FRAUD AND FEDERALISM: HOW THE MODERN COURT HAS USED THE MEANING OF "PROPERTY" TO RESHAPE FEDERAL FRAUD JURISPRUDENCE

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For the past several decades, the Supreme Court has repeatedly sought to reinterpret the meaning of "property" within federal fraud statutes to limit the degree to which federal prosecutors can regulate state official misconduct. While the Court's renewed interest in the federal fraud statutes has drawn varying degrees of praise and criticism from different sides of the legal community, this Note seeks to assess—in an apolitical, value-neutral fashion—whether the Court's doctrinal approach is effective in furthering the stated goal of drawing boundaries between federal and state actors in corruption cases. The Note first undertakes a deep-dive analysis of the evolution of the Court's mail and wire fraud jurisprudence. It then shows how even the most faithful applications of the Court's fraud doctrine lead to inconsistent outcomes and fail to provide lower courts or prosecutors with clear guidance on exactly what types of misconduct can fall within the purview of the fraud statutes. Concluding that the dissonance between the Court's clearly stated ideological objectives and the actual black-letter law of fraud jurisprudence is unsustainable, this Note explores alternative doctrinal approaches that might fix the current state of fraud jurisprudence. This Note contributes to the existing body of scholarship by not only offering a detailed accounting of the current state of fraud jurisprudence, but also providing a lens to analyze Supreme Court decisions that can be applied well beyond the fraud statutes themselves.

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INTRODUCTION

In federal criminal law, the meaning of "fraud" is at a crossroads. In *Ciminelli v. United States*, the Supreme Court considered a complex scheme to secure a billion-dollar contract with the State of New York.[1] The defendants, a mix of private actors and state officials, rigged the bidding process in their favor.[2] Crucially, this case did not hinge on the wrongdoing itself, but instead focused on whether the government's theory of fraud was compatible with the Court's conception of "property" as defined in its fraud jurisprudence.[3] The government's theory, rooted in the Second Circuit's "right to control" conception of property fraud, was that the defendants deprived New York of the right to valuable economic information needed to make discretionary economic decisions.[4] In a unanimous opinion, the Court rejected this theory of property and

1. 143 S. Ct. 1121, 1125 (2023).
2. Id. at 1125.
3. Id.
4. Id.

reversed the defendants' convictions. This result is neither surprising nor unprecedented; *Ciminelli* is but the latest in a line of cases to reverse fraud convictions despite obvious "wrongdoing[,] deception, corruption, [and] abuse of power"[5] by the defendants. Although predictable, this reversal continues a trend of troubling cases that have generated scholarly debate for decades.[6]

On one hand, the federal mail and wire fraud statutes remain one of the most versatile and valued tools in the white-collar prosecutor's arsenal.[7] During much of the twentieth century,[8] the Supreme Court rarely reviewed mail fraud convictions,[9] and it even more rarely reversed appellate decisions for substantive error.[10] During this era, the federal government found increasingly novel applications for the mail fraud statute.[11] Even in recent years, prosecutors have secured fraud convictions in such varied cases as the "Dieselgate" emissions scandals,[12] the use of state money for private campaign activities,[13] the "Varsity Blues" college admissions scandal,[14] the bribery of college athletes,[15] and countless other applications.[16]

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5. Kelly v. United States, 140 S. Ct. 1565, 1568 (2020).

6. See infra notes 22–23.

7. See, e.g., Craig M. Bradley, Federalism and the Federal Criminal Law, 55 Hastings L.J. 573, 574 (2004) (calling mail fraud one of "'[t]he Four Horsemen of the Apocalypse' of federal criminal law"); Jed S. Rakoff, The Federal Mail Fraud Statute (pt. 1), 18 Duq. L. Rev. 771, 771 (1980) ("[T]he mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love.").

8. Congress enacted the original mail fraud statute in 1872. See Act of June 8, 1872, ch. 335 § 302, 17 Stat. 323 (codified as amended at 18 U.S.C. § 1341 (2018)).

9. See infra section I.A.

10. See infra section I.A. For examples of instances in which the Supreme Court did reverse on a substantive fraud issue, see Neder v. United States, 527 U.S. 1, 23–24 (1999) (addressing whether the term "defraud" imposes a materiality requirement, that is, that a misstatement or omission must be material for the deception to be criminal under the current mail fraud statute, 18 U.S.C. § 1341); Fasulo v. United States, 272 U.S. 620, 626–29 (1926) (reversing a fraud conviction when there were in fact no "false or fraudulent" misrepresentations but instead outright threats of violence and noting that threats and "intimidation" are not "anything in the nature of deceit or fraud . . . as generally understood").

11. See infra section I.A.

12. See United States v. Palma, 58 F.4th 246, 252 (6th Cir. 2023); see also infra section II.B.2.

13. See, e.g., United States v. Shelton, 997 F.3d 749, 774–75 (7th Cir. 2021).

14. See, e.g., United States v. McGlashan, 78 F.4th 1, 7–8 (1st Cir. 2023); United States v. Khoury, No. 20-cr-10177-DJC, 2021 WL 2784835, at *1–2 (D. Mass. July 2, 2021); United States v. Ernst, 502 F. Supp. 3d 637, 643–44 (D. Mass. 2020); United States v. Sidoo, 468 F. Supp. 3d 428, 434–36 (D. Mass. 2020).

15. See, e.g., United States v. Gatto, 986 F.3d 104, 116 (2d Cir. 2021); see also infra section II.B.1.

16. See, e.g., United States v. Berroa, 856 F.3d 141, 151–53 (1st Cir. 2017) (exam cheating scheme); United States v. Chastain, No. 22-CR-305 (JMF), 2023 WL 2966643, at *1 (S.D.N.Y. Apr. 17, 2023) (scheme to front-run nonfungible tokens). For additional

On the other hand, fraud prosecutions have faced intense scrutiny from the Supreme Court in recent decades, particularly in cases that implicate states.[17] Since the 1980s, the Supreme Court reversed lower courts in four of the six cases in which the meaning of "property" was at issue.[18] Each reversal exhibited three important characteristics: (1) the purported victim (or defendant) was a state actor;[19] (2) the scheme did not have a "property interest" as its aim;[20] and (3) the opinion was motivated in part by the Court's announced desire to preserve state–federal divisions by limiting creative theories of fraud prosecution.[21]

The ideological considerations underlying the Supreme Court's modern case law have sparked intense debate. Detractors have criticized these decisions as hindering the federal government's ability to punish otherwise hard-to-reach instances of state corruption,[22] while supporters have defended the Court's decisions as a necessary prophylactic that protects against federal overreach into state affairs.[23] Rather than joining

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discussion of the front-running scheme in *Chastain*, see Kevin J. Harnisch, Andrew James Lom, Mayling C. Blanco, Rachael Browndorf & Matthew Niss, First NFT "Insider Trading" Trial Ends in Criminal Conviction Based on Novel Theory, Norton Rose Fulbright (May 2023), https://www.nortonrosefulbright.com/en-us/knowledge/publications/ce029848/first-nft-insider-trading-trial-ends-in-criminal-conviction-based-on-novel-theory/ [https://perma.cc/XK49-CTT3].

17. See infra sections I.A.2–.B.

18. See infra sections I.A.2–.B.

19. See infra sections I.A.2–.B.

20. See infra sections I.A.2–.B.

21. See infra sections I.A.2–.B; see also McNally v. United States, 483 U.S. 350, 360 (1987) ("[T]he Federal Government [should not] set[] standards of disclosure and good government for local and state officials . . . .").

22. See Ciara Torres-Spelliscy, Elegy for Anti-Corruption Law: How the Bridgegate Case Could Crush Corruption Prosecutions and Boost Liars, 69 Am. U. L. Rev. 1689, 1711 (2020) ("[The Supreme Court's recent cases will] broaden the parameter of acceptable lying by elected and appointed government officials."); see also George D. Brown, Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-*Lopez* Analysis, 82 Cornell L. Rev. 225, 299–300 (1997) (arguing, prior to *Cleveland*, for an incorporation of state law into federal prosecutions as a way of overcoming federalism concerns rather than limiting federal prosecutions outright); cf. Daniel C. Richman, Navigating Between "Politics as Usual" and Sacks of Cash, 133 Yale L.J. Forum 564, 566 (2023), https://www.yalelawjournal.org/pdf/RichmanYLJForumEssay_nwinm3th.pdf [https://perma.cc/K3UQ-F7PN] [hereinafter Richman, Politics as Usual] (arguing that there is a "federal interest in pursuing corrupt arrangements far more nuanced than the exchange of sacks of cash for official favor[s]" and that the Court must "confront the tension between its fears of . . . partisan targeting . . . and its ostensible commitment to statutory text").

23. See, e.g., United States v. Porat, 76 F.4th 213, 224–25 (3d Cir. 2023) (Krause, J., concurring) ("[This] era should have come to a grinding halt thirty-six years ago . . . . Yet federal prosecutors have continued to proffer novel theories of liability that run afoul of [Supreme Court] dictates, each time requiring the Supreme Court to step in and overturn the conviction."); George D. Brown, Defending Bridgegate, 77 Wash. & Lee L. Rev. Online 141, 176–77 (2020), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1134&context=wlulr-online [https://perma.cc/AGY9-HEYP] ("The extent to which federalism is a significant constitutional principle or a canon of construction is an important

the already-crowded debate as to the correctness of the Court's ideological views, this Note critically examines the *effectiveness* of the modern fraud doctrine relative to the Court's stated federalist agenda.

This Note argues that at the heart of the Court's modern fraud doctrine lies a vague, superficially simple "property-or-not" test that leads to paradoxical outcomes.[24] Originally rooted in cases that interpreted federal fraud to *require* property as a necessary element of the crime, the modern test defines property differently based on both the identity of the victim[25] and the extent to which the right or interest at issue was considered property under early common law.[26] In practice, the modern mutation of the property-or-not test creates outcomes in which the same fundamental right or interest might be a "property interest" in the hands of a private party while simultaneously constituting a nonproperty "regulatory interest" in the hands of a state. This Note argues that the doctrine's reliance on the meaning of property is not only practically and analytically unworkable, but also fundamentally fails to further the Court's ideal division between the federal and state balance of criminal power.

This Note proceeds in three parts: Part I first traces the expansion and contraction of mail and wire fraud jurisprudence and explains that the modern doctrinal shift toward property as a limiting principle was driven by the Supreme Court's renewed interest in federalist principles. It then examines the incremental evolution of the Court's property-or-not test from 1987 to the present day.

Part II explains how this doctrine fails to achieve the Court's stated policy goals. Section II.A first demonstrates that the property-or-not test fails to provide lower courts a workable test in day-to-day applications. II.B then provides specific examples to illustrate how the modern property fraud doctrine fails to meaningfully prevent prosecutors from intervening in state misconduct, concluding that property fraud jurisprudence amounts to little more than a handful of technical pleading requirements.

Finally, Part III considers different methods to unravel the "property paradox" created by the current doctrine. This Part ultimately concludes that to develop a fraud doctrine that truly limits prosecutors' ability to

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question. *Kelly* leads to this kind of questioning and rethinking. For this reason, it should be celebrated . . . ."); see also John C. Coffee, Jr., Hush!: The Criminal Status of Confidential Information After *McNally* and *Carpenter* and the Enduring Problem of Overcriminalization, 26 Am. Crim. L. Rev. 121, 130–31 (1988) (arguing that intangible property rights like information should not be within the scope of property fraud); Ellen S. Podgor, Mail Fraud: Opening Letters, 43 S.C. L. Rev. 223, 225 (1992) (characterizing mail fraud prior to *Cleveland* as "moving further from its roots" and "permit[ting] its haphazard application to a wide spectrum of criminal conduct"); cf. Miriam H. Baer, Square-Peg Frauds, 118 Nw. U. L. Rev. 1, 7–10 (2023) (arguing that use of the fraud statutes to punish misconduct like that seen in the Varsity Blues scandal is actually harmful in that it discourages legislators from making more systematic reforms).

24. See infra Part II.

25. See infra Part II.

26. See infra sections I.B.2–.3.

convict certain types of state-level wrongdoing, the Court must abandon its property-centric approach to fraud entirely. By systematically deconstructing the modern fraud doctrine and reimagining it from the ground up, this Note raises novel observations about the Court's ideological and doctrinal approaches to federal criminal jurisprudence. These observations are not only immediately useful to the federal criminal practitioner but also carry implications about the Court's jurisprudence that reach well beyond the fraud statutes themselves.

I. THE EVOLUTION OF "PROPERTY" IN MAIL AND WIRE FRAUD

While this Note focuses on mail fraud and wire fraud (hereinafter, the "fraud statutes"), both statutes—along with other types of federal fraud[27]—are frequently treated the same for the purposes of defining "property."[28] The fraud statutes both begin with the same crucial twenty-nine words: "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 . . . ."[29]

As an inchoate crime, fraud requires an intent to scheme a victim out of property.[30] Perhaps because other elements of fraud are relatively simple to prove,[31] most modern case law focuses on whether a given fraud

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27. See, e.g., 18 U.S.C. § 1344 (2018) (bank fraud); id. § 371 (conspiracy to defraud the United States).

28. See Neder v. United States, 527 U.S. 1, 20–21 (1999) ("Although the mail fraud and wire fraud statutes contain different jurisdictional elements . . . they both prohibit, in pertinent part, 'any scheme or artifice to defraud' or to obtain money or property 'by means of false or fraudulent pretenses, representations, or promises.'" (quoting 18 U.S.C. §§ 1341, 1343)).

29. 18 U.S.C. §§ 1341, 1343 (emphasis added). The statutes differ on the "jurisdictional element," or manner in which the fraud is furthered. Compare id. § 1343 ("transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce"), with id. § 1341 ("places . . . or deposits or causes to be deposited any matter or thing whatever to be sent . . . by the Postal Service, or . . . by any private or commercial interstate carrier"). The mail fraud statute also contains language that prohibits counterfeiting. See id. Neither the jurisdictional elements nor the counterfeiting language is a focus of this Note.

30. See Rakoff, supra note 7, at 777 ("[T]he 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 . . . .").

31. See Charles Doyle, Cong. Rsch. Serv., R41930, Mail and Wire Fraud: A Brief Overview of Federal Criminal Law 3 (2019) (describing the elements of property fraud as the "use of either mail or wire communications . . . [for] a scheme and intent to defraud another of . . . property . . . involving a material deception"); see also Tai H. Park, The "Right to Control" Theory of Fraud: When Deception Without Harm Becomes a Crime, 43 Cardozo L. Rev. 135, 148 (2021) ("[The inchoate nature of fraud means] actual loss need [not] be proven as long as the defendant had the unlawful scheme or intent in mind, and indeed, the offense could theoretically be doubly inchoate, for the statute targets anyone merely '*intending* to devise any scheme or artifice to defraud.'" (quoting 18 U.S.C. §§ 1341, 1343)). But see infra section II.B (discussing circuit splits on certain elements).

involves "money or property."[32] But this money-or-property element derives from a statutory clause that didn't even exist when the statute was first written[33] and was arguably intended to expand—rather than limit—the definition of fraud.[34] Moreover, it took another fifty years after this clause was inserted—years in which the lower courts largely ignored the statutory text—before the Supreme Court formally declared mail fraud to be "property" fraud.[35]

This Part explains both how and why property became the focus of fraud jurisprudence. Section I.A summarizes the "early" era of fraud as a flexible doctrine that was heavily influenced by a moralist and nationalist conception of federal criminal law. It also highlights the shift in both the modern Court's more state-centric federalism ideology and the accompanying change in doctrine. Section I.B then explains how the Court's modern cases have purported to refine the new property-or-not test to create the modern fraud doctrine as seen today.

A. *A Tale of Two Eras: Fraud Prosecutions and Changing Supreme Court Ideologies*

Broadly speaking, there are two schools of thought concerning the first century of federal fraud doctrine. Some scholars have argued that the original statute from 1872 had humble origins "as a means of preventing 'city slickers' from using the mail to cheat guileless 'country folks.'"[36] Proponents of this view tend to assert that twentieth-century prosecutors inappropriately stretched the statute far beyond its original limits. According to this narrative, lower courts indulged extravagant definitions of fraud put forward by the federal government, and the Court's modern jurisprudence merely represents a necessary counterbalance.[37] Others have convincingly argued that even in the nineteenth century, the statute

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32. See infra section I.A.2–I.B.

33. See Act of June 8, 1872, ch. 335 § 301, 17 Stat. 283, 323 (codified as amended at 18 U.S.C. § 1341) ("That if any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person . . . [extensively describing what activities would constitute use of the mails].").

34. See infra section I.A.1.

35. See Act of March 4, 1909, ch. 321 § 215, 35 Stat. 1088, 1130 (codified at 18 U.S.C. § 1341); see also infra section I.A.2.

36. Doyle, supra note 31, at 1. For an extensive analysis of the evolution of fraud and efforts to combat it, see generally Edward J. Balleisen, Fraud: An American History From Barnum to Madoff (2017).

37. See generally John C. Coffee, Jr., The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime, 21 Am. Crim. L. Rev. 1 (1983) (critiquing expansive theories of fraud such as the right to control); Park, supra note 31 (similar); see also Parmida Enkeshafi, Note, Universalizing Fraud, 18 Duke J. Const. L. & Pub. Pol'y Sidebar 47, 49 (2022), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1220&context=djclpp_sidebar [https://perma.cc/Z7EQ-AF2U] (arguing that fraud case law had a "morality" focus that complicated the doctrine).

signaled relative "novelty and breadth" compared to other laws of its day.[38] Thus, any prosecutorial creativity was an intentional byproduct of the statute's broad text.[39] Both accounts draw on the same fundamental ideological and doctrinal touchstones to frame the development of fraud jurisprudence over the course of 150 years.

1. *Nationalism and Moralism as Guiding Principles in Early Fraud Jurisprudence.* — The Supreme Court in 1999 opined that the original fraud statutes didn't *need* to specify that "money or property" was a necessary element of fraud because "both at the time of the mail fraud statute's original enactment in 1872, and later when Congress enacted the wire fraud and bank fraud statutes, actionable 'fraud' had a well-settled meaning at common law."[40] But as early as 1896, the Supreme Court in *Durland v. United States* had broken away from the classic common law definition of fraud.[41] In *Durland*, the defendant issued bonds for a company that became insolvent before the interest had been repaid to the bondholders.[42] The defendant argued that "fraud" at common law went only to deceits involving present or past facts, while the common law crime of "false pretenses" applied to misrepresentations about what might occur in the future.[43] While the Court acknowledged the distinction between the two crimes at common law, it declared that mail fraud should be construed in light of the "evil sought to be remedied."[44] Accordingly, the Court held that mail fraud covered *any* scheme involving misrepresentations, so long as the "intent and purpose" was to deceive a victim.[45] Finding that "the moral element" of the defendant's guilt was established, the Court affirmed the conviction.[46] Thus, within years of its inception, mail fraud had already adopted a flexible and moralistic inquiry that exceeded its common law roots.

The Court's opinion in *Durland* is emblematic of the nationalist and moralist tilt of early twentieth-century courts' values.[47] When Congress

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38. See Rakoff, supra note 7, at 779 (describing the complexities that the mail fraud statute's breadth uniquely created for courts and Congress).

39. See, e.g., United States v. Maze, 414 U.S. 395, 405–06 (1974) (Burger, J., dissenting) (arguing that the fraud statutes worked as a stopgap for novel schemes until Congress could pass more specific legislation).

40. Neder v. United States, 527 U.S. 1, 22 (1999). In the original mail fraud statute, the phrase "any scheme or artifice to defraud, *or for obtaining money or property by means of false or fraudulent pretenses*" didn't yet exist. Compare 18 U.S.C. § 1341, with supra note 33.

41. 161 U.S. 306 (1896). For a discussion of the different approaches lower courts took to assessing mail fraud prior to *Durland*—ranging from broad conceptions of fraud to a "strict constructionist" approach—see Rakoff, supra note 7, at 790–95.

42. *Durland*, 161 U.S. at 312.

43. Id.

44. Id. at 313.

45. Id.

46. Id. at 312, 315.

47. See Daniel C. Richman, Kate Stith & William J. Stuntz, Defining Federal Crimes 4 (2d ed. 2015) ("[In the early twentieth century,] Congress was no longer concerned simply

amended the fraud statute to include the current "for obtaining money or property" clause in 1909,[48] it was viewed as merely codifying *Durland*'s more expansive conception of fraud.[49] The Court seemed to share this broad view: One year after the mail fraud amendment, the Court declared that the crime of "Conspiracy to . . . defraud [the] United States"[50] included "any conspiracy which is calculated to obstruct or impair [the government's] efficiency," confirming that "it is *not* essential to charge or prove an actual financial or property loss."[51] Although the Court did not explicitly extend this to the mail fraud statute, it also did not distinguish it. Indeed, except to offer technical corrections as to what "use of the mails" entailed,[52] the Court was largely silent on mail fraud through much of the twentieth century. Lower courts, armed with a perceived mandate to likewise give wide discretion to federal prosecutions, adopted a more flexible and moralistic approach to fraud.[53]

The "intangible rights" doctrine was born against this backdrop of broadly conceived federal criminal law. Under the doctrine, the statutory phrase "to defraud" meant only to "deprive . . . of a right."[54] These rights

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with . . . misuse of federal assets. Instead, federal legislators showed that they were just as committed as their state brethren to . . . [addressing] the moral crusades of the day . . . through [prosecution].").

48. See Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130 (codified at 18 U.S.C. § 1341 (2018)).

49. See Rakoff, supra note 7, at 794 ("[When] Congress finally [amended the fraud statute,] 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."); Daniel C. Richman, Defining Crime, Delegating Authority—How Different Are Administrative Crimes?, 39 Yale J. on Regul. 304, 324 (2021) [hereinafter Richman, Defining Crime] ("Congress's response to *Durland* was to codify it in 1909."); see also McNally v. United States, 483 U.S. 350, 357 n.6 (1987) (noting the same); Norman Abrams, Uncovering the Legislative Histories of the Early Mail Fraud Statutes: The Origin of Federal Auxiliary Crimes Jurisdiction, 2021 Utah L. Rev. 1079, 1082 (arguing that the 1909 amendments to the mail fraud statute marked a "significant historic legislative change" that "enabled the crime of mail fraud to be used to prosecute conduct far removed from typical fraud").

50. Codified at 18 U.S.C. § 371.

51. Haas v. Henkel, 216 U.S. 462, 479 (1910) (emphasis added). This broad meaning was reaffirmed fourteen years later. See Hammerschmidt v. United States, 265 U.S. 182, 187–88 (1924) (rejecting the need for property requirements and instead defining fraud as "the deprivation of something of value by trick, deceit, chicane or overreaching," including interference with "a lawful function of the government").

52. See United States v. Maze, 414 U.S. 395, 398 (1974) (reversing conviction, not on the basis of whether the scheme amounted to fraud, but rather on the basis that the "use of the mails" was too attenuated to support a mail fraud charge); Kann v. United States, 323 U.S. 88, 94–95 (1944) (similar); but see Schmuck v. United States, 489 U.S. 705, 710–11 (1989) (reiterating that use of the mails "need not be an essential element" of a fraud as long as it is at least incidental to the underlying scheme).

53. See Rakoff, supra note 7, at 796 (noting that even before *Durland*, some courts viewed the mail fraud statute as broadly conveying a duty to "keep the mails 'pure,' 'untainted,' and 'unsullied'" from "any fraudulent design").

54. United States v. Horman, 118 F. 780, 781–82 (S.D. Ohio 1901), aff'd, 116 F. 350 (6th Cir. 1901).

encompassed the right of the public to fair dealing by government officials, as well as rights created by fiduciary duties.[55] Crucially, the insertion of the money-or-property clause in 1909 was rarely invoked as a limiting principle.[56] Rather, the jurisprudence of this era was marked by increasingly creative criminalization of acts that "failed to measure up to accepted moral standards and notions of honesty and fair play," or even of those that ran "contrary to public policy."[57] Simply put, the presiding courts during the early years of property fraud did not exhibit the same federalism concerns as seen later in the Rehnquist and Roberts courts.[58]

2. McNally*: The Crystallization of Property Fraud and New Normative Values.* — The nationalist conception of federal fraud met an abrupt end in 1983, when the Court's opinion in *McNally v. United States* seemingly heralded the end of the doctrine's flexibility.[59] The defendants were James Gray, an ex-public official of Kentucky, and Charles McNally, a private citizen.[60] Gray, McNally, and others operated a lucrative self-dealing scheme in which they gave Kentucky's state insurance contracts out to firms in which they retained an ownership interest.[61] They never disclosed

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55. See, e.g., United States v. Bronston, 658 F.2d 920, 926–27 (2d Cir. 1981) (holding that some violations of fiduciary duties are offenses under the fraud statutes); United States v. Bohonus, 628 F.2d 1167, 1170 (9th Cir. 1980) (sustaining fraud convictions on the basis of "(1) [the victim's] right to have its business conducted honestly; (2) its right to honest and loyal and disinterested services of its employee; and (3) its right to the secret profits obtained by its employee"); United States v. Isaacs, 493 F.2d 1124, 1144, 1150–51 (7th Cir. 1974) (affirming convictions when prosecution alleged a scheme to "defraud the State of Illinois and its citizens of their right to have the administration and execution of its laws free from corruption and fraud"); Shushan v. United States, 117 F.2d 110, 114–15 (5th Cir. 1941) (defining fraud as "a purpose to do wrong which is inconsistent with moral uprightness").

56. See, e.g., *Isaacs*, 493 F.2d at 1149–50 ("The mail fraud statute is not restricted in its application to cases in which the victim has suffered actual monetary or property loss."); cf. Rakoff, supra note 7, at 801 ("[W]here the fraud was substantial, [few] judges, whatever their attitude toward federalism, [were] persuaded to free the accused on the ground that prosecution would infringe on the rights of the states.").

57. Marilyn L. Byington, Note, Criminal Law—Mail Fraud Requires Loss of Property or Money, 10 U. Ark. Little Rock L. Rev. 773, 777–79 (1988). Scholars have observed that this stems from fraud's long-running roots, its origins as a primarily civil remedy, and the inherent ambiguity of the term, which led judges to struggle with the boundaries between civil and criminal fraud. See Ellen S. Podgor, Criminal Fraud, 48 Am. U. L. Rev. 729, 736–40 (1999) [hereinafter Podgor, Criminal Fraud].

58. See generally Christopher P. Banks & John C. Blakeman, The U.S. Supreme Court and New Federalism: From the Rehnquist to the Roberts Court (2012) (observing that from the New Deal era until well into the Burger Court, federalism was a fairly limited normative priority in the Supreme Court). Some scholars have observed that lower courts were beginning to express skepticism with the breadth of fraud prior to *McNally*. See, e.g., Richman, Politics as Usual, supra note 22, at 566 (arguing that the origins of the modern fraud movement began with "Second Circuit Judge Ralph Winter's 1982 dissent in *United States v. Margiotta*." (citing 688 F.2d 108, 139 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part))).

59. 483 U.S. 350 (1987).

60. See id. at 352.

61. See id. at 353–54.

their ownership stakes in the bidding process, and the resulting contracts generated hundreds of thousands of dollars in commissions.[62] The government charged the defendants on a theory that this scheme deprived Kentuckians of their "right to honest government" by means of "false pretenses and the concealment of material facts."[63] The Sixth Circuit had affirmed the convictions, citing cases from the Second, Fourth, Fifth, Seventh, and Eighth Circuits for the proposition that "[c]ourts have long interpreted the mail fraud statute . . . as proscribing schemes to defraud . . . citizens of their intangible rights."[64] Despite the apparent longstanding recognition of this theory of prosecution in the several circuits, the Supreme Court rejected the intangible rights doctrine in its entirety and reversed.[65]

The Court laid bare its ideological justifications for ending its hands-off approach to the fraud statutes. Justice White's opinion for a seven-Justice majority rejected the moralistic focus of prior case law, instead raising concern over the statute's ambiguous "outer boundaries."[66] The opinion clearly stated its guiding principles, namely that "the Federal Government [should not be] setting standards of disclosure and good government for local and state officials."[67] The Court further distinguished past fraud precedent that had adopted a broader construction—primarily for frauds committed against the United States, as discussed above[68]—on the cursory grounds that such a "broad construction . . . [was] based on a consideration not applicable to the mail fraud statute," which presumably meant that federalism concerns were not present in such cases.[69] Thus, *McNally* served to illustrate a new guiding principle of fraud jurisprudence: Nationalist conceptions of federal criminal law were

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62. See id.

63. Id. at 353–54 & n.3.

64. United States v. Gray, 790 F.2d 1290, 1294 (6th Cir. 1986) (citing United States v. Von Barta, 635 F.2d 999, 1005–06 (2d Cir. 1980); United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979), aff'd in relevant part, 602 F.2d 653 (4th Cir. 1979) (en banc); United States v. Keane, 522 F.2d 534 (7th Cir. 1975); United States v. States, 488 F.2d 761, 766 (8th Cir. 1973); Shushan v. United States, 117 F.2d 110, 115 (5th Cir. 1941)), rev'd, *McNally*, 483 U.S. 350 (1987).

65. *McNally*, 483 U.S. at 361.

66. Id. at 360.

67. Id. *McNally* further reiterated the shift in doctrine by rejecting the interpretive methods that justified the broad-ranging prosecutions seen in prior years. For example, some lower courts had specifically interpreted the mail fraud statute's wording "to defraud *or* for obtaining money or property" as being disjunctive—thus, to "defraud" had a different and broader meaning than "obtaining property or money." See, e.g., United States v. Clapps, 732 F.2d 1148, 1152 (3d Cir. 1984); *States*, 488 F.2d at 764. In *McNally*, the Court instead interpreted the statutes as not being written in the disjunctive but rather that "obtaining money or property by means of false . . . pretenses" was merely an explanation of what "any scheme or artifice to defraud" meant. 483 U.S. at 357–59 (quoting Act of March 4, 1909, ch. 321 § 215, 35 Stat. 1088, 1130 (codified at 18 U.S.C. § 1341 (2018)).

68. See supra notes 50–53 and accompanying text.

69. *McNally*, 483 U.S. at 358 n.8.

subordinated when federalist conceptions of state autonomy were jeopardized.[70]

Policy concerns aside, the *McNally* opinion reflected a renewed focus on the common law origin of fraud and the plain text of the fraud statutes. The Court began by portraying the "sparse legislative history" of the fraud statutes as targeting "'thieves, forgers, and rapscallions generally . . . [from] deceiving and fleecing the innocent people in the country' . . . of their money or property" rather than for use against government officials.[71] The Court then asserted that the common law conception of fraud had always been limited to "wronging one in his *property* rights by dishonest methods or schemes."[72] Similarly the majority contended that *Durland* merely made clear that any deceit in pursuit of obtaining *property* (but nothing more) was covered by the fraud statute.[73] With this narrative in mind, the *McNally* Court then turned to the text of the statute—and set the groundwork for the entire modern property fraud doctrine.

The Court acknowledged that the plain text of the statute, as amended after *Durland*, appeared in the disjunctive: "'to defraud' *or* 'for obtaining money or property.'"[74] The majority further conceded that this "arguable" interpretation supported the lower courts' view that money-or-property fraud and intangible-rights fraud were two distinct theories.[75] But the Court rejected this approach, holding that it would "depart[] from [the] common understanding" of fraud.[76] Instead, the Court held that "or" was to be interpreted conjunctively and merely combined the common law crimes of fraud and false pretenses when such schemes involved money or property.[77] Referencing its federalism and lenity concerns, the Court concluded its statutory analysis with a declaration that "[i]f Congress desires to go further, it must speak more clearly than it has."[78]

In a single move construing the meaning of a two-letter conjunction, the Court stripped away decades of lower-court jurisprudence rooted in theories of morality and public policy and replaced it with a seemingly

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70. The Court also buttressed this point by invoking the rule of lenity. See *McNally*, 483 U.S. at 359–60 ("[When there are] two rational readings of [the] statute, [the Court should choose the harsher reading] only when Congress has spoken in clear and definite language." (citing United States v. Bass, 404 U.S. 336, 347 (1971); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952))).

71. Id. at 356 (quoting Cong. Globe, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth)).

72. Id. at 358 (emphasis added) (internal quotation marks omitted) (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)).

73. Id. at 356–58.

74. Id. at 358 (emphasis added) (citing 18 U.S.C. § 1341).

75. See id. (citing United States v. Clapps, 732 F.2d 1148, 1152 (3d Cir. 1984); United States v. States, 488 F.2d 761, 764 (8th Cir. 1973)).

76. Id. at 359.

77. See id. at 358–60.

78. Id. at 360.

simple test: Was the objective of a given fraud to obtain *property*? Applying this property-or-not test to the facts, the Court found that the intangible rights to good government are not property rights.[79] And because the government had failed to allege specific property loss to the Commonwealth of Kentucky, the convictions were reversed.[80]

The property-or-not interpretation of the fraud statutes serves as the bedrock for most fraud prosecutions today. Congress moved quickly to abrogate *McNally* and a year later responded with a statute that restored the government's ability to prosecute schemes that "deprive another of the intangible right of honest services."[81] This new statute bifurcated fraud jurisprudence into two categories: traditional "property" fraud and "honest services" fraud.[82] For the purposes of this Note—which focuses on property fraud[83]—the holding and reasoning of *McNally* is alive and well.

B. *Post-*McNally *Jurisprudence and the Rise of the Property Paradox*

Since 1987, the Supreme Court has heard five cases that attempt to clarify *McNally*'s property-or-not test: *Carpenter*,[84] *Cleveland*,[85] *Pasquantino*,[86]

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79. Id. at 356.

80. Id. at 360–61.

81. 18 U.S.C. § 1346 (2018).

82. See, e.g., Doyle, supra note 31, at 6–8 (distinguishing mail and wire fraud charges that rely on a theory of fraud "to obtain money or property" from charges that rely on a theory of fraud rooted in "honest services").

83. Honest services fraud doctrine has mirrored the Court's property fraud jurisprudence in many ways. In 2010, the Court in *Skilling v. United States* ultimately cabined this new statute to schemes involving "bribes or kickbacks supplied by a third party who had not been deceived." 561 U.S. 358, 404 (2010). *Skilling* heavily relied on reasoning—both analytical and ideological—similar to that of *McNally*. See, e.g., id. at 401–03 (detailing the history of the intangible rights' doctrine and emphasizing *McNally*'s admonition that the federal government should not "set[] standards of disclosure and good government for local and state officials" (internal quotation marks omitted) (quoting *McNally*, 483 U.S. at 360)).

For additional academic commentary on modern honest services fraud and its relationship to property fraud, see generally Pamela Mathy, Honest Services Fraud After *Skilling*, 42 St. Mary's L.J. 645 (2011); Michelle V. Barone, Note, Honest Services Fraud: Construing the Contours of Section 1346 in the Corporate Realm, 38 Del. J. Corp. L. 571 (2013); Teresa M. Becvar, Note, When Does Sleaze Become a Crime? Redefining Honest Services Fraud After *Skilling v. United States*, 88 Chi.-Kent L. Rev. 593 (2013); Nicholas J. Wagoner, Comment, Honest-Services Fraud: The Supreme Court Defuses the Government's Weapon of Mass Discretion in *Skilling v. United States*, 51 S. Tex. L. Rev. 1087 (2010). The Court's decision to limit the scope of honest services fraud has arguably led to the proliferation of increasingly technical theories of property fraud as discussed in Part II, infra. For an example of such a proposal post-*Skilling*, see generally Brette M. Tannenbaum, Note, Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud After *Skilling*, 112 Colum. L. Rev. 359 (2012).

84. Carpenter v. United States, 484 U.S. 19 (1987).

85. Cleveland v. United States, 531 U.S. 12 (2000).

86. Pasquantino v. United States, 544 U.S. 349 (2005).

Kelly,[87] and *Ciminelli*.[88] This section addresses these cases in chronological order to show the incremental development of the doctrine over time. A few key points to bear in mind at a high level: *Carpenter* and *Pasquantino* are the only cases in which the Supreme Court affirmed fraud convictions. In *Carpenter*, both the defendant and the victim were private actors,[89] and in *Pasquantino*, the interest at stake was money—a "traditional" property interest.[90] *Cleveland*, *Kelly*, and *Ciminelli*, on the other hand, all dealt with cases in which the defendant or victim of the fraud was a state actor or state entity, and the right or interest at stake was not money or real (tangible) property.[91] These differences ultimately played a role in influencing both the Court's doctrinal approach, as well as how (and whether) the Court buttressed its doctrinal holdings with federalism concerns.

1. *Early Refinements to the* McNally *Property Test.* — Less than six months after *McNally*, the Court in *Carpenter v. United States* confronted the question of whether intangible rights could *ever* pass the property-or-not test.[92] Timothy Carpenter—a reporter for the Wall Street Journal—had access to confidential information from companies as a byproduct of his employment.[93] According to the government's theory, Carpenter misused that information for personal gain by trading on it before the news went public.[94] Justice White, now writing for a unanimous court, affirmed the conviction in a resounding opinion—"intangible rights" doctrine may not satisfy the fraud statutes, but intangible *property* rights certainly do.[95]

Carpenter was significant in that the Court explicitly rejected the notion that "monetary loss" was a prerequisite to a fraud prosecution, holding instead that the property-or-not test was satisfied when the Journal lost its right to "exclusive[ly] use" and "keep[] [the information] confidential."[96] The Court made this conclusion based on prior property jurisprudence outside of the fraud context—namely *International News Service v. Associated Press*, which treated news information as "quasi-property" as a matter of federal common law.[97] In reaching this conclusion, the Court was silent on the ideological concerns that it had expressed in *McNally*. In fact, nowhere in the opinion does Justice White

87. Kelly v. United States, 140 S. Ct. 1565 (2020).

88. Ciminelli v. United States, 143 S. Ct. 1121 (2023).

89. See infra section I.B.1.

90. See infra section I.B.2.

91. See infra sections I.B.1–.2. This Note uses the "tangible" property above as shorthand for straightforward property rights in things like real estate or chattels. As this Note illustrates below, intangible property is a significantly more amorphous concept in the fraud context. See infra Part II.

92. See Carpenter v. United States, 484 U.S. 19, 23 (1987).

93. Id. at 22–23.

94. Id.

95. Id. at 25–27.

96. Id. at 26.

97. Id. (citing Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918)).

mention federalism concerns. In sum, while *McNally* rejected "ethereal" nonproperty rights like "honest and faithful service," *Carpenter* ensured that intangible property rights are still fully protected within the meaning of the fraud statute.[98]

Cleveland v. United States added another layer of complexity to the Court's property fraud analysis.[99] Like *McNally*, *Cleveland* dealt with a situation in which the state was the purported victim of a fraud.[100] Unlike *McNally*, there was no state actor participation in the *Cleveland* scheme.[101] Here, the defendant was a private party who had falsified portions of an application to operate poker machines in the state of Louisiana.[102] The Court unanimously reversed, declaring that poker machine licenses (and *all* state-issued licenses) are not property within the meaning of the fraud statutes.[103]

In reaching this conclusion, the Court made a subtle-yet-crucial addition to the property-or-not test: The objective of a fraud must be "property *in the hands of the victim*."[104] This novel "hands of the victim" requirement was significant because it shifted the *McNally* test toward a victim-specific conception of property. Instead of adhering to a universal definition of property—for example, conceptions of property as rooted in a "right to exclude"[105]—the *Cleveland* test looks at the relationship between the "right" itself and the possessor of the right (the "victim").[106] Applying this new version of the property-or-not test, the Court went on to hold that state licenses are not property interests in a state's hands, but rather "regulatory" interests.[107]

The Court first rejected the argument that a license has "economic value" to a state, observing that while the *Cleveland* defendants had deceived the state to obtain the application, they nevertheless paid the state all required processing fees: "Tellingly . . . the Government nowhere alleges that Cleveland defrauded the State of any money to which the State was entitled by law."[108] Accordingly, the Court found that the defendants'

98. Id. at 25–26.

99. 531 U.S. 12 (2000).

100. See id. at 15–17.

101. The government had separately pursued charges against Cleveland and other defendants for a related scheme "to bribe state legislators to vote in a manner favorable to the video poker industry." Id. at 16. But these charges were not at issue on appeal. Id. at 16–18.

102. See id. at 15–17.

103. See id. at 18.

104. Id. at 15 (emphasis added).

105. See, e.g., Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730, 731 (1998) (arguing that the core defining feature of property is the right to exclude others); see also Francisco J. Morales, Comment, The Property Matrix: An Analytical Tool to Answer the Question, "Is This Property?", 161 U. Pa. L. Rev. 1125, 1127 (2013) (analyzing different conceptions of property through a factor-based matrix approach).

106. See *Cleveland*, 531 U.S. at 15.

107. Id. at 21–22.

108. Id. at 22.

deception was not intended to deprive the state of any "economic" interest that might satisfy the traditional money-or-property conception of fraud.[109]

Cleveland went on to reject the idea that the state has an intangible property interest—such as the interest in *Carpenter*—based on the state's "rights of allocation, exclusion and control," concluding that these intangible rights derive from "sovereign power to regulate" rather than from property.[110] *Cleveland* distinguished these "sovereign" rights as distinct from the long recognized property rights of confidential business information in *Carpenter*.[111] The Court buttressed this distinction with federalism principles, observing that (1) the issuance of licenses is an activity typically reserved for "state and local authorities,"[112] (2) the state already assigns criminal penalties for lying on applications,[113] and, perhaps most importantly, (3) allowing federal prosecutors to criminalize licensing fraud would "significantly change[] the federal-state balance in prosecution of crimes."[114] The upshot to *Cleveland* is that unlike in *Carpenter*, the presence of a state victim revived the ideological concerns of the *McNally* Court—the federal–state balance of criminal law—and led to an even more scrutinizing property-or-not test for fraud prosecutions.

2. *The Relationship Between Property, Tradition, and Economic Value.* — *Pasquantino v. United States*, in contrast, recognized an example of a property right in the hands of a state victim.[115] The government alleged that the defendants had schemed to smuggle liquor into the United States from Canada, thereby defrauding Canada by depriving it of tax revenues.[116] The Court, reasoning through syllogism that property means "something of value," affirmed the conviction[117]: It found that unpaid tax revenues were clearly an "economic interest" and thus something of value.[118] In so doing, the Court rejected the notion that the right to collect taxes was a "sovereign" interest like that seen in *Cleveland*, instead observing that "[t]he right to be paid money has long been thought to be a species of property."[119] Thus, *Pasquantino* stands for the proposition that states *can* have property interests that satisfy the property

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109. Id.

110. Id. at 23.

111. Id. at 23 (citing Carpenter v. United States, 484 U.S. 19, 26 (1987)).

112. Id. at 24.

113. Id. at 24–25 (citing La. Stat. Ann. § 27:309(A) (2000)).

114. Id. at 25 (internal quotation marks omitted) (quoting Jones v. United States, 529 U.S. 848, 858 (2000)).

115. 544 U.S. 349, 355–56 (2005).

116. Id. at 353–55.

117. Id. at 355 (internal quotation marks omitted) (citing McNally v. United States, 483 U.S. 350, 358 (1987)).

118. Id. at 356–57 ("Valuable entitlements like these are 'property' as that term ordinarily is employed.").

119. Id. at 356.

test so long as they are either "traditional" property interests like those at issue in *Carpenter* or interests with "economic value."

The more recent case of *Kelly v. United States*[120] was fraught with political intrigue[121] but seems to add little new to property fraud jurisprudence. *Kelly* considered property fraud charges against New Jersey Port Authority officials who schemed to cause a days-long traffic jam under the guise of a "traffic study."[122] While recognizing that the study was a sham, and that the real goal of the scheme was political retaliation against the mayor of Fort Lee,[123] the Court nevertheless reversed.[124] In a straightforward application of precedent, the Court first rejected the government's theory that by fraudulently realigning the traffic lanes, the defendants deprived the Port Authority of control over its property. This determination ostensibly fell within the type of "allocation, exclusion, and control" that *Cleveland* defined as state regulatory interests.[125]

The prosecution's second theory gave the Court more pause. The government sought to distinguish *Kelly* from *Cleveland* by arguing that the scheme required payment of overtime wages and that those wages were property within the meaning of the fraud test.[126] The Court, citing *Pasquantino*, agreed that wages were indeed property in the Port Authority's hands.[127] The Court nevertheless rejected the theory on the grounds that the employee wages weren't the "object[ive]" of the fraud:[128] "[A] property fraud conviction cannot stand" when, as here, "the loss to the victim is only an incidental byproduct of the scheme."[129] The Court justified this conclusion purely on pragmatism and *McNally*-esque ideological concerns alone: To hold otherwise would allow prosecutors to "end-run *Cleveland* just by pointing to . . . incidental costs" and "enforce (its view of) integrity in broad swaths of state and local policymaking."[130]

Kelly could be intended as a mandate to lower courts to take a harder look at prosecutors' theories of fraud. Or it could be viewed as a one-off anomaly that reaffirms the distinction between sovereignty in *Cleveland* and property in *Pasquantino* and simply reverses convictions in a sui generis finding of factual inadequacy. The extent to which the Court

120. 140 S. Ct. 1565 (2020).

121. See, e.g., Elie Mystal, The Bridgegate Trial Has Become the Most New Jersey Thing Ever, Above the Law (Nov. 3, 2016), https://abovethelaw.com/2016/11/the-bridgegate-trial-has-become-the-most-new-jersey-thing-ever/ [https://perma.cc/2HVQ-U9WA] (discussing the political motivations behind Bridgegate and the *Kelly* case).

122. *Kelly*, 140 S. Ct. at 1574.

123. Id. at 1568–69.

124. Id.

125. See id. at 1572–73 (quoting Cleveland v. United States, 531 U.S. 12, 23 (2000)).

126. See id. at 1573.

127. See id. (quoting Pasquantino v. United States, 544 U.S. 349, 357 (2005)).

128. Id.

129. Id.

130. Id. at 1574.

intended to put forth a new rule of fraud jurisprudence is still unclear, but lower courts have not seemed to enforce the "incidental byproduct" requirement rigorously.[131]

Most recently, the Supreme Court decided *Ciminelli v. United States*.[132] The defendants—comprising both private actors and public officials—were convicted of property fraud after scheming to rig the bidding processes for construction projects worth hundreds of millions of dollars.[133] While the government claimed at oral argument that they could have plausibly convicted under a traditional property theory alleging that the defendants deprived the state of economic value,[134] they ultimately proceeded on a "right to control" theory that was well-accepted in the Second Circuit.[135] The *Ciminelli* Court unanimously rejected the right to control theory, stating that "schemes to deprive the victim of 'potentially valuable economic information'" did not implicate a "traditional property interest[]" like the information in *Carpenter*.[136] The Court emphasized once again that "'absent a clear statement by Congress,' courts should 'not read the . . . fraud statutes to place under federal superintendence a vast array of conduct traditionally policed by the States.'"[137]

There are two key takeaways from *Ciminelli*. The first is doctrinal: Fraud prosecutions pass the property-or-not test only if the right at issue

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131. See infra note 211.

132. 143 S. Ct. 1121 (2023).

133. See id. at 1125.

134. See id.

135. See Transcript of Oral Argument at 3–5, *Ciminelli*, 143 S. Ct. 1121 (No. 21-1170), 2022 WL 22297206; Brief for United States at 8, *Ciminelli*, 143 S. Ct. 1121 (No. 21-1170), 2022 WL 10224977 (arguing that under the right to control theory, "[p]roperty includes intangible interests such as the right to control the use of one's assets . . . [such that] depriv[ations] of potentially valuable economic information" would constitute a property fraud (first alteration in original) (quoting Joint Appendix at 41, *Ciminelli*, 143 S. Ct. 1121 (No. 21-1170), 2022 WL 3999814)).

136. *Ciminelli*, 143 S. Ct. at 1124, 1128.

137. Id. at 1128 (alteration in original) (citing Cleveland v. United States, 531 U.S. 12, 27 (2000)). During oral arguments, the Court seemed to recognize that sovereign entities might have *some* intangible property interests similar to those in *Carpenter*. While the Court expressed an eagerness to dispel this right to control theory of property when *information* was the property interest at play, it was explicit in its desire to ensure that other "rights to control" such as deception in contracting or fraudulent inducement (in ways that implicate property with real economic value) would not be affected. See, e.g., Transcript of Oral Argument at 38, 40, 41–42, *Ciminelli*, 143 S. Ct. 1121 (No. 21-1170), 2022 WL 22297206 (statement of Gorsuch, J.) (remarking the Justices were "all in radical agreement" about limiting the holding to only the right to control theory at issue in the case, and not limiting the government's ability to prosecute other deception such as "pedigree fraud"). This colloquy did not seem to influence the final opinion, which made no mention of pedigree fraud or other longstanding fraud theories, but pedigree fraud continues to be upheld in courts. See, e.g., United States v. Kousisis, 82 F.4th 230, 240–41 (3d Cir. 2023) (upholding conviction for falsely obtaining a business certification to secure contracts with a state); United States v. Porat, 76 F.4th 213, 218–219 (3d Cir. 2023) (upholding conviction for falsely inflating university rankings to attract students).

has "traditionally" been recognized as a property right. The second is more ideological: The same core federalism concerns that influenced the Rehnquist Court in *McNally* are just as alive in today's Roberts Court.

3. *Property or Not? The Modern Doctrine Summarized.* — To summarize the doctrine as it stands today: *McNally* held that only deception aimed at obtaining money or property falls within the purview of the fraud statutes and distinguished between "property rights" and other "intangible rights."[138] *Cleveland* further required that the rights at issue be property rights "in the hands of the victim."[139] *Carpenter* emphasized that some intangible rights—such as confidential business information—may be property rights,[140] and both *Pasquantino* and *Ciminelli* suggest that rights that carry economic value or which have "long been recognized" as property rights will satisfy the property-or-not test.[141] But under *Ciminelli*, "potentially valuable economic information" is not a property right.[142] Lastly, *Kelly* seems to require that these rights *actually* be the objective of the fraudulent scheme rather than a mere "incidental byproduct."[143]

This paragraph may rightfully seem confusing. While any one fraud case may establish a fairly straightforward rule of law, the jurisprudence as a whole creates seemingly contradictory mandates for lower courts. At the same time, however, post-*McNally* jurisprudence has set forth a clear *normative* guideline for lower courts: scrutinize fraud prosecutions when states are involved. But does the Court's ideological rhetoric translate into a workable doctrine?

II. EVALUATING PROPERTY FRAUD

This Part evaluates the Supreme Court's modern fraud jurisprudence as a function of its stated ideological interests. Taking as given the Court's articulation that the fraud statutes should be read to limit federal intervention in state affairs,[144] an effective doctrine would provide clear rules by which lower courts can rebuke government efforts to prosecute apparent state misconduct. But the doctrine also reflects the Court's reluctance to limit prosecutors' ability to punish "traditional" forms of property fraud.[145] Accordingly, lower courts must not limit prosecutors'

138. See supra section I.A.2.

139. See supra section I.B.1.

140. See supra section I.B.1.

141. See supra section I.B.2.

142. See supra section I.B.2.

143. See supra section I.B.2.

144. It is again worth noting that this Note does not directly comment on whether these federalism concerns are normatively "good" ideals on which to build the doctrine—instead, it engages with the doctrine in a purely analytical fashion.

145. See supra text accompanying notes 140–141.

ability to pursue charges when a private party is defrauded of intangible property rights.[146]

When evaluated against this standard, this Part shows that modern fraud doctrine fails on its own terms: The property-or-not test is not only inherently challenging for lower courts to apply consistently but is also readily satisfied in many federal fraud cases. Section II.A illustrates the "property paradox" that makes applying the Supreme Court's jurisprudence so difficult—namely, the challenge of differentiating between "property interests" in private hands and the "regulatory interests" in sovereign hands. Section II.B illustrates how prosecutors can craft (and have crafted) indictments that satisfy the Court's property tests even when state actors are involved. This Part concludes that because of these flaws, modern fraud jurisprudence amounts to little more than vague interpretive guidelines that fail to meaningfully protect state sovereignty.

A. *The Property Paradox: Delineating Between State Property and State Sovereignty*

The property-or-not test becomes most challenging to implement when the purported property interest is in the hands of a state actor. As a doctrinal matter, the factors that inform lower courts' application of the test—that things "of value," that are "long . . . thought to be a species of property," or that "would qualify as an economic loss" can be property[147]—still leave wide swaths of intangible property rights uncategorized.[148] The recent cases of *United States v. Blaszczak* ("*Blaszczak I*"[149] and "*Blaszczak II*"[150]) illustrate this point.

In *Blaszczak I*, the Second Circuit upheld wire fraud convictions on an "information-as-property" theory. The defendants, all private individuals, obtained unauthorized confidential information about reimbursement rates from the Center for Medicare and Medicaid Services (CMS), a federal agency.[151] In finding that the CMS information was property, the court compared the holdings of *Cleveland* and *Carpenter*.[152] Ultimately analogizing to *Carpenter*, the court found that CMS possessed a "right to exclude" others from its confidential reimbursement rate information,[153] and further observed that the right to exclude was a "traditional" property

146. See supra text accompanying note 140.

147. See supra sections I.B.1–.2.

148. Cf. Morales, supra note 105, at 1134–35 (evaluating property using "descriptive" factors like "rights of a person over a given thing," "in rem" rights, and rights that "attach to the thing," as well as "normative" factors like the "right to exclude," a "bundle of rights," "autonomous interests," and "economic interests").

149. Blaszczak v. United States (*Blaszczak I*), 947 F.3d 19 (2d. Cir. 2019).

150. Blaszczak v. United States (*Blaszczak II*), 56 F.4th 230 (2d. Cir. 2022).

151. *Blaszczak I*, 947 F.3d at 26–28.

152. See id. at 32–34.

153. Id. at 33 (internal quotation marks omitted) (quoting Carpenter v. United States, 484 U.S. 19, 26 (1987)).

interest that had long been recognized at common law.[154] The court then determined that CMS also had an economic interest in the information, as the agency had invested significant "time and resources" to "generat[e] and maintain[] the [information's] confidentiality."[155] It reasoned that the defendants' disclosure of the information led to operational harms that effectively "devalued" CMS's economic interest by increasing costs and procedural requirements necessary to protect future information.[156] Thus, even though *Blaszczack I* was decided before *Kelly* and *Ciminelli*, the Second Circuit seemed to give full weight to the Supreme Court's property-or-not test and weighed the relevant factors offered in *Carpenter*, *Cleveland*, and *Pasquantino* before reaching its conclusion.[157]

Without commenting on the original opinion, the Supreme Court vacated and remanded *Blaszczak I* at the request of the Solicitor General.[158] On remand, taking the cue of the Solicitor General's Office, the Second Circuit reached the opposite conclusion and reversed the convictions.[159] Noting that the government had abandoned its position that the CMS information was a property right, the court this time emphasized that the reimbursement information represented an "exercise of regulatory power."[160] The opinion made no reference to the "right to exclude" theory

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154. See id. ("Like the private news company in *Carpenter*, CMS has a 'property right in keeping confidential and making exclusive use' of its nonpublic predecisional information." (quoting *Carpenter*, 484 U.S. at 26)).

155. Id.

156. Id. The court based this opinion on a finding of fact:

> As former CMS Director Dr. Jonathan Blum testified, leaks of confidential information could result in unbalanced lobbying efforts, which would in turn impede the agency's efficient functioning by making it "more difficult to manage the process flow and to convince [Blum's] superiors of the right course for the Medicare program." Leaks may also require the agency to "tighten up" its internal information-sharing processes, again with the result that the agency would become less efficient.

Id. (alteration in original) (citations omitted).

157. See Pasquantino v. United States, 544 U.S. 349, 356 (2005) (defining property as "something of value" that, if the fraud were effected, would cause the victim economic harm); Cleveland v. United States, 531 U.S. 12, 21 (2000) (defining property by distinguishing between economic and regulatory interests); Carpenter v. United States, 484 U.S. 19, 23 (1987) (distinguishing between intangible rights and intangible property rights); see also Ciminelli v. United States, 143 S. Ct. 1121, 1127 (2023) (reiterating that property fraud should be interpreted with respect to historical conceptions of property); Kelly v. United States, 140 S. Ct. 1565, 1568 (2020) (reiterating the difference between economic and regulatory interest); supra sections 1.B.1–.2.

158. See Olan v. United States, 141 S. Ct. 1040 (2021) (mem.). In requesting that the opinion be vacated and remanded, the Solicitor General confessed error in the government's arguments in *Blaszczak I*. See *Blaszczak II*, 56 F.4th 230, 241 (2d Cir. 2019).

159. The majority opinion was authored by Judge Kearse, who had previously dissented in *Blaszczak I*. See *Blaszczak II*, 56 F.4th at 233. Similarly, Judge Sullivan had written the opinion for *Blaszczak I* and now dissented in *Blaszczak II*. See id. at 250 (Sullivan, J., dissenting).

160. Id. at 243 (majority opinion) (citation omitted).

of property, and rejected the notion that the information had economic value to CMS on the basis that "disclosure has no direct impact on the government's fisc."[161]

The *Blaszczak II* majority at first seemed to soundly reject the idea that regulatory agencies can have a property interest in confidential information, reasoning that unlike a "commercial entity," the government does not "offer . . . a service or a product" that would give the information intrinsic value.[162] But the court stopped short of a bright-line rule, instead maintaining that at least *some* government information may still be a "thing of value" within the meaning of *Pasquantino*'s jurisprudence.[163] In support of this proposition, the court cited the earlier Second Circuit case of *United States v. Girard*.[164]

Girard was cited in *Blaszczak I* for the proposition that "the Government has a property interest in certain . . . private records."[165] The majority in *Blaszczak II* asserted that this was still true, because the information at issue in *Girard* included a list of Drug Enforcement Administration (DEA) informants in ongoing investigations. The court distinguished the DEA informant list from the CMS rate information by observing that the DEA's disclosure would "interfere with . . . operations" or "imperil[] the well-being of the [government] agents."[166] This, the *Blaszczak II* majority reasoned, gave the DEA's information "inherent value" that the "regulatory information" in the hands of CMS simply lacked.[167]

The dueling *Blaszczak* opinions showcase the Property Paradox in two ways. First, the disparate treatment of CMS and DEA information in *Blaszczak II* has little basis in the Supreme Court's property-or-not test. If the *Blaszczak II* CMS analysis is correct that the risk of "operational harms" from disclosing information carries no economic value, then there is no basis in the Supreme Court's jurisprudence to treat the DEA information differently.[168] Similarly, if the majority's DEA analysis correctly assigns economic value to their operational risks, then there is no clear reason

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161. Id. at 243–44.

162. Id. at 243.

163. See id. at 244.

164. 601 F.2d 69, 71 (2d Cir. 1979).

165. See *Blaszczak I*, 947 F.3d 19, 33 (2d Cir. 2019) (alteration in original) (citing *Girard*, 601 F.2d at 71).

166. *Blaszczak II*, 56 F.4th at 244.

167. Id.

168. See id. at 255–56 (Sullivan, J., dissenting) ("[T]his case and *Girard* [both] concern whether the government has a property interest in . . . [confidential information] . . . . [T]he majority . . . deems [DEA information] to have 'inherent value[']. . . [but] the reimbursement rates here were integral to CMS's administration . . . ." (quoting id. at 244 (majority opinion))).

why the CMS analysis in *Blaszczak I* was wrongly decided.[169] In order to cut through these contradictory outcomes, the *Blaszczak II* majority invents an entirely new sub-doctrine by relying on (1) the right in question and (2) the victim, and *additionally* (3) the level of harm brought by the perpetrator—a standard that the Supreme Court has never required. And even *if* the Supreme Court approved the reasoning in *Blaszczak II* and decided to incorporate the third prong into the existing property-or-not test, it is unclear how *that* test would be operationalized in a principled way in future cases. In other words, this holding would simply restart the Property Paradox all over again. This is not a criticism of the *Blaszczak II* majority's approach, which is a reasonable application of the law given the Court's overtly federalist dicta and the Solicitor General's decision to abandon the case, but instead is a critique of the property fraud doctrine itself.

The *Blaszczak* opinions highlight a second flaw in property fraud jurisprudence: Lower courts can apply the *exact same* doctrine to substantially similar facts and (reasonably) reach opposite results. The *Blaszczak I* majority began its analysis by asking whether the CMS had either (1) a right to exclude (similar to *Carpenter*) or (2) an interest that carried economic value (similar to *Pasquantino*). Finding that it did, it did not need to ask whether the information was a regulatory interest. *Blaszczak II*, in contrast, began first by emphasizing the "regulatory" nature of the CMS information, and only then determined that the regulatory nature of the information subordinates any arguably economic interest that CMS may have. Far from drawing a clear rule, the standards set forth by *McNally* and its progeny require judges to take a case-by-case approach to every fraud prosecution in which a sovereign entity is the purported victim.

This problem is not limited to the facts of *Blaszczak*. Consider two Fifth Circuit cases in the tax context: *United States v. Griffin* held that federal tax credits were not property when held in the hands of the Texas Department of Housing and Community Affairs (TDHCA).[170] Fifteen years later, the Fifth Circuit in *United States v. Hoffman* held that Louisiana state tax credits were property in the state's hands.[171] The *Hoffman* court distinguished the two cases on narrow grounds, reasoning that while Louisiana had a clear economic interest in its state tax credits under *Pasquantino*, the "unique nature" in which TDHCA "merely allocated *federal* tax credits" meant that the TDHCA interest was purely regulatory.[172] This pair of cases from the

169. Cf. id. at 256 (Sullivan, J., dissenting) ("[J]ust as the 'theft [of the informant records in *Girard*] would interfere with [the DEA's] operations,' the pre-publication leak of CMS's reimbursement rates here would 'risk[] hampering the agency's decision-making process' . . . ." (second, third, and fourth alterations in original) (citation omitted) (first quoting id. at 244 (majority opinion); then quoting *Blaszczak I*, 947 F.3d at 33)).

170. 324 F.3d 330, 338–41 (5th Cir. 2003).

171. 901 F.3d 523, 537 (5th Cir. 2018).

172. Id. at 539 (emphasis added).

same circuit demonstrates that prosecutors may face inconsistent outcomes even when the same fundamental "interest"—here, tax credits—is in the hands of different sovereign entities. It is hard to say the fraud doctrine does any work to preserve federal–state criminal balance—especially as seen here, when the federal prosecution was unable to pursue a theory of *federal* tax credit fraud but could nonetheless sustain a conviction against *state* tax credit fraud.

These examples—and others[173]—illustrate how the Court's property-or-not test can lead to different, and even contrary, outcomes. Some courts, like those in *Blaszczak II* and *Griffin*, might find that a regulatory interest predominates over any potential economic interests. Other courts may find that the economic interest trumps sovereign interests, as in *Hoffman*—even if the economic interest is attenuated, as in *Blaszczak I*. At any rate, these cases show that the property-or-not test does little to further the Supreme Court's ideal state–federal balance of power. Far from the bright-line rule that *McNally* attempted to establish with the property-or-not test, the modern doctrine often leaves the definition of property—and by implication, the federal–state balance of power—entirely up to the facts of the case and the judge's own intuition.

B. *Form Over Substance: Satisfying the Property-or-Not Test*

The shortcomings of the property-or-not test in the lower courts should be reason enough for the Supreme Court to revisit its approach to fraud. But as the Court in *Kelly* acknowledged,[174] and subsequent circuit cases have proven out,[175] there is an entirely separate problem as well: The property-or-not test can almost *always* be satisfied in some form or another. While the Supreme Court's jurisprudence would ideally set a bright-line rule on prosecutorial discretion, in practice it presents merely a set of technical pleading requirements. This section illustrates this grand irony of the court's federalism-focused doctrine: The lack of a functional bright-line rule against federal overreach renders the doctrine pointless. Fraud jurisprudence limits prosecutorial discretion only insofar as prosecutors are actually willing to defer to the Court's ideological dicta.

This phenomenon first appeared in *Kelly*. As discussed in Part I, the government alleged that the *Kelly* defendants' scheme necessarily

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173. One such example is United States v. Hird, 913 F.3d 332 (3d Cir. 2019). In *Hird*, the Third Circuit held that traffic tickets were a property interest. The court first acknowledged that traffic tickets themselves "would seem . . . to have no intrinsic *economic* value" given that they "implicate[] the Government's role as sovereign." Id. at 342 (first citing Cleveland v. United States, 531 U.S. 12 (2000); then quoting id. at 24). Despite this, the court ultimately concluded that because at least some of the traffic tickets would *probably* generate "fines and costs" for the state, the traffic tickets overall had enough economic value sufficient to satisfy the property-or-not test. Id. at 345.

174. See Kelly v. United States, 140 S. Ct. 1565, 1574 (2020) (noting the possibility of "end-running" the property-or-not test); see also infra text accompanying notes 177–178.

175. See infra note 211.

intended to deprive the Port Authority of overtime wages.[176] Unwilling to overturn *Pasquantino* and reject the notion that things of "economic value" such as "time and labor . . . can undergird a property fraud prosecution,"[177] the Court instead went wholly outside its prior property-or-not jurisprudence by declaring that "property must play more than some bit part in a scheme: It must be an 'object of the fraud.'"[178] The Court decided that the wages were *not* an object of the defendant's fraud, largely because "[t]o rule otherwise would . . . [allow] prosecutors [to] end-run *Cleveland* just by pointing to the regulation's incidental costs."[179] But while the Court admonished the government to refrain from interfering with "state and local policymaking,"[180] this part of the holding carries little weight beyond *Kelly* itself.

This part of *Kelly* carries little weight because it relates to a question of fact rather than of law. To explain, recall that federal property fraud is an inchoate crime.[181] As an inchoate crime, the key element is whether the fraudster *intends* to defraud. Thus, the government must allege in its indictment only that the fraudster *intended* to "obtain[] money or property by means of false or fraudulent pretenses, representations, or promises."[182] Intent is a question of fact for the jury, and juries may infer intent from circumstantial evidence.[183] Lower courts are obligated to consider the sufficiency of the indictment or the jury's findings of facts "in the light most favorable to the prosecution."[184] This deference extends to any inferences that can be plausibly (or reasonably or legitimately) drawn from the evidence.[185] Thus, prosecutors need only specify that a defendant *intended* to obtain something from a state victim that is unequivocally "property," like the wages in *Kelly*, to have a watertight theory of prosecution that complies with existing property fraud jurisprudence.[186]

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176. See Brief for the United States at 46–47, *Kelly*, 140 S. Ct. 1565 (No. 18-1059), 2019 WL 6324152 ("The scheme in this case required the Port Authority to pay additional wages, . . . all to the benefit of Kelly[,] . . . [and] was effectuated by means of a lie . . . . The scheme was, therefore, . . . in violation of federal law.").

177. See *Kelly*, 140 S. Ct. at 1573.

178. Id. (quoting Pasquantino v. United States, 544 U.S. 349, 355 (2005)).

179. Id. at 1574.

180. Id.

181. See supra note 30 and accompanying text.

182. 18 U.S.C. §§ 1341, 1343 (2018).

183. See, e.g., 75A Am. Jur. 2d Trial § 669 (2024); 1 Stephen E. Arthur & Robert S. Hunter, Federal Trial Handbook: Criminal § 10:21 (2023).

184. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

185. See, e.g., United States v. Doe, 921 F.2d 340, 343 (1st Cir. 1990) (describing the standard as "including reasonable inferences"); United States v. Smith, 680 F.2d 255, 259 (1st Cir. 1982) (articulating a standard of considering evidence inclusive of "all legitimate inferences").

186. While *Kelly* rejected the government's wage-deprivation theory on appeal, the Court did so in a conclusory manner without reference to specific facts—further, the Court did not suggest an intention to modify the "sufficiency of the evidence" standard. See Kelly v. United States, 140 S. Ct. 1565, 1568–69 (2020) ("The question presented is whether the

Given the deferential standard of review, and given federal prosecutors' impressive conviction rates at trial,[187] it is very likely that a meticulous United States Attorney could craft an indictment that would satisfy the property-or-not test and thereby render the Court's modern fraud doctrine largely meaningless.

1. United States v. Gatto *and Allegations of Specific Intent.* — This is not just an exercise in theory. Recent prosecutions have demonstrated that carefully crafted indictments can and do pass the property-or-not-test. In *United States v. Gatto*,[188] the Second Circuit affirmed a fraud conviction when the defendants—Adidas employees—made secret payments to college basketball athletes in exchange for attending specific schools.[189] The prosecution alleged that the "object of the fraud" was to deprive the universities of their financial aid.[190] The defendants insisted that they had no interest whatsoever in the universities' financial aid and simply wanted these players to attend Adidas-sponsored schools.[191] A commonsense understanding of the scheme would support this point: Absent discovery of the scheme, the students, Adidas, *and* the "victim" universities all arguably *benefit* from the payments, and it makes little sense that the defendants would pay student athletes with the specific intent of depriving the school of its financial aid.[192] But the Second Circuit didn't give this

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defendants committed property fraud. The evidence . . . no doubt shows wrongdoing . . . . [But] the employees' labor was just the incidental cost of . . . regulation."). The Court's silence on its standard of review is particularly interesting given that the government vigorously argued for factual sufficiency. See, e.g., Brief for the United States at I, *Kelly*, 140 S. Ct. 1565 (No. 18-1059), 2019 WL 6324152 ("Question Presented: Whether the evidence that defendants repeatedly lied . . . is sufficient to sustain their convictions for wire fraud . . . ."). But the government did not specifically argue in its brief that there was sufficient evidence that the object of the fraud was the Port Authority's wages, which may explain why the matter was not addressed in the Court's opinion. See id. at 46 (focusing on the alleged property interest at stake and the lie employed to commandeer it).

187. See, e.g., John Gramlich, Only 2% of Federal Criminal Defendants Went to Trial in 2018, and Most Who Did Were Found Guilty, Pew Rsch. Ctr. (June 11, 2019), https://www.pewresearch.org/short-reads/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/2988-N4BR] (observing a roughly eighty-three percent conviction rate of all federal cases that went to trial in 2018).

188. 986 F.3d 104 (2d Cir. 2021).

189. Id. at 109–10.

190. These payments violated NCAA rules and, if disclosed, would have rendered the players ineligible to compete; thus, as alleged, the fraud was to deprive universities of aid that would have gone to eligible players. See id. at 110–11.

191. See id. at 117 ("Defendants argue that this testimony would have proven that they intended to help, not harm, the schools when they paid the Recruits' families to entice the Recruits to attend Adidas-sponsored schools.").

192. See, e.g., David Byrne, The Cost of Bribery and Corruption in the NCAA, Medium (June 24, 2019), https://medium.com/@david_37223/the-cost-of-bribery-and-corruption-in-the-ncaa-2fa97437246 [https://perma.cc/2LDD-69GR] (observing that the universities and brands like Adidas entered into lucrative and mutually beneficial partnerships and that students in the scheme would have been otherwise unpaid for their athletic performance regardless of which school they attended).

argument weight. Instead, it simply concluded that "a rational trier of fact [could] find that the Universities' athletic-based aid was 'an object' of [the defendants'] scheme" under a sufficiency of the evidence standard.[193] *Gatto* proves that it is at least *possible* for prosecutors to craft an indictment that is insulated from the scrutiny of the property-or-not test.

Subsequent cases further confirm that the *Gatto* approach can pass the property-or-not test even when a state entity is involved. In *United States v. Kousisis*, for example, defendants were convicted for making misrepresentations to have their company classified as a "disadvantaged business enterprise" (DBE) and secure lucrative contracts with the Pennsylvania Department of Transportation (PennDOT).[194] The defendants argued that the government had failed to prove property fraud because (1) the DBE certification was not a property interest, but an "intangible" interest in the state's hands, and (2) the companies actually did the work that PennDOT paid them to do—in other words, their misrepresentation was to obtain a state designation like that in *Cleveland*, rather than to obtain money or property.[195] The court rejected this argument, holding that "those false certifications were merely incidental to the true purpose of the fraudulent agreement—obtaining millions of dollars from PennDOT."[196] In other words, the government successfully articulated a theory of fraud that focused on a "traditional" property interest (money) while downplaying the state-owned intangible rights at play. Thus, what *Gatto* proved to be possible may become the default mode of government pleading to maximize compliance with the mandates of *McNally*, *Cleveland*, *Kelly*, and *Ciminelli*.[197]

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193. *Gatto*, 986 F.3d at 115 (quoting Kelly v. United States, 140 S. Ct. 1565, 1573 (2020)). It is also worth noting that *Gatto*'s purported victims—North Carolina State University, the University of Kansas, and the University of Louisville—are all public universities, but the *Gatto* court did not give any indication that being a state-funded university would result in different factual standards than being a private university. See id. at 110.

194. See United States v. Kousisis, 82 F.4th 230, 233–34 (3d Cir. 2023) ("[D]isadvantaged business enterprise [designations] . . . [are] intended to promote the participation of minority and disadvantaged businesses in . . . federally financed [DOT] contracts.").

195. See id. at 236.

196. Id. at 240.

197. *Ciminelli* in particular does little to add rigor to the technical requirements established in *Kelly*. *Kousisis*, for example, dispensed with *Ciminelli*'s "traditional property interests" requirement in a footnote, simply noting that "the basis of the wire fraud conviction is not PennDOT's frustrated interest in DBE participation. Rather, it is the actual money paid." Id. at 240 n.63. See also United States v. Griffin, 76 F.4th 724, 738 (7th Cir. 2023) ("[T]he Government did not pursue a right-to-control theory of fraud in this case; rather, the Government's allegations focused explicitly on the defendants' attempts to deprive the SBA of loan guarantees and the millions of dollars the SBA lost paying out on these loan guarantees.").

In another case, the government secured a conviction against an employee at Temple University who lied to *U.S. News and World Report* to artificially inflate the rankings of the university's online business program. See United States v. Porat, 76 F.4th 213, 215–18 (3d

2. United States v. Palma *and Identifying a Nonstate Victim.* — Even in a world in which the Court's property-or-not doctrine was wholly watertight, the loophole presented by *Gatto* would still exist. Assuming that *any* interest held in a state's hands was beyond the reach of the fraud statutes, prosecutors could still end-run *McNally*'s property-or-not test: If the government can identify a valid theory of property to sustain a conviction, what would stop it from carefully identifying a victim?

In the "Dieselgate" scandal case *United States v. Palma*, the government charged Emanuele Palma, an engineer for Fiat Chrysler, with wire fraud, alleging that Palma had "fraudulently calibrated the emissions control systems" on several models of vehicles so that they could pass environmental regulatory tests.[198] In the original indictment, the government argued that this scheme intentionally made "false and misleading representations" to regulators and "cause[d] [regulators] to make false and misleading representations to [the public]."[199] Palma moved to dismiss, arguing that the government was "repackaging" a scheme to deceive regulators into issuing a certification in an attempt to end-run *Kelly*.[200] The district court agreed and dismissed the charges.[201]

But the government tried again, revising its indictment to include "new consumer-focused allegations."[202] These new allegations heavily deemphasized the role of regulators, alleging that scheme intended "to obtain money and property . . . through the production and sale of . . . [v]ehicles that they knew did not comply with . . . regulations governing emissions."[203] By deceiving regulators, they argued that defendants were able to market their products as "EcoDiesel engine[s] that reduced emissions and were environmentally-friendly"[204] and scam consumers out of their money. The district court again dismissed the charges, holding that this was still "insufficient to establish a causal link between the alleged

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Cir. 2023). On appeal, the defendant tried to argue that "rankings are not property." Id. at 219 (internal quotation marks omitted) (quoting Brief for Defendant-Appellant and Appendix Volume I of II at 25, *Porat*, 76 F.4th 213 (No. 22-1560), 2022 WL 2349266). The court rejected this as an "attempt to redirect focus to the rankings" instead simply reiterating that "[the defendant] was not convicted on the theory that he deprived students of rankings; he was convicted for depriving them of *tuition money*." Id. This further shows the relative ease by which the government can craft a theory which places a traditional property interest at the heart of a scheme, rather than as an incidental byproduct. But see infra notes 208–209 and accompanying text.

198. United States v. Palma, No. 19-20626, 2020 WL 6743144, at *2 (E.D. Mich. Nov. 17, 2020).

199. Id.

200. Id. at *3.

201. Id. at *4.

202. United States v. Palma, No. 19-20626, 2021 WL 5040326, at *3 (E.D. Mich. Oct. 28, 2021), rev'd, 58 F.4th 246 (6th Cir. 2023).

203. Id. at *2.

204. Id. (alteration in original) (internal quotation marks omitted).

fraud and the loss of property or money" under *Kelly*.[205] But on appeal, the Sixth Circuit reversed.[206] Observing that "the government need only allege facts showing that the [fraud] had the object of using deception to deprive consumers of property," the circuit concluded that "[this] case at bar is clearly about property. And it is plausible that the scheme's goal was not merely to deceive regulators but also to sell the resulting products to consumers."[207]

To be sure, the approach in *Palma* might not work every time.[208] Prosecutors may heed the normative proclamations of the Court and decline to bring cases even when they might formally comply with the law. And even if they forge onward, each circuit has its own unique approach to the nonproperty elements of fraud jurisprudence that the Supreme Court has never addressed.[209] Accordingly, some circuits may have an

205. Id. at *4.

206. *Palma*, 58 F.4th at 250.

207. Id. at 250–51.

208. For example, courts have expressed skepticism in government indictments which allege that an employee-defendant's wages were the object of the fraud, largely on the grounds that this is too close to the honest services theory of fraud rejected in *McNally*. See United States v. Guertin, 67 F.4th 445, 451 (D.C. Cir. 2023) (rejecting the government's theory "that whenever an employee lies about a specific, concrete condition of employment—here, Guertin's suitability for security clearance—the employer is defrauded of 'money or property' by paying the employee's salary"); United States v. Yates, 16 F.4th 256, 266 (9th Cir. 2021) ("[T]here is a difference between a scheme whose object is to obtain a new or higher salary and a scheme whose object is to deceive an employer while continuing to draw an existing salary—essentially, avoiding being fired.").

209. One such circuit split is whether the government must specifically allege that the object of the fraud was to obtain property or whether it may merely contemplate a deprivation of property. See, e.g., Porcelli v. United States, 404 F.3d 157, 162 (2d Cir. 2005) ("[A] defendant does not need to literally 'obtain' money or property to violate the statute."); United States v. Hedaithy, 392 F.3d 580, 602 n.21 (3d Cir. 2004) ("[A] mail fraud violation may be sufficiently found where the defendant has merely deprived another of a property right."); Monterey Plaza Hotel Ltd. P'ship v. Local 483 of the Hotel Emps. & Rest. Emps. Union, 215 F.3d 923, 926–27 (9th Cir. 2000) ("[The fraud statutes] explicitly require an intent to *obtain* 'money or property[']. . . . The[ir] purpose . . . is to punish wrongful *transfers* of property from the victim to the wrongdoer . . . ." (emphasis added) (quoting 18 U.S.C. §§ 1341, 1344 (2018))); see also United States v. Shulick, 18 F.4th 91, 109 (3d Cir. 2021) ("*Kelly* did not announce a 'benefit' rule[] that . . . [fraud] may never occur unless the defendant converted property for his benefit . . . .").

Another such possible split is whether there must be "convergence" between the fraud and the victim's property—that is, whether the party that is deceived by the fraud must also be the party that is harmed by the scheme. Most courts currently do not have a convergence requirement. See, e.g., United States v. Greenberg, 835 F.3d 295, 306 (2d Cir. 2016) ("Nothing in these statutory texts, moreover, suggests that the scheme to defraud must involve the deception of the same person or entity whose money or property is the object of the scheme."); United States v. Seidling, 737 F.3d 1155, 1161 (7th Cir. 2013) ("[T]his Court does not interpret the mail fraud statute as requiring convergence between the misrepresentations and the defrauded victims." (citing United States v. Cosentino, 869 F.2d 301 (7th Cir. 1989)); United States v. McMillan, 600 F.3d 434, 450 (5th Cir. 2010) ("The Government was not required to prove that misrepresentations were made directly to any of the victims."); United States v. Blumeyer, 114 F.3d 758, 768 (8th Cir. 1997) ("[A]

approach more like the district court in *Palma* and conclude that such theories are too attenuated.[210] But this only reinforces the more critical point: Just as before the modern property-or-not test existed, circuit-by-circuit variance and prosecutorial practice plays a significant role in the doctrine's effectiveness. Thus, standing alone, the property-or-not test is a poor means by which to prevent the government from prosecuting state-actor misconduct.[211]

Because the property-or-not test fails sometimes, it fails all the time. While the Supreme Court has reversed a conviction every few years over the past several decades, the federal government prosecutes over 4,000 white-collar crime cases annually.[212] The Court simply cannot keep up with the sheer volume of fraud cases: If even a small fraction of federal prosecutors have the wherewithal to craft an indictment that complies with modern jurisprudence, the current fraud doctrine simply fails (save the occasional reversal) to prevent the government from policing state actors. Far from *McNally*'s vision of a bright-line rule that restricts the cases that

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defendant who makes false representations to a regulatory agency in order to forestall regulatory action that threatens to impede the defendant's scheme to obtain money or property from others is guilty of [fraud] . . . ."). But some circuits may be changing that approach. Compare United States v. Berroa, 856 F.3d 141, 151–53 (1st Cir. 2017) (reversing fraud convictions on the grounds that a scheme to cheat on medical exams lacked a "causal nexus" to alleged harm to patients that later paid for the fraudster's medical services), with United States v. Christopher, 142 F.3d 46, 54 (1st Cir. 1998) ("We see no reason to read into the statutes an invariable requirement that the person deceived be the same person deprived of the money or property by the fraud.").

A final circuit split is the extent to which defendants may assert that their conduct was not fraudulent because the alleged victim received the "benefit of the bargain." Compare United States v. Kousisis, 82 F.4th 230, 243 (3d Cir. 2023) ("PennDOT was partially deprived of the benefit of its bargain when it paid the full contract price because of a false pretense."), with *Guertin*, 67 F.4th at 451 ("If an employee's untruths do not deprive the employer of the benefit of its bargain, the employer is not meaningfully defrauded of 'money or property' when it pays the employee his or her salary.").

210. See supra notes 198–202 and accompanying text.

211. Furthermore, none of the thirty circuit cases that cite *Kelly* at the time of drafting have overturned a fraud conviction on the basis that property played only "a bit part in the scheme." See, e.g., *Shulick*, 18 F.4th at 110–13 (holding that the government's allegations "unquestionably" satisfied property fraud because the "aim [was] to obtain money" when applying harmless error review in a case in which a private defendant allegedly defrauded the state school system of contractual services (alteration in original) (citation omitted)); United States v. Shelton, 997 F.3d 749, 774–75 (7th Cir. 2021) (holding that a public official's use of office resources to run a reelection campaign satisfied the property test and was "a viable legal claim as charged and as the government argued it at trial"). This suggests that circuits themselves are not going to adopt a stricter standard of review for property fraud cases without further input from the Supreme Court.

212. See, e.g., Glenn R. Schmitt & Lindsey Jeralds, U.S. Sentencing Comm'n, Overview of Federal Criminal Cases, Fiscal Year 2021, at 5 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/FY21_Overview_Federal_Criminal_Cases.pdf [https://perma.cc/D4NK-CUZ7] (reporting that the federal government managed 4,571 fraud, embezzlement, and theft cases in fiscal year 2021).

federal prosecutors can and cannot pursue, the modern fraud doctrine fails to protect state sovereignty in any meaningful way.

In sum, property fraud doctrine fails to advance the Court's conception of a proper federalist balance in criminal law. As a matter of black-letter law, it fails; as a matter of placing limits on the federal government, it fails. Of course, the Supreme Court could continue to redefine the meaning of "property" and make incremental changes, or grant certiorari to reverse one-off convictions it found particularly distasteful à la *Kelly*. But that approach will never truly achieve the ends that the Court seeks. To the extent that property is a constantly evolving concept,[213] unscrupulous fraudsters constantly devise new schemes,[214] and the government constantly develops new theories of criminality, trying to fix property fraud through the meaning of "property" risks becoming an endlessly futile endeavor.

III. UNRAVELING THE PROPERTY PARADOX: PROPOSALS TO FIX FRAUD JURISPRUDENCE

If property fraud is a broken doctrine, how can it be fixed? Perhaps by legislation—but despite calls for intervention,[215] it is unclear whether Congress will engage in the near term. And to the extent that fraud is a common law offense,[216] it is perhaps the Court's prerogative to update it as it sees fit.[217] If the Court insists on insulating states from federal

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213. Cf. Merrill, supra note 105, at 751–52 (observing the challenges of reconciling new forms of property with existing principles such as the right to exclude). This is compounded by the fact that intangible property under *Carpenter* is also still alive and well in the private fraud context. See United States v. Shin, 73 F.4th 1077, 1101 (9th Cir. 2023) (rejecting an argument that *Ciminelli* protected a defendant who obtained "confidential information" through fraud on the grounds that *Carpenter* upheld such information as property).

214. See supra note 39 and accompanying text.

215. See, e.g., Sloan Renfro, Note, The Need for a Clear Statement After "Bridgegate": Combatting SCOTUS's Narrowing View of Corruption With an "Abuse of Functions" Offense, 59 Am. Crim. L. Rev. 197, 220 (2022) (proposing that Congress adopt "a new criminal statute that more broadly captures a public officials' abuses of functions"). For an overview of the honest services fraud context, see generally Andrew J. Fishman, Note, Enforcement of Honest Services Fraud Post–*Kelly v. United States*, 63 B.C. L. Rev. 2349 (2022). For a similar proposal for legislative intervention in honest services fraud, see Michael J. Morgan, Note, Bridging the Gap: Assessing the State of Federal Corruption Law After *Kelly v. United States*, 89 Fordham L. Rev. 2339, 2370 (2021) (defining honest services fraud with reference to state law).

216. See supra note 40.

217. Cf. Richman, Politics as Usual, supra note 22, at 577 ("*Kelly* . . . did not turn on textual analysis. Rather, . . . the Supreme Court took the statutory reference to 'property,' . . . and applied its own restrictive analysis. . . . [T]he authoritative text came from the Court's own precedents, not Congress."). The Court has also updated other "common law" statutes in other contexts, such as the Sherman Act in antitrust. See Richman, Defining Crime, supra note 49, at 325, 335 (first noting that the Court's approach to property fraud is somewhat anomalous compared to its treatment of other fraud statutes,

intervention, it needs to do more to fraud jurisprudence than simply redefine property. This Note offers an unexpected but highly effective solution to the Property Paradox: To most effectively further the federalism ideals articulated by the Court in *McNally*, the modern court must overrule *McNally* itself.

This Part illustrates two potential methods to fix fraud jurisprudence and endorses one as a novel and practical solution.[218] The first proposal attempts to salvage current property fraud doctrine by both strengthening the bright-line nature of the property-or-not test and making other elements of the fraud doctrine harder to satisfy. After exploring the complexities and potential unintended ramifications these changes may have, the Note does not endorse this approach. Instead, this Note proposes a new look at an old problem: reconsider *McNally*, and in so doing, address the core flaw of the modern doctrine—interpreting "to defraud" *or* "for obtaining money or property" as conjunctive and making "property" the key turning point of the legal analysis. This Note concludes that revisiting this interpretation—and reevaluating the fraud statutes with respect to the meaning of "fraud" rather than the meaning of "property"—will result in a clearer jurisprudence that draws a genuine boundary between federal and state criminal authority.

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then observing that "the Court has largely dropped the pretense of statutory interpretation" in the context of antitrust law and instead interprets it to establish "delegated criminal lawmaking authority"). This has been justified as a necessary component of modernizing federal law to comport with contemporary economic understandings of fair competition. See Daniel M. Tracer, Stare Decisis in Antitrust: Continuity, Economics, and the Common Law Statute, 12 DePaul Bus. & Com. L.J. 1, 35 (2013). Such an approach comports with the principle of statutory construction that presumes Congress generally legislates in a way that incorporates common law language. See Anita S. Krishnakumar, The Common Law as Statutory Backdrop, 136 Harv. L. Rev. 608, 611 (2022) (pointing out that the Court stated that "Congress intends to incorporate the well-settled meaning of the common-law terms it uses" (internal quotation marks omitted) (quoting Sekhar v. United States, 570 U.S. 729, 732 (2013))).

218. In some sense, neither of these proposals can be fairly said to be truly "novel." In 1999—before the *Cleveland* court had even established the property-or-not test with reference to state actors—Professor Ellen Podgor argued that defining the crime of fraud was inherently challenging and proposed several solutions. See Podgor, Criminal Fraud, supra note 57, at 760–68. Among those solutions were a proposal to limit the range of prosecutable objects of the fraud and to limit the definition of "fraud" to specific contexts—for example, obtaining and trafficking in passwords under the computer fraud statute. See id. While the proposals in this Note focus more specifically on refining the modern property-or-not test rather than fraud as a whole—and on doing so in a purely judicial manner without legislative intervention—it is worth noting that these proposals in prior fraud scholarship like Professor Podgor's could also address the same problems observed by this Note in a more holistic way.

A. *The Incremental Approach: A Harder Look at Both Property and Other Elements of Fraud*

In order to realize the ideal balance of state–federal power envisioned in *McNally* while still retaining the "property" core of modern fraud case law, the meaning of property in states' hands first needs to be completely watertight—put bluntly, there can be no such thing as "property" in a state's hands.[219] This approach to the property-or-not test would categorically reject even frauds involving money—like the taxes in *Pasquantino*—so long as a state is the purported victim. While this would require overruling *Pasquantino*, as well as much of the dicta in many post-*McNally* cases, it would present a workable bright-line distinction for lower courts to apply. But while this change alone would certainly send a much firmer message to the federal government—and make it harder for overzealous prosecutors to intervene in state affairs—it would not be enough to curb federal discretion entirely.

As discussed in Part II, prosecutors could end-run even a bright-line property rule if they can identify a nonstate victim.[220] The Supreme Court would need to not only revise the property-or-not test, but also wade into the other elements of property fraud. The Court has only briefly touched this area in the past. *Pasquantino* made a passing reference to two elements of property fraud: "that the defendant engage in a scheme or artifice to defraud," and that the "object of the fraud . . . be money or property in the victim's hands."[221] *Kelly* went only slightly further, holding that an "object of the fraud" cannot be merely an "incidental byproduct of the scheme."[222] In the absence of clear Supreme Court guidance, the lower courts have developed myriad formulations of the elements of property fraud, with disagreements ranging from whether a fraud must intend to "obtain" property or merely "deprive" a victim of property to requirements of "convergence" or a "causal nexus" between a misrepresentation and the victim's property.[223] To address this, the Court would need to review cases like *Palma*, in which the Sixth Circuit adopted a permissive construction of the "convergence" requirement between the misrepresentation made and the ultimate victim,[224] and instead impose rigid formulations of fraud that limits prosecutors' ability to develop new theories when states are involved. After enough incremental refinements to the entire fraud doctrine, this approach could finally provide maximal insulation between state and federal criminal affairs.

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219. See supra section II.B.2.

220. See supra section II.B.2.

221. Pasquantino v. United States, 544 U.S. 349, 355 (2005) (internal quotation marks and brackets omitted).

222. Kelly v. United States, 140 S. Ct. 1565, 1573 (2020) (internal quotations marks omitted).

223. See supra note 209 and accompanying text.

224. See supra section II.B.2.

But this approach is inadvisable for several reasons. First, this would prove challenging to reconcile with other jurisprudence beyond the mail and wire fraud statutes. In the bank fraud context,[225] for example, the Court rejected the requirement that a fraudster needs to specifically deceive the bank itself, holding that bank fraud requires only that a scheme intend to deprive the bank of some type of property and that *some* misrepresentation occur as part of the fraud.[226] The Court has often treated these "adjacent" fraud statutes as synonymous with mail and wire fraud jurisprudence;[227] thus, any doctrinal changes would also need to explicitly extend (or not extend) to other statutes as well, or else risk causing an unintended consequence (such as limiting prosecutors' ability to charge bank fraud).

Additionally, the Court would likely need to revisit its jurisprudence with respect to "Capital S" State actors. As discussed in Part II, even the current property doctrine can lead to outcomes that preclude the federal government from prosecuting frauds that implicate its own tax credits.[228] A "maximalist" property doctrine would only exacerbate these concerns. Assuming *McNally*'s reasoning was chiefly intended to protect the states—and not limit the federal government's ability to reach frauds against the federal government itself—the Court would need to delineate between state sovereigns, the federal government, and perhaps even other nations.

In sum, it is possible, but not advisable, to reform the existing property fraud jurisprudence into a doctrine that protects state sovereignty. If the rest of the fraud elements are anything like the property-or-not test, it would take years before the Court could wrangle the broader fraud doctrine into alignment with its views. Even then, the Court would still have to contend with a potentially overbroad doctrine that limits federal prosecutors' ability to pursue criminal charges in wholly appropriate scenarios. Because this approach would be so inherently challenging and would already result in significant doctrinal upheaval, this Note proposes that the Court would be better off scrapping *McNally*'s property-centric doctrine entirely.

B. *The Last Paradox: Abandoning Reliance on Property to Fix Property Fraud*

This section illustrates why construing "to defraud" to mean more than just "obtaining money or property" will actually promote, rather than hinder, the Court's view of federal–state balance. As discussed in Part I, *McNally* held that the 1909 amendment to the fraud statute "simply made

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225. See 18 U.S.C. § 1344 (2018).

226. See Loughrin v. United States, 573 U.S. 351, 363–64 (2014) (holding that a criminal must "acquire (or attempt to acquire) bank property 'by means of' the misrepresentation" (quoting 18 U.S.C. § 1344(2))).

227. See supra notes 27–28 and accompanying text.

228. This is precisely what occurred in the cases of *Griffin* and *Hoffman*. See supra notes 170–172 and accompanying text.

it unmistakable that the statute reached [schemes] . . . involving money or property."[229] The Court claimed that this interpretation was compulsory: The rule of lenity and a federalist disinclination toward interference in state and local affairs precluded broader interpretations.[230] But just because the statute had to be narrowed did not mean it must be narrowed with respect to *property*: *McNally* could have narrowed the federal common law meaning of fraud to protect states. This proposal would establish a bright-line definition of fraud that is even simpler than the property test in *McNally*: The federal meaning of "fraud" does not extend to cases that implicate a state's internal affairs or sovereign powers.

This conception of fraud would adequately address almost every instance of prosecutorial overreach that the Court's modern jurisprudence has reviewed. In cases like *McNally* or *Kelly* that involve state actors as defendants, for example,[231] such a rule would automatically foreclose all avenues to federal prosecution; any indictment that accuses state officials of misconduct would be dismissed. Prosecutions that allege a state victim, such as *Cleveland* or *Ciminelli*, would likewise never make it past the indictment stage. Further—and perhaps most importantly—this conception of fraud would also close the loopholes seen in *Gatto* and *Palma*. Unlike those cases (in which prosecutors carefully skirted the property doctrine by emphasizing facts that suggested property was in the hands of private victims rather than states) courts would again have standing doctrinal orders to dismiss any case that implicated the sovereign powers of a state as a victim *or* as the target of misinformation.

This doctrine would also be substantially easier for lower courts to apply than the current property-or-not test. Given the fact that the Court has never overruled *Carpenter*,[232] it seems clear that the Court's narrow conceptions of property are chiefly designed to protect states. Under a state-centric definition of fraud, rather than property, the Court could permit more expansive conceptions of property such as one rooted in the right to exclude.[233] This model of fraud simultaneously preserves state sovereignty while still allowing the fraud statutes to serve as a "stopgap device to deal on a temporary basis . . . with the new varieties of fraud that the ever-inventive American 'con artist' is sure to develop."[234] In private-party fraud settings, courts and prosecutors would no longer have to grapple with *Cleveland*'s victim analysis or *Pasquantino*'s "long recognized as property" test, thus ensuring that even the latest and most insidious

229. McNally v. United States, 483 U.S. 350, 359 (1987).

230. Id. at 360; see also supra section I.A.2.

231. See supra sections I.A.2, I.B.2.

232. Cf. Ciminelli v. United States, 143 S. Ct. 1121, 1127 (2023) (invoking *Carpenter* for the proposition that interests which have "long been recognized as property" would still satisfy the fraud statute (internal quotation marks omitted) (quoting Carpenter v. United States, 484 U.S. 19, 26 (1987))).

233. See supra note 105.

234. United States v. Maze, 414 U.S. 395, 406–07 (1974) (Burger, J., dissenting).

schemes *could* be addressed, whether by the states themselves or at the federal level.[235]

A bright-line rule of fraud, though analytically tempting in its simplicity, comes with many risks and trade-offs. Stare decisis, for example, heavily cautions against overturning precedent absent a "special justification."[236] This is especially true in matters of statutory construction.[237] Here, the Court would be going beyond overruling a single case—this approach could (if done maximally) erase fifty years of precedent. But at the same time, past Supreme Courts have been more willing to revisit old interpretations of so-called "common law" statutes,[238] and the Court has previously considered the fraud statutes to be common law statutes.[239] Moreover, the current Supreme Court has been particularly willing to overlook decades of stare decisis and judicial stability in the name of achieving its ideological goals.[240] In light of the property doctrine's inability to advance federalism interests, it would be comparatively straightforward for the Court to justify taking a new tack toward fraud jurisprudence.

A change of this magnitude would implicate considerations beyond stare decisis as well. For example, such drastic change could draw the ire of Congress and be overruled by statute—but that has not previously stopped the Court from rendering what it deems a sensible decision.[241] Similarly, a maximalist approach to state sovereignty, with no "safety valve" for federal intervention, might result in unchecked corruption at the state

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235. Cf. Cleveland v. United States, 531 U.S. 12, 21 (2000) (justifying its interpretation of the property fraud statute in part on the fact that the state was statutorily authorized to prosecute the types of deception at issue); see also supra notes 106–111 and accompanying text.

236. See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) (declining to overturn Court precedent that a particular antidiscrimination statute reached private conduct despite several Justices' view that the precedent was "decided incorrectly").

237. See id. For an argument that frequent departures from the principle of stare decisis tend to produce legal uncertainty and disrupt the development of the law, see Stephen G. Gilles, The Supreme Court and Legal Uncertainty, 60 DePaul L. Rev. 311, 315 (2011). For an argument that rigid adherence to stare decisis may itself ossify untenable exceptions to a broader regulatory scheme, see Tracer, supra note 217, at 35.

238. See Krishnakumar, supra note 217, at 656 (discussing the "significant judicial discretion" involved in judges' use of the common law to interpret statutes).

239. See supra note 40 and accompanying text.

240. See Mark A. Lemley, The Imperial Supreme Court, 136 Harv. L. Rev. Forum 97, 112–15 (2022), https://harvardlawreview.org/wp-content/uploads/2022/11/136-Harv.-L.-Rev.-F.-97.pdf [https://perma.cc/84MF-F75A] (observing instances in which the Court has expressly overruled longstanding precedent).

241. This is exactly what happened after *McNally*. See supra notes 81–83 and accompanying text. For a discussion of the interplay between congressional updating of the fraud statutes and pronouncements by the Court, see Blair A. Rotert, Note, Was "Varsity Blues" Actually a Crime? The Supreme Court's Crusade Against the Federal Mail and Wire Fraud Statutes, 64 B.C. L. Rev. 415, 434 (2023).

level.[242] And it is worth asking whether it truly would respect state sovereignty to strip them of federal prosecutorial resources in this area. But the Supreme Court has not acknowledged these concerns in its previous decisions.[243] These considerations—and countless others—ought to factor in when deciding whether or not to change the existing approach to fraud jurisprudence. But external considerations aside, this much is clear: If the Court's primary motivation in its property fraud jurisprudence is to truly achieve its ideal conception of federalism, then it needs to make a change.

CONCLUSION

This Note began by declaring that the meaning of federal fraud is at a crossroads. This is still true. Relative to the ends that it purportedly seeks to achieve, property fraud jurisprudence is demonstrably broken. But in a broader sense, it is the Supreme Court that is at a crossroads. The modern Court has been willing to overturn long-standing precedent,[244] apply novel methods of statutory interpretation,[245] and articulate entirely new doctrines[246] in the name of limiting federal power. If it so chooses, the Court may exercise nearly uncontestable power to rewrite criminal fraud jurisprudence in conformity with its definition of the proper federal–state balance.

The Court must now ask itself if the reform is truly worth the risk: If the Court decides to prioritize state sovereignty over federal anticorruption efforts—and perhaps all else—this Note has proposed novel and pragmatic ways to do so. If the Court concludes that the jurisprudential upheaval is not worth the marginal benefit of yet another federalism-first doctrine, it should give more grace to the lower courts and prosecutors

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242. See Torres-Spelliscy, supra note 22, at 1705–08 (arguing that further narrowing of anticorruption laws such as the fraud statutes will adversely affect political systems). For further discussion of the corrosive impact of local corruption on the political process, see Thomas M. DiBlagio, Federal Public Corruption Statutes Targeting State and Local Officials: Understanding the Core Legal Element and the Government's Burden of Proving a Corrupt Intent After *McDonnell*, 7 U. Denv. Crim. L. Rev. 47, 47–48 (2017).

243. See, e.g., supra note 235. For "tentative support" of states' abilities to self-regulate anticorruption, see Ben Covington, Comment, State Official Misconduct Statutes and Anticorruption Federalism After *Kelly v. United States*, 121 Colum. L. Rev. Forum 273, 276 (2021), https://www.columbialawreview.org/wp-content/uploads/2021/12/Covington-State_Official_Misconduct_Statutes_And_Anticorrupted_Federalism_After_Kelly_v_United_States-1.pdf [https://perma.cc/8UYX-T7NK].

244. See supra note 240 and accompanying text.

245. See William N. Eskridge, Jr. & Victoria F. Nourse, Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism, 96 N.Y.U. L. Rev. 1718, 1761–63 (2021) (commenting that the "dogmatic" New Textualist approach of the current Court has led to "cherry-picking" statutes to achieve certain interpretive outcomes).

246. See, e.g., Mila Sohoni, The Major Questions Quartet, 136 Harv. L. Rev. 262, 276 (2022) (arguing that the Court's recently developed "major questions" doctrine limits both executive and congressional power).

who deal with corruption and wrongdoing on a day-to-day basis. This Note does not pretend to know the answer to that question, but it does make one thing clear: Regardless of the Supreme Court's decision, adopting half-measures and incremental refinements to the meaning of "property" is the wrong approach. As the Supreme Court so frequently seems to advise the political branches of government—if it "desires to go further, it must speak more clearly than it has."[247]

247. McNally v. United States, 483 U.S. 350, 360 (1987).