ACCEPTING A NEW GENRE OF FEDERAL CRIMINAL LAWS?: HOW THE SUPREME COURT'S *SABRI* DECISION INCREASES AVENUES OF CONGRESSIONAL AUTHORITY WITHOUT PROVIDING ADEQUATE SAFEGUARDS FOR STATES AND INDIVIDUALS

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I. INTRODUCTION

In *Sabri v. United States*,[1] the Supreme Court upheld Congress' authority under the Spending Clause[2] and corresponding authority found in the Necessary and Proper Clause[3] to federalize local criminal acts of bribery.[4] Fundamentally, the *Sabri* Court accepted that these two clauses, working in tandem, create federal jurisdiction over a large range of purely local criminal acts.[5] This Article: (1) explores the Supreme Court's failure to institute any shield between Congress' use of the Spending Clause and the autonomy afforded states in creating their own criminal laws; and (2) examines the current state of affairs concerning the limits of authority when Congress acts pursuant to its spending power.[6]

Moreover, in sanctioning Congress' authority the Supreme Court missed an important opportunity to synthesize its jurisprudence concerning the Commerce Clause[7] and the Spending Clause.[8] Since the Supreme Court decided *United States v. Lopez*[9] in 1995, academics and jurists across the country have hypothesized whether the jurisprudential philosophies announced in that case—principles embodied in the Rehnquist Court's so-called "New Federalism"—would extend beyond the realm of interstate commerce to the

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1. 541 U.S. 600 (2004).

2. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States"); *see Sabri*, 541 U.S. at 605; United States v. Sabri, 326 F.3d 937, 949 (8th Cir. 2003) (both concluding that Congress has authority under the Spending Clause and corresponding power under the Necessary and Proper Clause to enact federal laws criminalizing local acts of bribery).

3. U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have 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, or in any Department or Officer thereof."); *see infra* note 85 and accompanying text (touching upon the seminal Supreme Court case that interprets the Necessary and Proper Clause—McCulloch v. Maryland, 17 U.S. 316 (1819)).

4. *See* discussion *infra* Part IV.A. (detailing the *Sabri* majority and concurring opinions).

5. *See id.*

6. *See* discussion *infra* Part IV.B. (interpreting *Sabri* and delineating various implications of the decision).

7. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); *see* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995) (both highlighting the Court's recent Commerce Clause decisions, which resulted in a limitation on Congress' authority to regulate local, intrastate conduct).

8. *Compare Lopez*, 514 U.S. at 561-62 (voicing that the Commerce Clause does not give Congress power to regulate purely intrastate, local acts absent a "jurisdictional element," which ensures that the particular undertaking in question affected interstate commerce), *with* Sabri v. United States, 541 U.S. 600, 605 (2004) (denying that, under the Spending Clause, Congress is required to include a "jurisdictional hook" in federal criminal statutes).

9. 514 U.S. 549 (1995).

spending power.[10] In May 2004, the Court responded to that question, but decided against uniformity and consistency, and instead opted for a fragmented, counter-intuitive, and unpredictable jurisprudence.[11]

Part II of this Article places *Sabri* in its legal and historical context and provides relevant background on areas of the law that are analogous to the Court's reasoning in *Sabri*, such as recent Commerce Clause and Spending Clause analyses. Part III highlights several disconcerting examples of the use of Congress' power pursuant to this statute—examples which serve to illustrate the type of undertakings that the Court understood as being within the scope of the federal government's valid interests. Part IV discusses *Sabri* itself and examines its ramifications, in particular the application of the Court's reasoning to the acceptance of a new genre of federal criminal laws passed pursuant to the spending power. Finally, Part V suggests ways in which Congress can safeguard federal money from corrupt officials without overstepping constitutional limitations and federalism principles.

This Article suggests that: (1) the Court's determination that Congress has a sufficient federal interest in safeguarding its disbursed funds presupposes a certain structure of sub-national governments that is questionable and misleading; (2) the determination of what suffices as a "federal interest" has been construed in such a manner as to allow Congress to further criminalize and regulate individuals' local lives with an increasing number of federal statutes; and (3) there is a danger in allowing Congress this new avenue to exert its power, because the decision allows Congress to pass non-conditional, Spending Clause criminal laws by evading the meaningful restrictions on congressional power that the Court has imposed in its Commerce Clause and conditional Spending Clause cases.

II. BACKGROUND

10. *See*, *e.g.*, Richard W. Garnett & John P. Elwood, *Section 666, The Spending Power and Federalization of Criminal Law*, CHAMPION, May 2001, at 26 (asserting that the federal program bribery provision, discussed below, is unconstitutional in light of recent Supreme Court jurisprudence); Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104 (2001) (suggesting a way to harmonize recent Supreme Court cases); George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247, 251-52 (1998) (suggesting that "new federalism" raises questions regarding federal efforts at battling state and local corruption). *See generally* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911 (1995) [hereinafter Baker, *After* Lopez] (opining that the Court should have reevaluated congressional limits on the Spending Clause after it did so with the Commerce Clause); United States v. McCormack, 31 F. Supp. 2d 176, 186-87 (D. Mass. 1998) (discussing the Supreme Court's recent jurisprudence regarding the Commerce Clause restrictions and inferring that notions of federalism and states' rights apply as limitations on the Spending Clause as well).

11. *See* discussion *infra* Part IV. B (discussing the implications of the *Sabri* Court's decision); *see also Sabri*, 541 U.S. 600; *Leading Cases:* 118 HARV. L. REV. 376, 377, 381 (2004) [hereinafter *Leading Cases*] (reasoning that, until the Court reconciles its treatment of the Spending Clause with the Commerce Clause, the Commerce Clause principles will be "severely corroded").

A. A Brief and Recent History of the Court's Jurisprudence Concerning the Commerce and Spending Clauses

It is, of course, axiomatic to say that the Constitution does not give Congress general regulatory and police powers over the people or the states.[12] Indeed, Congress must act pursuant to an enumerated power granted by the Constitution—such as the power to "regulate Commerce . . . among the several States,"[13] the authority to enforce the provisions contained in the Fourteenth Amendment,[14] or the ability to create Article III courts;[15] otherwise, general regulatory and police powers rest among the states.[16]

Of all the Article I powers the Constitution delegates to Congress, there are three ways in which the Court has interpreted congressional power that are germane for the purposes of this Article: through the Commerce Clause power; through conditional grants of money to the states under the Spending Clause—which can resemble quid pro quo agreements;[17] and through the *Sabri* Court's acceptance of new spending power. This new spending power is a direct prohibition on individual actions that attach automatically to fund recipients, their agents, and anyone who interacts with these entities but are not considered traditional conditional grants—what this Article refers to as non-conditional, Spending Clause criminal laws.[18]

Until the Supreme Court decided *Lopez* in 1995, the Court treated as

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12. *See*, *e.g.*, *Lopez*, 514 U.S. at 552 (noting congressional authority to act must come from one of its enumerated powers).

13. U.S. CONST. art. I, § 8, cl. 3.

14. U.S. CONST. amend. XIV, § 5.

15. U.S. CONST. art. I, § 8, cl. 9.

16. *See* THE FEDERALIST NO. 45 (James Madison), *reprinted in* THE FEDERALIST PAPERS: A COLLECTION OF ESSAYS WRITTEN IN SUPPORT OF THE CONSTITUTION OF THE UNITED STATES, FROM THE ORIGINAL TEXT OF ALEXANDER HAMILTON, JAMES MADISON, JOHN JAY 137 (Roy P. Fairfield ed., Anchor Books 1961) (explaining that the powers of the federal government are "few and defined" whereas state powers govern "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"); *see also* Brief for Nat'l Ass'n of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner at 6, *Sabri*, 541 U.S. 600 (2003) (No. 03-44), 2003 WL 22891858 [hereinafter Criminal Defense Lawyers Brief] (delineating dangers that the Provision "poses to the administration of federal criminal justice and to 'first principles' of constitutional federalism"). The phrase "first principles" refers to Chief Justice Rehnquist's majority opinion in *Lopez* that states, "The Constitution creates a Federal Government of enumerated powers" where "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S. at 552 (internal quotations and citations omitted). Thus, the principles of which the late Chief Justice spoke refer to limited federal government and equilibrium between the federal government and the sovereign states. *See id.*

17. *See* Baker, *After* Lopez, *supra* note 10, at 1927 (characterizing such federal statutes as similar to contractual obligations between the grantor and the recipient).

18. As used here, a Spending Clause law simply means a law passed according to Congress' Spending Powers in U.S. CONST. art. I, § 8, cl. 1.

plenary Congress' commerce power—the Court had not voided any congressional act passed under the Commerce Clause since 1936.[19] In *Lopez*, however, the Supreme Court declared unconstitutional the Gun-Free School Zones Act of 1990, which made it a federal crime to possess a firearm within 1,000 feet of a school.[20] The Court, for the first time in nearly sixty years, reaffirmed the constitutional tenet that Congress may regulate intrastate activities under the Commerce Clause in three situations.[21] Congress can regulate: (1) channels of interstate commerce, such as interstate highways and rivers; (2) persons or things in interstate commerce or instrumentalities of interstate commerce, such as commercial airplanes, even if the acts are intrastate; and (3) actions which are commercial and where the activities at issue "substantially affect" interstate commerce.[22] In so restricting congressional power over citizens' non-economic, intrastate acts, the Court restricted the vehicle by which Congress operates very frequently when passing legislation.[23]

Since *Lopez*, at least one commentator has argued that the Court should "reinterpret the Spending Clause to work in tandem, rather than at odds, with its reading of the Commerce Clause."[24] Unfortunately, as discussed below, the Supreme Court declined to interpret the Spending Clause as having similar restrictions as the Commerce Clause. This has caused a jurisprudence that is fractured and ineffective at protecting state and individual rights because Congress can attach conditions to its funding and require the states to comport with the same positive requirements that the Court declared unconstitutional under a Commerce Clause application.[25]

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19. Baker, *After* Lopez, *supra* note 10, at 1911; *see Lopez*, 514 U.S. at 551 (invalidating the Gun-Free School Zones Act of 1990, which was passed pursuant to the Commerce Clause); Carter v. Carter Coal Co., 298 U.S. 238, 309 (1936) (striking down a federal law regulating the coal industry, an act Congress passed under its commerce power); *see also* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (stating in 1981, pre-*Lopez*: "Judicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress.").

20. *See Lopez*, 514 U.S. at 551 n.1, 568 (affirming the judgment of the Court of Appeals for the 5th Circuit).

21. *See id.*

22. *See id.* at 558-59 .

23. *See*, *e.g.*, The Partial-Birth Abortion Ban Act of 2003, 18 U.S.C.A. § 1531(a) (West Supp. 2005) (providing for criminal penalties for a physician who performs a partial-birth abortion and thereby affects interstate commerce); Sherman Antitrust Act, 15 U.S.C. § 1 (2000) (declaring "restraint of trade or commerce among the several States" to be illegal); 18 U.S.C. § 844(d) (2000) (criminalizing the interstate transportation of explosives for the purposes of injuring people or property); 18 U.S.C. § 844(e) (2000) (prohibiting the making of threats by means of any instrument of interstate commerce, like mail, telephone or telegraph); 18 U.S.C. § 844(i) (2000) (proscribing arson or attempted arson of any building used in interstate commerce).

24. *See* Baker, *After* Lopez, *supra* note 10, at 1916 (observing that, despite *Lopez*'s proscription on the use of the Commerce Clause, Congress could do indirectly through the Spending Clause what the Court precluded it from doing under its commerce powers).

25. *See* Baker, *After* Lopez, *supra* note 10 (insisting that these constitutional provisions are at odds with each other and should be reinterpreted so that *Lopez* does not become the case

One of the more recent and significant cases that interpreted the Spending Clause is *South Dakota v. Dole*,[26] which the Court decided in 1987. At issue in *Dole* was whether Congress could condition five percent of federal highway funds to states based on the prerequisite that states raise their drinking age to twenty-one years.[27] At the time, South Dakota allowed people nineteen years old and older to purchase and drink beer.[28] Stated another way, the federal statute would have authorized the Secretary of Transportation to pull five percent of the state's highway funding if it failed to increase its drinking age to twenty-one.[29]

The Court upheld Congress' power to condition highway funding to South Dakota in return for a blanket state law prohibiting persons under twenty-one from purchasing and drinking alcohol.[30] The Court, however, delineated a four-part test in determining whether an act of Congress passed pursuant to its spending powers extended beyond its proper authority.[31] First, the limitation "must be in pursuit of the general welfare."[32] Second, the conditioning of funds must be done "unambiguously . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."[33] Third, the conditions might be unconstitutional if they are unrelated to national affairs.[34] Fourth, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds."[35] In addition to these four limitations, the Court also distinguished between two types of conditional funding: those that are simple inducements, which are allowable,

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law that exemplifies an empty shell of federalism's philosophy). "Positive requirement" means, for example, that A gives B money and, in return, B promises to affirmatively take an action. *See*, *e.g.,* Nevada v. Skinner, 884 F.2d 445, 446, 454 (9th Cir. 1989) (upholding provisions of the Highway Act, which conditioned ninety-five percent of states' highway funding upon compliance with a fifty-five mile-per-hour speed limit).

26. 483 U.S. 203 (1987).

27. *Id.* at 211.

28. *Id.* at 205-06 (denying South Dakota's alternative argument that the federal statute allowing for a reduction of South Dakota's highway funds is violative of the Twenty-first Amendment to the U.S. Constitution, which ended the era of Prohibition).

29. *Id.* at 205.

30. *See id.* at 211-12 (articulating that the conditioning of funds was only "mild encouragement to the States" to increase their drinking age).

31. *Dole*, 483 U.S. at 207-09 (describing a four-part test for examining Spending Clause constitutionality).

32. *Id.* at 207 (providing a caveat that courts should generally defer to Congress and its judgment when examining this standard) (internal quotation marks and citations omitted).

33. *Id.* (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

34. *Id.* (stating, "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'") (internal citations omitted).

35. *Dole*, 483 U.S. at 208-11 (elaborating that the "independent constitutional bar" does not apply vis-à-vis the Tenth Amendment, but rather the Spending Clause cannot be used to "induce the States to engage in activities that would themselves be unconstitutional").

and those that are coercive mandates, which are unconstitutional.[36]

The *Dole* Court concluded that, although Congress could not directly elevate the drinking age to twenty-one, it had the power to induce states to raise their drinking ages.[37] In effect, the Court allowed Congress to condition funding to the states and regulate activity therein, provided that the *Dole* tests are satisfied.

Therefore, *Dole* suggested the existence of a dichotomy between the way in which the Court was going to evaluate congressional power:[38] Congress cannot use its commerce power to regulate intrastate acts without first validating the tests set forth in *Lopez*; however, it can spend federal money and condition that funding on meeting certain requirements, as long as the *Dole* tests are satisfied. Some academics have argued that the *Dole* tests appear to be more of a formality[39] than those imposed by the *Lopez* Court.[40]

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36. *See id.* at 211-12 (asserting that, despite the federal government's encouragement, the states still retain the choice in deciding whether or not to pass laws).

37. *Id.* (concluding that the condition placed on the funding is germane and related to a national interest, namely safe interstate travel on highways).

38. This dichotomy includes the Court's treatment of the states under the Tenth and Eleventh Amendments as well as the Commerce Clause and the Spending Clause. In recent years, the Court has reinforced the notion that our federal government is one of limited, enumerated powers, and that its role is narrow when intruding into states' affairs. In particular, the Court has interpreted the Tenth Amendment in such a way as to judicially enforce these limitations upon Congress. *See* Baker, *After* Lopez, *supra* note 10, at 1919 n.29 (describing the Tenth Amendment as a "truism" during a period of an expansive interpretation of the Commerce Clause, pre-*Lopez*). However, the Court has reinterpreted the Tenth Amendment in a more meaningful and substantive way: reaffirming the constitutional federalist structure of our system of government. *See* Printz v. United States, 521 U.S. 898 (1997) (holding unconstitutional the impressing of state officials into federal service pursuant to certain provisions of the Brady Act); New York v. United States, 505 U.S. 144, 175-76 (1992) (holding unconstitutional the "take title" provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required states to: (1) enact legislation disposing of radioactive waste created within their borders; or (2) take title to the waste, effectively requiring the States either to legislate pursuant to Congress' directions, or to implement an administrative solution). With regard to the Eleventh Amendment, the Court has recognized that states are independent, sovereign entities generally immune from suit by its citizens. *See*, *e.g.*, Alden v. Maine, 527 U.S. 706 (1999) (noting Congress cannot subject states to lawsuits in state courts under Fair Labor Standards Act); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 76 (1996) (holding Congress lacks power to foreclose states' sovereign immunity under the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3); Bd. of Trustees v. Garrett, 531 U.S. 356 (2001) (concluding that the Eleventh Amendment bars suits against states for violations of Title I of the American With Disabilities Act ("ADA")). *But see* Tennessee v. Lane, 541 U.S. 509, 533-34 (2004) (upholding Congress' authority under § 5 of the Fourteenth Amendment to abrogate states' immunity from suit pursuant to Title II of the ADA); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (upholding portion of the Family and Medical Leave Act that allows a private action against a state under § 5 of the Fourteenth Amendment for failure to comply with family-care provisions).

39. *See*, *e.g.*, Baker, *After* Lopez, *supra* note 10, at 1929-31 (contending that the four-prong *Dole* test is easily satisfied, because: (1) the Court generally defers to Congress in determining whether an act is in pursuit of the general welfare; (2) the Court could only cite to one statute that obfuscated the states' ability to "exercise their choice knowingly"; (3) the Court failed to specify any circumstance in which it had ruled unconstitutional a federal grant because it was unrelated to a national program or project; and (4) the Court also could not cite a case in

Moreover, as discussed in more detail below, the Court established that *Sabri* did not fit either the *Lopez* paradigm or the conditional funding framework in *Dole*. Rather, the statute at issue in *Sabri*, 18 U.S.C. § 666[41] ("section 666"), was a direct mandate from Congress to certain individuals, agencies, and entities regarding criminal activity.[42] Whereas *Lopez* and *Dole* both created tests regarding the scope of Congress' constitutional power (which assume that, at the very least, that power is finite), *Sabri* omitted any meaningful test.[43] Here, the *Sabri* Court accepted a new mechanism for congressional regulation of intrastate acts—non-conditional, Spending Clause criminal laws—without discussing any significant limitations on how or where those laws can be applied.[44]

B. The Text and History of the Federal Program Bribery Provision

The federal program bribery provision[45] ("the Provision" or "section 666") is a broadly worded federal law that imposes criminal penalties on any individual who bribes or attempts to bribe a member of a governmental entity,[46] if that member belongs to a sub-national[47] government that receives

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which it had struck down a grant because it violated the "independent bar" prong of the *Dole* test).

40. *See* Jeffrey Rosen, *Can Bush Deliver a Conservative Supreme Court?*, N.Y. TIMES, Nov. 14, 2004, at 12 (cataloging that, since 1995, the Court has held thirty-three federal statutes, which were passed pursuant to the Commerce Clause, as unconstitutional). *See*, *e.g.*, United States v. Morrison, 529 U.S. 598, 627 (2000) (striking down, subsequent to *Lopez*, civil remedy portion of the Violence Against Women Act of 1994, as beyond the scope of Congress' Commerce Clause power).

41. 18 U.S.C. § 666 (2000).

42. *See infra* note 91 and accompanying text (discussing differences between conditional Spending Clause statutes and non-conditional Spending Clause statutes, and concluding that the latter are more restrictive on state autonomy and individual rights).

43. *See infra* Part IV.B.

44. *Id. See generally* United States v. Sabri, 541 U.S. 600 (2004) (omitting any discussion of a restraint on non-conditional, Spending Clause statutes, except for a limited monetary threshold requirement).

45. *Compare* Brown, *supra* note 10, at 248 (announcing term for 18 U.S.C. § 666 as the "federal program bribery provision"), *with* Garnett & Elwood, *supra* note 10, at 27 (stating that § 666 is named the "federal-program bribery statute") *and* Daniel N. Rosenstein, *Section 666: The Beast in the Federal Criminal Arsenal*, 39 CATH. U. L. REV. 673 (1990) (appearing to note the double-entendre between the section's numerals and a number frequently associated with the Devil, a.k.a. "the Beast"). This Article uses the first designation of § 666 as well as the "Provision."

46. 18 U.S.C. § 666(a)(2) (2000) (mandating criminal penalties for violation of this section:

> Whoever . . . 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

federal funding.[48] Any person who violates this provision can be punished by fine and imprisonment.[49] It is the third of the above-mentioned types of statutes: a non-conditional, Spending Clause criminal law.

The Provision is a general anti-corruption statute with two minute limitations: the bribe (or attempted bribe) must exceed $5,000, and the subject of the bribe must be an agent of a governmental entity ("or any agency thereof") that receives more than $10,000 from the federal government.[50]

Congress intended for the Provision to be a "gap-filler"—it was passed namely as a response to two previous federal statutes that were deemed ineffective at safeguarding money flowing from the federal government—the federal theft statute[51] and the federal bribery law.[52] In contrast to these laws, section 666 does not require the government to prove that the funds affected by the bribe (or funds that would have been affected had a transaction taken

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any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more).

47. This Article uses the phrase "sub-national" throughout and it should be interpreted to mean state, tribal, municipal, or other local governments. *See* 18 U.S.C. § 666(a)(2) (2000) (delineating the governmental bodies to which this statute applies); *see also* George D. Brown, *Carte Blanche: Federal Prosecution of State and Local Officials After* Sabri, 54 CATH. U. L. REV. 403, 409 (2005) (using "sub-national" in the same context).

48. § 666(b) (adding the Provision's only other limitation on its application: 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.").

49. § 666(a)(2) (noting whoever violates this statute, "shall be fined under this title, imprisoned not more than 10 years, or both.").

50. § 666; *see infra* note 64 (discussing statutory limitations on the Provision and illuminating ineffectiveness and trivialness because the limitations are easily satisfied).

51. *See* S. REP. NO. 98-225, at 369-70 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3510-11 [hereinafter Legislative History] (charging that the federal theft statute, 18 U.S.C. § 641 (2000), is ineffective because the government must prove that the property stolen was that of the United States, which is difficult if funds are "commingled [with states' funds so] that the Federal character of the funds cannot be shown"); 18 U.S.C § 641 (2000) ("Whoever embezzles, steals, purloins, or knowingly converts [any] thing of value of the United States or of any department or agency thereof . . . [s]hall be fined under this title or imprisoned not more than ten years, or both."). Thus, the Court created a defense for defendants charged under § 641—they could avoid prosecution if the government could not trace the property to the United States government; *see also* Paul Salvatoriello, *The Practical Necessity of Federal Intervention Versus the Ideal of Federalism: An Expansive View of Section 666 in the Prosecution of State and Local Corruption*, 89 GEO. L.J. 2393, 2396-97 (2001).

52. *See* Salvatoriello, *supra* note 51, at 2396-97 (asserting, in a similar manner, that Congress deemed the federal bribery law, 18 U.S.C. § 201 (2000), inadequate because at the time, a circuit split existed as to who qualified as a "public official" within § 201(a), which in turn determined whom the government could prosecute); *see also* § 201 (providing for federal charges only against "public officials" who are "acting for or on behalf of the United States"); Dixson v. United States, 465 U.S. 482, 496 (1984) (interpreting § 201 as disallowing an application of the provision to individuals who do not occupy a "position of public trust with official federal responsibilities"); Sabri v. United States, 541 U.S. 600, 606 (2004) (characterizing § 641 and § 201 as "limited" in protecting federal funding).

place) actually came from a federal source.[53] Nor does the Provision require the subject of the bribe to be a member or agent of the federal government.[54]

Notwithstanding the two other previously enacted statutes, and the Provision's wide statutory language, the purpose of section 666 was to solve a narrow problem—corruption of officials who may threaten federal disbursements—not to act as a general catch-all provision for state and local malfeasance.[55] Yet, it appears that the Department of Justice, in prosecuting these acts, has used the Provision as a broad-spectrum criminal statute.[56] Ironically, although the Provision's main purpose was the safeguarding of federal funds, Congress failed to include any statutory element in section 666 that requires a federal prosecutor to prove that federal funds were (or could have been) affected.[57]

III. EXAMPLES OF THE FAR-REACHING POWER OF SECTION 666

53. Salvatoriello, *supra* note 51, at 2397 (contrasting statutory requirements of § 641 with those of § 666).

54. *Id.* (contrasting statutory requirements of § 201 with those of § 666).

55. Legislative History, *supra* note 51, at 350 (articulating that § 666 was designed to "vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program"); Brown, *supra* note 10, at 280 (viewing the legislative history, "fairly read, as supporting the interpretation that Congress intended to deal with a relatively narrow problem"). Relatedly, the phrase "involving federal monies" indicates congressional intent to limit the reach of § 666 to acts that actually involve federal money (not just in theory, those that might affect federal money) despite the Provision's lack of any statutory element requiring the government to prove that federal funds were actually affected. Legislative History, *supra* note 51, at 3510. *But see* Salvatoriello, *supra* note 51, at 2397-99 (summarizing judicial interpretations of § 666 as broadly interpreting legislative history, noting the former circuit split as to whether a narrow or broad interpretation is correct, and encouraging the Supreme Court to read § 666 expansively); United States v. Westmoreland, 841 F.2d 572, 577 (5th Cir. 1988) (noting that, "Congress has cast a broad net to encompass local officials who may administer federal funds, regardless of whether they actually do.").

56. *See*, *e.g.*, Salinas v. United States, 522 U.S. 52 (1997) (prosecuting county deputy sheriff of a Texas county jail who accepted bribe of a pick-up truck and two watches from a state prisoner in exchange for facilitating multiple conjugal visits, where the correctional facility received grants and income from federal government); United States v. McCormack, 31 F. Supp. 2d 176, 177, 186 (1998) (prosecuting individual for bribing municipal police officer with no connection to federal funding or programs, in return for the officer's ignoring defendant's illegal actions); United States v. Frega, 933 F. Supp. 1536, 1538 (S.D. Cal. 1996) (prosecuting defendants for bribing San Diego judges of the California Superior Court system—state judicial positions); United States v. Ferrara, 990 F. Supp. 146, 148 (E.D.N.Y. 1998) (prosecuting individual for bribing member of Southampton Town Board in return for a favorable zoning change).

57. *See* Brown, *supra* note 10, at 277 ("What is striking about § 666 is that the text is unambiguously broad, while the legislative history is almost as unambiguously narrow."). Note that no statutory element needs to be proved that connects the bribe to an effect on federal disbursements. *See generally* § 666.

Although most people have little sympathy in their hearts for the criminal acts of knaves,[58] the import and use of section 666 in purely local endeavors should concern those who are not yet disquieted about the overarching power of the federal government.[59] From 1981 to 2000, the number of Justice Department prosecutions for state and local corruption-based offenses increased dramatically.[60] In addition, United States Attorneys and Assistant United States Attorneys have increasingly looked to this statute in prosecuting local crimes.[61]

A brief example may demonstrate the latitude the federal government has in prosecuting local corruption crimes. As one federal judge succinctly stated, "[i]t is now a *federal* crime for an auto mechanic to induce a public high school principal to hire him to teach shop class by offering free car repair."[62] This example, however egregious, fails to fully demarcate the perimeter of federal police power now condoned by the *Sabri* Court.

For the purposes of this hypothetical, take, for example, the case of a municipal septic tank inspector in the Boston suburb of Malden, Massachusetts.[63] On a weekday during his normal course of business, the

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58. *See* ABA TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 16-18 (1998) [hereinafter ABA TASK FORCE] (highlighting that Members of Congress tend to consider scoring political points, and not overburdening the justice system or constitutional principles, when passing federal criminal laws); Garnett & Elwood, *supra* note 10, at 26 (highlighting that Congress responds to "high-profile" occurrences and not questions of constitutional limitations).

59. *See* ABA TASK FORCE, *supra* note 58 (discussing major policy concerns regarding the over-federalization of criminal law).

60. *See* Criminal Defense Lawyers Brief, *supra* note 16, at 5 (citing George D. Brown, *New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption?*, 60 WASH. & LEE L. REV. 417, 421 (2003)) (cataloging the use of § 666; from 1981 to 2000, the Justice Department indicted: (1) 1,704 state officials on corruption charges, of whom 1,462 were convicted and 554 were awaiting trial at the close of 2000; and (2) 4,968 local officials, of whom 4,233 were convicted and 1,735 were awaiting trial).

61. *See* Garnett & Elwood, *supra* note 10, at 27, 32 n.12 (reporting that "the Department of Justice Bureau of Justice Statistics show that in 1991 there were 67 prosecutions initiated that involved Section 666; by 1994, that number had almost doubled, to 112; and by 1997, the number of new prosecutions increased to 156"). *But see* U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS RESOURCE CENTER, QUERY THE FEDERAL JUSTICE STATISTICS DATABASE (1999), *available at* http://fjsrc.urban.org/index.cfm (cataloging more recent, and more consistent, use of § 666: 1998, 140 prosecutions; 1999, 136 prosecutions; 2000, 113 prosecutions; 2001, 96 prosecutions; 2002, 116 prosecutions).

62. United States v. Sabri, 326 F.3d 937, 956 (8th Cir. 2003) (Bye, J., dissenting) (emphasis in original). Judge Bye's hypothetical, although accurate, is not complete. The transaction described must meet two statutory elements: (1) the value of the car repair must equal or exceed $5,000; and (2) the town, municipality, or other local government of which the principal is a part must be the recipient of at least $10,001 of federal money over the past twelve months. 18 U.S.C. § 666(a)(1)(B), (b) (2000) (delineating statutory limitations).

63. *See* § 666(d)(3) ("the term 'local' means of or pertaining to a political subdivision within a State"). Thus, because Malden is a political subdivision of Massachusetts, it falls within the purview of § 666(a)(1); *cf.* United States v. McCormack, 31 F. Supp. 2d 176, 178 (D. Mass. 1998) ("The Malden Police Department, like scores of departments across the country, receives over $10,000 in federal funds."); United States v. Frega, 933 F. Supp. 1536, 1540 (S.D. Cal.

inspector makes a stop at the residence of a city homeowner. Although the inspector is finishing his twentieth year of civic service, he has no control or authority over any of the city's funding, let alone over state or federal money that the city receives. The inspector arrives at the house because his supervisor has received complaints that the homeowner's yard is starting to produce an obnoxious odor, and the inspector suspects that the source is an overfilled septic tank. During the course of the inspection, the municipal employee discovers that the septic tank is likely violating a city ordinance concerning the removal of waste.

To circumvent the various costs associated with this problem—repairs, possible fines, and expedited removal of the offending refuse—the homeowner offers the septic tank inspector a bribe of $5,000 if he will leave the property and not report the offense. The dutiful inspector refuses, hands the homeowner a warning citation, and promptly exits the property.

Because the City of Malden receives federal disbursements exceeding $10,000 a year,[64] the homeowner[65] is subject to federal prosecution under the

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1996) (indicating that because every state falls within the $10,000 statutory threshold, every state employee is subject to the Provision). Therefore, the monetary threshold "limitations" in § 666 are easily satisfied. *See* Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 40-42 (2003) (suggesting that the only piece of § 666 that prevents it from being a general, all-encompassing corruption statute is the "purported" monetary thresholds); *see also* Baker, *After* Lopez, *supra* note 10, at 1918 n.24 (evaluating the precipitous increase in federal spending and concluding that over the past half century federal disbursements to sub-national governments "increased nearly 20,000%, growing from $991 million in 1943 to . . . $195.201 billion in 1993") (emphasis deleted).

64. *McCormack*, 31 F. Supp. 2d at 178 (detailing that Malden, Massachusetts receives federal funding through a "Community Revitalization Grant ($33,500), two Community Policing Grants ($25,000 and $26,409), a D.A.R.E. Grant ($20,000), a Domestic Violence Grant ($114,500), and a Housing Authority Grant ($19,000)."). Thus, Malden, a small city of five square miles with a population of approximately 56,000 people, receives at least $238,409 per annum in federal disbursements. *See* City of Malden, Massachusetts, About Malden: Community Profile (2004), http://www.ci.malden.ma.us/about/profile.asp (listing various municipal statistics including area and population).

One remarkable, and often overlooked, element about the Provision is that it applies even if the state or local government did not receive a traditional federal grant, like a Housing Authority grant. Rather, the City of Malden, for example, would be subject to the proscriptions of § 666 if it received only a *loan* from the federal government in excess of $10,000. § 666(b); United States v. Rooney, 986 F.2d 31, 35 (2d Cir. 1993) (holding that government loans are within the scope of the Provision).

The distinction between a grant and a loan is, of course, that the former is a disbursement given with the understanding that the recipient is not going to repay the money, whereas in the latter, the recipient needs to repay the lender. *See* VentureLine, Accounting Terms-Accounting Dictionary-Accounting Glossary, http://www.ventureline.com/glossary_L.asp (last visited Feb. 16, 2006) (defining loans); *cf.* J. MARTIN BURKE & MICHAEL K. FRIEL, TAXATION OF INDIVIDUAL INCOME 55-56 (7th ed. 2004) (indicating loans, for tax purposes, are excluded from calculation of gross income, because the taxpayer does not gain any "accession to wealth").

federal program bribery provision.[66] Of course it was illegal for the homeowner to attempt to sway the inspector into "forgetting" the fine and the malodorous infliction, [67] but should it be a federal crime?

IV. THE *SABRI* SAGA

In 2001, Basim Omar Sabri was a real estate developer in Minneapolis who had proposed a real estate venture in the city's Eighth Ward.[68] This venture included plans by the City of Minneapolis, the Minneapolis Community Development Agency ("MCDA"), and the Minneapolis Neighborhood Revitalization Program for eminent domain actions, rezoning petitions, and licensing and funding acts.[69] Sitting opposite Sabri was Brian Herron—a member of the City Council representing the Eighth Ward.[70] Herron also served on a board that oversaw the MCDA's budget.[71]

In a federal indictment, the Department of Justice alleged that Sabri gave Herron a total of $95,000 in exchange for Herron's assisting Sabri in his real estate endeavors.[72] In the year that Sabri bribed Herron, the City of

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This Article argues it is unreasonable for the government to claim that a federal interest exists in many of its § 666 prosecutions. Therefore, if it is unreasonable for Congress to have a federal interest in money doled out by grant, it is even more unreasonable for Congress to claim a federal interest over funds it will get back. *See* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 92 (1994). The author chastises the notion of conditional spending:

> Congress has no more power to punish theft from the beneficiaries of its largesse than it has to punish theft from anyone else. Federal dominion over federal property is irrelevant, because once any particular funds have been given to a recipient, those funds are not federal property anymore. The Constitution does not contemplate that federal regulatory power should tag along after federal money like a hungry dog.

65. § 666(a)(2) (observing that a bribe does not need to actually occur—an offer of a bribe is sufficient for federal prosecution under the law).

66. § 666(a)(1)(B) (specifying that a federal prosecutor could charge the septic tank inspector had he accepted the bribe).

67. *See* MASS. GEN. LAWS ANN. ch. 268A, § 2 (West 2004) (proscribing bribery of Massachusetts "State, County or Municipal Employees, Members of Judiciary, Witnesses, etc.").

68. United States v. Sabri, 183 F. Supp. 2d 1145, 1146 (D. Minn. 2002) (noting that the Eighth Ward included areas for a hotel and other commercial retail businesses).

69. *Id.*; United States v. Sabri, 326 F.3d 937, 939 (8th Cir. 2003).

70. *Sabri*, 326 F.3d at 939 (detailing that Herron served on the City Council from 1993 until July, 2001); *see* David Hawley, *Bribery Trial For Developer Allowed*, ST. PAUL PIONEER PRESS, May 18, 2004 (indicating that Herron later resigned from the City Council and served a year in federal prison).

71. *Sabri*, 326 F.3d at 939 (indicating Herron served on the Board of Commissioners, a municipal organization that oversees the budget of the MCDA).

72. *Sabri*, 326 F.3d at 939 (outlining that Sabri offered three separate bribes or kickbacks to Herron: (1) $5,000 for helping Sabri obtain the City's regulatory approval; (2) $10,000 for threatening current property owners with condemnation if they failed to sell the property to Sabri; and (3) a ten percent kickback, or $80,000, in return for $800,000 in "community economic development grants" for the real estate venture).

Minneapolis received approximately $51.8 million in federal money.[73]

Sabri challenged the constitutionality of the Provision, arguing that Congress lacked the authority under the Spending Clause to enact such a law because it failed to require the government to prove that the funds affected by the alleged bribe were in fact federal funds.[74] Noting the Supreme Court's trend of incorporating principles drawn from *Lopez* and *Morrison*, the District Court granted Sabri's motion to dismiss.[75] However, the Court of Appeals for the Eighth Circuit affirmed in part and reversed in part.[76]

A majority panel of the Eighth Circuit determined that the Provision was a legitimate use of Congress' Necessary and Proper Clause.[77] Judge Bye,

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73. *Sabri*, 183 F. Supp. 2d at 1147 (delineating that Minneapolis was earmarked to receive $28.8 million in general federal aid and the MCDA, specifically, was expected to administer community grants and other programs worth $23 million). Because $51.8 million exceeds the Provision's § 666(b) statutory threshold, all agents of the municipality are within the scope of the Provision. *See id.*; 18 U.S.C. § 666(a)(2) (2000).

Admittedly, Petitioner in this case is not the most sympathetic individual to challenge the constitutionality of the Provision. Basim Sabri did grossly exceed the statutory threshold of $5,000 by allegedly offering Herron a total of approximately $95,000. *See Sabri*, 326 F.3d at 939. In addition, the case before the Court did not involve an instance where there was as tenuous a connection between federal money and the bribe as there was in the hypotheticals above. In this instance, Sabri allegedly was attempting to bribe an elected, government member, unlike an *agent* of the government, *e.g.*, a septic tank municipal worker. *Id.*; *supra* notes 64-65 and accompanying text. Furthermore, Herron, the city councilmember, unlike the septic tank worker, had some genuine control over funding related to the bribe—the MCDA's budget. *See Sabri*, 326 F.3d at 939; *supra* notes 64-65 and accompanying text. In turn, "[c]ommunity Development Block Grants and other federal programs" funded $23 million worth of the MDCA's budget—a direct link between the quid pro quo and federal disbursements. *See Sabri*, 183 F. Supp. 2d at 1147.

All this is being illustrated only to acknowledge that Sabri was not the best candidate to go before the Court and argue against § 666's constitutionality. Nevertheless, the Court still should have struck down the Provision as unconstitutional because Sabri brought a facial challenge to the statute. Sabri did not argue that the Provision as applied to him was unconstitutional, but asserted that the Provision itself could not be applied constitutionally in *any* instance, as it lacked the requisite statutory element proving a link between an effect on federal funds and the bribe. *See* Sabri v. United States, 541 U.S. 600, 604 (2004).

74. *Sabri*, 183 F. Supp. 2d at 1147-48 (noting Sabri presented a second argument that the statute should be interpreted to include a nexus requirement).

75. *Id.* (elaborating that § 666 fails to provide an adequate basis for conferring federal jurisdiction in this case because: (1) it lacks a "jurisdictional requirement," pursuant to *Lopez*; (2) the federal money is not a "condition" upon a federal grant like in *Dole*; and (3) the Provision encroaches on Minnesota's right to define and enforce criminal law, according to our federalist system of government).

76. *Sabri*, 326 F.3d at 953 (affirming the district court's interpretation of § 666, which asserted that as a matter of statutory construction, the Provision does not require a nexus between the federal money and the bribe; however, reversing the district court's determination that without a required nexus, § 666 is unconstitutional).

77. *Id.* (noting that the Eighth Circuit, unlike the district court, did not examine § 666 purely based on the Spending Clause, but considered the Necessary and Proper Clause as a crucial element in upholding the Provision's constitutionality); *see* Brief for the United States at 10, Sabri v. United States, 541 U.S. 600 (2004) (No. 03-44).

however, dissented and maintained that upholding the Provision "swims against the tide of governing law."[78]

In 2004, the Supreme Court granted certiorari[79] and affirmed the Eighth Circuit's judgment that section 666 was constitutional.[80] Simply stated, the Court held that the spending power authorizes Congress to appropriate money to promote the general welfare, and that the Necessary and Proper Clause permits Congress to adopt parallel statutes that ensure federal money is not unlawfully influenced or lost in questionable transactions.[81] As stated above,[82] and as discussed below,[83] the Court ignored an important opening that presented itself in *Sabri* to harmonize its opinions regarding the scope of congressional power, and in doing so, failed to meaningfully curtail Congress' regulation of intrastate acts. Moreover, the Court's opinion oversimplifies this decision by omitting or minimizing any meaningful discussion of principles of federalism.

A. The Court's Opinion

Justice Souter, who authored the majority opinion, began the Court's analysis by stating that the Court does not assume that federal criminal laws are unconstitutional simply because they lack a "jurisdictional hook."[84]

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78. *Sabri*, 326 F.3d at 953 (Bye, J., dissenting) (expounding that recent Supreme Court decisions in *Morrison*, *Lopez*, *Alden*, and *Printz* announce the legal axiom that Congress retains a limited role in "federaliz[ing] criminal conduct"). Principally, Judge Bye rejected the majority's notion that the Act was both a necessary *and* proper exercise of congressional power. *Id.* at 954 (asserting that the interpretation of "proper" could not extend to the federalization of traditional spheres of state and local power).

79. *Sabri*, 541 U.S. at 604 (granting writ of certiorari because the circuit courts had split on whether the interpretation of 18 U.S.C. § 666 (2000) required proof of a nexus between the bribe and federal money). *Compare* United States v. Zwick, 199 F.3d 672, 687 (3d Cir. 1999) (interpreting § 666 to require a nexus), *and* United States v. Santopietro, 166 F.3d 88, 93 (2d Cir. 1999) (indicating that the illegal transaction had a required connection to a federally funded program), *with* United States v. Lipscomb, 299 F.3d 303, 336-37 (5th Cir. 2002) (upholding constitutionality of § 666 as applied), United States v. Dakota, 197 F.3d 821, 826 (6th Cir. 1999) (interpreting § 666 not to require proof of a relationship between federal money and illegal activity), *and* United States v. Grossi, 143 F.3d 348 (7th Cir. 1998) (upholding the Provision's constitutionality without proof of a nexus where money from a township general assistance program was misappropriated, despite awareness that township money was completely insulated from and did not receive any federal funding).

80. *Sabri*, 541 U.S. 600 (upholding § 666 unanimously with only Justice Thomas voicing concern for the ways in which the Provision can be over-applied to purely local criminal acts). Justice Thomas concurred, however, because he would have analyzed the Provision's constitutionality under the Commerce Clause, not the Spending and Necessary and Proper Clauses. *Id.* at 614 (Thomas, J., concurring).

81. *See id.* at 605 (asserting that the Provision rationally addresses the "sources" of the bribery problem by protecting funding at all governmental levels).

82. *See supra* INTRODUCTION (discussing fragmentation of the Court's analysis under the commerce power and spending power).

83. *See infra* CONCLUSION.

84. *Sabri*, 541 U.S. at 605. The court determined that:

After establishing that Congress has the authority to enact such a provision under the Spending Clause and the Necessary and Proper Clause,[85] the Court then addressed Sabri's argument that not every quid pro quo exchange would affect federal funding.[86] In rejecting this argument, the Court stated that the federal interest can extend beyond the federal money in question, because "[m]oney is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value. Liquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring in there."[87]

Next, Justice Souter maintained that the threshold amounts in section 666 (the $5,000 bribe and the $10,000 government funding) sufficed as a federal interest that warrants congressional legislation.[88]

> Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars.

Id.

85. *Id.* at 605 (citing McCulloch v. Maryland, 17 U.S. 316 (1819), which established a rational basis test for judicial review when Congress acts under the Necessary and Proper Clause). In *McCulloch*, the Court laid forth the seminal test for whether an act of Congress is Necessary and Proper. Chief Justice Marshall has best articulated this relationship: "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 the constitution, are constitutional." *McCulloch*, 17 U.S. at 421 (footnote omitted). The phrase "plainly adapted" has subsequently been interpreted by courts to mean "rationally related." *See*, *e.g.*, United States v. Sabri, 326 f.3d 937, 949-51 (8th Cir. 2003) (discussing and applying the rationally related test to § 666). Thus, the means through which Congress acts must rationally relate to the congressional goal.

86. *Sabri*, 541 U.S. at 606 (responding that, although federal money may not be affected in every case, a federal interest still may attach because of the fungible nature of money).

87. *Id.* (characterizing this assertion at Oral Argument as the "clean funnel theory"—Congress has a right to ensure that agencies or governments receiving federal monies are "clean" from the start of the funding process through the final recipient of the disbursements); Transcript of Oral Argument, Sabri v. United States, 541 U.S. 600 (No. 03-44), 2004 U.S. TRANS LEXIS 21, at *23-25 [hereinafter Oral Argument]. In addition, because money is fungible, it is troublesome to trace federal money when it enters state and local accounts—funding commingles and is not easily segregated.

88. *Sabri*, 541 U.S. at 606. The majority opinion never addresses what at least one Justice opined at Oral Argument was a problem with § 666: that the statutory limitations are easily satisfied, allowing federal prosecutors to bring cases in a virtually unlimited number of jurisdictions. Oral Argument, *supra* note 87, at *15-17 (breaking down various state budgets and the amount of funding the federal government disburses to different states). The overall percentage of the $10,000 statutory threshold vis-à-vis state budgets is miniscule. *Id.* at *16-17 (discussing at Oral Argument the facility with which the statutory thresholds are met):

Additionally, the majority opinion distinguished the Supreme Court's precedents in *Lopez*, *Morrison*, and *Dole*. With regard to *Lopez* and *Morrison*, the Commerce Clause cases, the Court stated that, strictly speaking, "these precedents do not control here."[89]

The Court distinguished *Dole* as well, and articulated that section 666(a)(2)'s authority "to bring federal power to bear directly on individuals . . . [is] not a means for bringing federal economic might to bear on a State's own choices of public policy."[90] Additionally, at oral argument Justice Breyer distinguished *Dole* by asserting that section 666 is not a conditional grant to governmental entities, but instead is a federal law aimed at protecting federal funding.[91]

In the final analysis, the Court held that this law is a valid exercise of congressional authority because: (1) the Spending Clause gives Congress the right to spend money for the general welfare; and (2) the Necessary and Proper Clause gives Congress corresponding authority to protect the money it spends from corrupt officials.[92] Furthermore, a sufficient federal interest

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> QUESTION: And because there's $10,000 of Federal money, a drop of Federal money in this sea of—of California funds, the—the Federal Government can control the whole thing.
>
> MR. DREEBEN: But there's not a drop. There's a virtual flood. There was—
>
> QUESTION: No, no. But for the statute to apply, it takes only $10,000.

89. *Sabri*, 541 U.S. at 607-08 (distinguishing precedents by stating that, whereas in the Commerce Clause cases the Court would have to assume a great deal in order to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States[,]" no "piling" of inferences here is required, because it is implicit that Congress' power to spend is "bound up" with power to maintain safeguards protecting that funding).

90. *Id.* at 608; *see Leading Cases*, *supra* note 11, at 379 n.32 (stating that the Court failed to address why these two possibilities discussed were mutually exclusive); *see Sabri*, 541 U.S. at 608, n.* (Court's acknowledgement that the Provision does license federal prosecution in areas traditionally left to state law, however, stating, "[i]n upholding the constitutionality of the law, we mean to express no view as to its soundness as a policy matter.").

91. Oral Argument, *supra* note 87, at *23; *see* Brown, *supra* note 47, at 431 (emphasizing that the purpose of the *Dole* test is to allow states to have some choice as to whether they should accept federal funds and the resulting conditions of that choice, which in turn supports the reason the Court in *Dole* construed the four-part test—to help protect the states and maintain some semblance of dual sovereignty). Yet unlike the highway funds in *Dole*, where the states could reject five percent of their federal highway money, § 666 cannot be rejected, because it is not a condition on the receipt of funds to the states; rather it enforces federal law upon agents of recipient organizations and other private parties. *See*, *e.g.*, Brown, *supra* note 47, at 431 (reviewing *Sabri* and determining that the *Dole* test does not apply because § 666 is not a condition on federal money, but is a "direct command enforceable through criminal law"). Therefore, the Provision at issue in *Sabri* is, in at least one trait, more restrictive than the statute in *Dole*; the lack of any test or application by the Court condones Congress' power to regulate via spending, without any true, workable examination of congressional power. Brown, *supra*, note 47, at 431. (Concluding that non-conditional Spending Clause laws, like § 666, may be more intrusive on notions of federalism than conditional spending clause statutes).

92. *See Sabri*, 541 U.S. at 608-09 (noting in Part III of the opinion, in which the Court added an "afterword," that it discouraged Sabri's use of a facial challenge to a statute because it

exists because the minimum statutory threshold amounts ensure a satisfactory level of federally infused money.[93]

Sabri, however, fails to persuade adequately that Congress should have the ability to criminalize conduct similar to that of the septic tank inspector and public school principal. Justice Thomas' concurrence suggests that discovering the federal interest of which the majority speaks necessarily requires piling inference upon inference: "[S]imply noting that '[m]oney is fungible,' . . . does not explain how there could be any federal interest in 'prosecut[ing] 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.'"[94]

B. Interpretations & Implications

Because a broad use of section 666 is anathema to the logic of federalism, one possible interpretation of *Sabri*, put forth by Professor Brown, is that the Court's attentiveness to the principles embodied in New Federalism is "far from firm."[95] Further, a second interpretation of *Sabri*, suggests that the Court's reasoning can "readily extend to treating the concern for state and local integrity as the major *federal interest*, with the protection of federal funds operating almost as a pretext."[96] If Professor Brown's interpretation is correct, then the Court has implicitly expanded the federal government's role beyond its traditional scope so that it is now *policing* the integrity of sub-national governments.[97]

Another interpretation is that the Court was simply dealing with a narrow problem in *Sabri*—the corruption of state and local officials—and that it did

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advocates deciding a case based on a limited fact record and "it relax[es] familiar requirements of standing, to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand"); *see also* Brown, *supra* note 47, at 406 (concluding that the Court seemed to turn on the protection of federal funds and ensuring the recipient's fidelity in upholding § 666).

93. *Sabri*, 541 U.S. at 606 ("It is certainly enough that the statutes condition the offense on a threshold amount of federal dollars defining the federal interest, such as that provided here.").

94. *Id.* at 613 (citing United States v. Santopietro, 166 F.3d 88, 93 (2d Cir. 1999)).

95. Brown, *supra* note 47, at 404 (expounding a theory that *Sabri* can be interpreted to mean that the Court is not as concerned about issues of federalism when it comes to the Spending Clause as it is when it addresses the Commerce Clause, presumably because the spending power actually requires Congress to allocate funding).

96. Brown, *supra* note 47, at 428 (emphasis added).

97. *See id.* at 429-30 (describing the possible interpretations and flexibility of the term "integrity" and the pitfalls of allowing the federal government this police power: integrity may mean "fiscal honesty" and "good government," or requiring the elimination of nepotism and patronage positions; indeed, hypothesizing that *Sabri* might allow Congress to "regulate these practices directly, for example, by penalizing the awarding of patronage jobs").

not mean to imply that there are no impediments when Congress acts pursuant to the Spending Clause.[98] If this latter interpretation proves to be correct, then *Sabri* will be seen only as an aberration, and not as the Court's condonation of Congress' acts.[99] This interpretation, although insightful, answers a different question than that posed here. Even if *Sabri* may be understood as a fight against thieving public servants, the question for the purposes of this Article is not, "How can *Sabri* be explained given the Court's precedents?," but rather, "What restraints, if any, has the Court imposed on Congress in light of *Sabri*?"[100]

In this case, the Court defined the "federal interest" (which allows Congress the authority to intrude in this area of the law in the first place) broadly, allowing Congress to regulate individuals' local lives within the scope of this particular federal statute. The above examples of the septic tank inspector and the high school principal have highlighted varied and disparate zones of intrastate life that the Provision itself impacts.

Yet, one danger in *Sabri*, which the Court seemed to overlook, is that the opinion does not meaningfully curtail the possibility that Congress may use its spending powers to increase the number of *other* related federal criminal statutes[101]—actions state laws concomitantly proscribe.[102] The only constitutional limitations on the proliferation of these statutes are: (1) the deferential *McCulloch* language, which states that Congress can use the

98. *Id.* at 404-05 (inferring that if *Sabri* is read narrowly, it can be explained when examining it in conjunction with the Court's decision in McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003), because both cases highlight the Court's "sensitivity to the national mood of concern over abuse of power, and distrust of politicians and their susceptibility to corruptive influences"); *see Leading Cases*, *supra* note 11, at 379-80 n.36 (suggesting that *Sabri*, read in tandem with Tennessee v. Lane, 541 U.S. 509 (2004), expresses that the Court may be evolving toward a jurisprudence where "specific applications of statutes matter more than their general structural contours").

99. However, this could only be the case if the Court reigns in the spending power in a subsequent case. Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 147 n.715 (2004) (suggesting that an as-applied challenge in a more attenuated case, unlike in *Sabri*, may "prompt a narrowing construction of [§ 666]"). *But see* Brown, *supra* note 47, at 434-35 (indicating that the Court will treat the constitutionality of § 666 as a closed subject, regardless of whether a more attenuated as-applied challenge presents itself).

100. *See* Brown, *supra* note 47, at 426-34 (responding to the question of how *Sabri* can be explained and interpreted if one were to read the holding narrowly). *But see Leading Cases*, *supra* note 11, at 382-83 n.54 (concluding that a narrow interpretation of *Sabri* does not comport with Justice Souter's expansive language in the majority opinion).

101. *See infra* note 108 and accompanying text.

102. *See*, *e.g.*, MINN. STAT. § 609.42 (2003) (prohibiting bribery of any public officer or employee); MASS. GEN. LAWS ANN. ch. 265, § 13C (West 2004) (proscribing the practice of assault and battery upon individuals in order to collect loans); CAL. PENAL CODE § 459 (West 1999) (criminalizing burglary in California); CAL. PENAL CODE §§ 484b-502.9 (West 2006) (cataloging over two dozen types of state law larceny); OKLA. STAT. ANN. tit. 21, §§ 1482-1488 (West 2004) (detailing crimes of extortion and blackmail in Oklahoma); *see also* Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?"*, 50 SYRACUSE L. REV. 1317, 1329 (2000) (calculating that there are at least 3,000 federal crimes and concluding that in the past century, the majority of prohibited federal acts are simultaneously regulated by the states).

Necessary and Proper Clause for any "appropriate," "plainly adapted . . . end" that furthers other constitutionally-vested powers;[103] and (2) the monetary threshold amounts.

Although the Provision contains two expressed statutory thresholds that arguably ensure a federal interest, the federal interest has been defined as so little that almost nothing would preclude a lower threshold limitation. In other words, of the $51.8 million that Minneapolis received, what made the $10,000 significant enough in the eyes of the Court such that a federal interest attached? That percentage, approximately 0.02%, is so small that it is not a cognizable barometer or a legally workable threshold that future courts can apply.[104] By "legally workable threshold test," this article means to ask, what quantum of federal funding needs to be at risk in order for *Sabri*'s precedent to be applicable? The Supreme Court in this case clearly announced that a $10,000 infusion of federal money into any sub-national governmental entity suffices to create a federal interest.[105] Nevertheless, that limit fails to provide any indication as an answer to the question, how low can Congress go? Congress can rest assured that the Court would uphold any higher threshold. But, if $10,000 a year suffices, does $5,000 a year meet the grade? What about $1,000? Or, $250 a year?

Because *Sabri* failed to establish a "floor" regarding what types of strictures ensure the constitutional validity of a non-conditional, Spending Clause statute, the only indication of what is actually required must be drawn from *Sabri* itself. In *Sabri*, the Court interpreted the federal interest broadly; if

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103. *See* McCulloch v. Maryland, 17 U.S. 316, 421 (1819) (expanding the limitation to require Congress to use the Clause in a way not prohibited by the Constitution); *cf.* South Dakota v. Dole, 483 U.S. 203, 214-15 (1987) (O'Connor, J., dissenting) (questioning the wisdom of the majority's conclusion that there was a relationship between the federal government's purported interest—safe interstate travel—and the condition of the funds—an increased drinking age—and asserting that the relationship between the two is too over-inclusive and too under-inclusive to satisfy constitutional requirements). One might speculate as to why Justice O'Connor failed to raise a similar argument when it came to *Sabri*—that there was a tenuous relationship between the federal funding and the corresponding criminal statute.

104. *See Leading Cases*, *supra* note 11, at 380 n.46 (inquiring as to amount of threshold money needed to "support the enactment of prophylactic federal criminal laws").

105. Sabri v. United States, 541 U.S. 600, 602 (2004). Again at argument, Justice Scalia inquired as to the limits of the government's argument on the statutory threshold determination:

> What if—what if the Federal Government gave the State $1? Could it make—could it make it—it a crime for any person to bribe any State officer anywhere in any program at all? You know, the—really is—is there no end to the—to the scope of Congress' purported protection of its funds?

Oral Argument, *supra* note 87, at *15. However, the Court failed to announce any workable test in this regard. *See Sabri*, 541 U.S. at 602 (stating that the limits in the instant case are acceptable, without providing a standard); *Leading Cases*, *supra* note 11, at 380-81 n.46.

Congress deemed it worthy, it could pass a multitude of laws based on the *Sabri* rationale (alleged protection of federal disbursements) that create federal criminal jurisdiction for other actions that may threaten federal disbursements in one form or another.[106]

Under *Sabri*'s underlying principle, individuals may face federal charges for simple intrastate crimes passed under the Spending Clause,[107] such as burglarizing the home of an individual if the victim is a welfare beneficiary or a beneficiary of any other federal program regarding the property.[108] This position was adopted by the Government at oral argument in response to the logical ends of the Provision's constitutional underpinnings.[109] The *Sabri* rationale applies because the connection between the federal interest at issue in some of the more far-fetched section 666 cases is just as attenuated as the interest the federal government could claim in securing these homes.[110] For example, in some section 666 cases, like *McCormack*, the alleged federal interest is not in the federal money itself, but rather a weakness in a "sister" state program, which in turn receives federal money, and is several layers removed from federal disbursements.[111] In the hypothetical, the federal interest is similar: providing someone with federal money—a home loan or welfare benefits—and ensuring that this money is not lost or wasted because of criminal activity.[112]

What makes *Sabri* unique is that the Court accepted a new avenue by which

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106. *Infra* note 108.

107. Many traditional intrastate crimes, which the states criminalize, are simultaneously proscribed by federal law; however, these laws are passed pursuant to Congress' commerce powers. *See supra* note 23 (cataloging various Commerce Clause-based crimes); *see, e.g.*, Hobbs Act, 18 U.S.C. § 1951(a) (2000) (proscribing, *inter alia*, robbery, extortion, physical violence, or threats of physical violence if it affects interstate commerce). For an analysis of the Hobbs Act and its conflation with the jurisdictional requirements of *Lopez*, *see* Michael McGrail, *The Hobbs Act After* Lopez, 41 B.C. L. REV. 949, 959-66 (2000).

108. *See* Garnett, *supra* note 63, at 82 (concluding that Congress' collaborative use of the Spending Clause to promote the general welfare and use of the Necessary and Proper Clause to ensure a federal interest rationally and necessarily leads to a condition where Congress could "regulate or outlaw anything"); Oral Argument, *supra* note 87, at *21-23 (articulating the government's position that under its rationale, Congress would be within its right to federalize simple robbery crimes if it involved victims who receive money from the federal government, like through Medicare or welfare); Gary Lawson, *Making a Federal Case Out of It:* Sabri v. United States *and the Constitution of Leviathan*, *in* 2003-2004 CATO SUP. CT. REV. 119, 153 (2004) (maintaining that, now, Congress could prohibit the "solicitation of adultery in connection with recipients of federal funds"). *See generally* U.S. DEP'T OF HOUS. AND URBAN DEV., HUD HOUSING ASSISTANCE PROGRAMS COVERED BY EACH SUBPART OF THE LEAD-SAFE HOUSING RULE (1999), http://www.hud.gov/offices/lead/leadsaferule/1012housinglist.cfm (cataloging over four dozen types of federal assistance programs in the area of housing assistance).

109. Oral Argument, *supra*, note 87.

110. *See supra* note 56 (describing rather attenuated § 666 prosecutions).

111. *See* United States v. McCormack, 31 F. Supp. 2d 176, 177, 183-84 (D. Mass. 1998) (suggesting that the connection between the alleged bribes and a federal interest is too attenuated to support a federal charge of violating § 666).

112. *See supra* note 108 (supporting how the *Sabri* rationale allows Congress to criminalize other, non-bribery related activities).

Congress can regulate intrastate conduct. As this Article has mentioned, the Court in *Lopez* applied restrictions on Congress' power vis-à-vis the Commerce Clause.[113] In *Dole*, the Court put forth a test in deciding when a conditional spending law might violate constitutional parameters.[114] However, in the case of a non-conditional, Spending Clause, criminal statute, like section 666, the Court failed to establish *any* sensible test or restriction—the presumption that federal money was at risk was irrefutable.[115] The danger, then, is that Congress can perform a sweep around the defenses the Court installed in *Lopez* and *Dole*.[116] Relatedly, perhaps the most intriguing point regarding this case is not that this has been effectuated without deference to the federalism principles announced in prior cases, but rather, it has occurred without regard to even a *discussion* of these principles and why they should not apply.[117]

For example, since *Lopez* and *Morrison*, the Ninth Circuit Court of Appeals has invalidated several convictions based on federal laws passed pursuant to the commerce powers, because the defendant did not have any connection or effect on interstate commerce or the connection was too attenuated.[118]

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113. United States v. Lopez, 514 U.S. 549 (1994).

114. South Dakota v. Dole, 483 U.S. 203 (1987).

115. *Leading Cases*, *supra* note 11, at 383 n.57 (calling § 666 an "irrebuttable presumption" as long as the threshold amounts of federal money have been satisfied).

116. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 654-55 (1999) (Kennedy, J., dissenting) ("[T]he Spending Clause power, if wielded without concern for the federal balance, 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."); *Leading Cases*, *supra* note 11, at 377 (emphasizing that *Sabri* allows Congress to circumvent its Commerce Clause precedents). *See generally* Baker, *After* Lopez, *supra* note 10 (calling on the Court, pre-*Sabri*, to reconcile its Commerce and Spending Clause cases in order to prevent Congress from sidestepping the Commerce Clause limitations so easily).

117. *See* Brown, *supra* note 47, at 404 (mentioning that the *Sabri* Court bypassed almost every issue of constitutional federalism).

118. *See* Raich v. Ashcroft, 352 F.3d 1222, 1227-35 (9th Cir. 2003), *vacated*, 125 S.Ct. 2195 (2005) (concluding that the possession of "home-grown," intrastate, non-commercial cultivation of marijuana used to combat extreme medical needs falls outside of Congress' authority to regulate under the Controlled Substances Act passed by the Commerce Clause); United States v. Stewart, 348 F.3d 1132, 1135-42 (9th Cir. 2003) (preventing federal prosecution of individual for unlawful possession of machine guns, because the guns were manufactured by appellant from scratch, were simply in his possession, did not travel in interstate commerce and did not affect interstate commerce, even though some parts used for the weapons had traveled in interstate commerce); United States v. McCoy, 323 F.3d 1114, 1115, 1129 (9th Cir. 2003) (holding federal anti-child pornography statute unconstitutional as it applied to the appellant because, although the camera and film used to take an indecent picture were involved in interstate commerce, the restrictions of *Lopez* and *Morrison* do not allow Congress to criminalize this act, as the pictures themselves were home-grown and solely for personal possession). What should be kept in mind is that the states also prosecuted McCoy for violations of state law. *McCoy*, 323 F.3d at 1117 n.7. In *Raich*, the state did not prosecute the appellants, because California had passed the Compassionate Use Act, allowing for medical marijuana uses. *Raich*,

However, because of *Sabri*, Congress could retool its efforts in regulating these areas without showing any effect on interstate commerce, as long as the crime could have impacted or placed some amount of federal money at risk.[119]

C. Suggested Solutions

The Court's determination that Congress has a sufficient federal interest in safeguarding its funds, and therefore can criminalize a universe of local, unrelated conduct, assumes that the threat produced by a corrupt official somewhere in the branch of government will always threaten to cause a siphoning and waste of funds somewhere else in the system. The Court disregards the fact that sub-national governments may have separate, disconnected spheres. An agent who takes a bribe on one end does not necessarily have any effect on commingled funds (or threaten those funds) on the other end.[120]

The Court essentially contended that a sub-national government is entirely interconnected and watered with revenue by largess, tax proceeds, and other revenue-raising activities. The deluge of government largess and taxes is all the same—it is fungible[121] and liquid.[122] Thus, the sustenance it gets from federal disbursements is commingled and indistinguishable from that which it receives from state sources and tax revenues.

If a corrupt public servant accepts a bribe and either directly or indirectly diverts money from one recipient to another (again, it does not matter if it is state money or federal money, because they are commingled), then the diversion of resources is at the cost of the remainder of the government. In effect, the Court assumed it is a zero-sum game; the government must reroute resources from other areas to cover what is being lost on one end.

Although this may seem like a sensible analysis of how corruption and bribery affect resource allocation, the reality of state or local government structure does not necessarily lend itself to so simple a construct. Nevertheless, this is essentially the system of government the *Sabri* Court presupposed when it upheld section 666.

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352 F.3d at 1225. Thus, the Ninth Circuit's judgments here do not eliminate any chance of a valid prosecution—only those that are not meant to be in federal court because they are unconstitutional.

119. *Supra* note 108.

120. *Cf.* Grove City Coll. v. Bell, 465 U.S. 555, 572-74 (1984) (articulating in Title IX case that receipt of federal grants by some of the college's students, who then use the funding to pay for their educational expenses at the college, does not trigger institution-wide coverage of Title IX's sex discrimination prohibitions in an educational program; rather, Title IX's proscriptions apply only to the college programs or departments that actually receive federal money—it is "program-specific"). In this case, only the college's financial aid program was subject to non-discrimination prohibitions. *Id.* at 574-75.

121. Sabri v. United States, 541 U.S. 600, 606 (2004) (describing grant disbursements as fungible).

122. *Sabri*, 541 U.S. at 606 (observing that "[l]iquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring in there").

There is no doubt that there are many cases, like in *Sabri*, where the connection between a federal grant and a corrupt government agent directly or indirectly would cause waste. However, the hypothetical posed and the various cases cited demonstrate that there are many instances where no connection exists between federal disbursements and local corruption.

Obviously, no single example is perfect. They are used to illustrate that the "one-size-fits-all" approach, which the government proffered and to which the *Sabri* Court subscribed, should have, in light of principles of federalism, been subject to increased scrutiny by the Court.[123]

A more proper approach that balances the needs and desires of Congress with federalism is for Congress to require the government to prove an additional element in its section 666 cases: (1) that section 666 apply only to specific programs actually receiving funds from a federal source;[124] (2) that the recipient, or would-be recipient, of the bribe be in an authoritative and controlling position over either federal, state, or local money;[125] or (3) in response to an illicit quid pro quo exchange, federal, state, or local money was in fact siphoned off from one department to another in order to cover a loss.[126]

The first element would limit the scope of federal prosecutors' ability to prosecute a corrupt town property assessor because the town's public hospital was in receipt of $10,001 of Medicare benefits.[127] By contrast, the government would be able to bring a less disjointed case if, for example, the town obtained a federal grant from the Census Bureau (which is seeking a determination of average home values) *and* the property assessor was involved in a bribery scheme.

The second element would ensure that at the very least the individual was in

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123. *See Leading Cases*, *supra* note 11, at 381-82 (arguing that the Court should have instituted "safeguards" against federal criminal statutes that accompany federal disbursements).

124. *Cf. Grove City Coll.*, 465 U.S. at 572-74 (limiting reach of federal proscription on discrimination in educational institutions receiving federal funding to the program actually receiving the federal disbursements, rather than to the entire institution).

125. *Cf.* Dixson v. United States, 465 U.S. 482, 499 (1984) (limiting federal bribery law, § 201, to individuals who "possess some degree of official responsibility for carrying out a federal program or policy").

126. *See* Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75, 109 (2003) (speculating that § 666 should require at least a minimal nexus between the bribe and federal money); United States v. Zwick, 199 F.3d 672, 686-87 (3d Cir. 1999) (suggesting that in order to uphold § 666, the government should be required to prove that a particular federal interest was affected by the bribe). *But see Grove City Coll.*, 465 U.S. at 572 ("Most federal educational assistance has economic ripple effects throughout the aided institution, and it would be difficult, if not impossible, to determine which programs or activities derive such indirect benefits."). Similarly, it would be difficult to determine if any siphoning or draining of funds occurred due to an illegal bribery transaction. *See id.*

127. *See* Fischer v. United States, 529 U.S. 667, 669 (2000) (holding Medicare reimbursements to health care providers, like hospitals, are "benefits" within the purview of § 666).

a position where he or she could directly affect funding in the future, even if the bribe failed to influence any money whatsoever. This threat seemed to be a central reason why Congress passed section 666.[128]

The last suggested element would, of course, be the most difficult to prove.[129] However, it is a recommendation of last resort, as the first two proposals balance the requirements of federalism with the needs of safeguarding public funding.

Any one of these additional statutory elements would satisfy the government's federal interest—protecting federal money, or federal money that is so commingled with other revenue sources as to be indistinguishable from the remainder of the sub-national government's income stream. Further, this would more closely bring non-conditional Spending Clause laws in-line with the Court's Commerce Clause and conditional Spending Clause precedents.

Additionally, they would do so without federally criminalizing the conduct of individuals who: (1) have no direct connection to federal money by virtue of being in a completely different department than one that receives funding; (2) have no authority over money, deeming them a non-threat to the overall system; or (3) fail to affect the allocation of the overall pool of resources.[130] A

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128. *See supra* Part II.B (discussing legislative history and purpose of federal program bribery provision).

129. *See Grove City Coll.*, 465 U.S. at 572-73 (noting difficulty in following the flow of federal funding disbursements).

130. As a counterargument against this position, the Eighth Circuit's majority opinion in *Sabri* maintained:

> The maladministration of funds in one part of an agency can affect the allocation of funds, whether federal or local in origin, throughout an entire agency. Thus, to suggest that corruption involving a discrete department or section of an agency that does not itself receive federal funds or administer a federal program can have no effect on the integrity or efficacy of a federal program is to ignore the fact that money is fungible and that federal funds are often comingled [sic] with funds from other sources.

United States v. Sabri, 326 F.3d 937, 951 (8th Cir. 2003); *accord* United States v. Edgar, 304 F.3d 1320, 1327 (11th Cir. 2002) ("*any* corruption of such recipient organizations, regardless of whether the corruption involves the misappropriation of specifically federal funds, endangers the comprehensive programs in which the organizations participate, and thus the effective exercise of the Congressional spending power as well") (emphasis in original); *see also* Westfall v. United States, 274 U.S. 256, 258-59 (1927) (upholding constitutionality of federal law that provided criminal penalties for misapplication of funds by agents of state banks, which take part in the Federal Reserve Bank system). The Supreme Court aptly stated in *Westfall* that, although not every misapplication of funding at the state bank level will cause a loss, "every fraud like the one before us weakens the member bank and therefore weakens the System." *Id.* at 259. Indeed, the Court in *Sabri* approvingly cited *Westfall* in its decision. *See* Sabri v. United States, 541 U.S. 600, 606 (2004).

However, *Sabri* is distinguishable from the circumstances described in *Westfall*, because the *Westfall* Court knew that *money* was being pilfered by the state bank—the criminal charge required a misapplication of funds—whereas in *Sabri*, the statute *does not* require that

solution to parrying the thrust of future non-conditional, federal criminal statutes would require detailed information of the statute itself. Suffice it to say that these types of checks—focusing on a more direct connection between federal money and illegal activity—would ensure that, should Congress decide to criminalize other local conduct under its Spending Clause, a true federal interest will have attached.

V. CONCLUSION

The *Sabri* Court declined to assimilate its Spending Clause and Commerce Clause jurisprudence. The result is that Congress can further regulate individual citizens; this removes power from the states[131] by circumventing the strictures imposed by *Lopez* and *Dole*, and allows the spending power to be wielded in such a way as to impose federal criminal laws wherever a miniscule amount of federal money may be placed at risk.

In the end, the ordinary citizen carrying on in his or her everyday life will not feel the impact of *Sabri*. Yet, as the role of the federal government increases in the area of criminal law—an area that the states sufficiently criminalize—the balance that inheres in our federalist system of government is negatively affected.[132] The approaches presented offer ways in which

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money be pilfered or lost as a result of the bribe. Unlike in *Westfall*, it is not obvious in cases brought under § 666 that any governmental entity loses money or has any money at risk.

131. *See infra* note 132 and accompanying text.

132. This Article does not focus on policy resulting from the federalization of local crime; however, the effects are relevant to the overall discussion and should be noted. *See* United States v. Lopez, 514 U.S. 549, 575-83 (1995) (Kennedy, J., concurring) (discussing the unique origin of federalism in the United States and asserting that: (1) federalism "enhance[s]" the people's freedom by partitioning governments' powers; (2) ignoring federalist structures removes the possibility of states experimenting with their own justice systems; and (3) allowing the federal government to regulate traditional areas of state concern obscures any line between state and federal authority and responsibility); Henning, *supra* note 126, at 77 (citing *Lopez*, 514 U.S. at 561 n.3) (describing the "sensitive" relations between state and federal jurisdiction in the area of criminal law); Brown, *supra* note 10, at 257 (suggesting that federal corruption indictments remain a delicate area that upset the federal-state balance of power because they affects states' abilities to monitor and govern using their own proceedings); Videotape: Symposium, Overcriminalization: The Politics of Crime (Washington College of Law 2004) (on file with the American University Law Review) (indicating that federalizing local crimes allows prosecutors to forum shop and select courts more favorable to convictions); ABA TASK FORCE, *supra* note 58, at 3, 24-50 (outlining a multitude of negative results of federalization of crime, including: (1) a diminution of prestige associated with state judicial systems and an undermining of states' governmental roles; (2) the possibility of a detrimental and overwhelming impact on the federal justice system in terms of increased case loads and number of incarcerations; (3) a concentration of general, federal police power, which is contrary to the American system of government; (4) the possibility of disparate penalties being meted out by different courts for similar crimes; (5) the prospect of unhealthy competition between or among local and federal

Congress can adequately safeguard its disbursements to thousands of governmental entities, without encroaching on spheres of criminal law that have been traditionally left to the states.

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law enforcement divisions; (6) a "lessening of citizens' perception about their [state's] power" to address important criminal issues occurs; (7) a competition for finite resources; (8) the creation of an inherent conflict between federal prosecutions and community policing goals; and (9) a waste of Congressional time and attention to other activities, which may be more suitable for the federal government to address); Brief for Nat'l Conference of State Legislatures et al. as Amici Curiae in Support of Respondent, United States v. Lopez, 514 U.S. 549, 576-77 (1994) (No. 93-1260), 1994 WL 16007619, at *28 (declaring that federalization diminishes state and local accountability); Garnett, *supra* note 63, at 92-94 (maintaining that New Federalism, although formalistic, is appropriate because it "teaches" the federal government that the Constitution's framework cannot be easily overcome by well-intentioned public policy). *But see* Salvatoriello, *supra* note 51, at 2413-15 (arguing that public policy concerns of letting local, unpunished corruption occur outweigh the "academic concern for the potential erosion of federalism").