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And Into the Maelstrom Steps the United States Supreme Court: Licenses Are Not Property for Purposes of the Mail Fraud Statute - Cleveland v. United States

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Notes

And Into the Maelstrom Steps the United States Supreme Court: Licenses Are Not "Property" for Purposes of the Mail Fraud Statute

Cleveland v. United States[1]

I. INTRODUCTION

Consider this scenario: An individual applies for a state hunting license and the individual decides to falsify some information in the license application. The individual places the application in the mailbox and receives a "fraudulently procured" hunting license in a few days. Unfortunately, because the individual has used the United States mails to carry out her fraudulent scheme, she is subject to federal prosecution under 18 U.S.C. Section 1341 ("the mail fraud statute"). One problem arises however: has the state been deprived of "property" for purposes of the mail fraud statute? This deceptively simple issue had caused disarray in the federal courts until the United States Supreme Court stepped in to resolve the conflict. This Note will begin by providing a summary of the facts surrounding *Cleveland v. United States.* Following this synopsis is a brief discussion of the mail fraud statute, the property dilemma arising under the mail fraud statute, and issues relating to the federalization of crime. This Note will conclude by exploring the federalism implications of the Supreme Court's holding in *Cleveland v. United States*, which held that, absent a clear statement from Congress, licenses are not property for purposes of the mail fraud statute.

II. FACTS AND HOLDING

The State of Louisiana grants certain businesses, after obtaining a license, the privilege of operating video poker machines.[2] In 1992, Fred Goodson and

1. 531 U.S. 12 (2000).

2. *Id.* at 15; *see* LA. REV. STAT. ANN. §§ 27:301-:324 (West 2001). A license is required for potential owners of video game poker machines. *Id.* § 27:306. Licenses must be renewed annually, *Cleveland*, 531 U.S. at 15 (citing LA. ADMIN. CODE tit. 42, § 2405(B)(3) (2000)), and are non-transferable. LA. REV. STAT. ANN. § 27:311(G) (West 2001). The issuance of a license is contingent upon a demonstration by the applicant/licensee that she has good character and financial integrity and is, therefore, suitable to receive the license. *Id.* § 27:310.

his family formed a limited partnership, Truck Stop Gaming, Ltd. ("TSG"), to take part in the video poker business at their truck stop in Slidell, Louisiana.[3] Goodson hired Carl W. Cleveland, a New Orleans attorney, to assist him in executing TSG's application for a video poker license from the State of Louisiana.[4] In the application, TSG was required to list all of its partners and have these partners submit personal financial statements.[5] In addition, TSG was required to certify that: (1) the enumerated partners were the lone beneficial owners of TSG, (2) that none of the enumerated partners held an interest in the partnership solely as an agent or nominee, and (3) none of the enumerated partners planned on transferring the interest in the future.[6]

TSG's application provided that Goodson's adult children, Alex and Maria Goodson ("Alex and Maria"), were the lone beneficial owners of the partnership.[7] The application also stated that Alex and Maria had received all of the start-up capital for TSG from Cleveland's law firm and Goodson and that Goodson was TSG's general manager.[8] The State of Louisiana approved the application in May 1992 and issued TSG a license to operate video poker machines.[9] Successful renewals of the license occurred in 1993, 1994, and 1995, and the subsequent renewal applications continued to list Alex and Maria as the lone beneficial owners.[10]

In 1996, the FBI found evidence implicating Goodson and Cleveland in a scheme to bribe state legislators to induce the legislators to vote in support of the video poker industry.[11] As a result, the federal government indicted Goodson and Cleveland on several counts of money laundering under 18 U.S.C. Section 1957[12] and racketeering and conspiracy under Section 1962.[13] The predicate acts forming the basis of the Racketeering and Corrupt Organizations ("RICO")

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3. *Cleveland*, 531 U.S. at 15.
4. *Id.* at 16.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* The statute prohibits "various activities designed to conceal or promote 'specified unlawful activity.'" *Id.* at 16 n.1 (citing 18 U.S.C. § 1956 (2000)). "[S]pecified unlawful activity" is defined as "any act or activity constituting an offense listed in section 1961(1) of this title." 18 U.S.C. § 1956(c)(7)(A) (2000).
13. *Cleveland*, 531 U.S. at 16. The Racketeering Influenced and Corrupt Organizations Act ("RICO") prohibits "participation and conspiracy to participate in a pattern of racketeering activity." *Id.* at 16 n.1 (citing 18 U.S.C. § 1962(c),(d) (2000)). The statute defines "racketeering activity" to include "any act which is indictable under . . . Section 1341." 18 U.S.C. § 1961(1) (2000).

charge included four counts of mail fraud under Section 1341.[14] The government alleged that Goodson and Cleveland had violated Section 1341 by fraudulently concealing in the TSG license application and subsequent renewals mailed to the state that they were the true owners of TSG.[15] The government claimed that the reason Goodson and Cleveland concealed their ownership interests in TSG was to prevent the state from discovering certain tax and financial problems, problems that would have substantially weakened their likelihood of obtaining a license.[16]

Prior to the commencement of the prosecution, Cleveland filed a motion to dismiss the mail fraud counts, arguing that the state had not been deprived of "property" as required under Section 1341.[17] The district court denied the motion, holding that "licenses constitute property even before they are issued."[18] Subsequently, a jury found Cleveland guilty on two counts of mail fraud and one count each of money laundering, racketeering, and conspiracy based upon the mail fraud and sentenced him to 121 months in a federal penitentiary.[19] Cleveland appealed this decision to the United States Court of Appeals for the Fifth Circuit, arguing that the State of Louisiana did not give up "property" when it issued the license and was, therefore, not deprived of "property" for purposes of the mail fraud statute.[20] The court of appeals disagreed and affirmed the conviction and sentence.[21] Noting a conflict among the circuits, the United States Supreme Court granted certiorari and reversed the decision of the court of appeals.[22] The Court found that Louisiana's licensing scheme constituted a regulatory, rather than a property, interest.[23] Further, the Court held that it would not interpret the mail fraud statute as granting the federal government the power

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14. *Cleveland*, 531 U.S. at 16. The mail fraud statute states, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting to do so, [uses the mails or causes them to be used], shall be fined under this title or imprisoned not more than five years, or both.

Cleveland, 531 U.S. at 16 n.1 (quoting 18 U.S.C. § 1341 (2000) (amended 2002) (alterations in original)).

15. *Id.* at 17.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 18. The Fifth Circuit held that "Louisiana video poker licenses constitute 'property' in the hands of the State." *Id.*

22. *Id.*

23. *Id.* at 21.

to oversee conduct "traditionally policed by the States," absent a clear statement by Congress.[24] For the above reasons, the Court held that Section 1341 "requires the object of the fraud to be 'property' in the victim's hands and that a Louisiana video poker license in the State's hands is not 'property' under [Section] 1341."[25]

III. LEGAL BACKGROUND

A. The Federal Mail Fraud Statute

Since its enactment, the federal mail fraud statute has developed into a powerful prosecutorial weapon.[26] Under the statute, federal prosecutors are granted jurisdiction when a person uses the mails to effectuate a scheme or artifice to defraud.[27] To obtain a conviction under 18 U.S.C. Section 1341, the government must prove that a defendant committed: (1) a scheme to defraud, (2) with the intent to defraud, and (3) used the United States mails or a private interstate commercial carrier in furtherance of the scheme to defraud.[28]

The modern mail fraud statute, of which Section 1341 is a part, was originally enacted in 1872 as part of the recodification of the postal laws.[29] The original statute made it a misdemeanor for "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 . . . by means of post-office establishment of the United States."[30] While the legislative history for the mail fraud statute is sparse,[31] a statement from a member of the House of Representatives noted that the statute was intended "to

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24. *Id.* at 27.

25. *Id.* at 26-27.

26. Anne S. Dudley & Daniel F. Schubert, *Mail and Wire Fraud*, 38 AM. CRIM. L. REV. 1025, 1025 (2001).

27. Jonathan Lemann, Comment, *Big Brother & the Gambling Company: The Federal Regulation of Louisiana's Gaming Industry Under the Mail Fraud Statute*, 44 LOY. L. REV. 785, 786 (1999).

28. Dudley & Schubert, *supra* note 26, at 1029.

29. Christopher Q. Cutler, *McNally Revisited: The "Misrepresentation Branch" of the Mail Fraud Statute a Decade Later*, 13 BYU J. PUB. L. 77, 78 (1998). The origin of the modern mail fraud statute was the Postal Act of 1868. The Postal Act made it "unlawful to use the mail to send letters or circulars concerning lotteries or similar enterprises." Dudley & Schubert, *supra* note 26, at 1049 n.3. The Postal Act was recodified in 1872, "creating legislation that would be the predecessor of the modern mail fraud statute." *Id.*

30. Lemann, *supra* note 27, at 787-88 (quoting Act of June 8, 1872, ch. 355, § 301, 17 Stat. 283, 323).

31. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 779-80 (1980).

prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country."[32] The courts applying the statute initially presumed that the purpose of the statute was to preserve the integrity of the postal service.[33] The statute survived two early constitutional challenges[34] and has been amended numerous times during its history.[35]

While the original purpose of the mail fraud statute was limited to the preservation of the integrity of the postal service by preventing frauds on the public through the use of such service, the statute has taken a course of "rapid expansion" and is now a means for the government to prosecute numerous types of criminal activity in the public and private sectors.[36] The statute covers "not only the full range of consumer frauds, stock frauds, land frauds, bank frauds, insurance frauds, and commodity frauds, but [also] . . . such areas as blackmail, counterfeiting, election fraud, and bribery."[37] Thus, the mail fraud statute has extended far beyond the mere preservation of postal integrity and now grants federal jurisdiction in cases involving a wide range of frauds.[38] Furthermore, slow congressional response in fighting crime has turned the mail fraud statute into a "'first line of defense' serving as a 'stop-gap device which would permit the prosecution of newly conceived frauds until such time that Congress enacted

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32. Cutler, *supra* note 29, at 79 (quoting McNally v. United States, 483 U.S. 350, 356 (1987) (quoting Remarks of John Franklin Farnsworth, CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870)) .

33. Dudley & Schubert, *supra* note 26, at 1026; *see* Durland v. United States, 161 U.S. 306, 314 (1896).

34. Michael C. Bennett, Note, *Borre v. United States: An Improper Interpretation of Property Rights*, 42 DEPAUL L. REV. 1499, 1502 (1993). One such attack occurred in the 1877 case Ex Parte *Jackson*, 96 U.S. 727 (1877). In *Jackson*, the defendants argued that a postal law precluding the mailing of advertisements for illegal lotteries was beyond the scope of Congress's regulatory powers. *Id.* at 728. The Court rejected this argument, noting that "the power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded." *Id.* at 732.

35. One recent amendment was in response to the Court's holding in *McNally v. United States*, 483 U.S. 350 (1987). The Court held that the statutory phrase "scheme to defraud" did not include the intangible right to "good government" or "honest services." *Id.* at 356. Congress quickly overturned *McNally* in 1988 through the enactment of Section 1346. Dudley & Schubert, *supra* note 26, at 1036. This congressional action "clarified that the mail and wire fraud statutes extended to any scheme or artifice to deprive another of the intangible right of honest services." *Id.*

36. Lemann, *supra* note 27, at 786.

37. Dudley & Schubert, *supra* note 26, at 1026-27 (quoting Rakoff, *supra* note 31, at 772).

38. Dudley & Schubert, *supra* note 26, at 1026.

particularized legislation to cope with new frauds.'"[39] The mail fraud statute, therefore, has been described as a federal prosecutor's "secret weapon."[40] One oft-quoted remark characterizes the mail fraud statute as a federal prosecutor's:

> Stradivarious, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love. We may flirt with RICO, show off 10b-5, and call the conspiracy law "darling," but we always come home to the virtues of 18 U.S.C. 1341, with its simplicity, adaptability, and comfortable familiarity. It understands us and, like many a foolish spouse, we like to think we understand it.[41]

B. The Property Dilemma Surrounding Licenses

Whether a license constitutes a governmental property interest is an issue that has created a maelstrom in the federal courts.[42] The basic problem lies in determining whether an individual who has fraudulently procured a license has received "property" for purposes of the mail fraud statute.[43] While the problem seems simple on its face, the various courts that have addressed the issue have produced clashing results and a dizzying array of rationales to support those results.[44]

A majority of courts that have addressed the issue have found that a state does not have a property interest in a license.[45] These courts espouse the theory that a license becomes property in the licensee's hand but is not property in the hands of a state.[46] The license, according to these courts, represents a state's regulatory, rather than a property, interest.[47] As one court has put it, "from the

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39. Lemann, *supra* note 27, at 791 (quoting Christopher G. Green & Christopher P. Hammon, *Mail and Wire Fraud*, 35 AM. CRIM. L. REV. 943, 944 (1998)).

40. Lemann, *supra* note 27, at 791.

41. Rakoff, *supra* note 31, at 771.

42. Donna M. Maus, Comment, *License Procurement and the Federal Mail Fraud Statute*, 58 U. CHI. L. REV. 1125, 1132 (1991).

43. Geraldine Szott Moohr, *Federal Criminal Fraud and the Development of Intangible Property Rights in Information*, 2000 U. ILL. L. REV. 683, 708.

44. *Id.* at 712.

45. *See, e.g.*,United States v. Shotts, 145 F.3d 1289, 1296 (11th Cir. 1998); United States v. Schwartz, 924 F.2d 410, 418 (2d Cir. 1991); United States v. Paccione, 949 F.2d 1183, 1194 (2d Cir. 1991); United States v. Granberry, 908 F.2d 278, 280 (8th Cir. 1990); Toulabi v. United States, 875 F.2d 122, 125 (7th Cir. 1989); United States v. Kato, 878 F.2d 267, 268-69 (9th Cir. 1989); United States v. Dadanian, 856 F.2d 1391, 1391 (9th Cir. 1988); United States v. Murphy, 836 F.2d 248, 254 (6th Cir. 1988).

46. *See supra* note 45.

47. *See supra* note 45.

government's perspective . . . the license is a promise not to interfere rather than a sliver of property."[48]

The Second Circuit subscribed to this "regulatory" theory in *United States v. Schwartz*.[49] In *Schwartz*, three defendants fraudulently procured arms export licenses and were convicted under the wire fraud statute.[50] After concluding that wire fraud violations are subject to the same analysis as mail fraud violations, the court held that the state's interest in an export license was a regulatory rather than a property interest.[51] Reversing the conviction, the court noted that "the government's power to regulate does not a fortiori endow it with a property interest in the license."[52] Moreover:

> The government's interest in issuing its license ancillary to its regulatory program is no different than its interest in propounding and enforcing its other regulations with broad based applications that do not include the issuance of licenses. Whether it chooses to use licenses or blanket rules, the government's purpose is to control the private use of private property. Thus, a regulatory license is nothing more than a formal embodiment of "the necessary government approval."[53]

In contrast, other courts have held that a state *does* have a property interest in its licenses and have produced various other rationales to support their decisions.[54] Some courts have reasoned that because a license is property in the hands of the licensee, the license is also property in the hands of the government.[55] Other courts have argued that a license, as a physical document, has a certain physical quality and, therefore, "the physical manifestation belongs to the state."[56] "The paper, ink, and even '23 pieces of tin' that authorize the

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48. Bennett, *supra* note 34, at 1529 (quoting *Toulabi*, 875 F.2d at 125).

49. 924 F.2d 410 (2d Cir. 1991).

50. Lemann, *supra* note 27, at 800 (citing *Schwartz*, 924 F.2d at 413).

51. Lemann, *supra* note 27, at 800 (citing *Schwartz*, 924 F.2d at 416-17).

52. Lemann, *supra* note 27, at 800 (quoting *Schwartz*, 924 F.2d at 417).

53. Lemann, *supra* note 27, at 801 (quoting *Schwarz*, 924 F.2d at 417).

54. *See, e.g.*, United States v. Bankston, 182 F.3d 296, 309 (5th Cir. 1999); United States v. Salvatore, 110 F.3d 1131, 1143 (5th Cir. 1997); United States v. Bucuvalas, 970 F.2d 937, 945 (1st Cir.), *cert. denied*, 507 U.S. 959 (1992); Borre v. United States, 940 F.2d 215, 222 (7th Cir. 1991); United States v. Martinez, 905 F.2d 709, 715 (3d Cir.), *cert. denied*, 498 U.S. 1027 (1990); United States v. Turoff, 701 F. Supp. 981, 991 (E.D.N.Y. 1988).

55. *See* Moohr, *supra* note 43, at 708-09; *see also Turoff*, 701 F. Supp. at 989-90; *Salvatore*, 110 F.3d at 1139; *Martinez*, 905 F.2d at 713.

56. *See* Moohr, *supra* note 43, at 710; *see also* Maus, *supra* note 42, at 1135-36. The Second Circuit labeled this theory as "patently absurd." United States v. Schwartz,

license holder to [engage in the particular activity] are tangible, physical objects that belong to the state."[57] Once an individual has lied to obtain the license, then she has defrauded the state of property.[58] Finally, some courts have rested their holdings upon a "right to control" theory.[59] These courts reason that the right to control expenditures is intangible property for purposes of Section 1341, as is the "right of 'exclusive control over the persons and type of persons with whom it decides to enter employment agreements and contracts.'"[60] Under this rationale, states are allowed to bring an action once they have been "deprived of potentially valuable economic information."[61]

The Fifth Circuit decision *United States v. Salvatore*[62] provides an illustration of one of these theories. In *Salvatore*, seventeen businessmen were indicted for their involvement in certain organizations that owned and operated video poker machines and were also alleged to be members of a nationwide criminal organization.[63] All seventeen men were charged with mail fraud for manipulating state licensing requirements and all but three pled guilty.[64] The three men who did not plead guilty were eventually convicted of federal mail fraud and they appealed their convictions to the Fifth Circuit.[65] The Fifth Circuit held that the licenses were indeed property in the hands of the state.[66] According to the court, property is traditionally defined as "something of value" and a "legal bundle of rights."[67] Licenses fall under this definition because they are something of value, in that the state expects to generate revenue from them.[68] The court also characterized the distinction between issued and unissued licenses as "esoteric" and rejected the theory that the state's interest in the license was merely regulatory.[69] The court concluded that "a video poker license does not merely signify government approval of an individual's right to take part in a

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924 F.2d 410, 417-18 (2d Cir. 1991). The Eighth Circuit, while recognizing the tangible quality of the paper, noted that "it is simply negligible—de minimis as a matter of law and insignificant as a matter of fact, apart from the legal entitlement it represents." United States v. Granberry, 908 F.2d 278, 280 (8th Cir. 1990).

57. Moohr, *supra* note 43, at 710.

58. Moohr, *supra* note 43, at 710.

59. Moohr, *supra* note 43, at 710.

60. Maus, *supra* note 42, at 1134 (quoting *Granberry*, 908 F.2d at 279-80).

61. Moohr, *supra* note 43, at 711.

62. 110 F.3d 1131 (5th Cir. 1997).

63. Lemann, *supra* note 27, at 802 (citing United States v. Salvatore, 110 F.3d 1131, 1135 (5th Cir. 1997)).

64. Lemann, *supra* note 27, at 803 (citing *Salvatore*, 110 F.3d at 1136).

65. Lemann, *supra* note 27, at 803 (citing *Salvatore*, 110 F.3d at 1136).

66. Lemann, *supra* note 27, at 803 (citing *Salvatore*, 110 F.3d at 1138).

67. Lemann, *supra* note 27, at 804 (citing *Salvatore*, 110 F.3d at 1139-40).

68. Lemann, *supra* note 27, at 804 (citing *Salvatore*, 110 F.3d at 1142).

69. Lemann, *supra* note 27, at 804 (citing *Salvatore*, 110 F.3d at 1140-41).

particular regulated industry; it also evinces the state's intent to participate in that industry."[70]

C. The Federalization of Crime

Under our federalist system, states generally have the primary responsibility of defining criminal conduct and enforcing criminal laws.[71] "States define criminal conduct and assign penalties deemed appropriate in light of the goals of criminal law that the state has accepted."[72] This role stems from the fact that most crime is localized, giving the state an immediate interest in defining criminal conduct and enforcing criminal statutes.[73] Practical considerations, such as the size and experience of local police departments and state investments in penal institutions and supporting agencies, strengthen the states' interest.[74]

While the early days of our country witnessed limited federal participation in the realm of criminal law, those days are quickly disappearing, as the federal government increases its participation in the criminal arena.[75] Federal legislation making localized conduct subject to federal criminal sanction has increased dramatically, "[most] notably in areas in which existing state law already criminalizes the same conduct."[76] One study found that "40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970."[77] This increase in congressional activity is generally considered to be a response to studies finding that a majority of Americans view crime as a significant

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70. Lemann, *supra* note 27, at 804-05 (quoting *Salvatore*, 110 F.3d at 1141) (internal quotation remarks omitted).

71. *See* Lopez v. United States, 514 U.S. 549, 561 n.3 (1995) ("Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'") (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)); Screws v. United States, 325 U.S. 91, 109 (1945) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.").

72. Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1132 (1997).

73. *Id.* at 1132-33.

74. *Id.* at 1133.

75. *Id.*

76. JAMES E. STRAZELLA, THE REPORT OF THE ABA TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, 1998 A.B.A. SEC. CRIM. JUST. 5; *see also* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1162 (1995).

77. ABA, *supra* note 76, at 7.

national problem[78] and, Congress has enacted numerous federal statutes to address these concerns.[79]

Myriad criticisms have been leveled at the increase in the federalization of crime.[80] Some have argued that increased federalization is damaging the federalist framework expressly created by the Constitution.[81] The argument is that too much power becomes concentrated in the federal government, and federal prosecutors are granted jurisdiction to enter into areas traditionally governed by the states.[82] Others argue that duplicative federal crimes injure state independence because federal prosecution creates an alternative source of authority,[83] and that the functional advantages of our decentralized federal system are damaged as a result.[84] These advantages include "a check on abuse of federal power, increased opportunities for citizens to participate in government, creation of diverse cultural and political environments, and providing laboratories for innovative programs."[85] Finally, many argue that the increase in federal crime is placing a substantial burden on federal courts in terms of time and resources expended.[86] Consequently, federal courts are forced to stray from their primary function, which is to interpret federal law of national importance.[87]

IV. INSTANT DECISION

In *Cleveland v. United States*,[88] the Supreme Court settled the debate that has divided the federal courts. The Court held that the State of Louisiana did not part with "property" when it issued a video poker license to Cleveland.[89] The Court, reiterating its statement in *McNally v. United States*,[90] declared that "[i]f Congress desires to go further, it must speak more clearly than it has."[91]

At the outset of its decision, the Court addressed the dispute plaguing the courts by noting that no genuine dispute was really present because the state's

78. Moohr, *supra* note 72, at 1128.
79. Moohr, *supra* note 72, at 1128.
80. *See* Moohr, *supra* note 72, at 1128.
81. ABA, *supra* note 76, at 24-26.
82. ABA, *supra* note 76, at 32-35.
83. Moohr, *supra* note 72, at 1128.
84. Moohr, *supra* note 72, at 1134.
85. Moohr, *supra* note 72, at 1135 n.31; *see also* Brickey, *supra* note 76, at 1173.
86. Moohr, *supra* note 72, at 1135-36; *see also* ABA *supra* note 76, at 35-39.
87. Moohr, *supra* note 72, at 1136.
88. 531 U.S. 12 (2000).
89. *Id.* at 20.
90. 483 U.S. 350 (1987).
91. *Cleveland*, 531 U.S. at 20.

interest in its video poker licenses was clearly a regulatory, rather than a property, interest.[92] The State of Louisiana's licensing scheme was a paradigmatic regulatory program.[93] The state "licenses, subject to certain conditions, engagement in pursuits that private actors may not undertake without official authorization."[94] The overall program, therefore, was similar to licensing schemes long classified by the Court as exercises of state police power.[95]

While conceding Louisiana's regulatory interest, the government provided two arguments as to why the state also had a property interest in its video poker licenses.[96] First, the government argued that "the State receives a substantial sum of money in exchange for each license and continues to receive payments from the licensee as long as the license remains in effect."[97] The Court acknowledged that the State of Louisiana did have a substantial economic interest in the video poker industry derived from the various licensing fees, but the Court questioned how this economic interest created "property" in the hands of the state.[98] The state did not receive the majority of its fees while the licenses remained in the control of the state, but only *after* the licenses were issued.[99] Extending this reasoning, the Court concluded that labeling this arrangement as a property right would grant the state property rights "in any license or permit requiring an upfront fee, including drivers' licenses, medical licenses, and fishing and hunting licenses."[100] Those licenses, according to the Court and as conceded by the government, are "purely regulatory."[101]

The government also argued that the State of Louisiana had a property interest in the video poker licenses because it had "significant control over the issuance, renewal, suspension, and revocation of licenses," and Cleveland, through the false application, frustrated this "right to control."[102] The Court responded to the government's "right to control" theory by noting that this "right to control" was beyond that which has been traditionally recognized as a property interest.[103] Further, "intangible rights of allocation, exclusion, and control amount to no more and no less than Louisiana's sovereign power to

92. *Id.*
93. *Id.* at 21.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 21-22, 23.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 22.
103. *Id.* at 23.

regulate."[104] According to the Court, the government notably ignored the fact that the State of Louisiana also has the right to impose criminal sanctions for violation of the licensing scheme.[105] This "right to control" was no more a property right than a "law licensing liquor sales in a State that levies a sales tax on liquor."[106] Regulations of this type are "paradigmatic exercises of the States' traditional police powers."[107]

After quickly discarding the government's arguments that the state's interest in a video poker license were analogous to a patent holder's interest in a patent not yet licensed, or a franchisor's right to select franchisees, the Court provided an additional basis for holding that the video poker license was not "property" in the hands of the state.[108] The Court stated that to accept the government's interpretation of the mail fraud statute "[would invite the Court] to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress."[109] Holding that the issuance of licenses constitutes a deprivation of property would arm federal prosecutors with the ability to prosecute a wide array of conduct historically regulated by the states.[110] "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes."[111] Further, insomuch as the word "property" is riddled with ambiguity, the rule of lenity mandated that the Court rule in favor of the defendant.[112]

The government's final argument was one of statutory interpretation.[113] The government argued that Section 1341, as amended in 1909, created two separate offenses: (1) "any scheme or artifice to defraud" and (2) "any scheme or artifice . . . for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[114] Because a video poker license was property in the hands of Cleveland, Cleveland had "obtained property" and committed the second offense under the mail fraud statute, regardless of whether the license was property in the hands of the state.[115] While conceding that the two phrases seem to appear in the disjunctive, and are therefore independent offenses, the Court rejected this reading of the statute by stating that "the second phrase

104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 23-24.
109. *Id.* at 24.
110. *Id.*
111. *Id.* at 25 (quoting Jones v. United States, 529 U.S. 848, 858 (2000)).
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*

simply modifies the first 'by ma[king] it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property.'"[116]

In addition, the Court noted that constructing the mail fraud statute as two separate offenses "would appear to arm federal prosecutors with power to police false statements in an enormous range of submissions to state and local authorities."[117] As the Court stated earlier, absent a clear statement from Congress, it would not construe the statute to provide federal oversight over a wide array of conduct traditionally policed by the states.[118]

V. COMMENT

Through the use of the clear statement canon, the Supreme Court, like it did in *McNally v. United States*, has curbed the expansionist direction of the mail fraud statute by holding that licenses are not property for purposes of the mail fraud statute. The expansion of the mail fraud statute has been the subject of numerous criticisms by both courts[119] and scholars.[120] The mail fraud statute is now being used by federal prosecutors to prosecute all frauds involving virtually any mailing or communication sent by the United States Post Office or private carrier, even in areas where the federal interest is questionable.[121] Problems of notice,[122] gap-filling,[123] and abuse of prosecutorial discretion have exacerbated the situation.[124] "[C]ritics have been largely unsuccessful in generating either

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116. *Id.* at 26 (quoting McNally v. United States, 483 U.S. 350, 359 (1987)).

117. *Id.*

118. *Id.* at 26-27.

119. *See, e.g.*, Emery v. Am. Gen. Fin., Inc., 71 F.3d 1343, 1346 (7th Cir. 1995).

120. *See, e.g.*, Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435 (1995); Gregory H. Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137 (1990).

121. Moohr, *supra* note 72, at 1160, 1168, 1181.

122. One argument is that the breadth of the mail fraud statute fails to provide citizens with adequate notice as to what conduct is unlawful. Todd E. Molz, Comment, *The Mail Fraud Statute: An Argument for Repeal by Implication*, 64 U. CHI. L. REV. 983, 984 (1997); *see also* Jason T. Elder, Comment, *Federal Mail Fraud Unleashed: Revisiting the Criminal Catch-All*, 77 OR. L. REV. 707, 730 (1998).

123. Molz notes that the breadth of the mail fraud statute allows "prosecutors, aided by courts, [to] use the statute to fill gaps in the criminal laws left by Congress, despite the Constitution's declaration that 'all legislative powers' therein granted are vested in the Congress." Molz, *supra* note 122, at 984; *see also* Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 10, Cleveland v. United States, 531 U.S. 12 (2000) (No. 99-804).

124. *See generally* Williams, *supra* note 120.

legislative amendment, lower court reinterpretation, or Department of Justice rules to control such a broad interpretation of the statute."[125]

Although the mail fraud statute has a history of broad interpretation, this expansion should not interfere with our federalist framework. As one commentator has noted, "[a] statute of this breadth, intruding so deeply on the integral functions of state and local governments, ought to set off all sorts of federalism alarm bells."[126] Judicial extension of federal jurisdiction over minor state offenses, such as fraudulent license applications, would cause intractable harm to our sensitive federalist infrastructure.[127] Subjecting the substantial number of licensing applications in a vast array of areas to federal prosecution "would allow prosecutors an unleashed power to monitor all of these state activities."[128]

Federal mail fraud prosecution for every fraudulent state licensing application is an improper intrusion into the state criminal arena because of the absence of any recognizable federal interest justifying this intrusion, except for the fictional notion of preserving the integrity of the postal system.[129] The states clearly have the stronger interest in regulating this type of criminal behavior. The Supreme Court has traditionally characterized licensing schemes as exercises of state police powers.[130] The federal government's lack of interest is nicely summed up by Judge Easterbrook in *Toulabi v. United States*, a case involving a mail fraud licensing prosecution, in which he stated "[w]hy the United States should be so interested in enforcing the laws of the City of Chicago is something of a mystery.... State and local governments commonly prosecute violations of their own laws."[131]

While the Court in *Cleveland* partially rested its holding on the federalism principle by noting that characterizing licenses as property would allow federal prosecutors to enter areas historically regulated by the states, it did expound an important qualification: Congress, if it so desires, may enact legislation subjecting state licensing fraud to federal prosecution.[132] Congress, however, should be wary of following the same course of action it took after the *McNally* decision.[133] Recent decisions of the Supreme Court suggest that it is "laying the

125. Williams, *supra* note 120, at 138.

126. George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-Lopez Analysis*, 82 CORNELL L. REV. 225, 248 (1997).

127. Criminal Defense Lawyers Brief, *supra* note 123, at 6; *see supra* notes 71-87 & accompanying text.

128. Criminal Defense Lawyers Brief, *supra* note 123, at 10.

129. *See* Moohr, *supra* note 72, at 1160.

130. Cleveland v. United States, 531 U.S. 12, 22 (2000).

131. Toulabi v. United States, 875 F.2d 122, 123 (7th Cir. 1989).

132. *Cleveland*, 531 U.S. at 24.

133. *See supra* note 35.

groundwork for a broader reexamination of national power."[134] These decisions emphasize the "desire of several justices to emphasize dual federalism as a general guiding concept."[135] The Court has recognized the existence of an "inviolable zone of state sovereignty," which may place "external limits" on Congress's exercise of enumerated powers.[136] Furthermore, "internal limits" on Congressional power may present an additional avenue for invalidating a mail fraud statute that allows federal prosecution of state licensing fraud.[137] As one commentator has noted, "assertions of authority under any grant of power should now be open to question in order to preserve the principle of a limited national government which Chief Justice Rehnquist identified as fundamental."[138] Consequently, Congressional amendment of the mail fraud statute to include federal prosecution of fraudulent state licensing applications may force the Supreme Court to "bite the constitutional bullet," rather than once again narrowing the statute through the clear statement canon, and seriously consider the validity of the mail fraud statute.[139]

VI. CONCLUSION

The Court's decision in *Cleveland* is a victory for states' rights, even though the victory is indeed weakened by the Court's utilization of the clear statement canon. The license conflict, however, was not the appropriate scenario for the Court to lay a new chapter in its federalism jurisprudence. The Court took the responsible course by avoiding the potential constitutional problems posed by characterizing licenses as property for purposes of the mail fraud statute through the use of the clear statement canon. Congressional amendment in response to the *Cleveland* decision, however, may end up resulting in a Supreme Court decision of monumental import.

HADI S. AL-SHATHIR

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134. Brown, *supra* note 126, at 227; *see also* Printz v. United States, 521 U.S. 898 (1997); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992).

135. Brown, *supra* note 126, at 268.

136. Brown, *supra* note 126, at 259-77. Professor Brown defines "external limits" as "constraints upon congressional action that have their source in some provision or principle of the constitution other than the power Congress seeks to exercise." *Id.* at 226 n.17.

137. Brown, *supra* note 126, at 249-59. Professor Brown defines "internal limits" as congressional utilization of "a specific enumerated power to reach a subject matter beyond the scope of that power." *Id.* at 226 n.17.

138. Brown, *supra* note 126, at 253-54.

139. *See* Brown, *supra* note 126, at 296.