

10-5-2004

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Recommended Citation

George D. Brown. "Carte Blanche: Federal Prosecution of State and Local Officials After Sabri." *Catholic University Law Review* 2, (2004): 403-444.

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**“Carte Blanche: Federal Prosecution of State and
Local Officials after *Sabri*”**

**George D. Brown
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**Carte Blanche: Federal Prosecution of State and
Local Officials after *Sabri***

George D. Brown*

Introduction

In July of 2004, the State of Maryland was rocked by a political controversy that reached the highest levels of the federal Department of Justice. In a front page story, the Baltimore Sun revealed that the United States Attorney for Maryland, Thomas DiBiaggio, had told his staff that he wanted three “front page” white collar or public corruption indictments by November 6.¹ Since that date is election day, critics were quick to change him with politicizing the investigation and prosecution of public corruption cases.² The Washington Post thundered that he had “given the appearance of an excessive, irresponsible prosecutorial zeal to bring down prominent officials regardless of the evidence.”³ In an extraordinary rebuke, the Department of Justice made public a letter from the Deputy Attorney General directing DiBiaggio “until further notice, to submit to [the Deputy Attorney General] for review any proposed indictment in a public corruption matter.”⁴

One of the surprising aspects of the controversy is that anyone was terribly surprised. The local United States Attorney is, potentially, a major political actor in every

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¹ Doug Donovan, *DiBiaggio Voices Frustration Over Pace of Top Cases*, BALTIMORE SUN, July 15, 2004, at 1A.

² *See id.*

³ *A Vote of No Confidence*, WASHINGTON POST, July 20, 2004, at A16.

⁴ *Full text of letter to U.S. Attorney Thomas M. DiBiaggio*, BALTIMORE SUN, July 16, 2004.

state.⁵ The federal government prosecutes state and local officials all the time,⁶ sometimes in politically charged contexts.⁷ Totally apart from possible political dimensions, these prosecutions raise serious questions of constitutional federalism. In *Sabri v. United States*⁸ the Supreme Court managed to avoid almost every one of them, while upholding federal prosecution of a routine local bribery scheme. In the process, it issued a unanimous decision that seems both to confirm the national role in policing state and local officials and to cast doubt on the depth of the Court's commitment to any "New Federalism."⁹ One explanation for this apparent paradox is that the Court's commitment to the precept is far from firm. An alternative perspective emphasizes the fact that the defendant was convicted under a statute passed pursuant to the Spending Power¹⁰—the federal program bribery statute.¹¹ The Court has suggested that Spending Power Statutes are exempt from whatever strictures the New Federalism imposes.¹²

In this Article, I offer a third perspective. *Sabri* confirms the high priority that the Court places on the national government's authority to fight corruption at any level in order to protect the democratic process and public confidence in it. The key Supreme

⁵ See Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 175-76 (1994) (referring to "the power federal prosecutors exercise over the political affairs of states and cities...").

⁶ See e.g., PUBLIC INTEGRITY SECTION, UNITED STATES DEPARTMENT OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2002 37, table 2 (2002). According to this table, 731 state and local officials were classified as indicted, convicted, or awaiting trial. See George D. Brown, *New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption*, 60 WASH. & LEE L. REV. 419, 421 (2003) [hereinafter Brown, *Unanswered Question*] (summarizing 20-year totals for these categories).

⁷ NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 147 (3d ed. 2000) (noting "potential for politically motivated prosecutions.") See also Michael Powell, *Scandals Plague Governor*, BOSTON GLOBE, Aug. 8, 2004, at A5. The Democratic governor of New Jersey and his aides have charged that corruption prosecutions by a Republican U.S. Attorney are aimed at furthering his own political career.

⁸ *Sabri v. United States*, 124 S.Ct. 1941 (2004).

⁹ See generally Brown, *Unanswered Question*, *supra* note 6 (discussing interaction between federal corruption prosecutions and "New Federalism" precepts).

¹⁰ U.S. CONST. art. I, §8, cl. 1.

¹¹ 18 U.S.C. § 666 (2000).

¹² See *New York v. United States*, 505 U.S. 144 (1992).

Court decision for understanding *Sabri* is one issued the same term: *McConnell v. FEC*—the “Campaign Finance Reform” decision.¹³ There, the Court held that the governmental interest in combating corruption outweighs the powerful First Amendment interests at play in the political process. In *Sabri*, the Court could be seen as holding that that same governmental interest outweighs powerful federalism arguments in favor of letting state and local governments prosecute their own officials. In a sense, the 2003 Term was the Anti-Corruption Term. The Court showed sensitivity to the national mood of concern over abuse of power, and distrust of politicians and their susceptibility to corrupting influences.

True, the contexts of the two cases are different. So are their contents. *McConnell* dealt at length with constitutional arguments against an array of restrictions on campaign-related activity and its financing.¹⁴ There were definite splits among the justices.¹⁶ *Sabri* is the product of a unanimous Court.¹⁷ The analysis barely touches on the constitutional problems raised by the particular statutory issue presented. Indeed, the reasoning seems almost simplistic, as developed below. What unites the two cases, however, is a concern for integrity both in the political process itself and the governmental process that follows it.

Sabri looks like a run-of-the-mill bribery prosecution. The defendant, a developer, had allegedly offered kickbacks and other inducements to a city councilor to facilitate a proposed project. However, like many other prosecutions of state and local officials, *Sabri* was brought by federal officials in a federal court. The statute which

¹³ *McConnell v. Fed. Election Comm’n*, 124 S.Ct. 619 (2003).

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¹⁵ See e.g., *id.* at 635-76 (discussing issue advocacy).

¹⁶ E.g., *id.* at 720-29 (Scalia, J., dissenting)

¹⁷ *Sabri*, 124 S.Ct. 1941.

authorized this criminal proceeding is 18 U.S.C. § 666: the federal program bribery statute—sometimes referred to as the “Stealth Statute,” or the “Beast in the Federal Criminal Arsenal.”¹⁸ It applies to any entity, including governments, that receives more than \$10,000 a year in federal benefits. Within such an entity, numerous acts are made federal crimes. This case involved the portion of the statute which imposes federal criminal liability on anyone who

corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government or agency involving anything of value of \$5,000 or more.¹⁹

Under this language, it makes no difference whether any federal funds are involved in or connected to the proscribed transaction. Once an entity is covered, the specified corrupt acts within it are federal crimes. In *Sabri*, the Supreme Court considered, and rejected, arguments that some nexus to federal funds ought to be required. This issue had divided the lower courts.²⁰ For the Court, however, the crucial determinant was the national government’s ability to protect funds it had dispersed under the Spending Power by insuring the integrity of the recipient of those funds.²¹

The broad sweep of § 666 did not bother the Court at all. Indeed, this breadth turns § 666 into something of a national anti-corruption statute. Such a statute has long

¹⁸ See George D. Brown, *Stealth Statute – Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247 (1998) [hereinafter Brown, *Stealth Statute*]; Daniel N. Rosenstein, Note, *The Beast in the Federal Criminal Arsenal*, 39 CATH. U. L. REV. 673 (1990).

¹⁹ 18 U.S.C. §666(2) (2000).

²⁰ *Sabri*, 124 S.Ct. at 1945.

²¹ *Id.* at 1946.

been the holy grail of federal prosecutors.²² Perhaps they already have it. Still, if *Sabri* has, in fact, irrevocably tilted the debate on federal anti-corruption efforts in a nationalist direction, there may be more plausible and direct methods to reach this result, other than the rationale of somehow protecting federal funds. If fighting corruption at all levels of government is part of the national government's role in the American federal system, why not come out and say so?

Section I of the article deals with the underlying debate about the desirability of national prosecution of corrupt state and local officials. In particular, the analysis considers whether one can reconcile the widespread phenomenon of such prosecutions with the tenets of the New Federalism, while recognizing that there may be alternative justifications for a broad national role. Section II moves from the policy debate to its constitutional underpinnings. This section first considers whether the Constitution itself speaks authoritatively to the question of corruption and, possibly, contains provisions that direct government not to be corrupt. This section also considers the more modest question whether the grants of power to the national government can be read as permitting it to attack corruption at sub-national levels. With this background, Section III of the Article examines and critiques the *Sabri* decision at some length. In particular, the contention is made that the Court glossed over serious questions of constitutional law and statutory construction to arrive, seemingly, at the conclusion that protection of federal funds trumps any other consideration. Nonetheless, it is helpful to view the decision in tandem with that of the earlier released complex set of opinions in *McConnell v. FEC*.²³ *McConnell* establishes that the prevention of corruption or the appearance thereof goes a

²² See ABRAMS & BEALE, *supra* note 7, at 268-71 (discussing issues surrounding enactment of “a new federal statute aimed explicitly at state and local political corruption”).

²³ 124 S.Ct. 619 (2003).

long way toward supplying whatever governmental interest is necessary to justify restrictions on campaign activity, even though such activity has a strong claim to First Amendment protection. In other words, preventing corruption is seen by the Court as an essential function of the national government. Such a view of national authority would justify a general federal anti-corruption statute. It may be that § 666 in its present form represents such a statute. Section IV of the Article, nonetheless, examines alternative rationales for upholding such a general statute, including an alternative rationale under the Spending Power itself. The conclusion of the Article is that *Sabri* represents a missed opportunity to make a contribution to an important debate about the nature of the American federal system. Nonetheless, the decision stands. Perhaps, then, it answers many of the questions previously raised about the national role in fighting corruption at all levels. Whether or not § 666 is the long-sought general statute, it certainly comes close. Thus, *McConnell* and *Sabri* can be seen as two important steps down the road toward more vigorous anti-corruption efforts.

I. Prosecuting Corruption and the New Federalism Debate

A. Defining Corruption

A first step is to define corruption. Professor Susan Rose-Ackerman focuses on the unwarranted intrusion of the private marketplace into the “democratic political system that grants a formal equality to each citizen’s vote. . . .”²⁴ In discussing “corruption as an economic problem,”²⁵ she states the problem as follows:

²⁴ SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 1 (1978) [hereinafter ROSE-ACKERMAN, POLITICAL ECONOMY].

²⁵ SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 7 (1999) [hereinafter ROSE-ACKERMAN, CAUSES, CONSEQUENCES]. Thus, in describing the chapter on “The Economic Impact of Corruption,” she states that “this chapter isolates the most important situations where widespread corruption can determine who obtains the benefits and bears the costs of government action.” *Id.* at 9.

Payments are corrupt if they are illegally made to public agents with the goal of obtaining a benefit or avoiding a cost. Corruption is a symptom that something has gone wrong in the management of the state. Institutions designed to govern the interrelationships between the citizen and the state are used instead for personal enrichment and the provision of benefits to the corrupt. The price mechanism, so often a source of economic efficiency and a contributor to growth, can, in the form of bribery, undermine the legitimacy and effectiveness of government.²⁶

However, it is possible to put forward broader definitions of corruption that focus on the officeholder, not the relationship between that individual and some third party attempting to affect/alter government decisions. One such definition includes “nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit) and misappropriation (the illegal appropriation of public resources for private-regarding uses).”²⁷ Here the emphasis is on improper rent seeking.

B. Corruption at the National Level

Whatever the definition of corruption, one can postulate several reasons why the national government might want to proscribe such behavior in its own ranks. The basic argument can be seen in the President’s oath to “preserve, protect and defend the Constitution of the United States.”²⁸ A democratic government has the inherent power, indeed the duty, to preserve the democratic system and the line it establishes between public and private “markets” for allocating goods and services. Closely related to this argument is the contention that preventing corruption is essential to preserving public confidence and participation in the democratic process.²⁹ One finds this contention in

²⁶ *Id.* at 9.

²⁷ ROSE-ACKERMAN, *POLITICAL ECONOMY*, *supra* note 23, at 7. n10 (quoting J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POLITICAL SCI. REV. 417 (1967), reprinted in ARNOLD J. HEIDENHEIMER, *POLITICAL CORRUPTION: READINGS IN COMPARATIVE ANALYSIS*, 567 (1970)).

²⁸ U.S. CONST. art I., § 1.

²⁹ *E.g.*, Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367 (1989).

numerous Supreme Court cases, primarily in the area of Campaign Finance Reform, where the anti-corruption imperative has been dominant.³⁰ The contention has also played a key role in upholding conflict of interest legislation.³¹ In each context, the concept of the mere appearance of corruption or impropriety plays a large role in attempting to assess the impact of behavior on public attitudes towards the system as a whole.

Arguments based on improper incursion of the private market mechanism into the public sector include considerations of efficiency. As Professor Ackerman puts it, “corruption can create inefficiencies and inequities and is, at best, inferior to legally established payment schemes. Reforms can reduce the incentives for bribery and increase the risks of corruption. The goal is not the elimination of corruption, but an improvement in the overall efficiency, fairness, and legitimacy of the state.”³²

Obviously, the national government has a strong concern with the efficiency of its own operations. The view of corruption as improper rent seeking suggests additional considerations that the national government might take into account in policing corruption in its own ranks. Like any employer, government can determine, and limit the compensation of its employees. Beyond compensation, the government may wish to instill among its employees an imperative of honest public services. Professor Vaughn

³⁰ *E.g.*, *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390-91 (2000) (“The cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governments.”). Political scientists have disputed this contention. *See* Kelli Lammie and Nathaniel Persily, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. (forthcoming Dec. 2004). *See also* E-mail from Professor David Primo (Sept. 3, 2003) (on file with the author) (“In statistical work I have done, there is virtually zero evidence that campaign finance laws or campaign spending have an influence on confidence in government.”).

³¹ *See* *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (“[A] democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.”).

³² ROSE-ACKERMAN, CAUSES, CONSEQUENCES, *supra* note 24, at 4.

advocated a “public service” vision of public employment—“a vision containing a number of elements, but advocating the political neutrality of public employees and a role morality based on self-restraint as an ethical principle.”³³ On a more basic level, such corrupt actions as embezzlement or theft may simply constitute crimes that the government is entitled to prosecute in any context, regardless of the happenstance of its status as victim.

C. Sub-national Corruption

However, when assessing the national government’s interests in preventing corruption at the state and local levels, many of these justifications largely disappear. What concern is it to Washington if Smallville is inefficient, lax on ethical standards, and even allows employees to supplement their salaries through liberal use of municipal property and funds? As long as no federal funds are involved, it is hard to see any damage to the federal government from this behavior, or any federal interest in preventing it. Several answers suggest themselves that might demonstrate a federal interest. The first is that the conduct of all government officials is something the public views in unitary terms, regardless of the level at which it occurs. Thus corruption at any level can undermine confidence in the system as a whole.³⁴

Prosecuting state and local government is thus only another example of the fundamental national role of acting to preserve the democratic system. The argument has an intuitive appeal, but seems short on empirical justification, although it is true that in other societies public perceptions of corruption have undermined confidence in basic

³³ Robert G. Vaughn, *Ethics in Government and the Vision of Public Service*, 58 GEO. WASH. L. REV. 417, 418 (1990).

³⁴ See Kurland, *supra* note 28, at 377. Professor Kurland states that “the public is entitled to honest government at all levels. The faith that the citizenry places in all levels of government is the foundation of the republic. Thus, anything that erodes that foundation is of substantial federal interest.”

governmental institutions.³⁵ Nonetheless, the anti-corruption imperative present in both *McConnell* and *Sabri* may reflect the Court's sense of a need for a response to a widespread public perception that "they are all crooks." Other national interests can be postulated to justify corruption prosecutions of state and local officials. It may be that interstate externalities are present. Corruption in, say, industrial permitting in State A may harm the rigor and integrity of the permitting process in State B. This seems an example of the familiar race to the bottom argument as a justification for national intervention.³⁶ One might view the role of the federal government as ensuring a fair balance in the competitive environment among the states generally. Still, most state and local corruption seems to lack any clear interstate dimension. Of course, other additional federal interests may be present depending on the context. For example, local police corruption can threaten joint federal-state law enforcement in such areas as drug offenses and anti-terrorism efforts.³⁷ Widespread economic failure of local governments might have national repercussions. Alternatively, acts of corruption such as bribery may again be viewed as simply crimes, as in the context of transgressions by federal level officials. This is true, but does not demonstrate any federal interest in these crimes beyond the general federal interest in enacting a broad range of criminal statutes; a practice that has come under considerable attack, given our system's supposed assumptions about the primacy of the states in defining the criminal law.³⁸

³⁵ See e.g., Juan Forero, *Latin America Graft and Poverty Trying Patience with Democracy*, N.Y. TIMES, June 24, 2004, at A1.

³⁶ For a brief summary of the "race to the bottom argument," see GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 219-20 (4th ed. 2001).

³⁷ See e.g., Brown, *Stealth Statute*, supra note 17, at 260.

³⁸ See George D. Brown, *Constitutionalizing the Federal Criminal Law Debate: Morrison, Jones, and the ABA*, 2001 U. ILL. L. REV. 983 (2001) [hereinafter Brown, *Constitutionalizing*]; AM. BAR ASS'N, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW (1998); see

Bribery, and similar attempts at distorting outcomes reached through political processes may present a special justification for federal intervention. If corruption leads to inequality in the provision of public goods and services, a national role somewhat similar to the protection of civil rights may be justified.³⁹ At some level, extreme state and local corruption might lead to a breakdown in particular governmental units. Perhaps the Guarantee Clause⁴⁰ justifies federal intervention in such extreme cases, but that seems different from the run-of-the mill—if sometimes glamorous—federal prosecutions of state and local officials for a wide range of misconduct. In sum, there are plausible arguments for the current phenomenon of extensive federal prosecution of state and local officials for political corruption. However, these arguments are hardly overwhelming. Federal interests can be postulated, but they are far from self-evident. More to the point, arguments in favor of the federal prosecutions run directly counter to the notions of state autonomy, sovereignty and dignity that the current Court has often articulated, and which have come to be referred to as its “New Federalism.”⁴¹

D. (New) Federalism Concerns

Much has been written about the clash between federalism values and the large scale of anti-corruption prosecutions under discussion here.⁴² The criticism of the federal role in prosecuting state and local officials predates many of the Court’s recent New Federalism decisions. Writing in 1994, Professor Moohr summed up much of that

generally ABRAMS & BEALE, *supra* note 7, at 64-72 (outlining the debate over the proper scope of federal criminal law).

³⁹ See Brown, *Unanswered Question*, *supra* note 6, at 489-91 (discussing civil rights rationale).

⁴⁰ U.S. CONST. art IV, § 4.

⁴¹ On the “new federalism,” see generally Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431 (2002).

⁴² See e.g., Gregory Howard Williams, *Good Government By Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137 (1990).

critique of the federal prosecutorial role, contending that the impairment of state and local decision making

is a result of the phenomenon that federal prosecutions for political corruption make state and local officials more accountable to an extrinsic entity, the federal government, than to those who voted for them. An interventionists federal presence encourages citizens to abdicate their responsibility for self-government at the state and local levels. The ultimate result is a diminished demand on state and local legislative and executive branches to control political corruption. The power federal prosecutors exercise over the political affairs of states and cities is particularly troublesome in the area of criminal legislation, in which states traditionally have the ‘principal responsibility for defining and prosecuting crimes.’⁴³

The Supreme Court’s emphasis on federalism in cases such as *United States v. Lopez*⁴⁴ and its recent Eleventh Amendment decisions⁴⁵ seems to intensify that critique. The essence of the New Federalism is two-fold: an emphasis on the Constitution’s enumeration of powers as limiting the powers of the national government; and, the concept of states as quasi-sovereign, largely autonomous entities owed great respect by the co-equal national government. For that government to usurp the quintessentially sovereign task of another government entity’s controlling its own officials seems totally at variance with what the Court has been saying. It is true that no Supreme Court case has ever discussed at length the proper federal role in prosecuting state and local corruption. Justice Thomas questioned it in a dissent,⁴⁶ and a brief reference in *Fischer v. United States*⁴⁷ invokes the federal-state balance in prosecuting bribery.⁴⁸ But even without explicit guidance, the logic of federalism, old and new, seems to cut sharply against the practice of widespread prosecution of sub-national officials.

⁴³ Moohr, *supra* note 5, at 175-76.

⁴⁴ *United States v. Lopez*, 514 U.S. 549 (1995).

⁴⁵ *E.g.*, *Semiole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

⁴⁶ *Evans v. United States*, 504 U.S. 255, 278 (1992) (Thomas, J., dissenting).

⁴⁷ *Fischer v. United States*, 529 U.S. 667 (2000).

⁴⁸ *See id.* at 681.

E. Beyond Traditional Federalism

In a recent paper on “Corruption and Federalism,”⁴⁹ Prof. Roderick M. Hills, Jr. has made a significant contribution that takes the debate beyond traditional federalism considerations. He offers a “cautiously pessimistic answer”⁵⁰ to the question of whether federal prosecutions are likely to improve sub-national units of government. His overall contention is that “these prosecutions could impose on non-federal governments federal conflict-of-interest rules that are fundamentally inconsistent with the style of democracy that flourishes at the non-federal level.”⁵¹

Professor Hills first characterizes the democratic values followed at the federal level as “bureaucratic populism.”⁵² The model is that of a central legislature laying down values and policies which are then implemented by professional bureaucrats whose principal fidelity is to those values. Thus, those officials must be “insulated from private interests that might divert their judgment from national values,”⁵³ and reigned in by such techniques as a civil service system and extensive conflict of interest rules. In contrast to the bureaucratic populism of the national government, Professor Hills paints the following portrait of the “participatory populism” that predominates at the sub-national level.

Participatory populism rejects [the] separation of public and private spheres, instead mixing professional and lay decision-making. The elected legislators are often, indeed usually, part-time, under-paid officers with substantial private interests in the community. The administrative officers who carry out legislative policy are also usually lay people who serve part-time on supervisory bodies like planning commissions and school boards. They, too, have full-time private interests. This whole structure of lay-decision making is pervasively subjected to neighborhood, municipal, and state-wide plebiscites, allowing private citizens to sit as a kind of a super-legislature. In short, the entire system of participatory

⁴⁹ Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?* (manuscript, on file with author) [hereinafter Hills, *Corruption*].

⁵⁰ *Id.* at 1.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 2.

populism is designed to maximize private access to public-decision making, promiscuously mingling public and private interests in the process.⁵⁴

Professor Hills argues that the federal corruption prosecutions run the risk of imposing one level's set of values on the other without full appreciation of the costs. He discusses at length the application of the "honest services" theory under the mail fraud statute in circumstances where the federal conflict-of-interest rules might better be put aside to respect the norms that had already been developed under state law.⁵⁵ Clearly, Hills' piece is an important contribution to the debate. He takes that debate beyond formal considerations of New Federalism vs. a *Garcia*-based⁵⁶ view of the system to examine the real world impact. He also shifts focus away from the phenomenon of enforcement to the content of the underlying norms. One can, of course, take issue with aspects of his piece. For example, federal prosecution for hardcore forms of corruption such as bribery and extortion may not represent imposition of differing norms. It is also possible that the overall division between the two sets of norms is not as clear as he would have it, given the ongoing efforts at professionalization of state and local governments, and the fact that they may use federal ethics precepts as models for their own development of rules governing officials.⁵⁷ Nonetheless, "Corruption and Federalism" interposes yet one more objection to the arguments in favor of automatic acceptance of the national role in prosecuting state and local corruption.

Still, like the search for a federal interest, Hills' argument is not directly based on the Constitution. The New Federalism arguments against the prosecutions are more clearly constitutionally based, but they do not rise to the level of constitutional commands as

⁵⁴ *Id.*

⁵⁵ *Id.* at 38.

⁵⁶ *Garcia v. San Antonio Metro. Transp. Auth.*, 488 U.S. 889 (1988).

⁵⁷ See generally William G. Buss Jr., *The Massachusetts Conflicts-Of-Interest Statute: An Analysis*, 45 B.U. L. REV. 299, 302-04 (1965) (noting use by Massachusetts of federal law as "model" for state legislation).

prohibitions. Things would be easy if, for example, the Constitution contained language to the effect that “state and local governments shall not be corrupt. Congress shall have the power to enforce this prohibition through appropriate legislation.” The document contains no such nationalistic language; nor does it contain a federalistic prohibition on national anti-corruption legislation. Instead, examination of the text yields uncertainty as to the constitutional status of federal anti-corruption prosecutions. That is why background understandings and policy arguments loom large in the examination of those prosecutions. Still, the text is not entirely silent. Indeed, it is the ultimate source of the background understandings and policy arguments that are invoked to determine the ultimate validity of the widespread federal policing of state and local governments.

II. Corruption and the Constitution

A. The Constitution as a Direct Prohibition

A major recent contribution to the question of the Constitution’s bearing on the federal prosecutions is an article by Professor Peter Henning.⁵⁸ His thesis is two-fold. Henning’s first contention is that “the Constitution reflects the deep concern of the Founders with preventing corruption—what I term the Constitution’s ‘Anti-Corruption Legacy’—a concern that supports congressional power to reach misconduct by officials at all levels of government for the misuse of public authority.”⁵⁹ Professor Henning does not see a threat to the federalism values discussed above. Quite the contrary: “federal prosecution of corruption does not invade the sovereignty of the states because corruption undermines the balance established by federalism, and the national government must protect the integrity of both sides of the federalism equation. The constitutional design to

⁵⁸ Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75 (2003-2004).

⁵⁹ *Id.* at 81.

eliminate corruption demonstrates the Framers' intent to guard against the threat to liberty from the misuse of public authority.”⁶⁰

His second contention is that the “legacy” serves as a background understanding which should guide the construction of federal statutes potentially aimed at state and local corruption. “In analyzing Congress’ constitutional power to enact a statute, the Anti-Corruption Legacy supports a broad interpretation of congressional authority to reach the conduct of state and local officials, regardless of whether the crime could also be prosecuted by the state.”⁶¹ Professor Henning cites and analyzes several provisions of the Constitution to demonstrate its anti-corruption commitment at the national level. The following examples are invoked to improve his point: “Bribery” as one of the grounds for impeachment; the prohibition of both change in the President’s compensation during his term of office and of his receipt of “any other Emolument from the United States, or any of them;” the prohibition on federal officeholders’ receipt of Emoluments from foreign sources; the prohibition on members of Congress being appointed to any federal office “which shall have been created, or the Emoluments whereof shall have been increased during such time” that the member was in office; and, the Appropriations Clause requiring congressional authorization before the executive can disburse funds.⁶² He views these standards as “structural protections designed to limit the possibility of corruption in the federal government.”⁶³

As for corruption at the state level, Professor Henning identifies additional provisions “to deal with the possibility of corruption or the misuse of authority in the

⁶⁰ *Id.* at 81-82.

⁶¹ *Id.* at 82.

⁶² *Id.* at 87.

⁶³ *Id.*

states.”⁶⁴ He cites both the Seventh Amendment’s guarantee of jury trial and the provision for diversity jurisdiction in Article III.⁶⁵ He sees both as designed to limit the possibility of bias in state judicial proceedings and thus to provide a certain level of protection against corrupt state and local governments.⁶⁶

Surprisingly, the Guarantee Clause plays a small role in Professor Henning’s overall analysis, being relegated to a footnote, albeit a long one.⁶⁷ He sees the following role for the Clause: “by permitting a federal role in ensuring the integrity of state governments, the Guarantee Clause reflects the Founders’ concern with misuse of authority by the states.”⁶⁸ However, “the national government has a very restricted authority to interfere in the administration of the state governments, triggered only by systemic misuse of state authority that undermines the legitimacy of the exercise of official power. The federal concern is that abuse of authority should not reach a level that would result in the destruction of the state government by a tyrannical leader.”⁶⁹

The existence of such an anti-corruption “legacy” would play an important, perhaps dispositive, role in analyzing many of the questions raised by federal prosecutions of state and local officials. Indeed, Professor Henning demonstrates this in his use of the “legacy” as a background understanding in a thorough and persuasive treatment of questions of interpreting the statutes under which corruption is prosecuted. However, the premise of any such legacy, particularly one that rises to the level of a guide to constitutional interpretation, seems questionable on several counts. As an initial

⁶⁴ *Id.* at 89.

⁶⁵ *See id.*

⁶⁶ *See id.* at 91.

⁶⁷ *Id.* at 92 n.66.

⁶⁸ *Id.*

⁶⁹ *Id.*

matter, if the Framers felt that strongly about state and local corruption, one might ask why they did not place in the document more specific prohibitions on it as well as national authority to deal with it. Professor Henning's argument seems further weakened by the relatively small role that the Guarantee Clause plays in it. Far more than, say, the provision for Diversity Jurisdiction, that Clause can be interpreted as touching upon the overall quality of government within the states, through a broad construction of the concept of a "Republican Form of Government." The examples Professor Henning does invoke are hardly dispositive. For example, the provision in Article III for Diversity Jurisdiction may well be a potential protection against one form of corruption, but it is present in a section that seems to leave the very decision to create lower federal courts as well as the extent of their jurisdiction up to Congress.⁷⁰

Finally, there are nagging doubts about just why federal prosecution of state and local officials maintains the federal balance. The natural reading of that term, to use Professor Henning's words, is "that a balance between different levels of government will protect the liberty of the people by preventing one level from usurping the authority of the other."⁷¹ The prosecutions can be seen as usurping state and local government's inherent authority to police their own ranks as their own political processes deem appropriate. Moreover, to the extent that they enhance the role of national actors, particularly the United States Attorney, within the sub-national political process, federal

⁷⁰ ART. I, § 8 of the Constitution gives Congress the power "to constitute Tribunals inferior to the Supreme Court." I leave aside any arguments that Congress must vest in some court the federal jurisdiction provided for in ART III.

⁷¹ Henning, *supra* note 57, at 85.

prosecutions disturb equilibrium and alter balance. The Maryland experience, cited at the beginning of this article, is hardly unique.⁷²

Professor Henning's contention is that malfunctioning state and local governments undermine the federalism balance "by permitting individuals to purchase an outcome or by allowing public officials to misuse their authority for personal benefit, resulting in considerable social costs."⁷³ Because federalism requires viable governments at both levels, in order to protect individual liberty, these social costs prevent the system from functioning as designed. Public authority must be legitimate, and act legitimately, at each level. This is a strong argument, but it may not conclusively answer the question why a special role in maintaining that balance is granted to the federal government, especially if the assertion of that role is made without substantial reliance on the Guarantee Clause. Thus, even granting this particular use of the concept of balance to permit an imbalance in the power of the two levels, the analysis may well come up short.

Reliance on the Guarantee Clause is central to one of the seminal articles in the anti-corruption field: Professor Adam Kurland's piece on "the Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials."⁷⁴ Kurland is a strong defender of the prosecutions on nationalist grounds. In his view, "the primary federal interest in combating local corruption . . . is based on the principle that the public is entitled to honest government at all levels. The faith that the citizenry places in all levels of government is the foundation of the republic. Thus anything that erodes that

⁷² See generally ABRAMS & BEALE, *supra* note 7, at 147-48 (discussing the perception that "a high profile political corruption case can serve as a stepping stone to a political career for the prosecutor").

⁷³ Henning, *supra* note 57, at 85-86.

⁷⁴ Kurland, *supra* note 28.

foundation is of substantial federal interest. The citizens of the United States are therefore entitled to federal protection from abuses of power by those who govern.”⁷⁵

At the same time, Kurland is strongly critical of the prosecutorial approach that, at the time he wrote, required extremely broad use of statutes based on the Postal Power and the Commerce Clause. He views these statutes as not necessarily aimed at official corruption at all. Thus, complex cases may not fit.⁷⁶ More importantly, the statutes used to combat state and local corruption all contain a jurisdictional predicate that connects the defendant’s conduct to a source of federal power such as commerce. As Kurland puts it, “under the traditional analysis, the federal jurisdictional requirements of the statutes are essential to establish federal jurisdiction. If it cannot be established that the mails were used or that interstate commerce was in some manner affected, certain types of criminal activity, although significant enough to warrant federal interests, will not satisfy the requisite jurisdictional threshold and will not qualify for federal prosecution.”⁷⁷

His answer is to begin by approaching the problem directly and honestly. “No one seriously contends that protecting the sanctity of interstate commerce, or protecting the integrity of the postal service, is the principal reason the federal government allocates so much time and resources toward prosecuting official corruption cases.”⁷⁸ Still, some source of congressional power is necessary; a federal interest is not enough. The federal government is potentially interested in everything.⁷⁹ Kurland finds that power in the

⁷⁵ *Id.* at 376-77.

⁷⁶ *Id.* at 381.

⁷⁷ *Id.*

⁷⁸ *Id.* at 415.

⁷⁹ See Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 73 (2003) (quoting *United States v. Lipscomb*, 299 F.3d 303, 373 (5th Cir. 2002) (Smith, J., dissenting)).

Guarantee Clause which provides in part that “the United States shall guarantee to every State in this Union a Republican Form of Government. . . .”⁸⁰

The language certainly points in the direction of some authority over state and local government, and perhaps even to the quality of that government. “After all,” Kurland asks rhetorically, “what erodes a republican form of government more than corrupt officials?”⁸¹ He goes beyond an interpretation of the Clause that is limited to a concern with monarchy, and similar structural abuses, to a broader reading that reaches a guarantee of honest government. He relies heavily on writings of the Framers, finding in addition to structural concerns, a moral dimension. The Framers cared about “public virtue” as an essential element of republican government.⁸² Drawing on the writings of John Adams, for example, Kurland finds again the view that “officials who corruptly exercise their authority and secretly enrich themselves substantially erode the foundation of republican government.”⁸³

As for federalism, and the notion of a national government limited by a small number of enumerated powers, Kurland views the Guarantee Clause as conceptually different from those powers: a command to the national government to preserve the basic republican structure and the conditions requisite to its functioning. In this respect, Kurland’s views resemble Henning’s later analysis of the national government as the protector of the federal system through its anti-corruption efforts. Both contentions have the advantage of placing the federal prosecutorial role within the logic of the federal system as a whole. Reconciling the prosecutions with federalism is thus not a problem.

⁸⁰ U.S. CONST. art IV, § 4.

⁸¹ Kurland, *supra* note 28, at 417.

⁸² *Id.* at 428-29.

⁸³ *Id.* at 429.

Indeed, Kurland sees the Guarantee Clause as like the Fourteenth Amendment: “a constitutional provision that necessarily intrudes on state sovereignty and alters the normal federal state balance.”⁸⁴

Where Henning and Kurland differ is in the latter’s contention that the Guarantee Clause acts as a grant of power. He finds historical support for this view of the Clause, primarily in its use in the Reconstruction legislation.⁸⁵ He proposes an anti-corruption statute, based on the Clause, that provides in part that “whoever knowingly executes or attempts to execute any scheme or artifice to defraud or deprive the citizenry of a State or locality of its right to honest, faithful, and loyal government of such State or locality, shall be fined. . . or imprisoned. . . .”⁸⁶ Indeed Kurland presents evidence that some members of Congress have agreed with his view that a general anti-corruption statute could be enacted under the Guarantee Clause.⁸⁷ The main advantage of his thesis is that it represents a plausible basis for dealing directly with the problem of the prosecutions: validation under a general statute, of those prosecutions. However, Congress has never taken such a broad view of its power, as Kurland admits.⁸⁸ More importantly, recent Supreme Court invocations of the Guarantee Clause seem to view it more as a source of state autonomy than a font of federal power.⁸⁹

B. The Enumerated Powers

Both Henning and Kurland make important contributions to the debate. Suppose, however, that one rejects the thesis that the Constitution addresses the issue of state and

⁸⁴ *Id.* at 459.

⁸⁵ *Id.* at 438.

⁸⁶ *Id.* at 471-72.

⁸⁷ *Id.* at 484.

⁸⁸ *Id.*

⁸⁹ *E.g.*, *Printz v. United States*, 521 U.S. 898, 919 (1997) (listing the Clause among provisions that reflect the Constitution’s commitment to state sovereignty).

local corruption, either through a direct prohibition or through provisions strong enough to create a background understanding about this corruption. That is not the end of the matter in terms of finding federal power to bring the prosecutions. Congress may well be able to make the basic value judgment, as it has in so many other areas, through exercise of the enumerated powers. In fact, three of these powers are the bases on which most federal anti-corruption law rests. The Postal Power is the source of the mail fraud statute, an important tool in the federal prosecutors' arsenal.⁹⁰ As a textual matter, this outcome requires a series of leaps. One can concede, following Chief Justice Marshall's hypotheticals in *McCulloch v. Maryland*, that Congress may enact criminal statutes to protect the mails.⁹¹ One can also concede that Congress can protect the "integrity" of the mails by barring therefrom communications that are a part of a criminal scheme.⁹² The problem with modern mail fraud—as a matter of relating the corruption prosecutions to the constitutional text and scheme—is that almost any mailing somewhere along the line has become enough to justify a federal criminal trial.⁹³ If we limit our search to the text of the Postal Power and a reasonable construction of it, this power does not seem to be the basis of a general anti-corruption statute.

The Commerce Clause presents more complex questions. We are used to a legal universe in which this Clause is the basis for a range of moral judgments about practices Congress wishes to condemn.⁹⁴ While *Lopez* reminds us that the Commerce Clause has limits, the Clause has nonetheless played a key anti-corruption role. The Hobbs Act is

⁹⁰ U.S. CONST. art. I, § 8, cl. 7.

⁹¹ See *McCulloch v. Maryland*, 17 U.S. 316, 417 (1819).

⁹² See *McNally v. United States*, 483 U.S. 350, 365 (1987) (Stevens, J., dissenting) ("In considering the scope of the mail fraud statute, it is essential to remember Congress' purpose in enacting it. Congress sought to protect the integrity of the United States mails by not allowing them to be used as 'instruments of crime.'")

⁹³ See *infra* text accompanying notes 171-73 (discussing jurisdictional scope of mail fraud statute).

⁹⁴ E.g., *Champion v. Ames*, 188 U.S. 321 (1903).

the major example.⁹⁵ The Act requires an effect on commerce as a jurisdictional predicate for prosecuting the crimes, including extortion, under color of official right, that it prohibits. It is, indeed, possible to imagine specific instances of corruption that have such an effect. Part IV of this Article will explore briefly broader notions of corruption as an economic activity in and of itself. Taking the language of the Hobbs Act, and its case-by-case emphasis, as representative of current approaches to the Commerce Clause, the leap from commerce to any general anti-corruption statute requires some effort.

The third source of congressional power, the one endorsed in *Sabri*, is the Spending Power. Congress can “lay and collect Taxes, Duties, Imposts and Excises to pay the Debts and provide for the common Defense and general Welfare of the United States. . . .”⁹⁶ It is not a leap to conclude that the general welfare includes governments free from corruption, especially given a history of deference to Congress’ determination of what the general welfare means. Congress could, for example, enact a grant program to fund state and local anti-corruption efforts. It could probably attach anti-corruption “strings” to federal grant programs to those units of government. *Sabri*, however, involves a statute that does neither. 18 U.S.C. §666 is a criminal statute, apparently designed to protect federal funds from diversion and other dishonest practices. After *Sabri*, the statute has become the closest thing our system has to a general federal anti-corruption law.⁹⁷ The fact that the Court took this extraordinary step, and did so almost casually, merits close examination.

⁹⁵ 18 U.S.C. § 1951 (2000).

⁹⁶ U.S. CONST. art I., § 8, cl. 1.

⁹⁷ See *infra* text accompanying notes 162-64.

III. Section 666 and *Sabri*—No Limits?

A. Section 666

18 U.S.C. §666 provides, in part, as follows:

(a) Whoever, if the circumstance described in subsection (b) of this section exists--

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that--

(i) is valued at \$5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of \$5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.⁹⁸

Obviously, the statute raises a host of questions. If for example one removes subsection (b) and the reference to it after “whoever” in subsection (a), it looks like a general anti-corruption statute. Not only are the classic corruption offenses of bribery and offers of bribes covered; subsection (a)(1)(A) covers a variety of other crimes, two of which might be subject to broad interpretation. As discussed below, the concept of fraud

⁹⁸ 18 U.S.C. § 666 (2000).

has been developed, in the context of the mail fraud statute, into a broad category of “honest services.”⁹⁹ Potentially, then, §666, either through the concept of fraud or the uncertain crime of “misapplication” could apply to a wide variety of corrupt acts beyond the classic bribery offenses. Of course, subsection (b) is part of the statute as well. Thus it contains two limits: the \$5,000 minimum for any of the covered transactions and, more importantly, the requirement that the entity whose agent is prosecuted receive more than \$10,000 in federal assistance each year. However, given the large number of governmental, and other, entities that receive this amount of federal funding each year, the question arises whether the limits play a meaningful role in preventing the statute from being the long-sought general anti-corruption law.

The major debate surrounding the statute has been addressed to this very question, and has involved the issue of a possible “nexus” requirement within the statute. That is, should courts require that the prosecution not only prove the corrupt acts and the receipt of the funds, but should a connection between the federal funds and the corruption be present in the case as well? Opinions have differed as to whether any such requirement would be read into the statute as an element, or whether it is the ultimate test of the statute’s validity if applied to situations where no such connection exists.¹⁰⁰

Closely related to the question of the statute’s validity is the conceptual dilemma of how to analyze it. Virtually everyone agrees that Section 666 was passed pursuant to the congressional Spending Power.¹⁰¹ It would thus seem to follow that the classic test

⁹⁹ See *infra* text accompanying notes 165-70.

¹⁰⁰ *Sabri v. United States*, 12 S.Ct. 194, United States Supreme Court Official Transcript of Oral Argument at 31-33 (Mar. 3, 2004); *Cf. U.S. v. McCormack*, 31 F.Supp. 2d 176 (D. Mass 1998) (striking down the statute as applied).

¹⁰¹ *E.g., Sabri*, 124 S.Ct. at 1946-47; see Garnett, *supra* note 78, at 41 n.200 (citing cases to the effect that §666 represents an exercise of the spending power).

for examining the validity of Spending Power statutes as laid out in *South Dakota v. Dole*¹⁰² would be the appropriate analytical framework. *Dole*, however, involved assessment of the validity of conditions attached to federal grant programs.¹⁰³ Although often criticized as toothless, the multi-part *Dole* test has the potential to impose real limits on grant conditions.¹⁰⁴ The problem with applying it in the present context is that while §666 may have been passed pursuant to the Spending Power, it is not a grant condition. Nor is it specifically phrased as a “Cross-Cutting” condition that applies to all grant recipients. Rather, it is a criminal statute that applies to the “agents” of entities receiving more than \$10,000 in federal funds each year. The constitutional question that then arises is whether such a criminal statute is a more intrusive exercise of federal authority than the grant conditions that have been measured under *Dole*. As noted, efforts have been made to temper the statute by applying to it some form of nexus or connection requirement derived from the “relatedness” prong of the *Dole* test.¹⁰⁵ Recent scholarship, particularly the work of Prof. Richard Garnett, has emphasized the possible role of the Necessary and Proper Clause in analyzing the validity of a criminal statute, passed under the Spending Power, not directly applicable to the recipients of the funds.¹⁰⁶

B. Some Preliminary Questions

The ultimate question posed by the statute is what the federal role should be in policing state and local corruption through creation of a federal criminal offense. It seems clear from the legislative history that the drafters had no such lofty ambitions in mind as creating a general anti-corruption statute and did not view an enactment

¹⁰² *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

¹⁰³ *Id.* at 206.

¹⁰⁴ See generally Lynn A. Baker, *Conditional Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995).

¹⁰⁵ See *Dole*, 482 U.S. at 215-16 (O’Connor, J., dissenting).

¹⁰⁶ See Garnett, *supra* note 78, at 77.

concerning “Theft or bribery concerning programs receiving Federal funds” as presenting these fundamental issues. Congress was faced with what it viewed as the inadequacy of existing methods of protecting federal funds in the hands of local officials and their sub-grantees. However narrow the problem Congress was addressing, it passed a broad statute with the potential to evolve into an across-the-board anti-corruption statute carrying with it an alteration of the federal state balance.¹⁰⁷ For an initial period, the statute developed “below the radar.” However, a number of Court of Appeals decisions and a growing body of academic literature brought the “stealth statute” to light in the late 1990s.¹⁰⁸ Indeed, prior to *Sabri* the Supreme Court had already issued two significant opinions concerning §666.

C. §666 in the Supreme Court Before *Sabri*.

The Court first dealt with the statute in the 1997 case of *Salinas v. United States*.¹⁰⁹ The unanimous decision upheld a broad construction of the statute against the contention that it might require that “the Government. . . proved the bribe in some way affected federal funds, for instance by diverting or misappropriating them, before the bribe violates [it].”¹¹⁰ The Court rejected any “interpretation that federal funds must be affected.”¹¹¹ It relied primarily on the broad language of the statute. The opinion does not stand for the proposition that §666 raises no constitutional issues. The Court emphasized that there was “no serious doubt about the constitutionality” of the statute “as applied to the facts of this case.”¹¹² Indeed, the Court concluded that “the statute is

¹⁰⁷ See Brown, *Stealth Statute*, *supra* note 17, at 253.

¹⁰⁸ E.g., Paul Salvatoriello, *The Practical Necessity of Federal Intervention Versus the Ideal of Federalism: An Expansive View of Section 666 in the Prosecution of State and Local Corruption*, 89 GEO. L.J. 2393.

¹⁰⁹ *Salinas v. United States*, 522 U.S. 52 (1997).

¹¹⁰ *Id.* at 55.

¹¹¹ *Id.* at 56-57.

¹¹² *Id.* at 61.

constitutional as applied in this case.”¹¹³ The opinion did not reject a nexus requirement, holding only that the government did not have to prove federal funds were “involved” in the bribery at issue. Thus, while hospitable to the statute, *Salinas* contains tantalizing suggestions that serious constitutional questions do, indeed, lurk beneath the surface.¹¹⁴

The Court continued its hospitable construction of §666 in *Fischer v. United States*.¹¹⁵ At issue was whether hospitals participating in the Medicare program received “benefits” under §666(b), thus triggering its criminal provisions. The Court concluded that participation in the program resulted in receipt of benefits, turning to *Salinas* for support of a construction of §666 that could be described as “expansive,” “both as to the [conduct] forbidden and the entities covered.”¹¹⁶ Again, the Court showed awareness of and concern for the potential federalism issues raised by the breadth of the statute and the need to limit it. The majority stated that it did not wish to “turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance.”¹¹⁷ Indeed, Justices Thomas and Scalia dissented, relying in part on federalism considerations such as those enunciated in *United States v. Lopez*.¹¹⁸ For the dissenters, “without a jurisdictional provision that would ensure that in each case the exercise of federal power is related to the federal interests in a federal program, §666 would criminalize routine acts of fraud or bribery, which, as the Court admits, would ‘upset the proper federal balance.’”¹¹⁹ Their dissent, as well as the cautionary notes sounded by the entire Court

¹¹³ *Id.*

¹¹⁴ See Brown, *Unanswered Question*, *supra* note 6, at 506-09. Professor Coffee reads *Salinas* broadly as, apparently, resolving any constitutional issues. See John C. Coffee Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 459 (1998).

¹¹⁵ *Fischer*, 529 U.S. 667.

¹¹⁶ *Id.* at 678.

¹¹⁷ *Id.* at 681.

¹¹⁸ *Id.* at 682-93 (Thomas, J., dissenting).

¹¹⁹ *Id.* at 689.

in *Salinas*, appeared to indicate a continuing awareness of the federalism issues and constitutional questions referred to above. However, in *Sabri v. United States*,¹²⁰ caution disappeared.

D. *Sabri*

Sabri involved indictment of a Minneapolis developer for the following corrupt acts: offering a \$5,000 kickback to a City Councilor for obtaining regulatory approvals; offering a \$10,000 bribe to the Councilor to set up a meeting with objecting abutters; and, a 10% commission on community economic development grants that the defendant sought from the city and its funding entity for housing and economic development.¹²¹ The proposed prosecution easily met the requisites of §666. In the year of the acts at issue the Minneapolis City Council had administered 29 million dollars in federal funds. Moreover, the housing and economic development entity from which the defendant sought aid was, itself, a substantial recipient of federal funds. Defendant Sabri challenged the indictment on the ground that §666 “is unconstitutional on its face for failure to require proof of a connection between the federal funds and the alleged bribe, as an element of liability.”¹²² The district court agreed with this contention, and dismissed the indictment on grounds of facial invalidity.¹²³ A divided Eighth Circuit reinstated the indictment, and both upheld the statute and construed it as not requiring proof of a connection between a bribe and federal funds.¹²⁴

This decision accentuated a split among the circuits, reflecting the constitutional issues referred to above, whether a connection with federal funds was in fact necessary to

¹²⁰ *Sabri*, 124 S.Ct. 1941.

¹²¹ *Id.* at 1944.

¹²² *Id.* at 1945.

¹²³ *Id.*

¹²⁴ *Id.*

permit federal prosecution of the conduct under the Spending Power.¹²⁵ The Supreme Court stated that its reason for granting certiorari was to resolve this circuit conflict.¹²⁶ The Court had no problem in resolving the issue in favor of a broad construction of the statute dispensing altogether with any nexus requirement, and “readily dispose[d]” of the contention that this broad construction posed any constitutional problem.¹²⁷ Indeed, although there were two separate concurring opinions,¹²⁸ no Justice seemed to see any problem with the constitutionality of §666 as a general anti-corruption statute.

The Court’s opinion is a model of simplicity. First of all, Congress had unquestioned authority to appropriate federal grant funds to further the general welfare.¹²⁹ Although the Court did not refer to the facts at hand on this point, the housing and other grants received by Minneapolis are typical examples of the Spending Power in action. Second, Congress has “corresponding authority” under the Necessary and Proper Clause “. . . to see to it that taxpayer dollars appropriated under [the Spending Power] are in fact spent for the general welfare, and not frittered away. . . .”¹³⁰ Congress could well be concerned that dishonest public officers who are untrustworthy stewards or who do not deliver dollar-for-dollar value will not distinguish according to the source of funds when committing their corrupt acts.¹³¹ Furthermore, the fungibility of federal funds is an additional reason for not requiring proof of their presence in any particular corrupt activity.¹³² The Court invoked Justice Marshall’s venerable hypothetical in *McCulloch* to

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *See id.* at 1945-46.

¹²⁸ *Id.* at 1949-51 (Kennedy, J., concurring; Thomas, J., concurring).

¹²⁹ *Id.* at 1946

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

the effect that the power to establish post-offices and post-roads leads to authority to “punish those who steal letters.”¹³³

The Court’s short and simple analysis almost masks the fact that it adopted one of the major contending arguments in the ongoing debate over the constitutionality of §666: the integrity rationale. The rationale proceeds on the assumption that measures directed at transactions involving federal funds will often be insufficient to protect those funds. What is needed is a broad net that achieves protection through sweeping up all corrupt transactions in order to guarantee the integrity of the recipient entity.¹³⁴ However, this rationale can readily extend to treating the concern for state and local integrity as the major federal interest, with the protection of federal funds operating almost as a pretext. Federalism concerns were barely mentioned in *Sabri*. The Court relegated any problems stemming from “federal prosecution in an area historically of state concern” to a footnote.¹³⁵ It found *United States v. Lopez*¹³⁶ and *United States v. Morrison*¹³⁷ totally inapplicable because those Commerce Clause cases involved activity that had little relation to economic conduct that Congress could regulate. Here, there was no need to “pile inference upon inference” since the Spending Power was directly involved.¹³⁸ In sum, whatever constitutional reservations the debate over §666 had previously engendered and had come to light in *Salinas* were summarily rejected. After *Sabri*, §666 seems free to roam the political landscape as long as the sub-national entity where it comes into play receives more than \$10,000 in federal funds “in any one year,” and the

¹³³ *Id.*

¹³⁴ *See id.*

¹³⁵ *Id.* at 1948 n.*.

¹³⁶ *United States v. Lopez*, 514 U.S. 549 (1995).

¹³⁷ *United States v. Morrison*, 529 U.S. 598 (2000).

¹³⁸ *Sabri*, 124 S.Ct. at 1947.

corrupt transaction involves more than \$5,000 or, in the Court's words, "goes well beyond liquor and cigars."¹³⁹

Having given total victory to the broad reading of §666, the Court seemed almost to take it away in a curious "afterword" dealing with Sabri's ability to bring a facial challenge to the statute.¹⁴⁰ The Court expressed substantial doubt about the wisdom of such challenges and noted that "the acts charged against Sabri himself were well within the limits of legitimate congressional concern."¹⁴¹ If he was making an overbreadth challenge to the effect that the statute could not be enforced against someone else, the Court seemed to say that such challenges are limited to a "relatively few settings. . . ."¹⁴² This "afterword" raises the interesting question whether the Court decided anything at all with respect to the narrow (nexus) reading of §666 or the broad one. As the government's brief noted, neither party advocated the nexus reading.¹⁴³ The government, after all, wanted the broad one. Sabri, on the other hand, would lose, even under the narrow one, since federal funds appeared to be clearly involved in his schemes. Thus, the Court purported to resolve the predicate issue of statutory construction without either party arguing one of the contending sides.

It may be objected that Sabri, at least, did argue for a nexus requirement as essential to the statute's validity as part of his facial challenge. In the "afterword" the Court cast doubt on whether he could bring it at all. Indeed, since there was already a Supreme Court decision upholding the statute as applied (*Salinas*), it is particularly hard to see how there was any serious argument for a facial challenge. The government, in

¹³⁹ *Id.* at 1946.

¹⁴⁰ *Id.* at 1948.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Sabri v. United States*, 124 S.Ct. 1941, Respondents' Brief at 17 n.3 (No. 03-44).

fact, opposed the grant of certiorari on the grounds that there was no justiciable issue.¹⁴⁴ Perhaps the Court had to decide the construction issue to reach the validity question, but the Court's own words raise issues as to whether the validity question was properly before it. Perhaps this apparent dictum belongs in the arcane world of overbreadth and other issues relating to facial challenges, and *Sabri* should be read as standing for what it says. However, the "afterword" suggests that the Court might have dismissed the petition as improvidently granted, or otherwise ducked the broad issues concerning §666's construction and validity.¹⁴⁵ The conclusion is inescapable that the Court reached out to take a strong anti-corruption stand in order to emphasize its condemnation of corrupt activities at all levels of government.

The central aspect of the Court's constitutional analysis in *Sabri* is its acceptance of the integrity rationale, that is, that the federal government can act "to safeguard the integrity" of grant recipients in order to protect the disbursed funds.¹⁴⁶ Obviously, integrity might have several meanings. The term might be limited to the federal funds themselves or to the broader manner in which a particular federally funded program is administered. For example, in *Salinas*, correction officials took bribes to permit conjugal visits to federal prisoners housed in a state jail.¹⁴⁷ Integrity might mean the fiscal honesty of a recipient unit as a whole. Again, one can see a tie, albeit less direct, to the federal funds. However, integrity will certainly bear a much broader reading: the general quality of a recipient unit, in the case of a governmental one, whether or not it practices "good

¹⁴⁴ *Sabri v. United States*, 124 S.Ct. 1941, Respondents' Brief in Opposition to Writ of Certiorari at 6, 10-12 (No. 03-44).

¹⁴⁵ Had the Court done so, these issues would have remained in their partially unresolved state following *Salinas* and *Fischer*.

¹⁴⁶ See *Sabri*, 124 S.Ct. at 1943, 1946. A key early case in the development of the integrity rationale is *United States v. Westmoreland*, 841 F.2d 572 (5th Cir. 1988).

¹⁴⁷ *Salinas*, 522 U.S. at 55.

government.” One could surely find a lack of integrity in a governmental unit in which nepotism and patronage are rampant, “no-show” jobs exist, opposition parties are squelched by entrenched officeholders and there is a general sense of helplessness on the part of excluded groups. Would the *Sabri* rationale permit the federal government to regulate these practices directly, for example, by penalizing the awarding of patronage jobs? Ultimately there could be a relation back to some federal funds, in the sense that administrative positions with control over those funds might not be awarded on merit, but the goal of federal intervention seems to be the use of the Spending Power to achieve broader federal public policy ends of good government.

In this respect, the case most on point is *Oklahoma v. United States Civil Service Commission*.¹⁴⁸ A variant on the Hatch Act was designed to prohibit partisan activity by state or local employees “whose principal employment is in connection with any activity which is financed in whole or part by loans or grants made by the United States or by any Federal agency. . . .”¹⁴⁹ An elaborate procedure provided for hearings by the United States Civil Service Commission to determine if the forbidden partisan conduct had occurred. In the event of a positive finding, the Commission was to “certify” to the granting agency an “order requiring it to withhold” from the relevant grants a sum tied to the officials’ compensation.¹⁵⁰ The Supreme Court upheld the statute on traditional Spending Power grounds: Oklahoma had the choice of not taking the funds in the first place, and had accepted the conditions that accompanied the grant.¹⁵¹ However, the

¹⁴⁸ *Oklahoma v. United States Civil Serv. Comm’n*, 330 U.S. 127 (1947). Commentators have recognized the importance of *Oklahoma* as a key precedent in establishing the federal government’s interest in combating state and local corruption. See Henning, *supra* note 57, at 100-01; Brown, *Stealth Statute*, *supra* note 17, at 272.

¹⁴⁹ *Id.* at 129 n.1. For the current language of the statute, see Henning, *supra* note 57, at 101 n.102.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 137-38.

Court noted the end sought by the provision at issue: “better public service by requiring those who administer funds for national needs to abstain from active political partisanship.”¹⁵² *Oklahoma* thus represents a clear endorsement of use of the grant device to further national values of good public administration. Section 666 seems to go even further in this direction through the integrity pretext. This rationale allows Congress to reach deeply into the operations of any recipient government and has the potential to come close to federalizing any recipient of federal funds. The Court failed to sound the cautionary note that federalism values would seem to require and that it had, indeed, sounded in *Salinas*.

The important question of constitutional method previously referred to then arises: what is the proper framework for analyzing the validity of §666? It is tempting to use the analysis the Court set forth in *Dole* for exercises of the Spending Power. That analysis remains the vehicle for challenges to federal grant conditions.¹⁵³ However, §666 is not a condition; rather, it is a direct command enforceable through the criminal law. In that respect, it differs from the typical grant case, even from *Oklahoma* in which it is true that the key enforcement proceeding concerning a particular official’s conduct took place at the federal level. Indeed, it might be contended that direct criminal laws such as §666 are more intrusive on federalism values and that accusations that the *Dole* test is too lax make it even less appropriate in this context. Nonetheless, *Dole* remains the Court’s principal exposition of an approach to the Spending Power, and it may be helpful even if used by analogy. If the crucial question is how to cabin §666 through some sort of nexus or connection, the *Dole* requirement that a condition be related to the purpose of a

¹⁵² *Id.* at 143.

¹⁵³ See Garnett, *supra* note 78, at 61 (discussing *Dole* test and its possible relevance in the context of §666).

particular grant seems relevant and helpful.¹⁵⁴ Building on it, one can argue that at some point the integrity rationale takes the federal government too far away from the act of spending and too far into the internal operations of recipient entities.

Despite this attraction, however, Professor Garnett, has argued that “*Dole’s* usefulness as a translator for these federal-nexus claims is overstated, and *Dole*-based challenges to §666 and its applications are misplaced. Properly understood, the issue is not whether the statute or its uses satisfy that case’s . . . criteria but whether those criteria apply at all.”¹⁵⁵ The point is that the element of choice in the acceptance of any particular grant is missing. Thus, principles based on that element are not helpful in evaluating a statute which is not linked to any contractual element of choice. It is at this point that analysis based on the Necessary and Proper Clause comes to play an important role. The task for Necessary and Proper analysis is to find in it limits that will prevent a statute as broad as §666 from becoming a “sweeping” prohibition of state and local corruption. Professor Garnett sees the danger of a combination of the Spending Power and the Necessary and Proper Clause that leads to a point where Congress can regulate or outlaw anything.¹⁵⁶ The search for limits leads to what he and others have called the “non-infinity” principle.¹⁵⁷ Limits might be introduced by harking back to the need for “fit” between a particular law and the enumerated powers of Congress and the limitations on them such as the Bill of Rights.¹⁵⁸ However, the relatively short shrift that the Court gave to Necessary and Proper arguments in *Sabri* suggests that they do not yet add a great deal

¹⁵⁴ See Brown, *Stealth Statute*, *supra* note 17, at 262-72.

¹⁵⁵ Garnett, *supra* note 78, at 62.

¹⁵⁶ *Id.* at 82.

¹⁵⁷ *Id.* at 83.

¹⁵⁸ See *id.* at 79, 81.

to the attempt to limit §666.¹⁵⁹ Of course, it must be noted that federalism arguments got equally short shrift, perhaps, as I have suggested, because of the Court's desire to make a strong anti-corruption statement.

In the end, that is the lesson and the question that we must take from *Sabri*: to what extent does a perceived national anti-corruption imperative, whatever its source, overcome considerations of federalism? The Maryland example shows that perceived extreme cases of intervention can be curbed, but the general phenomenon persists. Certainly the widespread prosecution of state and local officials for the manner in which they govern raises serious questions. Holding those officials accountable for their style of governance ought to be as much a matter of constitutional concern as the policies they adopt, a subject deemed to merit that concern in both *New York v. United States*¹⁶⁰ and *Printz v. United States*¹⁶¹. As suggested, the use of direct federal criminal law seems even more of an intrusion than the typical grant enforcement mechanism, even one as federalized as that in *Oklahoma*. After all, it will usually be the federal grantor agency that takes the lead in determining non-compliance with any particular condition. A criminal statute like §666 breaks the grantor agency-grantee agency relationship, and introduces the United States Attorney, an actor whose priorities may have nothing to do with the grant program. Moreover, by the very fact of enacting an additional federal criminal statute, Congress can be seen to invade the province of the states in yet another way.¹⁶²

¹⁵⁹ The Court limited the role of review to one of “means-ends rationality under the Necessary and Proper Clause.” *Sabri*, 124 S.Ct. at 1946.

¹⁶⁰ *New York v. United States*, 505 U.S. 194.

¹⁶¹ *Printz v. United States*, 521 U.S. 898.

¹⁶² The invasion occurs in the form of enlarging the domain of federal criminal law. The federal criminal law debate can be seen as separate and distinct from the more specific question of federal prosecutions of state and local officials for political corruption.

At this point, it is instructive to compare *Sabri* with *McConnell*. *McConnell* upheld restrictions on campaign finance practices and related activities, restrictions that could be enforced through the criminal law. The restrictions were imposed by Congress in the Bipartisan Campaign Reform Act of 2002¹⁶³ (BICRA). BICRA increased the level of regulation of federal campaigns in two ways. It sharply curtailed the role of “soft money”—contributions to political parties for purposes other than the direct influencing of a national election.¹⁶⁴ BICRA also imposed substantial limits on “issue ads,” defined by the Court as ads “specifically intended to affect election results,”¹⁶⁵ but omitting “magic words” such as “Elect John Smith,” or “Vote against Jane Doe.”¹⁶⁶ Opponents mounted a substantial First Amendment challenge to BICRA, but a majority of the Court built upon the line of cases beginning with *Buckley v. Valo*,¹⁶⁷ and amplified in later precedent such as *Nixon v. Shrink Missouri Government PAC*,¹⁶⁸ to formulate a set of anti-corruption governmental interests that met the government’s burden to justify incursions on the First Amendment.¹⁶⁹ The government interest goes beyond preventing *quid pro quo* corruption¹⁷⁰ to countering “the appearance or perception of corruption,”¹⁷¹ and even to “the broader threat from politicians too compliant with the wishes of large contributions.”¹⁷²

One can, of course, identify differences between the two cases. In *McConnell*, the statute regulated the electoral process. In *Sabri*, the statute regulated the functioning of

¹⁶³ 116 Stat. 81.

¹⁶⁴ See *McConnell*, 124 S. Ct. 648-50 (discussing soft money).

¹⁶⁵ *Id.* at 651.

¹⁶⁶ *Id.* at 650.

¹⁶⁷ 424 U.S. 1 (1976).

¹⁶⁸ 528 U.S. 377 (2000).

¹⁶⁹ See e.g., *McConnell*, (655-61) (discussing First Amendment analysis in the context of soft money).

¹⁷⁰ *Id.* at 659.

¹⁷¹ *Id.* at 660.

¹⁷² *Id.*

government. *McConnell* involved the regulation of activities primarily at the federal level. *Sabri* involved regulation of activities at the local level. In *McConnell*, the activities regulated were essentially political advocacy and political contributions. In *Sabri*, the regulated activity was bribery. In *McConnell*, the principal constitutional defense against the challenged statute was the First Amendment. In *Sabri*, the challenge was based on federalism. Finally, *McConnell* relied substantially on notions of public confidence and the appearance of impropriety. *Sabri* focused substantially on the integrity of governmental operations.

Despite these differences, I see the two cases united by a broad anti-corruption imperative that justifies Congress' role as the guardian of the democratic process at all stages and at all levels. Each case focused on the importance of integrity in government. The integrity of recipient governments is the key to *Sabri*'s protection of federal funds rationale. *McConnell* invoked prior precedents as demonstrating a congressional interest in protecting "the integrity of our system of representative democracy."¹⁷³ As in *Sabri*, the notion of "integrity" is central to the analysis.¹⁷⁴ Indeed, parts of *McConnell* point in a "good government" direction.¹⁷⁵ Beyond a similar approach to recognizing Congress' role in achieving good government, each case demonstrates considerable deference to Congress in determining how to achieve that goal, even in the face of serious constitutional objections.

E. §666 after *Sabri*

¹⁷³ *Id.* at 647.

¹⁷⁴ The term "integrity" appears at several points in the *McConnell* opinion. E.g., *Id.*; *Id.* at 656; *Id.* at 658, n.42.

¹⁷⁵ See *Id.* at 664 ("Plaintiffs conceive of corruption too narrowly."); *Id.* at 666. ("Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.")

Sabri certainly looks like a sweeping victory for proponents of national anti-corruption efforts. Before further examination of how best to vindicate that position, it may be useful to consider whether the decision completely forecloses any consideration of the constitutionality of §666 in a case where there is little if any perceptible nexus between federal funds and the corrupt act charged. At first blush, the answer would seem to be yes, given the Court's adoption of the no-nexus construction of the statute and its equally strong adoption of the integrity rationale for that conclusion. However, there remains the somewhat troubling "afterword," as well as the previous language in *Salinas* suggesting that the question was an open one. Recall that the *Sabri* Court stated that, at best, he could be asserting that the statute would be unconstitutional as applied to someone else, and refused to let him assert that person's hypothetical challenge. What happens now if such a person comes before the Court armed with a challenge that Sabri, who was clearly attempting to tamper with federal funds, could not make?

Perhaps the opinion means exactly what it seems to say, foreclosing further consideration of the matter. The best guess is that the Court will, in fact, treat the matter as closed; any other reading would require treating the first part of the decision as dictum, with the holding coming only in the afterword. Perhaps traditional values such as those associated with Article III and highly case-specific adjudication would have better served if the "afterword" was the only decision. Certainly, federalism would have been better served if the issue of potentially narrowing §666 could have been fought out in a case where the parties could focus both on construction of the statute and on the possibility of a nexus requirement as the ultimate standard in as-applied challenges. In *Sabri* no one disagreed about the construction of the statute.

Let us take the Court at its word, however. We now have something very close to a general anti-corruption statute in the form of §666. How far it extends will then depend, not on any judicial oversight, but on the restraint and/or creativity of federal prosecutors. There will be some direct supervision from Washington, whether through specific interventions as in Maryland, or through the general guidance of the United States Attorneys Manual. But individual discretion will be extensive. In the remainder of this article, I wish to focus on the nationalist, anti-corruption values that *Sabri* unquestionably advances. The goal is to raise the question whether a more satisfactory constitutional basis for the approach is possible and desirable.

IV. Beyond *Sabri*—Alternative Bases for Federal Anti-Corruption Efforts

Taking our cue from *Sabri*, let us assume that the constitutional climate is favorable to the nationalist view of federal anti-corruption efforts, and that federalism questions have been resolved in the favor of those efforts. It does not follow that *Sabri* is the last word. The question remains both whether §666 should now emerge as the major broad-based anti-corruption statute, and whether there are alternative constitutional justifications for the federal role other than protecting federal funds disbursed under the Spending Power. In this section, I wish to offer briefly some observations on the latter point. It is worth beginning, however, with the form of an ideal statute. Both Professor Kurland's proposal and earlier legislation supported by the Justice Department relied primarily on the concept of deprivation and defrauding of "the honest services" of public officials.¹⁷⁶ Honest services is a concept that has developed in the interpretation of the mail fraud statute, as discussed below. It is exceedingly broad in scope, encompassing

¹⁷⁶ See ABRAMS & BEALE, *supra* note 7, at 271 (citing proposed Violent Crime Prevention Act of 1991, supported by the Department of Justice).

transactional forms of corruption such as bribery, and, probably, failure to disclose breaches of fiduciary duties, as well as establishing a broad range of fiduciary duties.¹⁷⁷ It is far from clear that §666 can be expanded to encompass the range of corruption reached by the honest services concept. The statute does include obtaining “by fraud” property worth more than \$5,000 as one of the criminal acts it reaches.¹⁷⁸ However, it is uncertain whether that use of fraud is as broad as the honest services concept of fraud that Congress, following the lead of lower courts, has explicitly written into the mail fraud statute. Let us focus on the constitutional bases and rationales for a national anti-corruption statute, recognizing that the “protection of federal funds” argument relied on in *Sabri* has limits and also suffers from being somewhat pretextual. If Congress is now free to adopt a general statute, why not rely on constitutionally-based authority to do so?

A. Mail Fraud

An initial argument that must be dealt with is that Congress has already done so through the enactment of the mail fraud statute and its specific amendment in 1988. Prior to that amendment, the statute (as well as the wire fraud statute)¹⁷⁹ made it a crime for persons with a scheme to defraud or to obtain money or property by means of false or fraudulent pretenses to, “for the purpose of executing such scheme,” place in the mails anything that the Postal Service would deliver.¹⁸⁰ The natural reading of the statute is that one should not utilize the Postal Service for the purpose of carrying out fraud, such as a false solicitation for worthless land. The lower courts had, however, construed the

¹⁷⁷ For a general discussion of the honest services doctrine, see Henning, *supra* note 57, at 135-47.

¹⁷⁸ 18 U.S.C. § 666(A)(i) (2000); *Cf.* Henning, *supra* note 57, at 128 (“The federal interest in preventing and punishing corruption supports the broad reading of section 666 in *Salinas* and *Fischer* as a powerful anti-corruption statute that reaches misconduct beyond what other federal criminal statutes had covered.”).

¹⁷⁹ Mail Fraud Statute, 18 U.S.C. § 1341-42 (2000); Wire Fraud Statute, 18 U.S.C. § 1343 (2000).

¹⁸⁰ 18 U.S.C. § 1341-42.

concept of “defraud” broadly to include deprivations of the citizens’ right of honest services.¹⁸¹ In 1988, in response to a Supreme Court decision calling a halt to this development, Congress passed a statute which provides in part that “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”¹⁸² Not surprisingly, an extraordinary range of corrupt practices, including but not limited to, various forms of bribery and failure to disclose breaches of fiduciary duty have been construed to fit within the concept of honest services. For example, in *United States v. Lopez-Lukis*,¹⁸³ the Eleventh Circuit held that a deprivation of honest services occurred when a local legislator sold not only her vote but also her influence in delivering a majority of the board on which she served. The court cautioned against any reading of the statute that would “impermissibly narrow the scope [of the honest services amendment] and ‘would belie a clear congressional intent to construe the mail fraud statute broadly.’”¹⁸⁴

There is, then, little doubt as to the scope of conduct embraced by the mail fraud statute, but there is considerable doubt as to whether it can, or should, serve as a general anti-corruption statute. After all, both the statute and the Constitution require some connection to the mails. In the seminal case of *Shmuck v. United States*,¹⁸⁵ the Supreme Court had appeared to take a loose approach to any requirement that the mails be a direct part of the scheme. The case involved selling cars with altered odometers. The mailing that triggered the statute was from the dealers who purchased cars from the defendant to

¹⁸¹ For a discussion of the development of the “honest services” theory in the lower courts, see Henning, *supra* note 57, at 136-41.

¹⁸² The current statute is 18 U.S.C. § 1346 (2000). For a discussion of this statute as a response to *McNally v. United States*, 483 U.S. 350 (1987), see, e.g., ABRAMS & BEALE, *supra* note 7, at 134-35.

¹⁸³ *United States v. Lopez-Lukis*, 102 F.3d 1164 (11th Cir. 1997).

¹⁸⁴ *Id.* at 1171.

¹⁸⁵ *Schmuck v. United States*, 489 U.S. 705 (1989).

the State Department of Transportation. The Department required a title-application form for the dealers' customers. Despite precedent pointing in the other direction, the Court found these mailings, though not made by the defendant, to be "an essential step in the successful passage of title to the retail purchases."¹⁸⁶ *Shmuck* was a highly contested five-to-four decision, in which the four dissenters cautioned that "the law does not establish a general federal remedy against fraudulent conduct, with use of the mails as the jurisdictional hook, but reaches only 'those limited instances in which the use of the mails, is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.'" ¹⁸⁷ Beyond statutory problems, it is hard to see any relationship between the mailings in *Schmuck* and the integrity of the mails or protection of the system. This is a constitutional problem. It is the existence of such a relationship that ties the statute to the Postal Power.¹⁸⁸ There may be a trend in the lower courts to distinguish *Schmuck*, almost to the point of distinguishing it away, and to focus on the earlier Supreme Court cases that emphasized the relationship of the mailing to the fraudulent scheme. Courts of Appeals have applied this more stringent test in both ordinary fraud cases and public corruption, honest services cases.¹⁸⁹ We thus return to the concerns voiced by Professor Kurland that the requirement of meeting jurisdictional elements can, indeed, be a significant barrier to the mail fraud's statute acting as a general anti-corruption law.¹⁹⁰

¹⁸⁶ *Id.* at 714.

¹⁸⁷ *Id.* at 722 (Scalia, J., dissenting).

¹⁸⁸ See Henning, *supra* note 57, at 143-45. Professor Henning is a strong defender of the broad use of the mail fraud statute. He states that the Congressional validation of the "honest services" theory is justified by the presence of "strong federal interests" which justify possible overlap with state criminal jurisdiction, and that the statute "is a clear Congressional mandate that federal authority can be used to police misconduct by state and local officials." (punctuation omitted). As previously discussed, Professor Henning invokes the "anti-corruption legacy" of the Constitution to support Congressional authority in this area. *Id.* at 146-47.

¹⁸⁹ See *United States v. Strong*, 371 F.3d 225 (5th Cir. 2004), *United States v. Cross*, 128 F.3d 145 (3rd Cir. 1997).

¹⁹⁰ See Kurland, *supra* note 28.

Perhaps there really does have to be a mailing somewhere in the case that is connected to the fraud.

B. Corruption as Commerce

Over the years, Congress has used the Commerce Clause to regulate a wide variety of subjects.¹⁹¹ It may be that the Clause justifies a broad anti-corruption statute as fitting comfortably within existing Supreme Court precedents, even those establishing limits, such as *Lopez* and *Morrison*. Indeed, Justice Thomas concurred in *Sabri* on the ground that upholding §666 was justified by existing Commerce Clause precedent.¹⁹² One way of reaching this approach would be to take an extremely broad view of commerce, drawing on the work of academics such as Professor Rose-Ackerman. In this view, the public and private sectors are part of a larger economy, in which different methods are used for the distribution of goods and services. Just as Congress can regulate the private market, a proposition with solid roots in cases such as *Wickard v. Filburn*,¹⁹³ so can it regulate the public sector market in goods and services as part of its overall power. Such a broad concept of the realm of commerce/economic power has considerable theoretical appeal, but may go beyond what either Congress or the Court is willing to consider as that part of the economy that Congress can regulate. It would seem to permit regulation of municipal fees and taxes, for example.

Let us consider a somewhat more narrow, but still encompassing approach. That is the notion that consensual corrupt transactions are a form of payment for government services that Congress can potentially regulate just as it can potentially regulate other

¹⁹¹ *E.g.*, *Champion v. Ames*, 188 U.S. 321 (1903).

¹⁹² *See Sabri*, 124 S.Ct. at 1949-51 (Thomas, J., concurring) (Justice Thomas cited *Perez v. United States*, discussed *infra* in text accompanying notes 181-82).

¹⁹³ *Wickard v. Filburn*, 317 U.S. 111 (1942).

forms of consensual economic transactions. As Professor Henning puts it, in the context of the Hobbs Act, “extortion under color of official right. . . involves a *quid pro quo* exchange of something of value for the exercise—or non-exercise—of governmental power. The corrupt transaction is fundamentally an economic one in which the official seeks to benefit personally from the misuse of authority.”¹⁹⁴ It is instructive that, in *Sabri*, Justice Thomas cited *Perez v. United States*,¹⁹⁵ in which the Court upheld regulation of loan-sharking on the grounds that it was an extortionate credit transaction. An advantage of a Commerce Clause-based anti-corruption statute is that it would seem to dispense with any problems of requiring a showing of an effect on commerce in the particular case, or any other form of jurisdictional requirement such as the receipt of more than \$10,000 in federal assistance in §666. *Perez* is relevant here as well. It is possible to aggregate similar commercial transactions to reach the level of a substantial effect on interstate commerce regardless of the magnitude of any particular one.¹⁹⁶

Nonetheless, there may be problems with the Commerce Clause approach to a general anti-corruption statute. Non-transactional forms of corruption may not be easily reached. The *Perez* analogy may also be flawed in the sense that that case seemed to rest on the proposition that Congress could reach the legal market in credit transactions. Therefore, it could reach the illegal market in extortionate credit transactions. As discussed above, there is doubt whether Congress could regulate, for example, fees

¹⁹⁴ Henning, *supra* note 57, at 134. Professor Henning argues that Congress could have enacted §666 under its Commerce Power. *Id.* at 123. He perhaps takes a broader view of corruption as commerce than the *quid pro quo* language cited above would suggest. “Corruption is largely an economic offense; it is not a crime of violence or one with only an attenuated commercial effect. Misuse of governmental authority enriches both office holders and those offering bribes because it is likely to result in a misallocation of governmental resources.” *Id.*

¹⁹⁵ *Perez v. United States*, 402 U.S. 146, 154 (1971).

¹⁹⁶ The classic aggregation case remains *Wickard v. Filburn*, 317 U.S. 111 (1942). For a discussion of aggregation versus jurisdictional elements, see Brown, *Constitutionalizing*, *supra* note 37, at 1109-17.

charged by municipalities for building permits. There are also lingering doubts about possible limits flowing from *Lopez* and its heightened concern for federalism when the Commerce Clause is used for regulation of matters far outside the classic view of the economy that Justice Thomas advanced, albeit alone, in that case.¹⁹⁷ Finally, it is worth noting that Congress has never adopted an all-encompassing view of commerce as justifying anti-corruption legislation. Rather, it has relied on jurisdictional elements requiring an effect on commerce in the individual case or use of a channel of interstate commerce such as travel.¹⁹⁸

C. Corruption as a Civil Rights Problem—a Possible Role for the Fourteenth Amendment

Corruption, especially in a local government, can be viewed as a form of deprivation of civil rights.¹⁹⁹ Corruption often leads to a skewing in the provision of goods and services, frequently to the detriment of minority communities. In addition, local corruption is often the product of political entrenchment. Again, there is the possibility that discrete and insular groups will suffer harm at the hands of “their government.” Any such analysis suggests the possibility of a role for the Fourteenth Amendment.²⁰⁰ That Amendment is aimed at protecting minorities, and has always been recognized by the Court as altering the federal-state balance.²⁰¹ Moreover, it contains an explicit authorization to Congress to enact “appropriate” legislation, thus putting it on a

¹⁹⁷ *Lopez*, 514 U.S. at 584-602 (Thomas, J., concurring). Justice Thomas stated, “Clearly, the Framers could have drafted a Constitution that contains a ‘substantially affects interstate commerce’ Clause had that been their objective.” *Id.* at 588. He also stated that “In an appropriate case, I believe that we must further reconsider our ‘substantial effects’ test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence.” *Id.* at 585.

¹⁹⁸ *E.g.*, The Travel Act, 18 U.S.C. § 1952 (2000).

¹⁹⁹ For a discussion of the civil rights rationale, see Brown, *Unanswered Question*, *supra* note 6, at 489-91.

²⁰⁰ U.S. CONST. amend. XIV.

²⁰¹ *E.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

par with the enumerated powers of §1.²⁰² (The fact that the Guarantee Clause contains no such authorization may be an additional problem in viewing it as a possible source of anti-corruption legislation).

There are, however, obvious problems, especially given current Fourteenth Amendment doctrine. The Amendment clearly contemplates, or establishes the existence of, rights of which states may not deprive their citizens.²⁰³ The Constitution does not explicitly provide a right to good government. The major current battle within Fourteenth Amendment doctrine is the extent to which Congress can create statutory rights to supplement those that can be found in the Constitution.²⁰⁴ The Court has affirmed that federalism plays a role in evaluating legislation based on the amendment. It has apparently focused on a test which requires the core existence of a constitutional right, a widespread degree of state violation of that right, and remedial mechanisms which are “congruent” and “proportional” to the deprivation.²⁰⁵ A case can be made that corruption fits this model, but it is not an easy one. The argument starts from the fact that certain forms of corruption implicate constitutional rights. Patronage practices can constitute First Amendment violations.²⁰⁶ Deprivations of due process might be found in

²⁰² U.S. CONST. amend. XIV, § 5.

²⁰³ In this respect, the key language of the Amendment is that providing that “no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” *Id.* at § 1.

²⁰⁴ *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

²⁰⁵ *See id.* at 519-20. In *City of Boerne*, Justice Kennedy stated that “While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.” *Id.*

²⁰⁶ *E.g.*, *Elrod v. Burns*, 427 U.S. 347 (1976).

some cases.²⁰⁷ Certainly Congress would be justified in taking the additional step of concluding that corruption is widespread in states and localities. However, it is doubtful that a broad-based anti-corruption statute would satisfy current notions of congruence and proportionality. This is probably a discussion that can be left for another day, but it does highlight the importance of being able to rely on a constitutional provision that contemplates federal intervention in state affairs to achieve a broad national goal. If one of the lessons of the 2003 Term is that corruption trumps federalism, then the Fourteenth Amendment rationale may well prove worth reexamination.

D. The Spending Power Revisited

Perhaps one may justify §666, and an even broader anti-corruption statute, on Spending Power grounds different from those set forth in *Sabri*. As stated previously in this article, why not let Congress say that its objective is to prevent corruption rather than hide behind the protection of federal funds? An alternative approach to outlawing corruption in entities, governmental or not, receiving federal funds would be based on the work of scholars such as Professor Hills who view the system of substantial federal aid to governments as creating an “intergovernmental marketplace” in which the national government enlists states, localities and other entities as partners in the provision of goods and services.²⁰⁸ As Professor Hills puts it “there is a vigorous intergovernmental marketplace in which municipalities, counties, and states—like private organizations and persons—compete with each other for the chance to obtain federal revenue. Therefore,

²⁰⁷ See ABRAMS & BEALE, *supra* note 7, at 555-60 (citing and discussing possible examples of corruption as deprivations of federal rights); see also Brown, *Unanswered Question*, *supra* note 6, at 486-87 (discussing equality issues). This analysis does not discuss the possibility of corruption issues in “class of one” cases.

²⁰⁸ See generally, Roderick M. Hills, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813 (1998).

whenever the national government values such services enough to pay nonfederal governments the costs of providing them, the national government can obtain the cooperation of state or local governments in implementing federal law.”²⁰⁹ Thus it might follow that the federal government has the power to establish the “rules of the game,” perhaps to achieve greater efficiency, perhaps to ensure that the complex set of partnerships it has created is run according to national values.²¹⁰ In theory, the presence of choice—the possibility of opting out—justifies the imposition of requirements on recipients including a criminal provision such as §666. It is not a condition for any specific grant, but it is a general rule applicable to the entire system. Perhaps there is less choice, since a recipient would have to opt out of the entire system, rather than any particular grant, to avoid the statute: I do not mean to impute support for this approach to Professor Hills. (He has noted, for example, that the federal interests in protecting the integrity of the mails or of federal grants can easily turn into “sheer formalities.”²¹¹ Perhaps the same thing would happen to the “rules of the intergovernmental system” rationale.) One would have to think through the implications of any such rationale. Perhaps it would take us too far—to the point feared by Professor Garnett where the view prevails that Congress can spend for the general welfare and can then adopt any law that is necessary and proper to further the general welfare.²¹² I recognize the problem of limits. The challenge for the nationalist perspective is to lay the basis for a general anti-corruption statute without reaching into all aspects of state and local governments. If the Spending Power is to be used to support a general anti-corruption statute, the challenge is

²⁰⁹ *Id.* at 819.

²¹⁰ These might be the values the Professor Hills has characterized as “bureaucratic populism.” Hills, *Corruption*, *supra* note 48, at 13.

²¹¹ *Id.* at n.75.

²¹² Garnett, *supra* note 78, at 82.

both to justify that role openly and to keep alive the prospect of some limits. Perhaps “protecting federal funds” serves these ends as well as any alternative rationale. At the very least, however, it must be recognized that there are cases of corruption in which that end is simply not served.

Conclusion

During the 2003 Term, the Supreme Court issued two important decisions aimed at keeping corruption out of government: *McConnell v. FEC* and *Sabri v. United States*. *McConnell* got all the publicity, but *Sabri* is just as significant. It not only validated a sweeping reading of the federal program bribery statute (18 U.S.C. §666), *Sabri* focused on protecting the integrity of state and local governments as the means of protecting federal funds. The case thus stands as an affirmation of the federal role in prosecuting state and local officials for political corruption.

In this Article, I have raised the recurring question whether the prosecutions are consistent with the Supreme Court’s New Federalism. A strong argument can be made that they are not, but the Court has established that its anti-corruption imperative trumps federalism. If *Sabri* represents a victory for the nationalist view on corruption prosecution, the question remains whether the Spending Power—coupled with the notion of protecting federal funds—is the best route to get there. There are alternative constitutional and statutory possibilities for a general anti-corruption statute. *Sabri*’s greatest strength may be that it takes us to the point where we can deal with the matter openly.