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The New Federalism, the Spending Power, and Federal Criminal Law

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THE NEW FEDERALISM, THE SPENDING POWER, AND FEDERAL CRIMINAL LAW

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It is often said that we are living through a "revival" of federalism. Certainly, the Rehnquist Court has brought back to the public-law table the notion that the Constitution is a charter for a government of limited and enumerated powers, one that is constrained both by that charter's text and by the structure of the government it creates. This allegedly "revolutionary" Court seems little inclined, however, to revise or revisit its Spending Power doctrine, and it remains settled law that Congress may disburse funds in pursuit of ends not authorized explicitly in Article I and may promote policy goals that might lie beyond the reach of its enumerated powers merely by attaching conditions to the money it spends.

This Article considers whether and to what extent Congress may use its Spending Power—standing alone, or in conjunction with the Necessary and Proper, or "Sweeping," Clause—to create, prosecute, and punish federal crimes. Specifically, it examines the challenges to a particular federal anti-corruption statute, concluding that the expansion of federal criminal jurisdiction through spending is inconsistent with the structures explicitly created and reasonably implied by our Constitution, with the values these structures were designed to advance, and with the liberties they were intended to protect.

This Article's doctrinal claims cohere well with leading themes in contemporary constitutional law. There are rich connections between the Article's arguments about conditional spending and criminalization, on the one hand, and contemporary debates in First Amendment law relating to government speech, forum analysis, and expressive association, on the other. In addition, the understanding of the Spending Power defended here serves not only as a complement to, but a crucial component of, the renewed emphasis on mediating institutions and civil society that will likely prove an enduring legacy of the Rehnquist Court.

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† Associate Professor of Law, Notre Dame Law School. Thanks are due to many of my colleagues and friends, including Randy Barnett, Mitchell Berman, A.J. Bellia, George Brown, Eric Claeys, Brannon Denning, John Elwood, Nicole Stelle Garnett, Steffen Johnson, Bill Kelley, Gary Lawson, John Nagle, Howard Sklamberg, and Stephen Smith, for their comments and criticisms. Mark Emery, Fred Marczyk, Diane Meyers, and Rebecca D'arcy provided valuable assistance. I should also note that parts of this Article expand on a brief survey, co-authored a few years ago with a friend and colleague, of federal courts' efforts to identify and enforce the boundaries of 18 U.S.C. § 666, the federal-program bribery statute. *See* John P. Elwood & Richard W. Garnett, *Section 666, The Spending Power and Federalization of Criminal Law*, THE CHAMPION 25 (May 2001).

The Constitution does not contemplate that federal regulatory power should tag along after federal money like a hungry dog.

—David E. Engdahl[1]

INTRODUCTION

Professor Gary Lawson observed a decade ago that "in this day and age, discussing the doctrine of enumerated powers is like discussing the redemption of Imperial Chinese bonds."[2] But then, not many months later, came the Supreme Court's decision in *United States v. Lopez*, and with it a reaffirmation of what the Court called one of the "first principles" of American law, namely, the notion that our Constitution "creates a Federal Government of enumerated powers," powers that, although vast, are at the same time "'few and defined.'"[3] With these observations, Chief Justice Rehnquist seemed to echo those offered nearly two centuries before by his most formidable predecessor: "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to

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1 David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 92 (1994).

2 Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1236 (1994).

3 514 U.S. 549, 552 (1995) (quoting THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961)).

it, . . . is now universally admitted."[4] At the same time, *Lopez* and its aftermath have proved prescient Chief Justice Marshall's guess that the "question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."[5]

Although Professor Lawson's quip could only have hit home ten years ago, ours, evidently, is a different "day and age." Today, given the content and trajectory of the Court's recent work,[6] few public-law scholars can afford to let enumerated-powers questions languish with "Imperial Chinese bonds" and other arcana in the constitutional junk drawer.[7] For better or worse, "[f]ederalism is back, with a vengeance."[8]

Perhaps. Despite talk of epochs, revivals, revolutions, and paradigm shifts,[9] one might just as reasonably conclude that the practical,

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4 M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819); *see also* John C. Eastman, *Re-entering the Arena: Restoring a Judicial Role for Enforcing Limits on Federal Mandates*, 25 HARV. J.L. & PUB. POL'Y 931, 931 (2002) ("Overlooked for the better part of the last century, [the] principle [of enumerated powers] has undergone a renaissance of sorts since the Supreme Court's decision in *United States v. Lopez*. . . .").

5 *M'Culloch*, 17 U.S. at 405. Further confirmation of Chief Justice Marshall's prediction can be found in several of the dissents in recent federalism cases. *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 788 (2002) (Breyer, J., dissenting) ("Today's decision reaffirms the need for continued dissent—unless the consequences of the Court's approach prove anodyne, as I hope, rather than randomly destructive, as I fear."); Alden v. Maine, 527 U.S. 706, 814 (1999) (Souter, J., dissenting) ("I expect the Court's late essay into immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting.").

6 *See infra* text accompanying Part I.A. During the past few years, the Supreme Court has in a variety of contexts reasserted—expanded, some would say—its own role in policing both the vertical and horizontal boundaries of congressional power. These moves have prompted mountains of academic and other criticism and commentary. A recent study by a colleague of mine is particularly helpful. *See generally* Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001). For a sharp and wide-ranging critique of some of these developments, see, for example, Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1045–61 (2001).

7 *Cf.* Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1459 (2001) ("Like bell-bottom jeans, the theory of the political safeguards of federalism periodically makes a brief comeback, before common sense returns it from whence it came.").

8 John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 27 (1998); *see* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 75 (2001) (noting that "[f]rom 1937 to 1995, federalism was part of a 'Constitution in exile'"); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2181 (1998) ("The constitutional law of federalism-based constraints on the federal government has risen phoenix-like from the ashes of post-New Deal enthusiasm for the exercise of national power."); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 819 (1999) ("In recent years, one of the most important developments in constitutional law has been the resurgence of federalism.").

9 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 615 (1995) (Souter, J., dissenting) (warning that "[n]ot every epochal case has come in epochal trappings"); Balkin & Levin-

doctrinal, and jurisprudential consequences of what is sometimes called the Court's "New Federalism"[10] are both slight and exaggerated. As Professor Fried asked, commenting on claims about "revolutions," "should the Court's works and words really cause our heads to spin? After all, what exactly [has] happened?"[11] The combined complaints of the Chief Justice,[12] the American Bar Association,[13] and countless others[14] have done little to halt the "federalization" of crime.[15] Nor have the federal courts shown much enthusiasm for aggressively employing *Lopez*'s Commerce Clause analysis.[16] The Tenth Amendment is still not much more than a truism;[17] provocative scholarly speculation about the invigoration of the Guaranty Clause[18] goes largely unnoticed in the courts; and the nondelegation doctrine re-

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son, *supra* note 6, at 1051 ("We are in the middle of a paradigm shift that has changed the way that people write, think, and teach about American constitutional law."); Mark Tushnet, *Keeping Your Eye on the Ball: The Significance of the Revival of Constitutional Federalism*, 13 GA. ST. U. L. REV. 1065, 1065 (1997) (arguing a "point about the recent revival of constitutional federalism").

10 *See, e.g.*, Symposium, *The New Federalism After* United States v. Lopez, 46 CASE W. RES. L. REV. 631 (1996).

11 Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 13–14 (1995).

12 *See* WILLIAM H. REHNQUIST, THE 1998 YEAR-END REPORT OF THE FEDERAL JUDICIARY, *reprinted in* 11 FED. SENTENCING REP. 134, 135 (1998) ("The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the Judiciary's resources . . . , but it also threatens to change entirely the nature of our federal system.").

13 *See* TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 55 (1998) ("The expanding coverage of federal criminal law, much of it enacted in the absence of a demonstrated and distinctive federal justification . . . . has little to commend it and much to condemn it.").

14 *See, e.g.*, Edwin Meese III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 4, 6 (1997) (describing federal criminal laws as "ineffective and partisan," and arguing that such laws increase "the potential . . . for an oppressive and burdensome federal police state").

15 *See, e.g.*, George D. Brown, *Constitutionalizing the Federal Criminal Law Debate:* Morrison, Jones, *and the ABA*, 2001 U. ILL. L. REV. 983, 992–1001, 1023 (analyzing the ABA's objections to the federalization of criminal law but eventually concluding that "[f]ederal criminal law is here to stay"); *cf., e.g.*, Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 825 (2000) ("In Congress' 105th Term, hundreds of bills were introduced having to do with federal criminal statutes . . . .").

16 *See, e.g.*, Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1256 (2003) ("There is evidence from the lower courts' opinions that they are still reluctant to take *Lopez* seriously[.]"); Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of* Lopez, *or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 370 (2000) ("[In the courts of appeal,] the impact of *Lopez* has been limited, to say the least.").

17 *See* New York v. United States, 505 U.S. 144, 156 (1992) ("[T]he Tenth Amendment 'states but a truism that all is retained which has not been surrendered.'" (quoting United States v. Darby, 312 U.S. 100, 124 (1941))).

18 Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815 (1994); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 70 (1988) ("For more than a hundred years . . . the Supreme Court has maintained that the guarantee clause raises only nonjusticiable political questions.").

mains a theoretical curiosity.[19] The Establishment Clause continues to bind state and local governments;[20] *Roe* and *Miranda* remain, for the most part, the law of the land,[21] and so on. In light of all this humdrum doctrinal sameness, it seems reasonable to wonder whether the Rehnquist Court's much-remarked federalism revival is, in the end, "much ado about nothing."[22]

In particular, the Rehnquist Revolution thesis is weakened considerably by the fact that the Court has done nothing, and seems little inclined to do anything, to revise or even revisit its Spending Power and conditional-spending doctrines.[23] *Lopez* and other New Federalism salvos notwithstanding, it remains settled law that Congress may spend money on projects and in pursuit of ends that are not authorized explicitly in Article I, and also may enthusiastically promote policy goals that might lie beyond the reach of its enumerated powers merely by attaching conditions to the money it spends.[24] Even as the

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19 *See, e.g.*, Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 474 (2001) (noting that the Court has struck down only two statutes under the rubric of the nondelegation doctrine).

20 *Cf.* Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) ("[I]n the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government.").

21 *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 432 (2000) (upholding *Miranda*); Stenberg v. Carhart, 530 U.S. 914, 930–31 (2000) (invalidating state ban on partial-birth abortions).

22 John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 64 (2001). *See also* Marci A. Hamilton, *Nine Shibboleths of the New Federalism*, 47 WAYNE L. REV. 931, 940 (2001) ("The Court is doing next to nothing. The new federalism is intellectually fascinating, and scholars have something wonderful to chew on, but the Court itself is nibbling."). For a penetrating, and pessimistic, assessment of the Rehnquist Court's progress toward a meaningful, authentic federalism, see generally ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM (2001) (critiquing the Court's decisions on federalism and blaming the trend of nationalization on the changing character of the American people).

23 *See, e.g.*, Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1914 (1995) ("[P]revailing Spending Clause doctrine appears to vitiate much of the import of *Lopez* and any progeny it may have."); Mark Tushnet, *What Is the Supreme Court's New Federalism?*, 25 OKLA. CITY U. L. REV. 927, 936–37 (2000) ("The Court is unlikely to succeed in radically transforming the relative roles of the national and the state governments unless it changes its doctrine regarding Congress's power to require that states accepting federal grants comply with federally prescribed requirements.").

The Court's lack of interest was confirmed, perhaps, with its recent, unanimous decision in *Pierce County v. Guillen*, 537 U.S. 129 (2003). In that case, notwithstanding the Washington Supreme Court's detailed determination that certain features of the federal Hazard Elimination Program, 23 U.S.C. § 152 (2000), exceeded Congress's power under the Spending Clause, Guillen v. Pierce County, 31 P.3d 628, 651 (Wash. 2001), *rev'd in part*, 537 U.S. 129 (2003), the Justices quickly concluded that the disputed provisions were well within the scope of Congress's Commerce Clause authority, and noted simply that, in light of its Commerce Clause holding, "we need not decide whether [the provisions] could also be a proper exercise of Congress'[s] authority under the Spending Clause or the Necessary and Proper Clause." 537 U.S. at 148 n.9.

24 *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987) ("'[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution[,]'" and so "objectives not thought to

Court tweaks the outer boundaries of federal power, Congress's ability to regulate broadly through conditional spending—*i.e.*, its power to regulate via contract[25]—is presumed, and serves perhaps to reassure those troubled by the Court's supposed anti-federal direction. When, for instance, the Court in *Printz v. United States* invalidated on Tenth Amendment grounds certain provisions of the Brady Handgun Violence Prevention Act, Justice O'Connor was quick to note in her concurring opinion that "[the Court's] holding . . . does not spell the end of the objectives of the Brady Act . . . [because] Congress is . . . free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs."[26] Apparently, as Professor Tushnet has observed, "the revolutionary path leads to places the Court has . . . no interest in reaching."[27]

At the very least, the Court's failure to import into its Spending Power doctrine the proposition that "Congress has vast power[,] but not all power"[28] sits uneasily with its New Federalism decisions. This Article explores the resulting dissonance by considering whether and to what extent Congress may use its Spending Power—that is, its power to "provide for the . . . general Welfare of the United States"[29]—to create, prosecute, and punish federal crimes. "[H]ow far," in other words, "[may] Congress . . . go[ ] to federalize

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be within Article I's 'enumerated legislative fields' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." (citation omitted) (quoting United States v. Butler, 297 U.S. 1, 65–66 (1936))); Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 654 (1999) (Kennedy, J., dissenting). In *Davis*, Justice Kennedy stated:

> The Court has held that Congress'[s] power "to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." As a consequence, Congress can use its Spending Clause power to pursue objectives outside of "Article I's enumerated legislative fields" by attaching conditions to the grant of federal funds.

(citation omitted) (internal quotation marks omitted) (quoting *Dole*, 483 U.S. at 207).

25 *See* Barnes v. Gorman, 536 U.S. 181, 186 (2002) ("We have repeatedly characterized . . . Spending Clause legislation as 'much in the nature of a *contract*. . . .'") (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)); *Pennhurst*, 451 U.S. at 17 ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.").

26 521 U.S. 898, 936 (1997) (O'Connor, J., concurring); *see* Alden v. Maine, 527 U.S. 706, 755 (1999) (citing *Dole*, and observing that the Federal Government does not "lack the authority or means to seek the States' voluntary consent to private suits"); Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 116 ("[A]ny time that Congress finds itself limited by . . . delegated regulatory powers, . . . [it] need only attach a condition on a federal spending grant that achieves the same (otherwise invalid) regulatory objective.").

27 Tushnet, *supra* note 23, at 937.

28 *Alden*, 527 U.S. at 758.

29 U.S. CONST. art. I, § 8, cl. 1.

crime[?]"[30] Does Congress's well-established ability to attach regulatory conditions to federal-program funds—either alone, or in conjunction with its power "[t]o make all Laws which shall be necessary and proper for carrying into Execution [its other enumerated] Powers"[31]—authorize the federal prosecution and punishment of all persons whose conduct in some way crosses paths with those funds? Does the Constitution authorize the government of the United States to "criminalize"[32] conduct merely because it has disbursed federal monies in that conduct's general direction?

Chief Justice Rehnquist, paying tribute to non-blockbuster decisions, has been known to quote Thomas Gray's *Elegy Written in a Country Churchyard,* and to describe such sleeper cases as "flowers which are born to blush unseen and waste their sweetness on the desert air."[33] The case of *United States v. McCormack* might, at first glance, seem just such a blushing flower—a surburban thug was charged with buying the inattention of a local police officer in Malden, Massachusetts.[34] What is noteworthy, however, about this case is not its seedy tale of garden-variety corruption, but rather the fact that Kevin McCormack was charged with a federal offense. What did he do, one might wonder, to merit the prosecutorial attentions of a government of "enumerated," "few," and "defined" powers?

McCormack was indicted under 18 U.S.C. § 666. That provision—known as "the Beast in the Federal Criminal Arsenal"[35] and "the Stealth Statute"[36]—makes run-of-the-mill bribery a federal crime if the bribe relates to a transaction worth more than $5,000 and involves the agent of any organization or government that "receives, in any one year period, benefits in excess of $10,000 under a Federal program . . . ."[37] In *McCormack,* no one disputed that Malden's local police department, "like scores of departments across the country," received more than $10,000 in federal-program funds.[38] For present purposes, the important point is that this anti-corruption statute's pur-

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30 United States v. McCormack, 31 F. Supp. 2d 176, 177 (D. Mass. 1998).

31 U.S. CONST. art. 1, § 8, cl. 18.

32 This is an unfortunate but unavoidable term. *See, e.g.,* United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) ("When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" (quoting United States v. Enmons, 410 U.S. 396, 411–12 (1973) (internal quotation marks omitted)).

33 *See* Jennifer Myers, *No Talk of Retirement at Circuit Meeting,* LEGAL TIMES, July 9, 2001, at 8.

34 *McCormack,* 31 F. Supp. 2d at 177.

35 Daniel N. Rosenstein, Note, *Section 666: The Beast in the Federal Criminal Arsenal,* 39 CATH. U. L. REV. 673 (1990).

36 George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666,* 73 NOTRE DAME L. REV. 247 (1998).

37 18 U.S.C. § 666(b) (2000).

38 *McCormack,* 31 F. Supp. 2d at 178.

ported constitutional basis[39] is not Congress's power to, say, "regulate Commerce"[40] or "establish Post Offices."[41] Instead, Congress relied simply on its above-mentioned ability to attach regulatory conditions to the money it spends,[42] and perhaps also on its power to create and prosecute crimes when "necessary and proper" for the smooth functioning of spending programs.[43]

At present, the federal courts are sharply divided over whether the government in Section 666 cases is required to establish a particular "nexus" between a criminal defendant's conduct and federal-program funds.[44] This is an interesting question, one that the Justices

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39 For an overview of the various "bases" for federal criminal jurisdiction, see, for example, NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 19–61 (3d ed. 2000); G. Robert Blakey, *Federal Criminal Law: The Need, Not for Revised Constitutional Theory or New Congressional Statutes, but the Exercise of Responsible Prosecutorial Discretion*, 46 HASTINGS L.J. 1175, 1219–44 (1995).

40 U.S. CONST. art. 1, § 8, cl. 3.

41 U.S. CONST. art. I, § 8, cl. 7; *see Ex parte* Jackson, 96 U.S. 727, 732 (1877), in which Justice Field noted that

> [t]he power vested in Congress "to establish post-offices and post-roads" has been practically construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried . . . but . . . all measures necessary to secure its safe and speedy transit

and that "[t]he power possessed by Congress embraces the regulation of the entire postal system of the country."

42 *See, e.g.*, Fischer v. United States, 529 U.S. 667, 689 n. 3 (2000) (Thomas, J., dissenting) ("Section 666 was adopted pursuant to Congress'[s] spending power, Art. I, § 8, cl. 1."); Brown, *supra* note 36, at 251 ("[Section] 666 represents an exercise of the spending power.").

43 *See, e.g.*, United States v. Lipscomb, 299 F.3d 303, 336–37 (5th Cir. 2002). The *Lipscomb* court noted that

> Congress could have believed . . . that preventing federal funds from passing through state and local legislative bodies whose members are corrupt, and to do so with the deterrent of criminalizing the legislators' corruption, even with respect to purely state or local issues, was necessary and proper to the federal spending power.

Id.

44 *See, e.g.*, Brown, *supra* note 36, at 305–06 (urging adoption of a nexus requirement). *Compare, e.g., Lipscomb*, 299 F.3d at 309 ("[Lipscomb] proposes that we construe the statute to require a nexus between his offense conduct and federal funds—or, put differently, that his conduct implicate a tangible federal interest. . . . [This] contention [does not] succeed[ ]."), *with* United States v. Zwick, 199 F.3d 672, 687 (3d Cir. 1999) ("[W]e hold that § 666 requires that the government prove a federal interest is implicated by the defendant's offense conduct."). *See generally* Cheryl Crumpton Herring, Comment, *18 U.S.C. § 666: Is It a Blank Check to Federal Authorities Prosecuting State and Local Corruption?*, 52 ALA. L. REV. 1317, 1318–25 (2001) (discussing a split in authority among the United States Courts of Appeals regarding whether federal funds must be affected to trigger Section 666); Paul Salvatoriello, Note, *The Practical Necessity of Federal Intervention Versus the Ideal of Federalism: An Expansive View of Section 666 in the Prosecution of State and Local Corruption*, 89 GEO. L.J. 2393, 2403–09 (2001) (same).

have dodged (at least) twice,[45] but will almost certainly resolve soon.

At the same time, though, the question presumes too much. This is because Section 666 itself—and not simply its application in cases involving no apparent federal interest[46]—is unconstitutional. In other words, the problem with the statute is not merely one of degree. Rather, the problem is that the Spending Power is simply not a valid vehicle for the creation of federal crimes and the expansion of criminal jurisdiction. Nor does it seem to be constitutionally outfitted for this task by the Necessary and Proper, or "Sweeping," Clause.[47] Thus, "the law is unconstitutional, void *ab initio*."[48]

None of this is to say that certain activities or actors are categorically beyond the reach of the federal criminal law. It could well be, given the vastness of even Congress's few and defined enumerated powers, that nearly every crime can be a federal crime.[49] The claim here is more modest: there are real and enforceable constitutional limits on Congress's ability to create crimes by spending and tying strings to money.

This inquiry is both timely and important. Several United States Courts of Appeals disagree about the implications of enumerated-

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45 *See Fischer*, 529 U.S. at 681–82; Salinas v. United States, 522 U.S. 52, 61 (1997) ("Whatever might be said about [Section 666's] application in other cases, the application of [the statute] to Salinas did not extend federal power beyond its proper bounds.").

46 *See Lipscomb*, 299 F.3d at 313 (concluding that "once a local government accepts more than $10,000 per year from the federal government, no further federal interest is needed to justify prosecution under § 666"); United States v. McCormack, 31 F. Supp. 2d 176, 178 (D. Mass. 1998) (noting the Government's argument that "any and all bribes, about any aspect of the entity's business, so long as they reach a certain level . . . may be prosecuted as federal offenses" and that "[i]t does not matter if federal funds were threatened, either directly or indirectly, or if a federal program was implicated in any way").

47 *See* U.S. CONST. art. I. § 8, cl. 18. *See generally* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993) (analyzing the Clause as a tool for preserving federalism).

48 United States v. Morgan, 230 F.3d 1067, 1073 (8th Cir. 2000) (Bye, J., concurring) ("Congress may not pass laws unless it acts pursuant to an express grant of power or authority in Article I of the Constitution. Section 666 cannot properly be linked to any grant of Congressional power in the Constitution. Hence, Congress exceeded its proper authority in enacting § 666. . . . ."). *But see, e.g.*, United States v. Sabri, 326 F.3d 937, 948–53 (8th Cir. 2003) (concluding that Section 666 is a "necessary and proper" exercise of Congressional power), *cert. granted*, No. 03-44, 2003 WL 21692658 (U.S. Oct. 14, 2003).

49 *Cf.* United States v. Lopez, 514 U.S. 549, 567–68 (1995). The *Lopez* Court noted: "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. . . . This we are unwilling to do." *Id.* For further reference, compare also Reynolds & Denning, *supra* note 16, at 376 (discussing *Lopez*'s "'non-infinity principle'—the principle that any accepted theory of the Commerce Clause resulting in a virtually unlimited source of governmental power must be invalid" (footnote omitted) (quoting David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously:* Lopez *and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59, 69 (1997))).

powers principles and Spending Power doctrine for one particular criminal statute, and the Supreme Court will inevitably agree to resolve this disagreement. What is more, several judges have flagged the broader problem whether the Spending Power can be used to create crimes at all.[50] More generally, though, the doctrinal and normative problems addressed here sit at the intersection of several contemporary discussions and developments in constitutional law, and invite us to engage challenging questions about formalism, federalism, and freedom.

Part I sets the stage for the discussion that follows. Here, the Article takes stock of the Supreme Court's renewed interest in questions of structural federalism and enumerated powers. More particularly, it surveys the Court's Spending Power and regulatory-conditions doctrine, suggesting that this is an area relatively untouched by the supposed federalism revival. Part II serves as a kind of case study. The Article will in Part II discuss the text, history, and purpose of Section 666 and review its judicial treatment, focusing on the gradual constitutionalization of claims concerning the statute's scope and on courts' responses to arguments invoking enumerated-powers and conditional-spending principles.

Part III analyzes and evaluates these claims and responses. The Article concludes that the prosecution and punishment of criminal defendants like Kevin McCormack cannot be justified under conditional-spending doctrine, because the possibility of such prosecution and punishment is not a "condition" to which the defendants previously agreed. In other words, the regulation-by-contract framework set out in *South Dakota v. Dole*[51] does not work as a method of analyzing federalism-based challenges to Section 666 and its applications. Nor, this Article submits, are such statutes and prosecutions authorized by Congress's power to enact laws "necessary and proper for carrying into Execution [its other enumerated] Powers."[52]

Finally, there remains a perhaps more difficult question: Why might these doctrinal claims *matter*? Accordingly, the Article concludes by suggesting that its doctrinal claims are normatively attractive and cohere well with leading themes in contemporary constitutional law. It notes, for example, an unremarked but instructive connection

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50 *See, e.g.*, *Lipscomb*, 299 F.3d at 366–67 (Smith, J., dissenting); *Morgan*, 230 F.3d at 1072–75 (Bye, J., concurring); United States v. Sabri, 183 F. Supp. 2d 1145, 1156–58 (D. Minn. 2002), *aff'd in part, rev'd in part*, 326 F.3d 937 (8th Cir. 2003), *cert. granted*, No. 03-44, 2003 WL 21692658 (U.S. Oct. 14, 2003).

51 483 U.S. 203 (1987).

52 U.S. CONST. art. I, § 8, cl. 18. However, as discussed in more detail below, several courts of appeals have concluded otherwise. *See* United States v. Bynum, 327 F.3d 986, 991 (9th Cir. 2003); *Sabri*, 326 F.3d at 948–53; United States v. Edgar, 304 F.3d 1320, 1325 (11th Cir. 2002).

between a sound understanding of conditional spending and criminal jurisdiction, on the one hand, and developments in First Amendment law relating to government speech, forum analysis, and expressive association, on the other. More generally, the Article suggests that such an understanding should serve not only as a complement to, but also as a crucial component of, the renewed emphasis on mediating institutions and civil society that has been provocatively identified as the enduring legacy of the Rehnquist Court.[53]

I
SETTING THE STAGE: THE NEW FEDERALISM, CONDITIONAL SPENDING, AND THE FEDERALIZATION DEBATE

The question whether the Spending Power, either standing alone or with the aid of the Sweeping Clause, may serve as the vehicle for the creation and prosecution of federal crimes is interesting and important in its own right. At the same time, it is probably best understood and addressed in context, against the backdrop of several contemporary debates and developments. After all, to inquire into the connection between conditional spending and crime-creation is to join any number of provocative and crowded conversations about the text, history, and structure of our Constitution; about the efficient administration of criminal justice; and about localism, subsidiarity, and political accountability.

This Part situates appropriately the analysis and arguments that follow. Accordingly, it first provides a brief overview of the Rehnquist Court's New Federalism and its more prominent themes, then turns to the state of the Court's Spending Power and conditional-spending doctrines, and, finally, fleshes out the observation that these doctrines—particularly in the criminal-law context—appear unmoved by any "revival" of or "revolution" in federalism.

A. An Overview of the New Federalism

It is difficult in legal and political circles to avoid the observation that we are living through a "revival,"[54] or a "revolution,"[55] of federalism. The doctrines and decisions said to warrant this observation are both hailed and condemned. To some, they reflect a "conservative"

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53 *See* John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 490–91 (2002).

54 *See, e.g.*, Lynn Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 195 (2001); Tushnet, *supra* note 9, at 1065.

55 *See, e.g.*, Balkin & Levinson, *supra* note 6, at 1045, 1053 (discussing the "constitutional revolution we are living through"); Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 7 (2001) ("[T]here has been a revolution with regard to the structure of the American government because of the Supreme Court decisions in the last few years regarding federalism.").

brand of ahistorical and unwise "judicial activism," substantive policy preferences masked as neutral principles, and even raw, shameless, partisan politics. To others, these developments represent a long-overdue return to bedrock principles of structural federalism, and are evidence of a commendable recommitment to text, forms, and restraint, and to localism, accountability, and experimentation. Some see the federal power to protect individual liberties and provide redress for their violation hobbled in the name of suspect "States' rights" abstractions;[56] others see a determination to secure freedom in a manner consistent with the plan of the Constitution, through enforcement of the limitations on Congress's power, deference to the States' legislatures in disputed matters of policy and morality, and solicitude for the independence of mediating associations.[57]

However evaluated, though, it is a hallmark—and perhaps the legacy—of the Rehnquist Court to have brought back to the public-law table the notion that the Constitution is a charter for a government of limited and enumerated powers, one that is constrained both by that charter's text and by the structure of the government it creates and authorizes.[58] More controversially, perhaps, the Court has revived the claim that the reach, content, and implications of these pow-

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56 *See* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 1–14 (2002).

57 For only a sample of the work of the *many* scholars and commentators who have recently provided detailed and ambitious studies of the Supreme Court's recent "federalism" decisions, see, for example, Balkin & Levinson, *supra* note 6 (concluding that the Court has not truly dampened federal regulatory power); Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752 (1995) (arguing that *Lopez* illustrates that the Court—and the Country—can return to an era of limited national power); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002) (concluding that the Rehnquist Court has done less to promote federalism than is widely perceived); Jackson, *supra* note 8 (discussing the Supreme Court's recent revival of federalism); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431 (2002) (concluding that the Rehnquist Court has not been ambitious about achieving a federalist vision); McGinnis, *supra* note 53 (arguing that the Rehnquist Court has pursued a coherent jurisprudence of federalism); Saikrishna Prakash, *Are the Judicial Safeguards of Federalism the Ultimate Form of Conservative Judicial Activism?*, 73 U. COLO. L. REV. 1363 (2002) (arguing that judicial review safeguarding federalism is not "activism"); Rappaport, *supra* note 8 (claiming that the Rehnquist Court is responsible for a resurgence of federalism).

58 Professor Walter Dellinger suggested recently that Chief Justice Rehnquist telegraphed his hopes for precisely this legacy more than twenty-five years ago, soon after his arrival on the Court, in "an obscure 1975 decision," *Fry v. United States*, 421 U.S. 542 (1975). Tony Mauro, *The Rehnquist Revolution's Humble Start*, LEGAL TIMES, Feb. 3, 2003, at 1. In *Fry*, the Court upheld a federally imposed wage freeze on Ohio state employees. In dissent, then-Justice Rehnquist insisted, among other things, that "basic constitutional principles" required greater solicitude for the State's dignity and sovereignty. *Fry*, 421 U.S. at 550 (Rehnquist, J., dissenting). For similar evidence that the recent federalism revival was presaged in the Chief Justice's earlier work, see Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1320 (1982) ("outlin[ing] the theory of federalism that emerges from Justice Rehnquist's work on the Court").

ers and structure are to be identified and enforced by the federal courts.

For example, the Court has, during the last decade or so, reaffirmed repeatedly the States' sovereign immunity from suit, and invalidated congressional attempts to abrogate that immunity through antidiscrimination and various other statutes.[59] It has cabined the power of Congress to employ Section 5 of the Fourteenth Amendment as a means of protecting individual rights and remedying various forms of discrimination or as a vehicle for ameliorative social legislation.[60] The Justices have insisted that there are identifiable and enforceable limits to the subjects Congress may regulate, and the extent to which it may regulate them, pursuant to its authority over "'Commerce . . . among the several States.'"[61] And, as if to insist that the Tenth Amendment retains more bite than the typical truism, they have stated that the Amendment and the structural premises it reflects disable Congress from "commandeering" for its own purposes the States' officers and political processes.[62]

But these are only some of the more obvious and prominent (or notorious) New Federalism developments. In addition, the increasing use of and reliance upon interpretive tools, such as the avoidance canon,[63] has constrained the regulatory power of Congress and solidi-

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59 *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78–79 (2000); Alden v. Maine, 527 U.S. 706, 712–13 (1999); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 635–36 (1999); Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 269 (1997); Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996).

60 *See, e.g.*, *Garrett*, 531 U.S. at 374; United States v. Morrison, 529 U.S. 598, 627 (2000); *Kimel*, 528 U.S. at 82–83; City of Boerne v. Flores, 521 U.S. 507, 536 (1997). *But see* Nev. Dep't of Hum. Res. v. Hibbs, 123 S. Ct. 1972 (2003) (concluding that Congress had, in creating private rights of action under the Family and Medical Leave Act of 1993, validly abrogated the States' immunity from suit pursuant to its power under Section Five of the Fourteenth Amendment).

61 *Morrison*, 529 U.S. at 607 (quoting U.S. CONST. art I, § 8, cl. 3); United States v. Lopez, 514 U.S. 549, 551 (1995) (same); *cf.* Jones v. United States, 529 U.S. 848, 858 (2000) (rejecting interpretation of federal arson that would criminalize damaging or destroying a private residence due to "the concerns brought to the fore in *Lopez*").

62 *See, e.g.*, Printz v. United States, 521 U.S. 898, 914 (1997); New York v. United States, 505 U.S. 144, 161 (1992). For more on the Court's "commandeering" cases and doctrine, see, for example, Bellia, *supra* note 6. For an argument that *Printz* might be better understood as a separation-of-powers case, see Jay S. Bybee, Printz, *The Unitary Executive, and the Fire in the Trash Can: Has Justice Scalia Picked the Court's Pocket?*, 77 NOTRE DAME L. REV. 269 (2001).

63 *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) (invoking and applying the avoidance canon, which urges an interpretation that avoids "rais[ing] serious constitutional doubts"). For a detailed analysis and critique of the avoidance canon, or the rule of "constitutional doubt," see William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 832 (2001) ("The rule of 'constitutional doubt' holds that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such

fied structural boundaries no less than the Court's substantive interpretations of constitutional text.[64] In fact, Professors Eskridge and Frickey suggested a decade ago that "[t]he most remarkable development in the 1980s was the greater enthusiasm the Court brought to the federalism-based canons."[65]

In several areas of substantive public law the Court's approach to both constitutional doctrine and statutory text seems to reflect the same commitments and priorities as do its more explicitly federalism-related decisions. The Court's *habeas corpus* cases, for instance, often reflect New Federalism-style deference to state-law procedures, state-court determinations, and state legislatures' policy preferences.[66] The Justices have invoked principles of federalism in a wide variety of pre-emption cases.[67] Less obvious, perhaps, is the gradual retreat, at least in some contexts, from a strict-separationist, no-aid reading of the Establishment Clause, and from a compelled-exemptions account of the Free Exercise Clause,[68] which has had the effect of permitting more

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questions are avoided, [a court's] duty is to adopt the latter.'" (quoting Jones v. United States, 526 U.S. 227, 239 (1999)).

64 *See, e.g.*, Jones v. United States, 529 U.S. 848, 857–58 (2000). In *Jones*, the Court unanimously held that the federal arson statute did not apply to the burning of an owner-occupied private residence not used for any commercial purpose. In so doing, the Court was moved by the principle of "constitutional doubt"; that is, the Justices rejected a broader reading of the statute—one that would have encompassed owner-occupied private residences—because of concerns about Congress's authority to criminalize such "'traditionally local criminal conduct.'" *Id.* at 858 (quoting United States v. Bass, 404 U.S. 336, 350 (1971)); *see also* New York v. United States, 505 U.S. at 170 (invoking rule of constitutional doubt).

65 William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 619 (1992).

66 *See, e.g.*, Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Williams v. Taylor, 529 U.S. 420, 436 (2000); Coleman v. Thompson, 501 U.S. 722, 726 (1991) ("This is a case about federalism."); Teague v. Lane, 489 U.S. 288, 308 (1989).

67 *See, e.g.*, City of Columbus v. Ours Garage & Wrecker Service, Inc., 536 U.S. 424, 439–40 (2002). The *Columbus* Court stated:

> Absent a basis more reliable than statutory language insufficient to demonstrate a "clear and manifest purpose" to the contrary, federal courts should resist attribution to Congress of a design to disturb a State's decision on the division of authority between the State's central and local units over safety on municipal streets and roads.

Id. For additional support, see, for example, Geier v. Am. Honda Motor Co., 529 U.S. 861, 887 (2000) (Stevens, J., dissenting); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 533 (1992) (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part) (noting that "[t]he principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously."); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 419–20 (1992) (Stevens, J., dissenting) (noting that the presumption against pre-emption is an incident of federalism).

68 *See generally, e.g.*, William K. Kelley, *The Primacy of Political Actors in Accommodation of Religion*, 22 U. HAW. L. REV. 403, 407–22 (2000) (analyzing the Supreme Court's decisions involving non-mandatory exemptions for religious actors).

variation, experimentation, and accommodation by States and localities.[69] The Court's refusal in *Washington v. Glucksberg* to create a substantive-due-process right to assisted suicide suggests a desire to avoid imposing a divisive and premature end to public debate concerning a difficult moral question.[70] And so on.

These are discrete illustrations; the New Federalism might also be understood through an overview of several of its leading themes.[71] Certainly, the Court's insistence that it is the task of the Justices to enforce both textual and structural limitations on federal power—*i.e.*, that "political safeguards" are not enough[72]—is one such theme. And some would no doubt insist that the most salient and telling features of the federalism revolution include hostility to antidiscrimination laws and norms,[73] the disingenuous pursuit of certain Justices' partisan agendas,[74] an extravagant commitment to judicial suprem-

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69 *Cf.* Zelman v. Simmons-Harris, 536 U.S. 639, 678–79 (2002) (Thomas, J., concurring). In *Zelman*, Justice Thomas urged such an approach:

> [I]n the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government. "States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion]—on a neutral basis—than the Federal Government." Thus, while the Federal Government may "make no law respecting an establishment of religion," the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest. By considering the particular religious liberty right alleged to be invaded by a State, federal courts can strike a proper balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other.

Id. (Thomas, J., concurring) (second alteration in original) (citation omitted) (first quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 699 (1970) (Harlan, J., concurring)).

70 *See* Washington v. Glucksberg, 521 U.S. 702, 735 (1997) ("Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.").

71 What follows does not, of course, purport to be the complete and definitive account, either in a descriptive or a normative sense, of these themes.

72 *See, e.g.*, Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001); Calabresi, *supra* note 57, at 790–99 (making "the case against reliance on the political branches").

73 *See, e.g.*, Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1142 (2002) ("In place of judicial activism, textualism, or federalism, I want to suggest a different unifying thread behind the Court's innovative constitutional case law. . . . It is possible that an *anti-antidiscrimination* agenda, deeply felt but as yet poorly theorized, is working itself out in the current Court's jurisprudence."). More generally, Professor Susan Bandes has insisted that federalism, as a concept, is "pervasively indeterminate," and is necessarily "animated by particular values[.]" Susan Bandes, Erie *and the History of the One True Federalism*, 110 YALE L.J. 829, 866 (2001) (book review).

74 *See, e.g.*, William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1255 (2002) ("The conservatives' record reflects a jurisprudence of judicial results, not of judicial method—nothing more and nothing less."); Jeffrey Rosen, *Disgrace: The Supreme Court Commits Suicide*, THE NEW REPUBLIC, Dec. 25, 2000, at 18 ("[T]he five conservatives . . . . have . . . . made it impossible for citizens of the United States to sustain any kind of faith in the rule of law as something larger than the self-interested

acy,[75] a hostility to democracy itself,[76] or even the stench of pervasive corruption and illegitimacy.[77]

But even a skeptical review of the Rehnquist Court's work would yield a number of other, less malevolent, storylines. For instance, a recurring theme in recent decisions is the notion of the States' "dignity," an idea that is closely tied to the purported nature of their "sovereignty."[78] Particularly in the Court's Eleventh Amendment immunity-from-suit cases, one frequently encounters the image of the States as metaphysical, almost mystical, entities, as demiurges in a kind of constitutional creation "myth."[79] The States are, a narrow majority of Justices continues to insist, the *kinds of things* that simply cannot be treated, or acted upon, in certain ways.[80] After all, the argument goes,

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political preferences of William Rehnquist, Antonin Scalia, Clarence Thomas, Anthony Kennedy, and Sandra Day O'Connor.").

75 *See, e.g.*, Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 14 (2001). In discussing the Rehnquist Court, Professor Kramer notes that

> something significant has happened on Chief Justice Rehnquist's watch: a subtle, unacknowledged shift in the Court's understanding of judicial review that has troubling consequences for constitutional doctrine and for constitutionalism generally. As opposition to judicial supremacy has receded, the seeming naturalness of the Court's power to interpret has grown, and with it the Court's own apparent sense that interpretation by non-judicial actors is somehow *un*natural. . . . The Rehnquist Court no longer views itself as first among equals, but has instead staked its claim to being the *only* institution empowered to speak with authority when it comes to the meaning of the Constitution.

Id.

76 *See, e.g.*, JAMIN B. RASKIN, OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE (2003).

77 *See, e.g.*, Balkin & Levinson, *supra* note 6, at 1049–50. Professors Balkin and Levinson supply a scathing description of the recent revolution:

> Why do we begin an article on the constitutional revolution with an account of the illegality of the 2000 election and the illegitimacy of the Bush Presidency? The answer is depressingly simple: Five members of the United States Supreme Court, confident of their power, and brazen in their authority, engaged in flagrant judicial misconduct that undermined the foundations of constitutional government. That is worth pointing out even if, empirically, they appear to have gotten away with it . . . . The election is like the stinking carcass of a pig dumped unceremoniously into a parlor. The smell of rot is everywhere.

Id.

78 *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.").

79 To take just one example, Professor Weinberg maintains that *Alden v. Maine*, 527 U.S. 706 (1999), and its premises rest not on constitutional federalism, properly understood, but on "myths." Louise Weinberg, *Of Sovereignty and Union: The Legends of* Alden, 76 NOTRE DAME L. REV. 1113, 1116 (2001).

80 *See Alden*, 527 U.S. at 748 (insisting that Congress "treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation"); NOONAN, *supra* note 56, at 41–57 (playfully critiquing the Courts' sovereign-immunity cases in a chapter entitled "Superior Beings"). A variation on this theme is the idea that certain subjects, kinds of transactions, or forms of regulation are particularly

"the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[81] They and their sovereignty pre-existed Congress; the Constitution is their creation, and its scope is entirely a function of what the "States as States" consented to share or give away. Thus, for example, the States may not be sued for money damages without their consent,[82] nor may their political processes, officials, or courts be commandeered.[83] But because neither the States' abstract dignity, nor the immunity that is thought to result from it, is obviously required by or described in the relevant constitutional text, this theme has opened the Court up to perhaps its most formidable criticism.[84]

At the other end of the spectrum, from the metaphysical to the mundane, is the more functional New Federalism claim that the structural and enumerated-powers features of our Constitution promote sound policy by permitting diversity, encouraging competition, and facilitating experimentation.[85] As Justice Brandeis famously put it,

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and specially the province of state governments. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 618 (2000) ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."); United States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) ("[I]t is well established that education is a traditional concern of the States."); Rose v. Rose, 481 U.S. 619, 625 (1987) (domestic-relations law traditionally left to state regulation); *cf.* San Antonio Metro. Transit Auth. v. Donovan, 557 F. Supp. 445, 453 (W.D. Tex. 1983), *rev'd*, 469 U.S. 528 (1985). According to District Judge Shannon:

> If transit is to be distinguished from the exempt . . . functions [identified in *National League of Cities v. Usery*, 426 U.S. 833 (1976),] it will have to be by identifying a traditional state function in the same way pornography is sometimes identified: someone knows it when they see it, but they can't describe it.

Id.

81 New York v. United States, 505 U.S. 144, 166 (1992).

82 *See, e.g., Fed. Mar. Comm'n*, 535 U.S. at 765–67.

83 *See* Printz v. United States, 521 U.S. 898, 935 (1997).

84 For a critique of the "dignity" theme from a scholar who is quite sympathetic to federalism values, see Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL. 93 (2002). On the other hand, for a powerful defense of the textualist *bona fides* of the sovereign-immunity decisions, see Rappaport, *supra* note 8. The Court's solicitude for the States' dignity and "sovereignty interests" can put the Justices in an awkward position when they are asked to referee a dispute pitting one State against another. *See, e.g.*, Franchise Tax Bd. of Cal. v. Hyatt, 123 S. Ct. 1683, 1690 (2003) ("Without a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause."). Similarly, some scholars have contended that the Court's sovereign-immunity decisions undermine other important federalism values, and "suggest an indifference to the States' potential to act as democratic, locally accountable policy makers within our federal structure." Richard Briffault, *A Fickle Federalism*, 14 AM. PROSPECT, Spring 2003, at A26, A28.

85 On "competitive federalism," and the claimed nexus between competition and exit rights, on the one hand, and innovation, efficiency, and freedom, on the other, see, for example, Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause After* Morrison, 25 OKLA. CITY U. L. REV. 843, 847 (2000) ("State governments seek to attract households and businesses by enacting competitive policies; this jurisdictional competition produces overall efficiency for the nation in the long run, much in the way a market forces corporations

"[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[86] The claim is, in a sense, a constitutionalization of Charles Tiebout's groundbreaking work in the local-government arena.[87] And yet, this theme sounds not only in contexts where one might expect it, such as securities regulation and corporate governance, or land use and environmental protection, but also, for example, in the Justices' recent treatment of school choice,[88] expressive association,[89] and the death penalty.[90] It goes beyond public-choice theory, and claims about exit rights and competition, to include a respect for moral and political deliberation. In *Washington v. Glucksberg*, for example, after declining to create a fundamental right to assisted suicide, Chief Justice Rehnquist closed his majority opinion by observing that "[t]hroughout the Nation, Americans are engaged in an ear-

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to adopt efficient business practices, which leads to overall increases in consumer welfare."); Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147 (1992); Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557 (2000); *see also* MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 2 (1999) (discussing a federalism that "aims to provide citizens with *choices* among different sovereigns, regulatory regimes, and packages of government services"). For a recent critique—only one of many—of competitive federalism, see, for example, Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 8–18 (2002).

86 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

87 *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (proposing a model for calculating "the level of expenditures for local public goods which reflects the preferences of the population more adequately than they can be reflected at the national level").

88 *See* Zelman v. Simmons-Harris, 536 U.S. 639, 680 (2002) (Thomas, J., concurring) (referring to the "wisdom of allowing States greater latitude in dealing with matters of religion and education").

89 *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 664 (2000) (Stevens, J., dissenting). Justice Stevens in *Dale* invoked Brandeis' *New State Ice* dissent in defense of New Jersey's application of its anti-discrimination law. *Id.* The majority, however, was unpersuaded:

> Justice Brandeis, a champion of state experimentation in the economic realm, ... was never a champion of state experimentation in the suppression of free speech. To the contrary, his First Amendment commentary provides compelling support for the Court's opinion in this case. In speaking of the Founders of this Nation, Justice Brandeis emphasized that they "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."

Id. at 660–61 (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969)).

90 *See* Atkins v. Virginia, 536 U.S. 304, 326 (2002) (Rehnquist, C.J., dissenting). Chief Justice Rehnquist argued:

> For the Court to rely on [the official positions of religious and professional groups] today serves only to illustrate its willingness to proscribe by judicial fiat—at the behest of private organizations speaking only for themselves—a punishment about which no across-the-board consensus has developed through the workings of normal democratic processes in the laboratories of the States.

Id.

nest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."[91]

The judicial notice taken in *Glucksberg* of an "earnest and profound" moral debate points to another related, though distinct, theme in work of the Rehnquist Court. The Court is often faulted for its "arrogance,"[92] "aggressiveness,"[93] and even its "imperious"[94] approach, both to disputed questions themselves and to its own authority to answer them. Even conceding some merit to these complaints, though, there is also a moral humility that runs through many of the Rehnquist Court's decisions.[95] Particularly in its First Amendment decisions, this Court "appears not to resist, and seems even to accept, the inevitability of reasonable disagreement on important political and moral questions."[96] What is more—and again, this is not to deny categorically the critics' judicial-supremacy charges—the Court has seemed willing to "acknowledge[ ] candidly its own and government's limited competence and prerogative to resolve authoritatively such

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91 521 U.S. 702, 735 (1997). In a similar vein, Professor Susan Klein has recently explored the idea of "independent-norm federalism." Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541 (2002). This form of federalism, she explains, involves more than the promotion of diversity and experimentation in matters of policy, but also fosters and protects communities' "expression[s] of morality," even where "a [S]tate's norm is independent of[, and departs from,] the federal norm." *Id.* at 1542, 1543. And, as Professor Lynn Baker has reminded us, the policy experimentation that federalism enables does not necessarily favor one ideology or set of positions over another. Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433, 450–53 (2002).

92 Larry Kramer, *The Arrogance of the Court*, WASH. POST, May 23, 2000, at A29. *Cf.* Suzanna Sherry, *Irresponsibility Breeds Contempt*, 6 GREEN BAG 2D 47, 47 (2002) ("The Court is portrayed as arrogant, self-aggrandizing, and unduly activist, and accused of giving insufficient deference—or even a modicum of respect—to Congress. Of course, these critics presume that Congress is *worthy* of deference and respect. . . .").

93 Guido Calabresi, *What Clarence Thomas Knows*, N.Y. TIMES, July 28, 1991, at 15 ("I despise the current Supreme Court and find its aggressive, willful, statist behavior disgusting. . . .").

94 Jeffrey Rosen, *The End of Deference*, THE NEW REPUBLIC, Nov. 6, 2000, at 39, 42 (book review) ("The Rehnquist Court . . . routinely adopts an imperious tone . . . even when striking down relatively insignificant, and symbolic laws. . . .").

95 *See* Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1860–64 (2001). *But see, e.g.*, Lawrence v. Texas, 123 S. Ct. 2472 (2003).

96 Garnett, *supra* note 95, at 1861; *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 660 (2000) ("The First Amendment protects expression, be it of the popular variety or not. . . . And the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view."); Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000) ("It is inevitable that government will adopt and pursue programs and policies . . . [which are] contrary to the profound beliefs and sincere convictions of some of its citizens."); *id.* at 232 ("It is all but inevitable that the fees will result in subsidies to speech which some students find objectionable and offensive to their personal beliefs.").

disagreements,"[97] and appears appropriately resigned to the crooked timber of free society.[98]

Another New Federalism theme sounds more in democratic theory than in claims about competition and exit. Structural federalism is sometimes said by the Justices not only to facilitate optimal outcomes through competition and choice, or diversity and experimentation; the Court's decisions and reasoning are animated as well by claims that decisionmakers and regulators ought to be "accountable" to those they serve, and that this accountability is enhanced by the dual sovereignty and decentralization preserved by our Constitution.[99] Thus, and particularly in the opinions of Justices O'Connor and Kennedy, the objection sometimes seems to be less to the injury, if any, done to the dignity of "States as States," than to the asserted loss of

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97 Garnett, *supra* note 95, at 1861; *see also Dale*, 530 U.S. at 651 ("[I]t is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."); *id.* ("'[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.'") (citation omitted); *id.* at 661 ("'[The law] is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.'" (quoting Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 579 (1995)). *But see* Planned Parenthood v. Casey, 505 U.S. 833, 866–67 (1992) (plurality opinion). The Court stated:

> Where . . . the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

Id.; Cal. Democratic Party v. Jones, 530 U.S. 567, 587 (2000) (Kennedy, J., concurring) ("A political party might be better served by allowing blanket primaries. . . . Under the First Amendment's guarantee of speech through free association, however, this is an issue for the party to resolve, not for the State[s]."); *id.* at 590 (Kennedy, J., concurring) ("In a free society the State is directed by political doctrine, not the other way around."); *Southworth*, 529 U.S. at 232 ("It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning."); *Hurley*, 515 U.S. at 575 ("But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."). In the end, as Professor (now Judge) McConnell has put it, "there are many reasonable, but mutually inconsistent, worldviews that are compatible with good citizenship, and it is neither necessary nor desirable to attempt to forge agreement." Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 454 (2000).

98 *See* ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY xi (Henry Hardy ed., Alfred A. Knopf, Inc. 1991) ("Out of timber so crooked as that from which man is made nothing entirely straight can be built.") (quoting IMMANUEL KANT, IDEE ZU EINER ALLGEMEINEN GESCHICHTE IN WELTBÜRGERLICHER ABSICHT (1784)).

99 *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 908 (2000) (Stevens, J., dissenting) ("We have addressed the heightened federalism and nondelegation concerns that agency pre-emption raises by using the presumption to build a procedural bridge across the political accountability gap between States and administrative agencies.").

transparency, the blurring of officials' responsibility, and the undermining of citizens' ability to assess praise and blame.[100]

As mentioned at the outset of this Article, yet another common premise of the New Federalism is that federal power is limited not only by division—among the branches of government, and between the States and Congress—and by the States' very nature, but also by enumeration. Here, *Lopez* sets the tone:

> The Constitution creates a Federal Government of enumerated powers. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties."[101]

Form and text are not simply matters of methodology, *e.g.*, "how ought we to decide what this statute means?" They are more than the raw materials of the Court's work, and more than what the Justices are seeking to apply or understand. The text of the Constitution—specifically, its enumeration of those "few" and "defined" powers enjoyed by Congress—is not only a tool to be employed, but a constraint on what may be done.

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100 *See, e.g.*, Cook v. Gralike, 531 U.S. 510, 528 (2001) (Kennedy, J., concurring). As Justice Kennedy observed,

> [t]he idea of federalism is that a National Legislature enacts laws which bind the people as individuals, not as citizens of a State; and, it follows, freedom is most secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the conduct of their office. If state enactments were allowed to condition or control certain actions of federal legislators, accountability would be blurred. . . .

Id.; New York v. United States, 505 U.S. 144, 169 (1992) ("Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation."); *see also* Michael S. Greve, Friends of the Earth, *Foes of Federalism*, 12 DUKE ENVTL. L. & POL'Y F. 167, 168 (2001) (observing that "the Supreme Court's conservative-centrist majority has generally placed a premium on public accountability and responsibility"); Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 484 (2002) (discussing the Court's concern both for "maintaining states' control over their own bureaucratic machinery" and that "federal legislation not undermine state governments' responsiveness to the preferences of their electorates"). *But see, e.g.*, Fed. Maritime Comm'n v. S.C. Ports Auth., 535 U.S. 743, 787 (2002) (Breyer, J., dissenting) ("An overly restrictive judicial interpretation of the Constitution's structural constraints (unlike its protections of certain basic liberties) will undermine the Constitution's own efforts to achieve its far more basic structural aim, the creation of a representative form of government capable of translating the people's will into effective public action.").

101 United States v. Lopez, 514 U.S. 549, 552 (1995) (citations omitted) (first quoting THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)) (second quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

Finally, and as Professor McGinnis has explored in great detail,[102] a powerful and pervasive theme in the Rehnquist Court's decisions is a recognition, and even a celebration, of the place of mediating associations, their expression, and their diversity in civic life.[103] Federalism is about allowing room for competition and innovation, but not simply by and among state and local governments. The landscape that is created, regulated, and reflected by our Constitution includes more than a federal government and States, and more than persons and governments. The structural features of that charter both preserve and clear out the "space" of civil society in which associations and mediating institutions also work to safeguard political liberty and constrain political authority. As I have suggested elsewhere:

> [A]ssociations have a *structural*, as well as a vehicular, purpose. They hold back the bulk of government and are the "critical buffers between the individual and the power of the State." They are "laboratories of innovation" that clear out the civic space needed to "sustain the expression of the rich pluralism of American life." Associations are not only conduits for expression, they are the scaffolding around which civil society is constructed, in which personal freedoms are exercised, in which loyalties are formed and transmitted, and in which individuals flourish.[104]

Thus, the New Federalism that is likely to be the legacy of the Rehnquist Court is more than a body of case law, or a litany of discrete, controversial decisions. It is also the playing out in concert of a number of related themes. It is, taken as a whole, an argument, in which certain claims about decision making and deliberation are said to proceed from a variety of premises about our Constitution's text, history, and structure.

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102 *See* McGinnis, *supra* note 53, at 526-43.

103 *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (observing that freedom of association is "'especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority'" (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984)); *id.* at 655 (noting that "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment"); Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."); Bd. of Regents v. Southworth, 529 U.S. 217, 231 (2000) (noting the importance of student associations at public universities to the "fulfillment of . . . personal aspirations and . . . potential"); Garnett, *supra* note 96, at 1853–54, 1863–64.

104 Garnett, *supra* note 95, at 1853–54 (footnotes omitted). *See also* Jason Mazzone, *The Social Capital Argument for Federalism*, 11 S. CAL. INTERDISC. L.J. 27, 27 (2001) (arguing that "[f]ederalism promotes social capital because dividing power between the national government and the states provides greater opportunities for citizen groups to influence politics and for individual citizens to participate in public life").

B. Conditional Spending and Regulation by Contract

This Part so far has provided the necessary context for the following discussion about the Spending Power, and about the possibility of employing conditional-spending arguments to justify the creation and prosecution of federal crimes.

It is clear that the Constitution gives Congress the power to raise, and to spend, money. True, as Professor Lawson and others have reminded us, there really is no "Spending Clause."[105] That is, there is no obvious textual counterpart—*i.e.*, the "power to spend money"—to, for example, the power "[t]o regulate Commerce."[106] In any event, it seems settled that the national legislature may spend money not only as specifically authorized, and not only as a necessary-and-proper means of exercising its several enumerated powers (after all, Congress cannot "support Armies" without spending money[107]), but also, and more generally, to "provide for . . . the general Welfare of the United States."[108] For purposes of this Article, then, *this* is the "Spending Power."[109]

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105 *See* Lawson, *supra* note 2, at 1235.

106 U.S. CONST. art. I, § 8, cl. 3. That said, the Constitution *does*, in some cases, explicitly authorize outlays from the national treasury. Senators and Representatives are to "receive a Compensation for their Services, . . . paid out of the Treasury," U.S. CONST. art. I, § 6, cl. 1; "[e]xpenditures of all public Money" are to be "puhlished from time to time," U.S. CONST. art. I, § 9, cl. 7; and money is to be "drawn from the Treasury" only "in Consequence of Appropriations made by [l]aw." *Id.*

107 U.S. CONST. art. I, § 8, cl. 12. In addition, even where the power to spend money is not obviously built into a specific, enumerated power, it would nonetheless be conceded all around that federal disbursements are not only "proper," but "necessary," for "carrying into execution," for example, the power to "constitute Tribunals" (judges will not likely work for free), U.S. CONST. art. I, § 8, cl. 9, or to "establish . . . post Roads" (an "established," but unmaintained, post road is of no use to anyone), U.S. CONST. art. I, § 8, cl. 7, or to "punish Piracies and Felonies" (crime may not pay, but it costs money to punish), U.S. CONST. art. I, § 8, cl. 10, and so on. Similarly, it is not possible to "maintain a Navy," U.S. CONST. art. I, § 8, cl. 13, or to "[e]rect[ ] dock-Yards," U.S. CONST. art. I, § 8, cl. 17, without spending money. A power to "borrow Money on the credit of the United States," U.S. CONST. art. 1, § 8, cl. 2, not only implies but probably includes a power to spend the money so borrowed; and a promise to honor as "valid" "[a]ll Debts" incurred under the Articles of Confederation, U.S. CONST. art. VI, cl. 1, can only mean that such debts will be paid. *See also* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power . . . to pay the Debts . . . of the United States."). Not to belabor the point, but even had the Framers omitted from Article I the "Sweeping Clause," there would not likely be hand-wringing, even in the most scrupulously textualist quarters, about the constitutional authorization to pay wages to our soldiers and sailors.

108 U.S. CONST. art. I, § 8, cl. 1. It should be emphasized here that several prominent scholars dissent from what appears to be the prevailing view. *See, e.g.*, David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994) (critiquing the named individuals' interpretations of the Spending Clause); Jeffrey T. Renz, *What Spending Clause? (Or, the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81 (1999) (same).

109 There is, I realize, some disagreement about which constitutional provision confers the "Spending Power." *See, e.g.*, Bradley A. Smith, *Hamilton at Wits End: The Lost Discipline of the Spending Clause Vs. the False Discipline of Campaign Finance Reform*, 4 CHAP. L. REV. 117,

At first blush, it is difficult to discern any limits or bounds to a power to "provide for" or "promote the general Welfare" of the Nation. Subject only to the Constitution's explicit, affirmative restrictions—for example, the First Amendment's Establishment Clause—the General Welfare Clause might seem to create a plenary power to disburse funds in pursuit of *any* project or aim thought by a particular majority to be in the public interest.[110] The only constraint on the employment of this Power would be public opinion, mediated through legislators' votes. What is more, we should add to the picture the earlier mentioned and well-settled rule that Congress may tie regulatory strings to the money it spends—that it may, in other words, "'further [its] broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'"[111] In *Oklahoma v. Civil Service Commission*, for example, the Commission withheld federal highway funds from the State after a state official violated the federal Hatch Act;[112] in *King v. Smith*, Congress required a State that received federal Aid for Families with Dependent Children funds to disburse AFDC program benefits in accord with the federal Social Security Act;[113] and in *South Dakota v. Dole*, Congress successfully conditioned the receipt of federal highway funds on the States' adoption of a twenty-one-year-old drink-

120–22 (2001) (discussing several possible textual sources of the Spending Power). Professor Engdahl, for example, has argued that the Property Clause, U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."), rather than the General Welfare Clause, is the Power's textual basis. *See* David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215 (1995); Engdahl, *supra* note 1, at 50–53. In Professor Stith's view, the power to spend is lodged squarely in the Necessary and Proper Clause, and no additional textual hooks are necessary. *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1348 (1988) ("Congress'[s] power to appropriate originates in article 1, section 8. The concept of 'necessary and proper' legislation to carry out 'all . . . Powers vested by this Constitution in the Government of the United States' includes the power to spend public funds on authorized federal activities."). Finally, Professor Smith has suggested that the Spending Power's source might be the requirement set out in Section 9 of Article 1 that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. art. I, § 9, cl. 7; *see* Smith, *supra*, at 120. Again, for present purposes, it is enough to note that the courts—including the Supreme Court—appear content to ground the Spending Power in the General Welfare (or "Spending") Clause, notwithstanding the undeniable fact that several other Clauses seem clearly to contemplate, and authorize, the disbursal of funds. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 206 (1987) (quoting U.S. CONST. art. 1, § 8, cl. 1).

110 *See* Eastman, *supra* note 22, at 87 ("For the first eighty-five years of our nation's history, under both the Articles of Confederation and the Constitution, the language of 'general welfare' was viewed as a limitation on the powers of Congress, not as a grant of plenary power."); *id.* at 66 ("Indeed, the contemporary view is that Congress's power to provide for the 'general welfare' is a power to spend for virtually anything that Congress itself views as helpful.").

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

112 330 U.S. 127, 133 (1947).

113 392 U.S. 309, 333–34 (1968).

ing age.[114] The result of this kind of regulation-by-contract[115] is that Congress can often accomplish indirectly what it perhaps cannot achieve directly, and may pursue regulatory ends that might lie beyond the reach of those specific legislative means enumerated in the Constitution.[116]

This cannot be the end of the matter, though. Otherwise, ours would not be, *contra Lopez*, a government of limited powers, but a government that is in effect empowered to pursue almost any objective by almost any means.[117] Such a conclusion is irreconcilable not only with the "New Federalism" but with the old as well, and with almost everything we know about the understanding of those who thought about, drafted, and ratified the Constitution. And so, we come to one of the oldest questions[118] of constitutional law—whether Congress's power to tax and spend in pursuit of the general welfare is bounded by the more specific, express grants of power set out in Article I, or whether the Spending Power supplements the national government's enumerated regulatory powers.

Others have described, analyzed, and evaluated the process through which this question was answered,[119] and there is no need to

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114 483 U.S. at 210–12.

115 *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."). *See also* Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 664–66 (1985) (following *Pennhurst* and concluding that the relevant spending condition was expressed with sufficient clarity to bind a State that chose to participate in the program at issue).

116 *See, e.g.*, Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 654 (1999) (Kennedy, J., dissenting) (noting that "Congress can use its Spending Clause power to pursue objectives outside of 'Article I's enumerated legislative fields' by attaching conditions to the grant of federal funds." (internal quotation marks omitted) (quoting *Dole*, 483 U.S. at 207)); *see also* Eastman, *supra* note 22, at 64 (noting arguments that Congress could reenact the programs struck down in decisions such as *Lopez* as conditions on grants given to States); McCoy & Friedman, *supra* note 26, at 116 ("[A]ny time that Congress finds itself limited by . . . delegated regulatory powers, . . . [it] need only attach a condition on a federal spending grant that achieves the same (otherwise invalid) regulatory objective.").

117 *See* Baker, *supra* note 23, at 1919–20 ("In the post-*Lopez* era, should Congress be permitted to use conditional offers of federal funds to regulate the states in ways that it could not directly mandate? . . . . The answer . . . cannot be a simple 'yes'[.]").

118 *See, e.g.*, New York v. United States, 505 U.S. 144, 149 (1992) ("The constitutional question is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States."); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 633 (1993) ("Here is one of the most important questions conceivable, with respect to the legal basis federalism. Is there an *implied* limitation on the federal powers, to the effect that they shall not be used to deal with some matters under state authority?" (quoting CHARLES L. BLACK, JR., PERSPECTIVES IN CONSTITUTIONAL LAW 25, 29 (rev. ed. 1970))).

119 *See, e.g.*, Eastman, *supra* note 22; Engdahl, *supra* note 108; Engdahl, *supra* note 1; Renz, *supra* note 108, at 136–42; Peter J. Smith, Pennhurst, Chevron, *and the Spending Power*, 110 YALE L.J. 1187 (2001); Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 167–99 (2002).

tell the story again here. In brief—over time, and culminating in the *Butler* decision,[120] the "Hamiltonian" answer prevailed over the "Madisonian" one.[121] That is, the view that "the General Welfare Clause could not in any way be construed as expanding Congress's powers beyond the enumerated objects of the Constitution" lost out to a reading that would "enable Congress to spend for any purpose that served the 'general welfare,' whether that purpose lay within its enumerated powers or not."[122]

Still, for another half-century, the question remained whether an apparently boundless power to spend included an equally far-reaching power to regulate through conditional spending.[123] Then, in *South Dakota v. Dole*, the Court confronted Congress's effort to impose a nationwide drinking age of twenty-one—a goal that, arguably, Congress could not achieve through direct regulation or fiat[124]—by threatening to withhold a portion of federal highway funds from any State that failed to impose such a rule on its own.[125] South Dakota objected, arguing, among other things, that Congress's carrot-and-stick efforts

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120 United States v. Butler, 297 U.S. 1 (1936). In *Butler*, the Court invalidated a statute authorizing the Secretary of Agriculture to pay farmers not to grow crops, but in so doing, indicated its agreement with the Hamiltonian account, and with the view that the Spending Power's objects were not bounded by the tasks specified in Article I; rather, Congress could spend for any general purpose thought to be in the public interest. *See id.* at 64–66. One year later, the Court reaffirmed its embrace of the Hamiltonian position in *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (upholding unemployment-insurance program and urging deference to Congress's discretion to spend for the general welfare "unless the choice is clearly wrong, a display of arbitrary power, [or otherwise] not an exercise of judgment").

121 As summarized by Professor Chemerinsky,

> Hamilton believed that Congress could tax and spend for any purpose that it thought served the general welfare, so long as Congress did not violate another constitutional provision. . . .
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> . . . .
>
> Madison took the view that Congress was limited to taxing and spending to carry out the other powers specifically granted in Article I of the Constitution. The Court expressly adopted Hamilton's competing position as "the correct one."

Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 90–91 (2001) (footnotes omitted); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5–6, at 834–36 (3d ed. 2000) (describing the "main debate about the construction of the spending power").

122 Alex Kozinski & Steven A. Engel, *Recapturing Madison's Constitution: Federalism Without the Blank Check*, *in* JAMES MADISON AND THE FUTURE OF LIMITED GOVERNMENT 13, 20 (John Samples ed., 2002).

123 For an overview of the development of conditional-spending doctrine, see Baker, *supra* note 23, at 1924–32.

124 *See* South Dakota v. Dole, 483 U.S. 203, 206 (1987) (noting that "we need not decide in this case whether [the Twenty-First] Amendment would prohibit an attempt by Congress to legislate directly a national minimum drinking age," because "[h]ere, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages. As we explain below, we find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly").

125 *Id.* at 205.

"violate[d] the constitutional limitations on congressional exercise of the spending power. . . ."[126]

The Court, however, was not persuaded, and rejected South Dakota's arguments.[127] At first, it seemed possible that the Court would find no limitations on this exercise of the spending power other than those spelled out in the Constitution, such as those dealing with the establishment of religion, bills of attainder, and titles of nobility. After all, once it is accepted that Congress's ability to spend in pursuit of the general welfare in not coextensive with the specific powers granted in Article I, it is not clear where one would look to find any constitutional limitations on Congress's ability to make deals with, rather than fling unencumbered largesse at, the States. Nevertheless, after reciting the *Butler* rule—"'the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution'" and so "objectives not thought to be within Article I's 'enumerated legislative fields' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds"[128]—the *Dole* Court insisted on several "general restrictions" on piggy-backed regulation.

First, any exercise of the spending power must—as the Constitution says—aim at the "general welfare."[129] The Court was quick to concede, though, that this first requirement is more of a toothless exhortation than a judicially reviewable limitation,[130] a point about which some scholars have complained.[131] Second, the Justices observed that "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'"[132] That is, because conditional spending oper-

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126 *Id.*

127 *Id.* at 206.

128 *Id.* at 207 (citation omitted) (quoting United States v. Butler, 297 U.S. 1, 65–66 (1936)).

129 *Id.* It is worth noting, though, that the Court did not say that the regulatory conditions attached to such spending must *themselves* relate to the general welfare.

130 The Court observed, in fact, 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." *Id.* at 207 n.2 (citing Buckley v. Valeo, 424 U.S. 1, 90–91 (1976) (per curiam)); *see also id.* at 207 ("In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress.").

131 *See, e.g.*, Eastman, *supra* note 22, at 64 n.8 ("[T]he relatedness prong of the [*Dole*] test does not carry much water; almost anything can be made to appear 'related.'").

132 483 U.S. at 207 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). *See also* Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 665–66 (1985) (quoting *Pennhurst*'s mandate that "Congress must express clearly its intent to impose conditions" on federal funds). For a recent and detailed essay exploring this clear-statement requirement, see Smith, *supra* note 109, at 1187. I am grateful, on this point, to my colleague, A.J.

ates like a contract, the State, as a purported party to and obligee under that contract, must have been given notice of, and actually agreed to, the terms. Regulation-by-contract, in other words, requires offer and acceptance.[133] Third, the Court found in its precedents, if not in the Constitution itself, the rule that conditions on federal spending "might be illegitimate" if "unrelated 'to the federal interest in particular national projects or programs.'"[134] Fourth, the Court noted that, in some cases, other constitutional provisions—again, the Establishment Clause provides an example[135]—might affirmatively constrain not only the power to spend, but also the ability to regulate through conditions attached to such spending.[136] And, finally, the Court suggested that, in some circumstances, "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[137]

All that said, the Court concluded quickly that—particularly in light of Congress's finding that "differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive"[138]—the uniform, twenty-one-year drinking age Congress had attached to federal highway funds was "reasonably calculated to advance the general welfare."[139] There was no question about the clarity of the conditions, *i.e.*, the terms of the

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Bellia, for pointing out to me that, in contract law generally, it is not the case that the particulars of the obligations that bind parties must be unambiguous. Rather, it is the assent to that obligation that must be free of ambiguity. E-mail from A.J. Bellia, Associate Professor of Law, Notre Dame Law School, to Richard W. Garnett, Associate Professor of Law, Notre Dame Law School (Aug. 3, 2003, 11:10:16 EST) (on file with author).

133 *Cf.* Barnes v. Gorman, 536 U.S. 181, 186 (2003) ("[W]e have been careful not to imply that *all* contract-law rules apply to spending clause legislation[.]").

134 483 U.S. at 207–08 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

135 *See, e.g.*, Mayweathers v. Newland, 314 F.3d 1062, 1066-68 (9th Cir. 2002) (upholding the Religious Land Use and Institutionalized Persons Act of 2000 after applying the *Dole* criteria and concluding, *inter alia*, that the spending conditions in question do not violate the Establishment Clause).

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

137 *Id.* at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)). As Professor Lynn Baker notes, though, the Court provided no guidelines that might help a judge, legislator, or citizen hoping to identify the line between unconstitutional coercion and permissible contracting. *See* Baker, *supra* note 23, at 1933 (noting that the Court "provided neither a workable definition of these critical standards nor any actual or hypothetical example of their violation"). For a detailed study of the "coercion" aspect of the *Dole* test, see, for example, Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L. J. 1 (2001).

138 438 U.S. at 208. The Court noted again the substantial deference that it accords to Congress's estimations of the "general welfare," insisting that "'the concept of welfare or the opposite is shaped by Congress.'" *Id.* (quoting Helvering v. Davis, 301 U.S. 619, 645 (1937)).

139 *Id.*

contract,[140] and the State did not even bother to challenge the "germaneness of [the drinking age] to federal purposes."[141] All that remained, then, was the question whether the Twenty-first Amendment—which gives States the authority to regulate alcohol-related matters—was an "independent constitutional bar" to Congress's indirect-regulation efforts. South Dakota insisted that "'Congress may not use the spending power to regulate that which it is prohibited from regulating directly under the Twenty-first Amendment,'"[142] but the Court did not accept this invitation to re-open the Madison-Hamilton debate.[143] Because the State was free to reject the funds and thereby avoid the condition,[144] the Court concluded that there was

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140 *Id.* ("The conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress.").

141 *Id.* ("Indeed, the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel.") In light of the State's concession on this point, the *Dole* Court was able to avoid providing either a defense of the requirement itself, or much guidance for applying it in future cases. As the Court stated:

> Our cases have not required that we define the outer bounds of the "germaneness" or "relatedness" limitation on the imposition of conditions under the spending power. *Amici* urge that we take this occasion to establish tbat a condition on federal funds is legitimate only if it relates directly to the purpose of the expenditure to which it is attached. Because petitioner has not sought sucb a restriction, and because we find any such limitation on conditional federal grants satisfied in this case in any event, we do not address whether conditions less directly related to the particular purpose of the expenditure might be outside the bounds of the spending power.

Id. at 208 n.3 (citations omitted).

142 *Id.* at 209 (quoting Petitioner's Brief at 52–53).

143 *Id.* at 210–11. The Court stated:

> [Our] cases establish that the "independent constitutional bar" limitation on the spending power is not . . . a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of tbe Congress'[s] broad spending power. But no such claim can be or is made here. Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in so doing would not violate the constitutional rights of anyone.

Id. But see id. at 212 (Brennan, J., dissenting) (dissenting on the grounds that "regulation of the minimum age of purchasers of liquor falls squarely within the ambit of those powers reserved to tbe States by the Twenty-first Amendment" and that because the "States possess this constitutional power, Congress cannot condition a federal grant in a manner that abridges this right. The Amendment, itself, strikes the proper balance between federal and state authority.").

144 *Id.* at 211–12 ("Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory but in fact.").

nothing "coercive" about the terms of Congress's "offer."[145] In the end, "[e]ven if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in [the law] is a valid use of the spending power."[146]

In Justice O'Connor's dissenting view, the uniform-drinking-age condition was "not a condition on spending reasonably related to the expenditure of federal funds . . . . [but rather was] an attempt to regulate the sale of liquor, an attempt that lies outside Congress' power to regulate commerce because it falls within the ambit of . . . the Twenty-first Amendment."[147] Though she professed to have no quarrel either with *Butler*'s embrace of the Hamiltonian position or with the general project of regulation through conditional spending,[148] she insisted that "establishment of a minimum drinking age of twenty-one is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose."[149] She conceded that "[w]hen Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one," but at the same time emphasized that "it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety."[150]

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145 *Id.* at 211. The Court noted:

> Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion." Here, however, Congress has directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds. Petitioner contends that the coercive nature of this program is evident from the degree of success it has achieved. We cannot conclude, however, that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective.

Id. (citation omitted) (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)); *see also Steward*, 301 U.S. at 589–90. In *Steward*, the Court stated:

> [E]very rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.

Id.

146 *Dole*, 483 U.S. at 212.

147 *Id.* (O'Connor, J., dissenting).

148 *Id.* at 212–13 (O'Connor, J., dissenting).

149 *Id.* at 213–14 (O'Connor, J., dissenting); *see also id.* at 214–15 (O'Connor, J., dissenting) (observing that "if the purpose of [the condition] is to deter drunken driving, it is far too over[-] and under-inclusive," further noting that "[i]t is over-inclusive because it stops teenagers from drinking even when they are not about to drive on interstate highways. It is under-inclusive because teenagers pose only a small part of the drunken driving problem in this Nation.").

150 *Id.* at 215 (O'Connor, J., dissenting).

In a way, Justice O'Connor's dissent foreshadowed the Court's "limited powers" reminder in *Lopez*. According to Justice O'Connor, "'Congress has the power to *spend* for the general welfare'"—a power that, she admits, reaches beyond the powers enumerated in Article I—but "'it has the power to *legislate* only for delegated purposes.'"[151] Thus, the "'appropriate inquiry . . . is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation.'"[152] And where is the line between a condition and a regulation? For Justice O'Connor, the "'difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress'[s] intent in making the grant will be effectuated,'" whereas "'[a] requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress'[s] delegated regulatory powers.'"[153] In her view, Congress cannot use the spending power to "regulate" activities that lie beyond the reach of its enumerated powers. True, its power to *spend* is limited only by its own judgment concerning the general welfare (and the acquiescence of the voting taxpayers), but conditions attached to such spending are not vehicles for additional regulation. They are, instead, simply directions for *use of those funds*.[154] And so, while she is apparently resigned in Hamilton's victory, Justice O'Connor's worries are downright Madisonian:

> If the spending power is to be limited only by Congress'[s] notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed." This, of course, . . . was not the Framers' plan and it is not the meaning of the Spending Clause.[155]

I will return shortly to *Dole*'s criteria for evaluating regulatory conditions attached to spending, to the question of their applicability in cases involving federal criminal statutes, and to the implications of Justice O'Connor's dissent for such cases. For purposes of this Part, it

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151 *Id.* at 216 (O'Connor, J., dissenting) (quoting Brief of Amici Curiae National Conference of State Legislatures et al., at 19–20).

152 *Id.* (O'Connor, J., dissenting) (quoting Brief of Amici Curiae National Conference of State Legislatures et al., at 19–20).

153 *Id.* (O'Connor, J., dissenting) (quoting Brief of Amici Curiae National Conference of State Legislatures et al., at 19–20).

154 *See id.* ("[T]here is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced.") (O'Connor, J., dissenting) (quoting United States v. Butler, 297 U.S. 1, 73 (1936)).

155 *Id.* at 217 (O'Connor, J., dissenting) (citation omitted) (quoting *Butler*, 297 U.S. at 78).

is sufficient to note that although the Court has shown an increased willingness—even an undue eagerness[156]—to enforce the limits on Congress's powers under the Commerce Clause and the Fourteenth Amendment, it has displayed no such enthusiasm for, nor interest in, policing the regulatory uses of the spending power.[157] Nor, for the most part, have any of the lower federal courts.[158] It was suggested,

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156 *See, e.g.*, Chemerinsky, *supra* note 121, at 105 ("In the last decade, and particularly in the last five years, the five most conservative Justices on the Court have engaged in great judicial activism in limiting Congress's powers, reviving the Tenth Amendment, and expanding sovereign immunity."); Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 FORDHAM L. REV. 2161, 2177 (2001) ("[T]he conservatives are activists in cases involving limits on federal power for the benefit of the States."); Simon Lazarus, *Don't Be Fooled. They're Activists, Too*, WASH. POST, June 3, 2001, at B3 ("In the name of an elaborate if quirky theory of 'federalism,' this group [of Justices] targets the New Deal, the Great Society and, above all, Congress itself. Their brand of judicial conservatism is avowedly activist. . . .").

157 *See, e.g.*, Pierce County v. Guillen, 537 U.S. 129 (2003); Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999). *But see The Supreme Court, 2001 Term—Leading Cases*, 116 HARV. L. REV. 200, 313 (2002) ("Last Term, in *Barnes v. Gorman*, the Court took a potentially significant step toward limiting the reach of Spending Clause legislation.") (footnote omitted). In *Barnes*, 536 U.S. 181 (2002), the Court held that punitive damages may not be awarded in private suits brought under the Americans with Disabilities Act and the Rehabilitation Act. *Id.* at 189–90. Justice Scalia noted first that "we have regularly applied the contract-law analogy in cases defining the scope of conduct for which funding recipients may be held liable for money damages." *Id.* at 186. One implication of this "analogy," he reasoned, is that a "a remedy is 'appropriate relief' only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* at 187 (citation omitted) (quoting Franklin v. Cowinnett County Pub. Sch., 503 U.S. 60, 73 (1992)). And while "[a] funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract[,]" *id.*, "punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract." *Id.* (citations omitted). At least in the minds of the majority, the decision in *Gorman* neither worked nor portends any major changes in conditional-spending doctrine. *See id.* at 188 n.2 ("Our decision merely applies a principle expressed and applied many times before. . . . Since Justice Stevens is unable to identify any 'far-reaching consequenc[e]' that might reasonably follow from our decision today, and since we are merely occupying ground that the Court has long held, we surely do not deserve his praise that we are 'fearless crusaders[.]'") (citations omitted). *But see id.* at 192–93 (Stevens, J., concurring in judgment) ("[T]he Court's novel reliance on what has been, at most, a useful analogy to contract law has potentially far-reaching consequences that go well beyond the issues briefed and argued in this case.").

158 Although a few courts have sent exploratory volleys, these cases appear to have had little impact. *See, e.g.*, Bradley v. Ark. Dep't of Educ., 189 F.3d 745, 758 (8th Cir. 1999) (holding that Section 504 of the Rehabilitation Act was not a valid exercise of the Spending Power because the conditions placed on the State's receipt of federal funds were too broad and therefore coercive), *vacated in part by* Jim C. v. United States, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc) ("While it appears, as the defendant urges, that the 'financial inducements' employed by Congress can become so 'coercive as to cross the point where pressure turns into compulsion,' that limit has not been crossed here." (internal quotation marks omitted) (quoting Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999))); Va. Dep't of Educ. v. Riley, 106 F.3d 559, 561 (4th Cir. 1997) (en banc) ("Since the plain language of the IDEA [Individuals with Disabilities Act] does not, even implicitly, condition the receipt of IDEA funding on the continued provision of educational services to disabled students . . . , [the federal government had no]

and perhaps even expected, that the *Dole* exceptions, and received Spending Power wisdom more generally, would be swept into the maelstrom of a post-*Lopez* revolution.[159] Instead, New Federalism notwithstanding, Congress's essentially unquestioned power to spend money, with regulatory strings attached, continues to provide practically limitless opportunities for the national government indirectly to shape policy at the state and local levels of society and government.[160]

This first Part will conclude, then, with a few observations about federalism, and federalization, in the context of criminal law. Along with the preceding overviews of the New Federalism generally, and

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authority to condition . . . receipt of IDEA funding on the continued provision of free education to such students."), *superseded by statute as stated in* Amos v. Md. Dep't of Pub. Safety & Corr. Servs., 126 F.3d 589, 603 n.3 (4th Cir. 1997); Koslow v. Pennsylvania, 158 F. Supp. 2d 539, 544 (E.D. Pa. 2001) ("As plaintiff does not argue that there is any connection between federal funds received by the state and his Rehabilitation Act claim, I hold that the Commonwealth of Pennsylvania has not waived its sovereign immunity in this case."), *aff'd in part, rev'd in part*, 302 F.3d 161, 175–76 (3d Cir. 2002) ("Congress has expressed a clear interest in eliminating disability-based discrimination in state departments or agencies. That interest . . . flows with every dollar spent by a department or agency receiving federal funds. The waiver of . . . immunity from Rehabilitation Act claims by Department of Corrections employees furthers that interest directly.") (citation omitted); *cf.* Johnson v. La. Dep't of Educ., 330 F.3d 362 (5th Cir. 2003) (State did not "knowingly waive its sovereign immunity by voluntarily continuing to receive federal funds conditioned on waiver"), *vacated by* 2003 WL 21983251.

159 *See, e.g.*, Baker, *supra* note 23, at 1914–15. As this Article was being revised, Professors Baker and Mitchell Berman added to their already indispensable work on conditional spending, and published a rich and provocative critique of *Dole*'s conditional-spending test, as well as a careful evaluation of the prospects for revisions of that test by the Rehnquist Court. Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459 (2003). I cannot do justice to their arguments and conclusions here. Essentially, Professors Baker and Berman contend that the "toothless" *Dole* test is both "substantively and conceptually infirm," *id.* at 461. On the substantive front, it "reduces aggregate social welfare[,]" *id.* at 471, by facilitating federal homogenization at the expense of diversity in matters of policy and values, *id.* at 471–83. Conceptually, on the other hand, the *Dole* test "coheres poorly with the body of current federalism doctrine." *Id.* at 483. In spite of these weaknesses, though, and notwithstanding the Rehnquist Court's apparent concern for federalism and enumerated-powers principles, Professors Baker and Berman think it unlikely that the Justices will revisit or revise *Dole* anytime soon. *Id.* at 485–86. Still, they do discuss several revisions that the Court might entertain, if it were interested in adding New Federalism-inspired teeth to its conditional-spending doctrine, *id.* at 512–24, as well as several possible outright replacements, *id.* at 524–41. In particular, and in addition to Professor Baker's 1995 proposal—"those conditional offers of federal funds which, if accepted, would regulate the states in ways that Congress could not directly mandate," should be presumed invalid, *id.* at 529—the article suggests that conditional-spending cases, like unconstitutional-conditions problems generally, be resolved in light of the following rule: "[A] conditional[-spending] proposal [by Congress] is coercive . . . if the act conditionally threatened would be wrongful . . . if carried out." *Id.* at 535. *See also id.* at 534–41; Baker, *supra* note 23; Berman, *supra* note 137.

160 Professor Somin has suggested recently that it is not only Congress's power to attach conditions to the money it spends that "poses a threat to constitutional federalism" Somin, *supra* note 100, at 488. Rather, in this view, "the very existence of a federal power to subsidize state governments poses a threat to constitutional federalism." *Id.*

the Court's Spending Power doctrine more specifically, these observations provide the necessary background for this Article's arguments about criminalization and conditional spending.

C. Federalism, Federalization, and Federal Criminal Law

Nearly fifty years ago, Justice Robert Jackson insisted that "the safeguard of our liberty lies in limiting any national policing or investigative organization, first of all to a small number of strictly federal offenses, and secondly to nonpolitical ones."[161] In recent years, though, and in a number of settings, concerns have been voiced about the "federalization" of crime. "One of the issues of prime concern to local prosecutors," a publication of the National District Attorneys Association recently observed, "is the trend toward increasing federalization of local crimes."[162] A special Task Force convened by the American Bar Association sounded a similar note, warning of "the long-range damage to real crime control . . . caused by inappropriate federalization."[163] And the Task Force's concerns went beyond practical worries about law enforcement: Its report suggests that, when it comes to crime legislation, lawmakers appear largely unconcerned with abstract questions of constitutional principle.[164] Rather, the report claims, Congress responds to high-profile catastrophes with bursts of symbolic legislative outrage and little regard for constraints of structural federalism.[165] Indeed, the Chief Justice himself in his 1999 Report to Congress warned that "[t]he pressure in Congress to appear responsive to every highly publicized social ill or sensational crime needs to be balanced with an inquiry into . . . whether we want most legal relationships decided at the national rather than the local level."[166]

There is no need here to survey in detail, or even to enter into, the academic and policy debates over the relative competencies of

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161 ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 71 (1955).

162 *Federalization of Crimes: Chief Justice Rehnquist on Federalization of Crimes*, PROSECUTOR, Mar.–Apr. 1999, at 9, 9.

163 TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, *supra* note 13, at 56; *see also* James A. Strazzella & William W. Taylor III, *Federalizing Crime: Examining the Congressional Trend to Duplicate State Laws*, CRIM. JUST., Spring 1999, at 4, 4 (providing a synopsis of the ABA's Task Force Report by its two principal authors).

164 *See* TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, *supra* note 13, at 24-26; *see also, e.g.*, Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 436 (2001) (noting Congress's "indifference to the constitutional fate of its handiwork"); Sherry, *supra* note 92, at 56 ("It is no wonder that the Court does not give much deference to an institution that seems to care so little about its own deliberative role in our constitutional regime. Perhaps if Congress started taking its own responsibilities seriously, the Court might start taking Congress more seriously.").

165 *See* TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, *supra* note 13, at 14–17.

166 REHNQUIST, *supra* note 12, at 135.

state and federal prosecutors, or the relative merits of state and federal crimes.[167] It does seem important, though, to note that these debates, and the federalization of crime itself, continue in the midst of the Rehnquist Court's purported "revolution" in Federalism. And this is strange, or at least counter-intuitive.[168] After all, although the Court's apparent renewed interest in policing the boundaries of federal-state relations has most often found expression in antidiscrimination, regulatory, and other civil cases, criminal statutes would seem equally likely to push the limits inherent in a system of enumerated powers and dual sovereignty.[169]

Indeed, probably the most salient, if not the most influential, moment in the "revival" of federalism was the Court's decision in *Lopez*. In that case, of course, the Justices held that the Gun Free School Zones Act—a criminal statute—exceeded Congress's Commerce Clause power.[170] The rejection in *Lopez* of the government's "all for the want of a horse-shoe nail" argument—that is, the argument that "possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the

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167 For more detailed discussions, see, for example, Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1236–47 (2000); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995); Blakey, *supra* note 39, at 1198–1218; Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213 (1984) (presenting a brief history of federal racketeering legislation as a paradigm for the growth of governmental power); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1146–65 (1995); Jay S. Bybee, *Insuring Domestic Tranquility:* Lopez, *Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 16–19 (1997); Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1 (1996); Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?"*, 50 SYRACUSE L. REV. 1317 (2000); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503 (1995).

168 Some scholars have argued, though, that this is not strange at all. In Professor Stephen Smith's view, the continued federalization of crime after *Lopez* is explained, at least in part, by the fact that "yes, *Lopez* closed a door, but only after opening every window in the house." E-mail from Stephen F. Smith, Associate Professor of Law, University of Virginia Law School, to Richard Garnett (June 11, 2003, 15:33:07 EST) (on file with author). In a different vein, Professor Bill Stuntz has linked this continuing development to the incentives of federal prosecutors. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 542–46 (2001). And, Professor Richard Fallon has pointed to the concept of "path dependence," as well as to the substantive "conservativism" of the Rehnquist Court, as explanations for the New Federalism's relatively anemic impact on the federalization of crime. *See* Fallon, *supra* note 57, at 433–34.

169 *See supra* note 156 and accompanying text.

170 514 U.S. 549, 567–68 (1995). Almost immediately, President Clinton assured the nation that he was "'determined to keep guns out of our schools,'" and suggested that Congress "'encourage states to ban guns from school zones by linking Federal funds to enactment of school-zone gun bans.'" Todd S. Purdum, *Clinton Seeks Way to Retain Gun Ban in School Zones*, N.Y. TIMES, Apr. 30, 1995, at 1.

national economy"[171]—reflected a reluctance 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."[172] The Court reaffirmed that the constitutionally mandated division of authority between the States and the federal government is neither anachronistic nor accidental, but instead "'was adopted by the Framers to ensure protection of our fundamental liberties.'"[173] Furthermore, the Court took care to observe that, in the arena where these "fundamental liberties" are perhaps most obviously in play, it is the States that "'possess primary authority for defining and enforcing the criminal law,'"[174] and that the creeping federalization of crime can, if left unchecked, threaten the "'sensitive relation between federal and state criminal jurisdiction.'"[175]

Recall that, while Congress possesses vast authority, it is also true that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."[176] And, our Constitution simply does not vest in Congress a general power to create, prosecute, and punish crimes.[177] That is, the national government does not

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171 514 U.S. at 563.

172 *Id.* at 567.

173 *Id.* at 552 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

174 *Id.* at 561 n.3 (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)) (internal quotation marks omitted).

175 *Id.* (quoting United States v. Emmons, 410 U.S. 396, 411–12 (1973)) (internal quotation marks omitted); *see also* United States v. Morrison, 529 U.S. 598, 618 (2000) (emphasizing the limited nature of Congress's Commerce Clause power and noting that the regulation of most crime "has always been the province of the States"); *id.* at 616 n.7 ("As we have repeatedly noted, the Framers crafted the federal system of Government so that the people's rights would be secured by the division of power."); *Lopez*, 514 U.S. at 564 (noting that criminal-law enforcement, like education, is an area "where States historically have been sovereign").

176 *Morrison*, 529 U.S. at 607.

177 This is not to say that Article I does not authorize Congress to create, prosecute, and punish *some* crimes. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 6 (conferring power "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States"); *id.* at cl. 10 (conferring power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations"). Further, the Bill of Rights explicitly regulates federal criminal prosecutions and trials. *See, e.g.*, U.S. CONST. amends. IV, V, VI, VIII. Still, Thomas Jefferson certainly spoke for many of the founding generation when he wrote:

> [T]he Constitution of the United States, having delegating to Congress that power to punish treason, counterfeiting the securities and current coin of the United States, piracies, and felonies committed on the high seas, and offenses against the law of nations, and no other crimes whatsoever; and it being true as a general principle, and one of the amendments to the Constitution having also declared, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," therefore . . . all their other acts which assume to create, define, and punish crimes, other than those so enumerated in the Constitution, are altogether void, and of no force; and that the power to create, define, and punish such other crimes is reserved,

enjoy the "police power"—the "authority to provide for the public health, safety, and morals"[178]—which is commonly regarded as one of the hallmarks and prerogatives of political sovereignty.[179] Put differently, the United States lacks the traditional power of governments to express moral condemnation, punish blameworthy conduct, deter harmful behavior and results, and reform wayward citizens by creating crimes and prosecuting criminals. And yet, it is this power which is the traditional basis and justification for criminal laws.[180]

Instead, our national government is granted in Article I of the Constitution powers to pursue certain specified ends—regulating interstate commerce, delivering the mail, maintaining a currency—and *those* powers are generally viewed as including, incidentally, the power to create, prosecute, and punish crimes as a means of achieving their specified, limited ends.[181] It follows that every federal criminal statute must be justified, if at all, as the exercise of a "power" specifically enumerated in the Constitution—the power to "regulate Commerce,"[182] to "establish Post Offices and post Roads,"[183] to "establish an uniform

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and, of right appertains solely and exclusively to the respective States, each within its own territory.

THOMAS JEFFERSON, THE KENTUCKY AND VIRGINIA RESOLUTION (1798).

178 Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (plurality opinion).

179 *See, e.g., Morrison*, 529 U.S. at 618 (noting that "the Founders denied the National Government [the police power] and reposed [it] in the States"); *Lopez*, 514 U.S. at 566 ("The Constitution . . . withhold[s] from Congress a plenary police power. . . ."); Heath v. Alabama, 474 U.S. 82, 93 (1985) ("Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824) ("No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation."); *see also, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 11 (1895) ("It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and public morals . . . is a power originally and always belonging to the states, not surrendered by them to the general government. . . ."), *disagreement on other grounds recognized by Lopez*, 514 U.S. at 554; THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.").

That said, Congress *does* exercise something like traditional police powers in particular contexts and in certain areas, including so-called "federal enclaves." *See* U.S. CONST. art. 1, § 8, cl. 17 (conferring power "[t]o exercise exclusive Legislation in all Cases whatsoever [in what is now the District of Columbia]," and "to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings"); 18 U.S.C. § 1152 (2000) (stating that criminal laws applicable in federal enclaves—"any place within the sole and exclusive jurisdiction of the United States"—are also applicable in "Indian country").

180 As the Court noted in *Morrison*, there is "no better example of the police power . . . than the suppression of violent crime and vindication of its victims." 529 U.S. at 618.

181 *See, e.g., supra* notes 40, 42.

182 U.S. CONST. art. 1, § 8, cl. 3.

183 *Id.* at cl. 7.

Rule of Naturalization,"[184] and so forth—or as a measure both "necessary and proper for carrying into Execution" these or some other power vested by the Constitution in the government of the United States.[185] The question posed in this Article is whether, or to what extent, the Spending Power is able to justify such statutes, and whether the federal-program bribery statute is such a measure.

To briefly return to *Lopez*, the Court's resounding rejection of congressional omnipotence in the area of crime control does not appear to have slowed, let alone reversed, the federalization of criminal law.[186] With few exceptions, courts have consistently rebuffed post-*Lopez* federalism-based challenges to criminal prosecutions, convictions, and statutes.[187] Nor has *Lopez* had any appreciable effect on Congress. It is not only those legislators with ideological or other objections to the decision who remain unmoved by its claims; neither party, and no camp, gives any evidence of embracing the Court's enumerated-powers revival.[188] Moreover, even if, at some point, *Lopez*'s "first principles" were to intrude upon the calculations of Congress, it would still be true—as the Justices noted in *Alden*—that legislators may accomplish through conditional spending grants what they cannot do directly, including, perhaps, the federalization of traditional state offenses. If this is true, though, it has important implications for federalism and individual liberty. As Justice Kennedy has noted, "the Spending Clause power . . . has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach."[189] In the Parts that follow, I ask whether this potential has been realized with Section 666.

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184 *Id.* at cl. 4.

185 *Id.* at cl. 18.

186 The case was received with great excitement, and some alarm, in the academic community. *See, e.g.*, Symposium, *Reflections on* United States v. Lopez, 94 MICH. L. REV. 533 (1995); *id.* at 541 (exploring "the ambiguity of what the majority have wrought" in *Lopez*).

187 *See generally, e.g.*, Reynolds & Denning, *supra* note 16 (examining the analysis of *Lopez* in the lower courts); Andrew Weis, Note, *Commerce Clause in the Cross-Hairs: The Use of* Lopez*-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 STAN. L. REV. 1431, 1444–62 (1996) (discussing the lower courts' post-*Lopez* categorization of federal statutes and the interpretive problems associated with applying *Lopez*).

188 *Cf.* TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, *supra* note 13, at 14 ("Writer after writer has noticed the absence of any underlying principle governing Congressional choice to criminalize conduct under federal law that is already criminalized by state law.").

189 Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 654–55 (1999) (Kennedy, J., dissenting).

II
THE NEW FEDERALISM AND FEDERAL-PROGRAM BRIBERY

So far, this Article has provided context for the question whether and how the Spending Power may serve as the "jurisdictional hook"[190] for the creation, prosecution, and punishment of federal crimes. We have seen that, despite warnings of "revolutions,"[191] the Rehnquist Court's renewed interest in enumerated-powers and structural-federalism questions has left untouched the decisions and doctrine dealing with regulatory conditions on federal spending.[192] Congress may still reach far beyond the goals explicitly delineated in Article I by attaching conditions to the money it spends.[193] Still, the important question remains whether the criminal jurisdiction of the United States is necessarily coextensive with the dramatically expanded zone of federal influence created by the validation, in *South Dakota v. Dole*, of strings-attached spending and regulation-by-contract.

Again, few doubt that Article I of the Constitution authorizes, even if not explicitly, the creation and application of any number of criminal statutes.[194] This being the case, Congress has rarely needed, or bothered, to look beyond the several tried-and-true bases for federal criminal jurisdiction, *e.g.*, the Commerce Clause or the power over the mails, for the power to spend in pursuit of the general welfare (and the accompanying regulatory influence). However, there is little reason to expect this reticence to continue for long.[195]

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190 *See* Schmuck v. United States, 489 U.S. 705, 722–23 (1989) (Scalia, J., dissenting) ("The law does not establish a general federal remedy against fraudulent conduct, with use of the mails as the jurisdictional hook. . . ."); *see also* Richard W. Garnett, *Once More Into the Maze:* United States v. Lopez, *Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country*, 72 N.D. L. REV. 433, 449 (1996) ("Congress's ahility to extend its criminal jurisdiction is limited both by its enumerated powers and by the States' reserved powers. Congress can expand its jurisdiction when it wishes, but it needs a 'hook' upon which to hang its ambitions.").

191 *See supra* note 55 and accompanying text.

192 *See* Balkin & Levinson, *supra* note 6, at 1058.

> At least up to now, the Court's federalism decisions have more struck an ideological blow for limited federal government than truly put a significant damper on federal regulatory power. As scholars on both the right and left have demonstrated, a Court truly committed to reinvigorating state autonomy must engage in far more active monitoring of conditional federal spending, the series of doctrines through which the federal government can get states to do things by threatening to withhold federal funds.

Id. (footnote omitted).

193 *See supra* note 24 and accompanying text; *see also* McGinnis, *supra* note 53, at 522 ("Under current doctrine, Congress clearly has the authority to accomplish almost any objective it wants under its conditional spending authority.").

194 *See supra* text accompanying note 181. This is one reason why, as a colleague of mine has observed, legislative restraint and prosecutorial discretion, no less than renewed appreciation for enumerated-powers principles, will be required to slow or undo the federalization of criminal law. *See* Blakey, *supra* note 39, at 1216.

195 See, for example, Justice O'Connor's concurring opinion in *Printz v. United States*:

To help determine whether or to what extent the Spending Power can be used as the "hook" for criminal jurisdiction, this Part examines the text and history of one particular statute and some of the interpretive disputes it involves. It canvasses the courts' responses to federalism-inspired attacks on the statute and its application, and reviews those (surprisingly) few cases in which litigants have explicitly framed their challenges in conditional-spending terms. This Part is, therefore, a kind of "case study."[196]

A. The Text, History, and Initial Construction of Section 666

As noted above, 18 U.S.C. § 666 federalizes certain bribes and thefts involving the agents of "organization[s]"—public and private—that receive "benefits in excess of $10,000 under a Federal program."[197] To be clear: The statute says nothing about federal prop-

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> [The Court's] holding . . . does not spell the end of the objectives of the Brady Act . . . . [because] Congress is . . . free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs.

521 U.S. 898, 936 (1997) (O'Connor, J., concurring).

196 The case study is an odd one, admittedly, given that it involves what is for practical purposes the only available case. *See* United States v. Morgan, 230 F.3d 1067, 1075 (8th Cir. 2000) (Bye, J., concurring) ("Section 666 is, I believe, the only federal crime whose supposed constitutional basis is the Spending Clause. That may speak volumes."). *But see* Engdahl, *supra* note 1, at 91–92 & n. 381 (suggesting 18 U.S.C. § 1014—which establishes the federal crime of making false statements to institutions whose accounts are insured by the Federal Deposit Insurance Corporation—as another example); Terrence M. Messonnier, *Neo-Federalism, Popular Sovereignty, and the Criminal Law*, 29 AKRON L. REV. 549, 577–78 (1996) (suggesting that the spending power supports federal criminal statutes aimed at fraud perpetrated against the United States); 18 U.S.C. § 1020 (2000) (prohibiting false statements and claims relating to federally approved highway projects). One other statute is worth mentioning here. The federal bank-robbery statute, 18 U.S.C. § 2113 (2000), targets robberies of, *inter alia*, "any institution the deposits of which are insured by the Federal Deposit Insurance Corporation." *Id.* § 2113(f). Although federal insurance of a bank is perhaps analogous to federal spending directed at a bank, no cases treat Section 2113(f) as a Spending Power statute. Rather, this provision has repeatedly been upheld as a valid use of the Commerce Clause. *See, e.g.*, United States v. Watts, 256 F.3d 630, 632–34 (7th Cir. 2001).

197 18 U.S.C. § 666(b). More generally, Section 666 provides, in relevant part:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists—
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
> (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—
> (i) is valued at $5,000 or more, and
> (ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or
> (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

erty, employees, or enclaves; it is silent about the wires and the mails; and it does not require the United States to prove any effects on, or connections to, interstate commerce. All that distinguishes Section 666 from a naked exercise of the general police power—a power that, again, Congress lacks[198]—is its purported jurisdictional element; that is, its requirement that the bribe involve the agent of an organization that receives the specified amount of federal-program funds.[199] In other words, the Spending Power is offered as the necessary jurisdictional basis for Section 666.[200] The jurisdictional theory of the statute

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(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.

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

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section—

(1) 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;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

18 U.S.C. § 666.

198 *See supra* note 179 and accompanying text.

199 *See* 18 U.S.C. § 666(b).

200 *See* Fischer v. United States, 529 U.S. 667, 689 n.3 (2000) (Thomas, J., dissenting) ("Section 666 was adopted pursuant to Congress'[s] spending power." (citation omitted)); *see also* United States v. Lipscomb, 299 F.3d 303, 318 (5th Cir. 2002) (discussing "whether [Section] 666 is necessary and proper to the spending power"); United States v. Dubón-Otero, 292 F.3d 1, 15 (1st Cir. 2002) (discussing Section 666 and the Spending Clause); United States v. Suarez, 263 F.3d 468, 489 (6th Cir. 2001) (same); United States v. Phillips, 219 F.3d 404, 414 (5th Cir. 2000) ("Congress' authority to enact [Section] 666 rests on the Spending Clause of the Constitution."); *Morgan*, 230 F.3d at 1073 (Bye, J., concurring)

is that a corrupt transaction is "federalizable" if it involves a person who is, or transacts with, the agent of an organization that in some way receives federal-program funds. If the Spending Power is not up to this task, then Section 666 is unconstitutional on its face.[201]

At first blush, Section 666 might appear more redundant than "stealth[y]." After all, bribery is and has long been a federal crime[202]—Section 201 of Title 18 prohibits bribing any "officer or employee or person acting for or on behalf of the United States, or any department, agency, or branch of Government thereof. . . ."[203] By the early 1980s, though, the federal courts had divided over Section 201's application to state and local government officials—not of "the United States"—who administer programs that receive and disburse federal-program funds.[204] One court insisted, in light of its "healthy

("Every court that has addressed the issue has concluded that Congress adopted [Section] 666 pursuant to its Spending Clause power."); United States v. Wright, 206 F. Supp. 2d 609, 622 n.8 (D. Del. 2002) (discussing Section 666 and the spending power); United States v. McCormack, 31 F. Supp. 2d 176, 186 n.18 (D. Mass. 1998) ("Courts have held that [S]ection 666 was passed pursuant to Congress'[s] tax and spending power as set forth in Article I, Section 8."); United States v. Roberts, 28 F. Supp. 2d 741, 743 (E.D.N.Y. 1998) ("Congress enacted 18 U.S.C. § 666 pursuant to its spending power."); United States v. Ferrara, 990 F. Supp. 146, 152 (E.D.N.Y. 1998) ("Section 666 was apparently passed pursuant to Congress's tax and spending power as set forth in Article I, Section 8."); 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."). Of course, this does not mean that the Spending Power is the only possible means of reaching and criminalizing much of the corrupt conduct that is presently targeted by Section 666. Certainly, under current doctrine, there are any number of constitutionally permissible anti-corruption statutes.

201 *See Morgan*, 230 F.3d at 1073 (Bye, J., concurring) (noting that "Congress may not pass laws unless it acts pursuant to an express grant of power or authority in Article 1 of the Constitution," and concluding that "Section 666 cannot properly be linked to any grant of Congressional power in the Constitution," so therefore "Congress exceeded its proper authority in enacting [section] 666; the law is unconstitutional, void *ab initio*"). In *United States v. Salerno*, 481 U.S. 739, 745 (1987), the Justices observed that "[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." The claim here is certainly not that no corrupt transaction covered by Section 666 could ever be prosecuted under a constitutionally valid criminal statute. It is, instead, that Section 666, *in all cases*, permits conviction in the absence of proof of a constitutionally sufficient jurisdictional element. In other words, the problem is not that the conduct targeted by Section 666 is categorically beyond the reach of federal prosecutors, but that the statute itself fails, as a constitutional matter, to create federal criminal jurisdiction.

202 For a wonderful study, executed in truly awesome detail, of the history of the practice and crime of bribery, see JOHN T. NOONAN, Jr., BRIBES (1984). *See also* G. Robert Blakey, Book Review, 60 NOTRE DAME L. REV. 1255 (1985) (reviewing NOONAN, *supra*).

203 18 U.S.C. § 201(a)(1) (2000) (defining, for federal-bribery purposes, "public official").

204 For a more detailed discussion of this disagreement, see Rosenstein, *supra* note 35, at 679–83. For further historical background on the federal role in prosecuting corruption at the state and local levels, see, for example, Andrew T. Baxter, *Federal Discretion in the Prosecution of Local Political Corruption*, 10 PEPP. L. REV. 321 (1983); George D. Brown, *New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption?*, 60 WASH. & LEE L. REV. 417 (forthcoming 2003) (on file with author) [hereinafter

regard for the federal system of divided powers" and the plain text of the bribery statute, that even municipal employees responsible for administering federal programs and spending federal funds were not "public officials" "acting for or on behalf of the United States" within the meaning of Section 201.[205] Another court concluded, though, that state or local officials whose salaries, and the programs they administered, were "funded by the federal Government for federal objectives," were, in effect, "substitute[s] for . . . federal employee[s],"[206] and therefore within the statute's reach.[207]

It is clear that this interpretive split involving Section 201 was the occasion for, and its resolution was the purpose of, Section 666.[208] Section 666 was designed "to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies," even though no federal officials are involved, and thereby "to protect the integrity of the vast sums of money distributed through Federal programs . . . ."[209]

As it happened, Section 666 became law even as the Supreme Court was considering a case presenting the very dispute that had prompted the statute in the first place. In law, as in life, timing is everything: The Court concluded, in *Dixson v. United States*,[210] that even non-federal employees, if they "occup[y] a position of public trust with official federal responsibilities," are "public officials" within

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Brown, *New Federalism*]; Brown, *supra* note 36, at 253–66; Charles F. C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171 (1977).

205 United States v. Del Toro, 513 F.2d 656, 662 (2d Cir. 1975), *superseded by statute as stated in* Salinas v. United States, 522 U.S. 52, 58 (1997); *see also* United States v. Loschiavo, 531 F.2d 659, 665–66 (2d Cir. 1976) (following *Del Toro*). For additional treatment of these cases, see, for example, United States v. Hoskins, 520 F. Supp. 410 (N.D. Ill. 1981); United States v. Gallegos, 510 F. Supp. 1112 (D.N.M. 1981).

206 United States v. Mosley, 659 F.2d 812, 815 (7th Cir. 1981).

207 *See* United States v. Hinton, 683 F.2d 195, 197–200 (7th Cir. 1982) (following *Mosley*), *aff'd sub nom.* Dixson v. United States, 465 U.S. 482 (1984), *superseded by statute as stated in* Salinas v. United States, 522 U.S. 52, 58 (1997); United States v. Hollingshead, 672 F.2d 751, 754 (9th Cir. 1982) (following *Mosley*). For an early discussion of the disagreement, see Randy J. Curato et al., *Government Fraud, Waste, and Abuse: A Practical Guide to Fighting Official Corruption*, 58 NOTRE DAME L. REV. 1027 (1983).

208 *See Salinas*, 522 U.S. at 58 ("Congress enacted [Section] 666 and made it clear that federal law applies to bribes of the kind offered to the state and local officials in *Del Toro*, as well as those at issue in *Mosley* and *Hinton*."); S. REP. NO. 98–225, at 369–70 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510–11 (discussing the split of authority and noting that the purpose of Section 666 is "to reach thefts and bribery in situations of the types involved in the *Del Toro*, *Hinton*, and *Mosley* cases"); Brown, *supra* note 36, at 276–81.

209 *See* S. REP. NO. 98-225, at 369–70; *see also, e.g.*, *Salinas*, 522 U.S. at 57–58 (noting legislative history and statute's stated purpose); United States v. Zwick, 199 F.3d 672, 684 (3d Cir. 1999) (same); United States v. Grubb, 11 F.3d 426, 433–34 (4th Cir. 1993) (same); United States v. Coyne, 4 F.3d 100, 109–10 (2d Cir. 1993) (same).

210 465 U.S. 482 (1984), *rev'g* United States v. Hinton, 683 F.2d 195 (7th Cir. 1982), *superseded by statute as stated in Salinas*, 522 U.S. at 58.

the reach of Section 201.[211] This was not to say, the Court cautioned that "the mere presence of some federal assistance brings a local organization and its employees within the jurisdiction of the federal bribery statute"; rather, the Justices insisted, "an individual must possess some degree of official responsibility for carrying out a federal program or policy."[212] Interestingly, this reading of Section 201 seems consonant with, if it does not echo, Congress's stated hope for Section 666, namely, to "augment the ability of the United States to vindicate *significant* acts of theft, fraud, and bribery involving Federal monies."[213] Both Congress and the *Dixson* Court appear to have disclaimed any extravagant ambitions, and instead to have envisioned a limited federal power to prosecute specific corrupt acts that threaten the integrity of federal programs and the funds disbursed through them.[214]

Nonetheless, it is now clear that the new statute's text invited more creative, expansive, and perhaps aggressive efforts to expose and root out corruption generally.[215] At first, Section 666 was—like many criminal statutes, perhaps—little more than window dressing, and rarely used.[216] But even in the early cases, prosecutors tested, defendants attempted to rein in, and courts struggled to identify, the statute's reach and bounds.[217]

In *United States v. Westmoreland,* for example, a county supervisor was convicted under Section 666 for receiving kickbacks in connec-

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211 *Dixson,* 465 U.S. at 496; *see also id.* ("Congress' long-standing commitment to a broadly drafted federal bribery statute, . . . and the House Report's endorsement of the Second Circuit's reasoning in *Levine,* combine to persuade us that Congress never intended section 201(a)'s open-ended definition of 'public official' to be given the cramped reading proposed by petitioners.").

212 *Id.* at 499.

213 S. REP. NO. 98-225, at 369 (emphasis added).

214 *See Brown, supra* note 36, at 280 (noting that Section 666's legislative history "support[s] the interpretation that Congress intended to deal with a relatively narrow problem, [namely,] specified forms of malfeasance in connection with the administration of federal assistance"); *see also* S. REP. NO. 98-225, at 370 ("[N]ot every Federal contract or disbursement of funds [is] covered.").

215 As one commentator observed, "in eliminating the problems caused by the narrow boundaries of the earlier statutes, Congress enacted a general federal criminal statute of potentially limitless scope and effect." Rosenstein, *supra* note 35, at 674. *See id.* at 700 ("Although section 666 symbolizes Congress'[s] intent to close the gaps left open by sections 641 and 201, the statute's broad language is amenable to interpretations that create a potentially limitless scope." (footnote omitted)); *see also Salinas,* 522 U.S. at 56 (noting the statute's "expansive, unqualified language"); *cf.* Salvatoriello, *supra* note 44, at 2396 ("Section 666 was developed with a broad purpose. . . .").

216 By 1990, there were still only nine published opinions dealing with the law. *See* Rosenstein, *supra* note 35, at 690 n.152. Since then, though, prosecutors' use of Section 666 has increased steadily and dramatically. ABRAMS & BEALE, *supra* note 39, at 252 ("[The statute's] development has been explosive.").

217 *See generally* Rosenstein, *supra* note 35, at 690–96 (canvassing cases); Salvatoriello, *supra* note 44, at 2397–99 (same).

tion with the County's contract awards.[218] All agreed that the County had received the required $10,000 in federal-program funds, but the defendant insisted that Section 666 requires the government to prove that the transactions to which the kickbacks were related themselves involved federal funds.[219] In other words, she argued that the prosecutor must "trace" the precise connection between federal-program dollars, on the one hand, and her own corrupt conduct, on the other. To be sure, this argument might reasonably be thought to enjoy support, if not obvious endorsement, from the relevant legislative history,[220] and more indirectly from the Court's cautionary statements in *Dixson*.[221] But the Fifth Circuit rejected it, emphasizing instead the "broad net" cast by the statute's text and terms.[222] And that court evidently heard a different message in the legislative history as well; it concluded that fidelity to the legislators' stated purpose of "preserv[ing] the integrity of federal funds by assuring the integrity of the organizations or agencies that receive them" required it to reject the proposed "tracing" construction.[223]

Another interpretive lesson concerned the meaning of the term "benefits." Section 666 requires the prosecutor to establish that the defendant's corrupt conduct involve the agent of an organization that receives at least $10,000 in federal-program "benefits."[224] But are all disbursements from the federal treasury "benefits"? Once disbursed,

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218 841 F.2d 572, 572 (5th Cir. 1988).

219 *Id.* at 575–76.

220 *See* S. REP. No. 98-225, at 369 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510 (aim of statute is to "augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery *involving Federal monies*") (emphasis added).

221 *See* Dixson v. United States, 465 U.S. 482, 500–01 (1984) ("The federal government has a strong and legitimate interest in prosecuting petitioners for their misuse of government funds.")

222 *Westmoreland*, 841 F.2d at 577.

223 *Id.* at 578. Nearly a decade later, the United States Supreme Court endorsed this conclusion. *See* Salinas v. United States, 522 U.S. 52, 61 (1997) ("[A]s a matter of statutory construction, § 666(a)(1)(B) does not require the Government to prove the bribe in question had any particular influence on federal funds. . . ."). For other non-Supreme Court decisions rejecting the tracing argument, see, *e.g.*, United States v. Zwick, 199 F.3d 672, 679 (3d Cir. 1999) ("By its terms, § 666 . . . imposes no title or tracing requirements and covers non-federal employees."); United States v. Paradies, 98 F.3d 1266, 1288–89 (11th Cir. 1996) (declining the "invitation to include the suggested 'connection to federal funds' element"); United States v. Foley, 73 F.3d 484, 490 (2d Cir. 1996) ("[I]n order to establish the more-than-$10,000 jurisdictional amount set out in § 666(b), the government need not trace the federal funds received by an organization to the project in connection with which its employee received a bribe."), *overruled in part by Salinas*, 522 U.S. 52; United States v. Coyne, 4 F.3d 100, 108–10 (2d Cir. 1993) (rejecting any tracing requirement); United States v. Simas, 937 F.2d 459, 463 (9th Cir. 1991) (same); United States v. Genova, 167 F. Supp. 2d 1021, 1042–43 (N.D. Ill. 2001) (same).

224 More specifically, the "benefits" must be received "under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. § 666(b) (2000).

and then spent, and perhaps spent again, do federal-program funds retain forever their character as "benefits"?[225] *United States v. Rooney* involved the general partner of a construction company that had received Farmers Home Administration (FHA) loan funds to construct a rural senior-citizens' housing project.[226] The defendant had agreed with his contractor to apply for an additional $300,000 in FHA funds if the contractor built, for nothing, a pond on the property next door to the project site.[227] In the government's view, Section 666's federal-program-benefits requirement was satisfied by the construction company's receipt of the FHA monies. Rooney insisted, though, that these funds were "loans" and not "benefits."[228] The district court agreed, reasoning that the statute does not apply "when the government receives something in return for its money—a situation of *quid pro quo*,"[229] but the Second Circuit rejected Rooney's position. The loans were received, that court reasoned, through a "program" and were best thought of as "benefits"—or as "Federal assistance"—even if their recipient eventually had to pay the government back.[230] The court conceded that the text and purpose of the statute excluded pure government-contractor cases, in which "'a government agency lawfully purchases more than $10,000 in equipment from a supplier,'"[231] but noted that they just as clearly denied Rooney the bene-

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225 The Supreme Court would confront these questions nearly a decade after *Rooney*, in *Fischer v. United States*, 529 U.S. 667, 676–77 (2000) (holding that Medicare payments received by a municipal hospital authority were "benefits" within the meaning of Section 666). *See infra* text accompanying notes 269–85.

226 986 F.2d 31, 32 (2d Cir. 1993).

227 *Id.* at 32–33.

228 *Id.* at 33.

229 *Id.*

230 *Id.* at 33–35.

231 *Id.* at 34 (quoting S. REP. No. 98-225, at 370 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511); *see also* 18 U.S.C. § 666(c) ("This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business."). In *United States v. Copeland*, 143 F.3d 1439 (11th Cir. 1998), for example, the court concluded that "organizations engaged in *purely commercial transactions* with the federal government," such as a prime contractor for the United States Department of Defense, "are not subject to § 666." *Id.* at 1441 (emphasis added). While conceding that punishing the corrupt activities of such entities "might further the statute's goal of protecting the integrity of federal funds," the court insisted that, given the text and history of the statute, "it is not the role of this Court to expand the scope of § 666 to encompass such behavior." *Id.* at 1442. *See also, e.g.*, United States v. Dubón-Otero, 292 F.3d 1, 8 n.8 (1st Cir. 2002). The First Circuit noted:

> A number of cases . . . support the proposition that, while purely commercial payments made by the government "as a commercial entity, such as payments for supplies or equipment," do not constitute benefits under § 666, the mere presence of quid pro quo does not preclude a finding of federal benefits. Those cases distinguish purely commercial transactions from "monies distributed through Federal programs, for which there is a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives."

fit of that exclusion. "[I]n light of the statute's purpose, we think that Congress only intended to exclude money spent by the government as a commercial entity, such as payments for supplies or equipment."[232]

It is noteworthy—and surprising, in light of contemporary New Federalism controversies—that the parties in these and other early efforts to interpret and narrow the reach of Section 666 did not invoke federalism and enumerated-powers principles and precedents. Indeed, for the most part, the Constitution appears to have played no explicit role in framing and deciding these cases.[233] Even *Dole*'s conditional-spending requirements went entirely unnoticed, in both the cases and commentary. Instead, the defendants in these cases tended to invoke the statute's text, in light of its stated purpose and history, as reason enough to restrain its use. This was not true, though, after *Lopez*.

B. The Federalism Revival and New Challenges to Section 666

Lopez emboldened the federal criminal-defense bar.[234] Armed with "first principles," and inspired by a perhaps newfound appreciation for Article I, lawyers representing defendants in criminal cases began to seize on the Court's apparent renewed interest in policing the bounds of Congress's enumerated powers and of the many criminal statutes predicated on them.[235] More specifically, defendants turned to the themes sounded in *Lopez* and other structural-federalism decisions to bolster their claims about how Section 666 should be read and applied. In at least one case, for instance, a defendant unsuccessfully invoked *Lopez* to support his argument that his prosecution exceeded the scope of the power conferred on the national government

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Id. (quoting *Rooney*, 986 F.2d at 33–35) (citations and internal quotations omitted)).

232 *Rooney*, 986 F.2d at 34.

233 In a few early cases, defendants' half-hearted vagueness and overbreadth complaints fell on deaf ears. *See, e.g.*, United States v. Little, 687 F. Supp. 1042, 1051 (N.D. Miss. 1988) ("In novel fashion, defendants assert that Section 666 is somehow unconstitutionally vague, ambiguous, and overbroad. This assertion is unsupported by any controlling or persuasive authority. . . ."); *see also* United States v. Urlacher, 979 F.2d 935, 939 (2d Cir. 1992) (rejecting vagueness challenge); United States v. Peery, 977 F.2d 1230, 1233 n.2 (8th Cir. 1992) (same); United States v. Shelton, 816 F. Supp. 1132, 1137 (W.D. Tex. 1993) (same); *cf.* United States v. Jackowe, 651 F. Supp. 1035, 1036 (S.D.N.Y. 1987) (interpreting statute to avoid possible due-process and equal-protection problems). More recently, the Eleventh Circuit also concluded that Section 666 is not constitutionally vague. United States v. Edgar, 304 F.3d 1320, 1327–28 (11th Cir. 2002).

234 *See* Weis, *supra* note 187, at 1462 ("Since April, 1995, federal defenders have aggressively attacked commerce-based criminal laws, deluging the lower courts with *Lopez*-inspired motions.").

235 As others have observed, however, litigants' post-*Lopez* enthusiasm has yielded little in the way of results. *See, e.g.*, Reynolds & Denning, *supra* note 16; Victoria Davis, Note, *A Landmark Lost: The Anemic Impact of* United States v. Lopez, *115 S. Ct. 1624 (1995), on the Federalization of Criminal Law*, 75 NEB. L. REV. 117 (1996).

by the Commerce Clause.[236] In others, parties pressed more ambitious and sweeping claims, insisting that the statute or its use was an unwarranted federal incursion into local affairs, in violation of the Tenth Amendment.[237]

Fairly quickly, a consistent line of constitutional argument developed. Defendants would contend that the Constitution, if not the plain language of the statute itself, required the government to prove some kind of connection or "nexus" between the conduct at issue, on the one hand, and federal funds, programs, or "interests," on the other. By and large, this purported requirement was grounded in these defendants' claims about the Spending Power, its reach, and its limits. For example, in *United States v. Ferrara*, a defendant argued that a Section 666 prosecution was too far removed from the federal interest in the integrity of federal spending programs to be justified under the Court's conditional-spending doctrine.[238] Sometimes, the argument took the form not of a direct constitutional attack, but of a delicate hint, or a gentle reminder, employing one or another of the various interpretive canons that recommend avoiding constitutionally troubling readings of statutes[239] and counsel against interpretations that might upset the delicate federal-state "balance" in an area traditionally recognized as the province of the States.[240] Although such

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236 *See* United States v. Roberts, 28 F. Supp. 2d 741, 743 (E.D.N.Y. 1998) ("Roberts urges this Court to find that the present application of § 666 is . . . [an] unconstitutional extension of Congressional power. Specifically, he argues that the Commerce Clause's constitutional limitations, as delineated by . . . *Lopez*, should apply to the facts of this case. This Court does not agree." (citation omitted)).

237 The Tenth Amendment to the United States Constitution states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. *See, e.g.*, United States v. Russo, No. 96-1394, 1997 WL 168276, at **2 (2d Cir. Apr. 8, 1997) ("Section 666 does not violate the Tenth Amendment. While [appellant] argues that the criminalization of bribery is traditionally a state function, the Tenth Amendment 'does not prohibit the federal government from enforcing its laws, even where there are state laws addressing the same criminal act.'" (quoting United States v. Bailey, 990 F.2d 119, 126 (4th Cir. 1993))); United States v. Ferrara, 990 F. Supp. 146, 152 (E.D.N.Y. 1998) ("[E]ach jurisdiction—state and federal—may prosecute offenders consistent with their respective interests. This circumstance is not violative of the Tenth Amendment."); *Roberts*, 28 F. Supp. 2d at 744; United States v. Cantor, 897 F. Supp. 110, 113 (S.D.N.Y. 1995); United States v. Bigler, 907 F. Supp. 401, 402 (S.D. Fla. 1995); *see also* United States v. Lipscomb, 299 F.3d 303, 318 (5th Cir. 2002) ("The Tenth Amendment . . . is not [that] great an obstacle to the necessity and propriety of § 666 . . . .").

238 990 F. Supp. at 151; *see also Cantor*, 897 F. Supp. at 113 ("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. . . .").

239 For a detailed analysis of the "avoidance canon," or the rule of "constitutional doubt" see Kelley, *supra* note 63.

240 *See, e.g.*, United States v. Morrison, 529 U.S. 598, 620 (2000) ("[T]he language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent

arguments met with limited success, courts did periodically sound cautionary, federalism-inspired notes regarding the use of Section 666 in cases concerning purely local matters and involving only tenuous connections to federal funds.[241]

In the mid-1990s, though—and notwithstanding the earlier rejection, in *Westmoreland* and elsewhere, of the "tracing" argument—a split began to develop over the question whether *some* connection was required, by the statute, the Constitution, or both, between federal-program funds and a defendant's conduct. In *United States v. Foley*, the Second Circuit conceded that the actions of an influence-peddling state legislator "affected neither the financial interests of the protected organization [the State of Connecticut] nor federal funds directly."[242] Without addressing any constitutional requirements, the court read the legislative history to suggest that the statute has a "specific federal interest, namely, safeguarding the integrity of federal funds that are intended to serve legislatively defined policy objectives. . . ."[243] It was not, the court insisted, "designed for the prosecution of corruption that was not shown in some way to touch upon federal funds."[244]

The Fifth Circuit rejected this view in *United States v. Marmolejo*.[245] It emphasized that Section 666 "does not require the government to prove that federal funds were directly involved in a bribery transaction, or that the federal monies funded the corrupt transaction."[246] Like the Second Circuit, though, the court did not take up the relevant constitutional questions.[247] When the United States Supreme Court took the opportunity presented in *Marmolejo* to consider

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the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government."); United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) ("When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'") (quoting United States v. Enmons, 410 U.S. 396, 411–12 (1973) (internal quotation marks omitted)); United States v. Bass, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.").

241 *See, e.g.*, United States v. Frega, 933 F. Supp. 1536, 1542 (S.D. Cal. 1996); *see also* United States v. Marmolejo, 89 F.3d 1185, 1201 (5th Cir. 1996) (Jolly, J., concurring in part and dissenting in part) (warning of Section 666's "virtually unlimited expansion"), *aff'd sub nom.* Salinas v. United States, 522 U.S. 52 (1997); Brown, *supra* note 36, at 283–84.

242 73 F.3d 484, 493 (2d Cir. 1996), *overruled in part by* Salinas v. United States, 522 U.S. 52 (1997).

243 *Id.* at 490.

244 *Id.* at 493.

245 89 F.3d 1185 (5th Cir. 1996), *aff'd sub nom.* Salinas v. United States, 522 U.S. 52 (1997).

246 *Id.* at 1191.

247 For more on this disagreement, see, for example, Brown, *supra* note 36, at 286–89.

whether "the federal bribery statute codified at 18 U.S.C. Section 666 [is] limited to cases in which the bribe has a demonstrated effect upon federal funds[,]"[248] some thought that the Court might use the case as a vehicle for continuing the work begun in *Lopez* of beating back the expansion of federal criminal jurisdiction, this time by limiting Congress's ability to create crimes through conditional spending.[249]

Mario Salinas (Marmolejo's co-defendant) was a deputy county sheriff in Hidalgo County, Texas. He had accepted two designer watches and a pickup truck in exchange for his help in arranging "contact visits" with a federal prisoner who was being housed in the county jail and, as a result, was charged under Section 666.[250] Although the County had received well over $10,000 in federal-program funds during the relevant years,[251] Salinas contended, among other things, that "the Government must prove the bribe"—*i.e.*, the receipt of the watches in exchange for the contact visits—"in some way affected federal funds, for instance by diverting or misappropriating them, before the bribe violates Section 666(a)(1)(B)."[252]

The Justices unanimously rejected this argument, on four separate grounds. First, the Court found no support for Salinas's proposed construction in the statute's "expansive, unqualified language."[253] Second, the Court disagreed with Salinas's reading of the legislative history, noting that Section 666 was enacted to "make it clear" that federal bribery law applies to certain bribes offered to state and local officials.[254] In other words, the Court stated, the law "was designed to extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds," and it would therefore be "incongruous to restrict [Section] 666 in the manner Salinas suggests."[255] Third, the Justices declined Salinas'

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248 *Salinas*, 522 U.S. at 54.

249 *See* Brown, *supra* note 36, at 250–51 ("The Supreme Court has granted *certiorari* in *Salinas v. United States* . . . . A decision could be the source of considerable guidance, although it may not be necessary to consider the outer limits of § 666, given the substantial federal interest present in the case." (footnotes omitted)).

250 *Salinas*, 522 U.S. at 54–55.

251 *Id.* at 54.

252 *Id.* at 55–56; *see also* Petitioner's Brief at 4, *Salinas* (No. 96-738) ("No Federal funds were impinged upon[.]"); *id.* at 16 ("[N]o protected Federal funds could have been unduly influenced.").

253 *Salinas*, 522 U.S. at 56–57 ("The enactment's expansive, unqualified language, both as to the bribes forbidden and the entities covered, does not support the interpretation that federal funds must be affected . . . . The word 'any,' which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction.").

254 *Id.* at 58.

255 *Id.*

invitation to follow *Gregory v. Ashcroft*[256] and *McNally v. United States*[257] in requiring a "plain statement of congressional intent" before construing Section 666 to apply to bribes not affecting federal monies.[258] True, "[s]tatutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature. Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress. . . ."[259]

Finally, the Court turned to Salinas's argument from constitutional structure: because "'[t]he States possess primary authority for defining and enforcing the criminal law,'"[260] and because Section 666 could be employed to expand the federal government's power at the expense of the States,[261] the law should therefore not be read to apply except in cases in which "[f]ederal funds are impinged upon, *i.e.*, unduly influenced."[262] In response, the Court observed that Salinas's conduct had, in fact, threatened the integrity of a federal program:

> [T]here is no serious doubt about the constitutionality of § 666(a)(1)(B) *as applied to the facts of this case*. . . . The preferential treatment . . . *was a threat to the integrity and proper operation of the federal program.* Whatever might be said about § 666(a)(1)(B)'s application in other cases, the application of § 666(a)(1)(B) to Salinas did not extend federal power beyond its proper bounds.[263]

While *Salinas* did not provide the constitutional fireworks that some had anticipated, the matter of the "proper bounds" of "federal power" seemed still to weigh on the minds of the Justices. The Court was careful to make clear that, while the text "does not require the

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256 501 U.S. 452 (1991) (interpreting the Age Discrimination in Employment Act).

257 483 U.S. 350 (1987) (interpreting the mail-fraud statute), *superseded by statute as stated in* United States v. Berlin, 707 F. Supp. 832, 835 (E.D. Va. 1989).

258 *Salinas*, 522 U.S. at 59.

259 *Id.* at 59–60 (internal quotation marks and citation omitted) (quoting United States v. Albertini, 472 U.S. 675, 680 (1985)). *See also id.* at 59 ("No rule of construction . . . requires that a penal statute be strained and distorted in order to exclude conduct *clearly* intended to be within its scope." (quoting United States v. Raynor, 302 U.S. 540, 552 (1938) (emphasis added)); *cf.* Kelley, *supra* note 63, at 834 ("[T]he [avoidance] canon seriously intrudes upon the roles of both Congress and the Executive in the constitutional scheme. Indeed, it is the role of the Executive which the avoidance canon most seriously threatens.").

260 Petitioner's Brief at 12, (No. 96-738) *Salinas* (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)) (internal quotation marks omitted). Also, the National Association of Criminal Defense Lawyers submitted an *amicus curiae* brief in which it argued that Section 666, as applied in Salinas's case, was an unconstitutional exercise of Congress's Spending Power violating "principles of federalism inherent in the structure of the Constitution itself" because Salinas's conduct did not implicate "the integrity of federal funds." Brief of *Amicus Curiae* National Association of Criminal Defense Lawyers at 23–25, (No. 96-738).

261 Petitioner's Brief at 14, (No. 96-738).

262 *Id.* at 15.

263 *Salinas*, 522 U.S. at 60–61 (emphasis added).

Government to prove the bribe in question had any particular influence on federal funds,"[264] it might still require "some other kind of connection between a bribe and the expenditure of federal funds."[265] With respect to Salinas's constitutional claims, the Justices held only that "under this construction the statute is constitutional as applied in this case."[266] That is, the Court left open the question whether a defendant in another case might succeed in challenging the constitutionality of a Section 666 prosecution.

The question remains open even after the Court's second decision concerning the statute's meaning and reach. *United States v. Fischer* presented the question whether and how the statute applied in cases where the "organization" in question is only an *indirect* recipient of federal-program funds.[267] What if, for example, the bribed agent's "organization" is one to which various individuals have paid over government benefits such as food stamps, Social Security, or student-loan monies? What if, in other words, Mrs. Murphy receives $10,000 in food stamps and spends it at Al's Grocery Store—has Al's Grocery received "benefits . . . under a Federal program"?[268]

In *Fischer*, the Government alleged that Jeffrey Fischer paid kickback "consulting fees" in exchange for a loan from the West Volusia Hospital Authority to his own company, "QMC."[269] On the Government's theory, Section 666 was triggered by the fact that the hospital had collected ten to fifteen million dollars in Medicare reimbursements in the relevant year.[270] The Eleventh Circuit had rejected (with little analysis) Fischer's argument that the Medicare funds received by the hospital were not "benefits" within the meaning of the statute.[271] What mattered was not whether the Hospital Authority had received the Medicare funds directly or as an assignee,[272] or whether the funds were paid to the organization directly or indirectly, but whether the

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264 *Id.* at 61.

265 *Id.* at 59. Again, in Salinas's case "the bribe was related to the housing of a prisoner in facilities paid for in significant part by federal funds themselves." *Id.* "[T]hat relationship," the Court insisted, "is close enough to satisfy whatever connection the statute might require." *Id.*

266 *Id.* at 61.

267 529 U.S. 667, 669 (2000). I should note that I was a co-author of the *amicus* brief filed by the National Association of Defense Lawyers in support of the petitioner in *Fischer*.

268 *See* United States v. LaHue, 998 F. Supp. 1182, 1192 (D. Kan. 1998) (rhetorically asking whether "Congress intended grocery store [c]hains that accept food stamps to fall within section 666's reach").

269 United States v. Fischer, 168 F.3d 1273, 1275 (11th Cir. 1999).

270 *Id.* at 1277.

271 *Id.* at 1278.

272 *Id.* ("[E]ven if WVHA received funds as an assignee, the plain language of § 666(b) does not distinguish between an organization, government, or agency that receives 'benefits' directly under a federal program and an organization, government, or agency that receives 'benefits' as an assignee under a federal program.").

payment arose out of "an 'assistance' program, rather than a purely commercial transaction."[273] Although the Tenth Circuit, when confronted with similar facts, had embraced the precise argument propounded by Fischer,[274] the Supreme Court affirmed.[275]

Notwithstanding the Court's ruling, and although the Court agreed with the Eleventh Circuit that the term "benefits" covered payments made to Medicare providers, it rejected explicitly the Government's contention that an organization receives "benefits" anytime it receives funds of which the government is the ultimate source.[276] Indeed, the Court echoed, and reinforced, its cryptic suggestion in *Salinas* that Section 666 can constitutionally be applied only to conduct that threatens the integrity of federal funds:

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273 *Id.*

274 *See* United States v. LaHue, 170 F.3d 1026 (10th Cir. 1999). Doctors Robert C. and Ronald H. LaHue concocted a scheme whereby they referred Medicare patients to various hospitals in return for a referral fee. The district court had dismissed the Section 666 charges, agreeing with the LaHues that "their ultimate receipt, in payment for medical services, of money whose origin is from Medicare . . . does not make them recipients of 'benefits . . . under a Federal program . . .' as contemplated by the statute." United States v. LaHue, 998 F. Supp. 1182, 1185 (D. Kan. 1998). "Once a federal program benefit reaches its target recipient," the court reasoned, "it simply loses its character as a 'benefit.'" *Id.* at 1186. The Tenth Circuit agreed, noting that

> [u]nder the government's [contrary] interpretation of section 666(b), any organization that is assigned $10,000 in a year in funds initially disbursed under a federal program source would fall within the statute. Thus, when funds have passed to the beneficiary and sbe assigns the funds further to any number of organizations whicb may assign them even further, the government's theory suggests that these monies are all considered benefits as long as they originated under a federal benefits program. Presumably under this interpretation, if the recipient pbysician endorsed Medicare checks to pay a supplier of medical goods, the supplier would be receiving benefits from a federal program.

170 F.3d at 1029. However, the Tenth Circuit emphasized, citing *Salinas*, that "[t]he purpose of section 666 to prevent the diversion of federal program funds on the distribution path to the intended beneficiaries is fulfilled once the funds have been received by the actual beneficiary." *Id.* at 1031.

A few other courts, before the *LaHue* and *Fischer* decisions, had confronted this same question. *Compare, e.g.*, United States v. Wyncoop, 11 F.3d 119, 121 (9th Cir. 1993) ("Congress did not intend, however, to make misappropriations of money from every organization that receives *indirect* benefits from a federal program a federal crime. . . . The statute clearly does not reach all entities that benefit from federal programs or expenditures. . . ."), *with* United States v. Zyskind, 118 F.3d 113, 116 (2d Cir. 1997) (noting that Section 666 "was designed broadly to prevent diversions of federal funds not only by agents of organizations that are direct beneficiaries of federal benefits funds, but by agents of organizations to whom such funds are 'disbursed' for further 'distribut[ion]' to or for the benefit of the individual beneficiaries" and that "[n]othing in the language of § 666 suggests that its reacb is limited to organizations that were the direct beneficiaries of federal funds").

275 *See* Fischer v. United States, 529 U.S. 667, 682 (2000).

276 *Fischer*, 529 U.S. at 677 ("We reject petitioner's reading of the statute but without endorsing the Government's broader position.").

> Our discussion should not be taken to suggest that federal funds disbursed under an assistance program will result in coverage of all recipient fraud under § 666(b). Any receipt of federal funds can, at some level of generality, be characterized as a benefit. The statute does not employ this broad, almost limitless use of the term. Doing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance.[277]

Instead, "an examination must be undertaken of the program's structure, operation, and purpose."[278] After conducting just such an examination, the Court concluded that Medicare "payments are made for significant and substantial reasons in addition to compensation or reimbursement" associated with ordinary contractual exchanges.[279] Those reasons—namely, "assist[ing] the hospital in making available and maintaining a certain level and quality of medical care"—are, the Court held, "suffic[ient] to make the payment a benefit within the meaning of the statute."[280] Moreover, the Court commented, Fischer's acts had, in fact, "threaten[ed] the program's integrity."[281] The seven-Justice majority ended the opinion, as the Court had in *Salinas*, with the caveat that the same might not be true in other, future "benefits" cases.[282]

But *Fischer*, unlike *Salinas*, was not unanimous. Justice Thomas, joined by Justice Scalia, dissented, making explicit the federalism concerns at which the Court had hinted. While it was enough for the *Fischer* majority to caution that reading Section 666 to encompass "[a]ny receipt of federal funds," resulting "in coverage of all recipient fraud," could run afoul of constitutional limits,[283] Justice Thomas insisted that "[w]ithout a jurisdictional provision that would ensure that in *each* case the exercise of federal power is related to the federal interest in a federal program, [Section] 666 would criminalize routine acts of fraud or bribery, which, as the Court admits, would 'upse[t] the proper federal balance.'"[284] This assertion—that a "jurisdictional provision" capable of ensuring a "federal interest" is required in "*each* case"—suggests that, for at least two Justices, the cautious intimation in *Salinas* that Section 666 might require "some other kind of connection between a bribe and the expenditure of federal funds"[285] left much unsaid.

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277 *Id.* at 681.
278 *Id.*
279 *Id.* at 679.
280 *Id.* at 679–80.
281 *Id.* at 681.
282 *Id.* at 682.
283 *Id.* at 681.
284 *Id.* at 689 n.3 (Thomas, J., dissenting) (quoting *id.* at 681).
285 Salinas v. United States, 522 U.S. 52, 59 (1997).

In any event, in both *Fischer* and *Salinas* all of the Justices assumed both that Section 666 itself is consistent with the Constitution, and also that the idea of a "proper federal balance" could constrain the statute's application.[286] In both cases, they acknowledged that respect for this "balance," which is grounded in the Constitution, could require some kind of "connection" between local corruption and the integrity of federal funds, programs, or interests. But the location of that point, and the nature of that connection, remain unidentified.[287]

Immediately after *Salinas*, courts and litigants returned to the task of identifying them. *United States v. Santopietro*, for example, involved a prosecution of the Mayor of Waterbury, Connecticut and two other city officials for accepting cash bribes and bank loans from real estate developers in exchange for influencing decisions by various city agencies.[288] The Second Circuit had to consider whether its above-mentioned decision in *United States v. Foley*—in which, again, the court had read Section 666 as applying only to cases involving corruption that "in some way . . . touch[es] upon federal funds"[289]—possessed "continued validity" after *Salinas*.[290] To the extent possible, the court held to its earlier interpretation, observing that "*Salinas* may be read to indicate that the 'threat to the integrity and proper operation of [a] federal program' created by the corrupt activity is *necessary to assure that the statute is not unconstitutionally applied*."[291] Thus, Section 666 "would not permit the Government . . . to prosecute a bribe paid to a city's meat inspector in connection with a substantial transaction just because the city's parks department had received a federal grant of $10,000."[292]

As was mentioned earlier, though, the courts of appeals are clearly and sharply split on this matter. Several circuits, in the wake of *Salinas* and *Fischer*, agree with the *Santopietro* court and hold that the

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286 *See, e.g.*, United States v. Wright, 194 F. Supp. 2d 287, 300 (D. Del. 2002) ("'[T]he best reading of the *Fischer* and *Salinas* cases seems to be that the Supreme Court does not want' an interpretation of [Section] 666 that would make it a 'generalized anti-corruption statute under the spending power.'" (quoting United States v. Suarez, 263 F.3d 468, 489 (6th Cir. 2001))).

287 A recent decision by the Eleventh Circuit suggests that at least for that court, that point is remote indeed. *See* United States v. Edgar, 304 F.3d 1320, 1329 (11th Cir. 2002) (noting that "further elucidation may be required to identify the point at which [Section] 666's application will transgress the outer boundary of Congress's spending power").

288 166 F.3d 88, 91 (2d Cir. 1999).

289 73 F.3d 484, 493 (2d Cir. 1996).

290 166 F.3d at 90.

291 *Id.* at 93 (quoting Salinas v. United States, 522 U.S. 52, 61 (1997)) (emphasis added). The Second Circuit did conclude that *Foley*'s requirement that a bribe "directly affect the disbursement or other use of federal funds" had been overruled by *Salinas*. *Id.* at 92. "However," the court continued, "to the extent that *Foley* requires at least some connection between the bribe and a risk to the integrity of the federal funded program, nothing in *Salinas* disturbs such a requirement." *Id.* at 93.

292 *Id.* at 93.

Constitution requires a connection between the bribe of a state or local official charged under Section 666 and the federal interest in program integrity.[293] Several others, though, have concluded that, a few cryptic comments in *Salinas* notwithstanding, Section 666 "requires no relationship between the illegal activity and the federal funding."[294] The point here is not to canvass in detail the conflicting decisions, but rather to note that, in these conflicting cases, the question is posed, as it was in Justice Thomas's *Fischer* dissent,[295] not so much as a query about text or legislative history, but as a matter of the extent and limits of the Spending Power.[296] That said, in neither *Salinas* nor *Fischer* did the Court discuss whether or how the *South Dakota v. Dole* criteria for permissible regulation-by-contract should apply in the Section 666 context or in criminal law generally.

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293 *See, e.g.*, United States v. DeLaurentis, 230 F.3d 659, 661–62 (3d Cir. 2000) (holding that a conviction of a public official for bribery must be based on "some connection between the defendant's bribery activities and the funds supplied by the federal government"); United States v. Naiman, 211 F.3d 40, 48 (2d Cir. 2000) ("Without proof of the nexus between the alleged bribes and the integrity of federally funded programs, Naiman's conviction cannot stand."); United States v. Zwick, 199 F.3d 672, 687 (3d Cir. 1999) (holding that Section 666 "requires that the government prove a federal interest is implicated by the defendant's offense conduct"); *cf.* United States v. Cabrera, 328 F.3d 506, 510 (9th Cir. 2003) (declining to decide whether a federal nexus is required because "the facts presented here [would] satisfy any [such] requirement"); United States v. Bynum, 327 F.3d 986, 992 (9th Cir. 2003) (concluding that "evidence was sufficient to demonstrate a federal nexus, if one is required"); United States v. Ganim, 225 F. Supp. 2d 145, 163–64 (D. Conn. 2002) (rejecting facial challenge to Section 666 and following *Santropietro* in imposing a "nexus requirement," but concluding that "the indictment's allegations are adequate").

294 United States v. Dakota, 197 F.3d 821, 826 (6th Cir. 1999); *see also* United States v. Fernandez, 282 F.3d 500, 510–511 (7th Cir. 2002) ("Defendants assert that the government failed to establish a necessary element of the offense, the requisite link between a federal interest and the defendants' fraud. We do not believe that it is necessary for the government to establish sucb a link."); United States v. Suarez, 263 F.3d 468, 489–91 (6th Cir. 2001) (refusing to require minimal nexus); United States v. Grossi, 143 F.3d 348, 350 (7th Cir. 1998) (refusing to require that "the program or activity that was touched by bribery itself received $10,000 in federal funds").

295 Fischer v. United States, 529 U.S. 667, 689 n.3 (2000) (Thomas, J., dissenting). Justice Thomas stated:

> Section 666 was adopted pursuant to Congress'[s] spending power. We have held that the spending power requires, at least, that the exercise of federal power be related 'to the federal interest in particular national projects or programs.' Arguably, if Congress attempted to criminalize acts of theft or bribery based solely on the fact that . . . the victim organization received federal funds as payment for a market transaction, this constitutional requirement would not be satisfied.

Id. (citations omitted) (quoting South Dakota v. Dole, 483 U.S. 203, 207 (1987)).

296 The Third Circuit, for example, in *Zwick* held that "[a]pplying [Section] 666 to offense conduct, absent evidence of any federal interest, would appear to be an unconstitutional exercise of power under the Spending Clause." 199 F.3d at 687. And so, invoking the "avoidance" canon, the court interpreted the statute to preclude such applications. *Id.* ("[W]hen a statute is unclear, we will construe it so as to avoid constitutional concerns, assuming that such construction does not amount to a rewriting of the statute.").

C. Conditional Spending, *South Dakota v. Dole*, and Section 666

Although a few courts in Section 666 cases had mentioned the Court's decision in *Dole*,[297] the first case in which *Dole*'s litany of conditional-spending requirements were analyzed and applied in any detail was *United States v. McCormack*.[298] In *McCormack*, as was mentioned at the outset of this Article, the defendant had been indicted under Section 666 for giving cash payments to a city police officer in Malden, Massachusetts, to persuade the officer not to investigate him for various state-law offenses.[299] The Government's theory was built on the fact that the Malden Police Department, "like scores of departments across the country," received over $10,000 in federal funds.[300] The prosecution characterized Section 666 simply as a "general federal anti-corruption statute" and insisted that "any and all bribes, about any aspect of the entity's business, so long as they reach a certain level . . . may be prosecuted as federal offenses."[301] On this view, "[i]t does not matter if federal funds were threatened, either directly or indirectly, or if a federal program was implicated in any way. The federal link is essential only to determine which programs and entities fall under federal protection; once there, any significant corruption can be federally prosecuted."[302]

Citing *Salinas*, the district court rejected McCormack's contention that the text itself requires a connection between the bribe in question and the federal funds that satisfy the statute's jurisdictional element.[303] In the court's view, *Salinas* had definitively established—at least as a matter of statutory construction—that a bribe need not "involve federal funds or jeopardize the financial integrity of a federal program" in order to violate Section 666.[304] Still, the court recognized that the Justices in *Salinas* seemed to have left open the possibility that particular applications of Section 666 might unconstitutionally

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297 *See, e.g.*, United States v. Russo, No. 96-1394, 1997 WL 168276, at *2 (2d Cir. Apr. 8, 1997); United States v. Roberts, 28 F. Supp. 2d 741 (E.D.N.Y. 1998); United States v. Cantor, 897 F. Supp. 110, 113 (S.D.N.Y. 1995); *see also* Brown, *supra* note 36, at 294–99 (suggesting that *Dole* be used in Section 666 cases).

298 31 F. Supp. 2d 176, 187-89 (D. Mass. 1998).

299 *Id.* at 177.

300 *Id.* at 178.

301 *Id.*

302 *Id.*

303 *See id.* at 185; *see id.* at 184 (concluding that Section 666 does not require the government to "trace[ ] the route of federal monies from Congress to the local agency and out again as a result of the charged offense").

304 *Id.* at 185. Although some courts, motivated both by constitutional concerns and by their reading of Section 666's legislative history, have "transformed the statutory language so as to require a federal connection[,]" the *McCormack* court insisted that "*Salinas* has shut off this avenue of analysis. . . . The language is clear, and the reach of the statute is clearly broad." *Id.* at 186 (citation omitted).

extend federal power.[305] For help in identifying such applications, the *McCormack* court turned to *Dole*.[306]

In *Dole*, the Court had observed that although "objectives not thought to be within Article I's 'enumerated legislative fields' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds . . . [t]he spending power is of course not unlimited."[307] For instance, the Court continued, "our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"[308] Nor, according to the *McCormack* court, had the Justices provided any significant elaboration in the years since *Dole*.[309] Nevertheless, the district court took the *Dole* Court at its word in treating the relatedness requirement as more than a rhetorical flourish.[310] And so, the *McCormack* court reasoned, questions of text and legislative history aside, *Dole* requires that Section 666 prosecutions bear some relation to the "federal interest" that the statute was intended to promote and protect, namely, the "integrity" of federal funds and funding programs.[311]

But what about *Salinas*? Had not the Court just decided that no such "relation" was required? The *McCormack* court noted that, although *Salinas* states that the Government need not connect a bribe directly to federal funds, it also suggests that the Government must show at least that the bribe threatened the integrity of those funds, or the federal program through which the funds were disbursed.[312] In *McCormack*, the local police department—the "organization" in ques-

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305 The court noted how little explanation the Supreme Court had provided, emphasizing the language of *Salinas*: "'*Whatever might be said about section 666(a)(1)(B)'s application to other cases*, the application of section 666(a)(1)(B) to Salinas did not extend federal power beyond its proper bounds.'" *Id.* at 185 (emphasis added by the *McCormack* court) (quoting Salinas v. United States, 522 U.S. 52, 61 (1997)).

306 *Id.* at 187–88. The court also relied on the avoidance canon, and on the Court's decision in *United States v. Bass*, 404 U.S. 336 (1971), in which the Court, expressing concern for the federal-state "balance" in criminal law, had adopted a narrow reading of an ambiguous federal criminal statute outlawing the possession and transportation of a firearm in order to save it from constitutional demise. *McCormack*, 31 F. Supp. 2d at 186–87 & n.19.

307 South Dakota v. Dole, 483 U.S. 203, 207 (1987) (citation omitted) (quoting United States v. Butler, 297 U.S. 1, 65 (1936)); *see also McCormack*, 31 F. Supp. 2d at 187–88 (discussing *Dole*).

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

309 *See McCormack*, 31 F. Supp. 2d at 188 (noting that since *Dole*, the court is "[g]uided only by [the] general princip[le]s" of subsequent cases in interpreting Section 666).

310 *See id. But see* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 632–33 (1999) (holding that a school district may be held liable under Title IX for student-on-student sexual harassment when, as a "funding recipient," it "acts with deliberate indifference to known acts of harassment in its programs or activities.").

311 *See McCormack*, 31 F. Supp. 2d at 189.

312 *See id.* The court further noted:

tion—had received several federal grants, relating to (among other things) community revitalization, a drug-use prevention project, and domestic violence.[313] In the court's view, though, there was no reason to believe that the defendant's corrupt activities posed any real threat to the federal programs through which these grants were disbursed, or to the various projects themselves. It is not enough, the court insisted, that a bribe involve a police department, which in turn receives federal funds; the Government must prove that the bribe itself was "related" to the "integrity" of the federal grants.[314] Because the bribes McCormack paid to local police officers to prevent further investigation of state-law crimes were not "'related to a legitimate national problem,'" and did not threaten the integrity of any of the various federal grants or programs, the court concluded that it would be unconstitutional to prosecute the defendant under Section 666.[315]

Since *McCormack*, several other courts have looked to *Dole*'s conditional-spending test for guidance when determining what, if any, kind of connection is required between a defendant's conduct and an identifiable federal interest.[316] These decisions illustrate courts' continued willingness to consider the claim, flagged in *Salinas*, that Section 666 could, in some cases, be employed in a way that exceeds Congress's power to regulate indirectly through conditional federal spending. The common theme that emerges is that in Section 666 cases, the Constitution requires some nexus between a defendant's bribe and the integrity of the federal funds implicated by that bribe. Put differently, these courts have responded to federal-program-brib-

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> Directed by the concerns expressed in *Salinas* about applying § 666(a) to conduct that has no connection with the federal funds or programs, and the broader concerns of *Lopez* and *Bass*, I find that "integrity" must be more carefully construed to provide for at least some nexus with the federal funds or programs. Establishing such a requirement is consistent with the limits the Supreme Court has placed on the spending power. In particular, it gives meaningful content to the "relatedness" standards as applied to this statutory scheme.

Id. (citations omitted).

313 *See id.* at 178.

314 *See id.* at 189.

315 *Id.*

316 In *United States v. Zwick*, for example, the Third Circuit followed *McCormack* in observing that "[a]pplying § 666 to offense conduct, absent evidence of any federal interest, would appear to be an unconstitutional exercise of power under the Spending Clause." 199 F.3d 672, 687 (3d Cir. 1999). In *Zwick*, however—unlike *McCormack*—the Third Circuit determined that the *statute itself* must be read to require such a connection, in accord with the avoidance canon. *Id.* In other words, because a no-relation reading could bring Section 666 into conflict with the Constitution (and with *Dole*), the *Zwick* court eschewed such a reading. *See also* United States v. Lipscomb, 299 F.3d 303, 328–32 (5th Cir. 2002) (surveying decisions of district and appellate courts on issue of federal-interest requirement); United States v. Morgan, 230 F.3d 1067, 1073–74 (8th Cir. 2000) (Bye, J., concurring) (discussing Congress's power under *Dole*); United States v. Phillips, 219 F.3d 404, 414–15 (5th Cir. 2000) (same).

ery prosecutions that appear to lack any real connection to federal interests by using the "relatedness" portion of the *Dole* inquiry—perhaps in conjunction with the avoidance canon—to police the "federal-state balance" in criminal law. What is still missing, though, is an argument that prosecution and punishment under Section 666 should be regarded as a "condition" attached to federal spending, or that it should trigger the *Dole* analysis at all. The aim of Part III is to show a conclusion cannot be drawn.

III
CRIMINALIZATION BY CONTRACT? THE DOCTRINAL CASE(S) AGAINST "HUNGRY DOG JURISDICTION"

Part II traced the gradual and continuing constitutionalization of arguments concerning the reach of Section 666. In the wake of the post-*Lopez* federalism revival, the claim that Section 666 by its terms and legislative history requires the government to establish a connection, relation, or nexus between a defendant's corrupt conduct on the one hand, and the integrity of federal funds or programs on the other, has been re-cast in terms of constitutional avoidance and conditional spending. In other words, it appears that the question in Section 666 cases is no longer "how far Congress has gone," but how far, "under the Constitution, [it] may go," in federalizing anticorruption law.[317]

At first blush, this move—from arguing for a statutory federal-connection element to invoking the "relatedness" requirement set out in *South Dakota v. Dole*[318]—seems consonant with the themes and maxims of the New Federalism. In fact, though, it misses the point entirely. The shift rests on a fundamental mistake: Its premise is that the prosecution of an individual by the United States is analogous to a regulatory condition attached to federal spending and imposed upon (or agreed to by) the funds' beneficiaries. Under this analogy, federal criminal jurisdiction over conduct that Congress could not or simply has not yet criminalized via its power to regulate commerce is, constitutionally speaking, no different from the powerfully persuasive effect of program funds and grants on the States' own policies and priorities. But persons prosecuted under Section 666 are not the federal government's contracting partners, and the requirement that they avoid bribery is in no way a condition attached to their receipt of federal-program funds. Nor are fund recipients obliged, as a condition

317 *McCormack*, 31 F. Supp. 2d at 177.

318 *See* 483 U.S. 203, 207 (1987) ("[O]ur cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs'" (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

of such receipt, to prosecute violations of the statute.[319] Thus, the analogy fails, and the premise remains unjustified.[320]

A. The *Dole* Test in the Criminal Context

As was mentioned above, in *McCormack*, a United States district court, citing *Dole*, dismissed an indictment charging violations of Section 666 on the ground that there was "no connection between the conduct at issue . . . and the federal funds, or the federal program to warrant a federal rather than a state prosecution of these matters."[321] Since then, a few other courts and litigants have followed suit, and framed their arguments concerning the statute's validity and scope around *Dole*'s criteria.[322] Recall that in *Dole*, the Justices reaffirmed Congress's power "'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'"[323] At the same time, the Court recounted "several general restrictions" on this power: "[T]he exercise of the spending power must be in pursuit of 'the general welfare'"; conditions must be "'unambiguously'" attached to the receipt of federal funds; conditions should not be "unrelated" to the "'federal interest in particular national projects or programs,'" nor should the "financial inducement offered by Congress" be coercive;[324] and any conditions must comply with other applicable constitutional provisions.[325]

For a court resolved to employ *Dole*'s conditional-spending criteria in a Section 666 case, the analysis would proceed as follows: First, is the expenditure to which the prosecution points for satisfaction of Section 666(b)'s "benefits" element[326] an expenditure "in pursuit of the general welfare"? Of course, the answer to this question will always be "yes."[327] Second, was it made "unambiguously" clear to the

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319 *See* United States v. Sabri, 326 F.3d 937, 946 (8th Cir. 2003) ("Unlike typical Spending Clause enactments, [Section] 666 imposes no affirmative obligation on the recipient of federal funds . . . . Nor does [Section] 666 proscribe conduct of the recipient of the federal funds."), *cert. granted*, No. 03-44, 2003 WL 21692658 (U.S. Oct. 14, 2003).

320 *But see, e.g.*, United States v. Bynum, 327 F.3d 986, 991 (9th Cir. 2003) (asserting that "[i]n *Salinas*, the Court specifically refuted the argument that [Section] 666 exceeds Congress's Spending Clause powers").

321 31 F. Supp. 2d at 189; *see supra* Part II.C.

322 *See supra* note 318 and accompanying text.

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

324 *Id.* at 208.

325 *Id.* at 207–08 (citations omitted).

326 *See* 18 U.S.C. § 666(b) (2000) ("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.").

327 *See Dole*, 483 U.S. at 207 n.2 ("The level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially

government agencies or organizations receiving these benefits that, by accepting them, they were consenting to the sweeping reach of Section 666, that is, to corruption prosecutions of third parties whose conduct in some way touches upon those or other State agencies' business? Third, is the condition—federal power to prosecute and punish corruption under Section 666—"related" to the interest of the United States in "particular national projects or programs"? Finally, is federal jurisdiction under Section 666 otherwise consistent with the Constitution?

It should be clear that, if Section 666 is a "condition" to be analyzed and evaluated in accord with *Dole*, the statute's use in many local-corruption cases should and will flunk the "relatedness" test. The prosecutions of junior varsity hoodlums like McCormack, for diverting through bribes the attention of a small-town police officer, are hardly "related" either to the "integrity of federal funds given to the Malden police department or even to the programs those funds were intended to support."[328] *Dole* seems, at first blush, to provide a convenient vehicle for salvaging the foundering statutory-text-based arguments for a "federal connection" or "nexus" requirement: Instead of asking whether Section 666 requires the government to prove a connection between the defendant's corruption and the federal program funds and whether, in a particular case, that requirement is satisfied, courts may now ask whether the prosecution of a defendant for corruption is, in a particular case, "unrelated" to the interest of the United States in the "particular national projects or programs" through which or for which the statutorily required funds were disbursed.[329]

But *Dole*'s usefulness as a translator for these federal-nexus claims is overstated, and *Dole*-based challenges to Section 666 and its applications are misplaced. Properly understood, the issue is not whether the statute or its uses satisfy that case's four criteria, but whether those criteria apply at all. Recall the doctrine that "legislation enacted pursuant to the spending power is much in the nature of a contract: in

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enforceable restriction at all."). *But see* Eastman, *supra* note 22, at 87 ("For the first eighty-five years of our nation's history, under both the Articles of Confederation and the Constitution, the language of 'general welfare' was viewed as a limitation on the powers of Congress, not as a grant of plenary power.").

328 United States v. McCormack, 31 F. Supp. 2d 176, 189 (D. Mass. 1998).

329 Other *Dole*-inspired arguments are possible as well. In *United States v. Sabri*, for example, the district court noted that, even if Section 666 could be considered a regulatory condition, and the federal funds disbursed to the City of Minneapolis a mere "'inducement' by which Congress bargained for federal jurisdiction over offenses traditionally within the purview of state and local governments, that bargain surely is 'so coercive as to pass the point at which pressure turns into compulsion.'" 183 F. Supp. 2d 1145, 1156 (D. Minn. 2002) (quoting *Dole*, 483 U.S. at 211), *aff'd in part, rev'd in part*, 326 F.3d 937 (8th Cir. 2003), *cert. granted*, No. 03-44, 2003 WL 21692658 (U.S. Oct. 14, 2003). The court of appeals, reversing the district court's decision, had no occasion to address this suggestion. 326 F.3d at 945–48.

return for federal funds, the States agree to comply with federally imposed conditions."[330] In the Section 666 context, there simply is no federal-spending "contract" to which those whose conduct is being regulated and punished are parties. Even if the "program" employed to satisfy the appropriate statutory element is fairly regarded, as in the typical regulatory-condition case, as a "contract" between the United States and the relevant organization or agency, Section 666 does not purport to govern the conduct of these "contracting" parties; rather, the statute "reaches beyond punishment of the state and local governments who receive those funds to proscribe the conduct of third persons who are not parties to the funding contract."[331] Neither Section 666 itself, nor its employment in particular cases, can helpfully be compared to a regulatory "condition" attached to federal funds disbursed to promote the general welfare.[332] Turning this point around, while the General Welfare Clause might well authorize the disbursal of funds, it does not authorize the enactment of *laws*.[333] Regulatory strings, which, of course, Congress is free to attach to its program funds, are not laws,[334] but Section 666 certainly is.

To continue further in this vein, *South Dakota v. Dole* held that the United States may achieve indirectly, through conditional spending, what it might not be able to achieve directly, through legislation or regulation. For instance, in the *Dole* situation itself, Congress might well lack the power to impose a national drinking age; nonetheless, it can simply cajole even the more hard-living States to embrace the federally preferred standard by making its adoption a condition for the receipt of federal highway funds.[335] In so doing, the theory goes, Congress does not regulate so much as it "generates legislation 'much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.'"[336] Criminal jurisdic-

330 Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

331 United States v. Morgan, 230 F.3d 1067, 1074 (8th Cir. 2000) (Bye, J., concurring).

332 *Cf.* McCoy & Friedman, *supra* note 26, at 116 ("[A]ny time that Congress finds itself limited by . . . delegated regulatory powers, . . . [it] need only attach a condition on a federal spending grant that achieves the same (otherwise invalid) regulatory objective.").

333 *Morgan*, 230 F.3d at 1073 (Bye, J., concurring).

334 *Id.* at 1073–74 (Bye, J., concurring) (citing Engdahl, *supra* note 1, at 71).

335 *See* South Dakota v. Dole, 483 U.S. 203, 205 (1987). True, in *Dole*, South Dakota contended that the "'Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. . . .'" *Id.* (quoting Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980)). The Court avoided resolving the matter of that Amendment's scope, though, stating "we need not decide in this case whether that Amendment would prohibit an attempt by Congress to legislate directly a national minimum drinking age," because "[h]ere, Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages. . . . [W]e find this legislative effort within constitutional bounds even if Congress may not regulate drinking ages directly." *Id.* at 206.

336 Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

tion and prosecutions under Section 666, though, are *not* "conditions" within the meaning of *Dole*; they cannot be analogized to the terms of a contract—real or imagined—between Congress and the agency in question. Nor is the statute itself a "condition" attached to a grant, or the term of a hypothesized federal-state contract. It is, rather, a generally applicable criminal statute: a *law*. And, as Judge Bye observed in *Morgan*, notwithstanding *Dole*, "Congress lacks the power under the Spending Clause to enact criminal laws governing third-party conduct."[337]

Nonetheless, in *United States v. Sabri*, the government argued that Section 666 "is merely a 'condition' which Congress may attach (incident to its spending power) on an entity's receipt of federal funds."[338] The facts alleged in *Sabri* were typical of Section 666 cases: Basim Omar Sabri, a Minneapolis developer and landlord, on several occasions in 2001 gave or offered money to Brian Herron, a city councilman and local leader, to secure Herron's political and other help with a variety of lucrative development projects.[339] Because both the city of Minneapolis and the Minneapolis Neighborhood Revitalization Program—of whose boards Herron was, *ex officio*, a member—received and administered upwards of $20 million in federal-program funds during that year, the United States contended that the scheme fell squarely within the scope of Section 666(a)(2).[340] The government did not allege, however, any particular connection between the corrupt dealings of Herron and Sabri and the program funds or their administration.[341]

Sabri moved to dismiss on the ground that the "statute is unconstitutional on its face," that is, it "lies outside the scope of Congress's authority to enact laws under the Spending Clause," because "it does not require a connection between the alleged criminal conduct—the giving or offering of a bribe—and the federal funds distributed by Congress."[342] Sabri's claim, then, was not the more common one discussed above: that the government had failed to allege or prove such a

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337 230 F.3d at 1073 (Bye, J., concurring).

338 183 F. Supp. 2d 1145, 1155 (D. Minn. 2002), *aff'd in part, rev'd in part*, 326 F.3d 937 (8th Cir. 2003), *cert. granted*, No. 03-44, 2003 WL 21692658 (U.S. Oct. 14, 2003). It should be noted that, as this Article was being revised, I co-authored a brief *amicus curiae*, filed by the National Association of Criminal Defense Lawyers, in support of Sabri's petition for a writ of certiorari.

339 *See id.* at 1146–47.

340 *See id.* at 1147. Recall that Section 666 criminalizes bribery involving agencies that receive, "in any one year period, benefits in excess of $10,000." 18 U.S.C. § 666(b) (2000).

341 *See Sabri*, 183 F. Supp. 2d at 1154 n.9 (dismissing as "irrelevant" the "government's argument . . . that it could establish a connection between the bribes . . . and the expenditure of federal funds" because "[t]he statute does not require proof of such a connection").

342 *Id.* at 1147.

connection, and that such a connection is required by the statute itself. Instead, Sabri proceeded from the premise that the statute does *not* require such a connection. And it is precisely for this reason, he insisted, that the statute is unconstitutional.

The bulk of the trial court's opinion was devoted to a close examination of Sabri's interpretive premise.[343] Again, as the court observed, the Justices in *Salinas* were content to leave unresolved the question whether Section 666(a)(1)(B) "'requires some . . . kind of connection between a bribe and the expenditure of federal funds,'"[344] leaving the door open for those courts of appeals who have since decided that such a link is necessary.[345] However broad the statute might be, and however intrusive its reach, the *Sabri* trial court concluded that the statute requires only the coexistence of the bribe and the specified financial inflow to the relevant agency—*not* any connection between the two. "[T]he remaining issue," then, was "whether the statute, as now construed . . . , is a constitutional exercise of Congress's powers under the Spending Clause."[346]

The court concluded that it was not. Section 666 contains no "express jurisdictional element" of the kind discussed in *Lopez*,[347] nor is federal jurisdiction over third-parties' bribes through Section 666 a "condition" attached to the funds disbursed to agencies through federal programs.[348] After all, Section 666 "'neither requires a state's compliance with federal regulatory or administrative directives, nor prevents state action.'"[349] It is no part of a "contract" between the United States and the agencies receiving or administering federal-program funds; instead, the court concluded, it is simply "an 'unbargained-for' intrusion into state criminal jurisdiction."[350] Thus, the federal-program bribery statute is "an unconstitutional exercise of

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343 *See, e.g., id.* at 1147–48 ("This Court begins its analysis by construing [Section] 666(a)(2) to determine whether it does or does not require a connection between the bribe and the expenditure of federal funds.").

344 *Id.* at 1149 (quoting Salinas v. United States, 522 U.S. 52, 59 (1997)).

345 *See supra* notes 289–95 and accompanying text.

346 183 F. Supp. 2d at 1154.

347 *Id.* at 1154–55 (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)) (noting that the statute in question, Section 922(q), lacked a "'jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce'").

348 *Id.* at 1155.

349 *Id.* at 1155–56 (quoting United States v. Cantor, 897 F. Supp. 110, 113 (S.D.N.Y. 1995)).

350 *Id.* at 1156; *see* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract. . . ."). Judge Kyle observed that, even if it *were* possible to conceive of criminal jurisdiction under Section 666 as a regulatory string of the kind addressed in *Dole*, the statute would *still* be invalid. Given that the city and the MCDA [Minneapolis Community Development Agency] would have to forego over 99% of the federal-program funds they receive in order to avoid this cut this "string," any "bargain" would be "'so coercive as to pass the

Congress's legislative power under the Spending Clause of Article 1 of the United States Constitution."[351]

In sum, it is settled law that Congress can, in effect, regulate activities and subjects otherwise outside the scope of the grants of power enumerated in Article I by attaching conditions and regulatory "strings" to the money it spends.[352] It is not at all clear, though, that the money flowing from the national treasury may serve as a constitutional vehicle for creating and invoking federal criminal jurisdiction over the conduct of third parties who have not entered into any kind of conditional-spending "contract" with the federal government.[353] In other words, it is one thing for Congress to condition States' receipt of federal highway funds on their adoption of a particular drinking age; it is quite another for this receipt of funds to authorize the enactment of a federal law punishing jaywalking. In effect, Section 666—as construed by the courts thus far—operates as though the highway-funds grant in *Dole* authorized federal prosecutions for underage drinking. However, even given *South Dakota v. Dole*, the Constitution does not permit federal criminal law, prosecutors, and punishments to—in one commentator's evocative words—"tag along after federal money like a

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point at which pressure turns into compulsion.'" *Sabri*, 183 F. Supp. 2d at 1156 (quoting South Dakota v. Dole, 483 U.S. 203, 211 (1987)).

351 *Sabri*, 183 F. Supp. 2d at 1158; *see also id.* at 1156 ("Section 666 plainly is not a 'condition' statute within the reasoning of *Dole* and cannot be justified under that decision as a valid exercise of Congress's power under the Spending Clause."). As has already been noted, Judge Kyle's decision in *Sabri* was reversed by the Eighth Circuit. United States v. Sabri, 326 F.3d 937 (8th Cir. 2003), *cert. granted*, No. 03-44, 2003 WL 21692658 (U.S. Oct. 14, 2003). It should be empbasized, though, that nothing in Judge Hansen's opinion for the Court of Appeals undermines or calls into question Judge Kyle's conclusion that Section 666 is not a conditional-spending statute. On the contrary, the Court of Appeals—echoing Judge Kyle, as well as Judge Bye's concurring opinion in *Morgan*, *see supra* note 331—noted tbat "[Section] 666 imposes no affirmative obligation on the recipient of federal funds[,]" *id.* at 946, that the statute does not "proscribe conduct of the recipient of [such] funds[,]" *id.*; and that it "has no contractual 'terms' with which the recipient of federal funds must comply[,]" *id.* The court concluded, accordingly, that "[Section] 666 is not a conditions statute at all and that the traditional *Dole* analysis is [therefore] inapplicable," *id.* at 946–47. *Cf.* United States v. Lipscomb, 299 F.3d 303, 321 (5th Cir. 2002) ("[A]lthough we may debate whether the [Section] 666 peg fits the conditional-grant hole, I shall test it under the four prongs of *Dole*."); *id.* at 366 ("The *Dole* test is inappropriate to analyze the constitutionality of [Section] 666, however, because the section does not qualify as a conditional-grant statute.").

352 *See, e.g.*, *Dole*, 483 U.S. at 206 ("Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980))).

353 *Cf.* United States v. Am. Library Ass'n, 123 S. Ct. 2297, 2303 n.2 (2003) (noting that the Child Internet Protection Act "does not directly regulate private conduct" and, therefore, that "*Dole* provides the appropriate framework for assessing [the Act's] constitutionality").

hungry dog."[354] Congress can buy the States' cooperation in furthering its policy objectives,[355] but it cannot buy a national police power, or spend its way to criminal jurisdiction that is not otherwise tethered to its few, enumerated, and defined powers.[356]

But even if Section 666 were thought, as in *McCormack*, to go beyond the kind of "conditioning" permitted by *Dole*, or even, as in *Sabri*, to not implicate the Court's regulation-by-contract doctrine at all, the question would remain whether the statute is a valid and permissible exercise of Congress's broad power to "carry[ ] into Execution"[357] its power to "provide for the . . . general Welfare."[358] In other words, perhaps the entire (and ongoing) debate about spending conditions and regulation-by-contract is, in the end, a distraction.

B. Is Criminal Jurisdiction over Individuals "Necessary and Proper" for "Carrying into Execution" the Spending Power?

The final, "sweeping"[359] clause of Article I, Section 8, states broadly that Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States. . . ."[360] Some have argued that Section 666, and any other criminal statutes whose purported jurisdictional hook is the flow of federal dollars in pursuit of the general welfare, are constitutional, not because they are "contractual conditions" attached to money grants to state and local governments, but because they are "Laws . . . necessary and proper for carrying into Execution" another of Congress's Article I powers, namely, the Spending Power itself.[361] The question here would be not whether the *Dole* criteria are

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354 Engdahl, *supra* note 1, at 92; *see also id.* ("Money cannot infect the recipient with the germ of generalized federal governing control, or an infectious virus capable of spreading that disease to anyone who touches the recipient or its property."). As this Article was being revised, the foregoing conclusion—that Section 666 is not a conditional-spending statute and should not, therefore, be analyzed using *Dole*—found additional support. *See Sabri*, 326 F.3d at 945–48; Baker & Berman, *supra* note 159, at 487–88 n.133.

355 *See Dole*, 483 U.S. at 206.

356 *See* United States v. Morrison, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.").

357 U.S. CONST. art. I, § 8, cl. 18.

358 *Id.* at cl. 1; *see, e.g.*, United States v. Bigler, 907 F. Supp. 401, 402 (S.D. Fla. 1995) ("Article I, § 8 gives Congress the power to 'provide for the . . . [g]eneral Welfare.' This power, in conjunction with the necessary and proper clause, gives Congress the power to enact Section 666.").

359 *See, e.g.*, THE FEDERALIST No. 33, at 203 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (referring to "the sweeping clause, as it has been . . . called").

360 U.S. CONST. art. I, § 8, cl. 18.

361 *See* United States v. Lipscomb, 299 F.3d 303, 318 (5th Cir. 2002) ("My solo review here will focus on whether [Section 666] is necessary and proper to the spending power . . . ."); United States v. Sabri, 326 F.3d 937, 953 (8th Cir. 2003) ("[W]e hold that

satisfied, or even whether they are applicable. Rather, it would be whether the ability to prosecute individuals whose corruption touches upon federal-grant-receiving institutions, agencies, and governments is "necessary and proper for carrying into execution" the "power" to "provide for . . . the general Welfare" through spending directed at these institutions, agencies, and governments.[362]

This question was examined in some detail recently by two disagreeing judges of the United States Court of Appeals for the Fifth Circuit in *United States v. Lipscomb*.[363] Albert Lipscomb, a former Dallas city councilman, was convicted under Section 666 for taking bribes offered to secure his support for local policies favorable to the Yellow Cab company.[364] The evidence at trial established that the City of Dallas received, through a variety of programs, more than $40 million per year in federal funds.[365] On appeal, Lipscomb argued, among other

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[Section] 666 is a legitimate exercise of Congress's undisputed power to make a law that is necessary and proper for the carrying out of its enumerated power to provide for the general welfare of the United States."), *cert. granted*, No. 03-44, 2003 WL 21692658 (U.S. Oct. 14, 2003); *Bigler*, 907 F. Supp. at 402 ("[The Spending Power], in conjunction with the necessary and proper clause, gives Congress the power to enact Section 666."); *see also* ABRAMS & BEALE, *supra* note 39, at 234 (observing, with respect to Sections 201 and 666, that "bribery of federal officials is punishable under the necessary and proper clause because it interferes with the conduct of the federal program in question"); Brown, *supra* note 36, at 266, noting that:

> 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' 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.

(footnote omitted); *id.* at 290 ("Congress has the power to spend the funds that constitute the federal assistance. It can take the steps necessary and proper to protect those funds."). *But see Lipscomb*, 299 F.3d at 370 (Smith, J., dissenting) ("I am aware of no court that has dealt with the issue of what uses of [Section] 666 are necessary and proper to effect the spending power.") .

362 *Cf., e.g.*, Jinks v. Richland County, 123 S. Ct. 1667, 1671 (2003) ("We agree . . . that § 1367(d) is necessary and proper for carrying into execution Congress's power '[t]o constitute Tribunals inferior to the Supreme Court' . . . and to assure that those tribunals may fairly and efficiently exercise '[t]he judicial Powers of the United States[.]'") (citations omitted).

363 299 F.3d 303 (5th Cir. 2002). Of the three opinions, Judge Wiener's opinion is the majority opinion in its fact section, procedural-background section, and section VII, dealing with venue. *See id.* at 349 (opinion of Duhé, J.) (listing sections with which Judge Duhé concurs). While both Judge Duhé and Judge Smith dissented from the remaining sections of Judge Wiener's opinion, Judges Duhé and Smith did not reach the same result, and thus did not create a majority opinion. *See id.* at 360–61 (Smith, J., dissenting).

364 *Id.* at 306–07 (opinion of Wiener, J.).

365 *Id.* at 307–08 (opinion of Wiener, J.). The court stated:

> During Lipscomb's second period of council service, the City, through many of its agencies and departments, received substantial federal funds. In the year ending in September 1996, Dallas received $44.3 million and spent $48.1 million in federal financial assistance which funded a wide range of joint priorities: community development, farmer's market infrastructure, emergency shelter, housing, community policing, airport and freeway improvements, arts development, pollution control, emergency

things, that the mere money flow to Dallas and its agencies was not enough. He claimed, as others have, that Section 666 should be read to require an identifiable connection between his corrupt conduct and the federal spending and that, so interpreted, the statute did not cover his own conduct.[366]

The three judges on the panel wrote three separate opinions. Judge Wiener concluded that Lipscomb had raised constitutional arguments with respect to the construction and reach of Section 666 that should be confronted.[367] In his view, however, both the statute and its application were constitutional because Section 666 is "rationally related to a federal interest—that is, to effecting Congress's spending power."[368] Judge Duhé agreed that Lipscomb was entitled to a new trial, but insisted that his constitutional arguments were not before the court and should not have been addressed.[369] Judge Smith rounded out the group. He disagreed with Judges Duhé and Wiener on the matter of venue,[370] but nonetheless concluded that that the conviction should be reversed and the charges dismissed with prejudice.[371] In Judge Smith's view, Section 666 and its applications were not justified under *Dole*,[372] nor was the prosecution of Lipscomb for accepting bribes by a local taxi company "'necessary and proper' for carrying out Congress's spending power."[373]

As Judge Smith pointed out, neither his nor Judge Wiener's contrasting view on the constitutionality of Section 666 was the majority

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management, interlibrary cooperation, child immunization, homeless health care, and substance abuse control, among others.

Id.

366 *See id.* at 309 (opinion of Wiener, J.) ("He proposes that we construe the statute to require a nexus between his offense conduct and federal funds—or, put differently, that his conduct implicate a tangible federal interest. He also contends that, when so construed, the statute does not reach his conduct. Neither contention succeeds."). As it happened, the court reversed Lipscomb's conviction, and remanded for a new trial, hut not for this reason. The trial court had, shortly before trial and over Lipscomb's objections, transferred the trial from Dallas to Amarillo. The court of appeals concluded that the district court had ahused its discretion in doing so. *Id.* at 337–49 (opinion of Wiener, J.).

367 *See id.* at 317 (opinion of Wiener, J.).

368 *Id.* at 336 (opinion of Wiener, J.).

369 *Id.* at 360 (opinion of Duhé, J.) ("Because the constitutionality of [Section] 666 was not argued at trial or on appeal, and there is no legal justification for our reaching it, I must respectfully dissent from the entire discussion of constitutionality found in the opinions of both Judge Wiener and Judge Smith."). Judge Duhé also noted that "[i]t is quite likely that a case will someday arise that squarely challenges the constitutionality of [Section] 666, but this is not that case." *Id.*

370 *Id.* at 377–78 (Smith, J., dissenting).

371 *Id.* at 360 (Smith, J., dissenting).

372 *See id.* at 365–66 (Smith, J., dissenting).

373 *Id.* at 367–74 (Smith, J., dissenting).

view.[374] Still, their exchange is illuminating. Putting aside the question, addressed just above, whether Section 666 should be analyzed, and can be justified, using the *Dole* line of conditional-spending cases, the issue is squarely joined in these opinions whether Section 666 and its use is constitutional because it is, or could rationally have been considered, necessary and proper to the exercise of the Spending Power.

Judge Wiener framed the inquiry in light of Chief Justice Marshall's now-canonical statement in *M'Culloch*: "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."[375] He added that Chief Justice Marshall had stated specifically in that case that the power to punish, while not itself set out in Article I, was one of those powers "'necessary,'" *i.e.*, "'needful, requisite, essential, or conducive to,'"[376] the exercise and effectiveness of those powers that are so enumerated.[377] "Congress's postal power," Judge Wiener observed, "carried with it the ability to impose criminal penalties to protect federal interests advanced by that power."[378] By the same token, then, the validity of Section 666 "depends on Congress's intent in enacting the statute, as well as on the nature of the federal interest embodied in this case and the relationship between that interest and Lipscomb's conduct."[379]

Judge Wiener's defense of the statute's constitutionality proceeded in two steps. First, noting that "[h]istory often tells us why Congress deemed a statute necessary and proper," he canvassed its legislative history in some detail, concluding that what existed was "multilayered, sparse, equivocal, and even mysterious."[380] That said, he concluded, *contra* Judge Smith, that neither the statute's history, nor its interpretation in other federal courts, justified a conclusion that "'Congress did not find it necessary that [Section] 666 be applied in cases not involving federal funds or programs.'"[381]

Next, Judge Wiener turned to the "traditional, rational-relationship test for whether a statute is necessary and proper to an enumer-

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374 *See id.* at 364 (Smith, J., dissenting) ("Despite the caption of this opinion as a dissent, this part [concerning the constitutionality of Section 666] is not a dissent, because there is no majority decision, on this issue, from which to dissent.").

375 *Id.* at 324 (opinion of Wiener, J.) (quoting M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

376 *Id.* (opinion of Wiener, J.) (quoting *M'Culloch*, 17 U.S. at 418).

377 *Id.* (opinion of Wiener, J.) (quoting *M'Culloch*, 17 U.S. at 416-17).

378 *Id.* (opinion of Wiener, J.).

379 *Id.* (opinion of Wiener, J.).

380 *Id.* (opinion of Wiener, J.).

381 *Id.* (opinion of Wiener, J.) (quoting *id.* at 369 (Smith, J., dissenting)). For Judge Wiener's review of the statute's history and interpretation, see *id.* at 324–32.

ated federal power."[382] He asserted that Congress could rationally have believed that the integrity of the tens of millions of dollars received by Dallas in the relevant years "suffice[d] as a federal interest weighty enough to justify federal criminal jurisdiction over Council members who are bribed with respect to local issues."[383] In addition, he found an important federal interest in the "integrity *vel non* of federal programs and funds," and stated that such integrity is threatened by the corruption of local officials who participate in those funds' administration and allocation "even if [the funds] are not actually or directly infected by [the] corruption."[384] He conceded, in response to Judge Smith, that Congress might well have "deluded itself" in thinking that Section 666 prosecutions of corrupt city councilmen might promote the federal interest in the integrity of federal programs.[385] Still, "'a law can be both economic folly and constitutional.'"[386]

In the end, Judge Wiener concluded that the Necessary and Proper Clause requires only that Section 666 prosecutions be "rationally related to a federal interest—that is, to effecting Congress's Spending Power."[387] He did suggest, though, that even this rational-relationship test has *some* bite, and that there might be cases where prosecutions under Section 666 are *not* "necessary and proper to the spending power."[388] Still, "[a]s courts can require of Congress nothing more than . . . a rational relationship to the spending power, [Section] 666 is constitutional as applied here."[389]

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382 *Id.* at 332 (opinion of Wiener, J.).

383 *Id.* at 333 (opinion of Wiener, J.); *see also id.* at 332 ("In the private sector, what would a reasonable funding partner who has advanced $56 million do after learning that its service partner takes kickbacks, albeit regarding matters not within the partnership's scope?") (opinion of Wiener, J.).

384 *Id.* at 333 (opinion of Wiener, J.). Judge Wiener continued, noting that "Congress may legitimately view as necessary and proper the imposition of federal criminal liability for bribery, so as to ensure the honesty of state and local officials who have federal funds in their purview or federal programs under their authority." *Id.*

385 *Id.* at 335 (opinion of Wiener, J.).

386 *Id.* (quoting CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 96–97 (1987) (Scalia, J., concurring)).

387 *Id.* at 336 (opinion of Wiener, J.). *See also* United States v. Edgar, 304 F.3d 1320, 1326 (11th Cir. 2002) ("[Section] 666 may be upheld if the availability of federal criminal jurisdiction over the specified offense conduct bears a reasonable relationship to exercise of the Congressional spending power.").

388 299 F.3d at 336. Moreover, Judge Wiener noted that "[f]or today's purposes it is sufficient to note that if there are such categories, Lipscomb is far removed from them." *Id.* at 336 (opinion of Wiener, J.). In response to Lipscomb's argument that under his theory there are "no limits to [Section 666's] sweep," Judge Wiener clarified that his opinion addressed only "Lipscomb's constitutional challenge to the statute as it applies to him" and that he would "not determine here whether there is a constitutional limit on [Section] 666's reach." *Id.* at 335–36 (opinion of Wiener, J.).

389 *Id.* at 337 (opinion of Wiener, J.). Judge Wiener bolstered his finding by adding:

Judge Smith, in what he insisted was mislabeled a dissent,[390] supplied an opposing view. He agreed, at the outset, with Judge Wiener that it was appropriate to "examine the relevant legislative history": "[A]lthough Congress is not the final judge of what is necessary and proper to carry out its powers, it is likely to have an informed opinion on the matter."[391] In his view, however, the relevant history shows that Congress had only limited ambitions for Section 666 and, thus, "we should be hesitant to conclude that the Necessary and Proper Clause permits the legislation to reach further than Congress felt necessary or proper to carry out its delegated powers."[392] Instead, "[a]rmed with knowledge of Congress's purpose in enacting [Section] 666," Judge Smith turned to the issue of the "minimum factors that must be present to make a prosecution under [Section] 666 'necessary and proper' under the spending power[.]"[393]

After reviewing the decisions of those courts of appeals that have read Section 666 to require a connection between corrupt conduct and federal funds, so as to avoid the constitutional questions that would, in their view, otherwise arise,[394] Judge Smith proposed one such minimum:

> [I]t cannot be necessary and proper to executing the spending power for the government to prosecute local crimes that have no relationship whatsoever to federal funds and programs.
>
> Any argument that it is "necessary" to protect the spending power by passing legislation that regulates conduct totally unrelated to federal spending is meritless on its face. Accepting this proposition would allow [Section] 666 to become a general federal police power statute that criminalizes corruption in all local governments and private agencies receiving federal funds.[395]

> Congress could have believed, quite legitimately, that preventing federal funds from passing through state and local legislative bodies whose members are corrupt, and to do so with the deterrent of criminalizing the legislators' corruption, even with respect to purely state or local issues, was necessary and proper to the federal spending power.

Id. at 336–37. *See supra* text accompanying notes 381–83; *see also Edgar*, 304 F.3d at 1327 ("It is reasonable for Congress to conclude that *any* corruption of . . . recipient organizations, regardless of whether the corruption involves the misappropriation of specifically federal funds, endangers . . . the effective exercise of the Congressional spending power. . . .").

390 *Lipscomb*, 299 F.3d at 364 (Smith, J., dissenting) ("Despite the caption of this opinion as a dissent, this part [discussing the constitutionality of Section 666] is not a dissent, because there is no majority decision, on this issue, from which to dissent.").

391 *Id.* at 367 (Smith, J., dissenting).

392 *Id.* (Smith, J., dissenting). For Judge Smith's discussion of the statute's history and treatment in the courts, see *id.* at 368–70 (Smith, J., dissenting).

393 *Id.* at 369 (Smith, J., dissenting).

394 *See id.* at 370–71 (Smith, J., dissenting).

395 *Id.* at 372 (Smith, J., dissenting).

This proposed "minimum factor" is, in a way, a restatement of what some have called the "non-infinity" principle.[396] That is, because "a general police power is denied the federal government by constitutional design," and because Judge Wiener's reading of the Sweeping Clause—one that authorizes the federalization of local bribery as "necessary and proper" for the execution of the power to spend in pursuit of the general welfare—would result in the creation of such a power, that interpretation cannot be accepted.[397] True, the United States "has an interest in the honesty of all officials," but then, "[t]he government has a similar interest in a great many things that are, however, beyond its power to regulate directly."[398]

Judge Smith concluded by disagreeing with Judge Wiener's evaluation of the government's claim that Lipscomb's prosecution was "necessary," and therefore constitutional, because of the large amount of federal-program funds the City of Dallas received and because the United States has an interest in ferreting out dishonesty among powerful local officials, like Lipscomb, who, if left in place, might "administer federal funds in the same corrupt fashion that they administer local matters."[399] After all, he suggested, there is no reason to think that local prosecutors would have declined to pursue Lipscomb's case, nor is there good reason to believe that the federal prosecution of Lipscomb would deter other local officials from corruptly mismanaging federal funds.[400] "Instead, allowing the double prosecution of local, but not federal, corruption might tend to cause dishonest local

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396 *See* Reynolds & Denning, *supra* note 16, at 376 (discussing the "non-infinity principle"); *see also* Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281, 329 (2000) ("[A] clever lawyer can always say that '[f]or want of a nail the kingdom was lost,' and soon we may find ourselves with an interpretation that seems inconsistent with basic constitutional principles." (quoting MOTHER GOOSE'S NURSERY RHYMES 191 (L. Edna Walter ed., A&C Black, Ltd. 1922) (1903))).

397 *Lipscomb*, 299 F.3d at 372 (Smith, J., dissenting); *see also id.* at 373–74:

> [T]he government's argument that no connection need be shown between federal funds or programs and the local corruption prosecuted under [Section] 666 confuses a connection to a federal interest in federally-funded programs with the federal government's generalized interest in everything that occurs within its borders. . . .
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> . . . .
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> . . . Such an analysis turns the accepted understanding of the Necessary and Proper Clause on its head and, in effect, asserts that because Congress may pursue the general welfare through the Spending Clause, all laws that are necessary and proper to the general welfare must be considered constitutional under the Spending Clause. This argument, if followed, would overturn the accepted meaning of the Spending and the General Welfare Clauses that has existed for nearly two centuries.

(Smith, J., dissenting) (footnote omitted)).

398 *Id.* at 373 (Smith, J., dissenting). To illustrate his point, Judge Smith noted that "Congress has no more power directly to criminalize local burglaries than it does to regulate marriage directly."

399 *Id.* at 376 (Smith, J., dissenting).

400 *Id.* (Smith, J., dissenting).

officials to abuse federal dollars rather than local funds."[401] In the end, because Section 666, "if applied to purely local crimes, should actually cause an increase in the criminal misuse of federal funds[,]" then "it cannot be said that prosecution of local crimes under [Section] 666 is necessary and proper to carry into execution the spending power, and the application of [Section] 666 to Lipscomb on the facts of this case is, accordingly, unconstitutional."[402]

A panel of the Eighth Circuit was able to speak with a united voice to Section 666's validity under the Sweeping Clause. Writing for a majority in *United States v. Sabri*,[403] Judge Hansen first rejected the argument that the statute's text requires a "connection between the offense conduct and the federal funds[,]"[404] and then turned to the question "whether Congress had the power to enact [Section] 666."[405] Although he agreed with those courts and commentators who have concluded that Section 666 is not a conditional-spending statute to be analyzed under *Dole*,[406] Judge Hansen concluded that the statute should nonetheless be upheld as "a legitimate exercise of Congress's undisputed power to make a law that is necessary and proper for the carrying out of its enumerated power to provide for the general welfare of the United States."[407]

Like Judge Wiener in *Lipscomb*,[408] Judge Hansen built his analysis on Chief Justice Marshall's articulation in *M'Culloch* of the "relationship between constitutional means and ends[.]"[409] And, as Judge Wiener had done in *Lipscomb*,[410] Judge Hansen concluded that "[Section] 666 is a means plainly adapted, *i.e.*, rationally related, to achieving the efficacious expenditure of federal funds and is, therefore, a law neces-

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401 *Id.* (Smith, J., dissenting).

402 *Id.* at 377 (Smith, J., dissenting). On this point, Judge Wiener's reply is persuasive. *See id.* at 335 (opinion of Wiener, J.) ("Judge Smith's second contention against high-official liability is a law-and-economics argument that, in my opinion, does not hold water and affords courts little basis, if any, on which to pronounce a statute unconstitutional, whether facially or as applied."). It is persuasive not so much because of any flaws in the law-and-economics analysis, but because, once it is conceded—as Judge Smith appeared to do, for the sake of argument—that the Necessary and Proper Clause requires merely a rational-basis inquiry into the connection between a particular law or prosecution and some federal "interest" that is within the scope of the Spending Power, the game is up. Again, "'a law can be both economic folly and constitutional.'" *Id.* (opinion of Wiener, J.) (footnote omitted).

403 326 F.3d 937 (8th Cir. 2003), *cert. granted*, No. 03-44, 2003 WL 21692658 (U.S. Oct. 14, 2003).

404 *Id.* at 945. *See also supra* Part II.B.

405 *Id.*

406 *Id.* at 945–48. *See also supra* Parts II.C and III.A.

407 *Id.* at 953.

408 *See supra* note 375 and accompanying text.

409 *Sabri*, 326 F.3d at 948.

410 *See supra* note 389 and accompanying text.

sary and proper to the execution of the spending power."[411] The statute was designed, he observed, to "protect the integrity of the vast sums of federal monies disbursed through federal programs"[412] and—even if "Section 666 could have been more narrowly crafted to more directly advance this goal"[413]—the fact remains that "Congress has made a determination that the most effective way to protect the integrity of federal funds is to police the integrity of the agencies administering those funds."[414] The court saw no reason or warrant to revise this determination.[415]

Building on his concurring opinion in an earlier case involving Section 666,[416] Judge Bye argued in dissent that the majority's validation of the statute flew in the face of the Supreme Court's New Federalism decisions.[417] For Judge Bye, the court's invocation of the Necessary and Proper Clause served only to illustrate Justice Scalia's observation that the Clause too often serves as "the last, best hope of those who defend *ultra vires* congressional action[.]"[418] What is more,

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411 *Sabri*, 326 F.3d at 950.

412 *Id.* at 951.

413 *Id.*

414 *Id.*

415 *Id.* ("[T]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function.") (quoting Yakus v. United States, 321 U.S. 414, 425 (1944)). The court found additional support for its deferential conclusion in *Westfall v. United States*, 274 U.S. 256 (1927), in which the Supreme Court upheld a statute criminalizing the misapplication of funds held by state banks that were members of the Federal Reserve System. *Sabri*, 326 F.3d at 952 ("As in *Westfall*, the government here has an interest in ensuring that the system of subnational agencies that administer federal funds remains strong even where there is not a direct loss to the federal funds themselves."). It is difficult to square Justice Holmes's sweeping assertions in *Westfall* with this Article's analysis, premises, and claims, or, indeed, with the New Federalism generally. For example, Justice Holmes responded to the complaint that the statute in question "applie[d] indifferently whether there is a loss to . . . Reserve banks or not" with the breezy assertion that "every fraud like the one before us weakens the member bank and therefore weakens the System." 274 U.S. at 258–59. "Moreover," he continued, "when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented, it may do so." *Id.* at 259 (Nearly fifty years later, the Justices re-embraced this contention in *Perez v. United States*, 402 U.S. 146, 154 (1971) (quoting *Westfall*)). That said, the underlying premise of the fraud statute at issue in *Westfall* was that the relevant state banks were, "with their consent, . . . instrumentalities of the United States." 274 U.S. at 259. The even broader premise underlying Judge Hansen's defense of Section 666, on the other hand, appears to be that the federal government's interest in protecting the "integrity of federal funds" disbursed in the general direction of the General Welfare authorizes the criminalization of all corrupt transactions touching on agencies through which those funds pass. *Sabri*, 326 F.3d at 951.

416 *See* United States v. Morgan, 230 F.3d 1067, 1071–75 (8th Cir. 2000) (Bye, J., specially concurring).

417 *Sabri*, 326 F.3d at 953 (Bye, J., dissenting) ("[T]he majority's decision to uphold [Section 666] . . . swims against the tide of governing law. A wave of recent Supreme Court decisions emphasizes Congress'[s] limited ability to federalize criminal conduct, and to interfere in matters traditionally left to state governance." (citations omitted)).

418 *Id.* at 954 (quoting Printz v. United States, 521 U.S. 898, 923 (1997)).

having invoked the Sweeping Clause as authority for the statute, the majority "fail[ed] to ask—let alone resolve—whether the statute is also 'proper.'"[419] In Judge Bye's view, even conceding the "received wisdom" that "Congress enjoys broad powers to select the means of enacting its objectives,"[420] Section 666 represents an unconstitutional exercise of power because it so "upsets the delicate balance between federal and state authority that animates our Constitution."[421]

At some point, the Supreme Court will have to resolve this disagreement, and decide whether Section 666 may be justified as a necessary-and-proper means of exercising—*i.e.*, "carrying into execution"—the Spending Power.[422] That resolution will turn on a prior, and more difficult, decision concerning the history, meaning, and scope of the Sweeping Clause itself.

There is a rich, provocative, and growing literature devoted to the Necessary and Proper Clause.[423] The canonical, even "talismanic," account of the Clause remains the one provided in *M'Culloch*:[424] "Let the end be legitimate, let it be within the scope of the [C]onstitution, 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

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419 *Id.*

420 *Id.*

421 *Id.* at 956.

422 Not only the Eighth Circuit in *Sabri*, but also the Eleventh and Ninth Circuits have expressed agreement with Judge Wiener's conclusion in *Lipscomb* that the Necessary and Proper Clause provides a valid constitutional basis for Section 666. *See* United States v. Bynum, 327 F.3d 986, 991 (9th Cir. 2003); United States v. Edgar, 304 F.3d 1320, 1325–26 (11th Cir. 2002).

423 *See, e.g.*, Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997) [hereinafter Barnett, *Necessary and Proper*]; Randy E. Barnett, *The Original Meaning of the Necessary & Proper Clause*, 6 U. PA. J. CONST. L. (forthcoming October 2003) (on file with author), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=410542 [hereinafter Barnett, *Original Meaning*]; J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581; David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 HARV. J.L. & PUB. POL'Y 107 (1998); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 803–19 (1996) (discussing the Clause as a source of congressional authority to preempt state law and arguing that many preemption cases are actually Necessary and Proper Clause cases); Lawson & Granger, *supra* note 47.

424 *See* Gardbaum, *supra* note 423, at 814. According to Gardbaum,

> [*M'Culloch*] is, of course, one of the handful of foundational decisions of the Supreme Court that are automatically cited as original sources for the propositions of constitutional law that they contain. But [*M'Culloch*] has the further (and even rarer) distinction of being treated as providing a full and complete interpretation of a particular clause of the Constitution. Analysis of the Necessary and Proper Clause has historically begun and ended with [*M'Culloch*] . . . .

Id.

the [C]onstitution, are constitutional."[425] Once again, the broad Hamiltonian understanding appears to have won out over a more narrow view: here, Jefferson's.[426] Notwithstanding Jefferson's worry that an expansive reading "would swallow up all the delegated powers, and reduce the whole to one phrase[,]"[427] it was sufficient for Chief Justice Marshall that the means employed by Congress be "needful," "requisite," "essential," or "conducive to" a specific, enumerated power.[428] Subject to contemporary solicitude for "principle[s] of state sovereignty,"[429] it also seems to be enough for the Court today.[430]

Nevertheless, several scholars have argued that the Necessary and Proper Clause, correctly understood, imposes more demanding obligations on federal legislators than the talismanic view supposes. Professor Beck, for instance, claims that the Clause "regulate[s] the relationship between congressional means and constitutional ends," even if it does not speak directly to whatever substantive limits on federal ends might derive from constitutional structure or from principles of "state sovereignty."[431] Professor Tribe's treatise explores in some detail the question whether the Clause and its exposition in *M'Culloch* warrant scrutiny of the "legislative motive" behind "necessary and proper" regulations, notwithstanding the usual irrelevance of congressional purpose.[432]

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425 M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819). Again, this statement provided a starting point for Judge Weiner in *Lipscomb*. *See* United States v. Lipscomb, 299 F.3d 303, 324 (5th Cir. 2002) (opinion of Wiener, J.).

426 *See, e.g.*, TRIBE, *supra* note 121, § 5-3, at 799 ("The Necessary and Proper Clause provided a focus for one of the great debates of early constitutional law . . . . Hamilton's view ultimately prevailed.").

427 Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, *in* 19 THE PAPERS OF THOMAS JEFFERSON 275, 278 (Julian P. Boyd ed., 1974).

428 *M'Culloch*, 17 U.S. at 418 (internal quotation marks omitted); *see also Lipscomb*, 299 F.3d at 324 (opinion of Wiener, J.) (discussing *M'Culloch*).

429 *See* Printz v. United States, 521 U.S. 898, 923–24 (1997), noting that "[w]hen a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty . . . , it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause,' and is thus . . . 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" (third and fourth quoting THE FEDERALIST No. 33, at 204 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

430 *See* Jinks v. Richland County, 123 S. Ct. 1667, 1671 (2003) (citing *M'Culloch* and observing that "we long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be '*absolutely* necessary' to the exercise of an enumerated power" (internal quotation marks omitted)).

431 Beck, *supra* note 423, at 584, 632.

432 TRIBE, *supra* note 121, § 5-3, at 802–04 ("In *M'Culloch*, Chief Justice Marshall spoke not only of a required nexus between means and ends, but also of a requirement that Congress not abuse its authority by enacting laws beyond its constitutionally entrusted powers 'under the pretext' of exercising powers actually granted to it."); *see also* Engdahl, *supra* note 423, at 118 (noting that "[w]hen Congress rationally makes such a judgment, the judgment should be honored by the courts even if it is wrong; for a court to step in and displace it would be to tread improperly on legislative ground," but that "a court likewise

For Lawson and Granger, the Clause can only be correctly understood if the term "proper" is allowed to do its own work.[433] That is, "necessary and proper" ought not to be treated as a unitary concept, as if the Clause required one, not two, inquiries and one, not two, standards.[434] In their view, despite the fact that the term "proper" is often regarded as a redundant sidekick, indicating nothing more than the drafting habits of late Eighteenth Century lawyers,[435] a "proper" law is "one that is *within the peculiar jurisdiction or responsibility of the relevant governmental actor.*"[436] Finally, and perhaps even more ambitiously, Professor Barnett contends that, rightly understood, the Necessary and Proper Clause supports a "general presumption of liberty," with "liberty's" content . . . supplied not only by the Constitution's explicit guarantees, but also by its endorsement, through the Ninth Amendment, of the natural-rights tradition[437]—"which places the bur-

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improperly enters the legislative domain when it posits a telic connection that is not demonstrably the premise upon which Congress acted").

433 *See* Lawson & Granger, *supra* note 47, at 291 ("There is . . . good reason to think that the word 'proper' adds meaning to the Sweeping Clause rather than merely emphasis to the word 'necessary.'"); *see also* Bybee, *supra* note 167, at 31 (asking "what limitations are there on Congress's power to define crime" and concluding that the "Sweeping Clause itself suggests a limitation: the crime must be not only 'necessary,' but also 'proper' to executing the narrow scope of Congress's enumerated powers. Thus, the Sweeping Clause both grants and limits Congress's power."). Justice Scalia, writing for a unanimous court in *Jinks*, seemed to endorse the idea that the inquiry into a measure's propriety is distinct from the analysis of its necessity. *Jinks*, 123 S. Ct. at 1671–72 (conducting separate analysis of the necessity and the propriety of a federal regulation).

434 For one example of such a case merging the requirements into a single test, see *United States v. Lipscomb*, 299 F.3d, 310, 332 (5th Cir. 2002) (opinion of Wiener, J.) ("My own review is guided by the traditional, rational-relationship test for whether a statute is necessary and proper to an enumerated federal power.").

435 *See, e.g.*, Lawson & Granger, *supra* note 47, at 289 (noting that "Daniel Webster, arguing on behalf of M'Culloch and the Bank, suggested [that] '[t]hese words, "necessary and proper," in such an instrument, are probably to be considered as synonymous.'").

436 *Id.* at 291. *See also id.* at 297 ("[T]he word 'proper' was often used during the founding era to describe the powers of a governmental entity as peculiarly within the province or jurisdiction of that entity."). Judge Bye relied extensively on the work of Professors Granger and Lawson in his *Sabri* dissent. *See* United States v. Sabri, 326 F.3d 937, 954–55 (8th Cir. 2003) (Bye, J., dissenting), *cert. granted*, No. 03-44, 2003 WL 21692658 (U.S. Oct. 14, 2003).

437 Barnett, *Necessary and Proper*, *supra* note 423, at 793; *see also* Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT. 93, 113–21 (1995) (discussing powers of Congress and natural rights); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 12–16 (1988) (examining how constitutional rights can constrain abuses of power as may happen under the Necessary and Proper Clause). *See generally* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (1998) (arguing that solving problems of knowledge requires a system of rights and procedures). In a forthcoming article, Professor Barnett returns to the Necessary and Proper Clause, offering a detailed originalist account of its history and meaning. Barnett, *Original Meaning*, *supra* note 423. He concludes that the original meaning of "necessity" was neither mere "convenience," or "absolute[ ]" necessity, but rather a justifiable requirement of "means-end-fit somewhere between these two extremes." *Id.* at 30. In addition, Professor Barnett argues that even a "necessary" law could be improper—and therefore

den on the government to establish the necessity and propriety of any infringement on individual or associational freedom."[438]

The Necessary and Proper Clause is best understood as speaking both to the "fit" between Congress's chosen means and desired ends, and to the permissibility—particularly in light of Article I—of those means and ends. The Clause invites and authorizes a meaningful, if deferential,[439] inquiry by all those charged with interpreting the Constitution[440] not only into the question "could means X reasonably be thought to facilitate end Y?", but also "are means X and end Y—wholly and apart from their compatibility—permitted by our Constitution, which creates a federal government of limited powers?" The Clause is not authority for otherwise *ultra vires* government actions;[441] rather, it forms part of the structural boundary constraining such actions. Put differently, the Clause contains both a "telic"[442] and a "jurisdictional"[443] component.

For present purposes, though, it is necessary neither to settle on the requisite closeness of the fit required between means and ends,[444]

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unconstitutional—if it transgressed "background rights of the people," *id.* at 39, or were "enacted to accomplish an improper end," *id.* at 42 (emphasis omitted).

438 Barnett, *Necessary and Proper*, *supra* note 423, at 787; *see also* Lawson & Granger, *supra* note 47, at 273 ("The Ninth Amendment potentially does refer to unremunerated substantive rights, but the Sweeping Clause's requirement that laws be 'proper' means that Congress never had the delegated power to violate those rights in the first instance."); *id.* at 297 ("[U]nder a jurisdictional construction of the Sweeping Clause, executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights." (footnote omitted)).

439 *See, e.g.*, *Lipscomb*, 299 F.3d at 367 (Smith, J., dissenting) ("[A]lthough Congress is not the final judge of what is necessary and proper to carry out its powers, it is likely to have an informed opinion on the matter.") (Smith, J., dissenting).

440 *See* Lawson & Granger, *supra* note 47, at 276 (noting that the Clause "does not explicitly designate Congress as the sole judge of the necessity and propriety of executory laws"); *id.* at 281 ("There was widespread recognition during and shortly after the ratification debates on the Constitution that the Sweeping Clause placed cognizable limits on Congress's discretion to determine the necessity and propriety of executory laws.").

441 *Cf.* Printz v. United States, 521 U.S. 898, 923 (1997) (asserting that the Necessary and Proper Clause is the "last, best hope of those who defend ultra vires congressional action").

442 Lawson & Granger, *supra* note 47, at 287–88 ("Necessity, on this understanding, refers to the telic relationship, or fit, between legislative means and ends—that is, the extent to which the means efficaciously promote the ends.").

443 *Id.* at 274 ("The Sweeping Clause, when properly understood as a jurisdictional limitation on the scope of federal power, is a vital part of the constitutional design. That understanding has largely been lost in modern times."); *id.* at 297–326 (making the historical case for a "jurisdictional meaning of the Sweeping Clause"). *But see* Beck, *supra* note 423, at 636–40 (analyzing, and criticizing, the jurisdictional account).

444 *Cf.* Barnett, *Necessary and Proper*, *supra* note 423, at 757. According to Barnett:

> The word "necessary" is said to be a synonym[ ] of "needful." But both these words are defined "indispensably requisite;" and most certainly this is the sense in which the word "necessary" is used in the constitution. To give it a more lax sense, would be to alter the whole character of the government as a sovereignty of limited powers.

nor to identify precisely those subject matters and policy goals that might lie beyond Congress's reach or the regulatory methods and activities that might be prohibited by a correct understanding of the Clause.[445] It is enough, instead, to propose that the content, reach, and application of the Clause—*whatever they are*—must be consistent both with what the majority of the Justices in *Lopez* insisted are "first principles" of constitutional law—*i.e.*, that our "Constitution creates a Federal Government of enumerated powers" and "'[t]he powers delegated by the proposed Constitution to the federal government are few and defined'"[446]—and with the "non-infinity" constraint these principles compel.[447] As Madison put it, "[w]hatever meaning this clause

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Id. (quoting M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 1, 366-67 (1819)); *id.* at 792 (commenting that "[t]his is not to say that scrutiny must be strict. A standard of review that no statute can pass is as hypocritical as a standard of review that every statute can pass[,]" and arguing that "[r]ather, some form of intermediate means-ends fit indicating *necessity* . . . would be an important step towards both restoring legitimacy to legislation and protecting the liberties of the people."); Beck, *supra* note 423, at 613 (identifying "directness, good faith, and plainness" as the requirements of the means-end relationship, and suggesting that these criteria "leave Congress with ample flexibility to accomplish the Framers' goals"); Lawson & Granger, *supra* note 47, at 288. Professors Lawson and Granger observe:

> The only dispute over the term [necessary] has concerned how tight the means-ends fit must be to comply with the requirements of the Sweeping Clause. Although we take no firm position on this dispute, we acknowledge the force of Chief Justice Marshall's claim that something less than strict indispensability is sufficient.

Id.

445 For some examples of possible boundaries, or lack thereof, see Barnett, *Necessary and Proper*, *supra* note 423, at 786–88 (noting that the "Necessary and Proper Clause may be made effectual in a manner that does not require us to enumerate all the enumerable liberties retained by the people. . . . The principled alternative . . . is to shift the presumption of constitutionality when legislation [a]ffects *any* exercise of liberty."); Beck, *supra* note 423, at 584 ("Careful analysis suggests that the propriety limitation should instead be understood to regulate the relationship between congressional means and constitutional ends, rather than as a repository for implied principles of federalism."); *id.* at 638 ("[I]t must be said that the historical evidence for treating the propriety requirement as an external limitation on congressional power seems relatively thin."); Lawson & Granger, *supra* note 47, at 297 (

> In view of the limited character of the national government under the Constitution, Congress's choice of means to execute federal powers would be constrained in at least three ways: first, an executory law would have to conform to the "proper" allocation of authority within the federal government; second, such a law would have to be within the "proper" scope of the federal government's limited jurisdiction with respect to the retained prerogatives of the states; and third, the law would have to be within the "proper" scope of the federal government's limited jurisdiction with respect to the people's retained rights. In other words, under a jurisdictional construction of the Sweeping Clause, executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights.

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446 United States v. Lopez, 514 U.S. 549, 552 (1995) (quoting THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961)).

447 *See* United States v. Morrison, 529 U.S. 598, 615–16 (2000); *Lopez*, 514 U.S. at 567 (refusing to "pile inference upon inference in a manner that would bid fair to convert

may have, none can be admitted, that would give an unlimited discretion to Congress."[448] Putting aside the more ambitious arguments sketched above, and even accepting that the Necessary and Proper Clause serves as a deep repository of implied power, it must still be the case, at the very least, that any action taken or legislation enacted pursuant to the Clause "neither conflict[ ] with external limitations—such as those of the Bill of Rights and of federalism—nor render[ ] Congress' powers limitless."[449]

Section 666, however, cannot withstand even this relatively undemanding level of constitutional scrutiny. Put differently, the understanding of the Sweeping Clause employed by Judge Wiener in upholding the statute is deficient even when held up to the nearly toothless minimum standard proposed in the previous paragraph. In *United States v. Lipscomb*, remember, Judge Wiener regarded the Clause as requiring no more than an extremely deferential, rational-

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congressional authority under the Commerce Clause to a general police power of the sort retained by the States"); Reynolds & Denning, *supra* note 16, at 376.

448 2 ANNALS OF CONG. 1898 (1791). It might be worth recalling how common this "whatever else," or "at the very least" mode of interpretation and argument is in the Supreme Court's decisions. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 868 (1995) (Souter, J., dissenting) ("[I]f the [Establishment] Clause was meant to accomplish nothing else, it was meant to bar this use of public money."); Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) ("Whatever else it may mean in addition, the defendant's constitutional right 'to be confronted with the witnesses against him' means, always and everywhere, at least what it explicitly says. . . ."); County of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 593–94 (1989) ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring))); *id.* at 669 (opinion of Kennedy, J.) ("I take it as settled law that, whatever standard the Court applies to Establishment Clause claims, it must at least suggest results consistent with our precedents and the historical practices that, by tradition, have informed our First Amendment jurisprudence."); Brewer v. Williams, 430 U.S. 387, 398 (1977) ("Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him. . . ."); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (emphasis added)); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (emphasis added)); Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."); Johnson v. United States, 333 U.S. 10, 15 (1948) ("If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required."); Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this . . . ." (internal citation omitted)).

449 TRIBE, *supra* note 121, § 5-3, at 798–99 (emphasis omitted).

basis inquiry into the connection between Section 666's applications and the federal interest, broadly conceived, in the program funds disbursed by Congress in pursuit of the general welfare, also broadly conceived.[450] In this context, however—that of Spending Power-based challenges to federal criminal laws and prosecutions—this view of the Clause simply cannot be reconciled with the non-infinity principle.

Recall that the Spending Power permits Congress to promote through spending the General Welfare (as it comprehends this concept), subject to practically no judicial review. That is, *any* decision to direct federal-program monies, as opposed to regulation, toward a particular policy goal is constitutionally permissible unless affirmatively prohibited by some other constitutional provision. Then consider the claim that the Sweeping Clause authorizes direct regulation—even regulation not explicitly authorized elsewhere in Article I—provided that it is rationally related to the federal interest in the unlimited policy goals and preferences it is permitted to promote through spending. It is difficult to see how the extent of federal regulatory power authorized by this doubly deferential scrutiny is anything but "limitless." If, under the Spending Power, Congress can spend beyond the confines of Article I to promote the General Welfare; and if, under the Necessary and Proper Clause, Congress's amorphous "interest" in the flow of once-federal dollars toward what is unreviewably identified by Congress as the General Welfare is sufficient to support any regulation or prohibition that is rationally related to that "interest"; then Congress can regulate or outlaw anything. Such a conclusion, however, would be inconsistent with everything the Court has ever said on the subject of congressional power. Even in *Garcia*, for example—a case not often associated with New Federalism-style enthusiasm for structural constraints on Congress—Justice Blackmun conceded the "limitation on federal authority inherent in the delegated nature of Congress'[s] Article 1 powers."[451] From Chief Justice Marshall in *M'Culloch*—"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be tran-

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450 *See* 299 F.3d 303, 336 (5th Cir. 2002) (opinion of Wiener, J.) (asserting that the "necessity" required by the Sweeping Clause boils down to "whether prosecution would be rationally related to . . . effecting Congress's spending power"); *id.* ("Reduced to the bare essentials, application of [Section] 666 to Lipscomb's conduct is indeed *reasonably related* to a *federal interest*, and thus is *necessary and proper* to Congress's exercise of its *spending power*."); *see also* Thomas B. McAffee, *Federalism and the Protection of Rights: The Modern Ninth Amendment's Spreading Confusion*, 1996 BYU L. REV. 351, 365 (endorsing the "traditional understanding" of the Necessary and Proper Clause, under which the Clause "performs the mundane task of affirming the fundamental idea that Congress has the authority to exercise reasonable discretion in choosing the means by which to implement the goals set forth in the legislative powers granted by Article I, Section 8.").

451 Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528, 550 (1985).

scended"[452]—to Chief Justice Rehnquist in *Lopez*—who refused to "conclude that the Constitution's enumeration of powers does not presuppose something not enumerated"[453]—the Justices have agreed *both* that the Constitution is not a "splendid bauble"[454] *and* that the federal government it authorizes is not rendered omnipotent by the Necessary and Proper Clause.[455] It would be, to say the least, "strange if a 'proper' executory law—a law that is distinctively and peculiarly within the jurisdiction of the national government—could regulate subjects outside the careful, precise enumeration of regulable subjects found elsewhere in the Constitution."[456]

The inability of the Necessary and Proper Clause to carry Section 666 over even the low bar set by the non-infinity principle is highlighted, and perhaps exacerbated, by the fact that Section 666 cannot be regarded as a funding condition governed by *Dole*'s regulation-by-contract criteria. After all, under *Dole*, Congress's power to control the conduct of state officials, or to require as a condition of program funds that States directly regulate their citizens, is at least theoretically constrained by the rule that "if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'"[457] But if Section 666 is justified simply as a necessary-and-proper "means" of pursuing General Welfare "ends," then even the minimal check that might be provided by a notice requirement, or by the States' own political processes, is eliminated. On this view, Congress may direct money toward the public good, as Congress understands it, and protect that enterprise

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452 M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

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

454 *M'Culloch*, 17 U.S. at 421.

455 *See, e.g.*, Engdahl, *supra* note 423, at 120-21 n.75 ("[T]he Necessary and Proper Clause simply does not provide a constitutional justification for utilizing means directed to . . . constitutionally extraneous ends."); Engdahl, *supra* note 1, at 42 (characterizing as "mistaken" the view that "the Necessary and Proper Clause authorizes even nonfiscal, avowedly coercive measures to more fully effectuate any policy about anything that Congress tries to influence somewhat through spending—obliterating the principle of enumerated powers" and that "the Supremacy Clause gives priority to every federal policy about anything, producing comprehensive, supreme governing power in the federal government"). *But see, e.g.*, NAGEL, *supra* note 22, at 30 ("What *Lopez* confirms is that the national government is for all practical purposes already a government of general regulatory powers. . . .").

456 Lawson & Granger, *supra* note 47, at 331; *see also, e.g.*, Bybee, *supra* note 167, at 31 ("If one assumes that the Sweeping Clause comprehends the possibility of criminal sanctions as a means of regulating matters within Congress's enumerated powers, what limitations are there on Congress's power to define crime?"); Lawson, *supra* note 2, at 1234 ("[T]he Necessary and Proper Clause, which the founding generation called the Sweeping Clause, [does not] grant general legislative powers to the national government." (footnote omitted)).

457 South Dakota v. Dole, 483 U.S. 203, 207 (1987) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

through whatever direct regulation and prosecution measures it finds reasonable, without resorting at all to the contract-law analogy relied on in *Dole*.

The aim of this Part has been to show that the debate over the scope of Section 666 has thus far been beside the point. It does not matter whether Section 666 is best read as requiring a connection or "nexus" between federal-program funds, on the one hand, and an accused's corruption, on the other; the statute exceeds Congress's power and is therefore unconstitutional. In other words, Section 666 fails to define an offense that, as described, Congress has the power to prosecute and punish. Nothing in Article I authorizes the United States to criminalize bribery merely because the corrupt transaction in question involves an agent of an organization that, somewhere, receives federal-program funds. Nor does the well established rule that Congress may, in effect, regulate the recipients of such funds through the attachment of conditions undermine this conclusion. Those prosecuted under Section 666 are not Congress's contracting partners for purposes of conditional-spending doctrine, nor are Section 666 prosecutions of corrupt individuals obligations to which the recipients of federal-program funds could possibly be said to have agreed. Finally, notwithstanding the Sweeping Clause's sometime role as a constitutional catch-all, the argument cannot be sustained, consistent with "first principles" of constitutional law, that Section 666 and its uses are valid as "necessary and proper" to the smooth functioning of federal programs aimed at promoting the General Welfare.

CONCLUSION

The previous Part set out the doctrinal cases against Section 666 specifically and, more generally, against the conflation of regulation-via-conditional-spending, on the one hand, and the creation and prosecution of federal crimes, on the other. It is worth emphasizing the unremarkable nature of the conclusions reached. This Article has arrived at the judgment that Section 666—like other similar statutes, extant or hypothetical—is unconstitutional. But there should be nothing particularly unsettling about this conclusion. No Supreme Court precedents need to be overturned,[458] nor any settled doctrines

458 To be sure, the conclusions reached here run contrary to the Supreme Court's assumption in *Salinas*—and also the holdings of several lower courts—that Section 666 itself *is* constitutional, even if, perhaps, some of its applications are not. *See* Salinas v. United States, 522 U.S. 52, 60–61 (1997) ("There is no serious doubt about the constitutionality of [Section 666] as applied to the facts of this case. . . . Whatever might be said about [Section 666's] application in other cases, [its] application . . . to Salinas did not extend federal power beyond its proper bounds."). *See also, e.g.*, United States v. Bynum, 327 F.3d 986, 990–91 (9th Cir. 2003) (noting that several courts of appeals have concluded, in light of *Salinas*, that Section 666 is not unconstitutional on its face). However,

abandoned. Whether or not *Dole* was correctly decided, and whether or not *Butler* was right, the conclusions remain the same. Even if Congress's power to spend in pursuit of the General Welfare reaches beyond the confines of those powers specifically enumerated in Article I, and even if Congress's power to regulate indirectly, by attaching conditions to the money it spends, is as expansive as *Dole* seems to permit, Section 666 is still unconstitutional, and the theory on which it relies should be rejected. Remember, the claim here is not so much that *Dole* is wrong as it is that *Dole* does not apply. The argument is not that Section 666 is a coercive or un-germane regulatory condition, or a condition about which the States were given insufficient notice, but rather that it is not a condition at all.

Nor should the doctrinal arguments' substantive implications cause much worry even to critics of the New Federalism. No subject matters or spheres of activity are removed from Congress's oversight, or placed beyond the limits of its regulatory efforts.[459] Nothing in this Article would require courts to identify, let alone protect, "integral" or

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neither in *Salinas* nor in *Fischer* did the Court have occasion squarely to consider the arguments presented here. Rather, for purposes of the interpretive questions presented in those cases, the facial constitutionality of Section 666 could be taken as given, because the statute's validity was not clearly called into question. *Cf., e.g.*, United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952) (observing that the Court is not bound by an earlier exercise of jurisdiction "where it was not questioned and it was passed *sub silentio*" (footnote omitted)); United States v. More, 7 U.S. (3 Cranch) 159, 172 (1805) (Marshall, C.J.) ("No question was made in that case as to the jurisdiction. It passed *sub silentio*, and the Court does not consider itself as bound by that case.").

459 *Cf.* United States v. Lopez, 514 U.S. 549, 564 (1995) (rejecting view that would result in conclusion that "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example[,]" and noting that, under this view, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign[,]" with the result that if the Court "were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."). It is also worth emphasizing here that, in all likelihood, entirely constitutional federal criminal statutes—consider 18 U.S.C. § 371 (2000), which broadly prohibits conspiracies to "defraud the United States"—would permit the prosecution of almost any conceivable Section 666 defendant.

Another way to make this point is to insist that this Article's claims do not require—even if they permit—an endorsement of "categorical federalism." *See* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 620 (2001). Professor Resnik writes:

> Categorical federalism's method first assumes that a particular rule of law regulates a single aspect of human action: Laws are described as about "the family," "crime," or "civil rights" as if laws were univocal and human interaction similarly one-dimensional. Second, categorical federalism relies on such identification to locate authority in state or national governments and then uses the identification as if to explain *why* power to regulate resides within one or another governmental structure. Third, categorical federalism has a presumption of exclusive control—to wit, if it is family law, it belongs *only* to the states.

Id.

"traditional governmental functions"[460] or the "essentials of state sovereignty."[461] No quixotic line-drawing between, say, "commercial" and "non-commercial" activities,[462] or between "direct" and "indirect" regulations of commerce, is required.[463] Decisionmakers are not asked to gauge the "substantial"-ness of the "effects" their decisions might have on commerce, the General Welfare, or anything else.[464] Even if the Commerce Clause is understood to convey sweeping, almost plenary, regulatory authority to Congress,[465] and even if that authority permits Congress to outlaw and punish, through appropriate legislation, all or most corrupt transactions that until now have been prosecuted under Section 666, it would remain true that the power of the purse is not the power to police, that a generally applicable federal criminal statute cannot reasonably be regarded as a "condition" on funds disbursed by the United States, and that not even the "Sweeping Clause" is a license for "hungry dog" criminal jurisdiction.[466]

Furthermore, the arguments offered here do not necessarily require a wholesale embrace of the "consequentialist values" that many believe result from our federal structure.[467] These asserted "values"

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460 Nat'l League of Cities v. Usery, 426 U.S. 833, 852, 855 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

461 Maryland v. Wirtz, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting), *overruled by Usery*, 426 U.S. at 833.

462 *Lopez*, 514 U.S. at 566 (admitting that "a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty" but insisting that "so long as Congress'[s] authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty'" (citation omitted)); *see also* United States v. Morrison, 529 U.S. 598, 610 (2000) (noting that "the noneconomic, criminal nature of the conduct at issue was central to [the] decision in [*Lopez*]"); *cf.* TRIBE, *supra* note 121, § 5-4, at 819 (suggesting that, post-*Lopez*, the Court's attention in Commerce Clause cases will be on "whether there is a colorable claim that the intrastate activity itself is 'commercial' or 'economic'") (citing *Lopez*, 514 U.S. at 567).

463 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 548 (1935) (characterizing the "distinction between direct and indirect effects of intrastate transactions upon interstate commerce" as "a fundamental one, essential to the maintenance of our constitutional system").

464 *See Morrison*, 529 U.S. at 609 ("'Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce.'" (quoting *Lopez*, 514 U.S. at 558–59)); *id.* at 611 ("*Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.").

465 *See, e.g.*, *Lopez*, 514 U.S. at 615–31 (Breyer, J., dissenting) (surveying the Court's expansive Commerce Clause jurisprudence during the preceding fifty years).

466 *See* Engdahl, *supra* note 1, at 92 (arguing that "federal regulatory power should [not] tag along after federal money like a hungry dog").

467 Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1074 (1995). For a detailed

include political accountability, policy diversification and decentralization, political participation, and individual liberty.[468] (It is, of course, no accident that this canonical list of federalism's values overlaps substantially with the general themes that, this Article has contended, run through the Rehnquist Court's New Federalism cases.[469]) While these values are indeed meaningful, and are substantially advanced and protected by the doctrinal and normative content of the Rehnquist Court's work,[470] this Article does not need to show either that the unconstitutionality of Section 666 follows from its incongruence with these values, or that they would be advanced by the statute's invalidation.[471] It concedes wide room for reasonable disagreement over the questions whether, for example, the federalization of anticorruption

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effort to "value" federalism and its contributions to the common good, see Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997). For other comprehensive evaluations of "the normative case for federalism," see Calabresi, *supra* note 57, at 756–90; Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987)

468 For a recent and thorough treatment of these values, see, for example, DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE (1995); Bellia, *supra* note 6, at 997–1001 (critiquing such values and considering them in the context of new federal regulation). *See also* Caminker, *supra* note 467, at 1074–81 (noting that the purported "values" of federalism "includ[e] greater political liberty from tyrannical regimes, greater rates of personal participation in political affairs and self-governance, and greater local tailoring and aggregate diversity of policies throughout the nation"); *cf.* George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 339–43 (1994) (discussing shared values of subsidiarity and federalism, including accountability, liberty, flexibility, preservation of identities, and diversity); Garnett, *supra* note 190, at 479 ("Like American Federalism, the subsidiarity principle protects individual liberties through the diffusion of coercive power and the 'clearing out' of space for individual and community self-definition and flourishing at the local level." (citations omitted)).

469 *See supra* Part I.A.

470 *But see, e.g.*, David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 382 (2001) (arguing that "the current law of federalism . . . constitutes a poor way of promoting the values associated with localism"); Erwin Chemerinsky, *Does Federalism Advance Liberty?*, 47 WAYNE L. REV. 911, 912 (2001) (stating "[t]he idea expressed is simply that limiting federal power means restricting the ability of the federal government to enact laws inimical to individual freedom," and arguing that "[t]he problem with this claim is that the federal government could use its authority to advance liberty or to restrict it. The Court's assumption is that the latter is more likely than the former. The Court never has justified this premise; neither it nor scholars have even tried to show this"); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 828 (1998) (contending that the "political accountability arguments" for federalism "overlook the complexity inherent in any system of federalism that always has the potential to confuse voters and thereby undermine political accountability").

471 Professor Brown has explored this matter—the extent to which federalism values are promoted or undermined by federal anticorruption efforts—in great and careful detail. *See generally* Brown, *supra* note 15 (arguing that *Lopez* and *Morrison* demand a constitutional analysis of federal criminal law); Brown, *New Federalism*, *supra* note 204; George D. Brown, *Putting Watergate Behind Us*—Salinas, Sun-Diamond, *and Two Views of the Anticorruption Model*, 74 TUL. L. REV. 747 (2000) (exploring the effect of the Court's recent decisions concerning federal anticorruption laws on federalism); George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-*Lopez *Analysis*, 82 CORNELL L. REV. 225

efforts undermines political accountability at the state and local level; or whether policy diversity, decentralization, and experimentation is either possible or desirable when it comes to bribery; or whether, as a general matter, prosecutions by the national government threaten or intrude upon individual liberties in any meaningful sense.

That said, it does seem that the conclusions reached here about the Spending Power, the Sweeping Clause, and criminal statutes resonate with the best of the New Federalism, and at the same time owe little to its more controversial aspects. For instance, the argument that criminal statutes such as Section 666 are not spending conditions to be evaluated under *Dole* does not depend on metaphysical or "mythical" notions of state sovereignty.[472] The same is true for the contention that the Necessary and Proper Clause does not authorize the creation and prosecution of crimes to protect the government's asserted interest in General Welfare spending. Section 666 and other spurious regulatory conditions are invalid not because of anything relating to the "dignity" or immunity of the States, but rather because ours is a federal government of limited and specifically enumerated powers.

Still, if the arguments set out in this Article require so little, can they matter very much? Even if the arguments convince, should anyone care? The answer is "yes." As was mentioned at the outset, there are rich connections between this Article's arguments about conditional spending, the Necessary and Proper Clause, and criminalization, on the one hand, and important contemporary developments and debates in areas such as First Amendment law, on the other.[473] Recall, for example, that in the First Amendment context, government spending can be framed in two very different ways.[474] The outflow of government funds, for the purchase of items or services with an expressive component, may in some cases be regarded as "government speech." In other cases, though, public spending that funds expression is treated not as the government's speech, but instead as government subsidization of others' speech, *i.e.*, as the creation of a "forum."

Many of the more interesting, and controversial, Supreme Court decisions in recent years have involved judicial efforts to distinguish

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(1997); Brown, *supra* note 36 (discussing the rise of Section 666 and suggesting possible limitations on its growth).

472 *See supra* text accompanying notes 79–81.

473 *See supra* text accompanying notes 66–70 (observing that decisions in a number of areas reflect similar commitments and priorities to those constituting the prominent New Federalism developments).

474 *See generally* EUGENE VOLOKH, THE FIRST AMENDMENT: PROBLEMS, CASES AND POLICY ARGUMENTS 435–37 (2001) (discussing and distinguishing the government's roles as "subsidizer" and "speaker").

these situations from one another. For example, the Court allowed Congress to prohibit family-planning agencies that received federal funds from providing counseling relating to abortion services, because the prohibition was treated as part of the government's effort to control its own speech, not as an effort to squelch others' messages.[475] On the other hand, the University of Virginia's policy of denying funds to otherwise-eligible student newspapers that "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality"[476] was invalidated as a viewpoint-discriminatory restriction on the group's speech in a publicly funded forum.[477] More recently, the Court determined that funds distributed through the Legal Services Corporation to organizations providing legal assistance to indigent clients, and the activities of lawyers paid for with those funds, were not government speech but were instead, as in *Rosenberger*, private expression in a government-subsidized forum.[478]

The point here is not to reconcile or unravel the Court's line-drawing efforts in these and similar cases.[479] It is merely to note that in both the "government speech" and the "public forum" cases, public money ends up paying for speech. However, the rules constraining what is said, and what the government may prevent from being said, with that money vary dramatically depending on how the cash-to-speech transition is framed. The government may, for the most part, say whatever it wants when it is speaking—and spending—for itself,[480] and may also regulate the conduct of those to whom it contracts out the task of promulgating its own message. But when public funds are seen not as paying for the government's message, but for the creation

475 *See* Rust v. Sullivan, 500 U.S. 173, 192-93 (1991).

476 Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 822–23 (1995) (internal quotations omitted); *cf.* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598–99 (1998) ("*Rosenberger*, as the Court explains, found the viewpoint discrimination unconstitutional, not because funding of 'private' speech was involved, but because the government had established a limited public forum . . . .") (Scalia, J., concurring in judgment) (internal citation omitted).

477 *See Rosenberger*, 515 U.S. at 845–46.

478 *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 546-47 (2001) (noting that "there is no alternative channel for expression of the advocacy Congress seeks to restrict").

479 For an entertaining overview of public-forum law, see, for example, Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653 (1996).

480 *See* VOLOKH, *supra* note 474, at 435; Abner S. Greene, *Government Speech on Unsettled Issues*, 69 FORDHAM L. REV. 1667, 1667 (2001). *But see, e.g.*, FCC v. League of Women Voters of Cal., 468 U.S. 364, 375-76 (1984) (striking down an FCC regulation because "the expression of editorial opinion on matters of public importance . . . is entitled to the most exacting degree of First Amendment protection").

of a forum—tangible or metaphysical[481]—then the government may not leverage its largesse into regulation of the speech of those who take advantage of that forum.[482]

Turn back now to *Dole*, and to the question whether General Welfare spending justifies direct regulation of those other than the government's contracting partners. The premises of the "virus"[483] or "hungry dog"[484] justifications for a criminal statute like Section 666 are, first, that the government has an interest in increasing the odds that the money it directs toward the General Welfare will, no matter how circuitous the route, end up actually promoting that end; and, second, that this interest provides sufficient constitutional reason for protecting that route through the federal criminal law.[485] The United States might well lack a general "police power,"[486] the argument goes, but it can nonetheless create through spending a regulable sphere that reaches as far as its funds. As was just discussed, though, these premises and arguments are rejected in the First Amendment context. They should be rejected with respect to the Spending Power as well.[487]

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481 *See Rosenberger*, 515 U.S. at 830 ("The [Student Activities Fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.").

482 *See, e.g., id.* at 834 (holding that "viewpoint based restrictions are [not] proper when the [government] . . . expends funds to encourage a diversity of views from private speakers").

483 Engdahl, *supra* note 1, at 72 ("What power can Congress claim over funds no longer its own? It is ridiculous to posit a germ of federal power infecting Social Security benefits like a virus incubated in the Federal Treasury." (footonote omitted)).

484 *Id.* at 92.

485 *See, e.g.*, United States v. Edgar, 304 F.3d 1328–29 (11th Cir. 2002) (noting the federal government's "continuing interest in the sound administration of Medicare reimbursement funds, long after any particular patient's course of treatment is completed").

486 *See supra* text accompanying notes 177–80.

487 It is worth noting that, if the "virus" theory is correct, a number of the Court's recent and leading Establishment Clause cases are wrongly decided. In a long line of cases, most recently in *Zelman v. Simmons-Harris*, the Court has held that government funds distributed to individuals through religion-neutral public-benefit programs *lose* their governmental character when those individuals decide to direct those funds toward religious uses or institutions. 536 U.S. 639, 655 (2002) ("[N]o reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement"); *see, e.g.*, Agostini v. Felton, 521 U.S. 203, 226–27 (1997) (holding parents' use of government funds for parochial schools not to be government support of religion); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 13 (1993) (holding that a deaf student could bring a state-employed interpreter to his Catholic school); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 488–89 (1986) (holding that permitting an individual to choose to use neutral state aid to pay for religious education is not a state endorsement of religion); Mueller v. Allen, 463 U.S. 388, 397 (1983) (holding that parents of children in parochial schools are similarly entitled to deduct educational expenses as are parents of children in secular schools); Bd. of Educ. v. Allen, 392 U.S. 236, 243–45 (1968) (upholding a statute providing textbooks to all school children, regardless of whether their school is religious); Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947) (upholding a statute reimbursing parents for cost of childrens' bus transportation, regardless of

More generally, this Article's doctrinal arguments and conclusions are consistent with emerging understandings of the freedom of association, with the renewed appreciation in public law and discourse for the place of mediating associations in civil society, and with what Professor McGinnis has called the "jurisprudence of social discovery" that is, no less than the New Federalism, likely to be the legacy of the Rehnquist Court.[488] As McGinnis has explained, the Rehnquist Court appears to be "rediscovering"—not only in the cases that obviously fall under the New Federalism category, but in others as well[489]—the "provisions of the Constitution that create alternative forums for norm creation by empowering institutions . . . that engage the citizenry and restrain special interests."[490] That is, "the Rehnquist Court's jurisprudence seems designed to protect the decentralized order and mediating institutions."[491]

I have written elsewhere about the place and importance of civil society, voluntary associations, and mediating institutions in the Court's recent First and Fourteenth Amendment decisions,[492] and still more research and thought on these matters is surely warranted. For now, suffice it to say, first, that the arguments presented here are consonant with the New Federalism's leading themes, and second, that norm-generating mediating institutions, and the space they create, are—in a world where public funds are everywhere and unavoidable—threatened by a view of the Spending Power and Sweeping Clause that would permit the federalization of all entities, conduct, agencies, and actors touched by those funds.[493]

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whether the school is religious). Were the "hungry dog" argument the law, the fact that, for example, Mr. Witters, and not the State of Washington, decided to spend once-government funds on a religious education could not have prevented the government program through which those benefits were disbursed from violating the First Amendment.

488 *See* McGinnis, *supra* note 53, at 490–91; *supra* text accompanying text note 53.

489 *See* McGinnis, *supra* note 53, at 490 ("The Rehnquist Court is tending toward this goal through reviving federalism, protecting and facilitating rights of civil and religious association, and empowering juries at the expense of judges." (footnotes omitted)).

490 *Id.* at 490.

491 *Id.* at 490–91 (footnote omitted). *See also supra* text accompanying notes 102–03 (noting that a "powerful and pervasive theme in the Rehnquist Court's decisions is a recognition, and even a celebration, of the place of mediating associations, their expression, and their diversity in civic life.").

492 *See* Garnett, *supra* note 95.

493 Such a view was, apparently, endorsed by the court in United States v. Brown, 384 F. Supp. 1151 (E.D. Mich. 1974), *rev'd on other grounds*, 557 F.2d 541 (6th Cir. 1977). The Michigan district court upheld 18 U.S.C. § 844(f) as a "necessary and proper" protection of "entities which are engaged in governmental functions. . . ." *Id.* at 1158. In the court's view, the victim of the arson—the Planned Parenthood League—was an "'instrumentality'" of the federal government "in that it provides facilities in furtherance of an announced national goal." *Id.* at 1159. Given the abundance of "national goals," and the ubiquity of federal-program funds, the premise implicit in *Brown*—that the activities of associations and institutions whose aims are shared by the United States may be regulated under the Necessary and Proper Clause—seems difficult to reconcile with the Rehnquist

This Article has considered whether the path of federal funds themselves, rather than, for example, the Commerce Clause or the power to coin money, may serve as the constitutional basis for federal criminal jurisdiction. It has asked whether and how the Spending Power may serve as the basis for the creation and prosecution of federal crimes; whether Congress's power to promote the General Welfare through federal spending and grant-giving carries with it a power to create crimes not otherwise grounded in Article I; and whether the Spending Power includes the ability to outlaw conduct that relates to or touches upon the funds spent, the programs through which they are disbursed, the agents who supervise their dispersal, or the program beneficiaries who receive them. It has concluded that the cases and doctrines dealing with conditional spending provide no support for Section 666 or similar legislative efforts. Moreover, not only is there no basis in constitutional text and history for the expansion of federal criminal jurisdiction through spending, but such expansions are also inconsistent with the structures explicitly created and reasonably implied by our Constitution, with the values these structures were designed to advance, and with the liberties they were intended to protect.

There remains, of course, the objection that this Article's arguments, and the New Federalism generally, are "formalistic." To be sure, this term often functions, among academics and jurists, more as an epithet than a description,[494] and it is often difficult to identify the precise content of the insult.[495] But if, as Professor Schlag observed

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Court's solicitude for civil society and its commitment to a meaningful line between state action and private enterprise.

494 *See, e.g.*, Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 564 n. 31 (1996) (collecting examples of scholarly and judicial derision directed at "formalism"); Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1144 (1999) (book review) ("'Formalism' is, like 'positivism,' frequently used as an epithet, and thus inspires unflattering, and sometimes colorful, characterizations."); *cf.* Stephen L. Carter, *The Iran-Contra Pardon Mess*, 29 HOUS. L. REV. 883, 885 (1992) ("[O]nly law professors consider [the] epithet ["formalistic"] an insult; judges should be pleased to be accused of seeing the law as followed instead of manipulated."); Robert Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920, in* PROFESSIONS AND PROFESSIONAL IDEOLOGISTS IN AMERICA 94 (Gerald L. Geison ed., 1983) ("The first-year law school curriculum to this very day consists of an Oedipal slaying of our grandfathers—the authors of formalism in private law and 'Lochnerism' in constitutional law."); Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 531 n.11 (1997) (book review) (asserting that the "kind of formalism . . . that makes the term 'formalism' appropriately an epithet [. . .] refers to the masking of a value judgment by reference to a judgment of law that actually encodes the value judgment").

495 *See* Leiter, *supra* note 494, at 1144 (noting that "[t]he literature . . . is replete with differing statements of the doctrine"); Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 607 (1999) (identifying several different types of formalism); Frederick Schaver, *Formalism*, 97 YALE L.J. 509, 509 (1988) ("[W]hat *is* formalism, and what is so bad about it?").

recently, what is thought to be "repellent" about formalists is their supposed "desire to maintain law's order at the expense of the living human beings compelled to bear its marks[,]"[496] then the charge seems misplaced. To insist, as did the Justices in *Lopez*, that ours is a federal government of enumerated powers, whose admittedly distant limits must nonetheless be identified, enforced, and respected, is not necessarily to cloak value judgments disingenuously or unconsciously beneath claims about law; nor need it reflect an elevation of "law's order" over the needs and aspirations of "living human beings." Rather, to affirm the reality and importance of constraints on federal power to create, prosecute, and enforce crimes—even when, as is true here, such an affirmation does little to shrink the sphere of federal regulatory power—is to *teach*.[497] That is, whatever "formalism" might be found lurking in the arguments has a *pedagogical*, and valuable, function. On the one hand, it teaches the federal government that it is meaningfully limited, and that the structural constraints imposed by our Constitution are not trumped even by well meaning legislative aspirations.[498] It teaches citizens, on the other hand, that Captain Vere's often-maligned "measured forms" can, at times, work to preserve and protect the space between the state and the individual that is required for human flourishing. It helps to instill the "settled disposition on the part of the people in favor of local diversity and prerogative" and the "disciplined love of liberty that transcends the desire for immediate gratification," both of which are required for a "truly robust federalism."[499] It could well be true, as Tocqueville charged, that citizens in democracies "do not comprehend the utility of forms" and even "feel an instinctive disdain for them."[500] Still, it is precisely this

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496 Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1062 n.47 (2002).

497 *See, e.g.*, United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (observing that "[o]ur expectations . . . are in large part reflections of laws that translate into rules the customs and values of the past and present[,]" and that "[s]ince it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society."); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."), *overruled in part by* Katz v. United States, 389 U.S. 347 (1967) *and* Berger v. New York, 388 U.S. 41 (1967). *See generally* M. Cathleen Kaveny, *Autonomy, Solidarity and Law's Pedagogy*, 27 LOUVAIN STUD. 339, 349–353 (2002) (exploring the role of "law as moral teacher.").

498 *See* HARVEY C. MANSFIELD, JR., AMERICA'S CONSTITUTIONAL SOUL 195 (1991) (noting that the "adoption of forms" is one method of "holding down elites" and also "restraining . . . the majority of the people").

499 Michael M. Uhlmann, *Wretched Judicial Excess*, FIRST THINGS, Nov. 2002, at 49, 51 (reviewing NAGEL, *supra* note 22).

500 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 669 (Harvey C. Mansfield ed., Delba Winthrop trans., 2000).

"inconvenience" that renders forms "so useful to freedom, their principal merit being to serve as a barrier between strong and weak, he who governs and he who is governed, to slow down the one and to give the other time to recollect himself."[501] Even if Professor Tribe is right in reducing *Lopez* to a "shot across the bow," and to merely a "signal to Congress about the absence of plenary national power over all spheres of life," it is still true that such a reminder, lesson, or "signal" is healthy in a free society.[502]

501 *Id.*

502 TRIBE, *supra* note 121, § 5-4, at 824.