this conduct did not amount to a scheme to defraud where it only inflicted a loss on the universities as an unintended (if perhaps foreseeable) by-product of his activities.[80] There is perhaps some tension between *Walters* and *Frost* in that forfeited scholarships were not an actionable loss in *Walters*, but illegitimate degrees were viewed as wrongfully obtained property in *Frost*. Still the key difference is probably one of nexus: Frost could only succeed by causing the university to issue degrees for bogus research, while Walters had no desire to see the athletes rendered ineligible or their scholarships invalidated. In any event, neither Walters nor the student athletes owed a clear fiduciary duty to the universities involved, as neither were formal employees or agents who would have owed a duty of honest services to the victimized universities.

5. *United States v. D'Amato*.[81] Armand D'Amato, the brother of the New York Republican Senator, was convicted of seven counts of mail fraud essentially for

78. *See, e.g.*, United States v. Bryza, 522 F.2d 414, 422 (7th Cir. 1975) (holding that defendant's failure to disclose kickbacks and consulting fees from supplier resulted in breach of his fiduciary duties); United States v. George, 477 F.2d 508, 512 (7th Cir. 1973) (determining that buyer defrauded his employer when he received kickbacks from supplier).

79. 997 F.2d 1219 (7th Cir. 1993).

80. *Id.* at 1227.

81. 39 F.3d 1249 (2d Cir. 1994).

disguising the nature of the services that he provided to Unisys Corporation. Hired in fact as a lobbyist to influence his brother, he "structured his billings to conceal from those in control of corporate funds the nature of his relationship with Unisys and the fact that his actual services involved lobbying his brother."[82] The government proceeded on two distinct legal theories: (1) the "right to control" theory that his concealment deprived Unisys and its shareholders of their ability to control corporate funds, and (2) a "false pretenses" theory under which D'Amato knew that the written reports on Senate proceedings that he contracted to provide (as a cover story for his billings) would never be provided in fact.[83] The Second Circuit rejected both theories on the ground that "the evidence of criminal intent was insufficient."[84]

The "right to control" theory had previously been upheld in *United States v. Wallach*[85] and "is predicated on a showing that some person or entity has been deprived of potentially valuable economic information."[86] The withholding of such information is thus deemed fraudulent to the extent that it "could impact on economic decisions."[87] The *D'Amato* panel re-interpreted this questionable extension of mail fraud to make it clear that it did not reach the case of "a corporate agent who in good faith believes that his or her (otherwise legal) misleading or inaccurate conduct is in the corporation's best interests."[88] As justification, it gave obvious examples, such as an oil geologist who hides the location of his drilling efforts or a takeover law firm that conceals its identity so as not to signal the corporation's plans to make a takeover.[89] It also indicated the limitations on this doctrine: namely (i) that management made an otherwise lawful decision, and (ii) that it was acting "in good faith in making, and did not personally profit, from the decision."[90]

Interestingly, *D'Amato* was particularly clear that the "right to control" is "defined by (i) state law concerning access to the company's books and records and the fiduciary obligations of management and (ii) the law of fraud concerning corporate information that is public."[91] Yet, the concept that the Second Circuit is defining in *D'Amato* based on New York law is "property," not the "right to honest services." This is because *D'Amato* is a pre-§ 1346 decision that did not need to construe the "right to honest services." Although it can be argued that the

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82. *Id.* at 1252.
83. *Id.*
84. *Id.*
85. 935 F.2d 445 (2d Cir. 1991). Even before *D'Amato*, the "right to control" theory had been limited in *United States v. Mittelstaedt*, 31 F.3d 1208 (2d Cir. 1994), which essentially involved a public fiduciary and is discussed *infra* at note 100.
86. *Wallach*, 935 F.2d at 462–63.
87. *Id.*
88. *D'Amato*, 39 F.3d at 1257.
89. *Id.* at 1257 n.5, 1258.
90. *Id.* at 1258.
91. *Id.*

"right to honest services" should be defined as a matter of federal common law, this draws a senseless distinction between § 1341 (the mail fraud statute), which uses the term "property" and § 1346, which indicates that a scheme to defraud can include a deprivation of the "right to honest services." If one looks primarily to state law to define "property," one arguably should similarly look there to understand the "right to honest services."

6. *United States v. Miller.*[92] *Miller* is another case involving a close and parsimonious reading of the scope of the fiduciary duty, owed in this case by an attorney to his clients. Although the principal defendant in this case was the Speaker of the New York State Assembly, the government's allegations related entirely to his private conduct representing investor clients in connection with the conversion of a rent-controlled housing project into a cooperative. Having successfully represented the tenants in this conversion, defendant Miller was approached by a group of sophisticated private investors to represent them in connection with purchasing occupied units in the project. While representing these investors, Miller also acquired units in the project, and the government alleged that Miller and a co-defendant thereby "wrongfully seized for themselves an economic benefit belonging to the [clients]."[93] In traditional fiduciary terms, this sounded like a "corporate opportunity" case: the fiduciary acquired property in which the principal to whom it owed the duty (i.e., the clients) had a tangible interest and expectancy. The problem was that the relationship between attorney and client was, according to the Second Circuit, "ill-defined at best."[94] The lead client in fact testified that he had no expectation that Miller would not acquire apartments, considered the transaction a "considerable success," and was satisfied with the defendant's representation.[95] Given the lack of any contractual agreement between the attorney and his clients, the government was forced to rely on traditional New York agency law that an agent "must account for any profits realized in connection with his representation of the principal."[96] According to the government's theory, this duty to account gave rise to a constructive trust that covered the apartment units acquired by the defendants.[97] The Second Circuit rejected this theory, finding that a constructive trust was a remedial concept, not a doctrine of substantive law, and hence did not rise to the level of a "property interest" that was required under *McNally.*[98]

Because the conduct in *Miller* occurred prior to the passage of § 1346, it can be

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92. 997 F.2d 1010 (2d Cir. 1993). The author served as one of the attorneys to the defendants in this case. *Id.* at 1011.

93. *Id.* at 1017.

94. *Id.*

95. *Id.* at 1015. This client also testified that "he would not have any problem retaining Miller to represent him again." *Id.*

96. *Id.* at 1018.

97. *Id.*

98. *Id.* at 1018–21 (citing McNally v. United States, 483 U.S. 350 (1987)).

argued that the outcome would have been reversed if § 1346 had been applicable.[99] But cases like *Cochran* and *Jain* suggest otherwise. Indeed, in stressing the ambiguous relationship between the attorneys and their sophisticated clients, and the fact that the clients were satisfied with the attorneys' services, the Second Circuit left at least some room in a future case to find that a § 1346 violation would not have been established on similar facts.

C. The New Case Law on Public Fiduciaries

The last three years have also witnessed important cases on public fiduciaries.[100] Of these, the two most important cases are *United States v. Sawyer*[101] and the Fifth Circuit's *en banc* decision in *United States v. Brumley.*[102] Collectively, these decisions resolve that, despite the claims of the Neo-Federalists that Congress cannot regulate state governance, § 1346 may constitutionally be applied to schemes by state or local governmental officials to deprive citizens of their honest services as public fiduciaries.[103] But they have not agreed whether federal law or state law determines the scope of the right to honest services.[104]

In *United States v. Sawyer*,[105] the defendant was a lobbyist for the largest life insurance company in Massachusetts. In that capacity, he regularly wined and dined, and played countless rounds of golf with, the state legislators who served on the Massachusetts Legislature's Joint Insurance Committee.[106] This conduct violated two Massachusetts statutes: a "gift statute" that forbade gifts above $100

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99. The decision suggests that there was a "generalized failure to accord the . . . [clients] honest and faithful services," but that this was not sufficient to satisfy *McNally* or constitute "property." *Id.* at 1020.

100. In addition to the cases discussed in the following text, two other reversals of convictions in cases involving public fiduciaries merit notice. First, in *United States v. Mittelstaedt*, 31 F.3d 1208 (2d Cir. 1994), the Second Circuit reversed a conviction of a local planning board official who had an undisclosed interest in applications that came before his board. The official had, however, little discretionary power and could not vote on any application, and the relevant events largely predated the passage of § 1346.

Second, in a closer case, the First Circuit has also reversed a conviction for "honest services" fraud of an IRS employee who conducted unauthorized searches of taxpayer files (apparently for no personal financial benefit). *See* United States v. Czubinski, 106 F.3d 1069 (1st Cir. 1997). The First Circuit found such conduct to amount to no more than a violation of IRS work rules and emphasized that the confidential information was not disclosed to third parties. The defendant appears to have had a vague plan to use his access to this information to assist the Klu Klux Klan, but he never implemented his plan. Because mail fraud is an inchoate crime which even an attempt to misappropriate confidential information can violate, this was a closer case, but one in which even the potential for injury was not closely approached. *See also* cases cited *infra* at note 112.

101. 85 F.3d 713, 722 (1st Cir. 1996).

102. *Brumley* has a substantial history. *See* 59 F.3d 517 (5th Cir. 1995), *withdrawn*, 79 F.3d 1430 (5th Cir. 1996), *aff'd* 116 F.3d 728 (5th Cir.) (en banc), *cert. denied* 118 S. Ct. 625 (1997).

103. In addition to *Sawyer* and *Brumley*, recent decisions in the Fourth and Eleventh Circuits have also upheld the application of § 1346 to state officials for breach of the duty of honest services. *See* United States v. Bryan, 58 F.3d 933, 939–43 (4th Cir. 1995); United States v. Waymer, 55 F.3d 564, 572 (11th Cir. 1995).

104. *See* text and notes *infra* at notes 152-60.

105. 85 F.3d 713 (1st Cir. 1996).

106. *Id.* at 720–21.

per year in the aggregate to state public officials by "legislative agents,"[107] and a "gratuity statute" that prohibited giving to a legislator anything of " 'substantial value . . . for or because of any official act performed or to be performed' by that person."[108] The evidence clearly provided a sufficient basis for the jury (which convicted the defendant) to find violations of both statutes. On appeal, however, the First Circuit said that the gift statute established only "a prophylactic civil prohibition that addresse[d] appearances of—but not actual—corruption."[109] Although in context the violation of the gratuity statute would have supported the conviction, the First Circuit concluded that the jury instructions did not permit it to determine on which theory the jury had convicted, with the result that the conviction had to be reversed.[110]

More importantly, the First Circuit found that the mail fraud statute, even after § 1346, "does not encompass every instance of official misconduct that results in the official's personal gain."[111] Not covered, it said, was the receipt of gratuities in connection with "non-discretionary administrative duty."[112] Reading § 1346 narrowly, it distinguished between a fiduciary breach and the actual deprivation of honest services, implying that the former did not necessarily amount to the latter. Receipt of grease payments did not necessarily violate § 1346, it concluded, "where the conduct does not actually deprive the public of its right to [a public official's] honest services, and it is not shown to intend that result."[113]

Yet, the facts of *Sawyer* went well beyond this special exception for gratuities paid to obtain non-discretionary services by low level officials, as the facts of the case showed high level lobbyists wining and dining state legislators who possessed considerable discretionary authority. Still, because the gift statute also covered grease payments paid for non-discretionary actions and the trial court had charged the jury that the violation of either of the two statutes could support a mail fraud conviction, the First Circuit concluded that it was obliged to overturn the conviction. In the course of so doing, it emphasized clearly that "proof of a state law violation is not required for conviction of honest services fraud,"[114] and that "[a] public official has an affirmative duty to disclose material information to the public employer."[115] It summarized its understanding of § 1346 in what was clearly a statement of federal law:

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107. *Id.* at 726–27 (citing Mass. Gen. L. Ch. 268B, § 6).

108. *Id.* at 729–30 (citing Mass. Gen. L. Ch. 268A, § 3).

109. *Id.* at 728.

110. *Id.* at 730–31. The First Circuit did find, however, that there was sufficient evidence upon which the jury could find an intent to defraud to permit the case to be retried. *Id.* at 742.

111. *Id.* at 725.

112. *Id.* The First Circuit cited two Eighth Circuit cases—*United States v. Rabbitt*, 583 F.2d 1014, 1026 (8th Cir. 1978), and *United States v. McNeive*, 536 F.2d 1245, 1246 (8th Cir. 1976)—for this proposition.

113. 85 F.3d at 725.

114. *Id.* at 726.

115. *Id.* at 724.

> When an official fails to disclose a personal interest in a matter over which she has decision-making power, the public is deprived of its right either to disinterested decision-making itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act.[116]

This interpretation arguably exempts not only grease payments, but also influence peddling where a legislator seeks to intervene with another public body (over which the legislator does not have "decision-making power") to protect or favor a constituent or special interest for undisclosed and self-interested reasons. Ironically, this was exactly the behavior involved in the *Margiotta* case,[117] where the defendant political party boss had no formal power over the county officials, but did enjoy much influence. To be sure, *Margiotta* can be distinguished to the extent that the court there charged the jury that it could find the defendant breached a fiduciary duty to its citizens only if the defendant enjoyed a control relationship over the state officials that he influenced.[118] But there is a fine line at best between the facts of *Margiotta* and those in a case that *Sawyer* relied upon, *United States v. Rabbit*.[119] In *Rabbitt*, a state legislator "introduced" an architectural firm to "other public officials responsible for awarding state architectural contracts, in return for a ten percent commission on any work awarded."[120] In *Margiotta*, the county party chairman (who was not even an elected official) instructed the County Executive as to whom to name the county's Broker of Record (in return basically for kickbacks to his party).[121] In all likelihood, the phone calls from the state legislator in *Rabbitt* and the party chairman in *Margiotta* sounded very much alike to the public officials receiving them.

While *Sawyer* emphasized that a state law offense was not necessarily sufficient to establish mail fraud, the Fifth Circuit, writing *en banc*, has taken the mirror-image opposite position in *United States v. Brumley*, holding that a state law violation is a necessary element of a mail fraud prosecution.[122] By itself, this was a significant reversal of prior law, which had seen the scope of mail fraud as determined by federal common law.[123] However, *Brumley* also raised and left open a potentially even more invasive inroad on the traditional law of mail and wire fraud: whether the failure to deliver these "honest services" must amount to a *criminal* offense under the relevant state law. At a minimum, *Brumley* indicates that mere improperties or ethical breaches will be insufficient. "If the employee

116. *Id.*

117. United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982).

118. *Id.* at 125.

119. 583 F.2d 1014 (8th Cir. 1978).

120. *Id.* at 1026.

121. *Margiotta*, 688 F.2d at 113–14.

122. 116 F.3d 728, 733 (5th Cir. 1997) ("We decide today that the services must be owed under state law and that the government must prove in a federal prosecution that they were in fact not delivered.").

123. *See* cases cited *supra* note 17.

renders all services his position calls for . . . [then] there has been no deprivation of honest services."[124]

The defendant in *Brumley* was clearly more culpable than the defendant in *Sawyer*. As a hearing attorney with adjudicatory authority for the Texas Workers' Compensation Board, defendant Brumley received loans from attorneys who had cases before him. To this extent, the defendant in *Brumley* held discretionary authority and was not a mere ministerial functionary (which was the fact pattern that at least nominally worried the *Sawyer* court). Also, real benefits (not mere gratuities in the form of drinks, meals, and rounds of golf) had been paid in *Brumley*.[125]

But these factual differences do not explain the difference in rationales. The *Sawyer* holding does little to protect its defendants on a retrial (that is, a revised indictment could simply omit the "gift" statute and rely on the "gratuity" statute). In *Brumley*, although the conviction was upheld on the ground that state law had indeed been violated by the defendant, the inroad on future cases is considerably more substantial: in the absence of a statute (or possibly a well-established common law rule), the defendant cannot be convicted of "honest services" fraud.[126] Seemingly, this means that the defendant in *Margiotta* could not be convicted in a future case, as no statutory violation was pled in that case and the common law does not normally make a political party chairman a fiduciary to all citizens of the jurisdiction.

Indeed, *Brumley* signals *Margiotta* is no longer necessarily good law in another respect. With clear intent, *Brumley* shifts the focus from a deprivation of the public's right to honest services to a deprivation of the public employer's right to such services.[127] Under this view, § 1346 enacts not a rule of federally mandated full disclosure to the public, but only federally mandated loyalty to the employer. In *Brumley*'s view, the public employer seems to be entitled to no more or less than the private employer.

At this point, *Brumley*'s probable overbreadth becomes discernible. If § 1346 was intended to reverse *McNally* and restore the intangible rights doctrine, this interpretation of § 1346 represents only a very partial and incomplete restoration. In addition, if § 1346 was intended to rest upon and implement the Guarantee Clause, it cannot do so under *Brumley*'s rationale when its very application depends upon the existence of a state statute (or at least an established state legal

124. *Brumley*, 116 F.3d at 734.

125. The defendant in fact received $86,730 in wire transfers from one such attorney. *Id.* at 731.

126. Of course, if there is also a provable property loss, the defendant can be convicted even under *McNally* and without regard to § 1346. Only the scope of "honest services" fraud is here being assessed.

127. *Brumley*, 116 F.3d at 734–35 ("We pause to put aside the frequent invocations of a deprivation of *citizens'* rights to honest services. The reference to such 'rights' of citizens has little relevant meaning beyond a shorthand statement of a duty rooted in state law and owed to the state employer. Despite its rhetorical ring, the rights of citizens to honest government have no purchase independent of rights and duties locatable in state law.") (citations omitted).

rule). Thus, a state wishing to escape the protections of the Guarantee Clause has merely to repeal its relevant statute or otherwise override its prior common law.

Clearly, the Fifth Circuit was significantly influenced by the Federalist argument that Congress should not be legislating "good government" standards for the states.[128] Arguably, this is consistent with earlier decisions that have looked to state law to define what constitutes a qualifying interest in "property" for purposes of mail and wire fraud, but it is also inconsistent with the Supreme Court's decision in *United States v. Carpenter*[129] that seemingly defined the employee's duty to the employer as a matter of federal law. To date, *Brumley*'s impact outside the Fifth Circuit seems to have been minimal. Later decisions have continued to uphold indictments, even for simple gratuities, and have relied upon the federal common law understanding of § 1346 as intended to restore the intangible rights doctrine.[130]

D. An Initial Evaluation

Factually, the leading common denominator across both the recent public and private fiduciary cases is an aversion to criminal liability based only on the receipt of gratuities.[131] But beneath this factual agreement, the two lines of cases have disagreed as to their rationale. A frequent statement in the private fiduciary cases is that the scope of § 1346 is far narrower in the private context than in the public context, and at least one case has expressed doubt that § 1346 reaches private fiduciaries when there is no deprivation of money or property.[132] Implicit in this consensus is a common understanding that § 1346 was intended to reverse

128. The decision expressly rejects any construction of § 1346 "as an enforcer of federal preferences of 'good government' with attendant potential for large federal inroads into state matters . . . ." *Id.* at 735. It also cites approvingly Brown, *supra* note 11. *Id.* at 733 n.1.

129. 484 U.S. 19 (1987).

130. *See* United States v. Espy, Crim. A. No. 97–0335 (RMU), 1997 U.S. Dist. LEXIS 20772, at *4–6, *25, *28, 1997 WL 795807, at *1–2, *5 (D.D.C. Dec. 23, 1997) (upholding indictment of former Secretary of Agriculture for undisclosed receipt of gratuities); *see also* United States v. Sun-Diamond Growers of Cal., 1998 U.S. App. LEXIS 5277 (D.C. Cir. 1998) (upholding conviction under § 1346 where defendant schemed to defraud corporation of right to honest services of corporate employee); United States v. Farley, No. 97 CR 0441, 1997 U.S. Dist. LEXIS 17671, at *18–19, 1997 WL 695680, at *6 (N.D. Ill. Oct. 31, 1997) (upholding indictment in part, under § 1346, where defendants were charged with "ghost payrolling scheme" at county treasurer's office); United States v. Stewart, No. Crim.A. 96–583, 1997 U.S. Dist. LEXIS 16947, at *12, 1997 WL 688815, at *4 (E.D. Pa. Oct. 23, 1997) (holding that state and citizens deprived of "honest services of its public servants who regulate insurance companies doing business within its borders"); United States v. Bolden, No. 97 C 0218, 1997 U.S. Dist. LEXIS 12252, at *13, 1997 WL 473240, at *4 (N.D. Ill. Aug. 14, 1997) (denying motion to dismiss indictment count because allegation could support claim that defendant used "his official position to require payment in exchange for after-hours access to [public property] . . . and/or providing 'security' ").

131. Even this generalization is not invariably correct. In *Espy,* 1997 U.S. Dist. LEXIS 20772, at *2, *16–28, 1997 WL 795807, at *1, *4–8, the indictment of the former Secretary of the Agriculture was upheld based simply on the alleged receipt of undisclosed gratuities and an alleged affirmative misrepresentation that they had not been received.

132. *See* United States v. Jain, 93 F.3d 436, 441–42 (8th Cir. 1996) (noting, without defining "outer limits of the private sector rights to 'honest services,' " that "[w]hen there is no tangible harm to the victim of a private scheme, it is hard to discern what intangible 'rights' have been violated"), *cert. denied,* 117 S. Ct. 2452 (1997).

McNally and restore the old intangible rights doctrine, which doctrine most decisions have assumed is to be interpreted as a body of federal common law, at least as against public fiduciaries.

In contrast, *Brumley* views federalism concerns as limiting the reach of § 1346 so that it only enforces duties that exist under state law. In truth, this approach may create an even greater disparity between the public and private contexts, because every state prohibits the bribery of public officials,[133] but many do not criminalize commercial bribery.[134] At a stroke, *Brumley* also reverses the traditional pre-*McNally* view that public officials owe a duty of disclosure to the public. In its view, this is only rhetorical embroidery, as public employees owe their duties in fact only to their public employer, not the citizenry. *Margiotta* and similar decisions would thus seem reversed under this standard, because the defendant in *Margiotta* was not a public employee and arguably owed no recognized duty under state law to the county of which he was Republican chairman. The difference in the formulation of the duty of disclosure under *Brumley* is not merely semantic. Under *Brumley*, disclosure by an interested decision-maker to a board or commission that was staffed by highly partisan members of the same political party might be sufficient, while under earlier law a broader disclosure to the public was seemingly required. Thus, if § 1346 was intended to mandate a federal standard of conflicts-of-interest disclosure applicable to public officials, it is left in tatters after *Brumley*.

III. THE AVAILABLE OPTIONS: AN INVENTORY

Although recent cases show a general disinclination to treat the private and public fiduciary identically, no single rationale or doctrinal standard runs through these cases. In part, this is because there are problems and shortcomings with most standards and a combination of standards may be necessary. Nonetheless, the following concepts regularly appear in the cases and constitute an inventory of the options available to courts:

A. Materiality

A number of courts have required that the misrepresentation or omission by the fiduciary be material.[135] This standard supplies an obvious means by which to

133. For a fifty state survey finding every American jurisdiction to prohibit "bribery in the public sector," *see* Brown, *supra* note 11, at 275 & n.431. At least thirty eight states also had conflict of interest legislation. *Id.* at 275.

134. In *Perrin v. United States*, 444 U.S. 37, 44 (1979), the Supreme Court surveyed state laws regulating commercial bribery as of the early 1960s. It found that only fourteen states generally prohibited commercial bribery, while another twenty-eight states had narrower statutes outlawing corrupt payments to influence private actors in some special contexts (such as sports or banking). Although the number of states generally prohibiting commercial bribery has probably increased, it is also likely that many states have not enacted a comprehensive prohibition.

135. *See, e.g.*, United States v. Cochran, 109 F.3d 660, 665 (10th Cir. 1997) (holding that § 1346 requires showing of fraudulent intent and materiality); United States v. Mittelstaedt, 31 F.3d 1208, 1217 (2d Cir. 1994)

exclude petty or *de minimis* violations. For example, take the case of an employee who calls (via an interstate phone call) his employer to report (falsely) that he is ill and will be taking the day off. In fact, the employee goes to a baseball game, and the employer incurs the expense of hiring an office temporary or paying another employee for overtime work. Although there is a misrepresentation and some minor, but foreseeable, economic damage, it seems likely that this misrepresentation is immaterial. To this extent, a materiality standard guards against overcriminalization.

But a problem remains with this standard. What is the denominator against which materiality is to be judged? If in *Frost* the defendant had arranged to award only one academic degree for a non-existent or plagiarized research or had done so for non-economic motives (possibly favoring a lover or family member), would the defendant now have a materiality defense?[136] Would a chief financial officer who makes a several million dollar annual salary have a materiality defense about the receipt of a $50,000 side payment to prefer one supplier over another? If so, is this an equitable standard when the same payment to a lower paid employee would be material? Possibly the best way out of this dilemma is to define materiality in terms of a standard that looks to whether the disclosure by the agent of the omitted information would have been reasonably likely to have caused the principal not to rely on the agent's services in the transaction or to replace the agent generally.[137] Still, to the extent this standard permits criminal liability for side payments, it could reverse the result in cases such as *Jain* or *Sawyer* (at least if the jury found the nondisclosure material). Hence, although it provides some protection, a simple materiality standard probably favors the prosecution in comparison to other possible standards.

B. The Actual Harm Standard

Well before *McNally* or the passage of § 1346, the District of Columbia Circuit in *United States v. Lemire*[138] adopted the standard of whether the "defendant might reasonably have contemplated some concrete business harm to his employer

("To be material, the information withheld must be of some independent value or must bear on the ultimate value of the transaction.").

136. *Frost* emphasized that a professor "owes a fiduciary duty to protect the property of his employer university, just like any other employee." United States v. Frost, 125 F.3d 346, 367 (6th Cir. 1997). "Awarding degrees to inept students, or to students who have not earned them," it added, "will decrease the value of degrees in general." *Id.* But will this reputational injury to the University result from only a single undeserved degree, or is it necessary to turn the department into a diploma mill (as defendant Frost seems to have done)? Professors who have sometimes passed marginal students (as I admit having done) may read this passage in *Frost* with anxiety and resolve to be more honest in the future.

137. However, in *Mittelstaedt*, discussed *supra* note 100, such a liberalized standard was rejected in favor of a standard that required the omitted information to show the unfairness of the transaction. *Mittelstaedt*, 31 F.3d at 1218.

138. 720 F.2d 1327 (D.C. Cir. 1983).

stemming from his failure to disclose the conflict along with any other information relevant to the transaction."[139] Other cases in the Second Circuit and elsewhere have used very similar language focused on whether "actual harm" occurred or was contemplated.[140] A number of recent decisions have looked to this standard, because it insulates the defendant caught in a undisclosed, but basically harmless, conflict of interest. For example, a lawyer who has represented clients with conflicting interests without disclosure to either is in the position of the defendant in *Bronston*. But under this "actual harm" standard, the attorney would not automatically be liable; however, the jury could convict the same defendant if it found that he was intending to misappropriate information from one client in order to aid the other.[141]

Nonetheless, there are at least two problems with this standard. First, it has no clear exception for *de minimis* violations. Thus, the employee in our earlier hypothetical who falsely calls in sick to attend a baseball game may have violated the wire fraud statute if the employee contemplated that the employer would incur some expense or loss as a result of the employee's absence. This problem can be corrected, however, by simply overlaying as an additional element the requirement that a material misrepresentation or omission be made. Second, the "actual harm" standard works relatively poorly in the case of the public fiduciary. Consider the case of a legislator who receives a stream of payments to oppose legislation hostile to the insurance industry. The legislator may sincerely believe that the legislation is ill-advised, but the bribery is no less corrupt as a result. The point is simply that "actual harm" (or any similar concept, such as "concrete business harm") does not work in the context of public decision-making. Instead, because we cannot meaningfully measure "harm" in this context (at least in the same concrete way that we can in private economic transactions where there is gain or loss), conflicts of interest and side payments need to be disclosed or forbidden as a prophylactic matter.

C. Deprivation of Honest Services

While the "actual harm" standard predates *McNally*, a post-*McNally* route to a similar end is to parse the language of § 1346 closely and ask whether the receipt of a side payment, or the failure to disclose a conflict, necessarily results in a deprivation of honest services. This focus on the services provided in fact allows

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139. *Id.*

140. *See, e.g.*, United States v. Von Barta, 635 F.2d 999, 1006 n.14 (2d Cir. 1980) (holding that § 1341 requies actual fraud: government must show defendant's specific intent to defraud and that "some actual harm or injury was at least contemplated); Epstein v. United States, 174 F.2d 754, 765 (6th Cir. 1949) (holding that to establish scheme to defraud under mail fraud statute, there must be proof of actual fraud).

141. This is the holding in *Carpenter v. United States*, 484 U.S. 19 (1987), which deemed the exclusive possession of material non-public information to be a property right (seemingly under federal common law) that tipping by the employee deprived the employer of his right to honest services.

the court to disregard conflicts, undisclosed interests, and side payments. A number of recent decisions have used this route,[142] as it semantically justifies overlooking lesser conflicts and benefits. Under this formula, if the defendant employee has performed the same services—no more, no less—that a totally honest employee would have provided, there has been no deprivation of honest services even if a conflict or a side payment was not disclosed.

The problem with this theory is simply that it proves too much. Essentially, it justifies the court in looking *ex post* at the terms or outcome of a transaction to determine if the principal was fraudulently deceived by its agent. In effect, terms that appear consistent with the market prove the agent's loyalty. Often, however, it will be impossible to determine (with at least the requisite certainty required for the criminal law) whether the agent could have negotiated better terms if the agent's loyalty had not been compromised. Also, in the public context, it is seldom possible to determine if there has been harm or a loss of services because the public official's decision-making calculus is far more complex than that of the value-maximizing private actor. As a result, this formula is less a test than a grant of fairly standardless discretion to the fact-finder. Indeed, because the basic advantage in § 1346's theory of "honest services" fraud was to permit the prosecutor to escape the constraint of having to prove a loss of money or property, this test in its strongest form takes us back full circle to judging whether the terms of the transaction were fair (that is, whether there was a loss of money or property). If so, "honest services" fraud adds nothing to the prosecutor's arsenal, and this interpretation thus trivializes § 1346.

D. Violation of State Law

Brumley's requirement that there must be a state law violation has considerably different implications for the private and public contexts. Although the Fifth Circuit reserved the question of whether the violation had to be criminal under state law, this issue makes a critical difference in the private context, but has relatively little importance in the public context. In the private context, a limitation to criminal law violations would emasculate § 1346. Although many (but far from all) states have a commercial bribery statute, few other state criminal law norms would apply to private business conduct. The law of agency and of fiduciary duties has basically evolved through the common law process and has been only partially codified in the "safe harbor" provisions that most modern corporation statutes now set forth in order to create a mechanism by which self-dealing transactions can be sanitized. State disclosure standards in the private context are generally civil in character, and the great bulk of fiduciary law is similarly civil.

However, if *Brumley* is read to recognize the violation of a well-established

142. *See e.g.*, United States v. DeFries, 129 F.3d 1293, 1306 (D.C. Cir. 1997); United States v. Czubinski, 106 F.3d 1069, 1076–77 (1st Cir. 1997); United States v. Brumley, 116 F.3d 728, 733–34 (5th Cir. 1997).

common law norm as a triggering event for purposes of § 1346, then the mail and wire fraud statutes would continue to reach most private fiduciary breaches. Virtually every state jurisdiction in the United States has civil decisions citing the Restatement of Agency or otherwise requiring disclosure of a conflict by the agent to the principal. To this extent, *Brumley* would curb the mail and wire fraud statutes only modestly in the private fiduciary context (if non-criminal law violations count). That is, the "corporate improprieties" cases[143] and the "right to control" cases[144] would be eclipsed, because they do not rest on a true corporate law foundation, but were rather an invention of the federal courts. Classic fiduciary breaches, however, would remain criminal under the primary federal fraud statutes.

In contrast, *Brumley* could have a devastating impact on the public fiduciary context. To be sure, all states have a bribery statute, and to this extent *Brumley* would make bribery in violation of state law a federal offense. As a practical matter, the Travel Act already accomplishes this, assuming that a state line is crossed.[145] But the broader disclosure obligations set forth in *Margiotta*, *Mandel*, and other "intangible rights" cases would be overturned, because the common law has never developed a substantial body of precedents dealing with the disclosure obligations of the public official. Indeed, the mail and wire fraud statutes were the principal vehicle for the development of this law. The key idea in this now sizable body of law is that a public decision-maker must disclose any conflict of interest in a transaction or decision that could result in personal gain to the decision-maker. In addition, any receipt of a gratuity may also require disclosure, at least when the decision-maker possesses discretionary authority and the payor has an incentive to influence the public official.[146] Because other federal statutes (such as the Hobbs Act and the Travel Act) require proof of additional elements (such as inducement or an expected quid pro quo),[147] the acceptance of *Brumley* by other circuits would

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143. *See* text and notes *infra* at notes 157-59.

144. *See* text and note *infra* at note 160.

145. *See* 18 U.S.C. § 1952 (1994).

146. This seems to be the holding in *United States v. Sawyer*, discussed *supra* note 105. *United States v. Espy*, discussed *supra* note 131, goes marginally further and finds that undisclosed gratuities could violate the mail and wire fraud statutes.

147. There is a continuing controversy as to whether the government must show that a payment to a public official was made in return for a quid pro quo in order to prove a violation of the Hobbs Act. *Compare* McCormick v. United States, 500 U.S. 257, 274 (1991) (disagreeing with lower court's holding that "a quid pro quo is not necessary for conviction under the Hobbs Act when an official receives a campaign contribution") *with* Evans v. United States, 504 U.S. 255, 268 (1992) (holding that jury instructions satisfied quid pro quo requirement of *McCormick* "because the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the quid pro quo is not an element of the offense").

Most circuits have now held that the quid pro quo requirement applies to all Hobbs Act prosecutions. *See* United States v. Collins, 78 F.3d 1021, 1035 (6th Cir.) (holding that quid pro quo requirement applies to all § 1951 extortion prosecutions, not just those involving campaign contributions), *cert. denied*, 117 S. Ct. 189 (1996); United States v. Haerston, 46 F.3d 361, 365 (4th Cir. 1995) (holding that government must prove "quid pro quo when it charges extortion under the color of official right"). Thus, a mail fraud theory places less of a burden of

significantly cut back the ability of the federal government to reach state and local corruption.

E. Does Federalism Limit Congress's Power to Reverse McNally?

The simplest theory about the scope of mail and wire fraud is that Congress simply reversed the decision in *McNally* and restored the prior, if amorphous, intangible rights theory. There is much to support this interpretation. Language in *McNally* expressly invited Congress to reverse its holding,[148] and § 1346, passed in immediate response, certainly reads as if it were a congressional acceptance of this invitation.[149] Still, even prior to *McNally*, many circuits had placed limits on the broad reach of the intangible rights doctrine (as *Lemire* certainly shows). Thus, restoring the old doctrine does not deny each circuit the ability to recognize limitations that had already been accepted, such as the foregoing "actual harm" standard.

Brumley, of course, was less concerned with Congress's intent than with constitutional limits on federal interference with state government. The nature of those limitations is open, however, to considerable dispute. Although in *United States v. Lopez*[150] the Supreme Court discovered an "internal" limitation on the reach of the Commerce Clause, no similar limitation has yet been placed, or is discernible, on the reach of the postal power. Instead, to invalidate the traditional "intangible rights" doctrine, it would be necessary for the Supreme Court to discover an "external" limitation on the postal power.[151] In all likelihood, some "external" limits exist (for example, the federal government probably could not discriminate among the states, refusing some the right to use its postal service).

Still, the bottom line issue is whether any external limit exists on the postal power that forbids the Congress the power to define and forbid corruption at the state and local level. Those who think so rely chiefly on *New York v. United States*,[152] which basically held that the federal government cannot "commandeer" state resources. Federal anticorruption legislation does not easily offend this

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proof on the prosecution than does a Hobbs Act prosecution. Bribery prosecutions (under the Travel Act) also typically require proof of an expected quid pro quo.

148. *See* McNally v. United States, 483 U.S. 350, 361 (1987) ("[I]t would take a much clearer indication than the mail fraud statute evidences to convince us that having and concealing such an interest defrauds the State and is forbidden under federal law.").

149. In *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997), the Sixth Circuit noted that "[e]very court to address the effect of § 1346 has held that it has overruled the holding in *McNally*." *Id.* at 364 (citing cases). It added: "We therefore hold that § 1346 has restored the mail fraud statute to its pre-*McNally* scope, according to previous opinions interpreting the intangible right to honest services." *Id.; see also* United States v. Czubinski, 106 F.3d 1069, 1076 (1st Cir. 1997).

150. 514 U.S. 549 (1995).

151. Again, the mail and wire fraud statutes have to be distinguished here, as the wire fraud statute and private mailings under the mail fraud statute do rely on the Commerce Clause and are subject to *Lopez*'s "internal" limitations. *See supra* note 10.

152. 505 U.S. 144 (1992).

principle, however, because it neither requires the states to do anything nor imposes any financial burden on them. Still, language in the *New York* opinion stresses the independence of the states as "neither regional offices nor administrative agencies of the Federal Government."[153] In addition, Justice O'Connor carefully carved out an exception in *New York* for legislation that "subjected a state to the same legislation applicable to private parties," suggesting that such legislation could more easily be upheld.[154] Section 1346 fits easily within this exception, because it applies to both public and private fiduciaries. Hence, although it remains possible that the Supreme Court could expand on its earlier decisions that insulate the states from federal interference,[155] neither the internal limits discovered in *Lopez* nor the external limits enforced in *New York* logically seem to constrain § 1346 at present.

F. State Corporate Governance

Much commentary has focused on the prosecution of state public officials on the assumption that this is the only context that triggers federalism concerns. Indeed, it may be the most sensitive context, but it is not unique. The Supreme Court has also presumptively allocated corporate governance to the states, unless Congress clearly provides otherwise.[156] This is not an absolute limit, and Congress can provide otherwise by a clear statement. Thus, in both the public and private contexts, Congress must express itself in unequivocal language if it is to recast significantly the balance of federal/state authority.

But here a critical distinction exists between the public and private contexts. Although § 1346 may well constitute a clear statement that public officials are to remain subject to federal anticorruption legislation, relatively little is said about the private fiduciary context. Indeed, no intent to override state corporate law is expressed anywhere in that legislative history. Yet, the intangible rights doctrine does at times do precisely that, overriding the normal rules of corporate gover-

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153. *Id.* at 188.

154. *Id.* at 160.

155. The Court, however, declined the opportunity to expand these precedents in *Salinas v. United States*, 118 S. Ct. 469 (1997). *See infra* notes 181-84 and accompanying text.

156. Particularly in a post-*Lopez* environment, where the boundaries of the Commerce Clause are in dispute (as they might be particularly in the case of the wire fraud statute), the following statement of the Court in *CTS Corp. v. Dynamics Corporation of America*, 481 U.S. 69 (1987), has particular relevance:

> We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law.

Id. at 89. This theme that corporations are "creatures of state law" runs through a string of modern Supreme Court decisions, beginning with *Cort v. Ash*, 422 U.S. 66 (1975), and continuing through *Daily Income Fund v. Fox*, 464 U.S. 523 (1984), *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991), and culminating with *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991).

nance. For example, in *United States v. Weiss*[157] and *United States v. Siegel*,[158] the Second Circuit effectively created a new crime of "corporate improprieties" (as Judge Winter said in dissent)[159] which prohibited a subordinate corporate officer from creating an off-books slush fund at the express instructions of the officer's superiors. Nothing in traditional state corporate law made such conduct, without more, a fiduciary breach. Similarly, in *United States v. Wallach*,[160] the defendant's characterization of his services on a bill to the corporation as being for work on an SEC registration statement (when his services were actually that of a lobbyist) was deemed a criminal interference with the shareholders' "right to control" corporate funds, even though corporate management had requested this false characterization. In both cases, novel, judicially-created theories of corporate governance displaced traditional state law rules.

Although the Supreme Court's decisions have particularly focused on the presumptive right of the states to regulate corporate governance, the same principles are at play when other private relationships (e.g., partnerships, trusts, principal and agent relations, or the attorney and client relationship) are at issue. Federal law does not generally regulate these relationships, and the discovery of a federal rule deep within the interstices of § 1346 necessarily displaces state law. In all these cases, there is little doubt that Congress can regulate, but it should be subject to the same requirement that it first make a "clear statement" of its intention to displace state law. Section 1346 does not contain any such clear statement with regard to private fiduciaries, even if it does with regard to public fiduciaries.

G. The Uncertain Impact of the Guarantee Clause

Although the recent debate about the proper construction of § 1346 has been dominated by the Neo-Federalists, an important counterargument has been raised by those who believe that the Guarantee Clause[161] provides a source of congressional power for federal anticorruption legislation aimed at state and local officials.[162] The starting point for this analysis is the linked propositions that (i) there is a strong national interest in assuring public confidence in government, and (ii) state enforcement cannot alone protect or preserve public confidence because of the potential for state enforcement to be compromised by political loyalties. Proponents of this view argue that inherently the Guarantee Clause commits the federal government to altering the federal/state balance to the extent necessary to

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157. 752 F.2d 777 (2d Cir. 1985).
158. 717 F.2d 9 (2d Cir. 1983).
159. *Id.* at 24 (Winter, J., dissenting).
160. 935 F.2d 445 (2d Cir. 1991).
161. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every state in this Union a Republican Form of Government. . . .").
162. For the fullest articulation of this view, see Kurland, *supra* note 20.

preserve a Republican form of government.[163] Although the foregoing claims have merit, the problem is that the Guarantee Clause has been more regarded by the Court more as a shield for the states than as a sword for Congress.[164]

Yet, if the Guarantee Clause alone cannot provide authority for federal legislation that would otherwise impermissibly invade some zone of sovereignty reserved for the states,[165] it might reinforce the power that the Congress has under the postal power to protect § 1346 from any external limits that might otherwise be imposed on that power. In short, if not dispositive, the Guarantee Clause may prove to be a counterweight, particularly to the extent that external limits on enumerated powers have so far only been imposed when the Congress seeks to "commandeer" state resources or authority (which the federal fraud statutes do not do).

Finally, there is a more modest role for the Guarantee Clause: references to it in the legislative history of § 1346 clearly show that federal common law is to govern as to the scope of § 1346. In the debate over § 1346, Congressman Conyers, the Chair of the Subcommittee on Criminal Justice,[166] who introduced the bill in the House that became § 1346,[167] stressed that the proposed legislation (1) was aimed at "state and local corruption,"[168] (2) sought to overturn *McNally* and restore the intangible rights doctrine,[169] and (3) relied on the Guarantee Clause and, more specifically, Professor Kurland's article interpreting it.[170] Congressman Conyers in fact reviewed the Federalist Papers in some detail to support his view, as the bill's sponsor, that Congress had "the power to act to protect state and local governments, not only from foreign intrigues or domestic violence, but also corruption."[171] Congressman Conyers noted that the Department of Justice had appeared at hearings before his Subcommittee to warn that "many significant prosecutions of political corruption brought under the mail and wire fraud statutes had been dismissed or overturned on appeal."[172]

At no point in either statement, however, does Congressman Conyers discuss private corruption or the dangers posed by fraud in the business setting. Rather, he

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163. Kurland, *supra* note 20, at 475.

164. In *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991), Justice O'Connor cited the Guarantee Clause as a basis for state determination of the qualifications of their officials. *See also* New York v. United States, 505 U.S. 144, 185–86 (1992) (explaining that the Guarantee Clause has role in preserving state institutions from federal standards); Deborah J. Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1583–84 (1994).

165. This Article does not advance the claim that there is such a zone, but other writers do. *See, e.g.*, Moohr, *supra* note 11.

166. *See* 134 CONG. REC. 33,296 (Oct. 21, 1988) (statement of Rep. Conyers).

167. *See* 133 CONG. REC. 32,959–32,961 (Nov. 19, 1987) (statement of Rep. Conyers).

168. *Id.* at 32,959.

169. *Id.*

170. 134 CONG. REC. at 33,297. In addition, Congressman Conyers noted that the National Commission on Reform of Federal Criminal Law (the "Brown Commission") had earlier suggested reliance on the Guarantee Clause to support anticorruption legislation aimed at state and local governments. 133 CONG. REC. at 32,959.

171. 133 CONG. REC. at 32,961.

172. 134 CONG. REC. at 33,296.

noted that constitutional concerns had been raised about the government's "role in prosecuting state and local corruption," and that he relied on the Guarantee Clause to answer these problems.[173] At most, Congressman Conyers's statement contains a brief, indeed parenthetical, listing of the types of decisions that *McNally* overturned and includes a reference to "the right of employers to the honest services of their employees."[174] But this brief reference is never connected to the purpose of the legislation or to the obstacles that needed to be overcome. The contrast is so strong between the repeated emphasis in this legislative history of the need to curb public corruption and this single, elliptical, string citation to a past case involving private corruption that only the former can fairly qualify as a "plain statement" able to recast the federal/state balance.[175]

On the Senate side, Senator Biden, Chair of the Senate Judiciary Committee, presented the bill on the floor of the Senate and echoed both Congressman Conyer's concerns with purging public corruption and his reliance on the Guarantee Clause:

> The Constitution guarantees a republican form of government, which means that Congress can enact statutes that make it possible to punish those who violate *the public trust at any level of government*. The bill we have before us today would reverse the *McNally* decision and allow Federal prosecutors to bring the kinds of *public corruption cases* they were able to bring before 1987.[176]

Although Senator Biden's statement contains a string citation to the kinds of cases that could again be prosecuted, which list includes private fiduciary cases as well,[177] he emphasized that "[i]t is not intended to criminalize mere breaches of fiduciary duty or private confidences or violations of the ordinary rules of the workplace."[178] Noting that there had been some academic criticism of mail fraud's scope, he said that the bill was "specifically limited to situations where the defendant is acting to obtain a thing of value or to harm the organization."[179] In short, like Congressman Conyers, Senator Biden's focus was on public corruption, and his comments about private fiduciaries emphasized a desire to prevent an overbroad interpretation of the statute's reach. Neither of them suggested that the statute would reach conduct that would not amount to a breach of duty under state law in the case of the private fiduciary, and indeed Senator Biden insisted that

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173. *Id.* at 33,297.

174. *Id.* (citing United States v. Von Barta, 635 F.2d 999 (2d Cir. 1980)).

175. The "plain statement" reference is to *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

176. 134 CONG. REC. 31,072 (Oct. 14, 1988) (statement of Senator Biden) (emphasis added). The reference to "1987" in the quotation is, of course, to the year of the *McNally* decision.

177. *Id.* at 31,073 (citing cases such as United States v. Weiss, 752 F.2d 777 (2d Cir. 1985); United States v. Siegel, 717 F.2d 9, 14 (2d Cir. 1983); and United States v. Lemire, 720 F.2d 1327, 1335–37 (D.C. Cir. 1983)). *Lemire*, of course, seems to disagree with *Weiss* and *Siegel*. *See supra* text and notes at notes 53–58.

178. 134 CONG. REC. at 31,073.

179. *Id.*

actual harm to the organization was a necessary element.[180] Read closely then, neither the Senate nor the House debate shows any intent to reject state common law in the case of private fiduciaries.

IV. A RECOMMENDED STANDARD: DISTINGUISHING PUBLIC AND PRIVATE FIDUCIARIES

Both for doctrinal and policy reasons, this Article has argued in favor of a sharp distinction between public and private fiduciaries in the reach of the mail and wire fraud statutes. On doctrinal grounds, this Article has maintained that federal common law can still guide the interpretation of these statutes as applied to public fiduciaries because the statutory intent of § 1346 is clear and the new principles of Neo-federalism that are captivating the Supreme Court have stopped short of placing state and local corruption beyond the reach of Congress. Perhaps the clearest indication of this judicial hesitation at fully adopting the dual sovereignties position is exhibited in the Court's recent decision in *Salinas v. United States*,[181] in which the Court held that a prosecution of a state official for bribery under 18 U.S.C. § 666 does not require the prosecution to prove any effect upon federal funds, even though the statute's reach was dependent upon the state agency's receipt of a requisite level of federal funds.[182] If ever there was a case for the Court to adopt the Neo-Federalist view that federal prosecutions for state corruption must be restrained, *Salinas* seemed to present an attractive vehicle, because it did not rest upon seldom-challenged federal powers (such as the postal power). Nonetheless, the case declined to construe narrowly a federal statute that seemed on its face intended only to protect the use of federal funds, which funds on the facts of *Salinas* were never threatened. *Salinas* involved a small bribe (a pair of designer watches) paid to the Sheriff of a Texas county by a prisoner in exchange for what were euphemistically described as "contact visits" in the jail with his girlfriend. This exchange of money for sex did not imperil federal funds (which on the face of § 666 seems to be the primary congressional concern underlying that statute), and thus the case seemed to provide the Court with a ripe opportunity to extend *Lopez*. Still, a unanimous Court upheld the conviction and expressly disdained the opportunity to apply either *Gregory v. Ashcroft*'s[183] clear statement requirement or the principles of *McNally* to this context. Although the Court reserved the issue of the statute's "applicability to intangible benefits such as

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180. *See supra* text accompanying note 179.

181. 118 S. Ct. 469 (1997).

182. Section 666 makes it a crime for an official of a state agency that receives $10,000 or more in benefits under federal assistance programs to accept a bribe with the intent to be influenced or rewarded in connection with any agency business, transaction, or series of transactions involving anything having a value of $5,000 or more. *See* 18 U.S.C. § 666(a)(1)(B) (1994).

183. 501 U.S. 452 (1991).

contact visits,"[184] this seems a minor reservation, given the Court's willingness to accept federal prosecutions of state officials for corrupt conduct that did not waste or imperil federal funds. Conceivably, *Salinas* will yet prove to be a transitional case while the Court waits for a better vehicle. Still, it shows a unanimous Court far from eager to curb federal authority over local corruption.

Given this backdrop, this Article would propose the following standards as consistent with both the case law and appropriate policy considerations:

1. In public fiduciary cases, the pre-*McNally* standards apply, and § 1346 can be applied to the conduct of state officials who receive undisclosed financial benefits or who have undisclosed financial interests in connection with transactions before them. No violation of state law should be necessary (although the fact of a violation certainly has relevance). Under this standard, the mere receipt of an undisclosed gratuity is not exempt, but a materiality standard should apply. Thus, decisions such as *Sawyer* are best viewed as cases in which the gratuities received (i.e., meals and drinks and golf rounds) were too inconsequential to amount to a fiduciary breach. Any broader interpretation of *Sawyer* (such as that an intent to influence the decision-maker in the exercise of discretionary authority is necessary) should not be adopted or generalized.

2. In private fiduciary cases, a finding should be required that (1) state law has been violated (although a criminal violation of state law should not be required),[185] *or* (2) that an independent federal statute (which also can be a civil provision) has been transgressed, if in either case the legal rule sought to protect the beneficiaries of the duty or duties owed by the defendant. Although this standard will result in a non-uniform construction of the mail and wire fraud statutes across the states, the Court has placed little value on uniformity in closely related contexts.[186] A state or federal law violation should not, however, be necessarily sufficient in itself; in addition, "actual harm" to the principal or fiduciary should have been intended (or at least reasonably foreseeable). Thus, civil law prophylactic rules are not

184. *Salinas*, 118 S. Ct. at 475. A decisive fact for the Court seems to have been the prisoner's status as a federal prisoner who had been assigned to a state jail under a contractual arrangement between the county and the federal government. Given his status as a federal prisoner, the bribery interfered with a federal program (although protection of federal programs are not the evident concern of § 666).

185. The mail and wire fraud statutes have a very different semantic structure than the Travel Act, 18 U.S.C. § 1952 (1994), which expressly requires a criminal violation of state law to trigger its application. In contrast, the mail and wire fraud statutes refer to a "scheme to defraud," not a state law violation. Thus, the obvious argument is that when Congress wanted to provide that a criminal violation was necessary, it knew how to say so.

186. Both *Atherton v. FDIC*, 117 S. Ct. 666 (1997), and *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), stand for the proposition that state law, not federal law, supplies the appropriate rule of decision, even when the non-uniformity of state law will result in some disruption for federal agencies. Only when there is a signficant conflict between some federal policy or interest and the use of state law will federal rules be preferred, absent a clear congressional intent. The use of state law in the case of the mail and wire fraud statutes would not seem to disrupt any federal regulatory program or interest (because these statutes do not seek to regulate or protect any federal program or interest), and so a clearly expressed congressional intent to use federal common law must be shown.

automatically converted into a federal felony.[187] But the state law violation need not be a criminal one; rather, a breach of traditional state law fiduciary norms should suffice so long as "actual harm" was foreseeable.

While the foregoing resolution can be defended as compelled by the limits placed by the Supreme Court on the use of federal common law, normative arguments also support this same outcome. From a normative perspective, the following arguments stand out:

1. *Fair Notice.* Public officials know from their earliest days that the public expects that a "public office is a public trust."[188] Political theorists since Locke have argued variations on the theory that governmental office is distinct from a property right and represents power held in trust for the citizenry.[189] Thus, the expectations held of public officials are deeply ingrained in our culture, and unfair surprise does not result when the criminal law enforces these expectations. The same cannot be as easily said of the private fiduciary, who generally does hold a property interest (as a corporate shareholder or business partner) in addition to being a representative for others and is, therefore, entitled in many instances to act in his or her own self interest. More importantly, not only are the expectations held of private fiduciaries less ingrained in our culture, but to the extent that private fiduciaries seek to learn the law's commands that apply to their status, they are likely to look primarily to state law. Hence, a requirement that state law standard or an independent federal statute or rule be violated assures fair notice. It also protects those persons who had little reason to know that they would be deemed fiduciaries at all.

2. *The Existence of Overlapping Statutory Duties.* The public official is closely regulated by federal criminal law, whatever the scope of the mail fraud statute. Both the Hobbs Act[190] and the Travel Act[191] overlap substantially with mail fraud (although it is true that mail fraud reaches somewhat further and imposes less of a burden on the prosecutor). Hence, curbing the mail fraud statute as it applies to public officials may accomplish relatively little. Ultimately, the Neo-Federalists will not have truly won the day unless and until Congress also cuts back not only

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187. In this sense, *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996), discussed *supra* notes 105-16, which held that a state law violation was not necessarily sufficient, should be followed in private fiduciary cases when the violated statute seems to have intended a purely prophylactic rule.

188. Some state constitutions actually provide that a "public office is a public trust." *See* FLA. CONST. art. II, § 8; Thomas Ross McSwain, *The Sun Rises on the Florida Legislature: The Constitutional Amendment on Open Legislative Meetings*, 19 FLA. ST. U. L. REV. 307, 325 n.130 (1991). The phrase was apparently first used by Grover Cleveland (see JOHN BARTLETT, FAMILIAR QUOTATIONS 532 n.3 (16th ed. 1992)) but very similar statements can be found in the writings of persons as diverse as Edmond Burke and Thomas Jefferson. *See* BARTLETT, *supra* at 330, 342.

189. *See* E. Mabry Rogers & Stephen B. Young, *Public Office as a Public Trust: A Suggestion That Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1025, 1027–28 (1975).

190. 18 U.S.C. § 1951 (1994).

191. 18 U.S.C. § 1952 (1994).

on mail and wire fraud, but on the Hobbs and Travel Acts and § 666 as well.[192] It is doubtful that the Court will follow the adherents of dual sovereignties this far.[193] In contrast, very few federal statutes overlap substantially with mail and wire fraud as they apply to private fiduciaries.

3. *Judicial Monitoring.* In general, precise standards are superior to opaque or fuzzy standards. But precise standards are not always possible. In the private fiduciary context, it is possible to ask a fairly precise question: did the fiduciary's conduct cause or threaten "actual harm"? This question can be asked because harm can generally be measured in simple economic terms in the private fiduciary setting. In this context, the underlying premise is that private fiduciaries are generally expected to maximize economic value for their principals. Even in cases that involve more than economic considerations (for example *United States v. Jain*,[194] where the doctor's referral to hospitals involved medical criteria as well as economic ones), it can generally be assumed that the principal would want to receive equivalent services at the lowest price available. In short, the world of private fiduciaries is simplified by the assumption that, other things being equal, the principal wants the agent to act in a wealth-maximizing fashion. Thus, if value appears to have been maximized, the fiduciary has normally complied with his or her duty, and the inquiry normally need not go further.

This same assumption cannot, however, be generally made in the public context. Here, trade-offs between wealth and other values are everyday events. Hence, a broader and necessarily stricter rule is required: a fiduciary should not accept anything of non-trivial value from interested parties (or their affiliates or agents) in connection with the decisions over which he or she has discretion or substantial influence. This is a broader rule and less precise, but it is required by the multi-factor nature of the decision-making calculus that public officials face.

4. *Relative Harm.* Arguably, public fiduciaries can cause greater harm and so need a stricter rule. The conventional statement of this argument is that any act of public corruption or self-interested behavior erodes public confidence in government and respect for the law.[195] Of course, private corruption or self-interested behavior in the business world also invites cynicism and a loss of confidence. At first glance, the only difference may seem to be that more persons are generally affected in the case of governmental corruption. But there is an additional difference: the victims of public corruption lack any right of exit. Put simply, they cannot change governments. But investors can change investments. Ultimately, markets provide exit, but politics do not.[196] In addition, incoming investors will

192. 18 U.S.C. § 666 (1994).

193. This is the seeming implication of *Salinas v. United States*, 118 S. Ct. 469 (1997). *See* discussion *supra* notes 181-84.

194. *See* text and notes *supra* at notes 71-78.

195. For a forceful statement of this thesis, see Kurland, *supra* note 20, at 376–81.

196. This theme is at the heart of Professor Hirschman's famous work. *See* ALBERT O. HIRSCHMAN, EXIT VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

buy at a reduced price to reflect the known injury and disloyalty. The point is that markets ameliorate the loss in the case of private fiduciary abuse, and indeed place some of the loss on those disloyal agents who are also owners. The absence of exit or other forms of loss protection (i.e., diversification, insurance, etc.) provides some justification for less tolerance for public corruption relative to private corruption. Also, ugly as this truth is, sometimes private corruption maximizes value for shareholders, and it is at least questionable whether statutes seeking to protect shareholders should be directed against agents or fiduciaries who act in an illegal or corrupt fashion to maximize value for their fellow shareholders.[197]

5. *Selective Enforcement.* The history of the mail and wire fraud statutes is a history of constant expansion, punctuated by occasional moments of judicial resistance and reaction. The net result is that open-ended, amorphous fraud statutes effectively shift power to prosecutors to define new crimes, expand the net of criminal liability, and ultimately turn the mail and wire fraud statutes into constantly "evolving" common law crimes. This happens in both the public and private fiduciary contexts, but more so in the latter context. Today, the private context is populated in substantial measure by a heterogeneous catch-all of miscellaneous defendants, united only by the bizarre character of their alleged misbehavior.[198] In theory, the common law crime, defined by judges to meet the temper of the times, is dead,[199] but in truth the reversal of *McNally* brought it back from the grave.

V. CONCLUSION

No single statute can cure everything. Section 1346 attempts to address two very different contexts at the same time. This attempt winds up distorting the development of the law in both contexts unless different standards for interpretation are applied to these different contexts. Confining the concept of "honest services" fraud in the case of private fiduciaries to a state law construction of "honest services" disciplines prosecutors and restrains the runaway sprawl of judicially made doctrine across the landscape of the private law. At the same time, construing "honest services" fraud in the case of public fiduciaries in terms of federal common law respects the intent of Congress and supplies a deterrent that may

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197. Examples of this tendency are *United States v. Siegel*, 717 F.2d 9 (2d Cir. 1983), and *United States v. Weiss*, 752 F.2d 777 (2d Cir. 1985). *See* discussion *supra* note 31.

198. For those who doubt this, compare *United States v. Condolon*, 600 F.2d 7 (4th Cir. 1979), and In re *Grand Jury Matter, Gronowicz*, 764 F.2d 983 (3d Cir. 1985) (en banc), *cert. denied*, 474 U.S. 1055 (1986), and answer this question: what other federal statute could be applied in these strange and bizarre instances?

199. In principle, federal common law crimes have been prohibited since *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812), on the theory that only the legislature is entitled to specify the elements of a crime. Historically, the meaning of "scheme to defraud" has, however, largely been determined by courts.

otherwise be lacking to persons who already knew the expectations that the public had of them.

Still, even clear congressional intent cannot authorize the continued "evolution" of "honest services" fraud in the public context. Both the vagueness doctrine and the separation of powers require that judges not view themselves as authorized by § 1346 to expand the net of criminal liability as seems appropriate from time to time in light of the current social and political climate. To keep the doctrine sensibly contained and to prevent § 1346 from degenerating into an impermissible common law crime,[200] some core, fixed meaning to "honest services" fraud must be recognized, even in the case of public fiduciaries. The core principle that is most compatible with the history of mail fraud and the congressional intention to overturn *McNally* is probably that set forth in *United States v. Mandel*,[201] that a public official must act as "trustee for the citizens and the state . . . and thus owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty" to them.[202] The "normal fiduciary duties of a trustee" are no doubt high, but they are also constant and defineable.

More importantly, such a standard employs a fundamentally economic definition of what must be disclosed: namely, any economic gain, advantage or other "pecuniary benefit" received by a public official (including a party officer) or a related person for that official's decision, opinion, recommendation, vote or other exercise of discretion (including gratuity payments made in the nature of a retainer for a future favorable disposition on discretionary decisions).[203] This is broad, but far less so than an obligation to disclose all conflicts of interest by anyone arguably characterizable as a public official. Few public officials make important decisions without pressures and political inducements being focused on them; it is in the nature of the job. Thus, as a prominent bar association committee has concluded in the immediate aftermath of *McNally*, such a broader disclosure obligation "is an impossibly broad standard for the criminal law to enforce."[204]

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200. For the Supreme Court's most recent pronouncement on the concept of "common law crimes," see *United States v. Lanier*, 117 S. Ct. 1219 (1997), as well as *United States v. Kozminski*, 487 U.S. 931 (1988).

201. 591 F.2d 1347 (4th Cir.), *aff'd in relevant part en banc*, 602 F.2d 653 (4th Cir. 1979).

202. *Id.* at 1363. *Mandel* also said that the breach of duty must be linked to some "actionable fraud," which requirement could be satisfied either by showing that the official had a "direct interest in a matter he is passing on" or that there had been a "deliberate concealment . . . to a public body, in order to receive a benefit by action of the public body." *Id.* at 1364; *see also* United States v. Sawyer, 85 F.3d 713, 723 (1st Cir. 1996); United States v. Silvano, 812 F.2d 754, 759 (1st Cir. 1987).

203. This definition basically tracks the Model Penal Code's provision on bribery. *See* MODEL PENAL CODE § 240.1 (Proposed Official Draft 1962). The term "benefit" is specifically defined to exclude "an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support or oppose." *Id.*

204. Committee on Criminal Law, *The Federal Mail Fraud Statute: Analysis of the Need for New Legislation*, 44 THE RECORD 264, 271 (April 1989). THE RECORD is the official publication of the Association of the Bar of the City of New York.

The difference in scope is best illustrated with two examples:

1. The President denies that he has received a $1 million political contribution from an official of a foreign government in return for the President's continued support of a particular policy toward the official's country.
2. The President denies publicly at repeated press conferences that he has had an affair with an intern and takes other steps that arguably amount to fraudulent concealment of that relationship.

The former case is reached by this suggested interpretation, based on *Mandel*, while the latter is not.[205] Perhaps these hypotheticals seem too unrealistic and far-fetched to merit serious analysis, but they reveal the gray area in the contemporary application of the mail and wire fraud statutes to public fiduciaries. Ignore this overreach in contemporary law, and it is predictable that some future, hypothetical special prosecutor will seek to exploit it.

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205. Note that the appointment of the intern to governmental office, either in return for sexual favors or continued silence, could be viewed as a "benefit" and even a "pecuniary benefit." However, because an unpaid intern is not presumably a public official, the focus has to be on the receipt of a benefit by the public official so appointing her. Arguably, the appointing public official is not receiving a "pecuniary benefit" and so falls outside of the Model Penal Code's definition. Of course, § 1346 does not necessarily track the Model Penal Code today.