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*Jed S. Rakoff**

### I. INTRODUCTION

To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love. We may flirt with RICO,[1] show off with 10b-5,[2] and call the conspiracy law "darling,"[3] but we always come home to the virtues of 18 U.S.C. § 1341,[4] with its simplicity, adaptability, and comfortable familiarity. It understands us and, like many a foolish spouse, we like to think we understand it. To ask us to explain it or deal with its problems, however, is quite another matter; but this article will undertake to try.

The mail fraud statute reads in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any

* Partner, Mudge Rose Guthrie & Alexander, New York, N.Y. B.A., 1964, Swarthmore College; M. Phil., 1966, Oxford University; J.D. 1969, Harvard University. The author, who was Chief of Business Frauds Prosecutions of the United States Attorney's Office for the Southern District of New York at the time this article was drafted, wishes to state that the views here expressed do not necessarily represent those of the United States Attorney's Office or the Department of Justice.

1. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1976).

2. 17 C.F.R. § 240.10b-5 (1979) (Rule 10b-5) (employment of manipulative and deceptive devices in connection with the purchase or sale of any security).

3. For Judge Learned Hand's description of the federal conspiracy law, 18 U.S.C. § 371 (1976), as "that darling of the modern prosecutor's nursery," see Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).

4. 18 U.S.C. § 1341 (1976).

> post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.[5]

First enacted in 1872, the mail fraud statute, together with its lineal descendant, the wire fraud statute,[6] has been characterized as the "first line of defense"[7] against virtually every new area of fraud to develop in the United States in the past century. Its applications, too numerous to catalog, cover not only the full range of consumer frauds, stock frauds, land frauds, bank frauds, insurance frauds, and commodity frauds, but have extended even to such areas as blackmail, counterfeiting, election fraud, and bribery. In many of these and other areas, where legislatures have sometimes been slow to enact specific prohibitory legislation, the mail fraud statute has frequently represented the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit.

During the past century, both Congress and the Supreme Court have repeatedly placed their stamps of approval on expansive use of the mail fraud statute. Indeed, each of the five legislative revisions of the statute has served to enlarge its coverage.[8] And while over the past decade Congress has had under consideration wholesale revision of the federal criminal code, until this past year each of the proposed new criminal codes provided for full retention and, in some instances, modest expansion of the crimes of mail fraud and wire fraud.[9]

Recently, however, the successful use of the mail and wire fraud statutes to prosecute "official corruption" cases against such prominent public figures as Judge Kerner[10] and Governor Mandel,[11] and to prosecute certain corporations for bribing foreign officials[12] has provoked

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5. *Id.*

6. 18 U.S.C. § 1343 (1976). Enacted in 1952, the wire fraud statute is nearly identical in wording to the mail fraud statute, except that, instead of the requisite mailing in execution of the scheme to defraud, it requires some interstate or international communication by means of "wire" (such as telephone lines), radio, or television.

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

8. *See* Act of March 2, 1889, ch. 393, § 1, 25 Stat. 873; Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130; Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 763; Act of May 24, 1949, ch. 139, § 34, 63 Stat. 94; Act of Aug. 12, 1970, Pub. L. No. 91-375, § 12 (11), 84 Stat. 778.

9. *See, e.g.*, S.1, 93d Cong. 1st Sess., § 2-805 (1973); S. 1400, 93d Cong., 1st Sess., § 1734 (1973); S. 1437, 95th Cong., 1st Sess., § 1734 (1977).

10. United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

11. United States v. Mandel, 602 F.2d 653 (4th Cir. 1979) (en banc), *mandamus denied*, 100 S. Ct. 1667 (1980).

12. *E.g.*, United States v. United Brands Co., No. 78 Crim. 538 (S.D.N.Y. July 19, 1978); United States v. The Williams Cos., No. Crim. 78-144 (D.D.C. March 24, 1978).

outcries from some quarters against what is termed an "unprecedented" expansion of mail fraud and wire fraud jurisdiction.[13] Concomitantly, the House subcommittee on criminal justice has been persuaded to reject the slight expansion of mail fraud and wire fraud jurisdiction contained in the latest Senate version of the proposed criminal code,[14] in favor of a version[15] that would substantially curtail existing mail fraud and wire fraud jurisdiction, reducing it to limits that are arguably the narrowest in its entire history. In response, even some commentators normally at odds with the Department of Justice have warned that the primary effect of such curtailment would be to inhibit the effective prosecution of white collar crime.[16]

On the familiar assumption that in order to understand the present and shape the future it is necessary to study the past, this article seeks to place these current controversies in perspective by tracing the historical development of the mail fraud statute in the context of the overall growth of federal criminal law.[17] Such an examination locates the source of both the unusual characteristics and current problems associated with the modern mail fraud statute in the persistance to this day of constructions given to the original mail fraud statute by some of the very earliest courts called upon to interpret its provisions.

## II. THE UNUSUAL CHARACTERISTICS OF THE MAIL FRAUD STATUTE

In its formal characteristics, the federal mail fraud statute, together with those few later statutes that have copied its format, is very unusual and perhaps unique among federal criminal laws. Aside from purely regulatory offenses (*malum prohibitum*), most federal criminal laws—at least those applicable to what are otherwise state crimes—describe a simple structure of two elements. The first or "substantive" element consists of the prohibited criminal conduct, either reprehensible on its face (*e.g.*, assault, murder, rape) or made so

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13. *See, e.g.*, Wall. St. J., Nov. 12, 1979, at 8, col. 1 (comments of the chairman of McDonnell Douglas Corporation: "unwarranted extension and use of U.S. statutes . . . which were enacted by Congress many years ago for entirely different purposes"). *See also* Hibey, *Application of the Mail and Wire Fraud Statutes to International Bribery: Questionable Prosecutions of Questionable Payments*, 9 GA. J. INT'L & COMP. L. 49 (1979); Surrey, *The Foreign Corrupt Practices Act: Let the Punishment Fit the Crime*, 20 HARV. J. INT'L L. 293, 297 (1979).

14. S. 1722, 96th Cong., 1st Sess., § 1734 (1979).

15. The House version was originally introduced in the Senate as S. 1723, 96th Cong., 1st Sess. § 2534 (1979).

16. *E.g.*, Newfield, *Crime in the Suites: Will Congress Go Easy on Corporate Crooks?*, THE VILLAGE VOICE, Oct. 29, 1979, at 1.

17. There appears to have been no previous attempt to trace the history of the mail fraud statute in any detail. *But see* the brief summary in Comment, *Survey of the Law of Mail Fraud*, 1975 U. ILL. L.F. 237.

by some reprehensible intent (*e.g.*, carrying a gun with intent to commit murder, or taking money from a bank with intent to steal). The second or "jurisdictional"[18] element consists of some, often wholly incidental, connection between the prohibited conduct and an area of federal power or involvement sufficient to warrant the exercise of federal sovereignty over the prosecution of the crime. For example, to be guilty of violating the federal assault statute,[19] (i) one must have assaulted a person who (ii) happens to be a federal officer. Similarly, to be guilty of federal bank theft,[20] (i) one acting with intent to steal the money must have taken $100 or more from a bank which (ii) happens to be federally organized or federally insured. In fact, the mere potential for interference with federal interests can, in appropriate circumstances, provide warrant for federal intervention. Thus, for example, a conspiracy to assault a person who happens to be a federal agent is punishable as a federal crime regardless of whether the conspirators knew the person was a federal agent and regardless of whether the assault was actually carried out.[21] As it happens, while Congress might have chosen to limit its exercise of jurisdiction over what otherwise are "state" crimes to those situations where the defendants actually *intended* to interfere with some matter of federal concern, in fact where Congress has entered this field its usual practice has been to extend its jurisdictional prerogative to all such instances where the criminal conduct itself affects (or is likely to affect) some federal preserve, regardless of the defendant's intention and regardless of whether the conduct that constitutes the federal effect is itself reprehensible.[22]

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18. *See* United States v. Feola, 420 U.S. 671, 676 (1975).

19. 18 U.S.C. § 111 (1976).

20. 18 U.S.C. § 2113(b) (1976).

21. United States v. Feola, 420 U.S. 671 (1975). *See* Anderson v. United States, 417 U.S. 211, 226-27 (1974); United States v. Polesti, 489 F.2d 822 (7th Cir. 1973), *cert. denied*, 420 U.S. 990 (1975); United States v. Roselli, 432 F.2d 879 (9th Cir. 1970). Similarly, if two defendants conspire to assault someone they believe is a federal officer and it turns out he is not, they can still be prosecuted for conspiracy to violate the federal assault statute, even though they cannot be prosecuted for the substantive violation thereof. *Cf.*, United States v. Feola, 420 U.S. at 674. *See also Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959). In short, federal jurisdiction to prosecute what are otherwise state offenses can be extended, under most federal statutes, either on the basis that the defendant's conduct happens to interfere with a federal interest, however little the defendant may have so intended, or (at least in conspiracy cases) on the basis that the defendant's intended conduct would have interfered with a federal interest, even if in fact it failed to do so. Thus the relationship between, on the one hand, the factors that determine a defendant's culpability and the moral gravity of the offense—*i.e.*, his intent and conduct— and, on the other hand, the factor that determines in what forum his guilt will be judged — *i.e.*, actual or potential interference with some federal interest — is an incidental, even accidental relationship, and not a functional one.

22. As Justice Blackmun noted in *Feola*:

[A] requirement is sufficient to confer jurisdiction on the federal courts for what

At first glance it might be thought that the mail fraud statute fits neatly into the format described above, for it likewise consists of two elements: reprehensible activity in the form of devising a scheme to defraud, and federal jurisdiction in the form of a use of the mails.[23] On closer examination, however, neither of these elements quite accords with the general formula. The first element of federal mail fraud—devising a scheme to defraud—is not itself conduct at all (although it may be made manifest by conduct), but is simply a plan, intention, or state of mind, insufficient in itself to give rise to any kind of criminal sanctions.[24] Accordingly, if the second element of federal mail fraud—using the mails—were nothing more than a bare jurisdictional act, having only an incidental relation to the criminal activity described in the first element and no relation whatever to the actor's intent, it is doubtful whether the statute would state a crime (at least in any ordinary sense), since it would not be addressed to any conduct that was both overt and reprehensible. To rectify this deficiency, the language of the

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otherwise are state crimes precisely because it implicates factors that are an appropriate subject for federal concern. . . . [W]here Congress seeks to protect the integrity of federal functions and the safety of federal officers, the interest is sufficient to warrant federal involvement. The significance of labeling a statutory requirement as "jurisdictional" is . . . that the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute.

*Id.* at 676-77 n.9. Funtionally, however, if Congress' concern in enacting such statutes was solely to deter interference with the federal area, it would have (or at least should have) made the exercise of federal jurisdiction turn on the defendant's intention to interfere with the area of federal concern, for this would have most directly and rationally served such a deterrent purpose. That, instead, these statutes focus so far as jurisdiction is concerned on the results, however unintended or incidental, of the defendant's acts, rather than on his intent, suggests a concern with something more than just deterring criminal interference with federal powers and preserves. Possibly it reflects a concern that state forums may not afford full protection to federal interests, even in criminal cases; but more likely it evidences Congress' intention to share with the states the prosecution of certain crimes to the maximum the Constitution permits. *Cf.* Perrin v. United States, 100 S. Ct. 311 (1979). *See also* text accompanying notes 124-125 *infra*.

23. *See* Pereira v. United States, 347 U.S. 1, 8 (1954).

24. *See* Hales v. Petit, 75 Eng. Rep. 387, 397 (C.B. 1562) ("the imagination of the mind to do wrong, without an act done, is not punishable in our law"). According to one commentator, the requirement that an evil intent manifest itself in at least one act before it can be punished

serves a number of closely-related objectives: it seeks to assure that the evil intent of the man branded a criminal has been expressed in a manner signifying harm to society; that there is no longer any substantial likelihood that he will be deterred by the threat of sanction; and that there has been an identifiable occurrence so that multiple prosecution and punishment may be minimized.

Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 405-06 (1959) [hereinafter cited as Goldstein].

mail fraud statute, and the cases construing it, require that the particular mailing charged as the second element of the crime be "sufficiently closely related" to the scheme-to-defraud charged as the first element of the crime as to be fairly held to be "for the purpose of executing" it;[25] and further, that such use of the mails in execution of the scheme be "reasonably foreseeable" to someone in the defendant's position.[26]

These added connections between the two elements of federal mail fraud are rather akin to the traditional requirements in a civil tort action that the ultimate injury be proximately caused by the defendant's acts and/or be a reasonably foreseeable result of the defendant's acts.[27] But although such requirements help to define a notion of "fault" sufficient to impose civil liability for damages, they are rarely to be found in criminal statutes, which typically require as a prerequisite to imposing criminal sanctions that the defendant have actual knowledge of the commission of the injurious or forbidden act and that he not only cause but also actually intend its commission.[28] Thus, the appearance of the "civil" requirements of proximate causation and, especially, reasonable foreseeability in the federal criminal mail fraud statute is, at the least, surprising. Moreover, whereas in tort law the requirements of proximate causation and reasonable foreseeability serve to link the defendant with the ultimate injurious act for which he is being held responsible, in the case of the federal mail fraud statute such requirements serve to link the defendant with merely an act of mailing—an act that may be perfectly innocent in itself and that, even in terms of the overall scheme that it is said to further, may be an act of minute consequence.

In some of these unusual characteristics, the federal mail fraud statute, while different from the great majority of federal criminal statutes, bears more than a passing resemblance to the federal conspiracy statute.[29] For example, under the federal conspiracy statute, conduct otherwise unpunishable because it is too inchoate, such as plotting to commit a federal crime, becomes criminal when the conspirators willfully cause an "overt act" to be taken in furtherance of

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25. United States v. Maze, 414 U.S. 395, 399, 405 (1974).

26. Pereira v. United States, 347 U.S. 1, 8-9 (1954).

27. W. PROSSER, THE LAW OF TORTS 143-49, 250-70 (4th ed. 1971).

28. By contrast, to be guilty of mail fraud, a defendant need not "actually intend" the use of the mails charged in the indictment, nor need his scheme to defraud "contemplate the use of the mails as an essential element." Pereira v. United States, 347 U.S. 1, 8-9 (1954). *See also* United States v. Kenofskey, 243 U.S. 440 (1917); United States v. Young, 232 U.S. 155, 161-62 (1914).

29. 18 U.S.C. § 371 (1976).

the plot and to effect its objectives, even if some of the conspirators lack actual knowledge of the overt act (provided the act is reasonably foreseeable) and even if the overt act is innocent in itself and of minimal consequence in furthering the plot.[30] Still, the analogy between the mail fraud statute and the conspiracy statute is far from perfect. Obviously, it requires a minimum of two persons to commit the crime of conspiracy, while one person alone can commit the crime of mail fraud; consequently, while the crime of mail fraud can (at least in theory) transpire almost entirely in the mind of the defendant and never manifest itself beyond the causing of the single use of the mails, the crime of conspiracy, requiring as it does the equivalent of a partnership agreement between the two conspirators, must manifest itself by at least such overt activity as is necessary for such "partners in crime" to formulate and mutually reach such an agreement.[31] Furthermore, while it is well established that (in the conceptualistic language favored by some courts) the "essence" of a conspiracy charge is the agreement between two or more persons to commit an evil act,[32] it is equally well settled that the "gist" of the mail fraud violation is not the evil scheme, but the use of the mails.[33] Therefore, while a single conspiracy gives rise to only a single criminal count regardless of the number of alleged overt acts,[34] each use of the mails that occurs in furtherance of a single mail fraud scheme will support a separate and independently punishable count of mail fraud.[35]

In short, the format of the mail fraud statute in comparison with that of most other federal criminal statutes is idiosyncratic. Moreover, the oddity of its design has had numerous repercussions on its interpretation and application. For example, it has led courts, as noted,[36] to describe the element of mailing as the "gist," "essence," "gravamen,"

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30. United States v. Bayer, 331 U.S. 532, 542 (1947); Pinkerton v. United States, 328 U.S. 640, 647 (1946); United States v. Rabinowich, 238 U.S. 78, 86 (1915).

31. Because of these and other dissimilarities, the crimes of mail fraud and conspiracy to commit mail fraud do not "merge," and one can properly be charged and convicted of both committing a mail fraud and conspiring to commit the same mail fraud. Pereira v. United States, 347 U.S. 1, 11-12 (1954).

32. United States v. Bayer, 331 U.S. 532, 542 (1947). *See also* Pereira v. United States, 347 U.S. 1, 11 (1954).

33. *E.g.*, United States v. Young, 232 U.S. 155, 159 (1914); Atkinson v. United States, 344 F.2d 97, 98 (8th Cir. 1965); United States v. Jones, 10 F. 469, 470 (C.C.S.D.N.Y. 1882).

34. United States v. Boyle, 338 F. Supp. 1028, 1035 (D.D.C. 1972); Sprague v. Aderholt, 45 F.2d 790, 792 (N.D. Ga. 1930). *See also* Braverman v. United States, 317 U.S. 49, 53-54 (1942); Ford v. United States, 273 U.S. 593, 602 (1927).

35. Badders v. United States, 240 U.S. 391, 394 (1916); *In re* Henry, 123 U.S. 372, 374 (1887).

36. *See, e.g.*, cases cited at note 33 *supra*.

and "substance" of the crime of mail fraud, even though it is obvious that the prime concern of those who commit mail fraud, those who legislate against it, those who prosecute it, and those who judge it, is the fraud and not the mailing. In turn, this legal "fiction" that the mailing is the "gist" of the crime of mail fraud has led to a number of unusual practical consequences.

First, it results in each separate use of the mails constituting a separate crime.[37] Consequently, the number of counts of mail fraud with which a defendant may be charged turns not on the scope or duration of the fraud, the number of victims, the amount of damage, or any other factor relating to the moral culpability of the perpetrator or the social damage inflicted by his fraud, but rather depends on the sheer happenstance of how many times the mails have been used in executing the fraud. Another practical result is that fugitive swindlers can sometimes successfully resist extradition for fraud on the ground that the charges against them, which are typically lodged under the mail and wire fraud statutes, do not state a charge of "fraud," for which extradition will commonly lie, but rather state only a charge of "misuse of the mails," for which extradition often will not lie.[38] Finally, a subtle but highly significant effect of conceiving federal mail fraud as a crime the "gist" of which is the misuse of the mails is that such a conception makes it easier for courts to avoid the issue of whether there exist substantive limitations—imposed by the Constitution, legislative intent, or public policy—on the kinds of frauds appropriate for federal prosecution under this statute. When such questions have been raised in mail fraud cases, many courts have simply reasoned that the questions are inapproprate because the concern of the statute is not with prosecuting fraud per se but with keeping the mails free of taint and misuse.[39] The practical effect of this approach has been to enable the courts to avoid manacling the statute with the kind of substantive limitations that commonly render state fraud statutes ineffectual and that, when judicially created, frequently reflect nothing more than a court's social and economic biases. Ironically, then, the seemingly narrow and artificial view that courts have taken of the function of the mail fraud statute—to protect the mails from misuse—has in practice provided the statute with a flexibility, breadth

37. *See, e.g.*, cases cited at note 35 *supra*.

38. *See In re* Extradition Act Chap. 37 and Robert L. Vesco (Accused), Magistrate's Court, New Providance, Bahamas (Dec. 7, 1973). Similarly, even where there is express provision for extradiction for mail fraud, it has been said that extradition for wire fraud will not lie, on the ground that since the "gist" of wire fraud is the interstate use of a wire, it is an entirely different crime from mail fraud. *See* United States v. Link and Green, [1955] 3 D.L.R. 386 (Quebec Super. Ct. 1954).

39. *See* notes 129-140 and accompanying text *infra*.

of coverage, and effectiveness unmatched by most of the other federal criminal laws.

It may be argued, however, that the idiosyncracies of design and interpretation that make the mail fraud statute so effective in combatting fraud likewise render it more liable to irrational, unpredictable or extreme applications and hence, to abuse. While until recently, remarkably few claims of this kind have been leveled against the mail fraud statute over the more-than-a-century of its existence, some potential for abuse undoubtedly inheres in any criminal statute drawn in terms sufficiently broad to preclude easy evasion; and Congress and the courts are likely to remain forever engaged in seeking the ideal balance between "overly broad" and "overly narrow." To the extent, however, that a substantial element of outright irrationality creeps into the design or interpretation of a criminal statute, an added and more deep-seated difficulty arises: by becoming unfathomable, even to initiates, it ultimately ceases to command any moral force. Consequently, any effort to amend, supplant, or perfect the present mail fraud statute should begin with the question of whether the effectiveness of the statute can still be saved while eliminating its seemingly irrational aspects. To answer this question, it seems best to examine the historical development of the mail fraud statute, since careful attention to the long history of this statute is likely to reveal those qualities central to the statute's effectiveness, as opposed to those aspects that are merely vestigial remains of bygone controversies.

## III. THE GENESIS OF THE ORIGINAL MAIL FRAUD STATUTE

The original federal mail fraud statute was enacted on June 8, 1872 as part of a 327-section omnibus act[40] chiefly intended to revise and recodify the various laws relating to the post office. Unlike most of the other sections of the act, however, the mail fraud section, section 301, had no obvious precursor. In view of the novelty and breadth of this section, it is surprising that it generated no congressional debate or other legislative history explaining its origins and purpose. Looking at the broader context, however, the mail fraud statute was not unlike a host of federal legislation (both criminal and civil) enacted in the Reconstruction Period immediately following the Civil War, that extended federal authority to areas previously reserved to the states.[41]

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

41. Included in the legislation enacted during this period were three amendments to the Constitution, *see* U.S. CONST. amends. XIII-XV; reconstruction acts dealing with various post-Civil War social and economic problems, *see* Act of March 2, 1867, ch. 152, 14 Stat. 428; Act of March 3, 1867, ch. 6, 15 Stat. 2; Act of July 19, 1867, ch. 30, 15 Stat. 14; Act of March 11, 1868, ch. 25, 15 Stat. 41; Act of Dc. 22, 1869, ch. 3, 16 Stat. 59; and

Two impulses, in particular, seem likely to have generated such legislation as the mail fraud statute. One was the growth of a national economy, evident even before the Civil War but greatly accelerating after the war, and a concomitant growth in large-scale swindles, get-rich-quick schemes, and financial frauds.[42] With the increase in such crimes, it "soon became apparent that rudimentary criminal codes, conceived for rural societies and confined by state lines and local considerations, could not cope with those who saw manifold opportunities for gain in the new activities."[43] Thus, there existed a perceived need for federal intervention to dispel widespread fraud.

This need was coupled with a perception of enlarged and dynamic federal power, hugely enhanced by both the exigencies of fighting a Civil War and by the fervor with which Reconstruction Republicans set about the legislative remodeling of the northern and southern states alike.[44] One result was that, although Reconstruction statutes were passed in response to specific ills and grievances, they tended to be drawn in sweeping language appropriate to the federal government's new-found sense of power.[45] This was particularly true where earlier, more specific legislation proved unable to cope in any coherent fashion with the multitude of upheavals and dislocations that immediately followed the end of the Civil War.[46]

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civil rights legislation, *see* Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Civil Rights Act of 1871, ch. 22, 17 Stat. 13; Civil Rights Act of 1875, ch. 114, §§ 3-5, 18 Stat. 336, 337.

42. *See* W. DUNNING, RECONSTRUCTION, POLITICAL AND ECONOMIC 224-37 (1962) [hereinafter cited as DUNNING]; H. FAULKNER, AMERICAN ECONOMIC HISTORY 483-86, 516-17 (1960) [hereinafter cited as FAULKNER]; J. FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 8-9, 146-49, 174-77 (1961) [hereinafter cited as FRANKLIN].

43. *See* Goldstein, *supra* note 24, at 420-21.

44. *See* DUNNING, *supra* note 42, at 88-89, 256-65.

45. *Id.* at 260.

46. Goldstein, *supra* note 24, at 417-20. Thus, for example, the attempt in the years immediately after the Civil War to collect the federal excise tax on whiskey—the chief peace-time source of federal revenue at that time—encountered intense resistance not only from recalcitrant southerners but from economically depressed and dislocated northerners as well. DUNNING, *supra* note 42, at 283-84; FRANKLIN, *supra* note 42, at 145-48. The resistance took many forms, but chief among them was bribery of distillery inspectors, false markings on whiskey cases, and false entries on documents submitted to revenue agents. FRANKLIN, *supra* note 42, at 145-48. *See also* Goldstein, *supra* note 24, at 417. Existing legislation against such practices was supplemented in 1866 by broader statutes directed against the corruption of distillery inspectors. *Id.* However, before this legislation could even begin to be implemented in any extensive fashion, the growing needs of the federal government for revenue and the persistent clamor of the public against the widespread bribery, fraud, and evasion led to the passage, in 1867, of a statute generally outlawing any conspiracy of any kind to "defraud the United States in any manner whatever." Act of March 2, 1867, ch. 169, § 30, 14 Stat. 484. Although it was sought to be justified at the time as a response to the specific vices that prompted its passage, legisla-

Prior to the Civil War, it was widely believed that Congress' power over the mails did not constitutionally extend to power over the contents of material placed in the mails, including the power to prohibit the mailing of objectionable material. Indeed, one of the early congressional battles between North and South and between nationalists and regionalists was fought on this very issue when, in 1835, President Jackson proposed a bill to prohibit the mailing of "incendiary publications" in the southern states. The proposal was referred to a Senate committee, which concluded that the federal government had no such power, although the states did have that power. Although a number of senators doubted that even the states possessed such power, almost all agreed that the power of Congress over the mails did not extend that far.[47]

With northern nationalism triumphant after the Civil War, the prevailing view on this issue underwent a rapid change, at least among the so-called "radical Republicans" who dominated Congress immediately after the war.[48] A distinction was to be made between the *power* to prohibit the use of the mails to further illicit enterprises and the *means* by which that power was exercised. The mere fact that Congress was forbidden to employ such means as opening sealed letters did not mean that Congress lacked the power to prosecute those who were discovered, through legitimate means of detection, to have used the federal mails for illicit purposes.[49] Accordingly, in 1868 Congress took a first small step toward prohibiting such "illicit" uses of the mails by enacting the so-called "lottery law," which made it unlawful to mail any letters or circulars "concerning [illegal] lotteries, so-called gift

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tion of such broad language clearly was intended for broader application, for which events quickly provided ample opportunity. *See generally* Goldstein, *supra* note 24, at 417-20. In view of the opposition sometimes expressed to the "extension" of the mail and wire fraud statutes to bribery cases, it is noteworthy that the crime of conspiracy "to defraud" the United States, promulgated a few years before the mail fraud statute, was intended from the start to include bribery within its ambit and has been uniformly so interpreted by the Supreme Court. *E.g.*, United States v. Johnson, 383 U.S. 169, 172 (1966); Haas v. Henkel, 216 U.S. 462, 479-80 (1910).

47. The history of President Jackson's proposal is briefly summarized in *Ex parte* Jackson, 96 U.S. 727, 733-35 (1877).

48. More generally, it "was confidently maintained by the nationalizing school of lawyers and statesmen that the [laws passed immediately after the Civil War] had effected a complete revolution in our constitutional jurisprudence by transferring from the states to the United States [responsibility over] all the fundamental rights of citizens—their life, their liberty, and their property." DUNNING, *supra* note 42, at 260.

49. This view of congressional power was eventually confirmed by the Supreme Court in *Ex parte* Jackson, 96 U.S. 727 (1877). *See* notes 66-76 and accompanying text *infra*.

concerts, or other similar enterprises offering prizes of any kind on any pretext whatever."[50] This first step did not provoke much opposition, possibly because it was strongly supported by active church and civic "reform" groups, which had already succeeded in convincing numerous states to outlaw lotteries and other common forms of gambling, and possibly because in a period of much economic turmoil and distress, fraudulent lotteries were a common swindle, much dependent on the mails for their success.[51]

In 1872, before there had been time to bring many prosecutions under the new lottery law or to litigate its constitutionality, Congress, as part of its general revision of the postal laws, took three steps that incalculably increased its exercise of criminal jurisdiction based upon the use of the mails. The first step was to criminalize the mailing of any "obscene . . . vulgar or indecent" book, pamphlet, picture, print, or publication, as well as any envelope or postal card on which was written or printed any "scurrilous epithets" or "disloyal devices."[52] The second step was to broaden the lottery law to prohibit the mailing of any letters or circulars concerning lotteries "or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses."[53] Finally, Congress created the mail fraud statute, with its general prohibition against using the mails for the purpose of effectuating "any scheme or artifice to defraud."[54]

Although the historical context in which the mail fraud statute was promulgated thus suggests that Congress intended it be given a broad construction and application, it seems unwise to rest much weight on this conclusion in the absence of more specific legislative history. Perhaps the safest course is to abandon any further search for evidence of legislative intent in the limited historical record surroun-

50. Act of July 27, 1868, ch. 246, § 13, 15 Stat. 196.

51. *See* J. FURNAS, THE AMERICANS: A SOCIAL HISTORY OF THE UNITED STATES 380, 590 (1969) [hereinafter cited as FURNAS].

52. Act of June 8, 1872, ch. 335, § 148, 17 Stat. 302 (commonly called the "Comstock Act").

53. *Id.* § 149, 17 Stat. 302 (emphasis added). Notwithstanding the "or," the language seemingly prohibiting the mailing of matter concerning schemes "to deceive and defraud" was authoritatively construed in United States v. Stever, 222 U.S. 167 (1911), to apply only to schemes involving lotteries or games of chance, on the ground that otherwise the statute would simply be a repetition of the mail fraud statute enacted at the same time, a result Congress was deemed unlikely to have intended. *See also* United States v. Sauer, 88 F. 249 (W.D. Mich. 1898).

54. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323. By other sections of the act, the Postmaster General was empowered to discontinue or modify the postal services available to those engaged in fraudulent schemes. *Id.* §§ 300, 302, 17 Stat. 322-23. *See* Donaldson v. Read Magazine, Inc., 333 U.S. 178 (1948); Public Clearing House v. Coyne, 194 U.S. 497 (1904).

ding the genesis of the mail fraud statute and to focus instead upon the wording of the statute itself. As originally enacted, the mail fraud statute read as follows:

> That if any person having devised or intending to devise any scheme or artifice to defraud, to be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside the United States), by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice (or attempting so to do), place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post-office establishment, shall be guilty of a misdemeanor, and shall be punished with a fine of not more than five hundred dollars, with or without such imprisonment, as the court shall direct, not exceeding eighteen calendar months. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.[55]

On its face, the wording of the statute explains in large part how the courts came to attribute to the crime of mail fraud many of the qualities that, when viewed in light of the statute's very different present-day wording, seem so peculiar.[56] Specifically, the concept that the "gist" or "essence" of the crime of mail fraud is the misuse of the mails—a concept that, when parroted by present-day courts, seems no better than a legal fiction—looks rather more reasonable in terms of the wording of the original statute. The title of the statute was "Penalty for Misusing the Post-Office Establishment," and the misuse at which it was purportedly directed was the mailing of a letter in execution of such fraudulent scheme as is intended to be effectuated by means of the mails. As noted by the Supreme Court in construing the original mail fraud statute, the "constituents" of the offense were not only the two elements of the present-day statute, but three elements:

> (1) That the persons charged must have devised a scheme or artifice to defraud. (2) That they must have intended to effect this scheme, by open-

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55. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323. As originally printed, the statute had a minor typographical error. It began: "That if any person having devised or intending to devise any scheme or artifice to defraud, *or* be effected by either opening or intending to open correspondence. . . ." The correction of "or" to read "to" was judically accomplished in the first reported decision construing the mail fraud statute. *See* Brand v. United States, 4 F. 394 (C.C.N.D.N.Y. 1880).

56. *See* notes 37-39 and accompanying text *supra*.

> ing or intending to open correspondence with some other person through the post office establishment, or by inciting such other person to open communication with them. (3) And that, in carrying out such scheme, such person must have either deposited a letter or packet in the post office, or taken or received one therefrom.[57]

The second element (absent from the present statute)[58] — the *intention* to effectuate the scheme through a significant reliance on the use of the mails—served not only to bridge the two other elements but also to unify the statute and make it an organic whole, the apparent function of which was to deter the actual and intentional misuse of the mails in furtherance of a truly *mail*-fraud scheme.[59] In addition, the express emphasis on misuse of the mails carried over to the penalty provisions of the original mail fraud statute, which directed the sentencing court to "proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device."[60] Thus, the punishment was to be based not so much on the degree of the fraud as on the degree of misuse of the mails.[61] Taken together, then, the language of

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57. Stokes v. United States, 157 U.S. 187, 188-89 (1895). *Accord, e.g.*, United States v. Young, 232 U.S. 155 (1914); Erbaugh v. United States, 173 F. 433 (8th Cir. 1909); United States v. Smith, 45 F. 561, 562 (E.D. Wis. 1891).

58. *See* 18 U.S.C. § 1341 (1976), quoted at text accompanying note 5 *supra*.

59. In defining the second element as a scheme "to be effected by either opening or intending to open correspondence or communication with any other person," the statute adds the interesting parenthethical elaboration that such "other person" (who ordinarily would be either a victim of the fraud or else a co-schemer) may be "resident within or outside the United States." The clear implication is that the statute is intended to include mail fraud schemes that, although launched in whole or in part from United States territory, are effectuated abroad at the expense of foreign victims and/or with the help of foreign swindlers. Moreover, even when Congress, in 1909, eliminated the second element of the mail fraud statute, it nonetheless retained this express reference to the statute's extraterritorial applicability. *See* Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130. However, when in 1948, as part of a general revision of the federal criminal code, Congress removed from the mail fraud statute all language that it regarded as "surplusage," this particular language was among the language eliminated. *See* Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 763. But Congress did not have any intention of narrowing the extraterritorial applicability of the statute, since, as the legislative history expressly stated, Congress' sole intent in removing the "surplus" language was to leave the statute "simplified without change of meaning." H.R. REP. No. 304, 80th Cong., 1st Sess. 2557 (1947). In other words, there is at least some evidence suggesting that the extraterritorial application of the mail and wire fraud statutes, *see* notes 12-13 and accompanying text *supra*, was contemplated by Congress from the very first.

60. *See* text accompanying note 55 *supra*.

61. The penalty provisions of the original mail fraud statute also provided that the indictment "may severally charge offences to the number of three when committed within the same six calendar months; but the court thereon shall give a single sentence." It appears that the intent of this provision was to try to resolve the incongruity arising from

the original mail fraud statute seemed to indicate that Congress' central concern was the misuse of the federal mail facilities.

Yet, it may be that the language of the original statute protests too much its concern with misuse of the mails. To take one small example, at one point, the statute, having already described the conduct constituting the crime, goes on characterize that conduct as "misusing the post office establishment."[62] In substantive or operational terms, this interjection is utterly superfluous, and any attempt to apply to it the standard rule of statutory construction that every word of a statute should be given effect[63] would be an exercise in futility, because it has no effect of its own. Perhaps it should be dismissed as sloppy draftsmanship; but an alternative explanation for the inclusion of this phrase is that the draftsmen hoped that by stoutly declaring that the proscribed conduct constituted interference with a federal area, otherwise skeptical arbiters would construe it accordingly. A more important example supporting this same interpretation is the penalty provision of the statute, which requires that the punishment be proportioned to "the degree in which the abuse of the post office establishment enters as an instrument into such fraudulent scheme.[64] The only plausible reason for including such an ambiguous, abstract and amoral provision, which would appear to be wholly unamenable to principled application and unlikely ever to be given effect, was to demonstrate a concern with "abuse" of the mails, and thus to make it less likely that the statute would be struck down as an unconstitutional extension of federal jurisdiction over ordinary fraud.

In sum, while the "mail-emphasizing" language of the original mail fraud statute seemed ostensibly to evidence a congressional preoccupa-

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the fact that each act of mailing constituted a separate "offence" although only a single fraudulent scheme may have been involved. *See* text accompanying note 35 *supra*. Under this interpretation, the original penalty provision handled this problem by providing that, while even a single scheme might be charged in up to three counts, only one sentence could be imposed unless the scheme extended beyond a six-month period. However, the definitive interpretation given to this provision by the Supreme Court, in *In re* Henry, 123 U.S. 372 (1887), was that the provision was simply a rule of permissive joinder and that a defender could be prosecuted *and* sentenced on any number of mail fraud counts (with each mailing constituting a separate count) arising from any number of schemes during any period of time, as long as no more than three such counts were joined in any given indictment. *Id.* at 374-75. Thus emasculated, the provision was dropped in the 1909 revision of the statute, leaving the absurdity, which has persisted to the present day, that the number of chargeable and sentenceable counts is a function entirely of the happenstance of how many mailings ultimately have transpired in execution of any given fraud.

62. *See* text accompanying note 55 *supra*.

63. *See, e.g.*, 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1973).

64. *See* text accompanying note 55 *supra*.

tion with misuse of the mails and with prosecuting only those fraudulent schemes that in essential respects involved such misuse, an alternative explanation was that Congress was concerned with "dressing up" a statute actually directed at the broadscale prosecution of all kinds of fraud in such a way as to preserve it from judicial override, and to that end, the brave, bold words of the statute announcing its applicability to "any scheme or artifice to defraud" were circumscribed by those qualifications, limitations and self-characterizations thought necessary to save the statute's constitutionality.[65]

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65. It should not be forgotten that at the time of the enactment of the original mail fraud statute in 1872, doubts of its constitutionality would have been far from idle. Congress itself had almost unanimously rejected as unconstitutional President Jackson's attempt in 1835 to introduce legislation prohibiting the mailing of "incendiary publications." *See* notes 46-47 and accompanying text *supra*. Moreover, prior to the Civil War, it remained the prevailing constitutional view that the federal power "to establish post-offices and post-roads," *see* U.S. CONST. art. I, § 8, cl. 7, even when coupled with a broad construction of Congress' "implied powers" as set forth in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), at most gave Congress power over the medium of communication, but not over the substance of the messages transmitted thereby. Although in 1868 the Reconstruction Congress had implicitly rejected that earlier view and made claim to at least some power over the content of mailed matter by enacting a prohibition against the mailing of letters and circulars "concerning" illegal lotteries, *see* notes 50-51 and accompanying text *supra*, no test of that statute's constitutionality had yet reached the Supreme Court prior to the enactment of the mail fraud statute. Moreover, the mail fraud statute seemingly stretched the limits of federal power further than the lottery law; the lottery law arguably prohibited only those mailings that on their faces invited participation in lottery schemes, while the mail fraud statute made criminal the mailing of even such letters as were perfectly innocent and proper on their faces but that were mailed in furtherance of a scheme that was, at most, a state crime and sometimes not even that.

Furthermore, however broad a view the ardent nationalists of the Reconstruction Congress might take of federal power, *see* note 46 *supra*, by 1872 they were clearly aware of the grave doubts being voiced in the Supreme Court and elsewhere about the constitutionality of much of their handiwork. Beginning in 1866, the Court, though basically reconciled to the expansion of federal power wrought by the Civil War and its immediate aftermath, had begun to strike down as unconstitutional some of the grosser excesses of "Radical Reconstructionism." *E.g.*, *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866). *See also* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870). *Hepburn* was effectively overruled in Knox v. Lee, 79 U.S. (12 Wall.) 457 (1871), but only after President Grant, having strongly voiced his disapproval of *Hepburn*, appointed two new Justices to the Court whose votes were enough to tip the balance against it. By 1868, Congress had become so fearful that the Supreme Court might invalidate its entire Reconstruction program that it had taken the extraordinary step of passing legislation seeking to deprive the Court of jurisdiction over a case already pending before the Court in which the constitutionality of the Reconstruction Acts was at issue. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869). Although tensions between the Court and Congress somewhat moderated after President Grant's appointment of several Justices favorable to the Reconstructionist viewpoint, the Court still found occasions to declare unconstitutional such federal interference with state or individual preserves that did not find justification

## IV. THE EFFECTS OF *EX PARTE JACKSON* ON THE INTERPRETATION OF THE MAIL FRAUD STATUTE

Ironically, before there was time to test the effectiveness of the "mail-emphasizing" language in preserving the constitutionality of the mail fraud statute, the issue was settled in a different context and in a manner that rendered the mail-emphasizing language extraneous to this putative purpose. In 1877, a unanimous Supreme Court, in *Ex parte Jackson*,[66] upheld the constitutionality of the lottery law[67] with language so broad as to leave no doubt as to the constitutionality of the mail fraud statute as well. Speaking through Justice Field, the Court ruled that "[t]he power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded."[68] From that premise, it followed that Congress was entirely free "to prescribe regulations as to what shall constitute mail matter" and that the sole limitation on such regulations would derive "from the necessity of enforcing them consistently with rights reserved to the People."[69] In practice, this meant that although postal agents could not, in enforcing the lottery law, open sealed letters without a fourth amendment warrant,[70] they were free to obtain evidence of violation of the statute in numerous other ways, "as from the parties receiving the letters or packages, or from agents depositing them in the post office, or others congnizant of the facts."[71] Once having thus obtained such evidence, the federal government was free to prosecute those who had misused the mails.[72]

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in the exercise of some overriding federal purpose. *E.g.*, Granger Cases, 94 U.S. 133 (1876); United States v. Reese, 92 U.S. 214 (1875). *See generally* DUNNING, *supra* note 40, at 252-65. Accordingly, it was but the better part of prudence for the draftsmen of the original mail fraud statute to include much language in the statute seemingly directing its thrust toward the protection of the mails, rather than toward the prosecution of fraud.

66. 96 U.S. 727 (1877).

67. *See* note 50 *supra*.

68. 96 U.S. at 732.

69. *Id.*

70. *Id.* at 733, 735.

71. *Id.* at 735.

72. *Id.* at 735-36. Over the years, *Ex parte Jackson* has been criticized by some judges on the ground that its implicit analogy of the post office to a private business that can condition the sale of its goods and services on whatever terms it chooses is doubly faulty; since the postal service is both a government-owned monopoly and also a near-necessity of modern life, people have no genuine alternative to accepting its terms. Justice Harlan even went so far as to claim that "[t]he hoary dogma of *Ex parte Jackson* . . . that the use of the mails is a privilege on which the government may impose such conditions as it chooses, has long since evaporated." Roth v. United States, 354 U.S. 476, 504

In terms of effect on the development of the mail fraud statute, *Jackson* could not have been more significant in fostering an affirmative view of the propriety of expansive federal jurisdiction in this area of criminal law. By broadly affirming the right of Congress to criminally prosecute those who utilized the mails for a purpose—operating lotteries—that was otherwise at most a state crime and beyond Congress' control, *Ex parte Jackson* freed the lower courts from having to address the mail fraud statute's constitutionality, and from possibly being required to "save" the statute by some narrow construction of its scope. Indeed, after the *Jackson* decision, the constitutionality of the mail fraud statute was raised in only one reported decision during the remainder of the nineteenth century,[73] and there the issue was quickly disposed of by reference to *Jackson*. Moreover, any ambiguity that might have remained as to the applicability of *Ex parte Jackson* to the question whether Congress could constitutionally prosecute what were otherwise state crimes if they happened to involve use of the mails was quickly resolved by the reading given to *Jackson* by the Supreme Court itself. Thus, for example, in *In re Rapier*,[74] where the constitutionality of the lottery law was once again challenged, this time on the express ground that the prosecution of illegal lotteries was reserved to the states and was not reasonably related to any federal postal function,[75] a unanimous Court held that *Ex parte Jackson* was decisive of the question because that decision

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n.5 (1957) (Harlan, J., dissenting). But, in fact, this is unfair as to what *Jackson* said and inaccurate as to what its history had been. *Jackson* expressly recognized that Congress' power over the mails must be exercised "consistently with the rights reserved to the people." As it happened, *Jackson* only mentioned two such rights: the fourth amendment right against unwarranted searches and seizures and the first amendment freedom of the press. In particular, there was no mention of freedom of speech. *See* United States v. Ramsey, 431 U.S. 606, 612 n.8 (1977). It was not until as recently as 1965 that the Supreme Court made clear that the mails must be operated consistently with that right as well. *See* Lamont v. Postmaster General, 381 U.S. 301 (1965). *See also* Blount v. Rizzi, 400 U.S. 410 (1971). But with that qualification and further elucidation of its underlying principles, *Ex parte Jackson* remains very much the law of the land and provides the constitutional underpinnings of the mail fraud statute. As summarized by Justice Black:

> [The mail fraud statute and others like it] manifest a purpose of Congress to utilize its powers, particularly over the mails and in interstate commerce, to protect people against fraud. This governmental power has always been recognized in this country and is firmly established. The particular statutes . . . have been regularly enforced by the executive officers and the court for more than half a century. They are now part and parcel of our governmental fabric.

Donaldson v. Read Magazine, Inc., 333 U.S. 178, 190 (1948).

73. *See* United States v. Loring, 91 F. 881 (N.D. Ill. 1884).

74. 143 U.S. 110 (1892).

75. *Id.* at 134.

established "that mail facilities are not required to be furnished for [wrongful] purpose[s]" and that it was "not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality."[76]

A more subtle effect of *Ex parte Jackson*, noticeable only now in hindsight, was to cast doubt upon the purpose and effect of the language in the original mail fraud statute that placed so much emphasis on the use of the mails as the gravamen of the offense.[77] After *Jackson* and *Rapier*, it was clear that any doubts about the constitutionality of the mail fraud statute were groundless. However, although no court could properly declare the mail fraud statute unconstitutional, it did not follow that courts could freely disregard the mail-emphasizing language of the statute as mere surplusage.[78] On the contrary, as the most prominent feature of the original mail fraud statute, the mail-emphasizing language—*i.e.*, the language emphasizing intentional misuse of the mails as central to both the crime and its punishment—virtually compelled comment from the courts. But because much of this mail-emphasizing language was ambiguous in its scope, impractical in its application, and doubtful in its effect,[79] the interpretations that could be given it were various. More generally, given the novelty of the original mail fraud statute, the breadth and ambiguity of some of its terms, such as "scheme to defraud" and "misusing the post-office establishment," the virtual absence of legislative history, the paucity of legal precedents, and, after *Ex parte Jackson*, the freedom from any obvious constitutional restraints, the courts were left with few specific guidelines by which to interpret the statute.

This is well reflected in the early attempts at interpretation of the mail fraud statute. Indeed, beyond their agreement that the misuse of the mails was the evil at which the statute was aimed—an agreement virtually compelled by the language of the original mail fraud statute—the early interpretations range to such extremes and seem-

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76. *Id.* at 133-34. See also Public Clearing House v. Coyne, 194 U.S. 497 (1904) (upheld constitutionality of provision of the 1872 omnibus postal revision act permitting Postmaster General to seize and return to the senders mail sent to the promoter of a scheme to defraud); Champion v. Ames, 188 U.S. 321 (1903) (upheld, on basis on commerce clause, the constitutionality of a statute prohibiting interstate transportation of lottery tickets).

77. *See* notes 56-60 and accompanying text *supra*.

78. As discussed earlier, however, some of this language may in fact have been mere surplusage. *See* text accompanying notes 62-63 *supra*.

79. *See* notes 61-65 and accompanying text *supra*.

ingly reflect so many personal viewpoints that it is difficult to categorize them in any very meaningful way. Very broadly, however, these early decisions may be classified as falling into one of two groups. The first group gives a relatively narrow or "strict" construction to the substantive scope of the mail fraud statute, usually by reading the mail-emphasizing language as an expression of congressional preoccupation with those frauds that are necessarily dependent upon the use of the mails for their success. The second group gives a relatively "broad" construction to the substantive scope of the mail fraud statute, usually by reading the mail-emphasizing language as an expression of an intention by Congress to punish any intentional "abuse" of the mails in furtherance of fraud, regardless of the kind of fraud involved or how essential the use of the mails is to its success. In other words, the "strict constructionists" saw the statute as being aimed at a particular kind of fraud—mail-dependent fraud—while the "broad constructionists" viewed the statute as being directed against any misuse of the mails in furtherance of any kind of fraud.

## V. THE STRICT CONSTRUCTIONIST APPROACH TO THE ORIGINAL MAIL FRAUD STATUTE

An early example of the strict constructionist approach to the mail fraud statute is *United States v. Owens*,[80] only the fourth reported decision of any kind dealing with the mail fraud statute. In *Owens*, the defendant, who was indebted to a distillery in the amount of $162.50, mailed to the distillery an envelope containing fifty cents in coin and a letter stating that he was enclosing $162.50. The indictment, without further particularity, alleged that in so doing, the defendant intended to defraud the distillery (perhaps by inducing a clerk to carelessly credit him with the full amount or by creating a spurious basis for later pretending that he had mailed the full amount).[81] Superficially, even these bare facts appear to make out a mail fraud scheme. The defendant's alleged intent was to defraud; he devised a scheme to effectuate his intent through use of the mails; and he actually executed the scheme through a mailing. Indeed, even by strict constructionist standards, the use of the mails was crucial to the defendant's intended scheme, since if he were to have tendered the envelope in person, the chances of his being credited with payment of the full amount or of creating a claim that he had tendered the full amount would have been remote. It was only the uncertainty inherent in the use of the mails that gave his scheme any hope of success.

80. 17 F. 72 (E.D. Mo. 1883).
81. *Id.* at 73.

The court in *Owens*, however, did not analyze the case in these terms. Instead, it considered first whether it was likely that Congress intended to draw within federal jurisdiction such everyday cases of bill-dodging:

> There may have been an attempt to cheat, cognizable, possibly, by some state statutes or at common law. [But] were the postal laws designed to draw within federal jurisdiction each and every individual transaction between debtor and creditor, when postal correspondence ensues, with respect thereto . . . if any [fraud] were designed? . . . If such is the scope of the [mail fraud statute], it may draw within federal cognizance nearly all the commercial correspondence of the country as to disputed demands and the value of remittances.[82]

It should be noted that the court did not say that such a broad extension of jurisdiction would be unconstitutional, but only, in effect, that it was unlikely that Congress could have intended to exercise such a broad jurisdiction over such petty matters.[83] In reaching that conclusion, the court examined the mail-emphasizing language of the statute, placing particular stress on the language related to proportioning the punishment "to the degree in which the abuse of the post-office establishment enters as an instrument into the fraudulent scheme."[84] The court read this language as demonstrating that the statute "was designed to strike at common schemes of fraud, whereby, through the post-office, circulars, etc., are distributed, generally to entrap and defraud the unwary, and not the supervision of commercial correspondence solely between a debtor and creditor."[85] Thus, the court interpreted the mail-emphasizing language of the statute as setting forth a substantive qualification on the phrase "any scheme or artifice to defraud," limiting it to "common schemes" involving the general distribution of fraudulent circulars through the mail. Since the scheme attributed to Owens was not of this type, the court dismissed the indictment.[86]

*Owens* exemplifies the dilemma faced by courts in initially construing the original mail fraud statute. If the statute were read as applying to any scheme to defraud whatever, provided only that certain discrete additional requirements relating to the use of the mails were met in the course of executing the scheme, then no matter how much emphasis was placed on these mail-related requirements, in countless situations the statute would still be applicable to fraudulent schemes

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82. *Id.* at 73-74.
83. *Id.* at 74.
84. *See* text accompanying note 55 *supra.*
85. 17 F. at 74.
86. *Id.*

of an utterly local and trivial nature—a result any court might find difficult to accept, especially in the nineteenth century. By contrast, if the mailing aspects were taken to limit and define the very categories of fraud to which the statute applied, there existed real difficulty in specifying those categories in any rational, workable, or consistent manner. Rejecting the former view as unlikely to have been intended by Congress, the court in *Owens* could offer no better definition of the kinds of frauds covered by the statute than those "common schemes" typified by the general distribution of "circulars, etc." through the mails.[87] Clearly, this definition was too vague to afford much guidance.

Other courts that followed the strict constructionist approach first taken in *Owens* rarely faired better in deriving from the mail-emphasizing language of the statute any more precise definition of the kinds of schemes to defraud covered by the mail fraud statute. Indeed, it is difficult to read these strict constructionist cases without drawing the inference that some of these courts were simply searching for excuses to dismiss indictments they did not care for, without having any very precise formulation in mind as to what kinds of cases would fall within the statute. For example, in *United States v. Mitchell*,[88] the court, possibly as a reaction against the seeming harshness of state laws that permitted insurance companies entirely to cancel long-held policies if premiums were not paid on time, dismissed on the authority of *Owens* a prosecution against a policyholder who, having suffered an accident two days after he had allowed his accident insurance policy to lapse, induced a postal employee to backdate the postmark on a letter containing the three dollar renewal premium that he mailed to the insurance company.[89] The court concluded that although this was undoubtedly a scheme to defraud effectuated by use of the mails, it was not of the (undefined) class or type against which the mail fraud statute was directed.[90]

Somewhat more definite, but even more extreme, was the position taken by the court in *United States v. Clark*.[91] In that case, the indictment alleged that the defendants mailed fraudulent circulars to their victims, falsely representing that in return for the victims' money they would provide individualized instruction through the mails.[92] On its face, this correspondence-school swindle propagated through the mailing of circulars would appear to be precisely the kind of fraud that

87. *Id.*
88. 36 F. 492 (W.D. Pa. 1888).
89. *Id.* at 492-93.
90. *Id.* at 493.
91. 121 F. 190 (M.D. Pa. 1903).
92. *Id.* at 191.

would meet the standards set forth in *Owens* and *Mitchell*. The court ruled, however, that although the fraud was propagated through the mails, it was not of the class of schemes to whose effectuation the use of the mails was absolutely "essential," because the circulars were only mailed to local individuals who could just as easily have been "sought out and induced through canvassers or solicitors or by advertisement in the public prints."[93] The court further reasoned as follows:

> It is not every fraudulent scheme in which the mails may happen to be employed that is made an offense against the federal law, but only such as are "to be effected" through that medium as an essential part. . . . What is sought to be prevented is an abuse of the post office facilities of the country to carry out schemes to defraud, a far wider range being secured through this public agency, with greater chance for immunity on account of the distance at which they are able to be undertaken. But, as stated above, this use must be an essential of the scheme, and not a mere adjunct or incident. . . . So the statute reads, and we cannot enlarge upon it. There is a growing tendency to try to do so, which must be resisted. Bad debts contracted by mail are even sought at times to be made the basis of a prosecution under it; but the federal law was not intended to bolster up the credit system of the country, nor improve its morals.[94]

The clear implication of *Clark* was that the mail fraud statute was not really directed at reprehensible behavior per se; nor was it designed to "improve the public morals." Its intent was merely to prevent the federal facility of the mails from becoming an essential weapon in the arsenal of those who commit frauds. Consequently, according to the *Clark* court, the statute's scope was limited to those kinds of frauds that necessarily depended upon the mails for their effectuation.

By carrying the logic of the strict constructionist approach to its natural conclusion, the *Clark* decision provided a somewhat clearer test of whether a given fraud scheme fell within the scope of the mail fraud statute. Essentially, the test enunciated in *Clark* was that the federal mail fraud statute was not applicable to a particular scheme unless that fraud could not have been committed "but for" the use of the mails.[95] Few other courts, however, were willing to apply so rigorously a logic that led to a result so disabling to the statute. They preferred, as in *Owens* and *Mitchell*, to dismiss particular indictments on the ground that the scheme in question was not of the type that sufficiently involved effectuation by use of the mails while avoiding any specification of the precise requirements necessary to bring the scheme within the statute.

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93. *Id.*
94. *Id.* at 190-91.
95. *See id.*

It should be noted that none of the strict constructionist courts based their narrow reading of the original mail fraud statute upon perceived constitutional limitations of Congress' power to enact such legislation. Perhaps in deference to *Ex parte Jackson*, these courts apparently assumed that Congress, if it had chosen, could have extended its jurisdiction even to schemes to defraud in which the mails were only incidentally involved.[96] However, on the strength of the mail-emphasizing language, the strict constructionists concluded that Congress had, as a matter of policy, chosen not to extend federal jurisdiction that far. Thus, they read the mail-emphasizing language of the statute not as a guard against possible claims of unconstitutionality, but rather as an expression of substantive congressional limitations on the scope of the statute, to which they struggled to give more precision.

It should also be mentioned that, because so few schemes met the mail-dependence requirement of the strict constructionist view, there was almost never a need to go further and to inquire whether the scheme in question was also a scheme to defraud. The result of this approach was that when, in 1909, Congress finally did away with the mail-emphasizing language in the statute,[97] there was no viable body of case law applying a narrow interpretation of the term "scheme to defraud," but only decisions giving it a broad construction.[98] Indeed, the enactment of the 1909 amendment was partly the result of the fact that some of the courts following the strict constructionist approach to the interpretation of the mail-emphasizing language had themselves found that approach perplexing and unworkable. While these courts did not abandon it for the broad constructionist approach, they increasingly fell back on the position that only Congress, by removing the mail-emphasizing language, could broaden the statute's scope.[99] Con-

96. *See* note 72-76 and accompanying text *supra*.

97. Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130. *See* notes 205-207 and accompanying text *infra*.

98. The only two exceptions to this statement are Miller v. United States, 174 F. 35 (7th Cir. 1909), and United States v. Fay, 83 F. 839 (E.D. Mo. 1897). *Miller* sought to limit "schemes to defraud" to schemes to defraud persons of money; but this doctrine, never followed outside the Seventh Circuit, *see, e.g.*, United States v. Rose, 56 F.2d 747, 749 (2d Cir.), *cert. denied*, 286 U.S. 554 (1932), was expressly disavowed a few years later in Moore v. United States, 2 F.2d 839, 841 (7th Cir. 1924). In *Fay* the court held that the defendant, who had induced the victim to pay him for use of supernatural powers that the defendant fraudulently claimed to possess, could not be guilty of a "scheme to defraud" because no "rational being, possessed of ordinary prudence and sagacity, could or would be deceived by any such irrational, visionary, and stupid pretense." 83 F. at 839. This holding is such an irrational pretense that no later court paid it any heed. *Cf.* O'Hara v. United States, 129 F. 551 (6th Cir. 1904) (opposite result on roughly similar facts).

99. Thus, for example, in United States v. Smith, 45 F. 561 (E.D. Wis. 1891), where the indictment charged that the defendant engaged in medical quackery through the

gress ultimately acted on these invitations and eliminated much of the mail-emphasizing language from the mail fraud statute.

## VI. THE BROAD CONSTRUCTIONIST APPROACH TO THE ORIGINAL MAIL FRAUD STATUTE

Well before Congress acted, however, another group of courts reached much the same practical result by interpreting the language of the statute, including the mail-emphasizing language, in a manner very different from the strict constructionists. Initially, the broad constructionists, like the strict constructionists, were confronted with the problem of having to divine the statute's purpose and scope in the absence of any direct legislative history. In seeking meaning in the not-very-plain language of the original mail fraud statute, the strict constructionists had followed the traditional path of construing the language of the statute as a unified whole, with each phrase being interpreted in light of every other phrase. With so much mail-emphasizing language running through the statute, the natural result of this approach was a view of the statute as being concerned with only those kinds of schemes to defraud that were dependent essentially on the use of the mails.[100]

The broad constructionists, on the other hand, took a less orthodox approach that in some respects foreshadowed the modern compartmentalization of the components of federal criminal stautes into purely "substantive" elements and purely "jurisdictional" elements. Specifically, the broad constructionists interpreted the mail-emphasizing

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medium of fraudulent advertisements placed in a mail-delivered newspaper, the Court, while dismissing the indictment on the ground that the kinds of schemes covered by the statute did not extend to those intended to be effectuated through newspapers (even if some newspapers were sometimes delivered by mail), nonetheless candidly confessed that:

> It is not clear why the design to use the mails was required as a constituent element of the offense. Thereby the statute measurably defeats its purpose, since the mail may be used in aid of fraudulent practices [even] if the intent so to use was not part of the scheme to defraud. But *ita lex scripta est*, and it must be administered as declared.

45 F. at 562-63. Similarly, in United States v. Ryan, 123 F. 634 (E.D. Ark. 1903), where the court dismissed an indictment relating to "fixed" foot races because the use of the mails to arrange the fix was not essential to the scheme's effectuation, the court added: "That Congress has the constitutional power to prohibit the use of the mails for such criminal purposes cannot be doubted, but, unfortunately, it has so far failed to exercise it, and, until it does, the courts are powerless to interfere." *Id.* at 636. *See also* Erbaugh v. United States, 173 F. 433 (8th Cir. 1909).

100. This is not to suggest that all "strict constructionist" judges actually followed this formal line of reasoning to reach their decisions, but only that they employed this type of reasoning to justify conclusions they may have reached for any number of personal or policy reasons.

language not as describing or limiting the kinds of schemes to defraud that were covered by the statute but as emphasizing the full and total control which the federal government intended to exercise over the use of the mails.[101] As viewed by the broad constructionists, the congressional purpose expressed by the mail-emphasizing language was a determination to keep the mails "pure," "untainted," and "unsullied," and not to allow the use of the mails to be perverted into aiding the commission of any fraudulent design. According to this view of the statute, swindlers were free to take their chances with local authorities by misusing those facilities supervised by the states, but if, in the implementation of their schemes, they sought to make use of the federally protected facility of the mails, federal intervention and prosecution would justifiably follow.[102]

Under this approach, it did not matter what kind of scheme to defraud was involved. Indeed, since the supposed object of the statute was to keep the federal mails free of any misuse, there was every reason to give the broadest interpretation to "scheme to defraud." Such an interpretation would not trench on state concerns because the crime would only be committed when, in furtherance of such a scheme and to effect its objects, the schemer intentionally made use of the federal facility of the mails. It was this forbidden "abuse" of the mails that was the "gist" of the crime, and not the scheme to defraud that it effectuated. Accordingly, by a kind of dynamic complementarity, the narrow, conceptualistic emphasis on the misuse of the mails as the "gist" of the crime afforded the courts that took this approach a certain freedom to embrace the most sweeping definitions of "scheme to defraud" without appearing to expand federal jurisdiction.

The broad constructionist approach, which was similar to the approach taken by the Supreme Court in *Ex parte Jackson* with respect to the lottery law, was somewhat artificial because it rested upon a conception of the use of the mails as a privilege, available only to the most high-minded,[103] instead of as the integral, often inescapable aspect

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101. *See* notes 105-125 and accompanying text *infra*.

102. *See, e.g*, United States v. Horman, 118 F. 780 (S.D. Ohio 1901), *aff'd*, 116 F. 350 (6th Cir.), *cert. denied*, 187 U.S. 641 (1902). In *Horman*, the court stated:

> The offense defined by [the mail fraud statute] is one against the postal laws of the United States, and the policy of this statute is to prevent the misuse of the mails of the United States,—the prostitution of the mails of the United States in furtherance of dishonest schemes. The government intends that the post-office establishment shall be used by the people for the purposes of legitimate business and social intercourse, and that it shall not be used for the purpose of furthering dishonest schemes or practices . . . .

*Id.* at 780-81.

103. *See* note 72 *supra*.

of modern American society that it actually was. Yet, this artificial conception served to justify in legal terms a broad and flexible construction of the mail fraud statute that, in fact, was much more consistent with Congress' actual intent than the seemingly more natural, but in practice much less workable, interpretation given to the statute by the strict constructionists. This conclusion, however, is less surprising when one considers that the original mail fraud statute was not well drafted, but rather was filled with imprecise terms, extraneous interjections and novel components.[104] Thus, a comparatively "straightforward" reading of the statute by the strict constructionists led to improbable results, while the more conceptualistic approach of the broad constructionists ultimately proved more satisfactory and "realistic."

The earliest case suggestive of the broad constructionist approach was *United States v. Jones*.[105] That case dealt with a crime, known at the time as a "green article" scheme, which was particularly rife in the latter half of the nineteenth century. In essence, the scheme consisted simply in mailing letters to persons offering to sell them counterfeit money ("green articles") at a small fraction of face value, which they could then pawn off on the public, realizing a large profit. Sometimes, the schemer genuinely intended to provide the counterfeit money to those who paid the price, in which case the scheme was essentially an attempt to distribute counterfeit money through an intermediary.[106] Other times, in a variation of the "green article" scheme sometimes called the "sawdust swindle,"[107] the schemer never intended to provide the promised counterfeit money, knowing that if he could induce the victim to pay for the counterfeit money in advance, the victim, having evidenced his own criminal intent to distribute counterfeit money,

104. *See* notes 61-65 and accompanying text *supra*.

105. 10 F. 469 (C.C.S.D.N.Y. 1882). *Jones* was decided by one of the old circuit courts created by the original Judiciary Act of 1789 and ultimately abolished in 1912. Respecting the mail fraud statute, these courts had both original jurisdiction (concurrent with the district courts) and appellate jurisdiction, until 1891 when their appellate jurisdiction was largely transferred to the newly-created courts of appeals. The decision in *Jones* itself was upon a new trial motion entertained pursuant to the court's original jurisdiction.

106. This scheme was difficult to prosecute under the then-existing counterfeiting statutes unless an attempt had been made by the intermediary to pass the money to the general public. If, instead, the recipient of the letter simply reported the scheme to the police, not enough had occurred to charge the letter writer with passing counterfeit money; nor, unless there was more than one signatory to the letter, could it be prosecuted as a conspiracy to defraud the United States, *see* 18 U.S.C. § 371 (1976), since the recipient had never agreed to join the conspiracy.

107. Typical decisions involving "green articles" schemes and "sawdust swindles" are Milby v. United States, 120 F. 1 (6th Cir. 1903), and Lehman v. United States, 127 F. 41 (2d Cir. 1903).

would be in a difficult position to report the matter to the authorities.[108]

Under the strict constructionist approach to the federal mail fraud statute, it was doubtful whether either version of the green article scheme could be prosecuted as mail fraud. Certainly the first type could never be prosecuted because, if the schemer had no intention to defraud the immediate person to whom he directed his mailings, there was no "essential relationship" between the fraud and the use of the mails. The part of the first type of scheme which could be said to be fraudulent—the further distribution of the counterfeit bills to the general unsuspecting public—neither contemplated nor was dependent upon the use of the mails.

In *Jones*, the scheme was of the first type. "[T]he accused devised a scheme to put counterfeit money in circulation by sending through the mail to one Bates a letter calculated to induce Bates to purchase counterfeit money at a low price, for the purpose of putting it off as good."[109] Moreover, there was a total "absence of any evidence to show an intention on the part of the accused to defraud Bates or any other particular person."[110] Nonetheless, the court ruled that a violation of the mail fraud statute had been established, reasoning that "the gist of the offence consists in the abuse of the mail. The *corpus delicti* was the mailing of the letter . . . and the letter itself showed its unlawful character."[111] Consequently, all that remained was to determine whether the overall scheme of which the letter was a part was "a scheme to defraud." Of this the court had no doubt:

> The scheme to defraud described in the information may be a scheme to defraud any person upon whom the bad money might be passed, and it is within the scope of the statute, although no particular person had been selected as the subject of its operation. Any scheme, the necessary result of which would be the defrauding of somebody, is a scheme to defraud within the meaning of [the mail fraud statute], and a scheme to put counterfeit money in circulation is such a scheme.[112]

The mail-emphasizing language of the statute was not read by the *Jones* court as modifying the term "scheme to defraud," but rather as expressing the notion that the mailing itself was the "gist" of the crime. Consequently, if there occurred an intentional use of the mails

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108. Since the authorities, therefore, normally became aware of these schemes only from those recipients of the letters who neither made the advance payments nor otherwise entered into the scheme, it was difficult to establish that the schemer had not genuinely intended to deliver the counterfeit money for which the payment was solicited.

109. 10 F. at 470.

110. *Id.* (emphasis added).

111. *Id.*

112. *Id.*

in execution of "any scheme or artifice to defraud" of any kind, that use of the mails was a misuse and was punishable under the statute.[113]

Just as the broad constructionist courts found no limitation on the term "scheme or artifice to defraud" in any of the other language of the statute, they likewise perceived no reason for modifying the great scope and sweep of this terminology by reference to such additional requirements and limiting doctrines as existed in state and common-law precedents. For example, in *United States v. Loring*,[114] the defendants were charged with scheming to obtain money by falsely promising to invest it in commodities speculations, when in fact they planned to convert it to their own use.[115] The defendants argued that the indictment should be dismissed because it failed to make out an offense of fraud either at common law or under the law of the state in which their alleged acts had been committed.[116] The court in *Loring* rejected this defense, concluding that it was not necessary that the scheme be unlawful under other sources of law, or that it constitute fraud under common law or some other statute, so long as the purpose of the scheme was to defraud (in any sense of that term) and the mails were employed to effectuate that purpose.[117] Thus in *Loring*, as in *Jones*, the focus on the use of the mails as the gist of the crime provided the court with a basis to propound the broadest definition of "scheme to defraud," unencumbered by any special qualifications derived from the law of other times or places.[118]

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113. *Id.*

114. 91 F. 881 (N.D. Ill. 1884).

115. *Id.* at 884.

116. *Id.* at 882.

117. *Id.* at 887. The court reasoned as follows:

> Nor is it necessary that the scheme or artifice devised should be in itself unlawful [under other sources of law]. If the scheme was fraudulent,—if the purpose was to get money from other persons, under pretense of investing it for such person, and not so to invest it, but apply it to the use of the defendants,—the case is within the statute. The object of the law was to prevent persons having fraudulent designs on others from using the post office as a means of effecting such fraud. It need not, in my opinion, be a fraud either at common law or by statute. It is enough if it was a scheme or purpose to defraud any persons of their money. Some of the states of this Union prohibit lotteries, and make it a crime to conduct a lottery; others legalize lotteries, and give them their affirmative legislation and sanction, for the support of public enterprises, or for the purpose of private gain; and yet all matter concerning lotteries, whether legal or illegal, is by law excluded from the mail. It is a misdemeanor to place such matter in the post office; and that has been held to be a constitutional law [in *Ex parte Jackson*].

*Id.*

118. For other early decisions in which the mail fraud statute was applied to schemes that allegedly would not have constituted state or common-law fraud, see Harris v. Rosenberger, 145 F. 449 (8th Cir.), *cert. denied*, 203 U.S. 591 (1906) (inducing purchases

It is not certain why some courts favored a "broad construction" of the language of the original mail fraud statute and other courts a "strict construction." Attitudes toward federalism and overall judicial philosophy undoubtedly played a role. So, unquestionably, did the personal social and economic biases of particular judges. This latter conclusion is supported by an examination of both the strict constructionist decisions, such as *Clark*, where the statute was found inapplicable to "prosecutions for bad debts" because federal law was not "intended" to "bolster the position of creditors,"[119] and broad constructionist decisions, where the same type of situation present in *Clark* was found to constitute a case of federal mail fraud.[120] Similarly, just as a strict constructionist judge could be so seemingly swayed by his dislike for the power of insurance companies as to dismiss as beyond the statute's scope the prosecution of a patent insurance swindler,[121] so too a broad constructionist judge did not shrink from finding a violation of the federal mail fraud statute in a union's mailing of circulars calling for a boycott of a nonunion employer.[122]

Yet the most important influence in determining the construction given to the mail fraud statute in those early cases, and concomitantly in determining the outcome of the cases, was none of the above, but rather was the degree of moral concern felt by the judge as to the underlying facts of the fraud.[123] Thus it appears that the single most common denominator among the strict constructionist decisions was that they involved relatively trivial crimes. No judge dismissing such a case was likely to feel that he was permitting some moral monster to roam free, or that he was opening the gates to rampant outrages in the future. By contrast, where the conduct in question evoked reponses of moral outrage, judges, whatever their judicial philosophy, were disinclined to allow the swindler to escape justice on the basis of a narrow construction of the statute.

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through false representations falls within statute even if victims in fact receive fair market value for their money); O'Hara v. United States, 129 F. 551 (6th Cir. 1904) (fact that scheme is self-evidently impossible of execution does not take it out of statute's coverage); United States v. Bernard, 84 F. 634 (C.C.S.D.N.Y. 1898) (obtaining money by false representations as to profits violates the statute even though the money is then properly invested for the benefit of those who remit it).

119. *See* notes 93-94 and accompanying text *supra*.

120. *See, e.g.*, United States v. Watson, 35 F. 358 (E.D.N.C. 1888); United States v. Wootten, 29 F. 702 (E.D.S.C. 1887).

121. *See* United States v. Mitchell, 36 F. 492 (W.D. Pa. 1888).

122. *See* United States v. Raish, 163 F. 911 (S.D. Ill. 1908).

123. Of course, a judge's social or economic philosophy partly influences the degree of moral concern he feels as to certain kinds of frauds, as does his upbringing, temperment, moral and religious training, etc. But there are many frauds, such as swindling widows and orphans, as to which moral outrage is felt by nearly everyone.

Nor, where the fraud was substantial, were many judges, whatever their attitude toward federalism, persuaded to free the accused on the ground that prosecution would infringe upon the rights of the states. It was not as if the states were being deprived of the chance to prosecute such men if they chose to do so. In practical terms, the states had no real interest in preventing the federal government from also prosecuting cheats and swindlers, since the sole effect of narrowing or eliminating federal jurisdiction over such frauds perpetrated though the mails was to make society as a whole that much more vulnerable to cheats and swindlers. Where the conduct was unquestionably criminal and the only real dispute was whether the states had sole jurisdiction to prosecute that conduct or were obliged to share that function with the federal government, the strict construction of criminal statutes seemed far less appropriate than in those situations where the conflict was between the power of the government and the freedom of the individual. Moreover, the language of many of the early mail fraud decisions suggests an intense religious and moral sentiment, and a feeling that it was not so much state or federal law that was contravened by the mail-fraud swindlers, but moral law — the law of "Thou shalt not steal." Thus, every form of organized society and every government, both state and federal, had a legitimate interest in protecting the members of society from fraudulent schemes. With economic crime rampant and many local authorities unable to cope with the more sophisticated forms of thievery,[124] no societal interest would have been served by preventing the federal government from adding its ammunition to the war on fraud.[125]

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124. *See* Goldstein, *supra* note 24, at 420-21.

125. For a recent illustration of the operation of some of the tendencies described in this paragraph, compare the narrow construction a unanimous Supreme Court gave to the Federal Travel Act, 18 U.S.C. § 1952 (1976), in Rewis v. United States, 401 U.S. 808 (1971), where the question was the applicability of the statute to the "victimless crime" of operating a small, local gambling lottery in a remote southern town, with the broad construction an equally-unanimous Supreme Court gave to the very same statute in Perrin v. United States, 100 S. Ct. 311 (1979), where the question was the applicability of the statute to a more sophisticated and (in the view of the present Court) pernicious scheme to extract secret business information by bribing corporate employees. In *Rewis*, it was said that the extension of the Travel Act to prosecution of a trivial local lottery would "alter sensitive federal-state relationships, could overextend limited federal police resources, and . . . would transform relatively minor state offenses into federal felonies." 401 U.S. at 812. But in *Perrin*, where the application was to an offense that, while only a misdemeanor in most states, was viewed by the Court as more serious (at least on the particular facts before it), the very same statute was now said to reflect "a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement." 100 S. Ct. at 318. Similarly, while in *Rewis* the Court invoked the familiar maxim that "ambiguity concerning the ambit of criminal statutes

## VII. THE BLACKMAIL CASES

The most extreme application of the broad constructionist approach to the original mail fraud statute occurred in cases involving allegations of blackmail, *i.e.*, extortion by threatening to publicize incriminatory or scandalous information concerning the victim.[126] The first blackmail case prosecuted under the federal mail fraud statute was *Weeber v. United States*.[127] In that case, the defendant Weeber, who was attempting to collect a debt from one Stephens, prepared a false letter in the name of the United States Attorney purportedly making inquiries of Weeber about Stephens. Weeber mailed the letter to himself and then, without opening it and as if it had been intercepted before delivery to him, had it delivered to Stephens with "the intention and expectation . . . that thereby Stephens would be frightened—blackmailed—into paying" the bill.[128] Under any strict constructionist view, this scheme would not have fallen within the mail fraud statute. The use of the mails was far from "essential" to the effectuation of the scheme. Moreover, the mailing of a letter to oneself was not, in the strict constructionist view, an "opening [of] correspondence or communication with any other person" by means of the mails, as required by the statute.[129] However, Justice Brewer, sitting as a circuit judge and writing the opinion of the court in *Weeber*, concluded that the defendant's scheme was actionable under the mail fraud statute:

> Congress has power to provide . . . for what purpose the post office shall be used, and to punish any one for a violation of its provisions in respect thereto . . . .
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> . . . The criminality of the defendant . . . [is not] avoided by the fact that the act of using the mails is only one step in a series of acts intended to accomplish the fraudulent scheme. It is enough that the defendant, having devised a scheme to defraud, in the execution of that scheme, and as a necessary or convenient step in the execution thereof, transmits through

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should be resolved in favor of lenity," 401 U.S. at 812, in *Perrin* the Court expressly rejected "the application of the maxim" because it was "'not to be used in complete disregard of the purpose of the legislature,'" 100 S. Ct. at 317, n.13 (citation omitted). *See also* United States v. Nardello, 393 U.S. 286 (1969). *But cf.* Seidman, *Factual Guilt and the Burger Court*, 80 COLUM. L. REV. 436 (1980).

126. Given the grossly hypocritical nature of American society during the "Gilded Age," when widespread graft and corruption existed side-by-side with what has been called a "waxy anxiousness of moral tone," FURNAS, *supra* note 51, at 312, it well may be that the crime of blackmail, which was addressed to the victim's social reputation, elicited particular scorn and loathing from those courts called upon to deal with it.

127. 62 F. 740 (C.C.D. Colo. 1894).

128. *Id.* at 741.

129. *See* Erbaugh v. United States, 173 F. 433, 434 (8th Cir. 1909).

> the post office a letter used, or designed to be used, for the purpose of carrying that scheme into effect.[130]

In Justice Brewer's view, although the mailing was the act upon which Congress conditioned its punishment of the scheme to defraud, the relationship of the act to the scheme need be nothing more than a "convenient step."[131] This view brought the required mailing remarkably close to being nothing more than what would be characterized today as a "bare" jurisdictional act.[132]

The conclusion that the mailing involved in *Weeber* was sufficient to bring the case within the scope of the federal mail fraud statute was not dispositive. There still remained the problem of whether Weeber's scheme was genuinely a scheme "to defraud." From one point of view, the scheme clearly was one to defraud, because the defendant had used false representations—the phony letter—to try to obtain the victim's money. The indictment, however, did not specify the falsity of the letter, but rather stated that the fraud was that the debt which Weeber was attempting to collect was not actually owed by Stephens in the first place, a fact of which Weeber apparently was not aware. Justice Brewer did not even address this problem, which raised a serious question as to whether Weeber possessed the requisite criminal intent to defraud; he merely concluded that it was "obvious" that there was a scheme to defraud[133] and did not set forth any additional analysis. This broad-brush approach set the stage for further blackmail cases that followed, of which the most important was *United States v. Horman*.[134]

In *Horman*, the defendant mailed letters to three victims, threatening that unless they paid him $7,000 he would reveal to newspapers and others the victims' scandalous "crimes," of which the defendant claimed to have knowledge.[135] The indictment charged that the defendant did not, in fact, know of any crimes committed by the victims and

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130. 62 F. at 741.

131. *Id.*

132. It may seem strange thus to characterize Justice Brewer as in effect a "broad constructionist" who favored broad application of federal prosecutive power, when he is more commonly described as having been an "arch-conservative" opposed to any governmental infringements on the rights of private property. But the contest over the construction of the mail fraud statute, to the extent it fell along economic lines, was not a contest of government vs. private property but rather a contest of federal government and creditors' rights vs. state government and debtors' interests. It is surely not strange, in Justice Brewer's day or in ours, to find a conservative jurist opposing federal restraints on business and yet strongly supporting federal "law and order" legislation.

133. 62 F. at 741.

134. 118 F. 780 (S.D. Ohio 1901), *aff'd*, 116 F. 350 (6th Cir.), *cert. denied*, 187 U.S. 641 (1902).

135. *Id.*

was therefore guilty of a false representation.[136] However, the district court in *Horman* chose to uphold the indictment on the broader theory that any blackmail scheme was a "scheme to defraud" within the meaning of the mail fraud statute, regardless of whether it involved an element of deception: "[A]ny scheme by which it is sought to obtain another man's money wrongfully, without giving him any equivalent for it, is a scheme to defraud."[137] In reaching this conclusion, the district court was strongly influenced by the "policy of this law, and the broad purposes it was intended to serve, in preventing the prostitution of the mails of the United States in furtherance of dishonest schemes or practices of any kind."[138] Moreover, this broad view was especially warranted to avoid situations in which "the misuse of the mails to further schemes by which men are bullied, frightened, and driven, through fear of unenviable notoriety, public criticism, or newspaper attack, to pay money, as the price of being delivered therefrom, would go unpunished."[139]

On appeal to the Court of Appeals for the Sixth Circuit, Judge (later Justice) Day, speaking for a unanimous panel, affirmed on the basis of the same broad theory applied by the district court. He justified this reading of the mail fraud statute as follows:

> The phrase "scheme or artifice to defraud" is to be construed bearing in mind the underlying purpose of the statute to preserve the use of the mails to legitimate ends. . . . A scheme may include a plan or device for the legitimate accomplishment of an object. But to come within the terms of the statute under consideration the artifice or scheme must be designed to defraud. We think, bearing in mind that the term is used to characterize the guilty purpose and wrongful intent with which the scheme or artifice has been formed by the accused, there is no difficulty in understanding the legislative purpose in using the term. . . . The acts are required to be done with intent to injure or defraud, as distinguished from an innocent purpose in the doing of the same. We think the term in this statute . . . is intended to define the wrongful purpose of injuring another, which must accompany the thing done to make it criminal within the meaning of the statute. . . .
>
> . . . .
>
> Nor does the interpretation given the term "to defraud" do violence to the lexical meaning of the expression. . . . To "deprive of something dishonestly" is to defraud. . . .
>
> Applying the principles which we have undertaken to state to the charge in the indictment before us, we have no doubt it describes a scheme to defraud within the meaning of the section. The scheme is set forth to ruin and blacken the reputation and character of others by ac-

136. *Id.* at 781.
137. *Id.*
138. *Id.* at 782.
139. *Id.*

> cusation of heinous offenses and misdeeds. That this scheme was not innocent, but intended for a wrongful purpose,—"to defraud," in the language of the statute,—is shown in the charge that these alleged crimes were to be published to the world in default of the payment of a large sum of money to the accused.[140]

In short, Judge Day read "to defraud" as nothing more than a requirement of general criminal intent ("the wrongful purpose of injuring another"), and thus perceived any crime whatever as being within the scope of the mail fraud statute if a mailing was found "convenient" to its execution.

Although the notion of "fraud" is undoubtedly one of the most elastic in law, it does not reach to the point claimed by the court in *Horman*. If, as was suggested by the *Horman* court, "to defraud" means simply to intend to injure, then, as noted, virtually every crime, including murder, rape and robbery, could be viewed as being within the scope of the "scheme to defraud" language. If that unlikely result was what Congress actually intended in promulgating this statute, it is not clear why Congress, which undoubtedly has the power[141] to forbid the use of the mails in furtherance of any "scheme to injure" or any "dishonest scheme," would not have used those terms instead of introducing ambiguity, doubt, and controversy by using the term "scheme to defraud." The fact is that in the context of criminal schemes the notion of "fraud," whatever vague meanings it may be given in other contexts, clearly denotes an element of deception, both in its ordinary lay meaning and in common legal usage.[142] While difficulty may lie in defining what, if anything, it means beyond simply a scheme to deceive, as to that central, minimum requirement there is no genuine doubt or ambiguity.

The overly broad interpretation of the mail fraud statute enunciated in *Horman* had little direct impact upon subsequent cases prosecuted under that statute. Indeed, the only attempt to base a prosecution on the actual holding in *Horman* was reversed by the Supreme Court in *Fasulo v. United States*,[143] where a unanimous Court held that "the use of the mails for the purpose of obtaining money by means of threats of murder or bodily harm" is not a "scheme to defraud" within the mean-

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140. 116 F. at 352, 354.

141. *See* notes 72-76 and accompanying text *supra*.

142. This is even more clearly true of the verb "to defraud"—the term actually used in the mail fraud statute—which is rarely used outside a context of wrongdoing by misrepresentation. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 593 (1961) (defining "to defraud" as "to take or withhold from (one) some possession, right, or interest by calculated misstatement or perversion of truth, trickery, or other deception"). *See also* BLACK'S LAW DICTIONARY 511 (rev. 4th ed 1968).

143. 272 U.S. 620 (1926).

ing of the mail fraud statute.[144] In reaching that conclusion, the Court stated: "The rule laid down in the *Horman* case includes every scheme that in its necessary consequences is calculated to injure another or to deprive him of his property wrongfully. That statement goes beyond the meaning that justly may be attributed to the language used [in the mail fraud statute]."[145] However, the language and "spirit" of *Horman* were not so readily dispensed with and continued for many years to influence the expanding interpretation of the mail fraud statute. Indeed, *Horman* continues to be cited, and even occasionally quoted, in modern mail fraud decisions, without mention of its apparent overruling in *Fasulo*.[146]

Despite its extremeness, the *Horman* decision brings into sharp relief the tendencies implicit in the broad constructionist approach to the original mail fraud statute, most particularly the tendency to rationalize an expansive application of the mail fraud statute in terms of fulfilling "the underlying purpose of the statute to preserve the use of the mails to legitimate ends."[147] Is this respect, *Horman* represents the "pure type" of broad constructionist approach, much like *Clark* represents the "pure type" of the strict constructionist approach. Although when taken to extremes, both approaches led to ridiculous results, each was capable, in more moderate hands, of achieving apparently reasonable results. Moreover, each of these approaches had a considerable following among the courts first called upon to construe the original mail fraud statute in the years between 1872 and 1909; yet, because the approaches led to diametrically opposite results, they could coexist for only so long before pressure grew for either the Supreme Court or Congress to choose between them.

## VIII. THE 1889 AMENDMENT TO THE MAIL FRAUD STATUTE

After protracted delay, both Congress and the Supreme Court ultimately opted for the broad constructionist approach. In hindsight, this choice may appear to have been "inevitable," given such broad social forces as the increasing growth of a national economy and the increasing prevalence of nationwide fraud schemes that local governmental authorities were unable to control;[148] the discrediting of regional

144. *Id.* at 625.

145. *Id.* at 628-29. The decision in *Fasulo* was foreshadowed in Naponiello v. United States, 291 F. 1008 (7th Cir. 1923). *See also* Hammerschmidt v. United Staes, 265 U.S. 182, 188-89 (1924) (stating that *Horman* "went to the verge and should be confined to pecuniary or property injury inflicted by a scheme to use the mails for the purpose").

146. *See, e.g.*, United States v. States, 488 F.2d 761, 765 (8th Cir. 1973); United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970).

147. United States v. Horman, 116 F. at 352.

148. *See* DUNNING, *supra* note 42, at 224-37; FAULKNER, *supra* note 42, at 516.

authority and the expansion of federal political power as the result of the Civil War and its aftermath;[149] the large increase of graft, corruption, and governmental fraud, and the strong reformist reaction to it;[150] the alliance between the federal government and established business, for whose benefit some early fraud prosecutions appear to have been brought;[151] and the absence of any well defined social or moral interest in leaving fraud prosecution the exclusive domain of the states.[152]

Yet, the very existence of so many strict constructionist decisions suggests that the ultimate outcome was not "inevitable." Closer scrutiny reveals that some of the "forces" that appear to have "caused" the triumph of the broad constructionist approach were themselves either far from established at the time, or were counterbalanced by opposing forces of seemingly equal strength. The national economy might have been growing, but most economic institutions and transactions were still of a local nature. Some frauds might have been perpetrated on a national basis, but the great majority of those frauds prosecuted, even by the federal government, were essentially small, local swindles. The "moral nationalism" of the Reconstructionists, which helped give rise to the mail fraud statute in 1872, had spent much of its fervor by the time the statute came before the courts for construction, and by the end of the nineteenth century was so thoroughly discredited that it was not until the 1960's that it came to be regarded as anything more than temporary lunancy. Perhaps most importantly, nineteenth-century judges, who were trained in the conservative methods of common-law jurisprudence by which cases were usually decided upon narrow grounds of pleading and procedure, and who were reared in an atmosphere in which criminal prosecution was almost the exclusive domain of the states and in which there was a predisposition toward the narrow interpretation of criminal statutes, were not prepared to throw over the habits of their legal lifetimes. Accordingly, while courts might stretch a point to preserve the mail fraud convictions of particularly outrageous swindlers, they would not hesitate to throw out the similar convictions of bill-dodgers, petty thieves and other minor miscreants. In the end, what apparently tipped the balance in favor of the broad constructionist approach was, first, the inability of the strict constructionists to develop any clear-cut or even remotely workable definition of those kinds of schemes to defraud which fell within federal mail

149. For a partial listing of the federal legislation passed during this period, see note 41 *supra*. *See also* DUNNING, *supra* note 42, at 260.

150. *See* note 46 *supra*.

151. For a discussion of the effect which business had on much of the legislation and enforcement efforts during this period see DUNNING, *supra* note 42, at 136-50.

152. *See* notes 123-125 and accompanying text *supra*.

fraud jurisdiction under their interpretation of the statute;[153] and, second, the reaction of the public, Congress, and even the Supreme Court against certain strict constructionist decisions excluding certain small but prevalent swindles from the statute's coverage.[154]

Although the mail fraud statute was enacted in 1872, it was more than fifteen years before the Supreme Court heard a case involving that act.[155] Unfortunately, although the wide divergence among the lower courts in their interpretations of the mail fraud statute rapidly emerged in the years following the statute's enactment, the issues presented by the first mail fraud cases to come before the Supreme Court bore only peripherally on these questions. For example, in *In re Henry*,[156] the primary question was whether that part of the statute's penalty provision which limited the number of counts to three for any six-month period and limited the sentence on such counts to one sentence, applied to all mail fraud charges brought against a person or only to those mail fraud charges contained in any single indictment against that individual.[157] The Court chose the latter interpretation, but in no way attempted to ground this decision upon any broader considerations regarding the scope or purpose of the statute.[158] Similarly, in *United States v. Hess*,[159] the question was whether an indictment that simply tracked the language of the mail fraud statute was sufficient, or whether it was necessary to particularize in the indictment the specific fraud scheme involved.[160] Noting that some particularity was necessary if the indictment was to serve such essential purposes as providing double jeopardy protection in the event of an acquittal, the Supreme Court ruled in favor of the defendant.[161] Again, however, the Court did not address the scope of the statute.

While the Supreme Court was addressing these relatively technical issues in *Hess* and *Henry*, some district courts taking a strict constructionist view point already were dismissing mail fraud indictments on the ground that the schemes charged were not the kinds of schemes to which use of the mails was essential.[162] That broad constructionist

153. *See* notes 87-88 and accompanying text *supra*.

154. *See* notes 204-212 and accompanying text *infra*.

155. In large measure, this reflected the fact that prior to 1891 the Court possessed only limited appellate jurisdiction over criminal convictions. *See generally* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 38-41 (5th ed. 1978).

156. 123 U.S. 372 (1887).

157. *Id.* at 374.

158. *Id.* at 374-375.

159. 124 U.S. 483 (1888).

160. *Id.* at 486.

161. *Id.* at 487-88.

162. *See* notes 91-94 and accompanying text *supra*.

courts, such as the *Jones* court, were holding these same schemes to fall within the coverage of the mail fraud statute only aggravated matters, because application of the statute was then dependent on the federal judicial district in which the scheme was perpetrated or prosecuted. When, after nearly seventeen years, the Supreme Court had not yet found occasion to end this uncertainty, Congress intervened and, on March 2, 1889, amended the "scheme to defraud" language of the mail fraud statute so as to expressly include certain specific schemes within the scope of the statute, namely:

> any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money, by or through correspondence, by what is commonly called the "sawdust swindle," or "counterfeit money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles . . . .[163]

The difficulty with such a listing, aside from its very temporary quality, was that courts of a strict constructionist philosophy could view it, not as proof that Congress—by specifically bringing within the statute what some strict constructionist courts had attempted to exclude from its coverage—intended the statute to be given broad applicability, but rather as an indication that Congress concurred in the narrow interpretation given by the strict constructionists, and intended that only such schemes as were specifically listed be covered by the statute. Thus, while the broad constructionists viewed the amendment as vindication for their view that the now-specified schemes were among the kinds of schemes Congress intended to cover from the beginning, the strict constructionists viewed the amendment as Congress' tacit concurrence that "scheme to defraud" did not extend to such schemes unless Congress specifically amended the statute to include them.[164] Moreover, because there was no express legislative history relating to the 1889 amendment, there was ample room for courts of either persuasion to interpret the amendment according to their predispositions.

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163. Act of March 2, 1889, ch. 393, § 1, 25 Stat. 873. Similarly, the term "letter or packet" in the original statute was amended to read "letter, packet, writing, circular, pamphlet, or advertisement," and the term "post-office" was amended to "post-office, branch post-office, or street or hotel letter box." *Id.*

164. *See* Beach v. United States, 71 F. 160 (D. Colo. 1895). *But see* Milby v. United States, 120 F. 1 (6th Cir. 1903) (expressly rejecting this interpretation).

Indeed, in the first reported decision to consider the effect of the 1889 amendment, a strict constructionist court managed to read the amendment as narrowing the coverage of the statute from what it had been before the amendment. Specifically, in *United States v. Beach*,[165] the question was whether the statute covered a scheme by which the defendant duped the victim into traveling a long distance and expending a large amount of money under the false impression that he would thereby secure employment.[166] The court reasoned that, without more, the phrase "scheme to defraud" might cover such conduct, since "[f]raud may be only an artifice to deprive another of his right."[167] However, the court read the 1889 amendment as compelling the conclusion that the "general language of the act must be limited to such schemes and artifices as are ejusdem generis with those named" in the amendment.[168] Because the defendant's alleged scheme, unlike those listed in the amendment, was not of "the kind which are gainful to the wrongdoer," the court dismissed the prosecution.[169]

Before any other lower court could express its view as to the effect of the 1889 amendment, the Supreme Court, in the space of less than a year, decided three cases relating to the amended statute. None of these decisions, however, directly resolved the question of the amendment's effect. The first case, *Stokes v. United States*,[170] was concerned with whether a particular mail fraud indictment was sufficiently specific and whether certain evidence was properly admitted.[171] The second case, *Streep v. United States*,[172] primarily involved issues relating to the statute of limitations.[173] *Streep* also held that a scheme to sell counterfeit obligations, as specified in the amended statute and charged in Streep's prosecution, required "no proof of a scheme to defraud . . . to support it."[174] Arguably, this remark could be read as support for the strict constructionist view of the amendment, since under the broad constructionist interpretation, any scheme to dispose of counterfeit obligations was *ipso facto* a scheme to defraud the public and hence a species of the genus "scheme to defraud," albeit one that Congress had chosen to single out in response to cases questioning its inclusion.

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165. 71 F. 160 (D. Colo. 1895).
166. *Id.*
167. *Id.*
168. *Id.* at 161.
169. *Id.*
170. 157 U.S. 187 (1895).
171. *Id.* at 188.
172. 160 U.S. 128 (1895).
173. *Id.* at 133.
174. *Id.*

However, whatever tacit support for the strict constructionist view might be inferred from this remark in *Streep* was more than offset by the thrust of the final decision in this trilogy, *Durland v. United States*.[175] In that case, the Court, while still not directly addressing the effect of the amendment on the scope of the statute, appeared to cast its support strongly in favor of the broad constructionist approach to the scope of the mail fraud statute. *Durland* involved two phony investment schemes in which the victims were induced, by prospectuses sent to them through the mails, to make monthly investments in the bonds of the defendants' companies, upon promises that when the bonds matured, the victims would realize a very high rate of return. In fact, the defendants intended to appropriate the money for their own use and to continue stringing the victims along indefinitely.[176] The defendants' primary argument to the Supreme Court was that the statute only reached those frauds that were criminally punishable at common law, "in order to make out which there must be a misrepresentation as to some existing fact and not a mere [false] promise as to the future."[177] Writing for a unanimous Court, Justice Brewer rejected the defendants' premise that the term "scheme to defraud" as used in the mail fraud statute should be limited by the common law:

> The statute is broader than is claimed. Its letter show this: "Any scheme or artifice to defraud." Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud. . . .
>
> But beyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning. . . .
>
> . . . It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed; and it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a specious and glittering promise.[178]

Although the narrow holding of *Durland* is that a "scheme to defraud," as that term is used in the mail fraud statute, can be premised as readily on false and fraudulent promises as on any other types of mispresentations, the broad and conclusory language used by Justice

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175. 161 U.S. 306 (1896).

176. *Id.* at 312.

177. *Id.* This argument had already been rejected by several lower courts, *see, e.g.*, United States v. Loring, 91 F. 881 (N.D. Ill. 1884). Whatever may have been required at common law, the distinction is an illusory one, since a defendant's present intention not to repay is just as much an "existing fact" as any other kind of fact. *See* Edgington v. Fitzmaurice, 29 Ch. D. 459, 483 (1885) ("the state of a man's mind is as much a fact as the state of his digestion").

178. 161 U.S. at 313-14.

Brewer exemplifies reasoning typical of the broad constructionist decisions and gives not the slightest hint of support for the strict constructionists' approach.[179]

Having thus come close to the point of endorsing, in *Durland*, the broad constructionist point of view, the Supreme Court retreated once again into silence, and did not deliver another opinion dealing with the scope of the mail fraud statute until nearly eighteen years later.[180] In the interim, the strict constructionists renewed their assault upon a broad application of the mail fraud statute. Indeed, at the same time that the broad constructionists were extending the application of the mail fraud statute even further, the strict constructionists were busy shackling it with even more narrowing limitations.[181] The result was that an innate uncertainty existed in the law of federal mail fraud. This uncertainty continued to be reflected in the controversy over the meaning and purpose of the 1889 amendment. The strict constructionist position advanced in *Beach*[182] elicited a broad constructionist response in *Culp v. United States*,[183] the first appellate decision directly to consider the effect of the 1889 amendment on the overall scope of the statute. Flatly rejecting the defendant's argument that the 1889 act completely repealed the original mail fraud statute and substituted in its place a provision limited to the counterfeiting schemes listed in the 1889 act and to fraudulent schemes of the same narrow type,[184] the Court in *Culp* squarely held that "the purpose of the amendment was not to restrict, but to extend, the operation of the statute,"[185] and that the original provisions "were continued in undiminished force and effect."[186]

In spite of this strong holding that the 1889 amendment was designed to expand the operation of the mail fraud statute, the *Culp* decision did not completely negate the more sophisticated version of the strict constructionist argument, that in recognizing the need to amend the

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179. However, it cannot be said that *Durland* definitively excluded the possibility of limiting the scope of the statute on the basis usually given by the strict constructionists—the interpretation of the mail-emphasizing language. That question was not before the Court in *Durland*.

180. United States v. Young, 232 U.S. 155 (1914). *See* notes 207-208 and accompanying text *infra*.

181. *Compare* United States v. Beach, 71 F. 160 (D. Colo. 1895) *with* Culp v. United States, 82 F. 990 (3d Cir. 1897). *See also* Rodgers, *Federal Control Through Regulation of Mails*, 27 HARV. L. REV. 27 (1913).

182. United States v. Beach, 71 F. 160 (D. Colo. 1895). *See* notes 165-169 and accompanying text *supra*.

183. 82 F. 990 (3d. Cir. 1897).

184. *Id.* at 991. This argument had been implicitly adopted by the court in *Beach*.

185. *Id.*

186. *Id.* at 992.

statute to bring the counterfeiting and other listed cases within its reach, Congress implicitly recognized that such schemes were not within the scope of the "schemes to defraud" language of the original statute; consequently, by negative implication, the 1889 amendment constituted congressional endorsement of the strict constructionist interpretation of "scheme to defraud."[187] Some of the language in *Culp* even appeared to support this position, for the court there stated that the 1889 amendment "evidently was intended to bring within the prohibition and penalty of the statute schemes, dealings, and transactions relating to counterfeit or spurious money and other articles . . . *which were not embraced in the original act.*"[188] By implication, this language could be interpreted to run contrary to the broad constructionist view of the 1889 amendment, which was that Congress, when confronted with some judicial decisions that placed counterfeiting schemes within the scope of "schemes to defraud" and some decisions that placed them outside of that scope, had sought to overrule the latter courts by explicitly adding these schemes to the list of offenses prosecutable under the statute, without in any way intending to suggest disagreement with those courts that viewed such schemes as falling within the ambit of the original statute.

This conflict was directly confronted by the Court of Appeals for the Sixth Circuit in *Milby v. United States*.[189] *Milby* involved the familiar situation in which the defendant was charged with mailing letters inviting the recipients to purchase counterfeit money from the defendant at a fraction of face value. In an earlier decision, the Sixth Circuit had dismissed the original indictment because it had failed to specifically allege those persons whom the defendant intended to defraud.[190] Implicit in this first decision, however, was the conclusion that the defendant's conduct constituted a "scheme to defraud" within the meaning of the statute.[191] That which was implicit in the first decision became explicit in the second. After the first dismissal, the defendant had been reindicted, with some counts charging that he had schemed

187. *See* notes 167-169 and accompanying text *supra*.

188. 82 F. at 991 (emphasis added).

189. 120 F. 1 (6th Cir. 190).

190. Milby v. United States, 109 F. 638 (6th Cir. 1901). The court held that the indictment was insufficient because it did not allege that the defendant had intended to defraud either the recipients of the letters—by failing to give them the counterfeit money after they had paid for it—or the ultimate recipients of the counterfeit money—by in fact giving the money to the recipients of the letters with a view toward having them distribute it to the ultimate recipients.

191. This, of course, had been the broad constructionist view expressed in decisions such as *Jones*, but it was now being applied to a prosecution brought under the amended statute.

to defraud the recipients of the letters, and other counts alleging that he had schemed to defraud the ultimate recipients of the counterfeit money.[192] After conviction on all counts, the defendant challenged the charges on the new ground that the "scheme to defraud" language of the statute did not extend to counterfeit money schemes, particularly of the "ultimate recipient" type.[193] Alternatively, he argued that even if such schemes could be construed as "schemes to defraud" under the original mail fraud statute, Congress, by creating a separate classification for them in the amended statute, had made clear that it did not regard them as schemes to defraud and that the indictment was therefore erroneous in charging the defendant with a "scheme to defraud."[194]

The Sixth Circuit, speaking through Judge (later Justice) Day, rejected these standard strict constructionist arguments, and instead offered the standard broad constructionist interpretation of the mail fraud statute. Judge Day began with the proposition that the "gist" of the mail fraud offense is the "criminal use of the mails," and that the purpose of the statute is to "prevent their use in aid of schemes having in view the defrauding of others of their money or property. The prime object of the statute is to prevent the post office from being perverted to the aid of fraudulent schemes."[195] From these broad pronouncements, it followed that the defendant's arguments were without merit, because they required a reading of the statute inconsistent with those purposes:

> The original statute was not repealed. It was still an offense to devise a scheme or artifice to defraud, to be effected through the medium of the post office establishment, whether the subject-matter was counterfeit money or something else. It is true that a scheme to sell counterfeit money may be an offense under the amendment by its specific terms without proof of a scheme to defraud. [But the] effect of the amendment is to extend the operation of the statute, and not to diminish the force of its original terms not in conflict with the amendment.[196]

Shortly after the *Milby* decision, the Eighth Circuit, which included the district in which *Beach* had been decided,[197] effectively overruled *Beach* and adopted the reasoning of *Culp* and *Milby*.[198]

The viewpoint of *Culp* and *Milby* did not, however, prevail

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192. 120 F. at 1-2.
193. *Id.* at 4.
194. *Id.* at 5.
195. *Id.* at 3.
196. *Id.* at 4.
197. *See* notes 165-169 and accompanying text *supra*.
198. *See* Miller v. United States, 133 F. 337 (8th Cir. 1904). *Accord*, Lemon v. United States, 164 F. 953 (8th Cir. 1908).

everywhere. For example, in *Stockton v. United States*,[199] a modified version of the strict constructionist view of the 1889 amendment was adopted by the Court of Appeals for the Seventh Circuit. In *Stockton*, the defendant had been convicted of using the mails to sell marked cards and loaded dice, "intending" that these articles would then be used by the purchasers to defraud third persons in games of chance.[200] Perhaps if the purchasers of the articles had been named as principals in a scheme to defraud the third persons, the defendant could have been named as a knowing aider and abettor of *their* scheme to defraud. However, in the absence of such a charge, it was not clear that the defendant himself could be charged as the principal of a scheme to defraud the third persons simply because he knew that his loaded dice and marked cards would ultimately be used for that purpose.[201] Relying on the analogous situation of the sale of counterfeit money, the government argued, on the basis of *Milby*, that the defendant could be charged under the mail fraud statute, because his otherwise nonfraudulent sale of the means by which the purchaser would then defraud others was itself a scheme to defraud.[202] The Seventh Circuit, after noting that the relevent language of *Milby* was arguably dicta, rejected the position taken in *Milby*, concluding that that case was inconsistent with the passage of the 1889 amendment:

> [T]he infirmity of the position taken in [*Milby*] is this: It is always possible to impute to a seller knowledge, and (in an inaccurate sense) an intention, that an article sold may be put to uses for which it is obviously intended. Hence, if the wrongful intent or scheme of the purchaser of counterfeit money could be ascribed to the seller as *his* scheme, there would have been no necessity for amending the statute. The sale, or offer to sell, would be a devising, and the *scheme* or *artifice* could always be charged and found, solely upon the *inherent character* of counterfeit money.[203]

Accordingly, the *Stockton* court concluded that "[u]ntil, by appropriate amendment, the scope of the statute is further expanded, it does not and cannot comprehend the situation thus disclosed."[204]

The above review of the decisions interpreting the 1889 amendment illustrates that neither the amendment itself not the Supreme Court decisions that shortly followed its enactment ended the controversy between strict and broad constructions of the mail fraud statute. If anything, the divergence grew greater. Yet, following *Durland*, the

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199. 205 F. 462 (7th Cir. 1913).
200. *Id.* at 463.
201. *Id.* at 465.
202. *Id.*
203. *Id.* at 467-68.
204. *Id.* at 468.

Supreme Court remained silent, with the result that prosecutors, courts, and even the public increasingly looked to Congress to reenter the controversy and settle it definitively.

## IX. THE 1909 REVISION OF THE MAIL FRAUD STATUTE

In 1909, Congress again intervened, and this time eliminated language from the statute in a manner that was clear in both intent and effect.[205] Specifically, Congress amended the mail fraud statute by eliminating the mail-emphasizing language.[206] Gone was the language characterizing the conduct of a person who committed the offense as "misusing the post-office establishment." Gone was the bizarre penalty provision by which courts were required to "proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device." Most significantly, gone was the entire second element of the crime—the requirement that the scheme to defraud, as devised by the defendant, be intended to be effected through use of the mails, an element that, even on the broad constructionist view, required proof beyond a reasonable doubt that the defendant intended not only to defraud but also to misuse the mails.

Bereft of these and other mail-emphasizing provisions, the statute ceased to afford any genuine support for the arguments developed by the strict constructionists over the previous thirty-seven years. With the very mention of mailing now reduced to the bare third element—the requirement that in execution of the scheme to defraud there occur at least one mailing—no court could seriously argue that the language of the statute dictated the substantive limitation of the statute's coverage to mail-dependent schemes, or to schemes whose very "essence" was the use of the mails. Moreover, it no longer made sense to say that the statute aimed to deter the abuse of the mail

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205. Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130. This clarity is fortunate because, again, there is virtually no direct legislative history that might otherwise serve to manifest the legislative purpose.

206. *Id.* As amended, the statute read in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post-office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States . . . shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

system, because the defendant no longer had to intend any use of the mails whatsoever; the minimal use of the mails that would trigger the statute could, within broad limits, be an incidental or even accidental accompaniment of the defendant's fraudulent scheme. Finally, even beyond the fact that the new wording of the statute would no longer support, either logically or functionally, the old strict constructionist interpretations, Congress' elimination from the statute of nearly every vestige of the language upon which the strict constructionists had based their constructions could itself be interpreted only as a flat rejection of the strict constructionist approach.

If there remained any lingering doubt as to the purpose, effect or propriety of the 1909 amendment, it was promptly dispelled by the Supreme Court in *United States v. Young*.[207] In that case, a unanimous Court overruled an attempt to read into the new statute some of the limitations imposed under the predecessor statute, holding that the elements of mail fraud under the new statute consist of "(a) a scheme devised or intended to be devised to defraud, or for obtaining money or property by means of false pretenses, and (b) for the purpose of executing such scheme or attempting to do so, the placing of any letter in any post office of the United States to be sent or delivered by the Post Office Establishment."[208] On its face, the Court's opinion in *Young* does little beyond simply reiterate the language of the new statute. This reiteration, however, is precisely the significance of *Young*: all that is required for conviction under the new statute is what its bare language specifies. All the constructions, whether "broad" or "strict," built like sandcastles upon the infirmities of the language of the prior statute, come tumbling down now that the supporting language has been washed away.

Thus, for a short time, the new mail fraud statute, as construed in decisions such as *Young*, was held to be a simple and unqualified extension of federal jurisdiction over any and all schemes to defraud that involved an act of mailing. That is to say, the mailing requirement functioned as nothing more than a simple "jurisdictional element" plus "overt act"—the conduct minimally necessary to permit the exercise of federal sovereignty and to distinguish the crime of mail fraud from one of pure intent. This left only the question of whether the newly amended mail fraud statute would withstand challenges that it was unconstitutional. Although the Supreme Court's previous decisions in *Ex parte Jackson* and *In re Rapier* seemed strongly to suggest that the new statute was constitutional, the Court expressly settled the issue in

207. 232 U.S. 155 (1914).
208. *Id.* at 161-62.

*Badders v. United States*.[209] The primary argument advanced by the defendant in *Badders* was that the new, stripped-down mail fraud statute was "beyond the power of Congress as applied to what may be a mere incident of a fraudulent scheme that itself is outside the jurisdiction of Congress to deal with."[210] A unanimous Supreme Court, speaking through Justice Holmes, ruled this contention was so frivolous as to "need no extended answer."[211] In the Court's view, since the "overt act of putting a letter into the postoffice of the United States is a matter that Congress may regulate," it followed that Congress has the power to "forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not."[212]

*Badders* should have marked the end of the virtual obsession with the mailing aspects of the crime that had plagued the approaches taken by both broad and strict constructionists under the earlier versions of the mail fraud statute. Unfortunately, lower federal court were unable entirely to shake clear of the approaches to the mail fraud statute that had developed over the prior forty years and had been engrained in extensive case law. For example, to those courts that desired to give the statute a broad application, there was great advantage in following the old "broad constructionist" approach and declaring that the "gist" of the offense was the misuse of the mails, for it seemed to follow that one did not have to inquire too deeply into the nature and scope of the schemes to defraud or into whether they were appropriate or intended subjects of federal criminal concern. Rather, any objections along those lines could be dismissed with a reference to a long line of pre-1909 decisions declaring that Congress' sole concern was that the mails not be used for any bad purpose; and since, under *Badders*, this was all the Constitution required, there was no basis, according to those courts, for imposing any limitations on what kinds of bad purposes might give rise to prosecution under the statute so long as they in any way included an aspect of fraud, which was to be defined as broadly as possible.

Thus, for example, in *United States v. States*,[213] where the defendants were convicted under the mail fraud statute of stuffing ballot boxes in a state primary election, the Court of Appeals for the Eighth Circuit, citing such old broad constructionist decisions as *Durland* and *Horman*, had no difficulty in concluding that the defendants' conduct

209. 240 U.S. 391 (1916).
210. *Id.* at 393.
211. *Id.*
212. *Id.*
213. 488 F.2d 761 (8th Cir. 1973).

fell within the statute, simply because "the definition of fraud in [the mail fraud statute] is to be broadly and liberally construed to further the purpose of the statute; namely, to prohibit the misuse of the mails."[214] The truth, however, is that at least since the 1909 amendment, the sole genuine purpose of the mail fraud statute has been to prosecute fraud and the mailing has served primarily as a basis for invoking federal jurisdiction. But by blindly reiterating the old mail-emphasizing concepts developed under the original mail fraud statute, courts such as the one in *States*[215] have succeeded in avoiding the real questions underlying most of the "controversial" prosecutions brought under the present mail fraud statute, including the precise definition of "scheme to defraud" and the delineation of the substantive limitations, if any, that may exist as to the kinds of schemes to defraud reached under the statute.[216]

The continued vitality in modern decisions of the old "broad constructionist" notion that the "gist" of the offense is the misuse of the mails leads to illogical results,[217] such as making the number of counts dependent upon the number of mailings, and deflects judicial analysis from the true issues. Even more troubling, however, is the persistence of the old "strict constructionist" approach, attempting to limit the substantive scope of the statute in terms of the use of the mails. It appears that some modern courts, seeking to limit the mail fraud statute's scope but unwilling to undertake the formidable task of directly determining whether there are any substantive limitations that may be imposed (as a matter of public policy or otherwise) on the term "scheme to defraud," have sometimes looked to the other terms of the statute as a source of potential limits on its scope. Although the wholesale removal of the mail-emphasizing language from the statute in the 1909 revision has left courts of this persuasion with very little to work with, they have attempted to impose what few limitations they can upon the statute by giving a strict reading to the remaining

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214. *Id.* at 764. *See also id.* at 767 ("The appellants' argument misinterprets the purpose of the mail fraud legislation. The focus of the statute is upon the misuse of the Postal Service, not the regulation of state affairs . . . .").

215. *See, e.g.*, United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 1647 (1980); United States v. Castor, 558 F.2d 379 (7th Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978).

216. Alternatively, these two questions can be combined into a single question: How should the term "scheme to defraud" as used in the mail fraud statute be defined in terms of the nature and purpose of that statute? The problem with framing the question in this manner is that it leads courts to begin, as in *Horman*, with a postulated legislative purpose and then to seek a definition of "scheme to defraud," no matter how skewed, that fits the purpose.

217. *See* notes 36-39 and accompanying text *supra*.

requirement that the mailing be for the "purpose" of executing the scheme to defraud.[218] Actually, however, there is no reason to believe that Congress intended this term to mean anything more than that the mailing partake of the same relationship to the scheme to defraud as an overt act does to a conspiracy; *i.e.*, that it be a step—however slight, unnecessary or innocent in itself—toward the execution of the criminal design. If Congress had intended to suggest some closer relationship between the mailing and the scheme to defraud,[219] it would have simply retained the old second element of the original mail fraud statute or something close to it, since it was at just such relationships that the old second element aimed.[220] Nonetheless, the appearance in the revised statute of the term "purpose" opened a tiny loophole through which courts so inclined could try to thread some of the old strict constructionist interpretations,[221] and in doing so those courts

218. *See* notes 25-26 and accompanying text *supra*.

219. Moreover, any attempt to limit the scope of the present mail fraud statute through a narrow reading of the term "purpose" is likely to be as haphazard and irrational as the comparable attempt made by the strict constructionists to limit the scope of the mail fraud statute through a strict reading of the mail-emphasizing language. For inasmuch as in reality the relationship of the use of the mails to the great majority of fraudulent schemes is incidental and fortuitous, any attempt to legally construct on the basis of that meaningless relationship a sensible limitation on the scope of the mail fraud statute is foredoomed.

220. Despite the anthropomorphic connotations of the term "purpose," no court has suggested that its use in the revised mail fraud statute requires that the defendant himself must actually intend the use of the mails charged in the indictment, and, indeed, the Supreme Court has expressly held to the contrary. Pereira v. United States, 347 U.S. 1, 8 (1954). The result, however, is that the relationship between the scheme to defraud and the mailing that some courts have required on the basis of the word "purpose" has tended to be expressed in terms (like "reasonably foreseeable") having a civil "tort" law quality that seems inappropriate to a criminal statute. *See* notes 27-28 and accompanying text *supra*.

221. On three rare occasions, makeshift majorities of the Supreme Court were arguably so inclined—*See* United States v. Maze, 414 U.S. 395 (1974); Parr v. United States, 363 U.S. 370 (1960); Kann v. United States, 323 U.S. 88 (1944)—although the narrow holdings of all three cases could be read as saying no more than that, on the particular facts of those cases, certain mailings that occurred as a result of the relevant schemes to defraud nevertheless occurred too long after the schemes had reached fruition to even arguably have been in the furtherance or execution of the schemes. At any rate, whether or not these cases were correctly decided (a question to be discussed in Part II of this article), for present purposes it is enough to point out that each of these cases has been effectively confined to its special facts and that of the thousands of mail fraud cases prosecuted between 1944 (when *Kann* was decided) and the present, it appears that a comparative handful, possibly fewer than a dozen such prosecutions, have been reversed on the basis of *Kann*, *Parr*, or *Maze*. Conversely, in dozens, possibly hundreds of reported cases in which defendants have appealed on the basis of *Kann*, *Parr*, and/or *Maze*, the appellate courts have been able to "distinguish" the cases at hand from those three cases and thereby uphold the convictions. This would seem to bear testament to the artificiality of the *Kann*, *Parr*, and *Maze* decisions.

helped to impose on the statute still further idiosyncracies, such as that the mailing be a "reasonably foreseeable" consequence of the intended scheme to defraud.[222]

## X. Some Preliminary Conclusions

Whatever limitations may yet be imposed on the form, scope or substance of the mail fraud statute, it is time for courts of all persuasions to realize the point of the 1909 amendment by doing away with all references to the mailing as the "gist" of the crime of mail fraud, by refraining from reading back into the statute such unsupported and inappropriate requirements as that the mailing be a reasonably foreseeable consequence of the intended scheme, and, in general, by ceasing to regard the mailing requirement as anything more than a simple overt act and bare jurisdictional element. The language of the two new versions of the mail fraud statute presently pending before Congress as part of the two current proposals for a revised criminal code would both admit of such a change.[223] Indeed, they appear to go a step further by reducing the required mailing to being solely a jurisdictional act, with the requirement of an overt act being met by any conduct in furtherance of the fraud, whether it be the mailing or any other act.[224] The language of the existing mail fraud statute would not support this further step; but there is nothing in the language of the present statute that prevents courts from viewing the mailing requirement in the very limited way that the 1909 amendment intended — as an overt act and jurisdictional act, and nothing more.[225] Since it appears, at least as of this writing, that passage of a revised criminal code will once again be deferred, courts should not wait for Congress to correct judicial errors but should abandon the restrictive limitations which the courts themselves have constructed upon the simple requirement of a mailing. If in so doing it becomes manifest that the scope of the mail fraud statute is too great, either in requiring only a very minimal amount of reprehensible conduct to trigger its application or in extending its application to an immensely broad and as yet ill-defined spectrum of intentions and activities, so much the better, for such prob-

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222. *See* notes 25-26 and accompanying text *supra*.

223. *See* notes 14 & 15 *supra*.

224. *Id.*

225. The post-1909 amendments to the mail fraud statute, which will be discussed briefly in Part II of this article, were chiefly designed to remove "surplus" language from the statute. Their legislative history gives not the slightest suggestion that Congress intended to "ratify" some courts' continuing deviation from the thrust of the 1909 amendment.

lems, if they in fact exist, can then be addressed directly, rather than indirectly, haphazardly, and irrationally as in the past.

While this article began with the familiar assumption that one must study the past in order to understand the present, to this it must be added that the lessons of history are not always readily discerned. Still, a review of the historical development of the mail fraud statute demonstrates that the early interpretations of the statute relied very heavily upon the premise that the use and misuse of the mails formed the central focus of the statute, a premise derived from words and intentions that are no longer part of the mail fraud statute and that, indeed, were purposely deleted. Consequently, one lesson would seem to be that continued emphasis upon the mailing aspects in interpreting the mail fraud statute is misplaced and serves no useful function. A second conclusion is that, contrary to common belief, the substantive scope of the mail fraud statute—at least as construed by the "broad constructionist" courts—was virtually as broad in the early days of the statute's application as it is today, and that Congress intended from the beginning that the statute be given a very broad application and approved and fostered this broad application at every opportunity. A final lesson from history is that the courts have used the misplaced emphasis on the mailing aspects of the crime almost as a shield to avoid having to directly confront the real issues underlying the more controversial applications of the mail fraud statute: most especially, they have neglected to develop any specific definition or delimitation of the term "scheme to defraud," even though that is the real heart of the mail fraud offense. The limited degree to which this fundamental oversight was remedied in the development of the mail fraud statute after 1909, and some suggestions as to how it may be more fully remedied in the future, are the primary subjects that will be addressed in Part II of this article.