Notre Dame Law Review

Volume 73 | Issue 1 Article 16

6-1-1999

Freedom is a Theme Only

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ARTICLES

STEALTH STATUTE—CORRUPTION, THE SPENDING POWER, AND THE RISE OF 18 U.S.C. § 666

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This case involves the diversion of over $2,300,000.00, and the time and efforts of police personnel, from the primary functions of the police department, i.e., the protection of the public, the enforcement of the laws, and the apprehension of law-breakers. . . .

Not only did the defendant misapply, convert and embezzle funds, and engage in a course of fraud and deception, evidence at trial also established that he diverted police personnel from their responsibilities to the public in order to provide inordinate security to the mayor and his relatives, and to assist the Chief himself in his own personal business and affairs. The effect of these diversions of money and personnel from their proper purposes and activities must necessarily have had an adverse effect on the police department's ability to prevent, detect, investigate and prosecute criminals and to apprehend malefactors.

The City of Detroit is a tortured city. It is at times almost under a state of siege by criminals, who have in many instances utterly no regard for human life, and who prey upon the good citizens of the community and devastate and destroy their neighborhoods.

In the face of that situation this defendant, the top law enforcement officer of the City of Detroit, elected to use the Secret Service Fund, a fund dedicated by the people's representatives to be used to fight organized crime, to combat the narcotics traffickers whose operations are a cancer on the residential neighborhoods of Detroit, and to conduct undercover operations so vitally necessary to effec-

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> tive law enforcement, for his own corrupt purposes. Such conduct was more than reprehensible. It was absolutely shameful. . . .[1]

The Chief's acts may well have been shameful, but do they rise to the level of a federal case? He was convicted in federal court of violating 18 U.S.C. § 666,[2] sometimes referred to as the "federal program bribery provision."[3] This may seem surprising, since the case involved neither bribery nor federal funds. In fact, it is a typical example of one of the most extraordinary recent developments in federal anti-corruption law: the rise of § 666 and its movement toward the status of a general federal prohibition of corruption at the state and local levels.[4] Section 666 warrants the term "stealth statute." Its explosive development has generated little academic commentary.[5] The lower federal courts have seen few problems with it. Yet the statute's current status is in serious conflict with the Supreme Court's concerns for dual sovereignty and state autonomy.[6]

At the heart of the matter is a broad law passed to deal with a narrow problem.[7] Section 666 applies when governmental or other entities receive more than ten thousand dollars in federal benefits within one year. It prohibits three basic forms of criminal activity: embezzling, stealing, and similar misappropriations of five thousand dollars or more worth of property of the recipient entity; corrupt solicitation or acceptance by entity agents of anything of value in connection with matters involving five thousand dollars or more; and, corrupt offers to such agents in connection with such matters. Conspicuously absent from these crimes is any requirement that the

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1 United States v. Hart, 803 F. Supp. 53, 66–67 (E.D. Mich. 1992), *aff'd*, 70 F.3d 854 (6th Cir. 1995).

2 18 U.S.C. § 666 (1994).

3 NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 233 (2d ed. 1993); *see also id.* at 226 & 243 n.a.

4 *See id.* at 243–53 (discussing failure to enact a general federal statute); *see also* Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 206-08 (1994) (criticizing proposed federal legislation).

5 The principal discussion of the statute is Daniel N. Rosenstein, Note, *Section 666: The Beast in the Federal Criminal Arsenal*, 39 CATH. U. L. REV. 673 (1990); *see also* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 90–91 (1994); Michael W. Carey et al., *Federal Prosecution of State and Local Officials: The Obstacles to Punishing Breaches of the Public Trust and a Proposal for Reform, Part One*, 94 W. VA. L. REV. 301, 329–31 (1992); Jay M. Green, Note, *Criminal Law—Does 18 U.S.C. § 666 Apply to the Corrupt Solicitation of Political Services in Exchange for Municipal Jobs?*, 37 VILL. L. REV. 1033 (1992).

6 *See e.g.*, Printz v. United States, 117 S. Ct. 2365 (1997); Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028 (1997); United States v. Lopez, 115 S. Ct. 1624 (1995).

7 *See infra* text accompanying notes 217–78.

property or transaction in question involve federal funds. Yet the purpose of the statute was to protect these funds, specifically to give them greater protection than they enjoyed under prior law.[8]

Congress enacted § 666 in 1984. Perhaps because of narrow legislative intent the statute did not play a major role for the first several years of its existence. A 1990 commentary found limited case law,[9] while at the same time noting the statute's "potentially limitless scope."[10] Subsequent developments have borne out the wisdom of the latter observation, while relegating the former to a historical footnote. From enactment to 1990 the statute generated nine reported cases according to that study.[11] From 1991–1996 the total jumped to over sixty.[12] Furthermore, reported cases are only the tip of the iceberg.[13]

What accounts for this extraordinary development? In the past, federal prosecutors may have been uncertain about the new law's scope, or hesitant to put it to broad uses. The unanswered question was whether the courts would apply the statute narrowly—either in accordance with the most natural reading of the legislative history,[14] or out of respect for principles of federalism[15]—or in the sweeping fashion that the language invites. In *United States v. Westmoreland*,[16] a key early decision, the Court of Appeals for the Fifth Circuit gave a clear green light. For that court, the way to protect federal funds in the hands of a local government was to take a broad approach that covered any transaction that the statute could reach, regardless of

8 *See* S. REP. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510; *see also* Rosenstein, *supra* note 5, at 673.

9 *See* Rosenstein, *supra* note 5, at 690.

10 *Id.* at 674.

11 *See id.* at 696 nn.225–226. There appear to be seven cases decided between 1989–90 that are not listed in this note.

12 This calculation is based on cases published in the Federal Reporter and Federal Supplement. A case is counted each time § 666 was the basis of all or part of the indictment.

13 *See* Carey et al., *supra* note 5, at 330 (stating that 49 persons had been convicted and sentenced under this statute in the previous five years in the Southern District of Mississippi alone).

14 In general, the legislative history supports a narrow construction. However, portions of it do support a broader reading. *See infra* text accompanying notes 245–76.

15 *See* Gregory v. Ashcroft, 501 U.S. 452 (1991) (relying on federalism grounds to narrow the scope of the Age Discrimination and Employment Act as applied to appointed state judges); McNally v. United States, 483 U.S. 350 (1987) (placing limits on the prosecution of corruption under the mail fraud statute, partially on federalism grounds).

16 841 F.2d 572 (5th Cir. 1988).

whether that particular transaction involved federal funds.[17] This approach would spare the federal government the need to trace its funds in a particular case.[18] More fundamentally, the court viewed the statute's general approach as one of "preserv[ing] the integrity of federal funds by assuring the integrity of the organizations or agencies that receive them."[19] *Westmoreland* remains the touchstone case for those who wish to apply § 666 broadly and literally.[20]

Not all courts have been as eager to embrace § 666. As the volume of prosecutions has risen, so have the expressions of concern. Recently, a district judge felt compelled to remind the government that § 666 is not a general anti-corruption statute.[21] Some courts have nibbled around the edges of the statute, taking a narrow view of who is an "agent" of the recipient entity,[22] or what constitutes a federal benefit that triggers the statute.[23] On a more fundamental level, while federalism-based constitutional attacks have failed,[24] some courts have shown a willingness to look for federal funds, or at least a possible impact on federal funds,[25] before applying the statute.[26]

The Supreme Court has granted *certiorari* in *Salinas v. United States*,[27] a case raising the latter issue. A decision could be the source of considerable guidance, although it may not be necessary to con-

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17 *Id.* at 576.

18 *Id.* at 577.

19 *Id.* at 578.

20 *See, e.g.*, United States v. Foley, 73 F.3d 484, 495 (2d Cir. 1996) (Lumbard, J., dissenting).

21 *See* United States v. Frega, 933 F. Supp. 1536, 1540 (S.D. Cal. 1996). *See also* United States v. Marmolejo, 89 F.3d 1185, 1203–04 (5th Cir. 1996) (Jolly, J., dissenting), *cert. granted sub nom.*, Salinas v. United States, 117 S. Ct. 1079 (1997).

22 *See* United States v. Ferber, 966 F. Supp. 90 (D. Mass. 1997).

23 *See* United States v. Wyncoop, 11 F.3d 119, 122 (9th Cir. 1993).

24 *See* United States v. Cantor, 897 F. Supp. 110 (S.D.N.Y. 1995); United States v. Bigler, 907 F. Supp. 401 (S.D. Fla. 1995).

25 *See Frega*, 933 F. Supp. at 1542; *cf. Foley*, 73 F.3d at 490 (indicating importance of possible impact on federal funds).

26 *See Foley*, 73 F.3d at 490.

27 117 S. Ct. 1079 (1997). The question relevant to this article on which the Court granted *certiorari* is as follows: "What kind of cases involving state employees are subject to prosecution under the Federal Bribery Statute, 18 U.S.C. Section 666? Do such cases include cases where no federal funds are disbursed or impinged?" Salinas v. United States, 117 U.S. 1709 (1997), *petition for certiorari* at i. The court also granted *certiorari* on an important question concerning the scope of RICO conspiracies. *Id.* at ii.

sider the outer limits of § 666, given the substantial federal interest present in the case.[28]

However the Court resolves *Salinas*, major issues are certain to remain. It is important to remember that § 666 represents an exercise of the spending power.[29] Even the current "conservative" Court, generally solicitous of state concerns, has recognized that this power permits Congress to exercise greater authority over states than it could through the exercise of regulatory powers.[30] Exercises of the power to spend for the general welfare have great potential to alter the federal-state balance, as several significant articles have pointed out.[31] Yet it is easier to state the need for limits on the power than to formulate them. Difficulties in curbing the scope of § 666 are closely linked to problems in delineating the scope of the power upon which it rests. Moreover, the entire landscape of federal-state relations is undergoing a seismic transformation. Devolution, block grants, reduced federal mandates, and other forms of "new federalism"[32] raise serious questions about federal anti-corruption efforts.[33]

These questions may be particularly difficult when federal funds are involved. Should courts approach § 666 with a hands-off attitude, on the theory that the monies have devolved to the recipient, or does the possibility that federal funds may be even harder to trace call for greater vigilance in efforts to "protect" them?[34]

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28 *Salinas* involves the receipt of bribes by county officials for conjugal visits to a federal prisoner housed in the county jail under an intergovernmental agreement. Because the federal government is paying for the housing of a federal prisoner, there seems a clear federal interest in the conditions of confinement. *See infra* text accompanying notes 310–42.

29 U.S. CONST. art. I, § 8, cl. 1.

30 *See* New York v. United States, 505 U.S. 144, 158–59(1992); South Dakota v. Dole, 483 U.S. 203 (1987); *see also* National League of Cities v. Usery, 426 U.S. 833, 852 n.17 (1976) (leaving spending power issue open while limiting commerce power).

31 *See* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911 (1995); Lewis B. Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979); Thomas McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85.

32 *See, e.g.*, Wilfred McClay, *A More Perfect Union? Toward a New Federalism*, COMMENTARY, Sept. 1995, at 28, 29–30; Richard C. Reuben, *The New Federalism*, A.B.A. J., Apr. 1995, at 76; *see generally*, Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements and Federalism: A Conceptual Map of Contested Terrain*, 14 YALE L. & POL'Y REV. 297 (1996).

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

34 *See* United States v. Dransfield, 913 F. Supp. 702, 710–11 (E.D.N.Y. 1996) (block grant mechanism justifies broad approach to § 666).

This Article addresses the important questions raised by § 666. I propose answers, but recognize that they are tentative at this stage of development of the statute. There is no Supreme Court decision construing it, and a dearth of guidance in the literature.[35] Still, § 666 cannot remain in academic obscurity. It is rapidly becoming one of the federal prosecutors' principal weapons in the fight against state and local corruption. The rise of § 666 forces a hard look at these efforts, at the role of the spending power as a constitutional underpinning of them, and, ultimately, at the allocation of political power in our federal system. The current Supreme Court's emphasis on the concept of "dual sovereignty"[36] indicates a willingness to return to "first principles"[37] in considering this general issue.

Part I of the Article reviews briefly the federal role in prosecuting state and local corruption. After examining the legitimacy of federal interest in the subject, it focuses on exercises of national regulatory powers, such as that over commerce,[38] and considers recent decisions such as *Printz v. United States*[39] and *United States v. Lopez*.[40] Especially after *Printz*, national control over state and local officials is suspect. Federal authority to prosecute those officials cannot be taken for granted. Part II considers the special case of the spending power, both as a source of federal authority generally and as the basis of increasing anti-corruption prosecutions. Part III examines § 666 itself and traces the rise in decided cases. Part IV considers the possibility of establishing limits to the statute. This Part focuses on the statute as an exercise of the spending power and considers constitutional approaches, such as those formulated in the context of grant-in-aid programs, and statutory approaches, such as the clear statement rule. I treat the *Salinas* case[41] at some length. My contention is that the case gives the Court the opportunity to formulate limits, although they may not apply to defeat prosecution in that instance. Part V examines two other problems that may grow in importance as § 666 grows in use. The first is whether § 666 covers gratuities offenses as well as bribery.

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35 Rosenstein, *supra* note 5, is a thorough early treatment of the issues. For brief discussions of the statute, see ABRAMS & BEALE, *supra* note 3, at 233; Engdahl, *supra* note 5, at 90–91.

36 Printz v. United States, 117 S. Ct. 2365, 2376 (1997) (quoting Gregory v. Ashcroft, 502 U.S. 452, 457 (1991)).

37 United States v. Lopez, 115 S. Ct. 1624, 1626 (1995).

38 *See* U.S. CONST. art. I, § 8, cl. 3.

39 117 S. Ct. 2365 (1997).

40 115 S. Ct. 1624 (1995).

41 United States v. Marmolejo, 89 F.3d 1185 (5th Cir. 1996), *cert. granted sub nom.*, Salinas v. United States, 117 S. Ct. 1079 (1997).

I conclude that it does not, despite Second Circuit precedent to the contrary.[42] Secondly, I consider whether the statute's general prohibition of theft or embezzlement of, obtaining by fraud, or misapplication of property of five thousand dollars contains the potential to become another federal "honest services" statute.[43] I find evidence of this potential in several of the cases and argue against any such development. This particular argument for limits is an example of the Article's broader thesis: § 666, like the spending power upon which it is based, has great potential to upset the federal-state balance through broad application. In each case, the task is to impose limits, based in federalism, upon a very broad text, while mindful of the important role of federal prosecutions.

I. THE FEDERAL ROLE IN PROSECUTING STATE AND LOCAL CORRUPTION—THE CONTROVERSY AND ITS STATUS

Prosecuting state and local corruption is an important activity of United States Attorneys across the country. This major federal law enforcement priority emerged in the early 1970s[44] and continues unabated.[45] Sub-national officials from governors[46] to sewer inspectors[47] have stood in the federal dock. Many observers of the national judicial system view these prosecutions as part of the distinctive mission of the federal courts.[48] At the same time, these activities are a source of controversy and tension. They pose difficult problems, with respect to

42 *See* United States v. Crozier, 987 F.2d 893, 899 (2d Cir. 1993); *see also infra* text accompanying notes 472–508.

43 18 U.S.C. § 1346 (1994). *See generally* Brown, *supra* note 33, at 244–48 (discussing the role of the honest services doctrine and the mail fraud statute in the prosecution of state and local corruption).

44 *See* Andrew T. Baxter, *Federal Discretion in the Prosecution of Local Political Corruption*, 10 PEPP. L. REV. 321, 323 n.13 (1983).

45 As of December 31, 1994 there were 2,090 state and local officials awaiting trial for abuse of public office. *See* U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1995, 533 (Kathleen Maguire & Ann L. Pastore eds., 1996). Additionally, between 1973 and 1994, 6,435 state and local officials were indicted on federal charges. *See id*; *see also* Moohr, *supra* note 4, at 154 (citing earlier figures on federal prosecutions of state and local officials).

46 *See* United States v. Mandel, 591 F.2d 1347, 1352 (4th Cir. 1979) (prosecution of Governor Marvin Mandel of Maryland), *aff'd en banc*, 602 F.2d 653 (4th Cir. 1979); United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974) (prosecution of Governor Otto Kerner of Illinois).

47 *See* United States v. Garner, 837 F.2d 1404 (7th Cir. 1987).

48 *See, e.g.*, JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 25 (d) (1995).

statutory interpretation,[49] separation of powers,[50] federal-state relations,[51] and, ultimately, the existence and scope of national power.[52] Decisions such as *Printz v. United States*,[53] *United States v. Lopez*,[54] and *New York v. United States*,[55] bring the latter issue to the fore, but broader considerations of federalism predate these cases and their specific issues.[56] Indeed, the whole question of the federal role in fighting state and local corruption can benefit from re-examination.

As a starting point, it is important to recognize that there is no general federal statute dealing with state and local corruption.[57] There have been numerous proposals for such a law, but Congress has not enacted any of them. As a result, federal prosecutors utilize a patchwork approach, relying on an array of statutes whose principal target is not state and local corruption.[58] Most analysts[59] identify four

49 An example of this is *McNally v. United States*, 483 U.S. 350 (1987), which interpreted the mail fraud statute narrowly in an attempt to limit federal prosecutions of state and local officials. Congress subsequently overturned the decision by adding the "honest services" language, thus endorsing a broader interpretation. 18 U.S.C. § 1346 (1994); *see also Evans v. United States*, 504 U.S. 255 (1992), in which the Court divided sharply over construction of the extortion component of the Hobbs Act.

50 In this context, an important problem is the broad nature of prosecutorial discretion. *See* Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV 137, 148 (1990); *see also* Baxter, *supra* note 44, at 336 (contending that delegation of the power to create new federal felonies to prosecutors would be objectionable because of separation of powers concerns); Moohr, *supra* note 4, at 178–83 (discussing the implications of prosecutorial discretion on the principle of separation of powers). The respective roles of Congress and the courts in developing the federal criminal law are also an important consideration. *See* Brown, *supra* note 33, at 296–99 (discussing federal common law approach to development of honest services doctrine).

51 *See* Baxter, *supra* note 44, at 337–38; Moohr, *supra* note 4, at 175–76; Williams, *supra* note 51, at 153–57.

52 *See* Brown, *supra* note 33, at 227 (discussing the role of internal and external limits on federal power).

53 117 S. Ct. 2365 (1997).

54 115 S. Ct. 1624 (1995).

55 505 U.S. 144 (1992).

56 Examples of earlier considerations of federalism issues include: Baxter, *supra* note 44, at 336–43; Charles F. C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1213–14 (1977). Obviously, the decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), sparked interest in the potential for federalism limits on the national government.

57 *See* ABRAMS & BEALE, *supra* note 3, at 248.

58 *See* Baxter, *supra* note 44, at 322 ("Faced with an inadequate statutory basis for prosecuting corrupt local officials, federal enforcement officials began to apply four federal statutes which traditionally had been applied to other forms of criminal activity."); *see also* ABRAMS & BEALE, *supra* note 3, at 243 (stating that pressure exists "for expansive readings of the other federal statutes in question in order to allow federal

principal laws that the national government relies on: the Hobbs Act,[60] the Travel Act,[61] the mail fraud statute,[62] and the Racketeer Influenced and Corrupt Organizations Act (RICO).[63]

I believe it necessary to add two more statutes to the mix. Civil rights crimes, prosecutable under 18 U.S.C. § 242,[64] can cover a wide array of governmental abuses.[65] In *United States v. Lanier*,[66] the Supreme Court showed a surprising receptivity to a broad reading of this statute.[67] The civil rights criminal jurisdiction has the potential to reach beyond its traditional scope, particularly police abuses,[68] to a range of state and local governmental activities.[69]

As this Article contends, 18 U.S.C § 666, should also be added to any list of the basic arsenal. Not only are prosecutors using it more frequently, this statute has a key characteristic in common with those listed above: the capacity for expansion far beyond its original boundaries to embrace a large number of corrupt practices. The absence of a general statute on state and local corruption has led prosecutors to

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prosecution of corruption in state and local government"); Williams, *supra* note 50, at 137 (describing the broad use of the mail fraud statute).

59 *See, e.g.*, Baxter, *supra* note 44, at 332.

60 18 U.S.C. § 1951 (1994).

61 18 U.S.C. § 1952 (1994).

62 18 U.S.C. § 1341 (1994). Analysis of the mail fraud statute generally includes the wire fraud statute, 18 U.S.C. § 1343 (1994), as well.

63 18 U.S.C. § 1961 (1994). For a general discussion of these statutes see Baxter, *supra* note 44, at 330–33.

64 18 U.S.C. § 242 (1994). The statute is directed primarily at deprivation under color of law of "any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . ." *Id.*

65 *See* ABRAMS & BEALE, *supra* note 3, at 580–614 (discussing the civil rights statute and the cases applying it). The two other basic civil rights criminal statutes are 18 U.S.C. § 241 ("Conspiracy against rights") and 18 U.S.C. § 245 ("Federally protected activities").

66 117 S. Ct. 1219 (1997). *Lanier* involved prosecution of a state judge under § 242 for sexual harassment of litigants and court employees and applicants for jobs.

67 *See id.* at 1225 ("[t]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal").

68 *See, e.g.*, Screws v. United States, 325 U.S. 91 (1945); United States v. Koon, 833 F. Supp. 769 (C.D. Cal. 1993), *aff'd in part, vacated in part*, 34 F.3d 1416 (9th Cir. 1994), *aff'd in part, rev'd in part*, 116 S. Ct. 2035 (1996); Indictment, United States v. Robinson, No. 97-10059-DPW (D. Mass. 1997) (on file with author); *see also* JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 25 (e) (1995).

69 *See* ABRAMS & BEALE, *supra* note 3, at 598–603. In *United States v. Senak*, 477 F.2d 304, 308–09 (7th Cir. 1973), the Seventh Circuit, under § 242, upheld the indictment of a public defender who exacted money from impoverished clients.

"push the envelope" with individual laws in an effort to make the statute fit the crime.[70] The most widely cited example of this phenomenon is the mail fraud statute.[71] Professor, now Dean, Gregory Williams contends that the federal government "us[es] the mail fraud statute to develop an *ad hoc* Federal Code of Political Conduct."[72] Section 666 has the potential to generate similar developments.

Many critics of these efforts view them as presenting a serious separation of powers problem.[73] Under this view, Congress is no longer making the law applicable to state and local corruption cases. Instead, "the law" becomes what individual United States Attorneys decide to prosecute,[74] along with decisions by federal judges and juries in particular cases. Recently, Professor Dan Kahan has challenged the validity of such attacks.[75] He makes his defense of "federal common law crimes"[76] in the context of federal criminal law in general, but it applies with special force to anti-corruption cases, where the practice may have reached its zenith.[77] Professor Kahan argues forcefully that this kind of delegated lawmaking can further congressional intent and lead to greater efficiency.[78] For him, the key question becomes whether to vest interpretative discretion in individual United States Attorneys or in the Justice Department.[79]

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70 *See* Ruff, *supra* note 56, at 1228. As Charles Ruff puts it, "Like Nature, the federal prosecutor abhors a vacuum. Given a statutory grant of jurisdiction, he will seek to bring within it any offense he finds unattended or even, in his view, inadequately attended." *Id.*

71 *See, e.g.*, Moohr, *supra* note 4.

72 Williams, *supra* note 50, at 157.

73 *See* Baxter, *supra* note 44, at 336; Moohr, *supra* note 4, at 178–83; Williams, *supra* note 50, at 148.

74 *See* Williams, *supra* note 50, at 144 ("They [prosecutors] are constantly defining and redefining the meaning of fraud as they choose offenders").

75 Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996) [hereinafter, Kahan, *Federal Criminal :Law*]; Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347 [hereinafter, Kahan, *Lenity*].

76 Kahan, *Federal Criminal Law*, *supra* note 75, at 471.

77 *See* Brown, *supra* note 33, at 277–80 (discussing "federal common law" and the rise of anti-corruption cases under the mail fraud statute).

78 Kahan, *Lenity*, *supra* note 75, at 425–26 ("Delegated lawmaking reduces the cost of making criminal law . . . [and] also enhances the effectiveness of the criminal law by preventing the under-inclusivity associated with excessive legislative specification of criminal prohibitions.").

79 Kahan, *Federal Criminal Law*, *supra* note 75, at 488–89 (discussing how to "[i]mprove the content of federal criminal law by shifting to the Justice Department the delegated lawmaking powers now exercised jointly by courts and individual prosecutors.").

It is important to recognize the separation of powers dimensions of the debate over federal anti-corruption efforts. One's view of this matter will affect how strongly one feels about limiting the scope of particular laws, for example, through utilization of the rule of lenity.[80] Moreover, this is an area, among others, where separation of powers and federalism work together to constrain the exercise of national power over the states.[81] Of the two, however, the federalism dimensions of the matter are far more serious.

As Charles Ruff puts it, federal anti-corruption prosecutions represent "perhaps the most sensitive area of potential federal-state conflict . . . ."[82] This is a widely shared view,[83] which the Supreme Court has also expressed,[84] although not yet in a constitutional opinion striking down a federal initiative. The major theme of these criticisms is that federal prosecution of state officials for the way in which they govern strikes at the heart of state "autonomy,"[85] especially the states' ability to control their own political processes.[86] What is particularly interesting about the federalism critique is that it arose during a period when the status of federalism as a judicially enforceable constitutional value was uncertain. The short reign of *National League of Cities v. Usery*,[87] with its concept of state sovereignty in specified zones, was

80 *Compare* Dixson v. United States, 465 U.S. 482, 511 (1984) (O'Connor, J., dissenting) ("Finally, I think it especially inappropriate to construe an ambiguous criminal statute unfavorably to the defendant when the construction that is adopted leaves the statute as unclear in its coverage as the bare statutory language") *with* Kahan, *Lenity*, *supra* note 75, at 397 ("Lenity is completely unnecessary to assure the fair and predictable administration of criminal justice").

81 *See* United States v. Bass, 404 U.S. 336, 349–50 (1971) (construing the statute narrowly to preserve the role of states in the "federal-state" balance).

82 Ruff, *supra* note 56, at 1172.

83 *See* Moohr, *supra* note 4, at 155–56. ("Mail fraud prosecutions for political corruption . . . conflict with a fundamental principal of federalism by diminishing state and local autonomy and threatening other constitutional provisions."); *see also* Charles N. Whitaker, Note, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach*, 78 VA. L. REV. 1617 (1992); Williams, *supra* note 50, at 153–57.

84 *See* McNally v. United States, 483 U.S. 350, 356–60 (1987) (attempting to limit mail fraud prosecutions based in part on federalist premises); *see also* Evans v. United States, 504 U.S. 255, 290–94 (1992) (Thomas, J., dissenting); *Dixson*, 465 U.S. at 501–12 (O'Connor, J., dissenting).

85 *See* Baxter, *supra* note 44, at 337; Moohr, *supra* note 4, at 157–58.

86 *See* Williams, *supra* note 50, at 154. As Professor Williams states: "the growing divergence of views between federal and state governments on criminal justice issues may revive questions about the role of the federal government in establishing ethical standards for the states." *Id.*

87 426 U.S. 833 (1976). *National League of Cities* was overturned by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

precarious at best. Recent decisions of the Supreme Court, such as *Printz*,[88] *Lopez*,[89] and *New York*,[90] suggest that federalism-based critiques of national anti-corruption efforts need to be taken even more seriously.

Before considering the force of these critiques, it is helpful to ask why the federal government cares about state and local corruption and from what source it derives its power to act on the matter. Should a case like *United States v. Hart*[91] end up in federal court? Understanding the extent and force of national interests helps to place in perspective questions of national power as well as possible limits on it.[92] The most frequent contention is that the federal government should step in when state and local officials are unable or unwilling to act because of possible corruption in their own ranks.[93] Such circumstances do arise, but the justification begs the question why the federal government cares in the first place.[94] Perhaps the national government is concerned with the honest functioning of state government as a form of civil rights of citizens that it is obliged to protect.[95] The quote from *Hart* about Detroit as a "tortured" city[96] suggests a failure of local governments to protect basic rights to life, safety, and prop-

88 117 S. Ct. 2365 (1997).

89 115 S. Ct. 1624 (1995).

90 505 U.S. 144 (1992).

91 803 F. Supp. 53 (E.D. Mich. 1992), *aff'd*, 70 F.3d 854 (6th Cir. 1995).

92 *But see* ABRAMS & BEALE, *supra* note 3, at 48 (questioning the correlation between constitutional doctrine and scope of national interest). I recognize that the distinction is somewhat formalistic, particularly when interest and power may merge. *See* Baxter, *supra* note 44, at 342.

93 *See, e.g.*, Baxter, *supra* note 44, at 322 (discussing the unwillingness of state and local law enforcement agencies to pursue corruption); Carey et al., *supra* note 5, at 331 ("[S]tate and local entities, for a multitude of reasons, are ill-equipped to police themselves."); Rory K. Little, *Myths and Principles of Federalism*, 46 HASTINGS L.J. 1029, 1077–80 (1995) (proposing a requirement of particularized inquiry into the effectiveness of state and local action); Whitaker, *supra* note 83, at 1623 ("[F]ederal prosecutors must intervene . . . when the local authorities, for political or other reasons, are otherwise unwilling to prosecute.").

94 *See, e.g.*, Brown, *supra* note 33, at 241; Ruff, *supra* note 56, at 1314. Professor Williams questions the need for the federal government to step in based on the alternate ground of growing state professionalism. Williams, *supra* note 50, at 155.

95 *See* Williams, *supra* note 50, at 155 ("The second reason, often articulated as the basis for federal intervention to control state and local corruption, is that the federal government has a special constitutional obligation to ensure that states are free of political corruption and managed on a fair and non-partisan basis"); *see also* Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367 (1989).

96 803 F. Supp. at 67.

erty. The Guarantee Clause[97] may justify federal intervention to rectify such failures.[98] Alternatively, one can take the view that governmental corruption at any level threatens public confidence at all levels. Thus, the federal government is protecting itself.[99] Indeed, the national government has an interest in healthy state governments both to preserve balance in the federal system and to ensure that subnational governments continue to serve as a talent pool for its own ranks.[100]

In terms of general federal interests, there may well be instances of state and local corruption that affect segments of the national economy, such as the securities market.[101] Certainly a widespread economic failure of local governments would have national repercussions. Massive embezzlements like those found in *Hart* may contribute to local fiscal instability. It is possible that the case for federal intervention is strengthened by the fact that many of the federal laws in question are not aimed at state and local corruption *per se*, but at crimes that Congress wanted to punish whenever they occur, usually because of an effect on commerce.[102] These laws regulate private

97 U.S. CONST. art. IV, § 4. "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." *Id.*

98 For an extensive historical and doctrinal development of the Guarantee Clause rationale, see Kurland, *supra* note 95.

99 *See, e.g.*, Baxter, *supra* note 44, at 322 ("[c]orrupt schemes at the state and local level . . . [were] at least as corrosive of the governmental process as corruption at the federal level." (quoting Thomas H. Henderson, Jr., *The Expanding Role of Federal Prosecutors in Combating State and Local Political Corruption*, 8 CUMB. L. REV. 385, 386 (1977))). Professor Williams accepts this premise, but would require that more specific statutes be enacted. Williams, *supra* note 50, at 155–56; *see also* Brown, *supra* note 33, at 241.

100 *See* Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1574 (1994); *see also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 185–86 (3d ed. 1996) (citing Professor Jesse Choper's argument that federal officials' experience in state and local office ensures responsiveness to concerns of those levels of government).

101 *See, e.g.*, United States v. ReBrook, 837 F. Supp. 162 (S.D. W. Va. 1993) (indicting the state lottery attorney for wire fraud and insider trading in violation of securities laws), *aff'd in part*, 58 F.3d 961 (4th Cir.), *cert. denied*, 116 S. Ct. 431 (1995); *see also* Ruff, *supra* note 56, at 1215 (citing United States v. Hall, 536 F.2d 313, 316–18 (10th Cir. 1976)) (noting that federal intervention was reasonable, despite no direct federal impact, in light of the substantial federal interest in questions of retirement security and in the protection of the securities market).

102 *See, e.g.*, The Hobbs Act, 18 U.S.C. § 1951 (1994). "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion . . . shall be fined under this title or imprisoned not more than twenty years, or both." *Id.* at § 1951(a). It must be recognized that Congress may be less concerned with commerce than with using a "jurisdic-

individuals as well as state officials. One cannot ignore, however, the fact that individual federal prosecutors sometimes push these statutes to their limits in order to vindicate perceived federal interests in combating state and local corruption.[103]

It is possible to identify more specific federal interests than those discussed above. Police corruption, for example, can threaten joint federal-state law enforcement efforts and may be directly related to federal crimes such as drug offenses.[104] Perhaps the actions in *Hart* do not present these particular dangers, but police corruption may not be a divisible phenomenon.[105] Charles Ruff suggests the following as "readily identifiable federal interests:"[106] "the safety of federal officers, protection of the mails or of federally insured banks, and defense of the national security, as well as enforcement of the increasing number of federal regulatory schemes."[107] One may also derive "[a] substantial federal interest in the prosecution of local political corruption . . . from [the] resulting interference with federal programs or the improper use of federal funds."[108]

Let us assume that the potential range of federal interests, both general and specific, could justify national intervention to deal with state and local corruption much of the time, while recognizing that there are cases of such corruption in which no national interest is readily identifiable.[109] Federal interest, however, does not necessarily equal federal power. Most federal anti-corruption law, like federal criminal law generally, grew up at a time when the existence of federal authority, particularly under the Commerce Clause,[110] was rarely questioned.[111] Important statutes, such as the Hobbs and Travel

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tional hook" to get at the underlying offense. *See* ABRAMS & BEALE, *supra* note 3, at 34–38 (discussing statutory approaches and proposals for a federal criminal code).

103 *See* ABRAMS & BEALE, supra note 3, at 246–47; Williams, *supra* note 50, at 147 ("U.S. Attorneys are a highly politicized group and their particular views on government affect charging decisions.").

104 *See, e.g.*, Baxter, *supra* note 44, at 339.

105 *See, e.g.*, Ruff, *supra* note 56, at 1218.

106 *Id.* at 1209.

107 *Id.*

108 Baxter, *supra* note 44, at 342.

109 *See, e.g., id.* at 342–43 (discussing the use of RICO to prosecute a traffic court judge for collecting bribes from employees to guarantee their continued tenure and to "fix" traffic tickets); Ruff, *supra* note 56, at 1217 (discussing the role of federal prosecutions in state judiciary corruption).

110 U. S. CONST. art. I, § 8, cl. 3.

111 *See, e.g.*, G. Robert Blakey, *Federal Criminal Law: The Need, Not for Revised Constitutional Theory or New Congressional Statutes, but the Exercise of Responsible Prosecutive Discretion*, 46 HASTINGS L. J. 1175, 1176–77 (1995).

Acts,[112] are based on this source of power. The Supreme Court's 1995 decision in *United States v. Lopez*[113] is a sharp reminder that "[t]he Constitution creates a Federal Government of enumerated powers."[114]

Lopez is a reaffirmation of internal limits,[115] within the Commerce Clause, on exercises of authority over matters deemed to be economic. The *Lopez* majority refused to "pile inference upon inference"[116] to find that possession of guns in or near schools is an economic activity with a significant effect on commerce. The Court, however, left open the mode of analysis under statutes that contain a "jurisdictional element"[117] such as an effect on interstate commerce. The Hobbs[118] and Travel Acts,[119] as well as RICO,[120] all contain such an element or predicate.[121] The mail fraud statute generally requires use of the mails,[122] although courts have applied this predicate liberally.[123] After *Lopez*, it is likely that the jurisdictional prerequisites of criminal statutes, particularly those involving commerce, will be applied more strictly in individual cases.[124]

The civil rights criminal jurisdiction stands on an entirely different footing. Its basis is the Fourteenth Amendment—a constitutional

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112 18 U.S.C. § 1951 (1994); 18 U.S.C. § 1952 (1994).

113 115 S. Ct. 1624 (1995).

114 *Id.* at 1626.

115 *See* STONE ET AL., *supra* note 100, at 190 ("The distinction between internal and external limits, though not always stated in those terms, pervades discussions of Congress' powers.").

116 *Lopez*, 115 S. Ct. at 1634.

117 *Id.* at 1631.

118 18 U.S.C. § 1951 (1994).

119 18 U.S.C. § 1952 (1994).

120 18 U.S.C. § 1961 (1994).

121 A RICO prosecution can be based on multiple predicates involving interstate commerce, combining the commission of acts of "racketeering activity" under statutes containing such a predicate with the presence of an "enterprise engaged in, or the activities of which affect . . . commerce." 18 U.S.C. § 1961-62 (1994).

122 18 U.S.C. § 1341 (1994). In 1994, Congress broadened the statute to include "any private or commercial interstate carrier." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 250006, 108 Stat. 1796, 2087 (codified at 18 U.S.C. § 1341 (1994)).

123 *See* Schmuck v. United States, 489 U.S. 705, 710–15 (1989) (perpetuating the view that the mailing need only have a tangential relation to the scheme). The Court might, of course, tighten this requirement. *See id.* at 723–24 (Scalia, J., dissenting).

124 *See* United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995); United States v. Paredes, 950 F. Supp. 584 (S.D.N.Y. 1996). *But see* United States v. Stillo, 57 F.3d 553 (7th Cir.) (upholding Hobbs Act jurisdiction under a "depletion of assets" theory), *cert. denied*, 116 S. Ct. 383 (1995). For a discussion of the application of the jurisdictional prerequisites of criminal statutes, see Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 40 (1995).

provision not subject to the federalism constraints that played a major role in *Lopez*.[125] One can expect that anti-corruption cases will test the outer boundaries of 18 U.S.C. § 242, particularly after *United States v. Lanier*.[126] Section 242 penalizes deprivation under color of state law "of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . ."[127] In *Lanier*, a unanimous Supreme Court held that the rights in question are not limited to those established in Supreme Court decisions involving facts essentially similar to those present in a particular prosecution.[128] Coming after *Lopez*, *Lanier* seems to be a clear signal that federalism concerns will not hinder the civil rights criminal jurisdiction.[129] If civil suits under 42 U.S.C. § 1983[130] are any guide, an extraordinary range of state and local governmental abuse and misconduct[131] could now be the subject of federal civil rights criminal prosecutions.

As for 18 U.S.C. § 666, the spending power is the source of Congress' authority to enact it.[132] The Supreme Court's 1987 decision in *South Dakota v. Dole*[133] is generally viewed as imposing few constraints on Congress' ability to regulate state governments via the imposition of grant conditions.[134] The question inevitably arises whether, in light of *Lopez*, the Court will take another look at imposing limits on the spending power.[135] A number of conflicting decisions in the lower courts provide it with the impetus to do so.[136] If one treats the crimi-

125 *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (concluding that remedial power under the Fourteenth Amendment overrides a state's Eleventh Amendment immunity).

126 117 S. Ct. 1219 (1997).

127 18 U.S.C. § 242 (1994).

128 *Lanier*, 117 S. Ct. at 1226–28.

129 *See* ABRAMS & BEALE, *supra* note 3, at 581, 598–602 (discussing application of § 242 to extortion on the ground that it is deprivation of property); Brown, *supra* note 33, at 237.

130 42 U.S.C. § 1983 (1994).

131 *See* Lewis v. Sacramento County, 98 F.3d 434 (9th Cir.) (section 1983 action based on high speed chase), *cert. granted* 117 S. Ct. 2406 (1997).

132 *See* United States v. Cantor, 897 F. Supp. 110, 113 (S.D.N.Y. 1995) ("The parties agree that Congress enacted 18 U.S.C. § 666 pursuant to its spending power.").

133 483 U.S. 203 (1987).

134 *See id.* at 212–18 (O'Connor, J., dissenting) (arguing that while the Court's interpretation of the spending power restrictions is correct, the loose application of those restrictions makes them ineffective). For a discussion of the spending power after *Dole*, see Baker, *supra* note 31.

135 *See id.* at 1916 (advocating that the Court "reinterpreted the Spending Clause . . . .").

136 In a recent en banc decision by the Fourth Circuit, a plurality of the court adopted Judge Luttig's dissenting opinion in the panel below. He advocated using

nal sanction of § 666 as analogous to a grant condition, it is possible that a reexamination of the breadth of the spending power will raise serious questions about the scope of that statute.

A final issue for purposes of this section is whether external constitutional limits may play a role in defining the reach of federal anti-corruption efforts. The concept of external limits rests on the supposition that even if the Constitution grants Congress the power to deal with a given subject, exercises of that power may not contravene limits on government activity found elsewhere in the Constitution.[137] Ever since *National League of Cities v. Usery*,[138] the possibility that federalism might constitute such a limit, and that the courts might enforce it, has been the subject of intense debate.[139] The demise of *National League of Cities*[140] appeared to put the subject to rest, but *New York v. United States*[141] rekindled the debate.[142] In *New York*, the Court, emphasizing concepts of state sovereignty and accountability,[143] held that Congress could not "commandeer" the authority of state legislatures to enact a portion of a nuclear waste disposal scheme that was, admittedly, within the general commerce power.

Printz v. United States [144] applies the anti-commandeering principle to state executive branch officials. It represents both an extension of *New York* and a reaffirmation of the concept of dual sovereignty as an external limit on exercises of congressional power. The narrow issue of the use of state law enforcement officers to carry out background checks as part of a federal gun control program served as the occasion for a major pronouncement on the nature of the federal system. According to Justice Scalia, "[t]he Framers' experience under

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Tenth Amendment and coercion principles to invalidate a revocation of funding by the Secretary of Education. Virginia Dep't of Educ. v. Riley, 106 F.3d 559 (4th Cir.) (en banc), *rev'g* 86 F.3d 1337 (4th Cir. 1997). *But see* Magyar v. Tucson Unified Sch. Dist., 958 F. Supp. 1423 (D. Ariz. 1997) (disagreeing with the Fourth Circuit in *Riley*).

137 *See* STONE ET AL., *supra* note 100, at 189–90.

138 426 U.S. 833 (1976).

139 *See* Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority*: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985); Candice Hoke, *Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles*, 21 HASTINGS CONST. L.Q. 489 (1994); Mark Tushnet, *Why the Supreme Court Overruled* National League of Cities, 47 VAND. L. REV. 1623 (1994).

140 *National League of Cities* was overruled by *Garcia v. San Antonio Metropolitan. Transit Authority.*, 469 U.S. 528 (1985).

141 505 U.S. 144 (1992).

142 *See* Hoke, *supra* note 139; *see also* Gregory v. Ashcroft, 501 U.S. 452 (1991) (narrowing the scope of the Age Discrimination in Employment Act as it is applied to appointed state judges).

143 *New York*, 505 U.S. at 175–76.

144 117 S. Ct. 2365 (1997).

the Articles of Confederation had persuaded them that using the states as the instruments of Federal governance was both ineffectual and provocative of federal-state conflict."[145] For the majority, federal commands "to enact or enforce a federal regulatory program . . . are fundamentally incompatible with our constitutional system of dual sovereignty."[146] The concept of dual sovereignty emphasizes both state autonomy and the accountability of state governments.[147]

To the extent that there are external limits on national actions, federal anti-corruption prosecutions of state officials may well trigger them. If one government cannot commandeer the political or executive processes of another, the same considerations of accountability, autonomy, and sovereignty may limit its ability to police those processes.[148] For example, lines of accountability may be blurred if a state's citizens do not know who is guarding the guardians. In anti-corruption prosecutions, federal executive branch officials in federal court utilize federal statutes passed by Congress to hold state officials criminally accountable for their conduct of governmental affairs. The concept of federalism as an external limit might suggest direct constitutional constraints on Congress' ability to pass statutes applicable to state and local officials[149] or at least to produce narrow judicial con-

145 *Id.* at 2377.

146 *Id.* at 2384.

147 *See id.* at 2376–77. One of the problems with external limits analysis is finding direct textual support for it in the Constitution. In *Printz*, Justice Scalia recognized the absence of precise text and stated that the answer to the external limits challenge in that case was to "be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court." *Id.* at 2370. The concept of state sovereignty also suggests respect for state institutional processes and rejection of the notion of superiority of federal institutions. *See* Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028, 2036–37 (1997) (noting availability and adequacy of a state forum in rejecting availability of a federal court for challenge to state officials' actions).

148 *See* Baxter, *supra* note 44, at 337–38; Moohr, *supra* note 4, at 156; Ruff, *supra* note 56, at 1214; Williams, *supra* note 50, at 154, 156–57. It is important to note, however, the ability of the federal government to protect the franchise and to intervene deeply into state and local political processes in order to ensure this protection. *See, e.g.*, Kathryn Abrams, *No "There" There: State Autonomy and Voting Rights Regulation*, 65 U. COLO. L. REV. 835 (1994).

149 *See* Brown, *supra* note 33, at 264. There has been vigorous contention that the Court's ruling in *New York* should apply only to state legislatures. *See* United States v. Printz, 117 S. Ct. 2365, 2404 (1997) (Souter, J., dissenting). Justice Scalia, however, insisted in *Printz* that "the distinction between congressional control of the States (impermissible) and congressional control of state officers (permissible) is based upon the most egregious wrenching of statements out of context." *Id.* at 2394 n.16. The *Printz* majority also declined to make any distinction between state and local officials.

struction of the statutes through techniques such as the "clear statement rule."[150]

I have recognized elsewhere that this argument is not a one-way street.[151] Federal prosecutions help state governments, and their citizens, in several ways. They produce the short run benefit of eliminating specific instances of corruption.[152] On a more general level, these prosecutions may raise citizen concerns about their own officials' failure to act. The latter result is likely if state law covers the matter, particularly if federal officials are utilizing state law, incorporated into the relevant federal statute, to prosecute state officials.[153] In Massachusetts, an intense debate has focused on the role of federal prosecutors in applying state standards.[154] The result may be clearer state laws and stronger state institutions.[155] Despite the value of these prosecutions, it is necessary to re-evaluate the federal laws authorizing them in light of federalism-based limits on congressional power.

The question of external limits may be particularly relevant to an exercise of the spending power such as § 666. The Court held in *Dole* that federalism would not serve as an external constraint on such exercises.[156] I argue below that treating federalism as an external constraint on the spending power merits serious consideration, both as a general matter and in the context of § 666. As *Dole* demonstrates, attempts to formulate internal limits based on a distinction between conditions and regulations may be doomed from the start. Any condition contains an element of regulation. The extraordinary growth of § 666's regulation of the internal affairs of state governments comes at a time when advocates of devolution seek less federal control over

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Compare id. at 2382 n.15 (rejecting distinction) *with id.* at 2394–95 (Stevens, J., dissenting) (suggesting distinction based on Eleventh Amendment jurisprudence).

150 *See, e.g.*, United States v. Frega, 933 F. Supp. 1536 (S.D. Cal. 1996); *see generally* Brown, *supra* note 33.

151 *See* Brown, *supra* note 33, at 282.

152 *See* Moohr, *supra* note 4, at 183–87.

153 *See* Brown, *supra* note 33, at 291.

154 *See* United States v. Sawyer, 85 F.3d 713 (1st Cir. 1996); Mark MacDougall & Steven Ross, *An Unethical Prosecution*, BOSTON GLOBE, Dec. 12, 1996, at A27. ("The duty of federal prosecutors is to enforce the law and do justice, not to push the edge of the judicial envelope with novel or experimental criminal cases.").

155 *See* Brian C. Mooney, *Bill Seeks to Clarify Conflict-of-Interest Law*, BOSTON GLOBE, June 5, 1997, at B6, *available in* 1997 WL 6256306; *see generally* Carey et al., *supra* note 5 (acknowledging the ability to clarify state law, but noting that the federal prosecutions are necessary to do so).

156 South Dakota v. Dole, 483 U.S. 203, 210 (1987). Chief Justice Rehnquist made it quite clear that "independent constitutional bar" did not include a Tenth Amendment limitation. *Id.*

state programmatic decisions. Perhaps the latter necessitates the former in order to avoid relinquishing all federal control over federal monies.[157] In my view, however, there is a serious tension between the growth of § 666 and current notions of federalism. The response to this tension ought to be the limitation of the statute.

II. THE SPENDING POWER AND ITS LIMITS

Section 666 forbids a range of practices—including theft, embezzlement, fraud, and bribery[158]—by agents of entities receiving more than $10,000 in federal benefits annually.[159] One might assume that the role of the statute is to protect the federal funds that trigger its application. If this were the case, § 666 would simply be a law "necessary and proper for carrying into [e]xecution"[160] the power to spend the money in the first place, that is, the power to provide for the general welfare, generally referred to as the spending power.[161] However, both in its text and its judicial application, the statute reaches far beyond conduct involving federal funds. The federal government seems to be in the process of using a statute based on the spending power as a general anti-corruption statute aimed at officials of subnational entities, primarily state and local governments.[162] To understand why such an enterprise may be not only thinkable but also permissible, it is necessary to understand the scope of the spending power as well as the attempts to place limits on it.

The first clause of Article I, Section 8 of the Constitution states that "[t]he Congress shall have Power to 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 . . . ."[163] The ambiguities of this text have always presented serious problems. If read as a blanket authorization to provide for the general welfare, the clause would constitute a general police power, swallowing up the notion of

157 *See* United States v. Dransfield, 913 F. Supp. 702, 709–12 (E.D.N.Y. 1996).

158 18 U.S.C. § 666 (1994). It is important to note, however, that federal jurisdiction is restricted to cases involving $5,000 or more.

159 The statute reads, in part: "(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." *Id.*

160 U.S. CONST. art. I, § 8, cl. 18.

161 U.S. CONST. art. I, § 8, cl. 1.

162 The overwhelming majority of reported cases between 1985 and 1996 involved officials of state and local governments or persons dealing with such units.

163 U.S. CONST. art. I, § 8, cl. 1.

enumerated powers.[164] On the other hand, if it only authorizes taxing and spending in aid of the enumerated powers, the grant duplicates the Necessary and Proper Clause.[165] The Court has struggled to carve out a middle ground, advocated early on by Alexander Hamilton, under which "the clause confers a power separate and distinct from those later enumerated, [and] is not restricted in meaning by the grant of them."[166]

No sooner had the Court accepted Hamilton's view of the reach of the power than it set about trying to limit it. *United States v. Butler* first suggested that the concept of the "general welfare" might itself serve as a limit.[167] This language, however, is not much of a limit. Almost any governmental expenditure has the potential to make the nation, or at least some portion of it, better off.[168] Moreover, Congress is in a better position than a court to make the essentially political judgment of what constitutes the general welfare. Indeed, a half century after *Butler*, the Court stated that "[t]he level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all."[169]

Butler did formulate a quite different limit on the power contained in the general welfare clause, as well as suggesting other possible limits. The Court held that the taxing and spending scheme at issue in that case was "a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government."[170] The opinion sought to distinguish between conditions placed on the receipt of federal funds and the purchasing of

164 *See* United States v. Butler, 297 U.S. 1, 64 (1936).

165 *See id.* at 65 ("[I]n this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers.").

166 *Id.*

167 *Id.* at 65–66 ("Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States.").

168 "General welfare" must, by necessity, include subsets of the nation. Otherwise it would refer only to expenditures that benefit the entire polity. *But see id.* at 67 (distinguishing between national and local welfare).

169 South Dakota v. Dole, 483 U. S. 203, 208 n.2 (1987); *see also Butler*, 297 U.S. at 67 ("How great is the extent of that range, when the subject is the promotion of the general welfare of the United States, we hardly need remark.").

170 Butler, 297 U.S. at 68. At issue in *Butler* was Section 9 of the Agricultural Adjustment Act, 1933, which allowed the Secretary of Agriculture to institute a special tax on farm commodities and to use the proceeds to encourage decreases in production. This law was based on Congress' power to tax and spend. *Id.* at 53–56.

impermissible regulation.[171] The majority also warned against federal "coercion,"[172] indicated a willingness to go beyond congressional "pretext,"[173] and, in general, stressed the importance of maintaining the federal-state balance in judicial examination of federal expenditures.[174] *Butler* remains a major decision in analyses of the federalism dimensions of national spending, particularly in the grant-in-aid context, despite its precedential and doctrinal weaknesses.[175]

The most serious problem with reliance on *Butler* is its fundamental premise that Congress may not use the power of the purse to "indirectly accomplish . . . ends [beyond granted powers] by taxing and spending to purchase compliance."[176] This is precisely what grants-in-aid do, a fact the Court condoned when it refused to limit the taxing and spending power to a necessary and proper scope.[177] Yet *Butler*'s inconsistencies no doubt reflect the Court's unease about letting the genie out of the bottle. Federal spending programs do extend deeply into state domains, beyond Congress' regulatory power under a classical enumeration perspective.[178] That is one reason why Congress enacts them. Recognizing this potential, the *Butler* Court rendered a profoundly ambiguous opinion—giving the broad reading of the spending power with one hand while striving to fashion constraints with the other.[179]

Despite its weaknesses, a number of excellent recent academic analyses have echoed the latter dimension of *Butler* and sought to build upon its distinction between conditions and regulation.[180] Professor Lynn Baker has argued persuasively that the Court must reinforce the willingness it showed in *Lopez* to treat federalism as judicially enforceable and attempt to scrutinize exercises of the spending power as it did with the commerce power in that case.[181] She suggests a dis-

171 *See id.* at 73.

172 *Id.* at 71.

173 *Id.* at 69.

174 *E.g.*, *id.* at 63, 77–78.

175 *See, e.g.*, *Dole*, 483 U.S. at 216–17 (noting *Butler*'s questionable authority, particularly in light of the fact that today, the Agricultural Adjustment Act would likely be within the commerce power).

176 *Butler*, 297 U.S. at 74.

177 *See generally* STONE ET AL., *supra* note 100, at 248–51.

178 *See* United States v. Lopez, 115 S. Ct. 1624 (1995); *Butler*, 297 U.S. at 63.

179 *See* Baker, *supra* note 31, at 1927 (noting that the *Butler* court ruled that it was the Tenth Amendment, not the "general Welfare" requirement, which restricted the spending power).

180 *See, e.g.*, McCoy & Friedman, *supra* note 31, at 107 (discussing the distinction between conditions and regulations); *see also* Baker, *supra* note 31, at 1927.

181 Baker, *supra* note 31, at 1927.

tinction between "reimbursement spending" and "regulatory spending"[182] as a basis for spending clause analysis.[183] Professor Baker's analysis reflects, in part, dissatisfaction with the Court's timid approach to spending power issues in *South Dakota v. Dole*.[184] At least for challenges to grant-in-aid statutes, *Dole* remains the touchstone. I argue in Part IV that it is highly relevant to analysis of § 666 as well.

At issue in *Dole* was a condition of federal highway aid directing withholding of a percentage of funds in states with a minimum drinking age of less than twenty-one years. Building upon broad language in *Butler* and successor cases,[185] the Court had little difficulty upholding this condition. The majority emphasized Congress' ability to go beyond specific enumerated powers and to use conditions "to further broad policy objectives by conditioning receipt of federal monies upon compliance by the recipient with federal statutory and administrative directives."[186] Culling spending power jurisprudence, the Court did enunciate four limits on its exercise: Congress must act to further the general welfare; it must state any conditions unambiguously; conditions must be related to the federal interest in question; and, conditions must not violate other, independent constitutional restrictions on government activity.

The Court applied these "limits" in an almost cursory fashion.[187] Of particular relevance to this Article are the application of the last two. The majority viewed the drinking age as "directly related to one of the main purposes for which highway funds are expended—safe interstate travel."[188] In dissent, Justice O'Connor criticized the attenuated nature of the relationship between the condition and the purpose of the funds.[189] In language that prefigures Chief Justice Rehnquist's Commerce Clause analysis in *Lopez*,[190] she warned against

182 *Id.* at 1963.

183 *See* McCoy & Friedman, *supra* note 31, at 122.

184 483 U.S. 203 (1987). Professor Baker sees Justice O'Connor's dissent in *Dole* as "the most attractive alternative to date" on the issue of Congress' spending power. Baker, *supra* note 31, at 1956.

185 *See Butler*, 297 U.S. at 63; *see also* Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127, 143–44 (1947); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

186 *Dole*, 483 U.S. at 206 (quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980)).

187 *See generally Dole*, 483 U.S. at 212 (O'Connor, J., dissenting); Baker, *supra* note 31; McCoy & Friedman, *supra* note 31.

188 *Dole*, 483 U.S. at 208.

189 *See id.* at 213–14 (O'Connor, J., dissenting).

190 115 S. Ct. 1624, 1634 (1995) ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.").

letting Congress use such a condition to "effectively regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced."[191]

Justice O'Connor did not, however, disagree with the majority's approach to the fourth limitation—the bearing of independent constitutional limitations. The Court held that any general federalism limitations such as those emanating from the Tenth Amendment[192] are not applicable in the grant condition context.[193]

The states can obviate federalism problems by not accepting the funds that contain the objectionable condition.[194] According to Justice Rehnquist, the "independent constitutional bar" constraint refers to limits on all governmental action, such as the prohibition on cruel and unusual punishment.[195] This limit on the limits takes a lot of sting out of the fourth element. Moreover, it completely ignores the substantial concerns for federal-state balance that pervade the *Butler* opinion. Perhaps it is not surprising that the *Dole* Court took this position two years after *Garcia v. San Antonio Metropolitan Transit Authority*[196] had rejected the notion of judicially enforceable federalism limits on congressional power. However, the notion of federalism-based external limits enjoys considerably more force today than it did in the mid-1980s.[197] In Part IV of this Article I argue that adding federalism limits to the fourth factor would make a major difference in application of the *Dole* test, and would strengthen the case for reining in § 666.[198]

At the end of his opinion, Justice Rehnquist suggested an alternative basis for invalidating the condition: that it amounted to "coercion" of state choices.[199] The notion that federal spending can amount to coercion of the recipient can be traced back to *Butler*.[200]

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191 *Dole*, 483 U.S. at 215 (O'Connor, J., dissenting).

192 U.S. CONST. amend. X.

193 *Dole*, 483 U.S. at 210.

194 *Id.*

195 *Id.* at 210–11; U.S. CONST. amend. VIII.

196 469 U.S. 528 (1985).

197 *See* Printz v. United States, 117 S. Ct. 2365 (1997); New York v. United States, 505 U.S. 144 (1992); *see generally* Brown, *supra* note 33. It should be noted, however, that even under *New York*, Congress enjoys considerable freedom under the spending power, giving force to Professor Baker's argument that re-examining Congress' spending power is the next step. *See* Baker, *supra* note 31.

198 *See* text accompanying notes 343–70; *see also* Hoke, *supra* note 139, at 572.

199 *Dole*, 483 U.S. at 211.

200 United States v. Butler, 297 U.S. 1 (1936); *see also* Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

However, federal courts have consistently rejected attempts to invalidate grant conditions on coercion grounds.[201] Attempts to demonstrate coercion do, in Justice Cardozo's words, "plunge the law in endless difficulties."[202] Should a court look at the percentage of a grant that might be withheld, the dollar amount in question, the relation of federal funds to state funds in the relevant area, or some other variable?[203] Recently, a plurality of the Fourth Circuit returned to the fray in a decision that overturned a grant condition.[204] The same opinion also suggests the possibility of a federalism-based analysis like that suggested above.[205] There is enough ferment in the circuits that the Supreme Court may step in and revisit *Dole*.[206]

As far as existing Supreme Court precedent is concerned, the case most relevant to federal use of the spending power to attack political corruption is *Oklahoma v. Civil Service Commission*.[207] A section of the Hatch Act[208] forbade any "officer or employee of any State or local agency 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 any Federal agency . . . [from] tak[ing] any active part in political management or in political campaigns."[209] The Court conceded that Congress could not regulate these sorts of political activities directly.[210] However, it saw the matter as a classic case of an offer of federal funds that Oklahoma was free to reject.[211] As part of that offer, Congress could attach conditions seeking "*better public service* by requiring those who administer [federal] funds for national needs to abstain from active political partisanship."[212]

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201 *See* Virginia Dep't of Educ. v. Riley, 86 F.3d 1337, 1346 (4th Cir. 1996), *rev'd en banc*, 106 F.3d 559 (4th Cir. 1997) (quoting Virginia v. Browner, 80 F.3d 869, 881 (4th Cir. 1996), for the observation that "[n]o court . . . has ever struck down a federal statute on grounds that it exceeded the Spending Power").

202 *Steward Mach. Co.*, 301 U.S. at 589–90 (1937).

203 *See Dole*, 483 U.S. at 211–12; *see also* Hoke, *supra* note 139, at 571–72 (discussing alternative to the coercion test); McCoy & Friedman, *supra* note 31, at 118–19 (discussing the difficulties of a coercion test).

204 *Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc), *rev'g* 86 F.3d 1337 (1996).

205 *See id.* at 569–72.

206 *See id.* at 580–82 (Hall, J., dissenting); *see also* Magyar v. Tucson Unified Sch. Dist., 958 F. Supp. 1423 (D. Ariz. 1997) (disagreeing with the federalism argument in *Riley*).

207 330 U.S. 127 (1947).

208 5 U.S.C. § 7324 (1993).

209 *Oklahoma*, 330 U.S. at 129 n.1.

210 *See id.* at 143.

211 *See id.* at 143–44.

212 *Id.* at 143 (emphasis added).

Oklahoma is a very important case.[213] It is possible to view the decision as simply authorizing Congress to prevent potentially harmful practices by those who administer federal funds, the disbursement of which should not be tainted by partisanship. This is Justice O'Connor's reading of *Oklahoma* in *Dole*.[214]

This reading suggests emphasis on the latter part of the quoted phrase, particularly on the words "those who administer federal funds." On the other hand, the *Dole* majority cited *Oklahoma*, in part, for the proposition that Congress can use spending conditions "to further broad national policy objectives."[215] Perhaps one should focus on the earlier part of the phrase quoted from *Oklahoma*, namely the reference to "better public service." It is important to remember that *Oklahoma* was decided at the same time the Court was upholding the basic Hatch Act at the federal level against a First Amendment attack.[216] The Court expressed great deference to Congress' view that partisan practices by federal civil servants "menace the integrity and competency of the service."[217] It is possible, then, to read *Oklahoma* for the proposition that Congress can utilize a state or local government's receipt of federal funds as a hook to impose the "broad policy objective" of honest public services upon that government. In the next Part I consider whether § 666 has done precisely that.

III. SECTION 666: TEXT, HISTORY, AND INTERPRETIVE DECISIONS—THE TENSION BETWEEN BROAD AND NARROW READINGS

A. The Text

As with any statute, one should begin with the text of § 666. I prepare to start, however, with a hypothetical version slightly different from the actual version. Let us consider the first subsection of § 666,

213 *See* McCoy & Friedman, *supra* note 31, at 115 ("The decision in *Oklahoma v. United States Civil Service Commission* is the only one of the cited cases that even arguably lends any support to Chief Justice Rehnquist's opinion in *Dole*.").

214 *Dole*, 483 U.S. at 217 (O'Connor, J., dissenting) ("This condition is appropriately viewed as a condition relating to how federal moneys were to be expended"). *But see* Baker, *supra* note 31, at 1961 (discussing Justice O'Connor's dissent in *Dole*). One might view the condition as almost the equivalent of an administrative condition. *See* Kaden, *supra* note 31, at 874.

215 *Dole*, 483 U.S. at 206 (quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980)). The *Dole* majority also later cited *Oklahoma* for the proposition that the state could simply not accept the funding. *Id.* at 210.

216 *See* United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

217 *Id.* at 103. The court in *Oklahoma* noted that standards under the Hatch Act are the same for federal and state employees, without reference to whether states received federal funds. *Oklahoma*, 330 U.S. at 144.

with minor deletions, as if it were the entire statute. It would read as follows:

> § 666. Theft or bribery
> (a) Whoever,
> (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 anything 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.

The language would constitute a general anti-corruption statute, subject to the five thousand dollar minimum amount. It would cover such specific crimes by government officials and employees[218] as embezzlement, theft, and conversion. Misapplication may have a broader meaning such as wrongful use of employee time and services.[219] Fraud, of course would reach even further. It could embrace the entire concept of "honest services" by government employees. The lower federal courts had developed such a concept in the context of the mail fraud statute.[220] In 18 U.S.C. § 1346 the Congress codified this development in response to a Supreme Court decision rejecting

218 Section 666 also includes provisions for nongovernmental persons, but these are not relevant for the purpose of this article.

219 *See* United States v. Skelton, 816 F. Supp. 1132 (W.D. Tex. 1993) (nepotism hiring as misapplication).

220 *See, e.g.*, Moohr, *supra* note 4, at 163-66. This concept was developed as part of the fraud prong of the statute rather than the property prong. *See id.*

it.[221] Deprivation of honest service covers a very broad range of official misconduct.[222] It might not be a big step to transfer the concept of honest services fraud to § 666.[223]

Section 666 would also cover bribery, probably extortion,[224] and, possibly, gratuities offenses.[225] The result would be a federal prosecutor's dream: expansive coverage without the need to satisfy such annoying jurisdictional predicates as use of the mails, effect on commerce, or interstate travel.[226]

It may be objected that the concept of "property" serves as an important limit to any extensive use of subsection (1)(A), particularly an attempt to broaden the concept of fraud. "Property," however, is an uncertain concept at best.[227] In *McNally v. United States*[228] the Court had held that honest services were not property, at least as a matter of statutory construction. In the contemporaneous case of *Carpenter v. United States*,[229] however, the Court held that the mail and wire fraud statutes do cover intangible property rights.[230] The combination of *Carpenter* and § 1346, overruling *McNally*, indicates that "fraud" covers services and that "property" does not function as much of a limit on its reach. Thus a court might hold, under my § 666 variant, that an official could defraud a governmental entity of his own

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221 18 U.S.C. § 1346 (1997). The statute is generally viewed as a response to the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350 (1987). *See, e.g.*, Williams, *supra* note 50, at 138; United States v. Czubinski, 106 F.3d 1069, 1076 (1st Cir. 1997).

222 *See generally* Brown, *supra* note 33.

223 Currently, the concept of deprivation of honest services only applies to the mail and wire fraud statutes.

224 *See* Evans v. United States, 504 U.S. 255, 290–91 (1992) (Thomas, J., dissenting) (discussing the expansionist tendencies in the use of the Hobbs Act to prosecute extortion).

225 *See* United States v. Crozier, 987 F.2d 893, 899 (2d Cir. 1993) ("[W]e believe that the statute, [§ 666], like § 201 (which it was enacted to supplement), should be construed to include gratuities as well."); *see also infra* text accompanying notes 471–507.

226 *See* Carey et al., *supra* note 5, at 330. ("[I]t [§ 666] does not require prosecutors to stretch for jurisdiction.").

227 *See* ABRAMS & BEALE, *supra* note 3, at 158–59 (discussing a wide variety of claims that property was involved in scheme to defraud); Moohr, *supra* note 4, at 168–69 (discussing *McNally* and the Court's construction of the mail fraud statute to criminalize only those frauds that involve money or property).

228 483 U.S. 350 (1987).

229 484 U.S. 19 (1987).

230 *Id.* at 25–27.

honest services.[231] It is true that the five thousand dollar valuation requirement would function as something of a limit, although a large range of transactions and jurisdictions would be included. Moreover, where the "limit" is in question, a court can always reason that all money potentially involved in any such matter is the rightful property of the principal, that is, the governmental unit.[232] Some peccadilloes where less than five thousand dollars could be found would slip through the net, but an extraordinary range of wrongdoing would still be subject to § 666.

The above analysis shows what § 666 might have been, but the close reader will object that the omissions render it academic in the pejorative sense of the term. I omitted the following from the beginning of subsection (a): "Whoever, if the circumstance described in subsection (b) of this statute exists—." Subsection (b) provides as follows:

> (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.[233]

Thus the actual statute may well prohibit everything I have described in my hypothetical analysis, but it contains a jurisdictional predicate in addition to the five thousand dollar floor. Congress did not enact anything resembling a "catch-all" statute.[234] It only applies to jurisdictions receiving significant federal funds and only to significant transactions within those entities.[235] I have already dealt with the latter "limit." More to the point, the former is not much of one either.

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231 *But cf.* United States v. Harloff, 815 F. Supp. 618 (W.D.N.Y. 1993) (declining to hold that an official could defraud a government entity of his own honest services through falsifying payroll records in a § 666 prosecution).

232 *See McNally*, 483 U.S. at 377 n.10. (Stevens, J., dissenting) (citing agency principles for the proposition that the agent would have to turn over the money).

233 Subsection (c) excepts certain bona fide salary and other payments. Subsection (d) is definitional. I also omitted part of title which reads in full: "Theft or bribery concerning programs receiving Federal funds."

234 *See, e.g.*, United States v. Margiotta, 688 F.2d 108, 144 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part); *see also* Rosenstein, *supra* note 5, at 690.

235 *See Rosenstein, supra* note 5, at 686.

All states[236] and thousands of cities, towns, counties and special districts receive federal funds.[237] Many of these will meet the ten thousand dollar limit. Looking only at the reported cases under § 666, one finds states,[238] counties,[239] special districts,[240] an interstate commission,[241] large cities such as Detroit[242] and Buffalo,[243] Tennessee cities of 9,651 and 7,128 persons, and a New Jersey city of 8,268.[244] If receipt of ten thousand dollars within a calendar year is all it takes to trigger § 666, the statute cuts a wide swath indeed. The hypothetical at the beginning of this Part does not look so hypothetical after all, triggered as it might be in cases that have nothing to do with federal funds. Did Congress intend to reach this far in a statute captioned "Theft or bribery concerning programs receiving Federal funds"?

B. The Legislative History

It may be that the language of § 666 is so clear that no recourse to legislative history is necessary, at least in the context of a judicial decision. The issue of when judges can go beyond statutory text and utilize legislative history is a contested one that I do not intend to treat

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236 *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, FEDERAL EXPENDITURES BY STATE FOR FISCAL YEAR 1995, at 1. (Listing distribution of federal funds by state and Territory).

237 A precise count may not be possible. However, grants to state and local governments have risen from $872 million in 1940 to $225 billion in 1995 and are estimated to rise to $282 billion in 2002. *See* OFFICE OF MANAGEMENT AND BUDGET, U.S. GOV'T, EXECUTIVE OFFICE OF THE PRESIDENT, HISTORICAL TABLES, BUDGET OF THE U.S. GOV'T, FISCAL YEAR 1997, at 193–94. The Bureau of the Census counts 85 thousand units of government within the United States. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1992 CENSUS OF GOVERNMENT Table 1. There are 946 grant programs for which state and local governments are eligible. *See* OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, UPDATE TO THE 1996 30TH EDITION CATALOG OF FEDERAL DOMESTIC ASSISTANCE PROGRAMS, AE1 1–27.

238 *See* United States v. Frega, 933 F. Supp. 1536 (S.D. Cal. 1996).

239 *See* United States v. Coyne, 4 F.3d 100 (2d Cir. 1993); United States v. Westmoreland, 841 F.2d 572 (5th Cir. 1988).

240 *See* United States v. Simas, 937 F.2d 459 (9th Cir. 1991).

241 *See* United States v. Peery, 977 F.2d 1230 (8th Cir. 1992).

242 *See* United States v. Hart, 803 F. Supp. 53 (E.D. Mich. 1992).

243 *See* United States v. Delano, 55 F.3d 720 (2d Cir. 1995).

244 *See* United States v. Brown, 66 F.3d 124 (6th Cir. 1995) (Humboldt, Tennessee); United States v. Valentine, 63 F.3d 459 (6th Cir. 1995) (Sevierville, Tennessee); United States v. Cicco, 938 F.2d 441 (3d Cir. 1991) (Guttenberg, New Jersey). These figures are from BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, 1990 CENSUS. A Department press release of October 2, 1995 indicates that the population of Sevierville has grown to 10,204. Press Release CB 95–179.

here.[245] In terms of a nonjudicial inquiry, however, what congressional committees said can, at a minimum, put the language in context. What is striking about § 666 is that the text is unambiguously broad, while the legislative history is almost as unambiguously narrow.[246]

According to the Senate Report generally viewed as the main guide to § 666,[247] the purpose of the statute was to "augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies which are disbursed to private organizations or State and local governments pursuant to a Federal program."[248] Congress was responding to the problem that no general statute existed to deal with such cases and that other statutes reached only part of the problem. The general theft of federal property statute[249] applied only to property still legally that of the United States. The fact that title might have passed, or the funds have been commingled, created a "gap" in situations where there might still be a federal interest.[250] Similarly, the federal bribery statute covered federal officials and "public officials" "acting for or on behalf of the United States."[251] Lower courts had divided over whether that language covered local administrators of federal funds.[252]

The Report indicates a desire to cover such officials and overturn cases reaching an opposite result.[253] The Report makes clear that its

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245 *See* United States v. Albertini, 472 U.S. 675 (1985). In § 666 cases, the rule may be more honored in the breach than in the observance. *See, e.g.*, United States v. Coyne, 4 F.3d 100, 108–09 (2d Cir. 1993); United States v. Westmoreland, 841 F.2d 572, 576 (5th Cir. 1988).

246 The cited legislative history of § 666 consists essentially of the Senate Report. S. REP. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510. This history is sparse at best. *See Valentine*, 63 F.3d at 463 (noting the "brevity" of discussion); United States v. Sanderson 966 F.2d 184, 188 (6th Cir. 1992) (describing the legislative history of § 666 as "scant").

247 *See* S. REP. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510; *see also, e.g., Valentine*, 63 F.3d at 463; *Sanderson*, 966 F.2d at 188. Daniel Rosenstein also cites to S. REP. No. 97-307, at 726 (1981), in his discussion of § 666. *See* Rosenstein, *supra* note 5, at 686.

248 *See* S. REP. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510. The analysis in this article focuses on assistance to governmental units.

249 18 U.S.C. § 641 (1996).

250 S. REP. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510.

251 18 U.S.C. § 201 (1994); *see* S. REP. No. 98-225, *supra* note 246, at 369, *reprinted in* 1984 U.S.C.C.A.N. at 3510.

252 *Compare* United States v. Mosley, 659 F.2d 812, 815 (7th Cir. 1981) *with* United States v. Del Toro, 513 F.2d 656, 662 (2d Cir. 1975).

253 *See* S. REP. No. 98-225, at 369–70 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510–11.

authors viewed bribery of fund administrators as equally serious as theft in terms of its effect on the "integrity of federal funds."[254]

The Report seems focused on a narrow set of problems: theft, similar diversions, and improper influences upon administration of federal funds and other assistance to organizations and governments. This reading places it in apparent conflict with the broad reach of the actual statutory text. There are, however, within the Report several concepts that, on closer examination, may serve to prefigure this breadth. The first is that of the "*Integrity* of [federal] program funds."[255] The term could have a range of meanings: keeping funds intact; preventing them from being spent under dishonest conditions; or, a more general concern for the entities that receive them.[256] One might support the broad reading with the argument that entities that are dishonest in their own management cannot be counted on to administer federal funds with "integrity."

The second potentially broad concept is that of an ongoing federal interest in the employees of recipient organizations that extends beyond the point when federal assistance is received.[257] The cases that troubled Congress involved refusals to extend the federal bribery statute to matters such as the bribery of a Model Cities administrator.[258] The lower courts' theory was that such individuals are not "public officials" within the meaning of 18 U.S.C. § 201.[259] However, the Supreme Court, in a decision roughly contemporaneous with pas-

254 *Id.*; *see* ABRAMS & BEALE, *supra* note 3, at 233 ("§ 666 is specifically aimed at bribery of local officials in connection with federal programs . . . .").

255 *Id.* (emphasis added).

256 *See* Rosenstein, *supra* note 5, at 686; *see also* United States v. Westmoreland, 841 F.2d 572, 578 (5th Cir. 1988).

257 *See* Rosenstein, *supra* note 5, at 689 ("Thus, the statute suggests that a relationship between the . . . governmental entity and the Federal government, resulting from a federal grant or benefit program, opens the door to federal jurisdiction over an employee of that entity, regardless of any specific connection that employee might have to either the federal program or the Federal Government"); *see also* Carey et al., *supra* note 5, at 331 (noting that state and local governments are in some measure "creatures of the federal government").

258 *See* United States v. Del Toro, 513 F.2d 656 (2d Cir. 1975), *cited in* S. REP. No. 98-225, at 370 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511.

259 18 U.S.C. § 201 (1994). For the purposes of the statute, the term "public official" refers to "Member of Congress, Delegate, or Resident Commissioner . . . or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency or branch of Government." *Id.*

sage of § 666, rejected that view.[260] In *Dixson v. United States*,[261] the Court established a standard focusing on "whether the person occupies a position of public trust with official federal responsibilities."[262] The Court did qualify its test somewhat by requiring that "[t]o be a public official under section 201(a), an individual must possess some degree of official responsibility for carrying out a federal program or policy."[263]

Even this limitation was not enough for Justice O'Connor, joined by three other dissenters.[264] In part, she invoked the rule of lenity in applying a statute whose key term—"public official"—was ambiguous.[265] The more significant aspect of her dissent rests on arguments that I believe will surface in the forthcoming debate over the scope of § 666. She invoked the principle of "grantee autonomy,"[266] particularly when the grantee is a unit of state or local government, for the following proposition: "A proper respect for the *sovereignty* of States requires that federal programs not be interpreted to deputize States or their political subdivisions to act on behalf of the United States unless such deputy status is expressly accepted or, where lawful, expressly imposed."[267] This remarkable utilization of federalism principles anticipates both her expansion of clear statement rules in *Gregory v. Ashcroft*[268] and her ultimate elevation of nondeputizing principles to constitutional status in *New York v. United States*.[269] The *Dixson* Court, however, went the other way. So, perhaps, did Congress.

The legislative history also contains language that courts might treat as a direct call for a broad construction of the statute. The Report states the Committee's intent:

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260 *See* Dixson v. United States, 465 U.S. 482 (1984). The Senate Report dealing with § 666 notes the pendency of the Court's decision in *Dixson*. S. REP. No. 98-225, *supra* note 246, at 370, *reprinted in* 1984 U.S.C.C.A.N. at 3511 n.2.

261 465 U.S. 482 (1984).

262 *Id.* at 496. "By accepting the responsibility for distributing these federal fiscal resources, petitioners assumed the quintessentially official role of administering a social service program established by the United States Congress." *Id.*

263 *Id.* at 499; *see also* ABRAMS & BEALE, *supra* note 3, at 233 (noting the overlap between § 201 and § 666).

264 *See Dixson*, 465 U.S. at 501 (O'Connor, J., dissenting). Justice O'Connor was joined in her dissent by Justices Brennan, Rehnquist, and Stevens. *Id.*

265 *See id.* at 511. *But see* Dan M. Kahan, *Lenity*, *supra* note 75, at 345 (arguing against the use of the rule of lenity in federal criminal law).

266 *Dixson*, 465 U.S. at 508–09, 511 (O'Connor, J., dissenting).

267 *Id.* at 510 (emphasis added).

268 501 U.S. 452 (1991).

269 505 U.S. 144 (1992); *see also* Printz v. United States, 117 S. Ct. 2365 (1997).

> that the term 'Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance' be construed broadly, consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery.[270]

This call for broad construction applies only to a part of the statute. However, it would be easy for a court to apply this exhortation to the entire statute. To some extent, this has already happened.[271]

Finally, it should be noted that the innocuous reference to the derivation of the bill that became § 666 from a previous proposal[272] may contain more than meets the eye. The earlier bill, S. 1630, the Criminal Code Reform Act of 1981 was tied much more directly to the presence of federal funds than the current § 666.[273] Its prohibition of thefts was limited to property of the federally funded program.[274] The previous Committee Report contains similar limitations.[275] The bribery section applied to an "agent or fiduciary of . . . an organization charged . . . with administering monies or property derived from a federal program, and the recipient's conduct is related to the administration of such program ."[276] Section 666 takes the significant step of applying its prohibitions to the recipient without any such limits. One court of appeals has already relied heavily on this difference between the two proposals to apply § 666 broadly against a defendant seeking to limit it to federally-funded projects.[277]

Despite these openings to daylight, I view the legislative history, fairly read, as supporting the interpretation that Congress intended to deal with a relatively narrow problem, specified forms of malfeasance in connection with the administration of federal assistance. But it is impossible to deny that the actual statute is the antithesis of narrow. Fairly read, *it* gives the federal government authority to deal with a

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270 S. REP. No. 98-225, at 370 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511.

271 *See* United States v. Rooney, 37 F.3d 847 (2d Cir. 1994). While the court in *Rooney* discussed a broad construction of the statute, there was a narrow result in the case as a whole.

272 *See* S. REP. No. 98-225, *supra* note 246, at 369, *reprinted in* 1984 U.S.C.C.A.N. at 3510 (stating "[t]he proposal is derived from S. 1630, the Criminal Code Reform Act of 1981 approved by the Committee in the 97th Congress").

273 *See* United States v. Coyne, 4 F.3d 100, 110 (2d Cir. 1993) (discussing limitations which exist in S. 1630 which do not exist in § 666).

274 *See id.*

275 *See id.* at 110 n.l.

276 *Id.* at 110 (punctuation altered in quote).

277 *See id.* at 109–10. The government relies substantially on this change in its brief in *Salinas.* Brief for the United States at 16, Salinas v. United States, No. 96–738.

range of malfeasance anywhere within governmental (and other) entities that benefit from a variety of programs, whether or not the wrongdoing is connected to the federal assistance.[278] Moreover, § 666 is not a statute where Congress, through legislative use of open-ended, relatively undefined, delegatory terms, left it up to the courts to take the broadening step of applying the law to unforeseen situations.[279] The statute is not just potentially broad; it is explicitly broad, despite a legislative history that points in the other direction.

The text is an invitation to use the statute extensively. After an initial period of relatively infrequent use, federal prosecutors have responded to this invitation with alacrity. Judicial reaction has encouraged this development. A 1990 commentary found "only nine published opinions dealing with section 666 between its enactment in 1984 and the date of writing."[280] Since that date, the growth of published opinions has been extraordinary. In 1996, for example, there were fourteen published opinions dealing with the section.[281] Many courts, focusing on the text, have given § 666 the extensive reading it invites.[282] There is, however, a growing counter-trend. Some judges seem to think that Congress cannot possibly have meant what it said,[283] and that the statute must have limits.[284] It is helpful to get a brief sense of the judicial environment before considering the possibility of limiting § 666.

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278 *See* Rosenstein, *supra* note 5, at 700 (calling for narrower drafting of § 666).

279 This is the sort of situation that Professor Kahan envisages. However, the use of the term "fraud" in § 666 might qualify as such a term.

280 Rosenstein, *supra* note 5, at 690 n.152. The nine decisions are as follows: United States v. Bordallo, 857 F.2d 519 (9th Cir. 1988); United States v. Duvall, 846 F.2d 966 (5th Cir. 1988); United States v. Westmoreland, 841 F.2d 572 (5th Cir. 1988); United States v. Barquin, 799 F.2d 619 (10th Cir. 1986); United States v. Webb, 691 F. Supp. 1164 (N.D. Ill. 1988); United States v. Little, 687 F. Supp. 1042 (N.D. Miss. 1988); United States v. Smith, 659 F. Supp. 833 (S.D. Miss. 1987); United States v. Jackowe, 651 F. Supp. 1035 (S.D.N.Y. 1987); and United States v. Sadlier, 649 F. Supp. 1560 (D. Mass. 1986). *See* Rosenstein, *supra* note 5, at 696–97 nn.225–226. *But see* Carey et al., *supra* note 5, at 330 (noting that "in the Southern District of Mississippi alone, forty-nine persons involved in the corruption of county and local business activities have been convicted and sentenced under this statute in the past five years").

281 I have used the number of published opinions for purposes of comparison. Obviously, they do not reflect the large volume of prosecutions under § 666.

282 *See, e.g., Coyne*, 4 F.3d at 110.

283 *See* United States v. Frega, 933 F. Supp. 1536, 1540 n.7 (S.D. Cal. 1996) (noting that at oral argument, the United States agreed that its construction of the statute would enable it to prosecute, for example, "a secretary for a state parking agency receiv[ing] federal funds").

284 *See* United States v. Marmolejo, 89 F.3d 1185, 1201 (5th Cir. 1996) (Jolly, J., dissenting), *cert. granted sub nom.* Salinas v. United States, 117 S. Ct. 1079 (1997).

C. *The Interpretative Climate and the Possibility of Supreme Court Clarification*

The foundation case is *United States v. Westmoreland.*[285] A county supervisor was convicted under § 666, as well as other federal statutes,[286] based on kickbacks for the awarding of county contracts. The county received more than $10,000 in federal funds under the General Revenue Sharing program then in existence.[287] The indictment tracked the statute in alleging the entity's receipt of the requisite federal funds, her receipt of a "thing of value," and the fact that receipt was in connection with transactions involving more than $5,000 "concerning the affairs of" the county.[288] The defendant argued that the government had to show that the government transactions in question were financed by federal funds.[289]

The court rejected this contention, holding that the statute means what it says. The opinion relied both on the statutory language—which it found "plain and unambiguous"[290]—and on the legislative history.[291] The analysis focuses on the difficulty of tracing federal funds and on gaps in the pre-§ 666 statutory framework.[292] Beyond the holding, *Westmoreland* contains two particularly significant statements about the reach of § 666. The first is that Congress "has cast a broad net to encompass local officials who may administer federal funds, regardless of whether they actually do."[293] The second is that Congress sought "to preserve *the integrity of federal funds by assuring the integrity of the organizations or agencies that receive them.*"[294] The latter statement is a crucial justification for the scope of § 666. It supports

285 841 F.2d 572 (5th Cir. 1988).

286 *See id.* at 574. Defendant was also convicted on mail fraud, 18 U.S.C. § 1341 (1994), extortion, 18 U.S.C. § 1951(a) (1994), and aiding and abetting an offense against the United States, 18 U.S.C. § 2 (1994).

287 *See Westmoreland.*, 841 F.2d at at 575. For a general discussion of the revenue sharing program, see George D. Brown, *Beyond the New Federalism—Revenue Sharing in Perspective,* 15 HARV. J. ON LEGIS. 1 (1977).

288 *See Westmoreland,* 841 F.2d at 574–75 (quoting from original version of the statute). For a discussion of whether this language covers bribes, gratuities, or both, see *infra* text accompanying notes 472–508.

289 *See id* at 575–76.

290 *Id.* at 576.

291 *See id.* at 576–77.

292 *See id.*

293 *Id.* at 577.

294 *Id.* at 578 (emphasis added); *see also id.* at 576 ("By the terms of section 666, when a local government agency receives an annual benefit of more than $10,000 under a federal assistance program, its agents are governed by the statute, and an agent violates subsection (b) when he engages in the prohibited conduct in *any* trans-

Congress' extending its reach beyond federal funds and property—even in commingled or difficult-to-trace form—to the internal practices of the recipient. Integrity of funds[295] has become integrity of governments.[296] It is true that one might find a possible limit in *Westmoreland*'s references to the status and role of particular officials.[297] Subsequent cases, however, have focused on the Fifth Circuit's validation of considering the recipient's "integrity" and on its refusal to require any direct link between federal funds and the alleged criminal activity.[298]

Many of these cases involve governments that receive federal grants-in-aid. Broad construction of § 666 is not limited to the grant context, however. Courts have shown a willingness to apply it in a variety of contexts such as the actions of a private developer of a federally assisted project,[299] a federal contract for services,[300] and a pass-through of federal funds.[301] There is a growing counter-trend, however. Some courts see serious federalism issues lurking in the sweep of § 666. Recently, the District Court for the Southern District of California warned against the broad reading of § 666 on the ground that "it would drastically change the balance of power between federal and state governments by bringing conduct that had previously been entirely in the realm of the states within the federal purview."[302] In a case involving the bribery of state judges[303] the court formulated a test based on the need to show "that federal funds were corruptly administered, were in danger of being corruptly administered, or even

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action or matter or series of transactions or matters involving $5,000 or more concerning the affairs of the local government agency").

295 S. REP. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510.

296 There is a parallel argument under the mail fraud statute, in that concern for the integrity of the mails has broadened to concern for integrity of government. *See generally* Brown, *supra* note 33, at 225–28.

297 *See Westmoreland*, 841 F.2d at 578 (stating that "the statute limits its reach to entities that receive a substantial amount of federal funds and to agents who have the authority to effect significant transactions").

298 *See, e.g.*, United States v. Paradies, 98 F.3d 1266, 1288 (11th Cir. 1996); United States v. Coyne, 4 F.3d 100, 108–09 (2d Cir. 1993); United States v. Simas, 937 F.2d 459, 463 (9th Cir. 1991).

299 *See* United States v. Rooney, 37 F.3d 847 (2d Cir. 1994) (§ 666 applicable, but conviction reversed because conduct not within prohibitions).

300 *See* United States v. Marmolejo, 89 F.3d 1185 (5th Cir. 1996), *cert. granted sub nom.* Salinas v. United States, 117 S. Ct. 1079 (1997).

301 *See* United States v. Dransfield, 913 F. Supp. 702 (E.D.N.Y. 1996).

302 United States v. Frega, 933 F. Supp. 1536, 1540 (S.D. Cal. 1996).

303 *See id.* at 1538–39; *see also* Ruff, *supra* note 56, at 1217 (discussing the justification for federal prosecutions of members of the state judiciary).

could have been corruptly administered,"[304] and on the question of whether there was a direct or indirect threat to federal funds.[305] Other courts have shown a willingness to interpret § 666 narrowly by emphasizing the indirectness of the defendant's relationship to federal funds,[306] or the existence of another federal statute more directly on point.[307]

At the core of the divergence is the question of how to apply § 666 to protect federal funds or property when no federal funds or property are present in the case. Building on *Westmoreland* and its progeny, the predominant view rests on two key premises: that Congress is properly concerned with the integrity of recipient governments, as well as with the integrity of federal funds, because wrongdoing in any part of an entity can spill over to its administration of federal funds; and that problems of tracing federal funds—exacerbated in the case of programs such as block grants—justify treating all funds alike, as long as the $10,000 threshold is reached. This post-*Westmoreland* view is consistent with decisions that have rejected out of hand federalism-based constitutional challenges to § 666.[308] Other judges are not so sure. They warn against § 666 becoming a general anti-corruption statute,[309] and criticize what they see as its "virtually unlimited expansion."[310]

This Term the Supreme Court will have the opportunity to shed light on § 666 and to resolve a conflict between circuits over a seemingly narrow point. The specific issue is whether the bribery subsec-

304 *Frega*, 933 F. Supp. at 1543. The court in *Frega* also pointed out that the "specificity is significant in that it reinforces the view that § 666 was intended to protect the integrity of federal funds, and not as a general anti-corruption statute." *Id.* at 1542.

305 *See id.* at 1543.

306 *See* United States v. Wyncoop, 11 F.3d 119, 123 (9th Cir. 1993) ("Yet there is no more reason to conclude that Congress in enacting section 666 intended to bring employees at every college and university in the country within the scope of potential federal criminal jurisdiction than it is to assume that Congress wished to reach employees of every grocery store.").

307 *See* United States v. Cicco, 938 F.2d 441 (3d Cir. 1991) (suggesting 18 U.S.C. § 601 as a more appropriate statute in case of politically related employment decisions).

308 *See* United States v. Russo, No. 96-1394, 1997 U.S. App. LEXIS 6513 (2d Cir. April 8, 1997); United States v. Bigler, 907 F. Supp. 401 (S.D. Fla. 1995); United States v. Cantor, 897 F. Supp. 110 (S.D.N.Y. 1995). *But see* Engdahl, *supra* note 5, at 91–92 (discussing the statute and contending that it lacks constitutional basis). The issue of whether or not § 666 is unconstitutionally vague is not discussed here. *See, e.g.*, United States v. Urlacher, 979 F.2d 935, 939 (2d Cir. 1992) (rejecting challenge of § 666 based on vagueness).

309 *See Frega*, 933 F. Supp. at 1542.

310 United States v. Marmolejo, 89 F.3d 1185, 1201 (Jolly, J. dissenting).

tion of § 666[311] applies when the matter involved has a value of $5,000 to the official but not necessarily to the recipient government. However, the case—*Salinas v. United States*[312]—could lead the Court to a general statement about the applicability of the statute.[313] *Salinas* involved payments to officials of a county sheriff's department in exchange for allowing a federal prisoner housed at a county jail to have conjugal visits.[314] Federal funds helped finance construction of the jail. In addition, there was an agreement between the federal government and the county to house federal prisoners at cost. The Court of Appeals for the Fifth Circuit unanimously found that the initial construction grant plus the ongoing contract constituted "Federal assistance."[315] The holding seems correct on this point even if the only federal funds involved were the prisoner housing contract. Courts have attempted to draw a distinction between payments by the government as a commercial entity and payments to further a federal statutory scheme or policy objectives.[316] The distinction may seem tenuous in that all payments by the government further governmental objectives. However, some sort of line makes sense. In the case of a purchase of supplies, for example,[317] the federal interest in *the use of the funds* ceases when the purchase is made. In the case of a purchase of a service such as housing prisoners, the national government has an ongoing interest in how the services are performed, at least when it has spelled out a policy concerning them. Here a federal statute declared a policy of providing "suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress."[318] The Supreme Court did not grant *certiorari* on the receipt of federal funds issue, although if it is treated as jurisdictional, the Court might consider it.[319]

311 18 U.S.C. § 666(a)(1)(B) (1994). This subsection deals with soliciting or accepting bribes. Subsection (a)(2) deals with offering or giving bribes.

312 *Marmolejo*, 89 F.3d 1185 (5th Cir. 1996), *cert. granted sub nom.* Salinas v. United States, 117 S. Ct. 1079 (1997).

313 *See* Salinas v. United States, 117 S. Ct. 1079 (1997), *petition for certiorari.* For the text of the question raised by the petition, see *supra* note 27.

314 *See Marmolejo*, 89 F.3d at 1188.

315 *See id.* at 1189–91. The dissent apparently accepts this point also. In its paraphrasing of the majority, it disagrees with the second point, the $5,000 value requirement, without addressing the first, the $10,000 federal assistance requirement, implying agreement with, or at least acceptance of, the ruling that the $10,000 requirement had been met. *See id.* at 1201 (Jolly, J., dissenting).

316 *See id.* at 1190 (citing United States v. Rooney, 986 F.2d 31, 35 (2d Cir. 1993)).

317 *See, e.g.*, United States v. Duvall, 846 F.2d 966 (5th Cir. 1988).

318 18 U.S.C. § 4002 (1994).

319 *See* United States v. Foley, 73 F.3d 484, 487–90 (2d Cir. 1996).

The grant of *certiorari* pertinent to § 666 arises from the second issue in the case: whether the officials received anything of value intending to be influenced "in connection with any business, transaction, or series of transactions of such government . . . involving anything of value of $5,000 or more" as § 666 requires. The court first dealt with the problem that payments in question were for intangible items—conjugal visits that were hard to value. It concluded that the proper approach to valuation was to consider "how much a person in the market would be willing to pay for them."[320] Somewhat more subtle is the question of whether or not to consider if the government in question can be said to attach a value of $5,000 or more to the transaction. Obviously, the county was not in the business of selling conjugal visits. Therefore the transaction might not have had the requisite value as to it. The majority took the straightforward view that "the statute does not require that the organization, government, or agency or the person giving the agent the bribe valued the transaction at $5,000 or more."[321] The dissent relied on language from the Second Circuit's decision in *United States v. Foley*[322] to the effect that the corrupt transaction must affect either the recipient's financial interests or "federal funds directly."[323] Judge Jolly found this requirement not satisfied.

At first blush, *Salinas* seems to present a narrow disagreement over how to interpret the $5,000 requirement when the payment is for an intangible element such as a permit[324] and not in connection with an outlay from the recipient government such as a purchase[325] or a construction contract.[326] However, the disagreement between the Fifth and Second Circuits takes us deeply into the core question of § 666's application when no federal funds are involved in the particular transaction.

Foley represents such a case. It involved a state legislator whose state received federal funds.[327] He took a bribe in order to influence a change in a legislative vote concerning bank mergers and divesti-

320 *Marmolejo*, 89 F.3d at 1194.

321 *Id.* at 1191.

322 73 F.3d 484 (2d Cir. 1996).

323 *Marmolejo*, 89 F.3d at 1205 (Jolly, J., dissenting) (quoting *Foley*, 73 F.3d at 493). Judge Jolly also found there to be ambiguity in the statute and thus invoked the rule of lenity. *See id.*

324 *See* United States v. Mongelli, 794 F. Supp. 529 (S.D.N.Y. 1992). Judge Jolly viewed *Mongelli*, which did not require that value be computed from the recipient entity's perspective, as overruled by *Foley* . *See Marmolego*, 794 F. Supp. at 1204 n.31.

325 *See* United States v. Westmoreland, 841 F.2d 572 (5th Cir. 1988).

326 *See* United States v. Coyne, 4 F.3d 100 (2d Cir. 1993).

327 *Foley*, 73 F.3d at 486.

tures. As in *Salinas*, it is hard to place a value on the legislative action. It surely was worth a good deal to the banks involved, although its effect on the state fisc is not clear. There may be no quantifiable value to the state. The vote's relation to federal funds received by the state seems nonexistent. Thus the court reversed the conviction, holding that "insofar as the presented evidence in this case reveals, the [voted] exemption affected neither the financial interests of the protected organization nor federal funds directly."[328] More than just a stab at a particular valuation issue, *Foley* represents an attempt to rein in § 666.[329]

The court was careful to cite *Westmoreland* and its statements about problems of tracing, casting a "broad net," and "preserving the integrity of the entities that receive the federal funds."[330] Before getting to these judicial guidelines, however, the Second Circuit engaged in a close analysis of the legislative history of § 666, emphasizing its focus on protection of federal funds.[331] As I noted earlier, one can read the history broadly or narrowly depending, in part, on how far one takes the concept of "integrity."[332] For the *Foley* court, § 666 responded "to a very specific federal interest, namely, safeguarding the integrity of federal funds that are intended to serve legislatively defined policy objectives."[333] The emphasis in this part of the opinion is on the integrity of the funds rather than that of the entity.[334] Despite the citation of *Westmoreland* and successor cases, the Second Circuit found in its own precedents a clear pattern of considering the effect of conduct on federal funds.[335]

One might have expected the court to reverse Foley's conviction on the ground that the prosecution had shown no effect of the bank vote on federal funds the state received. Instead, it reversed on the slightly broader ground that neither this effect nor an effect on the financial interests of the state was shown.[336]

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328 *Id.* at 493.

329 *See Marmolejo*, 89 F.3d at 1193–94 n.10 (criticizing *Foley* as inconsistent with *Westmoreland*).

330 *Foley*, 73 F.3d at 491 (quoting *Westmoreland*, 841 F.2d at 574–75, 577).

331 *See id.* at 489–90. This analysis was triggered by the ambiguity of the term "[a] thing of value of $5,000 or more." *Id.* at 489.

332 *See supra* text accompanying notes 255–56.

333 *Foley*, 73 F.3d at 490.

334 *See id.* ("The assessment of the thing's value must be connected, even if only indirectly, to the integrity of federal program funds.").

335 *See id.* at 491–92 (citing United States v. Bonito, 57 F.3d 167, 172 (2d Cir. 1995), and United States v. Rooney, 37 F.3d 847 (2d Cir. 1994)).

336 *See id.* at 493. Because the court considered whether there was a financial effect on the state, it discussed the related issue of whether the valuation of the funds in

The opinion does not explain the relation between the latter effect and the court's emphasis on the protection of federal funds. The court appears to have viewed a negative effect on the recipient governments' fisc as a proxy for an impact on federal funds. It thus treats Congress' concern for "integrity" of federal funds as broader than a requirement that they be involved in the wrongdoing at issue. The Second Circuit can claim consistency with *Westmoreland*'s concern about the difficulty of tracing federal funds because of its willingness to consider the recipient's entire financial picture. But it stops short of the "integrity of the entity" rationale, as the following statement makes clear: "section [666] was not designed for the prosecution of corruption that was not shown *in some way* to touch upon federal funds."[337]

Foley represents the most extensive discussion by a court of appeals of the desirability of limiting § 666, although that discussion rests solely on the legislative history rather than broader concerns of federalism. In particular, the court refused to apply the plain meaning of § 666 to a case that fits well within it, as Judge Lumbard argued in dissent.[338] As a subsequent district court opinion states, *Foley* constitutes an attempt to find a middle ground between a "corruption focus" and a "funds focus" of § 666.[339] *Foley* can be criticized as both over- and under-inclusive. It is over-inclusive because acts that affect the fisc may not affect federal funds. If Foley had voted to award a bank $10,000 because of a forced divestiture, that would affect Connecticut's treasury, but any effect on the state's federal funds is speculative at best.[340] Yet the test may be under-inclusive in that corruption that does not immediately affect the fisc may ultimately damage it, spilling over to federal funds. As the district court that analyzed *Foley* stated: "In subtle ways a bribe can ultimately lead an official to deplete agency resources by misusing them. Indeed, if anything, the phrases 'undue influence by bribery' in the legislative history [of § 666] and

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question should be calculated from the state's point of view. Thus, it is a mistake to view the disagreement between the Fifth and Second Circuits as essentially over the valuation issue. That issue only becomes relevant if one adopts a requirement of potential impact on federal funds that is satisfied by an impact on the state's fisc.

337 *Id.* (emphasis added).

338 *See id.* at 495 (Lumbard, J., dissenting) ("The statute does not contain the limitation the majority creates.").

339 United States v. Apple, 927 F. Supp. 1119, 1124 (N.D. Ind. 1996).

340 As long as he was paid "anything of value," this would be a classic § 666 prosecution. *See, e.g.*, United States v. Coyne, 4 F.3d 100 (2d Cir. 1993).

the term 'corruptly' in the statute evoke this insidious, corrupting aspect of bribery."[341]

The Supreme Court's decision in *Salinas* may clarify the validity of the *Foley* approach. Rather than limit its decision to the narrow question of whose perspective controls the valuation, the Court should reach the broader issue of whether a connection to federal funds is necessary. Of course, even under this approach, *Salinas* could well come out the same way. The bribes for conjugal visits had "a connection . . . with a federal program" and "touch[ed] upon federal funds."[342] The federal government has an obvious interest in how prisoners are housed in its own jails, as the recent "Badfellas" scandal illustrates.[343] That interest does not disappear when it is using its funds to pay another government to house them. The more fundamental question about *Salinas* is whether the Court should not simply hold that § 666 means what it says in all cases, or whether some narrowing is necessary. In order to evaluate the propriety of any judicially-imposed limitations on § 666, it is necessary to examine the constitutional dimensions of § 666 and the objections to its reach.

IV. SECTION 666 AND THE CONSTITUTION

The constitutional issue that § 666 raises is that it reaches acts of wrongdoing over which federal power is dubious: actions involving property or transactions that meet the $5,000 requisite in jurisdictions that receive $10,000 under a federal assistance program, *but* which seem to have no connection at all to that assistance.[344] Consider the following hypothetical. A county stretches from the state's coast deep into its interior sections. The county receives a one time federal grant of $15,000 for coastal zone management planning. At the same time, the County Agricultural Commissioner takes a bribe to get the county to contribute $6,000 to an interior irrigation project. Apart from water, what links the two matters? Why does the coastal grant give the federal government power to prosecute the Agricultural Commissioner for an unrelated act he committed hundreds of miles from the coastal zone? For that matter, why does it even care? This hypothetical is representative of many decided cases where no connection is

341 *Apple*, 927 F. Supp. at 1126. It is worth noting, however, that the court goes on to use a quote from *United States v. Duvall*, 846 F.2d 966, 972 (5th Cir. 1988), which focuses on "loyalty and judgment." *Id.*

342 *Foley*, 73 F. 3d at 493.

343 *See* Joseph P. Fried, *U.S. Says Guards Turned Jail Into a 'Badfellas' Social Club*, N.Y. TIMES, May 23, 1997, at A1.

344 *See* Engdahl, *supra* note 5, at 92.

shown between federal assistance and the defendant's conduct.[345] It presents what I refer to as the § 666 constitutional problem.

One way to analyze this exercise of federal power is through the Necessary and Proper Clause.[346] Congress has the power to spend the funds that constitute the federal assistance.[347] It can take the steps necessary and proper to protect those funds. One federal district court has, summarily, upheld § 666 on precisely this ground.[348] The Necessary and Proper Clause justification represents one form of the integrity rationale discussed above.[349] However, the argument that corruption *anywhere* in the recipient could undermine protection of federal funds requires a considerable stretch, despite the traditionally broad reading given to the Necessary and Proper Clause.[350]

That reading dates back to *McCulloch v. Maryland*,[351] still the leading case on the issue.[352] Chief Justice Marshall did, indeed, stress the importance of a broad construction of the clause[353] in order not to "impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government."[354] However, he indicated that there are limits[355] and the examples he gave do not suggest a power run rampant.

345 *See, e.g.*, United States v. Paradies, 98 F.3d 1266 (11th Cir. 1996); United States v. Foley, 73 F.3d 484 (2d Cir. 1996); United States v. Coyne, 4 F.3d 100 (2d Cir. 1993); United States v. Frega, 933 F. Supp. 1536 (S.D. Cal. 1996).

346 U.S. CONST. art. I, § 8, cl. 18. *See* ABRAMS & BEALE, *supra* note 3, at 226 (discussing Necessary and Proper Clause basis of general federal bribery statute and of § 666).

347 *See* U.S. CONST. art. I, § 8, cl. 1. Professor David Engdahl argues that the spending power finds its roots in the Property Clause. U.S. CONST. art. IV, § 3, cl. 2; Engdahl, *supra* note 5, at 50–53.

348 *See* United States v. Bigler, 907 F. Supp. 401 (S.D. Fla. 1995); *see also* United States v. Russo, No. 96-1394, 1997 U.S. App. LEXIS 6513 (2d Cir. April 8, 1997) (discussing the spending power and the protection of funds, although with no mention of the Necessary and Proper Clause).

349 *See supra* text accompanying notes 255–56.

350 *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 121–24 (4th ed. 1991) (discussing judicial deference).

351 17 U.S. (4 Wheat.) 316 (1819).

352 *See generally* NOWAK & ROTUNDA, *supra* note 350.

353 *See McCulloch*, 17 U.S. (4 Wheat.) at 417–18 ("The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it, without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws.").

354 *Id.* at 420.

355 *See id.* at 421. Marshall states: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* Justice O'Connor has argued that this quote

Thus he reasoned that Congress' power to establish courts would, under Necessary and Proper analysis, carry with it the power to punish perjury and falsifying records *in those courts.*[356] The § 666 problem presents a substantially lesser degree of federal interest. Recent scholarship has stressed the potential importance of a disjunction between "necessary" and "proper."[357] Analysts have suggested that the propriety of national laws should be evaluated on the basis of "whether such laws are consistent with principles of federalism."[358] Justice Scalia expressed agreement with this reading in *Printz.*[359] Quite apart from this approach, the phrase "Necessary and Proper" suggests a degree of relatedness between the chosen means and the exercised power.[360] The § 666 constitutional problem presents so many situations where the relatedness to protecting federal funds is either so extremely attenuated or nonexistent that the statute does not seem necessary, without reaching the issue of propriety. The majority in *Lopez* rejected an analysis of the Commerce Clause that would allow piling "inference upon inference"[361] so that everything affects commerce. The same might be said of remote possibilities that make every statute somehow necessary to effectuate an enumerated power.[362] One should be reluctant, however, to let a conclusion of serious constitutional problems rest on Necessary and Proper analysis. The clause is generally viewed as enhancing congressional power. In addition, there is a lack of developed precedent to guide any such analysis.

As an alternative, it may be helpful to analyze the § 666 constitutional problem in light of general welfare-spending power precedents,[363] particularly cases concerning the validity of grant conditions. On this question there is a well developed body of judicial deci-

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should limit Congress' power rather than expand it. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 585 (1985) (O'Connor, J., dissenting).

356 *See McCulloch,* 17 U.S. (4 Wheat.) at 417.

357 *See* Stephen Gardbaum, *Rethinking Constitutional Federalism,* 74 TEX. L. REV. 795 (1996); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause,* 43 DUKE L.J. 267 (1993).

358 Randy E. Barnett, *Necessary and Proper,* 44 UCLA L. REV. 745, 773 (1997) (citing Gardbaum, *supra* note 357).

359 Printz v. United States, 117 S. Ct. at 2378–79 (1997). Justice Scalia appears to favor the approach to the Necessary and Proper Clause taken by Lawson and Granger. *Id.* at 2379.

360 *See McCulloch,* 17 U.S. (4 Wheat.) at 417.

361 United States v. Lopez, 514 U.S. 549, 567 (1995).

362 *Cf.* United States v. Wyncoop, 11 F.3d 119, 123 (9th Cir. 1993) (discussing the scope of § 666).

363 *See* Baker, *supra* note 31, at 1924–32 (tracing development of Supreme Court precedents).

sions,[364] as well as of academic commentary.[365] Moreover, the disputed issues are strikingly similar. Attacks on grant conditions tend to focus on whether they are related to the purpose for which the federal funds were awarded,[366] or whether they inject too great a federal presence into an area of state competence.[367] Finally, it makes sense to utilize the General Welfare–spending power cases since they rest on interpretations of the same clause of the Constitution that authorizes § 666.

There are, however, two serious objections to the use of this precedent that must be dealt with. The first is that § 666 is not a grant condition. As the Federal District Court for the Southern District of New York stated: "18 U.S.C. § 666 does not impose a condition on the receipt of federal funds. The statute neither requires a state's compliance with federal regulatory or administrative directives, nor prevents state action."[368] Furthermore, § 666 applies not to recipient governments but to their officials and even to private parties.[369] However, what makes § 666 like a grant condition is that the recipient can avoid the statute's application to its officials by not accepting federal funds of $10,000 or more. It is the ultimate form of government regulation—the utilization of the processes of the criminal law—but variable in its application, triggered only by the receipt of federal funds. Section 666 sets out federal requirements for recipient governments, and prescribes negative consequences if those requirements are not honored. It thus operates in a similar way to grant conditions.

There are, of course, serious doctrinal problems with using the essentially contractual grant relationship as the basis for any binding norms, which might apply to consideration of the general validity of § 666, apart from what I call the constitutional problem.[370] I will fo-

364 *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987); Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947).

365 *See* Baker, *supra* note 31; Engdahl, *supra* note 5; McCoy & Friedman, *supra* note 31.

366 *See* South Dakota v. Dole, 483 U.S. 203, 213-14 (1987).

367 *See* Virginia Dep't of Educ. v. Riley, 106 F.3d 559, 570–72 (4th Cir. 1997) (en banc) (plurality opinion), *rev'g* 86 F.3d 1337 (4th Cir. 1996).

368 United States v. Cantor, 897 F. Supp. 110, 113 (S.D.N.Y. 1995).

369 *See* United States v. Thompson, 685 F.2d 993 (6th Cir. 1982) (distinguishing between regulation of states and regulation of officials). In my view, the prosecution is inescapably a federal judgment about, and an intrusion into, the working of state government. *Cf.* Printz v. United States, 117 S. Ct. 2365, 2382 (1997) ("To say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance.").

370 Professor David Engdahl has noted that conditional grants are, in essence, contractual agreements, and thus the parties should be bound by contractual principles.

cus here on the latter, however, and treat § 666 as analogous to a grant condition. It seems most analogous to what the Advisory Commission on Intergovernmental Relations calls a "crosscutting requirement": "generally applicable requirements imposed on grants across the board to further various national social and economic policies."[371]

A second objection to applying the General Welfare-spending power precedents, or any others, to the § 666 constitutional problem is that Congress has foreclosed *any* constitutional inquiry through the use of a jurisdictional predicate or element. The Supreme Court in *Lopez* placed great emphasis on the fact that the statute before it, the Gun-Free School Zones Act of 1990, contained no such element.[372] The opinion suggests that the presence in a statute of a requirement of a case-by-case inquiry to demonstrate the presence of federal power will insulate the statute from general attack. Many federal criminal statutes used in the anti-corruption field contain jurisdictional elements. For example, the Travel Act[373] provides, in part, that:

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—(1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity [shall be punished].[374]

One might contend that, similarly, § 666 contains a jurisdictional element:[375] it is only applicable in entities receiving more than $10,000 annually in federal assistance.[376] The analogy is misleading, however. The Travel Act links the wrongdoing directly to the subjects over which Congress has power: travel and facilities of commerce. The reason why there is a § 666 constitutional problem is that that statute's predicate contains no such direct link. The wrongdoing may

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See Engdahl, *supra* note 5, at 71–72. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract . . . ." *Id.* at 70 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). With this in mind, Professor Engdahl questions the ability of Congress to "punish theft from beneficiaries of its largesse," as the federal government has no control over the money once it has been dispersed. *Id.* at 92. It is upon these grounds that Professor Engdahl would find § 666 unconstitutional. *Id.*

371 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT AND REFORM 8 (1984).

372 United States v. Lopez, 514 U.S. 549, 561–62 (1995).

373 18 U.S.C. § 1952 (1994).

374 *Id.* The defendant must also "thereafter" perform or attempt to perform specified crimes.

375 *See* United States v. Frega, 933 F. Supp. 1536, 1540 (S.D. Cal. 1996).

376 *See id.* (referring to the $10,000 requirement as a "federal funding jurisdiction element").

have nothing to do with the federal funds. If Congress had said "Whoever travels and within one year thereof commits robbery can be tried in a federal court," it is doubtful that the "predicate" would save the statute. The latter would reach vast quantities of conduct over which Congress has no power. Nor could Congress provide that any person who uses the mails is subject to federal criminal jurisdiction.[377] Section 666 looks like the hypothetical statutes in that it contains no link between the federal assistance somewhere in the jurisdiction and the wrongdoing somewhere in the jurisdiction. I do not mean to say this automatically makes the statute unconstitutional, but it negates the force of the jurisdictional predicate objection to asking the question: "Is the § 666 constitutional problem serious enough to raise doubts about the statute's validity?"

If we turn to the General Welfare-spending power decisions, specifically the condition cases, the *Dole* test seems the obvious focal point.[378] It represents both the Court's most recent detailed treatment of the issue[379] and an attempt to distill the teaching of prior precedent.[380] The first two restrictions that *Dole* elaborated do not pose serious obstacles in an analysis of the § 666 constitutional problem. The goal of reducing corruption and related practices seems to fit within the concept of the general welfare, especially given the great degree of judicial deference to Congress on that question.[381] As for ambiguity, the language of § 666 is rather blunt. It appears sufficiently clear to appraise recipients of federal assistance of the criminal consequences for their officials.[382] Buttressing this conclusion is the fact that several courts have rejected vagueness challenges to the stat-

377 The mail fraud statute is only triggered when the mails are used "for the purpose of executing such scheme or artifice" as defined by the statute. 18 U.S.C. § 1341 (1994). The way in which this jurisdictional "hook" is worded guarantees at least some relationship between the crime and the federal power upon which the statute rests. *But see* Schmuck v. United States, 489 U.S. 705, 723–24 (1989) (Scalia, J., dissenting). Whether such a hook should be enough to federalize an area of the criminal law is, of course, an important issue. *See supra* note 102. Section 666, however, goes one step further, requiring no relation between the money spent by the federal government and the theft or bribery.

378 *See Dole*, 483 U.S. 203, 207–08 (1987).

379 There was some limited discussion in the Court's decision in *New York v. United States*, 505 U.S. 144 (1992).

380 *Dole*, 483 U.S. at 207–08. The Southern District of New York, in *United States v. Cantor*, 897 F. Supp. 110, 113 (S.D.N.Y. 1995), discounted the precedential authority of *Dole* in § 666 cases, but then proceeded to apply parts of the *Dole* test.

381 *Dole*, 483 U.S. at 207. Thus, Congress could almost certainly appropriate funds for anti-corruption grants.

382 *See id.* (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)) (discussing the second element of the test).

ute.[383] If a statute can surmount a criminal defendant's vagueness challenge, it almost certainly satisfies *Dole*'s nonambiguity requirement.[384]

The difficulties begin when one applies to the § 666 constitutional problem the third *Dole* restriction: "[T]hat conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"[385] As discussed above,[386] analysts of the spending power have viewed the relatedness prong, or some variant thereof, as one of the most promising ways to constrain it. In *Dole* itself, Justice O'Connor dissented on the ground that "Congress may only condition grants in ways that can fairly be said to be related to the expenditure of federal funds."[387] However, to the extent that the spending power doctrine is helpful, the relatedness issue provides no clearer answer than it did in consideration of the Necessary and Proper Clause. Whether or not the statute is related to the receipt of federal funds (or other form of assistance)[388] depends on how far one takes the concept of integrity. If it applies only to the wholeness of the funds or to the honesty of the manner in which they are administered, many applications of § 666 will fail the relatedness test. If, on the other hand, one takes the view that the integrity of the recipient as a whole is relevant to the integrity of the funds, relatedness is satisfied.

As discussed above in the county hypothetical, this is a considerable stretch.[389] Illegalities in one part of a recipient will often have

383 *See* United States v. Paradies, 98 F.3d 1266, 1288 (11th Cir. 1996) ("[I]n construing § 666, we agree with the following expression of the Fifth Circuit: '[W]e find the relevant statutory language plain and unambiguous.'"(quoting United States v. Westmoreland, 841 F.2d 572, 576 (5th Cir. 1988))); United States v. Urlacher, 979 F.2d 935, 939 (2d Cir. 1992) ("He cannot be heard to complain that the statute was vague.").

384 It should be noted, however, that several courts have found sufficient ambiguity in the statute to resort to the legislative history with respect to the extent to which Congress intended to reach transactions where no federal funds were involved. *See* United States v. Marmolejo, 89 F.3d 1185, 1202 (5th Cir. 1996) (Jolly, J., dissenting) ("Given this ambiguity, it is necessary to turn to the legislative history for guidance in interpreting and applying the statute."); United States v. Foley, 73 F.3d 484, 489 (2d Cir. 1996) ("Accordingly, we look to the legislative history and purpose of the statute for illumination.").

385 *Dole*, 483 U.S. at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

386 *See supra* text accompanying notes 179–82.

387 *See Dole*, 483 U.S. at 217 (O'Connor, J., dissenting).

388 The focus here is on funds, because grant concepts are being applied.

389 *See supra* text accompanying notes 344–45.

nothing to do with the federal funds.[390] In this context, the holding of *Oklahoma v. Civil Service Commission* [391] is consistent with a specific relatedness requirement. The statute there analyzed applied to political activities of state officials whose employment was financed in whole or in part with federal funds.[392] *Oklahoma's* holding does not justify exercising power over all state officials just because the state receives federal funds. To the extent the third *Dole* restriction is relevant, the § 666 constitutional problem is a real one.[393]

There remains, however, the suggestion in *Dole* that Congress can use grant conditions "to further broad policy objectives."[394] As noted, *Oklahoma* itself might be an example. Congress' real objective was to further "good government" as the Hatch Act embodied it. Perhaps Congress could have gone further than it did, by prohibiting partisan activity by a range of recipient state officials, whether they were involved with federal funds or not. Section 666 could then be seen as an example of furthering this national interest. As noted in Part I, one can posit a number of contemporary reasons why the national government cares about corruption at the state and local level.[395] The award of federal funds gives it a hook to enforce this concern throughout the entire recipient government. Section 666 thus satisfies this broad form of the relatedness prong, broadly construed.

If this analysis is correct, however, the concept of "national problem" serves more as a blank check than as a limitation. As Professors McCoy and Friedman note, "[r]equiring that the condition simply relate to a national problem rather than specify characteristics of the particular goods and services to be purchased by the grant is tantamount to a statement that Congress can regulate perceived national problems through the spending power."[396] The recurring notion of using the third *Dole* element to permit only conditions that relate to

390 *See* United States v. Frega, 933 F. Supp. 1536, 1540 n.7 (S.D. Cal. 1996) (noting prosecutors conceded that a "secretary for a state parking agency" would be subject to § 666 prosecutions).

391 330 U.S. 127 (1947).

392 *See Dole*, 483 U.S. at 217 (discussing *Oklahoma*).

393 *But see* United States v. Cantor, 897 F. Supp. 110, 113 (S.D.N.Y. 1995) ("Nor is the conduct prohibited by § 666 so remote from the federal interest in protecting federal funds from the effects of local bribery schemes as to exceed the scope of Congressional spending power or to run afoul of the Tenth Amendment.").

394 *Dole*, 483 U.S. at 206 (quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980)).

395 *See supra* text accompanying notes 90–107.

396 McCoy & Friedman, *supra* note 31, at 121.

how the money is spent[397] may be workable in the context of conditions specific to a particular grant. However, it is less satisfactory when applied to crosscutting conditions applicable to a range of grants. These conditions require grantees to adhere to a national policy such as various forms of nondiscrimination.[398] Section 666 looks like one of these conditions. No recipient of federal funds of more than $10,000 shall permit specified corrupt practices. Instead of withholding funds from a governmental unit,[399] the "sanction" is criminal prosecutions of that government's officials. The analysis of Professors McCoy and Friedman suggests that such conditions might be valid only if sustainable under one of Congress' regulatory powers.[400] Under this approach, the § 666 constitutional problem would lead to a conclusion of invalidity because there is no independent regulatory power over state and local corruption.[401] However, the proposed limit is not found in *Dole.*

This focus on the third element of *Dole* represents an attempt to apply the internal limits[402] on the spending power to the § 666 constitutional problem. It raises serious questions about the statute's validity, but falls short of providing clear guidance for two reasons. First,

397 *See id.* at 122; *Dole,* 483 U.S. at 215–16 (O'Connor, J. dissenting). For a discussion of the distinction between "reimbursement spending" and "regulatory spending," see Baker, *supra* note 31, at 1963.

398 Title VI of the Civil Rights Act of 1964 is a classic example. *See* McCoy & Friedman, *supra* note 31, at 114. Apart from the source of power to enact it, a cross-cutting condition also raises questions of its reach. Congress and the Supreme Court have disagreed over whether Title VI authorizes the withholding of funds from an entity within which there is some discrimination, or whether the withholding should be limited to the particular program in violation. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, 102 Stat. 28 (1988), *overruling* Grove City College v. Bell, 465 U.S. 555 (1984). Section 666 takes the same broad approach, but is not based on a regulatory power. Moreover, it applies the sanctions of the criminal law rather than the withholding of funds.

399 Withholding funds is the classic sanction in the grant-in-aid context. There has also been considerable controversy over the possibility of private enforcement of grant conditions. *See, e.g.,* Engdahl, *supra* note 5, at 101–05 (discussing Maine v. Thiboutot, 448 U.S. 1 (1980), and criticizing the availability of private suits); *cf.* Blessing v. Freestone, 117 S. Ct. 1353 (1997) (suggesting continued availability, but not reaching the issue).

400 *See* McCoy & Friedman, *supra* note 31, at 114; South Dakota v. Dole, 483 U.S. 203, 217 (1987) (O'Connor, J., dissenting).

401 There would be an independent regulatory power over state and local corruption if one accepts Professor Kurland's excellent analysis of the Guarantee Clause. *See* Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials,* 62 S. CAL. L. REV. 369 (1989).

402 *See* STONE ET AL., *supra* note 100, at 189–90 (discussing internal and external limits).

the current status of spending power analysis is itself uncertain. *Dole* and the subsequent discussion of the spending power in *New York v. United States* [403] suggest few limits. As Professor Baker contends, after *Lopez*,[404] the Court should take a closer look at the reach of the power consistent with its emphasis on the need to limit the enumerated powers to maintain a healthy federalism.[405] However, that has not happened yet. The second reason why internal limits analysis falls short here is that it has been developed primarily in the context of grant conditions. Section 666 is *like* a grant condition in important ways, but it is different enough that we may wish to consider the statute from another perspective. Let us treat § 666 like any other federal criminal statute applicable to state and local governments. Apart from the internal limits question of basic authority to enact it, it is subject to external limits, which Justice Rehnquist in *Dole* referred to as the general prohibition on engaging "in activities that would themselves be unconstitutional."[406]

The *Dole* opinion indicates that federalism-based external limits would not be applicable to exercises of the spending power.[407] I think that the Court would, and should, reconsider this position. Indeed, a plurality of the Fourth Circuit appears to have already advocated this step.[408] It is important to remember that *Dole* was decided two years after *Garcia v. San Antonio Metropolitan Transit Authority*[409] had seemed to discredit any notion of judicially enforceable federalism-based limits on Congress.[410] A lot has happened since *Garcia*.[411] The Court has revived both the precepts of federalism-based external limits on con-

403 505 U.S. 144, 158–59 (1992); *see generally* Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995) (providing a detailed analysis of *New York*).

404 514 U.S. 545 (1995).

405 Baker, *supra* note 31, at 1916. A plurality of the Fourth Circuit has apparently taken Professor Baker's view to heart in its recent decision in Virginia Dep't of Educ. v. Riley, 106 F.3d 559 (4th Cir. 1997) (en banc) (plurality opinion) (discussing favorably a Tenth Amendment challenge to the Individuals with Disabilities Education Act, passed under the spending power), *rev'g* 86 F.3d 1337 (4th Cir. 1996).

406 Dakota v. Dole, 483 U.S. 203, 210 (1987).

407 *Id.*

408 *See Riley*, 106 F.3d at 571–72 (discussing the Tenth Amendment as an external restraint on spending in addition to coercion).

409 469 U.S. 528 (1985).

410 *See id.* at 549.

411 *See* Brown, *supra* note 33, at 259–77.

gressional power[412] and the power of the judiciary to enforce these limits.[413]

The exact contours of the doctrine are only beginning to emerge. There is at least one absolute bar on the federal government's control of states. This prohibition is the anti-commandeering principle as developed in *New York* and extended in *Printz*. It does not follow that external limits will always take the form of bars on the national government or of zones of state autonomy from which its reach is excluded. This was the approach of *National League of Cities*.[414] Yet even that case, during its uncertain tenure, evolved into a partial balancing test.[415]

There may well be room for balancing approaches as federalism-based limits on the national government become clearer. In *Printz*, Justice Scalia rejected balancing in the case of laws that apply only to states, but left open the possibility of its use in the case of a general law that applies to state governments.[416] Section 666 is such a law.

The current majority refers to its approach as "dual sovereignty."[417] (The *New York Times* refers to it as "cockeyed" federal-

412 *See* Printz v. United States, 117 S. Ct. 2365 (1997); New York v. United States, 505 U.S. 144 (1992).

413 *See* United States v. Lopez, 514 U.S. 549 (1995) (Kennedy, J., concurring) ("[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.").

414 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); *see also* Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563 (1994) (discussing three "models" of federalism).

415 *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 n.29 (1981) (stating that the relation of state and federal interest must not be such that "the nature of the federal interest . . . justifies state submission"); *National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring) (joining the majority because, in part, it adopts a "balancing approach"). *But see Printz*, 117 S. Ct. at 2383 ("But where, as here, it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a 'balancing' analysis is inappropriate.").

416 *See Printz*, 117 S. Ct. at 2383 (stating that a balancing test "might be relevant if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments"); *see also* Idaho v. Coeur d'Alene Tribe of Idaho, 117 S. Ct. 2028, 2039 (1997) ("The theme that thus emerges . . . is one of balancing of state and federal interests." (quoting Pennsylvania v. Union Gas Co., 491 U.S. 1, 27 (1989) (Stevens, J., concurring))).

417 *E.g.*, *Printz*, 117 S. Ct. at 2376 (quoting Gregory v. Ashcroft, 501 U.S. 452, 457 (1991)).

ism.)[418] I find helpful Professor Merritt's analysis of the development as an "autonomy model" of federalism.[419]

External limits draw much of their content from the notions of autonomy and accountability. Essential to both notions is the ability of states to establish and to police their governmental processes.[420] The § 666 constitutional problem is an obvious candidate for an external limits inquiry. The statute sets up standards of conduct for governmental officials. It thus leads to federal investigation and prosecution of a wide range of state and local officials[421] for a wide range of corrupt activities that need not involve federal funds at all. Yet the development of ethical standards and the policing of its own officials is an important aspect of a government's exercise of sovereignty.[422] Applying external limits analysis would probably not mean the demise of federal anti-corruption statutes applicable to state and local governments. Many long-standing federal statutes extend to various forms of corrupt activities by state and local officials.[423] The current Court has applied them without questioning their validity.[424] Justice Thomas and other members of the Court generally favorable to state concerns have specifically recognized the existence of substantial federal power in this area.[425] The most promising resolution of the conflict is the utilization of some form of balancing test.[426] In the grant context, Professor Candice Hoke has suggested such an approach in lieu of the "lax" *Dole* test[427] or the difficulties of fashioning a coercion limit.[428] She would ask whether the federal government has "constitutionally sufficient justifications" for impeding the ability of

418 *Two Days That Shaped the Law*, N.Y. TIMES, June 28, 1997, at A20.

419 *See* Merritt, *supra* note 414, at 1570.

420 *See Gregory*, 501 U.S. at 457. For an excellent early definition of autonomy, see Kaden, *supra* note 31, at 849–53.

421 According to § 666, "the term 'agent' means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative." 18 U.S.C. § 666(d)(1)(1994).

422 *See, e.g.*, Brown, *supra* note 33, at 275–76; Williams, *supra* note 50, at 154.

423 *See supra* text accompanying notes 60–63.

424 *See, e.g.*, Evans v. United States, 504 U.S. 255 (1992); McCormick v. United States, 500 U.S. 257 (1991).

425 *See Evans*, 504 U.S. at 290–91 (Thomas, J., dissenting).

426 *See generally* Brown, *supra* note 33, at 273–74 (discussing Justice Blackmun's concurrence in *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

427 *See* Hoke, *supra* note 139, at 571.

428 *See id.* at 571–72; *see also* Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) ("Certainly, one reason for the federal courts' lack of enthusiasm for the theory is its elusiveness.").

state governments to function in an independent and representative fashion.[429]

Applying any such approach to federal legislation regulating the internal affairs of state governments would be a complicated task. Each set of interests at stake can seemingly point in two directions. The federal government has an interest in preserving what Professor Hoke terms "the constitutional role of states,"[430] as well as in enforcing its laws to advance the interests identified in Part I. Yet the former concern might mean leaving the states alone. At the same time, *state* interests do not argue only for autonomy. They can be furthered by federal prosecutions. Federal action may spur state officials to change laws or the means of their enforcement, or it may cause citizens to demand more of their own officials at the risk of being replaced.[431] An important variable is the extent to which states can police themselves.[432] There must, however, be a wide range of cases where the federal interest is so slight that the balance tilts against federal involvement. I think that many § 666 cases fall into this category. Small scale thefts of state property,[433] diversion of parking fines,[434] and diversion of employee time[435] do not seem to threaten the federal interest in the constitutional functioning of the states. Section 666 intrudes deeply into the workings of state and local government, applies to many trivial cases, and can apply in many instances when there is no effect on federal funds. Of course, any corrupt activity chips away at state integrity, but any federal enforcement chips away at state autonomy.

External limits analysis heightens the doubts about the § 666 constitutional problem that internal limits analysis has already raised. The absence of federal funds removes the only direct source of fed-

429 *See* Hoke, *supra* note 139, at 572 (quoting CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 292 (1993)). Many grant statutes require the enactment of state enabling or related legislation. Strict application of the anti-commandeering principle would invalidate any such condition. This further supports the use of a balancing test.

430 *Id.*

431 *See* ABRAMS & BEALE, *supra* note 3, at 248 (arguing that federal prosecution is a "desirable second line of defense" in corruption cases); Brown, *supra* note 33, at 285–86.

432 *See* Rory K. Little, *Myths and Principles of Federalism*, 46 HASTINGS L.J. 1029, 1077–80 (1995) (proposing a requirement of particularized inquiry into the effectiveness of state and local action); Williams, *supra* note 50, at 155.

433 *See* United States v. Valentine, 63 F.3d 459 (6th Cir. 1995).

434 *See id.*; *see also* United States v. Frega, 933 F. Supp. 1538, 1540 n.7 (S.D. Cal. 1996) (noting that the United States agreed at oral argument that "a secretary for a state parking agency" would be subject to § 666 prosecution).

435 *See* United States v. Delano, 825 F. Supp. 534 (W.D.N.Y. 1993).

eral power. A general concern with governmental integrity is not enough. The § 666 constitutional problem places the statute under a cloud. One way to remove the cloud is through construction. Several courts have restricted the apparent reach of § 666 through a variety of techniques: refusing to apply it when a narrower statute was directly on point,[436] formulating a test that would render it inapplicable,[437] and applying principles of clear statement to find a particular transaction excluded.[438] I believe that the latter is the most promising place to start, particularly given the strong recent interest within the lower federal courts in applying the clear statement rule both to exercises of the spending power[439] and to federal anti-corruption efforts.[440]

The clear statement rule takes several forms.[441] It rests on the premise that Congress would not impose obligations on states without stating precisely what those obligations are. Although § 666 does not subject the states themselves to criminal prosecution, I view the prosecution of officials for failing to govern the state properly as analogous to the types of situations that have triggered the rule. At the heart of the principle of clear statement are precepts of federalism, particularly the notion that courts should be reluctant to assume that Congress has acted to upset the federal-state balance in an area of traditional state concern.[442] The rule can be viewed as a form of "quasi-constitutional law."[443]

The rule appears in a variety of contexts. In the Eleventh Amendment context it permits states to avoid being sued in federal court under broadly worded statutes that would seem to permit such suits, unless the law specifies suits against states.[444] In grant-in-aid disputes the Court has utilized the rule to preclude the enforcement of grant

436 *See* United States v. Cicco, 938 F.2d 441 (3d Cir. 1991) (concluding that 18 U.S.C. § 601 was more on point).

437 *See* United States v. Foley, 73 F.3d 484, 493 (2d Cir. 1996) (stating "that section was not designed for the prosecution of corruption that was not shown in some way to touch upon federal funds").

438 *See* United States v. Frega, 933 F. Supp. 1536, 1541 (S.D. Cal. 1996).

439 *See* Virginia Dep't of Educ. v. Riley, 106 F.3d 559 (4th Cir. 1997) (en banc), *rev'g* 86 F.3d 1337 (4th Cir. 1996).

440 *See* United States v. Brumley, 116 F.3d 728 (5th Cir. 1997) (en banc) (overturning earlier application of rule to honest services prosecution under wire fraud statute).

441 *See generally* Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959 (1994).

442 *See* United States v. Bass, 404 U.S. 336 (1971).

443 William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

444 *E.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

conditions against states unless the requirement is stated unambiguously.[445] Even when statutes impose unquestioned obligations on states, the Court has utilized the rule to choose the least onerous of those obligations when they intrude upon state processes and threaten state autonomy.[446]

The rule acts as something of a proxy for judicial oversight of the political process[447] and as a substitute for an absolute bar on congressional regulation of states. To the extent that the Court is moving closer to reestablishing such bars in its recent elaboration of external limits,[448] this development strengthens the appeal of the clear statement approach. It calls for narrowing readings of seemingly broad statutes, in part to avoid constitutional questions. If there are real constitutional issues, that is all the more reason to invoke the rule. In a sense, the federalist wing of the Court gets to have it both ways. They can invoke the rule to curb congressional power over states, while their pronouncements that the rule must be utilized serve to reinforce the notion that constitutional limits do exist.[449]

There are two major obstacles to any utilization of the clear statement technique to resolve the § 666 constitutional problem. The first is that the statute seems clear enough about when and how it applies to states and their subdivisions. It is triggered by the receipt of a specified amount of federal assistance and it applies to specific acts of wrongdoing. Many courts have relied on this clarity as a reason for not limiting § 666's scope.[450] The second obstacle is that the clear statement approach is normally invoked to deny applicability of a stat-

445 *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (stating that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously"); *see also* South Dakota v. Dole, 483 U.S. 203, 207 (1987).

446 *See* Gregory v. Ashcroft, 501 U.S. 452 (1991). There is a strong emphasis in the majority opinion on state sovereignty, exemplified by the following quote: "Through the structure of its government, and the character of those who exercise government authority, a state defines itself as a sovereign." *Id.* at 460.

447 *See id.*; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 5-8, at 317 (2d ed. 1988) ("[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.).

448 *See* Printz v. United States, 117 S. Ct. 2365 (1997); New York v. United States, 505 U.S. 144 (1992). There has also been a recent trend in the Court to strengthen the Eleventh Amendment as well. *See, e.g.*, Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028 (1997); Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).

449 *Cf. Gregory*, 501 U.S. at 477 (White, J., concurring in part and dissenting in part).

450 *See, e.g.*, United States v. Marmolejo, 89 F.3d 1185 (5th Cir. 1996), *cert. granted sub nom.* Salinas v. United States, 117 S. Ct. 1079 (1997); United States v. Westmoreland, 841 F.2d 572 (5th Cir. 1988).

ute,[451] or to choose between plausible constructions in the way that most respects state autonomy.[452] Here, engrafting a limit to respond to the § 666 constitutional problem would mean adding words to the statute. This is a more substantial exercise of judicial power[453] than developing a test to define a broad statutory term such as the concept of "enterprise" in RICO.[454]

Nonetheless, I think that utilization of the clear statement approach is appropriate in the context of § 666. There is a serious constitutional problem when the statute leads to federal prosecution in cases where no federal funds are involved or affected. The legislative history suggests that a narrowing to emphasize the protection of federal funds would be consistent with Congress' intent. Moreover, even the courts that proclaim the statute's clarity often end up examining that history, perhaps out of lingering doubts that the statute really means what it says.[455]

Thus, I take the approach that applying the statute to cases where there is no impact on federal funds is such an extraordinary step that one would expect Congress to state it expressly. My approach to the § 666 constitutional problem is to stay as close to the language of the statute as possible while recognizing the need to narrow it.

United States v. Bass[456] is a helpful precedent. It is one of the cornerstones of clear statement jurisprudence, enunciating the need to construe statutes to preserve the federal-state balance.[457] The statute at issue in *Bass* contained a jurisdictional predicate. The statute made it criminal for a felon to "receiv[e], posses[s], or tranpor[t] in commerce or affecting commerce . . . any firearm."[458] According to the *Lopez* Court, *Bass* "interpreted the possession component . . . to require an additional nexus to interstate commerce."[459] I would build

451 This is the case with the Eleventh Amendment. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

452 *See Gregory*, 501 U.S. at 460.

453 *See* William N. Eskridge, Jr. & Phillip Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 27, 82 (1994).

454 *See* United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982); ABRAMS & BEALE, *supra* note 4, at 462–69.

455 *See, e.g.*, United States v. Westmoreland, 841 F.2d 572 (5th Cir. 1988). The *Westmoreland* court ultimately engaged in a broad reading of § 666, stating that: "It is sufficient that Congress seeks to preserve the integrity of federal funds by assuring the integrity of the organizations or agencies that receive them." *Id.* at 578.

456 404 U.S. 336 (1971).

457 *See id.* at 349.

458 *See* United States v. Lopez, 115 S. Ct. 1624, 1631 (1995) (quoting *Bass*, 404 U.S. at 337) (punctuation altered).

459 *Id.*

on this example to limit the applicability of § 666 to cases in which there is a clearer nexus to federal aid. It is true that the *Bass* Court essentially altered the sentence's grammar by making existing language modify more than it seemed to. Narrowing § 666 requires adding language. However, the existing language already suggests a focus on federal aid in order to trigger the statute.[460]

Formulation of a limitation would build on cases such as *United States v. Foley*[461] and *United States v. Wyncoop*[462] that emphasize the protection of federal funds and the undesirability of prosecutions under § 666 for "corruption that was not shown in some way to touch upon federal funds,"[463] as well as *Frega*'s requirement of a showing that federal funds were "threatened, either directly or indirectly,"[464] or that "federal funds were corruptly administered, were in danger of being corruptly administered, or even could have been corruptly administered."[465] There is similar language in Judge Jolly's dissent in *Salinas*.[466] I recognize that adding a nexus to the statute goes beyond normal clear statement practices. It can be seen as a combination of them and of judicial formulation of a test analogous to that in *Foley*. If this approach saves the statute from unconstitutionality and respects congressional intent, I think the game is worth the candle.

Utilization of a nexus gloss would require the prosecution in a § 666 case to show that the defendant's conduct affected federal funds directly, indirectly, or potentially. The mere presence of federal funds somewhere in the jurisdiction would not be enough. Courts would have to make a more detailed inquiry into the existence of the jurisdictional predicate. It is important to recognize that they make such inquiries all the time under such statutes as the Travel Act,[467] the

460 *See* 18 U.S.C. § 666(b) (1994). "(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 forms of Federal assistance." *Id.* Narrowing the statute's reach when governments are involved raises the question of symmetry when the entity is private. I would opt for consistency.

461 73 F.3d 484 (2d Cir. 1996).

462 11 F.3d 119 (9th Cir. 1993).

463 *Foley*, 73 F.3d at 493.

464 United States v. Frega, 933 F. Supp. 1536, 1543 (S.D. Cal. 1996).

465 *Id.*

466 *See* United States v. Marmolejo, 89 F.3d 1185, 1201 (5th Cir. 1996) (Jolly, J., concurring in part and dissenting in part), *cert. granted sub nom.* Salinas v. United States, 117 S. Ct. 1079 (1997); *see also Foley*, 73 F.3d at 484; *Frega*, 933 F. Supp. at 1536.

467 *See, e.g.*, Rewis v. United States, 401 U.S. 808 (1971) (relating interstate travel to gambling activity).

Hobbs Act,[468] and the mail and wire fraud statutes.[469] Indeed, they already engage in similar analysis under § 666.[470] Some cases will be easy because the connection to federal funds is obvious.[471] The receipt of $10,000 anywhere within the jurisdiction should be enough to trigger the nexus requirement. The prosecution might not be required to show receipt by the particular sub-entity within which the defendant works, at least in the case of fungible or pass-through funds.[472] Fungible assistance is different than aid to a discreet project. I recognize that courts would have to work such problems out. Utilization of a nexus approach would reduce the number of § 666 prosecutions. On the other hand, the federal government has at its disposal a number of other statutes, some quite broad in scope. If *none* of these statutes is applicable, and if a § 666 nexus approach cannot be satisfied, perhaps the matter is not a federal case. To insist that it is invites a difficult constitutional clash that, for the moment, might well be avoided.

How would the cases come out under this approach? Many would be decided the same way. Any case such as *Westmoreland* that involved highly fungible federal funds would probably meet it.[473] *Salinas* might be affirmed on the ground of indirect threat of corruption in the administration of federal funds. *All* of the lower court decisions cited in the Senate Report would come out in favor of federal jurisdiction.[474] In cases like *Foley* the prosecution might not be able to make the requisite showing. Unlike the *Foley* court, I would view the effect on Connecticut's fisc as irrelevant. The question would be that of the effects on its federal funds from the defendant's taking the bribe to alter votes on the banking bill. A number of cases will probably no

468 *See, e.g.*, United States v. Stillo, 57 F.3d 553 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 383 (1995) (discussing the effect of extortion on interstate commerce).

469 *See, e.g.*, Carpenter v. United States, 484 U.S. 19 (1987) (relating defendant's conduct to the use of mails and wires).

470 *See* United States v. Rooney, 37 F.3d 847 (2d Cir. 1994) (analyzing whether federal loans to a real estate developer constitute "federal assistance" under § 666). The court subsequently concluded that the developer's conduct did not constitute misapplication of federal funds. *Id.* at 854.

471 *See, e.g.*, United States v. Finn, 919 F. Supp. 1305 (D. Minn. 1995) (discussing the theft of federal funds from a grant to an Indian tribe).

472 *See* United States v. Dransfield, 913 F. Supp. 702, 709–10 (E.D.N.Y. 1996) (discussing pass-through issue).

473 Thus, this analysis accepts the application of § 666 to mechanisms such as block grants.

474 The Senate Report states that it is "the intent to reach thefts and bribery in situations of the types involved in the *Del Toro, Hinton,* and *Mosley* cases cited herein." S. REP. No. 98–225, at 370 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511.

longer fit under § 666. In *United States v. Valentine*,[475] for example, one count involved the City Recorder's supervision of a scheme to divert copying fees to an unofficial "kitty." The scheme netted $8,363.[476] Such malfeasance in a locality like Sevierville, Tennessee (population 7,103)[477] may well belong in the hands of state authorities.[478]

V. Other Emerging Section 666 Issues—Bribery Versus Gratuities and a General Honest Services Prohibition

Courts are beginning to focus on the question of limiting the general scope of § 666. This section will focus briefly on two other emerging issues under the statute: whether it covers gratuities as well as bribes, and whether it has the potential to develop into a general "honest services" statute. There is a growing body of case law on both, but the cases raise more questions than they answer.

A. Bribery v. Gratuities

The basic distinction between the bribery and gratuities offenses is generally accepted. Bribery depends on the presence of a quid pro quo, a specific official act that the payment may influence.[479] The gratuities offense occurs when something of value is given to an official who is likely to perform official acts that could benefit the giver.[480] The federal civil gratuities statute utilizes the following terms to embody the concept of a prohibited gratuity:

> Gifts to Federal Employees
> (a) Except as permitted by subsection (b), no Member of Congress or officer or employee of the executive, legislative, or judicial branch shall solicit or accept anything of value from a person—

475 63 F.3d 459 (6th Cir. 1995).

476 *See id.* at 461.

477 This figure is from Bureau of the Census, U.S. Dep't of Commerce, 1990 Census. *But see supra* note 244.

478 Alternative tests might be formulated that focus on the governmental position of the particular defendant or on the funding of a particular sub-entity within the recipient jurisdiction. I believe that neither draws the best line nor respects the statutory language as faithfully. Of course, such inquiries might be relevant in applying a test based on impact on federal funds. *See Westmoreland*, 841 F.2d at 578 (stating "the statute limits its reach to entities that receive a substantial amount of federal funds and to agents who have the authority to effect significant transactions").

479 *See* 18 U.S.C. § 201(b)(2)(1994); Whitaker, *supra* note 83, at 1621.

480 *See* Whittaker, *supra* note 83, at 1622.

> (1) seeking official action from, doing business with, or (in the case of executive branch officers and employees) conducting activities regulated by, the individual's employing entity; or
> (2) whose interests may be substantially affected by the performance or nonperformance of the individual's official duties.[481]

The federal criminal code proscribes the two offenses in different terms and provides different penalties.[482] The key to the bribery offense is a corrupt transfer to influence an official act.[483] The key to the gratuities offense is gifts "for or because of any official act performed or to be performed by [a] public official."[484] The distinction between the two offenses makes sense, but cases can arise at the margin which create some confusion.[485] In the context of § 666, the confusion is rampant.

The language of § 666(a)(1)(B) and (a)(2) appears to create the offenses of giving and receiving bribes in connection with a transaction of the recipient government involving $5,000 or more.[486] Some courts have, in fact, viewed this as a bribery statute only.[487] However, the Second Circuit has held that it embraces both offenses.[488] Other courts have explicitly left the matter open.[489] Some courts avoid the issue by noting that the language of the indictment or jury charge tracks the statute.[490]

The source of the confusion appears to be the Second Circuit's decision in *United States v. Crozier*.[491] The facts suggested bribery of a

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481 5 U.S.C. § 7353 (1990).

482 18 U.S.C. § 201 (1994); *see also* ABRAMS & BEALE, *supra* note 3, at 225–26.

483 *See* 18 U.S.C. § 201(b)(A).

484 18 U.S.C. § 201(c)(1)(A).

485 *See* Whitaker, *supra* note 83, at 1650 n.186.

486 18 U.S.C. § 666 (1994).

487 *See* United States v. Jackowe, 651 F. Supp. 1035 (S.D.N.Y. 1987), *overruled by* United States v. Crozier, 987 F.2d 893 (2d Cir. 1993).

488 *See, e.g.*, United States v. Rooney, 37 F.3d 847 (2d Cir. 1994); United States v. Coyne, 4 F.3d 100 (2d Cir. 1993); United States v. Crozier, 987 F.2d 893 (2d Cir. 1993). The Supreme Court recently denied *certiorari* in a case in which the Eleventh Circuit, in an unpublished opinion, appears to have affirmed a conviction based on a gratuities theory of § 666. *See* Fowlkes v. United States, 66 U.S.L.W. 3227 (October 7, 1997).

489 *See, e.g.*, United States v. Mariano, 983 F.2d 1150 (1st Cir. 1993); United States v. Duvall, 846 F.2d 966 (5th Cir. 1988); *cf.* United States v. Frega, 933 F. Supp. 1536, 1539–40 n.6 (S.D. Cal. 1996) (not reaching the issue, but suggesting that the statute would reach bribery only).

490 *See* United States v. Medley, 913 F.2d 1248, 1259–61 (7th Cir. 1990) (stating that the government's argument tracked the statute, even if the instructions did not).

491 987 F.2d 893 (2d Cir. 1993).

public official in return for a contract.[492] However, the jury instructions reflected a gratuities theory,[493] despite a subsequent attempt to clarify.[494] The defendant claimed that he could not be convicted for conspiracy to violate § 666 on a gratuities theory.[495] The court finessed any procedural problem by holding that § 666 covers both offenses.[496] The court noted some "confusion" as to the relationship between § 666 and 18 U.S.C. § 201, the federal bribery and gratuity statute.[497] It may have compounded the confusion by treating the two statutes as essentially identical.[498] A subsequent Second Circuit opinion involved a conviction in a case where the indictment and jury charge "tracked" the language of the statute.[499] The court stated that "a corrupt purpose was an essential element of [defendant's] conviction under 18 U.S.C. § 666."[500] If corrupt purpose is essential to a § 666 conviction, then that statute covers bribery only.[501]

There are two reasons why courts are confused about the gratuity/bribery issue. Both point toward treating § 666 as a bribery-only statute. The first is that the original language of the 1984 statute was amended in 1986. The original statute proscribed gifts "for or because of the recipient's conduct in any transaction or matter . . . involving $5,000 or more concerning the affairs of [a] state or local government agency . . . ."[502] The amended, and current, language proscribes "corruptly" giving, receiving, etc. anything of value "to influence or reward an agent of . . . a state, [or] local . . . government . . . in connection with any business, etc."[503] This

492 *See id.* at 896.

493 *See id.* at 897.

494 *See id.*

495 *See id.* at 897–98.

496 *See id.* at 898–900.

497 *See id.* at 898.

498 *See id.*

499 *See* United States v. Santopietro, 996 F.2d 17, 20 (2d Cir. 1993) (considering whether bribery or gratuities sentencing guidelines should be applied to § 666 convictions). The Index to the UNITED STATE SENTENCING COMMISSION GUIDELINES MANUAL indicates that both the bribery and gratuities guidelines are applicable to § 666. UNITED STATE SENTENCING COMMISSION GUIDELINES MANUAL 377 (1995).

500 *Id.* at 21.

501 *See id.*; *see also* United States v. Medley, 913 F.2d. 1248, 1261 (7th Cir. 1990) ("The instruction given, even without using the word 'corruptly,' would not permit a finding of guilt on some gratuity or real estate fee analysis.").

502 Crime Control Act of 1984, Pub. L. No. 98-473, § 1104, 98 Stat. 2143 (codified at 18 U.S.C. § 666(a) (1984)).

503 18 U.S.C. § 666(a)(2) (1994).

is not a "technical" change.[504] The change from "for" or "because of" to "corruptly influencing" is a change from a gratuities to a bribery statute.[505]

A second reason why courts are confused about the issues is that they assume, correctly, that Congress was concerned about the possibly inadequate scope of 18 U.S.C. § 201 when the defendants are not federal officials.[506] Congress did not, however, enact a mirror image of § 201 for nonfederal officials. Section 201 contains separate subsections to deal with bribery and gratuities. Section 666 does not. It is a mistake to attempt to read the two statutes as equal in reach. As the Second Circuit itself said in *Crozier*, identical language should be treated identically.[507]

Moreover, there are substantial policy arguments against extending § 666 to gratuities offenses. Any such application takes the statute deeply into a range of government ethics issues[508] that may be better handled at the state level.[509] States may differ about whether to treat them as criminal offenses, rely on civil enforcement, or utilize nonpunitive remedies.[510] This seems like an ideal area for states to play a laboratory role[511] as opposed to the hard-core area of bribery[512] where any federal interest in government integrity will be stronger. Federal prosecutions of state officials for gratuities are controversial,[513] and may be difficult or impossible under several of the major anti-corruption statutes.[514] Without a clearer indication from Congress, § 666 should not be available for end runs around these limits.

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504 *But see* United States v. Apple, 927 F. Supp. 1119, 1127 n.3 (N.D. Ind. 1996) ("[T]he amendments were technical and do not affect this ruling.").

505 *See* ABRAMS & BEALE, *supra* note 3, at 225 (discussing the element of "corrupt intent" in bribery statutes such as 18 U.S.C. § 201); *see also* United States v. Crozier, 987 F.2d 893, 899 (2d Cir. 1993) ("The amendments were made to limit the scope of these statutes, and not to broaden them to include new theories.").

506 *See* S. REP. No. 98-225, at 369–70 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510–11; *see also Crozier*, 987 F.2d at 898.

507 *Crozier*, 987 F.2d at 899.

508 *See* Brian C. Mooney, *Bill Seeks to Clarify Conflict-of-Interest Law*, BOSTON GLOBE, June 5, 1997, at B6.

509 *See* Williams, *supra* note 50, at 154; *see also* Brown, *supra* note 33, at 230.

510 *See* MASSACHUSETTS SPECIAL COMM'N ON ETHICS FINAL REPORT 13–22 (1995) (discussing reform of state gratuities law).

511 *See* Brown, *supra* note 33, at 280; *see also* United States v. Lopez, 514 U.S 549, 583 (1995) (Kennedy, J., concurring).

512 *See* Whitaker, *supra* note 83, at 1621 (discussing the strong federal interest in "quid pro quo" bribery).

513 *See* Judy Rakowsky, *Ex-Hancock Lobbyist Gets Fine, Probation*, BOSTON GLOBE, Nov. 28, 1996, at A1.

514 *See* ABRAMS & BEALE, *supra* note 3, at 245; Whitaker, *supra* note 83, at 1635.

Finally, in those cases where gratuities offenses involving state and local officials can have an impact on federal funds, § 201 remains available, at least if the *Dixson* "national public trust" requirement is satisfied.[515]

B. Towards a General Honest Services Statute?

The extent to which there should be a federal law of "honest services" applicable to state and local governments is highly controversial.[516] The controversy has arisen in the context of the mail fraud statute[517] and Congress' amendment of it to include honest services.[518] Debate focuses on such issues as prosecutorial discretion,[519] the desirability of a federal "catch-all" crime,[520] and the extent of federal intrusion into state and local governance.[521] In theory the mail fraud-honest services debate is not applicable to consideration of § 666. The former statute specifically covers both frauds involving honest services and those involving property.[522] Section 666 covers only the latter. Moreover, the congressional enactment that extended mail fraud coverage to deprivations of honest services is only applicable to the mail and wire fraud chapter of Title 18.[523]

However, I wish to consider briefly whether § 666 might evolve in the same direction. It contains broad language referring to fraud and misapplication, as well as the narrower offenses of theft, embezzlement, and conversion.[524] Cases have begun to explore the outer limits of "property" in the context of this section. It has been applied to misuse of employees' services,[525] payments to bogus employees,[526]

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515 United States v. Dixson, 465 U.S. 482, 500 (1984).

516 *See* Moohr, *supra* note 4, at 155; Williams *supra* note 50, at 170.

517 18 U.S.C. § 1341 (1994).

518 *Id.* § 1346; *see* Williams, *supra* note 50, at 162.

519 *See* Whitaker, *supra* note 83, at 1635.

520 *Id.*

521 *See* Moohr, *supra* note 4, at 156–57.

522 *See* 18 U.S.C. §§ 1341, 1345 (1994); *see* ABRAMS & BEALE, *supra* note 3, at 244.

523 Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508 (1988) (codified as amended at 18 U.S.C. § 1346 (1994)).

524 *See* 18 U.S.C. § 666 (a)(1)(A) (1994) ("Whoever . . . 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 . . . ."). The Court of Appeals for the First Circuit recently stated that embezzlement was an example of the "serious corruption" embraced by the honest services doctrine. United States v. Czubiniski, 106 F.3d 1069, 1076 (1st Cir. 1997).

525 *See* United States v. Valentine, 63 F.3d 459 (6th Cir. 1995); United States v. Delano, 55 F.3d 720 (2d Cir. 1995).

and nonexistent contracts.[527] Courts clearly take a broad view of property.[528] However, there is reluctance to extend it to defrauding the entity of one's own services.[529] To hold it applicable in these circumstances would be a large step toward another honest services statute. Such a step would be unwise, given the constitutional problem of § 666 and the extraordinary reach of such an interpretation. Of course, if the statute is limited to instances of an effect on federal funds, that limit would keep honest services uses within bounds. Moreover, the requirement that "property" be involved may restrict the possibility of applying it to deprivations of services. Misapplying your employees' time is one thing:[530] misapplying your own may be another, especially if the latter misuse takes the form of a conflict of interest.

The prospect of applying § 666 to conflicts of interest outside the bribery context shows how far the statute could intrude into state and local governmental practices. Suppose that in a city receiving federal anti-crime assistance a school board member votes to hire her brother-in-law for a $50,000 job in a context where there is no effect on federal funds. Conceivably this constitutes misapplication of government property worth more than $5,000. In my view, such conflict of interest matters should remain with the states.[531] From both a constitutional and a textual perspective, § 666 is a weak support for any such development. In its short life, however, the statute has shown extraordinary capacity for growth and the potential for bigger things to come. Thus, no extension of § 666 can be ruled out. Although I doubt it will happen, I raise the honest services issue here to show how far the statute might reach.

VI. CONCLUSION

Federal prosecutions of state and local officials play an important role in American public life. However, that role should not be immune from re-examination. The use of § 666 is a case in point. The potential reach of this statute is a cause for concern. Its existing appli-

526 *See* United States v. Stout, CRIM. No. 89-317-1-2-3, 1990 WL 136341 (E.D. Pa. Sept. 18, 1990).

527 *See* United States v. Moeller, 80 F.3d 1053 (5th Cir. 1996).

528 *See* United States v. Sanderson, 966 F.2d 184, 189 (6th Cir. 1992).

529 *See Valentine*, 63 F.3d at 465; United States v. Harloff, 815 F. Supp. 618 (W.D.N.Y. 1993).

530 *See Delano*, 55 F.3d at 729–30.

531 *But see* United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996) (holding that undisclosed conflicts of interest resulting in personal gain are honest services violations)

cations are a greater one. The courts are dealing with a broadly drafted law that Congress enacted to deal with a relatively narrow set of problems. The text can enable this law to become a form of general federal anti-corruption statute in any jurisdiction that receives more than $10,000 in federal assistance. This degree of intrusiveness raises serious constitutional problems, especially in the face of the Supreme Court's recent concern for limiting federal authority and preserving the autonomy of state and local governments. In this Article I have suggested limits. The courts might accept these proposals, or develop others. A Supreme Court decision in *Salinas* could be of great importance. The main goal for all concerned should be to bring the stealth statute into the light of day.