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I. Introduction

The conviction of Providence, Rhode Island, Mayor Vincent J. "Buddy" Cianci on federal corruption charges was a major national news story.[1] The case's notoriety may owe a lot to the NBC television series "Providence" as well as to the theatrics of the trial, which at times exceeded those of the television show.[2] Even *Time* viewed the following example of the Mayor's political philosophy as worth quoting: "The toe you stepped on yesterday may be connected to the ass you have to kiss today."[3] However, much more was involved than good courtroom theatre and colorful maxims. The Cianci prosecution—preceded by a federal investigation colorfully entitled "Operation Plunder Dome"—is hardly unique. State and local officials from governors and mayors to police officers and sewer inspectors have faced federal charges for corrupt activity.

The Mayor is gone, but a fundamental question about American federalism remains: Is it a responsibility of the national government to ferret out and prosecute political corruption at the state and local level? The controversy is not new,[4] but it seems increasingly important as the Supreme Court expands the reach of its federalism decisions, sometimes applying the "new federalism" with a vengeance.[5]

It is hard to believe that a doctrine which emphasizes state sovereignty, imposes limits on the national government's power over the states, and stresses the accountability of state officials to their citizens would accept as business as usual prosecution of those same officials by that same national

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1. *See, e.g.*, Dan Barry, *Providence Mayor is Guilty of Corruption*, N.Y. TIMES, June 25, 2002, at A14 (outlining the "colorful" career of Cianci and the city's reaction to the charges); Elizabeth Mehren, *Providence Mayor Is Found Corrupt*, L.A. TIMES, June 25, 2002, at A12 (reporting jury findings that Cianci and two codefendants ran an elaborate scheme involving bribes in exchange for city jobs and favors).

2. *See* Brian C. Mooney, *Club Snub: Cianci, Elite at Odds Again*, THE BOSTON GLOBE, May 1, 2002, at B1 (describing charges against Cianci that he abused his position). Particularly colorful was the testimony over whether Cianci had retaliated against an exclusive club that once denied him membership. *Id.* One witness testified that Cianci vowed to have members' cars ticketed any time they were outside the club. *Id.*

3. Karen Tumulty, *Can Buddy Beat the Rap?*, TIME, May 20, 2002, at 47.

4. *E.g.*, Andrew T. Baxter, *Federal Discretion in the Prosecution of Local Political Corruption*, 10 PEPP. L. REV. 321 (1983).

5. For example, in the Eleventh Amendment context, the Court has seriously limited Congress's authority to abrogate state immunity using its Fourteenth Amendment power. *See, e.g.*, Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (concluding that Patent and Plant Variety Protection Remedy Clarification Act was an invalid abrogation of State's sovereign immunity).

government. Yet the Supreme Court has virtually ignored the issue, and the mountain of commentary generated by the federalism initiatives largely has not addressed it. Perhaps the inconsistency is so obvious that the Court is simply waiting for the right case to take a major step in curbing these prosecutions.

However, a close look at the issue of dealing with state and local corruption suggests that the answers are not clear cut. A few recent Supreme Court precedents involve such prosecutions,[6] but they offer little guidance on how to reconcile the phenomenon with current federalism doctrine. Moreover, in the civil context, the Burger and Rehnquist Courts have decided a series of cases on patronage that represent an active role on the part of the national judiciary in dealing with state and local corruption.[7] One can extrapolate from these cases support for federal corruption prosecutions. A substantial national presence in this area may also reflect deeply held constitutional and non-constitutional values within the legal system. Protecting civil rights is a well-accepted national responsibility. So is guaranteeing the right to vote and ensuring the openness, and perhaps the fairness, of subnational political and governmental processes. How big is the step from open government to good government? The notion of the national government as guardian of civic virtue at all levels is not far-fetched—at times, the system seems to have come close to acknowledging a generalized right to good government as part of the rights that belong to every citizen in our democracy.

This Article advances the thesis that the Court is likely to take a nuanced position on the matter when cases presenting these issues come before it, while perhaps tilting toward the side of the new federalism. One can foresee the Court cutting back on some instances of federal prosecution while endorsing the basic federal role. We are left with the phenomenon of increasingly "autonomous" states whose officials are policed by the government from which they are autonomous. That may seem paradoxical, but so is federalism itself.

Part II of the Article outlines the type of prosecutions that occur most frequently and analyzes their statutory bases. Part III briefly examines the new federalism, both as pronounced by the Court and as seen by the academy. Part IV focuses on why the prosecutions seem fundamentally inconsistent with the premises of the new federalism. Part V turns to the patronage cases. It

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6. *See infra* subpart V.A (analyzing the Court's treatment of corruption cases).

7. *See, e.g.*, Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996) (determining that the First Amendment protects independent contractors from the termination of at-will government contracts in retaliation for the exercise of their freedom of speech); Elrod v. Burns, 427 U.S. 347, 349–50 (1976) (concluding that the practice of patronage dismissals violates the First and Fourteenth Amendments).

analyzes them at length and concludes that they provide substantial support for national action to deter corruption. Part VI examines other possible sources of support for a protective role on the part of the national government. I take as my point of departure Professor John Hart Ely's position "that it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open."[8] Numerous themes in the American legal tradition are relevant to the question of guarding the guardians. States may be unable to police certain problems adequately, especially if those involved are investigating themselves. The national government has always shown a special solicitude for matters such as the franchise, the functioning of the electoral process, and the protection of civil rights. I examine these and other themes, such as the development by the lower federal courts of the doctrine of a citizen's intangible right to honest services,[9] with a view to arriving at an accommodation between the apparent dictates of the new federalism and the well-established role of the national government in prosecuting corruption. Part VII develops several scenarios in which the Court might be called upon to deal with what I regard as one of federalism's great unanswered questions.

II. The Prosecutions: The Present State of Play and the Uncertain Role of Congress

Prosecuting state and local corruption is an important activity of the Department of Justice. Between 1981 and 2000, 1,704 state officials were indicted on corruption offenses, 1,462 were convicted, and 554 were awaiting trial at the end of 2000.[10] The twenty-year totals for local officials were as follows: 4,968 were indicted, 4,233 were convicted, and 1,735 were awaiting trial as of the end of the year.[11] These prosecutions are sometimes the result of extensive investigations using all the tools of high-tech law enforcement as well as more classic methods. "Operation Plunder Dome," involving corruption in Providence, Rhode Island, has already been mentioned.[12] Another equally colorful title is "Operation Lost Trust."[13] This investigation stemmed

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8. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 76 (1980).

9. *E.g.*, United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982).

10. U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2000, at 36 (2000).

11. *Id.*

12. *See id.* at 30–32 (describing Operation Plunder Dome, an FBI undercover investigation of municipal corruption in Providence, and the resulting cases).

13. U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS

from a "narcotics sting operation against a prominent lobbyist and former state legislator" in South Carolina.[14] The investigation centered on a bill that would have legalized gambling on horse and dog races.[15] The former legislator cooperated with the FBI and posed as a lobbyist for an FBI dummy corporation, offering cash during meetings which were wired and videotaped.[16] The operation led to the indictment of twenty-eight individuals, primarily on extortion and drug charges.[17]

The phenomenon of what Judge John Noonan calls "the Larger Than Local Champion"[18] is relatively recent. Analysts agree that it achieved its present status in the late 1960s and early 1970s as a result of three distinct developments. The first is a broad interpretation of the Hobbs Act[19] pushed by United States Attorneys and generally supported by the federal courts. The Act deals with extortion. In *United States v. Kenny*,[20] the U.S. Court of Appeals for the Third Circuit took an important step toward an expansive reading of the Hobbs Act.[21] The court defined extortion broadly to reach what Judge Noonan has described as "a new crime—local bribery affecting Interstate Commerce."[22] Federal prosecutors seized upon the Act after the court broadened it and made it the vehicle for "extortion convictions of an astonishing variety of state and local officials, from a state governor . . . down to a local policeman."[23] One United States Attorney went so far as to describe the Hobbs Act as "a special code of integrity for public officials."[24] Writing in 2000, Professors Abrams and Beale state that "the Hobbs Act now appears to be the statute of choice in prosecutions for bribery involving state and local officials."[25]

OF THE PUBLIC INTEGRITY SECTION FOR 1999, at 31 (1999).

14. *Id.*

15. *Id.*

16. *Id.*

17. *See id.* (detailing the "lost trust" cases stemming from the sting operation).

18. JOHN T. NOONAN JR., BRIBES 584 (1984).

19. 18 U.S.C. § 1951 (2000).

20. United States v. Kenny, 462 F.2d 1205 (3d Cir. 1972).

21. *Id.*

22. NOONAN, *supra* note 18, at 586.

23. Evans v. United States, 504 U.S. 255, 291 (1991) (Thomas, J., dissenting).

24. United States v. O'Grady, 742 F.2d 682, 694 (2d Cir. 1984) (en banc) (quoting letter from Raymond J. Dearie, U.S. Attorney for the Eastern District of New York, to the U.S. Court of Appeals for the Second Circuit).

25. NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 195 (3d ed. 2000). The ABRAMS & BEALE casebook contains an excellent overview of many of the problems discussed in this Article. *See id.* at 262–74 (presenting "overview of

However, a parallel development is of equal significance: the articulation of the "intangible rights doctrine" under the mail (and wire) fraud statute.[26] The statute is aimed at persons who use the mails "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[27] Beginning in the 1940s, the courts developed the notion that the "scheme to defraud" prong extended to the intangible rights of citizens to honest public services.[28] As with the Hobbs Act, federal prosecutors pushed for aggressive applications of this broad reading. Again, the 1970s saw an expanded use of the statute in both the public and private sectors.[29] Professors Abrams and Beale discuss how broadly the statute could reach, as illustrated by a case of corruption in Illinois:

> The intangible rights cases substantially extended the concept of fraud. The cases typically involved neither an express misrepresentation, nor the loss of any money or tangible property by the victim of the scheme. The element of deceit or misrepresentation was generally satisfied by non-disclosure of dishonest or corrupt actions, and the loss of an intangible right obviated the necessity to determine whether the scheme caused any economic loss. For example, former governor Otto Kerner of Illinois was convicted of mail fraud on the theory that his failure to disclose a sweetheart deal with the racing industry deprived the public of his faithful services as an elected official.[30]

Indeed, one can argue that the mail fraud statute is potentially far broader in application than the Hobbs Act. The latter uses the term "extortion," which is contained to some degree by precedent. It has been broadened to include bribery, which is itself a legal term of art. The concept of honest services has no such common-law moorings, however. A frequently cited formulation from a federal court of appeals is that it reaches schemes that "[fail] to match the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society."[31]

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federal crimes dealing with political corruption").

26. 18 U.S.C. § 1341 (2000) (mail fraud); *id.* § 1343 (wire fraud).

27. *Id.* § 1341.

28. *See* ABRAMS & BEALE, *supra* note 25, at 131 (describing how early, broad construction of the statute ultimately led to honest services concept).

29. *See id.* at 131–33 (detailing the application of the expanded definition of mail fraud to various public officials).

30. *Id.* at 132.

31. Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967) (quoting Gregory v. United States, 253 F.2d 104, 190 (5th Cir. 1958)).

The third development was the increased priority placed on prosecuting political corruption at all levels by the Department of Justice.[32] Judge Noonan traces this phenomenon to the administration of Richard Nixon,[33] although one might view him as one of its victims. However, its most important formal manifestation was the creation of the Department of Justice's Public Integrity Section in 1976.[34] In a sense, one can view the emphasis on state and local corruption as a parallel to the concern with corruption at the federal level, most obviously manifested in the creation of the Independent Counsel mechanism.[35]

Under the traditional analysis of federal prosecution of state and local officials, emphasis has been on the role of the federal executive and judicial branches, particularly the United States Attorneys and the lower federal courts.[36] This analysis suggests that Congress has not been a major player in making state and local corruption a significant national priority. I believe that this picture is incomplete. The most dramatic example of Congress's endorsement of a strong federal role is its quick reaction to the Supreme Court decision in *McNally v. United States*,[37] in which the Court ruled that the development of the intangible right of honest services doctrine under the mail fraud statute was an invalid statutory construction.[38] Obviously, *McNally* was a significant threat to the expansive role that the mail fraud statute was playing. Congress responded quickly and decisively. The following year it enacted 18 U.S.C. § 1346,[39] which provides that, for purposes of the mail and wire fraud statutes, "the term scheme or artifice to defraud includes a scheme or artifice

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32. *See* Baxter, *supra* note 4, at 321–22 (describing federal prosecutors' increased efforts to target local political corruption in the 1970s); Paul Salvatoriello, Note, *The Practical Necessity of Federal Intervention Versus the Ideal of Federalism: An Expansive View of Section 666 in the Prosecution of State and Local Corruption*, 89 GEO. L.J. 2393, 2393 (2001) (discussing the policy of the Department of Justice, beginning in the 1970s, to prosecute public corruption at all levels of government vigorously).

33. *See* NOONAN, *supra* note 18, at 598 (advancing several hypotheses to explain the increased efforts to prosecute corrupt officials during the Nixon administration).

34. *See* Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 379 n.26 (1989) (explaining that, since the formation of the Public Integrity Section, public corruption at all levels has been a specific target).

35. *See, e.g.*, George D. Brown, *Putting Watergate Behind Us*—Salinas, Sun-Diamond, *and Two Views of the Anti-Corruption Model*, 74 TUL. L. REV. 747, 804–07 (2000) (providing a description of the independent counsel system, including the history surrounding its creation).

36. *See* NOONAN, *supra* note 18, at 584, 590 (describing centralization of power in federal government and expanding role of federal judiciary in policing of local corruption).

37. McNally v. United States, 483 U.S. 350 (1987).

38. *See id.* at 356–59 (concluding that while mail fraud statute protects property rights, it does not refer to intangible rights of society to good government).

39. 18 U.S.C. § 1346 (2000).

to deprive another of the intangible right of honest services."[40] As one key congressional supporter indicated, the amendment was intended to "reinstate" pre-*McNally* caselaw, "including the right of the public to the honest services of public officials."[41]

The 1988 amendment is a dramatic example of congressional reaction to a judicial decision curbing the federal role. It does not stand alone, however. In 1984, Congress enacted the federal program bribery statute.[42] The problem that the national government faced concerned acts of theft or bribery in connection with federal funds disbursed to states, localities, and other entities. Prosecutors brought bribery charges under the general federal bribery statute, which appears to apply only to federal officials and those closely associated with them.[43] Lower courts were divided on whether the statute reached nonfederal officials administering federal funds.[44] To resolve these doubts, Congress enacted a strikingly broad statute which, read literally, provides that any official of a government or other entity receiving a threshold amount of federal funds can be prosecuted for bribery as long as the matter with which the bribe deals is valued at more than $5,000.[45] As with the honest services amendment, Congress intended to increase the power of federal prosecutors over state and local officials.[46]

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40. Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 169–70 (1994). For a discussion of the enactment of § 1346, see *id.* at 169–70 (outlining Congress's reinstatement of the intangible rights doctrine) and ABRAMS & BEALE, *supra* note 25, at 134–35 (describing legislative response to the abolition of the intangible rights doctrine).

41. ABRAMS & BEALE, *supra* note 25, at 134–35 (quoting remarks of Senator Biden).

42. 18 U.S.C. § 666 (2000); *see generally* Salvatoriello, *supra* note 32.

43. Title 18, section 201 of the United States Code covers "bribery of public officials and witnesses." 18 U.S.C. § 201 (2003). Its definition of "public official" is as follows:

> Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency, or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror.

Id.

44. *See* Dixson v. United States, 465 U.S. 482, 505 (1984) (O'Connor, J., dissenting) (asserting that there "is no consistent lower court construction of the statute as it applies to grant recipients to bolster the Court's reading," and citing lower court cases utilizing varying constructions).

45. *See* George D. Brown, *Stealth Statute—Corruption, The Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247, 272–76 (1998) (describing various offenses that are potentially covered by 18 U.S.C. § 666 and detailing the legislative history of the statute).

46. A dispute exists over how far Congress intended to increase this power. *Compare id.*

Admittedly, the mail fraud and federal program bribery statutes are clear examples of this approach. The more fundamental question is whether the basic array of other federal statutes utilized in state and local corruption cases shows the same attitude toward the problem. The general view is that they do not. Rather, the standard description of these statutes is that they are aimed at criminal activity in general, and that federal prosecutors are forced to shoehorn acts of corruption under them.[47] As one recent defense of the federal role puts it, because "Congress has considered, but never enacted, a general federal statute focused specifically on state and local corruption, federal prosecutors have resorted to charging state and local officials under an array of statutes that were not initially intended to target such corruption."[48] However, this analysis is open to question. Indeed, one can offer a totally different interpretation of the statutory scheme, under which the federal prosecutor's problem is not finding a statute available for acts of state and local corruption, but rather choosing the one that fits best, bearing in mind the need to meet the relevant jurisdictional predicate. Consider the Hobbs Act: it punishes, in part, extortion that "obstructs, delays, or affects commerce."[49] Extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or *under color of official right*."[50] The italicized language seems clearly aimed at acts of corruption. Thus, the prosecutor's main problem might be the effect on commerce.

Another important statute in the federal anticorruption arsenal is the Travel Act.[51] It punishes persons who travel in interstate commerce or use its facilities in order to commit certain acts that constitute or facilitate what the statute terms "unlawful activity."[52] Unlawful activity, as defined, includes a number of crimes such as "extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."[53] Federal prosecutors use the Travel Act frequently in corruption cases. Such use is hardly surprising given the fact that the Act's references to extortion and bribery present a clear statutory basis for pursuing the sorts of crimes involved in these cases.

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at 276–81 (arguing for narrow reading of legislative history) *with* Salvatoriello, *supra* note 32, at 2396–2403 (arguing for broad reading of legislative history).

47. *See* Kurland, *supra* note 34, at 381 (noting that "none of the statutes was originally drafted specifically to combat official corruption"). *See generally* ABRAMS & BEALE, *supra* note 25, at 262–63.

48. Salvatoriello, *supra* note 32, at 2393.

49. 18 U.S.C. § 1951(a) (2000).

50. *Id.* § 1951(b)(2) (emphasis added).

51. *Id.* § 1952.

52. *Id.*

53. *Id.* § 1952(b).

A commentator has stated that "since the Travel Act was not drafted with official corruption in mind, its effectiveness in prosecuting official local corruption is necessarily limited."[54] However, the plain language is not limiting in terms of its application to corrupt acts. If one considers only the four statutes just discussed, the substantive references to corrupt conduct are clear.

The complex federal statute known as RICO (Racketeer Influenced and Corrupt Organizations Act)[55] is also widely used in corruption cases.[56] Here, there is initial force to the argument that the statutory language does not directly refer to corruption, although the title does. However, the Supreme Court, with ample support from legislative history, has consistently held that courts should construe RICO broadly, extending beyond any core notion of activities that are solely the province of organized crime.[57] Because the language applies to a wide range of economic crimes, there seems no reason to believe that it should not embrace corruption. Indeed, much of the RICO offense depends upon the commission of a number of so-called "predicate crimes," which include the Hobbs Act, the mail fraud statute, and the Travel Act.[58] The organizational component of the RICO offense clearly can be triggered by commission of the predicate crimes in the context of political corruption.

In sum, I think that a strong case can be made that the prosecutorial developments which began in the 1970s are solidly grounded in federal statutes, as well as supported by both the executive and judicial branches. This phenomenon is consistent with the contemporaneous growth of federal criminal law in general, as well as notions of constitutional federalism embodied in *Garcia v. San Antonio Metropolitan Transit Authority*.[59] The basic premise in both contexts is that few, if any, federalism-based limits exist on the power of the national government. This premise would certainly extend to prosecuting state and local corruption. However, beginning in the 1970s, a group of critics began to invoke federalism to question sharply the practices

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54. Kurland, *supra* note 34, at 386.

55. 18 U.S.C. § 1961 (2000).

56. *See* ABRAMS & BEALE, *supra* note 25, at 456 (stating that "courts have uniformly upheld treating government agencies as enterprises under RICO"). The previous version of the casebook contains an extensive list of state and local agencies that have been treated as "enterprises" for RICO purposes. *See* NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 475–76 (2d ed. 1993) (listing numerous state and local agencies treated as "enterprises" for RICO purposes).

57. *E.g.*, United States v. Turkette, 452 U.S. 576 (1981).

58. *See* 18 U.S.C. § 1961(1) (2000) (listing various forms of "racketeering activity," the commission of which is a predicate to the applicability of RICO).

59. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

that all three branches of the national government seemed to endorse. In the last decade, that critique may have gone beyond policy considerations to find support in basic tenets of constitutional doctrine.

III. The New Federalism: A Constitutional (Counter) Revolution?

A. The New Federalism: A Brief Overview

"New Federalism" is not a new idea. President Richard Nixon referred to it frequently in articulating his plans for devolving to the states substantial authority in the administration of federal grant programs.[60] During the 1970s, the Supreme Court articulated a form of "judicial new federalism" emphasizing, in cases such as *Younger v. Harris*,[61] the respect due to state courts and the need to fashion federal jurisdictional doctrines accordingly.[62] However, in current discourse, the term refers to efforts by a majority of the Supreme Court to emphasize concepts of dual federalism and the separate legal status of the constituent states within the American republic, as well as the effects of this doctrinal shift on national power.

This development's most important origin is the decision of the Burger Court in *National League of Cities v. Usery*.[63] In that case, the majority attempted to articulate and utilize federalism-based limits on national power to invalidate an otherwise valid exercise of Congress's Commerce Clause authority to regulate wages and hours of state and local employees. The Court articulated such concepts as regulating the "states as states,"[64] "attributes of state sovereignty,"[65] and "areas of traditional governmental functions"[66] as benchmarks for any such limitations. Nine years later, however, *Garcia v. San Antonio Metropolitan Transit Authority*[67] overruled *National League of Cities*. *Garcia* essentially rejected the notion of judicially enforceable limits on the Commerce Clause and, adopting a view first propounded by Professor

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60. *See generally* RICHARD P. NATHAN, THE PLOT THAT FAILED: NIXON AND THE ADMINISTRATIVE PRESIDENCY 16–26 (1975); *see also* Daniel J. Elazar, Reagan's New Federalism and American Federal Democracy (1982) (unpublished manuscript prepared for American Enterprise Institute) (on file with the author).

61. Younger v. Harris, 401 U.S. 37 (1971).

62. *See generally* Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977).

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

64. *Id.* at 845.

65. *Id.*

66. *Id.* at 852.

67. *Garcia*, 469 U.S. at 528.

Herbert Wechsler,[68] stated that the principal protection for the states' role in the constitutional system was to be found in the congressional legislative process rather than through judicial review.[69] *Garcia* was certainly a setback for the new federalism, but because both it and *National League of Cities* were five-to-four decisions, the issue was far from closed.

Indeed, a federalist majority emerged to give the states some protection through statutory construction and the rule of "clear statement" six years after *Garcia* in *Gregory v. Ashcroft*.[70] The utilization of statutory construction to further state autonomy can be viewed as a step toward re-establishing it as a constitutional construct. The technique permits the conservative Justices to find in favor of the states on nonconstitutional grounds while suggesting that a constitutional background that compels this approach to the statute in question exists. An important next step was the partial restoration of immunity from federal regulation through the "anticommandeering" principle articulated in *New York v. United States*[71] and *Printz v. United States*.[72] Those cases stand for the proposition that, even within its enumerated powers, Congress cannot impose duties on state legislative and executive branches. As for the basic existence of federal power, *United States v. Lopez*[73] and *United States v. Morrison*[74] held, for the first time since the early New Deal, that regulatory exercises of congressional power under the Commerce Clause were invalid. Although neither involved classic economic regulation of the New Deal variety, the symbolic importance of a brake on congressional power was great.

Another controversial area was the question of state immunity from citizen suits in federal courts on federal statutory claims. Relying heavily on notions of state sovereignty, the Court treated this immunity as a major attribute of the states' role in the federal system in cases such as *Seminole Tribe of Florida v. Florida*[75] and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*.[76] Much of the debate in these cases

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68. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543–60 (1954).

69. Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528, 537–56 (1985).

70. Gregory v. Ashcroft, 501 U.S. 452 (1991).

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

72. Printz v. United States, 521 U.S. 898 (1997).

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

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

75. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

76. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

was a rehash of the debate over whether the Eleventh Amendment furnishes a constitutional basis for state immunity from such suits. The issue had periodically divided federalistic and nationalistic judges for a number of years.[77] The cases brought to the forefront the question of Congress's power to abrogate whatever immunity states might enjoy. In *Seminole*, the majority overruled an earlier holding that Congress could do so under its Article I powers.[78] The same majority later took a dim view of notions of waiver.[79] Thus, for Congress to abrogate the states' Eleventh Amendment immunity, it would have to act under the powers granted by Section 5 of the Fourteenth Amendment. The Court had previously recognized that Congress had this power, relying in part on the notion that the Fourteenth Amendment brought about a substantial change in the underlying nature of federal-state relations.[80] Thus, the Eleventh Amendment battleground shifted to Fourteenth Amendment abrogation at the same time as the Court was re-examining the broader issue of Congress's authority under Section 5.[81] The net result was a series of Eleventh Amendment decisions fortifying limits that the Court seemed already prepared to place on Congress's exercise of this non-Article I power over states.

As this brief synopsis indicates, the new federalism cases cover a substantial range of ground and articulate a number of doctrines and concepts that, taken together, can substantially recast the nature of American federalism. Rather than analyze them further, I will let the Court speak for itself. The following discussion of key decisions gives the reader a sense not only of substance but also of rhetoric and symbolism in an area in which these two qualities have taken on substantial importance.

B. The New Federalism as Pronounced by the Court

Several major themes emerge from the cases decided over the last eleven years, beginning with *Gregory v. Ashcroft*.[82] The first is that the courts can

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77. *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 5–23 (1989) (upholding federal legislation giving individuals a federal cause of action against states for environmental harms), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

78. *See Seminole Tribe*, 517 U.S. at 63–74 (overruling *Union Gas*).

79. *See Coll. Sav. Bank*, 527 U.S. at 666 (affirming dismissal of trademark claim against state education board on sovereign immunity grounds).

80. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 447–56 (1976) (upholding the 1972 amendments to the Civil Rights Act of 1964, which allow federal courts to award money damages to an individual succeeding in a suit against a state).

81. *See* City of Boerne v. Flores, 521 U.S. 507, 518–19 (1997) (limiting congressional authority under U.S. CONST. amend. XIV, § 5).

82. Gregory v. Ashcroft, 501 U.S. 452 (1991).

enforce limits on the national government and that these limits are based in federalism. This is an exceedingly important doctrinal development, given the basic premise of *Garcia* that such limits were unnecessary and unworkable. In *Lopez*, Justice Kennedy concurred in part to emphasize the importance of the Court's willingness to find and enforce limits.[83] He noted the argument that issues of federal and state power should be left to the national political process,[84] but concluded that "the absence of structural mechanisms to require [national political] officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role."[85] For Justice Kennedy, "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."[86] Both Justice Kennedy and Chief Justice Rehnquist acknowledged that a judicial role in preserving federalism limits on Commerce Clause authority would lead to "legal uncertainty"[87] in some cases. They considered this an inevitable consequence of constitutional adjudication in this area, and each cited *Marbury v. Madison*[88] for a recognition of the Court as the branch whose duty it is to declare "what the law is."[89] As Justice Kennedy put it, "we are often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines."[90] Thus, an important component of the new federalism is the commitment to treat federalism-based constitutional adjudication as seriously as, for example, issues of individual rights.

A second important theme is that there is something for the Court to enforce. Limits on the power of the national government exist. This, of course, is the message of *Lopez* and *Morrison*, both of which found internal limits on the reach of the Commerce Clause.[91] The two cases struck down legislation dealing with guns within school zones[92] and civil remedies for

83. *See* United States v. Lopez, 514 U.S. 549, 574–581 (1995) (Kennedy, J., concurring) (noting that while courts have struggled to define the limits of Congress's commerce power, education and police powers fall within the domain of the states).

84. *Id.* at 577 (Kennedy, J., concurring).

85. *Id.* at 578 (Kennedy, J., concurring).

86. *Id.* (Kennedy, J., concurring).

87. *Id.* at 566.

88. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

89. *Id.* at 177.

90. United States v. Lopez, 514 U.S. 549, 579 (1995) (Kennedy, J., concurring).

91. United States v. Morrison, 529 U.S. 598, 608 (2000); *Lopez*, 514 U.S. at 557.

92. *Lopez*, 514 U.S. at 551.

gender-based violence.[93] Chief Justice Rehnquist began the analysis of his *Lopez* opinion with the following observation: "We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, 8. As James Madison wrote: 'The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'"[94] Particularly troubling to the majority in both *Lopez* and *Morrison* was the possible connection of virtually any activity to commerce, thus permitting the national government to regulate all aspects of American life through that power.[95]

The majority has also found external, federalism-based limits on national power. The best example is Justice O'Connor's majority opinion in *New York v. United States*.[96] She viewed the constitutional structure as one which provides Congress with a certain amount of authority over individuals but not over states.[97] She quoted *The Federalist Papers* for the following proposition: "[A] sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity . . . ."[98] Her opinion reasoned that an effort to commandeer the state governments would run directly counter to this basic structural premise.[99] *New York* involved what the majority saw as an effort to commandeer the state legislature.[100] In *Printz v. United States*,[101] the majority extended this principle to national efforts to commandeer the state executive branch for the administration of a federal program.[102]

Explicit in these analyses of the constitutional structure is a concept of divided sovereignty in which the states retain a substantial amount of power. *Lopez* enforces this notion by its emphasis on the Federalist concept of "nu-

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93. *Morrison*, 529 U.S. at 617–18.

94. *Lopez*, 514 U.S. at 552 (quoting THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961)).

95. *See, e.g., id.* at 564–67 (noting that, under the dissent's view, even child rearing might fall under Congress's Commerce Clause powers).

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

97. *Id.* at 181.

98. *Id.* at 180 (quoting THE FEDERALIST NO. 20, at 138 (Alexander Hamilton & James Madison) (Clinton Rossiter ed., 1961)).

99. *See id.* at 181–83 (noting that a state's consent cannot enlarge the powers of Congress beyond constitutional boundaries).

100. *See id.* at 174–75 (noting that "take title" provision of Low-Level Radioactive Waste Policy Act "crossed the line distinguishing encouragement from coercion").

101. Printz v. United States, 521 U.S. 898 (1997).

102. *Id.* at 902–35.

merous and indefinite" powers in the state governments. What Justice Kennedy saw as a threat in the Gun Free School Zone Act was a danger that the statute "upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power."[103] He also saw the statute as seeking "to intrude upon an area of traditional state concern."[104] Obviously, concepts like the latter, which played a prominent role in *National League of Cities*, have undergone a substantial resurrection.

When they exercise their considerable array of powers, the states function as political entities. One of the themes of the new federalism cases has been the importance of preventing federal actions that blur the lines of accountability within these entities. In *Lopez*, Justice Kennedy enunciated a means of keeping the lines of accountability clear: preventing the federal government from taking over "entire areas of traditional state concern."[105] In *New York*, Justice O'Connor emphasized the importance of having a state's citizens know whether their elected officials were attempting to follow the will of the voters or applying a policy imposed from above. Thus, "the residents of the State retain the ultimate decision as to whether or not the State will comply."[106] In *Printz*, which involved administration of a gun control program, Justice Scalia pointed to the opportunities for officials at one level to take credit for "solving" a problem while constituents at another level must pay higher taxes.[107] The Court's emphasis on accountability includes fiscal as well as policy choices. This emphasis has constituted an important theme in Eleventh Amendment jurisprudence, questioning the desirability of federal instrumentalities imposing large fiscal burdens on states when their citizens might choose to expend the funds elsewhere.[108]

Indeed, the Court has gone beyond treating states as political entities to the point of referring to them repeatedly as sovereigns. *Gregory* represents an important step: "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."[109] *New York* referred to "the sovereignty reserved to the States by the Tenth Amendment,"[110] and asserted that "[s]tate sovereignty is not just an end in itself,"[111] noting the importance of federalism as a means of protecting

103. United States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring).
104. *Id.* (Kennedy, J., concurring).
105. *Id.* at 577 (Kennedy, J., concurring).
106. New York v. United States, 505 U.S 144, 168 (1992).
107. Printz v. United States, 521 U.S. 898, 929–30 (1997).
108. Alden v. Maine, 527 U.S. 706, 751–52 (1999).
109. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).
110. *New York*, 505 U.S at 174, 177.
111. *Id.* at 181.

individual liberties.[112] In *Printz*, Justice Scalia returned to the theme, viewing it as "an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."[113] This emphasis on the status of states appears to reach its full development in the Eleventh Amendment cases. In *Seminole Tribe of Florida*, Justice Rehnquist stated as a fundamental premise of Eleventh Amendment jurisprudence "that each State is a sovereign entity in our federal system."[114] *College Savings Bank* takes the point one step further by treating the state's sovereign immunity as a "constitutional right."[115]

In *Alden v. Maine*,[116] Chief Justice Rehnquist trotted out a familiar metaphor to describe the place of states within our federal system:

> When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate states.[117]

The reference to "esteem," which apparently follows from their sovereign status, is an example of the current majority's emphasis on showing "respect" for states. The Court's most recent statement on the subject highlights this dimension of dual federalism: "While state sovereign immunity serves the important function of shielding state treasuries and thus preserving the States' ability to govern in accordance with the will of their citizens . . . the doctrine's central purpose is to accord the states the respect owed them as joint sovereigns."[118]

The Justices supporting these various new federalism initiatives take care to tie them to broader questions of the purposes of federalism. An obvious example is the role of states as "laboratories," invoked by Justice Kennedy in his *Lopez* concurrence.[119] However, the central theme is the Framers' intentional division of governmental power into two distinct, inde-

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112. *Id.*

113. *Printz*, 521 U.S. at 928.

114. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996).

115. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 684 (1999).

116. Alden v. Maine, 527 U.S. 706 (1999).

117. *Id.* at 758.

118. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 765 (2002) (quoting *Alden*, 527 U.S. at 750–51; Puerto Rico Aqueduct & Sewer Auth. v. Metcalf and Eddy, Inc., 506 U.S. 139, 146 (1993)).

119. United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

pendent spheres, each with the ability to compete with the other, thereby preventing tyranny and enhancing the liberty of citizens. Far from a potential infringement on individual rights, federalism is presented as a central means of achieving them. The following statement from Justice Scalia's opinion in *Printz*, with its reference both to *The Federalist Papers* and Justice Kennedy's oft-cited concurring opinion in *U.S. Term Limits, Inc. v. Thornton*,[120] summarizes these themes well:

> The Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people .... The great innovation of this design was that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other—a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens.[121]

If all of this sounds too good to be true, perhaps it is. Each of the opinions quoted above provoked one or more strong dissents by "liberal" members of the Court.[122] The critiques of the majority in these opinions are wide ranging, including incorrect history, improper methodology, and insufficient respect for the role of Congress.[123] The dissents of Justices Souter and Breyer in *Morrison* are particularly relevant. For the former, the Court is attempting in vain to restore "the Federalism of some earlier time,"[124] a goal that cannot be achieved through constitutional interpretation. Justice Breyer appears to take the analysis one step further, suggesting that federalism itself is not only irrelevant but also has all but disappeared: "We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change."[125] Justice Breyer was arguing the futility of imposing boundaries through the Commerce Clause, particularly because it touches upon a subject

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120. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

121. Printz v. United States, 521 U.S. 898, 919–20 (1997) (quoting THE FEDERALIST NO. 15 (Alexander Hamilton); United States Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)) (internal punctuation altered).

122. *E.g.*, United States v. Morrison, 529 U.S. 598, 655 (2000) (Souter, J., dissenting); *Printz*, 521 U.S. at 939–75 (Stevens, J., dissenting).

123. *Printz*, 521 U.S. at 919–20.

124. *Morrison*, 529 U.S at 655 (Souter, J., dissenting).

125. *Id.* at 660 (Breyer, J., dissenting).

which highlights the interdependence of contemporary society.[126] However, his observations suggest that the entire new federalism project is doomed to failure because its fundamental core—separate and independent states—no longer retains validity.[127] Perhaps the majority is, in fact, tilting at windmills. Still, it seems to have knocked quite a few of them down. The new federalism cases have had a definite theoretical impact on the relationship between the two governments. In the remaining Parts of this Article, I will apply new federalism precepts to the highly visible practice of federal prosecution of state and local officials for political corruption.[128] Before turning to that subject, however, I wish to examine briefly the voluminous academic commentary that the cases discussed above have generated.

C. The New Federalism as Seen by the Academy

As the saying goes, many trees have been felled to support articles analyzing what the Court has done over the last decade to redefine American federalism. The commentaries run the gamut of perspectives, from viewing the decisions as "revolutionary"[129] to taking the position that the new federalism is not a major change, but should be seen as more of a tinkering with the status quo, which remains basically intact.[130] Needless to say, much of the analysis is highly critical. For example, in an article partially entitled *The Hypocrisy of* Alden v. Maine,[131] Professor Chemerinsky asserts that the Court has rendered to the states power over the individual analogous to that enjoyed by the Soviet Government under the Stalin-era Constitution.[132] None of the major articles appears to address the issue of federal prosecutions of state and local officials for political corruption. I find this a surprising omission. Nonetheless, some analyses are particularly helpful in addressing the issues of states as polities and the ability of the national government to reach the manner in which those polities interact with their citizens.

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126. *See id.* (Breyer, J., dissenting) (arguing that, in modern times, all activities affect interstate commerce).

127. *Id.*

128. *Infra* Parts IV–VII.

129. Steven Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 25 (2001).

130. *See* Michael Dorf, *No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court*, 31 RUTGERS L.J. 741, 741 (2000) (arguing that the Supreme Court decisions in the last decade do not fundamentally threaten federal power).

131. *See generally* Erwin Chemerinsky, *The Hypocrisy of* Alden v. Maine*: Judicial Review, Sovereign Immunity and the Rehnquist Court*, 33 LOY. L.A. L. REV. 1283 (2000).

132. *Id.* at 1308.

Professor Daniel Farber notes the Court's "reverential language"[133] toward the states that I have referred to above in connection with the concept of sovereignty. He views a principal goal of the new federalism as establishing the position of the states as republics.[134] Within their allotted sphere, these republics will function as co-sovereigns with the national government. Professor John O. McGinnis has elaborated on the division of responsibility and the role of the states (and localities) in a "certain sphere of non-economic matters, such as criminal law and human rights."[135] The national government remains supreme in economic matters, perhaps reflecting the view that when the national government regulates "activities having spillover effects among the states," it furthers efficiency.[136] Outside of this realm, Professor McGinnis posits a model in which the states compete with each other and encourage active citizen participation in making the relevant policy decisions.[137] "Thus, the Court is responding to the danger of mass apathy and interest group politics by making state citizens more responsible arbitrators of their own affairs."[138]

These latter analyses of the status of states within the new federalism are similar to Professor Deborah Merritt's earlier hypothesis of a developing "autonomy model" of federalism.[139] However, the defenders are usually quick to point out that the states do not get carte blanche. Not only does Congress remain supreme in regulating the national economy, but also the dormant Commerce Clause shows that the Court can utilize the Constitution to mount strong limits on state authority in order to further the national interest.[140] As Professor Farber asserts, "the Court views the federal system as one where federal law is paramount within its sphere, but with implementation mechanisms that are tempered by an appreciation for the state role in the system."[141]

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133. Daniel Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133, 1135 (2000).

134. *Id.* at 1134.

135. John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 519 (2002).

136. *Id.* at 516.

137. *See id.* at 521 (concluding that reserving power to the states may encourage political participation).

138. *Id.*

139. Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1570–73 (1994).

140. *See* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 460–62 (2002) (illustrating how the dormant Commerce Clause doctrine can limit state authority).

141. Farber, *supra* note 133, at 1139.

Even Professor Steven Calabresi, who had described the recent decisions as "revolutionary,"[142] views current doctrine as essentially "a mild corrective to a half-century of steady and sometimes ill-considered expansions of national power."[143] Thus, one might analyze *Lopez* not as an attempt to roll back the Commerce power, but rather as an attempt to prevent it from becoming all embracing.[144] This is certainly what Chief Justice Rehnquist said he was doing, both in terms of utilizing existing precedent and expressing disagreement with nationalist logic that knows no stopping point.[145]

The commentators have devoted considerable attention to the manner in which the new federalism might affect the national government's ability to reach the manner in which its co-sovereign states treat their citizens. The driving force here is concern over preserving the federal government's historic role as protector of civil rights. For example, Professor Calvin Massey asserts that there will be no effect on this role, particularly on enforcement by the Court.[146] The position of Professor McGinnis on this matter is particularly interesting. He includes human rights as an area in which the states have room for some experimentation, but stresses the guarantee of a core of constitutional rights through Fourteenth Amendment doctrine.[147] Indeed, he goes beyond federal enforcement: "The national government can enforce a threshold level of enforcement by authorizing actions against state officials for enforcement failures."[148] This backstop role might cover not only failure to enforce nationally guaranteed rights, but could conceivably extend to those created by the states themselves.

Most analysts appear to be discussing civil rights within a relatively traditional framework. They are sharply at odds, and not all of them share Professor Massey's optimism. Professor Michael Crusto contends that the danger of the new federalism is that it may strengthen state majorities to the point at which they can substantially oppress minority and civil rights.[149]

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142. Calabresi, *supra* note 129, at 25.

143. *Id.* at 33–34.

144. *See* McGinnis, *supra* note 135, at 516–19 (contending that the "contours and coherence" of the Court's federalism revival are unclear).

145. United States v. Lopez, 514 U.S. 549, 554–55 (1995).

146. *See* Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 437 (2002) (emphasizing "a judicial claim of primacy in interpreting the nature and scope of individual liberties"); *id.* at 439–40 ("Federalism has no place with respect to individual rights secured by the Constitution.").

147. McGinnis, *supra* note 135, at 519 (noting that the Court has guaranteed a core of human rights through the Fourteenth Amendment).

148. *Id.* at 521.

149. *See* Mitchell F. Crusto, *The Supreme Court's "New" Federalism: An Anti-Rights*

Echoes of Madison's concern about diluting the tyranny of factions in the larger nation are part of the analysis. Professor Crusto views the current decisions as part of the Court's general anti-rights agenda which could lead to a pre-*Brown* constitutional stance.[150] Like other commentators, Professor Rebecca Zeitlow notes the apparent paradox of a deferential approach to the congressional spending power within an overall federalistic doctrine intended to limit Congress's ability to regulate states.[151] She sees the continuation of spending power doctrine as crucial to the maintenance of a strong national role in protecting civil rights, especially if federal power under Section 5 of the Fourteenth Amendment is contracted.[152] Other analysts suggest that the civil rights area will remain an important realm of national authority. Professor Fallon stresses the Court's respect for precedent and its desire to avoid the embarrassment caused by its resistance to the New Deal.[153] Professor Farber sees defending constitutional rights from either level of government as part of the current Court's vision.[154]

Clearly, for most analysts, the new federalism decisions represent an important development, although they disagree on its content, significance, and validity. Let us assume, nonetheless, something close to a consensus that the states, under emerging doctrine, will play a more meaningful role, somewhat as equals with the national government. The economic authority of the latter is not disputed. What is in question is the national government's role in overseeing the manner in which states protect their citizens. The commentators have focused on civil rights. Prosecuting state and local officials for corrupt government acts may seem far removed from this arena, but there are a striking number of similarities. For example, the prosecutions represent a national intervention to correct mistakes by government officers that have hurt citizens, at least indirectly. Civil rights and "good government" might both be part of a national protective role. Can one reconcile the prosecutions with the new federalism? The next Part develops the hypothesis that one cannot and that the two phenomena are fundamentally at odds.

Agenda?, 16 GA. ST. U. L. REV. 517, 520 (2000) (asserting that the Court's new pro-state government orientation may threaten civil rights).

150. *Id.* at 533.

151. Rebecca E. Zeitlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 189–90 (2002).

152. *Id.* at 192.

153. *See* Fallon, *supra* note 140, at 475–76 (arguing that the Court in *Lopez* was cautious not to overreach in its ruling).

154. Farber, *supra* note 133, at 1134.

IV. The New Federalism and the Prosecutions: A Fundamental Inconsistency?

A. The Pre-New Federalist Critiques

As early as the 1970s, observers of the criminal justice system began to question the expanding prosecutions of state and local officials.[155] To some extent, any such critiques might be viewed as part of the general debate over the existence and scope of federal criminal law—a debate that remains intense today.[156] The early federalism-based criticisms of the corruption prosecutions are important in and of themselves and form an important backdrop for a new federalism-based critique. One of the first articles to deal with these issues was the late Charles Ruff's examination entitled *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*.[157] Professor Ruff used the expanding interpretations of the Hobbs Act as a point of departure to examine the general phenomenon of corruption prosecutions.[158] He devoted much of his analysis to the rapid growth of this body of law and the role of individual federal prosecutors in both guiding and utilizing it.[159] However, he also placed some emphasis on the federalism problems that the prosecutions created.[160] For example, he stated the following:

> [G]ranting that it is detrimental to the interests of the citizens of a state for their elected or appointed officials to breach the trust reposed in them, these interests would be served better by effective state enforcement than by reliance on the federal government for remedial action.[161]

He also quoted extensively from the oft-cited case from the U.S. Court of Appeals for the Seventh Circuit, *United States v. Craig*,[162] in which the court invoked "the federal nature of the American system of government"[163] to call attention to the potential dangers of federal prosecution of state legislators. In the view of the Seventh Circuit, while the United States Attorneys may prosecute local officials who violate federal law, "the primary responsibility for

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155. *E.g.*, Ralph E. Loomis, Comment, *Federal Prosecution of Elected State Officials for Mail Fraud: Creative Prosecution or an Affront to Federalism?*, 28 AM. U. L. REV. 63 (1978).

156. *See generally* ABRAMS & BEALE, *supra* note 25, at 64–72.

157. Charles Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171 (1977).

158. *Id.* at 1174–93.

159. *Id.*

160. *Id.* at 1216, 1223–25.

161. *Id.* at 1214.

162. United States v. Craig, 528 F.2d 773 (7th Cir. 1976).

163. *Id.* at 778.

ferreting out their political corruption must rest, until Congress directs otherwise, with the State, the political unit most directly involved."[164]

The year after the Ruff article, a student note, using the growing number of mail fraud prosecutions as a point of departure, asked whether such actions by the federal government constituted *Creative Prosecution or an Affront to Federalism?*[165] The author recognized the relationship between the corruption prosecutions and the broader issues triggered by the debate over federal criminal law.[166] He articulated the concept of "a special state interest" that might be present beyond the state's "traditional role of administering criminal justice" as a deterrent to federal action.[167] In his view, corruption prosecutions represented a clear example:

> The policing of a state government's own political system would seem to be such a special state interest. The duty owed the state and its citizens by an elected official is fiduciary in nature, a special duty of honest and faithful service. Insuring the performance of this duty is best left to its beneficiaries—the people and government of the state. Indiscriminate intervention by the federal government may dampen not only internal state efforts at reform, but also the special rapport necessary between an elected representative and his constituency. Elected state officials increasingly may gauge their activities by the federal standard rather than that imposed by their constituents. The people, moreover, may rely increasingly on the federal prosecutor to turn the rascals out.[168]

Like other analysts, the author focused on the dramatically expanded and highly visible role of the federal prosecutor, citing well-publicized corruption cases that had increased the stature of prosecutors such as United States Attorney James Thompson in Chicago.[169] "The dangers of this activist approach are twofold: It legitimatizes the United States Attorney as a political actor, and advocates a broad unchecked use of discretion."[170]

Five years later, Andrew Baxter authored a comprehensive study of *Federal Discretion in the Prosecution of Local Political Corruption*.[171] He began by arguing that the statutory interpretation developments discussed earlier in this Article[172] stretched the federal laws far beyond their original

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164. *Id.* at 779.
165. *See* Loomis, *supra* note 155, at 63 (examining expanding federal prosecution powers).
166. *See generally id.*
167. *Id.* at 73.
168. *Id.* at 73–74.
169. *Id.*
170. *Id.* at 78–79.
171. Baxter, *supra* note 4.
172. *Supra* Part II.

intent.[173] He saw both a danger to the federal-state balance in criminal law and a dramatic increase in the discretion and power of individual federal prosecutors.[174] He posited a general "state interest in law enforcement autonomy" which seems "especially compelling in the context of local political corruption."[175] He dealt with the problem of states' inability to prosecute their own officials some of the time.[176] He admitted the possibility, noting that it could hinder the enforcement of both state and federal law, but argued that federal prosecutors are too quick to find state or local lack of capacity.[177] He argued for action at all levels of the federal government to limit prosecutorial discretion.[178]

A pair of important articles in the early 1990s continued the pre-new federalism critique in the context of both the mail fraud statute and Congress's endorsement of its exponential growth in overturning *McNally*. Professor, later Dean, Gregory Howard Williams analyzed *Good Government by Prosecutorial Decree*.[179] He first discussed the problem of prosecutorial discretion in administering a broadly drafted statute.[180] Turning to issues of federalism, he expressed a certain ambivalence based on his perception of the need for the national government to play something of a backstop role.[181] Williams thought any debate over federal intervention should include:

> [C]onsideration of the state's interest in controlling its own political forums. States should have the opportunity to act against local corruption and legitimate themselves before the federal government intercedes. This does not mean there is not an appropriate federal role in controlling corruption nationwide, but states' efforts to police public corruption should be recognized and encouraged. In fact, many states have grappled with thorny questions surrounding bribery and corruption.[182]

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173. *See* Baxter, *supra* note 4, at 322–23, 330–33 (arguing that federal prosecutors stretched the Hobbs Act, the mail fraud statute, the Travel Act, and RICO beyond what the legislature had intended).

174. *See id.* at 323 (contending that "federal prosecutors have enjoyed broad discretion in developing and implementing, unilaterally, federal law enforcement policy").

175. *Id.* at 337.

176. *Id.* at 340.

177. *Id.*

178. *See id.* at 345–76 (offering ways to narrow federal prosecutorial discretion).

179. *See generally* Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137 (1990).

180. *See id.* at 143–44 (noting that federal prosecutors investigated a very low number of mail fraud complaints).

181. *See id.* at 155–56 (contending that the federal government should have some limited role in combating fraud).

182. *Id.* at 156–57.

Williams thus questioned the assumption that states cannot or will not deal with the problem and advocated a federal prosecutorial role that keeps state concerns in the forefront. He predicted an increasing debate about the national role in "establishing ethical standards for the states" and insisted that in any such debate "there is a special need to respect governmental boundaries and limit the intrusiveness of the federal government into state matters."[183] For Williams, as for the other critics, the fact that corruption was involved was an argument for *less* federal involvement.

More recently, Professor Geraldine Szott Moohr offered a particularly trenchant analysis of the same statute, entitled in part *Someone to Watch Over Us*.[184] She discussed issues of drafting, vagueness, and prosecutorial discretion as well as separation of powers problems, given the extensive power placed in the hands of judges and juries.[185] However, she also devoted considerable attention to federalism.[186] She invoked values such as decentralization and government responsiveness to citizens. Under her analysis, the corruption prosecutions impair federalism in several ways. In particular, she discussed their impact on the concept of accountability and on the important value of encouraging maximum state and local government responsiveness to citizen desires.[187] According to Professor Moohr,

> [F]ederal prosecutions for political corruption make state and local officials more accountable to an extrinsic entity, the federal government, than to those who voted for them. An interventionist federal presence encourages citizens to abdicate their responsibility for self-government at the state and local levels. The ultimate result is a diminished demand on state and local legislative and executive branches to control political corruption.[188]

Professor Moohr wrote the article after the decision in *New York v. United States*, enabling her to cite an important early example of the new federalism to bolster her argument on this point. However, her analysis generally assumed that federalism concerns are matters of policy rather than doctrines that derive their strength from a body of binding constitutional law.[189] Indeed, one of the striking aspects of all of the early critiques is the extent to which their authors mounted strong federalism-based arguments without the advantage of

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183. *Id.* at 154.

184. Moohr, *supra* note 40, at 153.

185. *Id.* at 178–83.

186. *Id.* at 171–78.

187. *Id.* at 175.

188. *Id.* (citations omitted).

189. *See id.* at 177–78 (noting that "[c]ourts also routinely reject defenses grounded on the debasement of federalism") (citation omitted).

direct constitutional support. The current Court's new federalism provides that support, thus substantially reinforcing the earlier analyses.

B. The New Federalism: A Constitutional Basis for the Critiques

One of the central themes of this Article is that the national role in bringing corruption prosecutions needs re-examination because of the changed constitutional dynamic the new federalism has engendered. Certainly, one general message of the current new federalism cases is that previously unquestioned assumptions are up for grabs. Why should this not be true for federal prosecutions of state and local officials? Basic concepts from the body of new federalism cases discussed in Part III cast serious doubts on the practice. At this stage of the inquiry, my focus is not on any particular statute but on the broader question of the effect of the constitutional dialogue on the federal anticorruption role in general.

The fundamental structural relationship that the advocates of the new federalism envisage between the national and state governments is captured in the following quote from *The Federalist No. 20*, that Justice O'Connor utilized in *New York*: "[A] sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity."[190] In *New York*, Justice O'Connor used the precepts of Madison and Hamilton to buttress her conclusion that the federal government could not act directly on the state legislature by "commandeering" it.[191] However, the quote catches nicely the broader view of the current majority that, to a remarkable degree, revives the vision of *National League of Cities*.[192]

Justice Kennedy outlined the same vision when he concurred in *U.S. Term Limits, Inc. v. Thornton*,[193] an essentially nationalistic decision that invalidated state imposition of term limits on candidates for Congress.[194] For Kennedy, the case provided an excellent opportunity to demonstrate that federalism works both ways. As he put it, the "Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of

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190. New York v. United States, 505 U.S. 144, 180 (1992) (quoting THE FEDERALIST NO. 20, at 138 (Alexander Hamilton & James Madison) (Clinton Rossiter ed., 1961)).

191. *Id.* at 161.

192. Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

193. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

194. *Id.* (Kennedy, J., concurring).

mutual rights and obligations to the people who sustain it and are governed by it."[195] Building on this view of federalism, one can make a strong argument that the "mutual rights and obligations" between the citizens of each state and their officials include complete power over their qualifications and their job performance. In other words, if a state cannot impose term limits on federal representatives, neither should the federal government establish standards of criminal conduct for governors and mayors. In each case, one "order of government" is determining who can serve in the other.

New York was the Court's first constitutional foray in this direction after *Garcia*. The anticommandeering principle was, understandably, controversial within the Court.[196] The nationalist dissenters recognized it for what it was: a step back towards state immunity from federal regulation.[197] Even if we take the anticommandeering principle in a narrow sense, it argues against the prosecutions. Conceptually, telling state officials what to do is not a big step from the imposition of standards on how they perform their jobs. Either way, federally imposed standards on the state government are at issue, even if conduct is distinguishable from substantive policy. Perhaps the more fundamental point is the notion of state sovereignty reflected in the majority's rejection of commandeering. Here, the inconsistency of the corruption prosecutions is even clearer. An essential part of sovereignty is control of the officials and employees who exercise it. The federal prosecutions can be seen as either taking away that control or creating an awkward sharing of power when the lines should be distinct. In a sense, the federal prosecutions turn the state officials into federal officials.

Another way of bringing the anticommandeering decisions in *New York* and *Printz* to bear is to focus on their emphasis on the issue of accountability. In *Printz*, for example, Justice Scalia invoked the highly plausible scenario in which, "[b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for solving problems without having to ask their constituents to pay for the solutions with higher federal taxes."[198] Again, although the emphasis in discussing accountability is on policy, it carries over to performance. The prosecutions put the federal government in the position of choosing when to ride in on a white horse and take credit for "cleaning up" an egregious governmental situation, while the normal discontent and grousing about incompetent

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195. *Id.* (Kennedy, J., concurring).

196. Printz v. United States, 521 U.S. 898, 939 (1997) (Stevens, J., dissenting).

197. *Id.* at 956–62 (Stevens, J., dissenting) (citing *Garcia* and expressing doubt that "the entire structure of federalism will soon collapse").

198. *Id.* at 930.

or marginally corrupt state and local officials is not directed at the national government.

On a more symbolic level, this Article has already noted the high degree of "respect" that the current majority insists the federal government must show to states. Professor Farber has noted the "reverential" language used in the opinions.[199] A recent example is found in *Federal Maritime Commission v. South Carolina State Ports Authority*.[200] In *Federal Maritime Commission*, Justice Thomas contended that "[w]hile state sovereign immunity serves the important function of shielding state treasuries and thus preserving the States' ability to govern in accordance with the will of their citizens, the doctrine's central purpose is to accord the states the respect owed them as joint sovereigns."[201] The Court has made it clear that while respect is a somewhat symbolic concept, it has teeth in that it opens to question traditional roles of the federal government. The most notable example is the sharp restriction on the availability of federal courts for suits by citizens against their own state for violations of federal law. On a symbolic level, a state's being haled into the courts of a fellow "sovereign" can be seen as a lack of respect. On a more practical level, the Court's decisions call into question an important dimension of the protective role of the national government—a concept that is analyzed at length later in this Article as part of a theoretical justification for the corruption prosecutions.[202]

Notably, many of the Court's decisions curbing the power of Congress under Section 5 of the Fourteenth Amendment have come in the context of attempts to abrogate the states' protection from suit in federal court under the Eleventh Amendment.[203] The Fourteenth Amendment most strongly supports a reversal of the original federal-state balance that the current majority repeatedly cites as integral to its vision of federalism.[204] By developing concepts such as the requirement that the record before Congress demonstrate state inability to protect rights[205] and that federal action must be not only essentially remedial in nature but also congruent and proportional,[206] the Court has placed

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199. Farber, *supra* note 133, at 1135.

200. Fed. Mar. Comm'n v. S.C. State Ports Author., 535 U.S. 743 (2002).

201. *Id.* at 765 (citations omitted). Justice Scalia began his analysis by stating that "dual sovereignty is a defining feature of our Nation's constitutional blueprint." *Id.* at 751.

202. *See infra* subparts VI.A–D.

203. *See, e.g.*, Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 634 (1999) (invalidating the abrogation of state immunity under the Patent Remedy Act).

204. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 453–56 (1976) (discussing impact of Fourteenth Amendment on relationship between federal and state governments).

205. *Fla. Prepaid*, 527 U.S. at 639–645.

206. City of Boerne v. Flores, 521 U.S. 507, 520 (1997) ("There must be a congruence and

serious restrictions on Congress. "Respect" imposes limits on the protective role of the judicial and legislative branches. It is not a large step to extend this analysis to prosecutions of state and local officials brought in federal tribunals by officials of the federal executive branch under statutes passed by Congress.

Thus far, I have focused on the relationship between the national government and the states as a key aspect of the new federalism that calls into serious question the federal prosecutorial role. An additional element of the Court's federalism jurisprudence is, of course, the notion of internal limits on the enumerated powers of the national government. In *Lopez*, Justice Kennedy elaborated on these limits by identifying "areas of traditional state concern" as subjects where federal criminal legislation is suspect.[207] One federal judge has already utilized this reasoning in a decision striking down an anticorruption statute.[208] I think that narrow construction of the relevant statutes is more likely than outright invalidation. However, the notion of limits on granted powers must be factored into the debate on the federal role in prosecuting corruption, as well as into the debate on federal criminal law in general. Certainly, whatever momentum that might have once existed for a broad-based federal anticorruption statute is diminished, if not eliminated, by the constitutional approach of the current Court.[209]

In his *Lopez* concurrence, Justice Kennedy also developed a persuasive analysis of the states' classic laboratory role in the context of novel criminal problems.[210] This concern is particularly relevant in the area of "good government." People do not agree on what constitutes good government, much less on how to achieve it or to deal with bad government. Therefore, national policymakers have been sharply divided between hardline views, which I call the post-Watergate approach,[211] typified by the independent counsel mechanism, and a less draconian treatment of errant public officials, illustrated by civil sanctions for ethics law violations that might be criminally prosecuted.[212] Such fundamental disagreements are an obvious reason to take advantage of the existence of fifty states to experiment with different approaches. In fact, the states have responded creatively to the problem. For example, the large

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proportionality between the injury to be prevented or remedied and the means adopted to that end.").

207. United States v. Lopez, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring).

208. United States v. Sabri, 183 F. Supp. 2d 1145, 1157 (D. Minn. 2002).

209. *See* ABRAMS & BEALE, *supra* note 25, at 268–71 (discussing policy considerations concerning such a statute).

210. *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring).

211. Brown, *supra* note 35, at 751–56.

212. *Id.* at 758–60.

number of state ethics commissions utilize a variety of approaches.[213] Nationalizing the pursuit and punishment of corrupt public officials frustrates experimentation in an area in which it is obviously needed. When the federal sheriff rides in with a one-size-fits-all approach to political corruption, development of alternatives is stifled, if not destroyed.

Building on the work of earlier critics, all the arguments developed in this section make a strong case for the existence of a fundamental inconsistency between the premises of the new federalism and the ongoing prosecutions of state and local officials. Yet, things are not so simple. Obviously, the prosecutions continue. They constitute a paradox that reflects fundamental tensions in the constitutional system. The same Court that is developing the new federalism is well aware of this activity and, at times, has indicated tacit approval. In the next Part, I deal first with the Court's recent anticorruption precedents and their apparently ambiguous message. The analysis then turns to a different body of precedent—the patronage decisions extending from 1976 to 1996—and finds surprising support for a federal anticorruption role.

V. Corruption, Patronage, and the Rehnquist and Burger Courts: Support for a National Role?

A. The State and Local Corruption Cases in the Supreme Court

Although the new federalism has flowered under the Rehnquist Court, the seminal case is *National League of Cities*,[214] decided in 1976 when Chief Justice Warren Burger was pointing the Court in a more federalistic direction. Since 1984, the Court has reviewed five of the corruption prosecutions that I view as in tension with that thrust.[215] The precedential value of these cases is uncertain. One case was rendered moot by a statutory change.[216] A second was overturned by Congress.[217] A third case was implicitly qualified by a fourth.[218] Still, the decisions are important. One majority opinion and two

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213. *E.g.*, Jon Lender, *Firm Settles Ethics Case: To Pay $5 Million in Historic Accord*, THE HARTFORD COURANT, July 4, 2001, at A1, *available at* 2001 WL 4572676.

214. Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

215. Salinas v. United States, 522 U.S. 52 (1997); Evans v. United States, 504 U.S. 255 (1992); McCormick v. United States, 500 U.S. 257 (1991); McNally v. United States, 483 U.S. 350 (1987); Dixson v. United States, 465 U.S. 482 (1984).

216. The federal program bribery statute, discussed *infra* section VII.A.5, rendered unnecessary the analysis in *Dixson*.

217. For a discussion of the overturning of *McNally*, see *supra* notes 37–41 and accompanying text.

218. For a discussion of the effect of *Evans* on *McCormick*, see *infra* notes 276–96 and accompanying text.

dissents raised the federalism issues.[219] The Court could hardly have been unaware of them. I am inclined to read the cases as an endorsement, however muffled, of the federal role.

The Court's only explicit reference to the federalism-based objections to the prosecutions is a phrase in *McNally v. United States*.[220] *McNally* involved a mail fraud prosecution of a state politician for a scheme that allowed a fictitious insurance agency to receive a portion of the commissions on insurance purchased by the state.[221] The convictions were based on the widely accepted theory that "the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government."[222] The lower federal courts had developed the "honest services" doctrine in part because the statute prohibited schemes or artifices "to defraud" or "for obtaining money or property by means of false or fraudulent premises, etc."[223] Honest services of public officials were viewed as a form of intangible right protected by the general language "to defraud."

McNally put an abrupt end to the honest services doctrine.[224] The majority viewed the matter primarily as one of statutory construction, employing the concept of lenity in noting that "[t]he Court has often stated that where there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language."[225] Thus, the Court held, fraud only included "money or property" and the intangible right to honest services did not constitute property.[226] Federalism concerns bolstered this result. Apart from the ambiguous "outer boundaries" of the statute, the majority expressed its concern about a construction that "involves the Federal Government in setting standards of disclosure and good government for local and state officials."[227] Nonetheless, the limits were not presented as constitutional. Congress, the majority said, could speak more clearly, presumably reinstating the doctrine.[228]

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219. They were discussed briefly in the *McNally* opinion and the dissents in *Dixson* and *Evans*.

220. McNally v. United States, 483 U.S. 350 (1987).

221. *Id.* 352–53.

222. *Id.* at 355.

223. 18 U.S.C. § 1341 (2000). *See* ABRAMS & BEALE, *supra* note 25, at 131–33 (discussing development of doctrine).

224. According to Professor Kurland, "the decision, which overturned nearly twenty years of appellate court precedents, literally stunned federal prosecutors." Kurland, *supra* note 34, at 400 (footnote omitted).

225. *McNally*, 483 U.S. at 359–60 (citations omitted).

226. *Id.* at 356–59.

227. *Id.* at 360.

228. *Id.* According to the majority, "[i]f Congress desires to go further, it must speak more

Justice Stevens, in dissent, relied in part on the well-worn argument that Congress's goal was to defend the "integrity of the Postal Service."[229] He noted the broad language of the statute and expressed his strong support for the construction that had developed in the lower courts.[230] Particularly important for purposes of this Article was his explicit acceptance of the use of the postal power to further a general right on the part of citizens "to an honest government, or to unbiased public officials."[231] What is surprising about Stevens's dissent is that Justice O'Connor joined it. *McNally* seems part of the effort by those who dissented in *Garcia*,[232] including Justice O'Connor, to rehabilitate the concept of state immunity from federal regulation that was lost when *Garcia* overruled *National League of Cities*. *McNally* is a small step toward one of the major decisions in the development of process federalism as one vehicle to this rehabilitation: Justice O'Connor's opinion in *Gregory v. Ashcroft*,[233] which used federalism-based statutory construction to broaden the states' exemption from the Age Discrimination in Employment Act.[234] Perhaps this major architect of the new federalism did not see *McNally* as an important federalism case.

In terms of the thrust of Rehnquist Court precedent, *McNally* can be read as supporting the federalistic opposition to federal prosecution of state and local corruption. However, this reasoning did not play a major role in the decision. More importantly, Congress overturned it a year later. For purposes of mail and wire fraud, "the term scheme or artifice to defraud includes a scheme or artifice to deprive another of the intangible right of honest services."[235] The legislative materials suggest that at least some members of Congress saw *McNally* as not just incorrect statutory construction but also as a misunderstanding of the broad scope of the federal role in prosecuting corruption.[236]

Dixson v. United States[237] and *Salinas v. United States*[238] point in a nationalist direction. *Dixson* involved kickbacks received by officials of the

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clearly than it has." *Id.*

229. *Id.* at 366 (Stevens, J., dissenting).

230. *Id.* at 371–72 (Stevens, J., dissenting).

231. *Id.* at 366 (Stevens, J., dissenting).

232. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985) (Powell, J., dissenting); *id.* at 579 (Rehnquist, C.J., dissenting); *id.* at 580 (O'Connor, J., dissenting).

233. Gregory v. Ashcroft, 501 U.S. 452, 452 (1991).

234. *Id.* at 460–62.

235. 18 U.S.C. § 1346 (2000).

236. *See* ABRAMS & BEALE, *supra* note 25, at 134–35.

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

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

subgrantee under a city's Community Development Block Grant.[239] The government prosecuted them under the federal bribery statute, which applies to "public officials," defined in part as "an officer or employee or person acting for or on behalf of the United States, or any department agency or branch of Government thereof, . . . in any official function, under or by authority of any such department, agency, or branch of Government."[240] The defendants were not federal officials and would probably not even have been considered local officials.[241] However, they played a key role in allocating federal funds awarded to the city and were subject to federal guidelines.[242] Therefore, according to the Court, they had "assumed the quintessentially official role of administering a social service program established by the United States Congress."[243] The majority found that they fit the statute's language of "acting for or on behalf of."[244] It formulated the following test to deal with persons in such circumstances who are not federal officials: whether the person occupies "a position of public trust with official federal responsibilities."[245] The majority found that the defendants easily met the test.[246]

Justices O'Connor, Brennan, Rehnquist, and Stevens dissented.[247] The opinion, written by Justice O'Connor, rested in part on issues of statutory construction and the rule of lenity.[248] Its most interesting aspect is a discussion of federalism and federal grant relationships.[249] She found a principle of "grantee autonomy" present in all grant programs.[250] Grants represent a special form of intergovernmental activity in which governmental grantees do not lose

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239. *See Dixson*, 465 U.S. at 484 (detailing the scheme). For a description of the Community Development Block Grant Program, see George D. Brown, *Federal Funds and Federal Courts—Community Development Litigation as a Testing Ground for the New Law of Standing*, 21 B.C. L. REV. 525, 537–44 (1980).

240. 18 U.S.C. § 201(a)(1) (2000).

241. *See Dixson*, 465 U.S. at 490 (noting that there is "no basis for claiming that petitioners were officers or employees of the United States").

242. *See id.* at 484 (noting that petitioner was hired to provide "general supervision" of administration of federal block grant funds).

243. *Dixson*, 465 U.S. at 497.

244. *Id.* at 500.

245. *Id.* at 497.

246. *See id.* at 496–97 ("We have little difficulty concluding that these persons served as public officials for the purposes of section 201(a)."). The majority stressed the defendants' operational responsibility for the grant program and their obligations under federal guidelines.

247. *Id.* at 501 (O'Connor, J., dissenting).

248. *Id.* at 501–02 (O'Connor, J., dissenting).

249. *See id.* at 507–11 (O'Connor, J., dissenting) (describing differing levels of federal control over grants).

250. *Id.* at 508–10 (O'Connor, J., dissenting).

their status as state and local governments. What she referred to as "grantee autonomy"[251] should be especially strong in a decentralized block-grant program.[252] Thus Justice O'Connor was able to invoke "principles of federalism inherent in our constitutional system"[253] and "proper respect for the sovereignty of States."[254]

These federalism arguments would be somewhat weaker in the case of a categorical grant. These grants employ extremely precise conditions to make the recipient, governmental or not, act as something close to an agent of the federal government.[255] The spending power thus allows Congress to "deputize" state and local governments in a way that it could not do directly, at least under current law.[256] However, block grants reintroduce the elements of grantee choice and discretion. The goal of these instruments is to take advantage of the sovereign capacity of recipients to make their own expenditure choices. Thus, Justice O'Connor's federalism points have considerable force apart from statutory construction issues. However, they deal with the grant relationship, and who is a federal official, rather than treating federal prosecution of state and local officials as a distinct problem. As for the majority, it saw no federalism-based objections to prosecution of the local subgrantees under federal law.

Dixson's reasoning, if not its result, was superseded by passage of the federal program bribery statute in 1984.[257] This statute applies to "agents" of all entities that receive more than $10,000 in federal funds in one year.[258] Agents are subject to federal prosecution for a number of crimes, including bribery, if the matter the bribe involves has a value of $5,000 or more.[259] Thus, if a city receives a $100,000 law enforcement grant, and the building inspector takes a $3,000 bribe to expedite a $50,000 addition to a dwelling, he or she can be prosecuted under the act. Such uses of the spending power to reach crimes far removed from any apparent federal interest raise substantial constitutional

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251. *See id.* (O'Connor, J., dissenting) (describing block grant).

252. *Id.* at 509 (O'Connor, J., dissenting).

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

254. *Id.* at 510 (O'Connor, J., dissenting).

255. *See* George D. Brown, *Beyond the New Federalism—Revenue Sharing in Perspective*, 15 HARV. J. ON LEGIS. 1, 19–20 (1977) (describing different forms of grants and extent of federal control in categorical context).

256. Dixson v. United States, 465 U.S. 482, 510 (1984) (O'Connor, J., dissenting). Justice O'Connor argued that the Court should not normally interpret federal grant programs to "deputize" states. *Id.*

257. 18 U.S.C. § 666 (2000).

258. *Id.* at § 666(b).

259. *Id.* at § 666(a)(i)(A)(i).

questions discussed below.[260] *Salinas v. United States*[261] upheld a conviction under the statute in a case in which these questions were not present. Federal funds were used to improve a county jail and to pay for incarceration of federal prisoners.[262] The sheriff and deputy took bribes from one of the federal prisoners for special treatment.[263] A unanimous Court upheld the deputy's conviction.[264] The Court found the federal interest clear, while leaving open the question of the statute's application in cases of more attenuated federal interest.[265] It also noted that the statute addressed directly the issues debated in *Dixson* and removed any doubts about such prosecutions.[266] *Dixson* and *Salinas* involve wrongdoing closely related to federal funds. Each thus presents a specific federal interest rather than any general federal concern with corruption.

Perhaps *McNally* points in a federalistic direction, while *Dixson* and *Salinas* are more nationalistic. A comparison of two Hobbs Act cases decided during the same period provides further support for the latter position. *McCormick v. United States*[267] seemed an initial setback. The federal government prosecuted a state legislator for extorting campaign contributions.[268] He had played an important role in advancing the legislative interests of a group of doctors.[269] During a campaign, he informed their lobbyist that "he had not heard anything from [them]."[270] Cash payments soon followed these statements.[271] The government prosecuted him under that portion of the Hobbs Act that forbids extortion "under color of official right."[272] The Supreme Court reversed the legislator's conviction in part out of concern that the court of appeals' construction of the Act would permit prosecution for legitimate campaign contributions.[273] The opinion develops a frequent theme of the

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260. *See infra* notes 710–31 and accompanying text.

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

262. *Id.* at 54.

263. *Id.* at 55.

264. *Id.* at 54.

265. *See id.* at 60–61 (noting issues left undecided).

266. *See id.* at 58 (explaining effect of statute).

267. McCormick v. United States, 500 U.S. 257 (1991)

268. *Id.* at 261.

269. *See id.* at 259–260 (describing the legislator's activities).

270. *Id.* at 260.

271. *Id.*

272. 18 U.S.C. § 1951(b)(2) (2000).

273. *See McCormick*, 500 U.S. at 271–74 (stating that an alternative ground for reversal was that the lower court "affirmed the conviction on legal and factual grounds that were never submitted to the jury").

current Court: the importance of private financing in political campaigns and the role of "campaign promises" in generating that funding.[274] The majority viewed "under color of official right" extortion as requiring an explicit *quid pro quo*; the dissent would have permitted an implicit one, thus facilitating prosecution.[275]

Most of the ground lost by the prosecution in *McCormick* was made up the following year. In *Evans v. United States*,[276] the Court accepted a broad reading of the Act's requirement of "inducement"[277] and appeared also to accept the notion of an implicit *quid pro quo*.[278] These two aspects of the case are significant as an apparent retreat from the strict approach of *McCormick*,[279] although Hobbs Act prosecutions still present uncertainties.[280] Two other aspects of the decision are particularly relevant for this Article. First, the plurality took note, with apparent approval, of the extensive use of the Hobbs Act in political corruption prosecutions.[281] It specifically referred to the prosecution of a state governor as well as several county officials and political leaders.[282]

The second significant dimension of *Evans* is that Justice Thomas's dissent[283] contains the only general discussion in any Supreme Court opinion of the tension between principles of federalism and federal corruption prosecutions of state and local officials.[284] His starting point was an argument for a narrow construction of the "under color of official right" prong of extortion.[285] He, Chief Justice Rehnquist, and Justice Scalia contended that it should only apply when the official claimed a right to the extorted money, such as an

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274. *See, e.g., id.* at 272 (noting that "[m]oney is constantly being solicited on behalf of candidates"); Buckley v. Valeo, 424 U.S. 1, 21 (1976) (noting "the important role of contributions in financing political campaigns").

275. *See McCormick*, 500 U.S. at 282 (Stevens, J., dissenting) (noting that "there is no statutory requirement that illegal agreements . . . be in writing").

276. Evans v. United States, 504 U.S. 255 (1992)

277. *See id.* at 258–59 (endorsing a broad definition). The majority opinion was written by Justice Stevens, who had dissented in *McCormick*.

278. *See id.* at 278 (Kennedy, J., concurring) (noting that "[t]he quid pro quo . . . is the essence of the offense").

279. *See* ABRAMS & BEALE, *supra* note 25, at 212–16 (discussing the change from *McCormick*).

280. *See id.* (discussing uncertainties of Hobbs Act prosecutions).

281. *See Evans*, 504 U.S. at 269 (noting that many cases involved important officials).

282. *See id.* at 269 n.22 (noting prosecution of the governor of Oklahoma).

283. *Id.* at 278 (Thomas, J., dissenting).

284. As noted earlier, Justice O'Connor's dissent in *Dixson* was limited to the grant context. *Supra* notes 247–56 and accompanying text.

285. Evans v. United States, 504 U.S. 255, 280–85 (1992) (Thomas, J., dissenting).

unlawful fee for services.[286] Justice Thomas relied primarily on the history of the crime of extortion.[287] He also criticized the majority for choosing "not only the harshest interpretation of a criminal statute, but also the interpretation that maximizes federal criminal jurisdiction over state and local officials."[288]

Justice Thomas's federalism analysis began by noting the extraordinary increase in use of the Hobbs Act as "the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws—acts of public corruption by state and local officials."[289] He traced the development of these prosecutions in the lower courts and quoted the well-known reference to the Hobbs Act, by a United States Attorney, as "a special code of integrity for public officials."[290] At this point in the opinion, under today's federalism doctrine, one would have expected an analysis of the serious constitutional problems such prosecutions present, particularly for Justice Thomas.

However, he was writing under the shadow of *Garcia* and before the new federalism had achieved its current doctrinal force. He even cited *Garcia* in conceding that "Congress enjoys broad constitutional power to legislate in areas traditionally regulated by the States—power that apparently extends even to the direct regulation of the qualifications, tenure, and conduct of state government officials."[291] Thus, instead of constitutional limits, he invoked *Gregory v. Ashcroft* and its federalism limits based on clear statement in "traditionally sensitive areas."[292] Justice Thomas clearly saw the federalism "problem" that federal corruption prosecutions pose. In applying *Gregory*, he referred not only to its general language on state sovereignty[293] but also to Congress's "extraordinary power to regulate state officials."[294] These views could lead to reservations about prosecutions under other statutes, whether of constitutional or statutory magnitude.[295] His dissent is important. Still, it was

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286. *See id.* at 285–86 (disagreeing with broader interpretation of the plurality).

287. *Id.* at 284–86 & n.4.

288. *Id.* at 287.

289. *Id.* at 290.

290. *Id.* at 291 (citing United States v. O'Grady, 742 F.2d 682, 694 (2d Cir. 1984) (en banc) (quoting letter from Raymond J. Dearie, United States Attorney for the Eastern District of New York)).

291. *Id.*

292. Evans v. United States, 504 U.S 255, 292 (1992) (Thomas, J., dissenting) (citing Gregory v. Aschcroft, 501 U.S. 452 (1991)).

293. *See id.* (noting that states retain substantial sovereign powers).

294. *Id.*

295. *See infra* subpart VII.B (discussing possible impact of new federalism on corruption prosecutions).

a dissent. The majority and concurring Justices did not even discuss federalism problems.[296] A fair reading of *Evans* is as an endorsement of the federal role and as a stronger positive statement than the negative of *McNally*. Thus, the cases that deal directly with federal prosecution of state and local officials seem to support it more than to cast doubt upon it. They certainly do not apply new federalism analysis. They do not even apply old federalism to suggest a problem with the practice along the lines of the critique articulated above. Moreover, there is another body of precedent—the "patronage" cases decided between 1976 and 1996—that lends further support to the prosecutions. The patronage cases are not normally viewed as relevant to federal prosecution of state and local officials.[297] However, they suggest the presence, alongside the recent emphasis on federalism, of nationalist values within the legal system that argue in favor of a protective national role generally, and deterrence of official corruption in particular. Because of their importance, I discuss them extensively in the next subpart.

B. The Patronage Cases: Stretching Both Patronage and the First Amendment to Reach Corruption

1. Overview

Most people regard patronage as bad.[298] Still, it came as a surprise when the Supreme Court declared patronage was unconstitutional. In the 1976 case of *Elrod v. Burns*[299] the Court held that most patronage dismissals—dismissals of public employees based on their political activities or affiliations—violate the employees' First Amendment rights.[300] Subsequent cases reaffirmed *Elrod*,[301] refined its analysis,[302] and extended the First Amendment-based ban to patronage-like practices well beyond the public employment context. In *Board of County of Commissioners v. Umbehr*[303] and *O'Hare Truck Service*,

296. The omission is remarkable, but is consistent with the Court's pattern in these cases.

297. *But see* Moohr, *supra* note 40, at 153–55 (linking corruption and patronage).

298. *See generally* Lydia Segal, *Can We Fight the New Tammany Hall?: Difficulties of Prosecuting Political Patronage and Suggestions for Reform*, 50 RUTGERS L. REV. 507 (1998). Professor Segal discusses possible uses of anti-corruption statutes in prosecutions of patronage. *Id.* at 534–45.

299. Elrod v. Burns, 427 U.S. 347 (1976).

300. *See id.* at 355–60 (developing First Amendment analysis of dismissals).

301. *See* Branti v. Finkel, 445 U.S. 507, 520 (1980) (holding that the tenure of an assistant public defender may not be dependent on political affiliation).

302. *Id.* at 517–520.

303. Bd. of County Comm'rs v. Umbehr, 518 U.S. 668 (1996).

Inc. v. City of Northlake,[304] the Court found First Amendment protection for independent contractors from termination, or similar action, of their contracts by local governments.[305]

The patronage cases represent a significant intrusion by the federal judiciary into the structure and operations of state and local governments begun, ironically, in the same year the Court decided *National League of Cities*.[306] Yet, for twenty years, different majorities of the Court have clung to *Elrod* and its First Amendment foundations.[307] They have done so in the face of substantial criticism from within[308] and without[309] the Court, overt resistance from lower federal courts,[310] and the impossibility of extending First Amendment analysis to many patronage practices.[311] The Court's First Amendment analysis seems incomplete and unconvincing. For example, why should public employees who received their jobs through patronage in the first place be heard to complain about the constitutionality of patronage? If protection from patronage problems really is one of the First Amendment rights of public employees, why did the Court ignore for twenty years its precedents on dismissals of public employees for their speech[312] and then treat those precedents as part of the governing law when it extended *Elrod* to persons who were not public employees?

This lack of fit suggests that more is involved than a First Amendment problem. One way to look at the patronage cases—some of which do not

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304. O'Hare Truck Serv., Inc. v. City of Northlake, 18 U.S. 712 (1996).

305. *Id.* at 720–26.

306. The Court decided both cases in 1976.

307. In the two most recent cases, *Umbehr* and *O'Hare*, the margin was seven-to-two. In terms of numbers, the closest case was the five-to-four decision *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

308. *See, e.g.*, *Umbehr*, 518 U.S. 668, 686–711 (Scalia & Thomas, JJ., dissenting) (arguing the value of patronage and its importance as a governmental interest).

309. *See, e.g.*, Bryan R. Berry, Note, *Donkeys, Elephants, and Barney Fife: Are Deputy Sheriffs Policymakers Subject to Patronage Termination?*, 66 MO. L. REV. 667, 681–82 (2001) (criticizing confused state of Court's doctrine).

310. *See, e.g.*, Susan Lorde Martin, *A Decade of* Branti *Decisions: A Government Official's Guide to Patronage Dismissals*, 39 AM. U. L. REV. 11, 29–31 (1989) (noting Second Circuit's hostility to expanding categories of protected employees). The author states that the court is concerned with "federal intrusion into the essence of local governance." *Id* at 29.

311. The *Elrod* analysis requires an individual right holder to bring a suit. Creation of a special job for a favored politician might not produce plaintiffs with sufficient harm to survive a standing challenge.

312. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), first surfaced in a concurrence and dissent in *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990). *Rutan*, 497 U.S. at 86 (Stevens, J., concurring); *id.* at 99 (Scalia, J., dissenting).

involve patronage as traditionally defined[313]—is that the Court sought to call into question a range of corrupt practices.[314] The First Amendment provided a vehicle for condemning patronage in specific instances. That condemnation gave the Court the opportunity to signal its views on both patronage and political corruption in general. What emerges from the cases is a vision of what a legitimate government ought to be: neutral and nonpartisan in its operation, free from corrupt practices, and selected by a political process that avoids such evils as "entrenchment." In short, the cases are about "good government."

2. Elrod: *Shocked to Find Patronage in Cook County!*

Elrod v. Burns seems a weak rock upon which to build a major doctrine. Justice Brennan wrote for a plurality of three.[315] Two other Justices joined in the result, but not in his "wide-ranging opinion."[316] Three Justices dissented, sounding themes that would be repeated for twenty years.[317] However, Justice Brennan's analysis has remained the touchstone for cases that go far beyond the straightforward fact pattern of *Elrod*. That case arose out of a change in administrations in Cook County, Illinois.[318] The newly elected Democratic sheriff replaced non-civil-service Republicans with Democrats.[319] Some discharged Republicans sued, claiming violation of their First Amendment rights.[320] Justice Brennan seized on the case as presenting "but one form of the general practice of political patronage."[321] He broadly defined patronage to include not only jobs but also "lucrative" contracts, special treatment in public services, and other plums.[322] He also made clear that he did not like it, linking it to Nazi Germany and to corruption here at home.[323]

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313. The independent contractor cases do not involve "the practice where politicians reward their supporters with government jobs and promotions in return for political backing." Segal, *supra* note 298, at 507. *But see id.* at 507 n.11 (discussing the possibility of broader definitions that would include contracting).

314. *See infra* sections V.B.6–9 (discussing patronage cases).

315. Elrod v. Burns, 427 U.S. 347, 349 (1976).

316. *Id.* at 374 (Stewart, J., concurring).

317. *Id.* at 375 (Burger, C.J., dissenting); *id.* at 376 (Powell, J., dissenting).

318. *Id.* at 349–52.

319. *Id.* at 349–50.

320. *Id.* at 349–51.

321. *Id.* at 353.

322. *Id.*

323. *Id.* at 353–54.

Patronage might be evil, but was it unconstitutional? Justice Brennan answered with a ringing "yes."[324] He viewed the problem as one of coerced belief and association, a classic First Amendment violation.[325] He also suggested problems of a broader scope. Patronage can harm "the free functioning of the electoral process,"[326] and "tip it in favor of the incumbent party."[327] However, his emphasis was on the individual rights of association and belief.[328] Justice Brennan saw a system in which retaining one's job depends on one's party affiliation as analogous to coerced orthodoxy, such as prohibiting public employment of members of certain groups,[329] or requiring an "oath denying past affiliation with Communists."[330] Thus, he viewed patronage as a form of condition: a non-civil-service employee's beliefs had to be acceptable to the ruling political party. This amounted to the government seeking to produce indirectly a result it could not command directly.[331] Such an attempt triggered the unconstitutional condition doctrine.[332] Justice Brennan brushed aside any notion that the plaintiffs waived their rights by getting their jobs through patronage in the first place.[333]

Because core First Amendment rights were at stake, the practice needed to survive strict scrutiny and such associated doctrines as narrowly tailored means to advance a government interest of vital importance.[334] Justice Brennan first dismissed the possible force of any significant interest in employee effectiveness or accountability.[335] He declined to equate efficiency with party affiliation and cited merit systems as a less intrusive means of ensuring accountability.[336] A second purported governmental interest was harder to deal with: the need for "political loyalty of employees" to ensure that disconcerted employees did not undercut the elected officials' policies.[337] Justice Brennan conceded the point, but he limited its application to validating

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324. *Id.* at 373.

325. *See id.* at 355–57 (outlining costs of patronage dismissals).

326. *Id.* at 356.

327. *Id.*

328. *See id.* (stating that "political belief and association" constitute the core of the activities protected by the First Amendment).

329. *See id.* (quoting Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

330. *See id.* at 358 (citing Wieman v. Updegraff, 344 U.S. 183 (1952)).

331. *Id.* at 359.

332. *See id.* at 360–61 (citing Perry v. Sinderman, 405 U.S. 593, 597 (1972)).

333. *Id.* at 359–60 n.13.

334. *Id.* at 362–64.

335. *Id.* at 364–66.

336. *See id.* at 364–67 (doubting political affiliation as motive for poor performance). This portion of the opinion shows his deep suspicion of "partisan" public administration.

337. *Id.* at 367.

patronage dismissals in "policymaking positions."[338] Thus, despite its evils, the opinion would permit some patronage.[339]

The most significant governmental interest advanced—and the one that most sharply reveals the Justices' differing views of patronage—was the key role of patronage in maintaining political parties and thus in "preservation of the democratic process."[340] Justice Brennan met the argument head-on by recognizing the goal of preserving the democratic process as a significant interest, but arguing that patronage dismissals may well impede that goal.[341] Parties, he insisted, can function well without patronage.[342] More importantly, patronage (and patronage dismissals) creates the danger of entrenchment and impairs individual rights of freedom and association.[343]

As a whole, Justice Brennan's opinion extends well beyond the issue in the case: whether patronage dismissals violate First Amendment rights. His analysis is an indictment of patronage in general.[344] It not only threatens good administration, but it strikes at democracy.[345] He views the case as presenting the "evil of influence,"[346] which the Court in *Buckley v. Valeo*[347] had invoked to justify both limits on campaign contributions and broad disclosure rules.[348]

However, Brennan's views were those of only three Justices. The two concurring Justices rejected "the Court's wide-ranging opinion," although they were apparently willing to invalidate patronage dismissals of "nonpolicy making, nonconfidential government employee[s]."[349] The principal dissent, written by Justice Powell, saw patronage in a wholly different light.[350] He described it as "a practice as old as the Republic" with numerous benefits.[351] He defended it not only as strengthening parties[352] but also as a means of broadening the base of political participation, thus "increasing the volume of

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338. *Id.*

339. *Id.*

340. *Id.* at 368.

341. *Id.* at 369.

342. *Id.* at 368–69.

343. *Id.* at 369–70.

344. *Id.* at 372.

345. *Id.* at 369–70.

346. *Id.* at 370 n.25.

347. Buckley v. Valeo, 424 U.S. 1 (1976).

348. *See* Elrod v. Burns, 427 U.S. 347, 370 n.25 (1976) (noting that "[p]atronage dismissals involve the evil of influence, whose very need for elimination justified the contribution and disclosure provisions in *Buckley*").

349. *Id.* at 378 (Stewart, J., concurring).

350. *Id.* at 376 (Powell, J., dissenting).

351. *Id.* (Powell, J., dissenting).

352. *Id.* at 382–86 (Powell, J., dissenting).

political discourse."[353] Justice Powell also noted the role of patronage in advancing the social status of minority groups.[354] He apparently accepted the plurality's conditional employment analysis,[355] but distinguished patronage from governmental attempts to prescribe or eliminate political beliefs.[356] Thus, although largely accepting the plurality's First Amendment mode of scrutiny,[357] he found a sufficiently important state interest.[358] For Justice Powell, the whole point of patronage is to promote "vigorous ideological competition in the political marketplace."[359]

One comes away from *Elrod* with considerable uncertainty. The case might be an attempt to reach out beyond dismissals to call into question a broad range of patronage practices. Indeed, it might be a step toward establishing good government as an enforceable right. On the other hand, only two Justices joined Justice Brennan. Certainly, Justice Powell's strong defense of patronage makes the existence of an important state interest look like one of those questions that could go either way. The constitutional compulsion to condemn it seems weak, particularly at the behest of individuals who have benefitted from the practice. These are not the only analytical problems with *Elrod*. Thus, the first post-*Elrod* question was whether and how the decision would survive.

3. Branti: *Refining (and Reaffirming)* Elrod

One can view the Court's 1980 decision in *Branti v. Finkel*[360] in two ways. On the one hand, the six-member majority treated *Elrod* as unquestionably good law,[361] even appearing to broaden its scope by restricting the test for

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353. *Id.* at 379 (Powell, J., dissenting).

354. *See id.* at 385 n.6 (Powell, J., dissenting) (stating that "each first appointment given a member of any underdog element is a boost in that element's struggle for social acceptance").

355. *See id.* at 381–82 (Powell, J., dissenting) (stating that "[t]he question is whether it is consistent with the First and Fourteenth Amendments for a State to offer some employment conditioned, explicitly or implicitly, on partisan political affiliation and on the political fortunes of the incumbent officeholder").

356. *See id.* at 387–88 (Powell, J., dissenting) (explaining how patronage differs from other contexts).

357. *See id.* at 381 (Powell, J., dissenting) (noting use of *Buckley* standard in First Amendment analysis).

358. *See id.* at 387 (Powell, J., dissenting) (concluding that "patronage hiring practices sufficiently serve important state interests, including some interests sought to be advanced by the First Amendment, to justify a tolerable intrusion on the First Amendment interests of employees or potential employees").

359. *Id.* at 388 (Powell, J., dissenting).

360. Branti v. Finkel, 445 U.S. 507 (1980).

361. *See id.* at 513–18 (referring to *Elrod* as authority for the Court's ruling).

permissible patronage dismissals.[362] On the other hand, Justice Stevens's opinion for the Court is void of any discussion of the evils for the democratic process that Justice Brennan found lurking in patronage.[363] The facts in *Branti* were somewhat similar to *Elrod*.[364] A newly elected Democratic county public defender began terminating the assistants of his Republican predecessor.[365] The assistants invoked *Elrod* and won in the lower courts.[366] Apart from a feeble attempt to distinguish that case, the defendant's principal argument in the Supreme Court was that *Elrod* supported him. The public defender argued that the plaintiffs were "policymaking, confidential employees"[367] whom he could, under *Elrod*, dismiss on partisan grounds.[368] Justice Stevens, for the Court, repeated the prior First Amendment unconstitutional condition analysis and seemed to narrow the exceptions to it.[369] Whether a public employee can be dismissed on partisan grounds does not depend on policymaking or confidential status.[370] "[R]ather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[371] The *Branti* opinion noted the potentially broad scope of patronage practices, but stated that they were not then before the Court, nor had they been in *Elrod*.[372] The Court thus left the larger, good government issues of 1976 for another day or, perhaps, quietly put them to rest for good.

In dissent once again, Justice Powell criticized the majority for extending *Elrod* by narrowing the category of permitted dismissals.[373] In Justice Powell's view, the decision was another "evisceration of patronage

362. *See id.* at 518 (stating that "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved").

363. *See id.* at 508–20 (containing the opinion of the Court).

364. *Compare id.* at 509–10 (dealing with newly appointed public defender replacing Republican assistants) *with* Elrod v. Burns, 427 U.S. 347, 349–52 (1976) (addressing a newly elected Democratic sheriff's dismissal of Republican, non-civil servants).

365. *See Branti*, 445 U.S. at 509–10 (outlining facts of case)

366. *See id.* at 510–11 (reviewing lower court's disposition of case).

367. *Id.* at 518.

368. *Id.*

369. *See id.* at 513–18 (quoting Justice Brennan's analysis from *Elrod*, which analyzes the impact of a political patronage system and states that political patronage imposed an unconstitutional condition upon the receipt of a public benefit).

370. *See id.* at 518 (noting that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular person").

371. *Id.*

372. *See id.* at 513 n.7 (stating that, in this case and in *Elrod*, the only practice at issue was the dismissal of public employees for partisan reasons).

373. *Id.* at 523–27 (Powell, J., dissenting).

practices."[374] He contended that the Court compounded the *Elrod* mistake by formulating a test which excluded dismissal of confidential employees[375] and limited the dismissal of policymakers.[376] Powell also put forth an argument that would become one of the main themes of post-*Elrod* criticism of the patronage cases: the Court's standard was so "vague and sweeping" that it would create substantial uncertainty for whomever had to apply it.[377] Much of Justice Powell's dissent restates his earlier views about the importance of patronage to political parties and their essential role in the political process.[378] He saw *Branti* as "decreas[ing] the accountability and denigrat[ing] the role of our national political parties."[379] Formulating an argument that would also become central to Justice Scalia's later attacks on the patronage cases, Justice Powell contended that weakening parties would strengthen special interest groups, an undemocratic and destabilizing result.[380]

Perhaps the most interesting aspect of Justice Powell's dissent in *Branti* is his development of federalism and related concerns, which Chief Justice Burger had alluded to in a brief dissent in *Elrod*.[381] Fearing the "downgrading" of states, Chief Justice Burger invoked *National League of Cities*[382] and the Tenth Amendment to argue that patronage is an example of a state's choice about how to manage its government.[383] He had also presented the issue as a matter of judicial intrusion into legislative and executive matters.[384] Echoing the latter argument, Justice Powell criticized *Branti* as the formulation of "a constitutionalized civil service standard."[385] He also saw the decision as one that "well may impair the right of local voters to structure their government."[386]

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374. *Id.* at 521 (Powell, J., dissenting).

375. *Id.* at 523 (Powell, J., dissenting).

376. *Id.* (Powell, J., dissenting).

377. *See id.* at 524 (Powell, J., dissenting) (criticizing the standard articulated by the majority).

378. *See id.* at 526–33 (Powell, J., dissenting) (identifying and weighing the governmental interest that patronage serves).

379. *Id.* at 531 (Powell, J., dissenting).

380. *Id.* at 532 (Powell, J., dissenting).

381. *See* Elrod v. Burns, 427 U.S. 347, 375–76 (1976) (Burger, C.J., dissenting) (discussing the impact of the Court's decision on the power of the states).

382. *Id.* (Burger, C.J., dissenting).

383. *See id.* (Burger, C.J., dissenting) (stating that the Court should not disturb the choice of state legislatures to use patronage).

384. *See id.* at 375 (Burger, C.J., dissenting) (describing the decision as "a significant intrusion into the area of legislative and policy concerns, the sort of intrusion Mr. Justice Brennan has recently protested in other contexts").

385. Branti v. Finkel, 445 U.S. 507, 521 (1980) (Powell, J., dissenting).

386. *Id.* at 532 (Powell, J., dissenting).

Thus, *Branti* may simply be a refinement of *Elrod*. True, the *Branti* test seems to make patronage dismissals of public employees more difficult, but the Court limited its decision to that narrow context. However, the key significance of *Branti* is the possible emergence of a solid majority in support of *Elrod* and its constitutional analysis. Why stop with dismissals? The acceptance of Justice Brennan's views suggests the possibility of a broader attack on patronage and, indeed, on corruption itself.

4. Rutan: *Continuing and Broadening the Debate*

The 1990 decision in *Rutan v. Republican Party of Illinois*[387] dropped the other shoe by extending the *Elrod-Branti* analysis to patronage hirings.[388] At the same time, the five-to-four split exposed the uncertain status of the antipatronage position, even as the majority Justices hinted at broader applications. *Rutan* arose out of an apparent attempt by the Republican governor of Illinois to convert that state's civil service system into a patronage system.[389] A hiring agency first screened all vacancies in state employment.[390] The agency then submitted its choice for approval to the Governor's Office of Personnel.[391] These approvals extended to promotions, transfers, recalls and new hires.[392] Plaintiffs, appealing from a variety of negative actions, asserted that a Republican party connection was necessary for the Office of Personnel to issue an affirmative decision.[393]

Justice Brennan, for the majority, had little difficulty applying *Elrod-Branti* to promotions, transfers, and recalls. He found potentially significant personal costs, like those of a dismissal, at stake in such actions.[394] Illinois's failure to hire because of belief and association also burdened the plaintiffs' First Amendment rights.[395] Justice Brennan found the unconstitutional condition cases directly relevant to the denial of a valuable benefit such as

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387. Rutan v. Republican Party of Ill., 497 U.S. 62 (1990).

388. *See id.* at 65 (holding that promotion, transfer, hiring, and recall decisions involving low-level public employees may not be based on party affiliation).

389. *See id.* at 66 (stating the facts of the case).

390. *See id.* (stating that governor created the Office of Personnel specifically for this screening process).

391. *Id.*

392. *Id.*

393. *Id.* at 66–68.

394. *See id.* at 75 (stating that the First Amendment extends beyond dismissal because "there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy").

395. *Id.* at 77.

employment.[396] Thus, what had seemed the big, unanswered question, turned out not to be very difficult after all.

Justice Brennan hints in *Rutan* that more might be at stake than the claims of individual jobholders. He invoked the risk of "entrenchment" as a means of curtailing First Amendment freedoms[397] and impairing the electoral process.[398] However, it is the clash between Justice Scalia's dissent and Justice Stevens's concurrence in response to that dissent that reveals both the depth of the divide on patronage and the presence of broader issues.[399] Part of Justice Scalia's dissent is a restatement of Justice Powell's earlier arguments. In *Rutan*, Justice Scalia stated the importance of patronage for maintaining the political parties—"the forges upon which many of the essential compromises of American political life are hammered out"[400]—and the danger that the Court's decision would hasten the decline of political parties to the benefit of special interest groups.[401] Justice Scalia admitted the seamy side of patronage such as "financial corruption" and "salary kickbacks," but viewed the advantages of patronage as sufficiently strong to survive a properly framed balancing test and to make the whole question one of policy to be decided by the legislature rather than the judiciary.[402] Justice Stevens, in his concurrence, seized on these admitted weaknesses to place patronage squarely at the center of corruption in American life.[403] Justice Stevens also decried the impact of patronage on the electoral process and found it "at war with the deeper traditions of democracy embodied in the First Amendment."[404]

Justice Scalia's dissent in *Rutan* offered two other critiques of post-*Elrod* developments that are important to appreciating the vulnerability of that line of authority. He raised the previously unaddressed question of why strict scrutiny was even the right standard. At least since *Pickering v. Board of*

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396. *See id.* at 78 (stating that conditioning hiring on political beliefs is "plainly" an unconstitutional condition).

397. *See id.* at 70 (quoting *Elrod v. Burns*, 427 U.S. 347, 368 (1976), and stating that patronage can result in the entrenchment of one or a few parties to the exclusion of others).

398. *See id.* (stating that the democratic process functions as well or better without patronage).

399. *Compare id.* at 92–115 (Scalia, J., dissenting) (arguing that judges who are not politically elected should not be making decisions about patronage for government jobs) *with id.* at 79–92 (Stevens, J., concurring) (defending the Court's recent decisions).

400. *Id.* at 106 (Scalia, J., dissenting).

401. *See id.* at 107–108 (Scalia, J., dissenting) (arguing that a system relying heavily on the parties has a stabilizing effect and deters end runs by splinter groups and special interests).

402. *Id.* at 104–09, 113–14 (Scalia, J., dissenting).

403. *Id.* at 89 n.4 (Stevens, J., concurring).

404. *Id.* at 92 (Stevens, J., concurring).

Education,[405] decided in 1968, the Court had subjected the government's ability to take action against its employees because of their speech to a less vigorous standard.[406] Why not, Justice Scalia argued, apply the same looser analysis to adverse personnel action based on political affiliation?[407] The absence of any sustained discussion of *Pickering* in previous majority opinions does seem a serious omission. A second problem, raised earlier by Justice Powell, is the imprecision in the *Branti* test for determining when affiliation-based dismissals are appropriate and the test's apparent restriction of *Elrod* in this respect.[408] Justice Scalia had great fun demonstrating the "shambles"[409] of post-*Branti* law by citing apparently conflicting lower court decisions.[410] Indeed, these cases are the tip of an iceberg that includes not only uncertainty but also thinly veiled opposition to the Court's approach.[411] Still, Justice Scalia did not prevail. As of 1990, the law seemed settled, even if by a five-to-four decision, that a state or local government could not base personnel decisions on political affiliation unless it could demonstrate that "party affiliation is an appropriate requirement for the effective performance of the public office involved."[412]

5. Umbehr *and* O'Hare: *Extending Patronage Analysis Beyond Patronage*

In 1996 the Court returned to the *Elrod* problem in two cases that did not involve public employees. At issue in *Board of County Commissioners v. Umbehr*[413] and *O'Hare Trucking Services, Inc. v. City of Northlake*[414] were politically motivated decisions concerning independent contractors. Although the facts were somewhat similar, the two majority opinions used substantially

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405. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

406. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 98–101 (1980) (Scalia, J., dissenting) (stating that restrictions on speech for nonemployees are judged differently than restrictions on employees).

407. *Id.* at 94–98 (Scalia, J., dissenting).

408. *See id.* at 110–12 (Scalia, J., dissenting) (saying of the Court's current test: "What that means is anybody's guess.").

409. *Id.* at 111 (Scalia, J., dissenting).

410. *See id.* at 111–13 (Scalia, J., dissenting) (stating that the *Branti* test has produced inconsistent and unpredictable results).

411. The conflicting approaches described by Berry, *supra* note 309, clearly reflect not only differing readings of *Elrod-Branti*, but also differing degrees of acceptance.

412. Rutan v. Republican Party of Ill., 497 U.S. 62, 64 (1980).

413. Bd. of County Comm'rs v. Umbehr, 518 U.S. 668 (1996).

414. O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996).

different approaches.[415] The *Elrod* analysis emerged extended, but seriously confused.

a. Umbehr: Pickering *Now?*

In *Umbehr*, the county terminated plaintiff's waste disposal contract because of his constant criticism of the Board of Commissioners over a range of topics from landfill user rates to mismanagement of funds.[416] The plaintiff also ran for the board.[417] The lower courts saw the problem not as an *Elrod* issue, but as a question of whether to extend *Pickering*'s protection of public employee speech to independent contractors.[418] Writing for the majority, Justice O'Connor appeared to agree. She focused on the *Pickering* balancing test as an attempt to accommodate the competing interests when governments punish employee speech and found that independent contractors have similar enough interests that it should apply in that context.[419] The *Pickering* inquiry is sufficiently flexible to take account of any differences in status.[420]

If that were all the opinion contained, it would not tell the reader much about the Court's current view of *Elrod* beyond two references to *Branti*[421] and a linking of *Pickering* to the unconstitutional condition doctrine.[422] However, the opinion makes an abrupt turn from a discussion of government versus independent contractor rights to an indictment of patronage.[423] The Court claimed that the Board had engaged in "patronage contracting," an example of more widespread evils.[424] Justice O'Connor cited "courtroom patronage," "bribery, "extortion," "kickbacks," "abuses of power," "illegal government action," and "political bias" to bolster her analysis.[425]

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415. *Umbehr* gave the *Pickering* analysis substantial weight, while *O'Hare* drew heavily on *Elrod*. The end result is a blurring of the two.

416. *Umbehr*, 518 U.S. at 671–72.

417. *Id.*

418. *E.g.*, *id.* at 672.

419. *See id.* at 676–681 (balancing the First Amendment rights of employees against the states' interest in efficiency).

420. *See id.* at 678–79 (stating that the *Pickering* approach is superior to a bright-line rule).

421. *See id.* at 675, 676 (citing Branti v. Finkel, 445 U.S. 507 (1980)).

422. *See id.* at 679 (discussing *Pickering* and stating that the prohibition of unconstitutional conditions on speech applied regardless of the employee's contractual or other claim to a job).

423. *See id.* at 681–85 (disputing the dissent's use of patronage as a positive factor in First Amendment analysis).

424. *See id.* at 681 (discussing patronage in connection with other violations of free speech, including the Sedition Act of 1798 and common-law libel).

425. *See id.* at 681–83 (rebutting the dissent's defense of patronage and its argument that

A case involving the application of *Pickering* to independent contractors seemed suddenly to have become one about patronage. Uncertainties abound. This portion of Justice O'Connor's opinion does not cite, let alone discuss, the *Elrod* line of cases, which do analyze patronage.[426] *Pickering*, which was about employees, played virtually no role in the cases involving patronage-related treatment of employees. The Court was now applying it in cases brought by nonemployees.[427] A possible explanation is that the Court wanted governments to benefit from the more lenient *Pickering* standard in cases involving contractors. The question remains why it applied to some negative actions and not others. The Court's apparent answer was that *Elrod* and its line of cases involved affiliation while *Pickering* involved speech.[428] In the political context, this distinction is hard to draw. Indeed, the similarity of a wide range of political activities, and their protection under the First Amendment, is the cornerstone of many of the Court's important cases in the area, such as *Buckley v. Valeo*.[429] However, these observations are more a criticism of the *Elrod* line of cases than of *Umbehr*. One could understand Justice O'Connor's keeping the two lines of cases separate in order to allow more lenient treatment of independent contractors. Then came *O'Hare*.

b. O'Hare: *Melding* Elrod *and* Pickering?

In *O'Hare*, the Mayor of Northlake, Illinois, removed an independent towing operator from the city's eligible list after the towing operator refused to make a contribution to him, supported his opponent, and displayed that opponent's campaign posters.[430] Though the facts seemed somewhat similar to *Umbehr*, Justice Kennedy began his majority opinion by citing *Elrod* and *Branti* and stating the issue as whether to extend the two cases to independent contractors.[431] He specifically drew a distinction between the *Elrod* and

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patronage is more suitable for independent contractors).

426. *Id.* It is true, of course, that many of her criticisms of patronage are the same as those made in this line of cases.

427. *See id.* at 673 (using the *Pickering* balancing test for independent contractor suits).

428. *See id.* at 672 (noting that *Pickering* addressed employees' speech rights).

429. Buckley v. Valeo, 424 U.S. 1, 14–15 (1976).

430. O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 715 (1996).

431. *See id.* at 714 ("We must decide whether the protections of *Elrod* and *Branti* extend to an independent contractor, who, in retaliation for refusing to comply with demands for political support, has a government contract terminated or is removed from an official list of contractors authorized to perform public services.").

Pickering analyses.[432] Adverse action based on belief or association triggers the former,[433] while adverse action based on speech triggers the latter.[434]

There is, of course, the *Buckley* problem that speech, belief, and affiliation can best be analyzed as tightly bound together given their First Amendment origins, especially in the political context. In *O'Hare*, the government could be viewed as punishing the contractor for his speech or his beliefs. Indeed, Justice Kennedy treated the case as presenting both problems.[435] The whole issue would largely disappear if the two labels led to the same judicial inquiry into the contested action, but he insisted they do not. *Branti* (affiliation) requires the government to "demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." [436] *Umbehr* (speech) calls for balancing "legitimate countervailing government interests" against the employee's rights.[437]

Pickering seems more deferential.[438] This might make a big difference if we were at the initial (*Elrod*) phase of deciding the close question of the validity of patronage. However, Justice Kennedy treated patronage as a closed issue[439] and indicated that both types of cases (affiliation and speech) require case-by-case analysis.[440] The whole inquiry may even merge into a question of reasonableness.[441] Justice Kennedy suggested this,[442] but then in a remarkable remand directed the court of appeals to "decide whether the case is governed by the *Elrod-Branti* rule or by the *Pickering* rule."[443]

Apart from the fact that patronage as a value seems beyond analysis under either "test," the above seems clear as mud. Nonetheless, *O'Hare* can fairly be read as another reaffirmation and possible extension of *Elrod*. If anything,

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432. *Id.* at 718–20.

433. *Id.* at 718.

434. *Id.* at 719.

435. *See id.* at 718 (citing cases involving both political beliefs and political speech for support of analysis).

436. *Id.* (quoting Branti v. Finkel, 445 U.S. 507, 518 (1980)) (emphasis added).

437. Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996).

438. This was an important point of Justice Scalia's dissent in *Rutan*. One of his reasons for upholding the patronage practices that the Court had been invalidating since *Elrod* was that the strict scrutiny standard was applied rather than *Pickering* balancing. Rutan v. Republican Party of Ill., 497 U.S. 62, 97–103 (1980) (Scalia, J., dissenting). Although admitting that the question of which test should be used was not clear, he stated that "the normal 'strict scrutiny' that we accord to government regulation of speech is not applicable in this field." *Id.* at 100.

439. O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 718 (1996).

440. *See id.* at 719–20 (stating that case-by-case analyses will result in more just results).

441. *Id.* at 719.

442. *Id.*

443. *Id.* at 726.

reaffirmation is the more significant interpretation. *Elrod* governs when "government retaliates . . . for the exercise of rights of political association or the expression of political allegiance."[444] The evils of patronage go beyond infringement of individual rights. The *O'Hare* facts might well constitute bribery.[445] On a broader level, Justice Kennedy raised the specter of entrenchment,[446] portrayed patronage as a form of "governmental overreaching,"[447] and questioned whether it is a "necessary part of a legitimate political system."[448] Whether or not they are extended to independent contractors like *O'Hare*, the antipatronage precedents remain central to any analysis of government personnel and related practices.

Justice Scalia, joined by Justice Thomas, dissented in both cases.[449] He not only reiterated his earlier defense of patronage as a long-standing governmental practice with good and bad aspects,[450] but also objected strenuously to extending the antipatronage analysis beyond the employment context "to the massive field of all government contracting."[451] Not surprisingly, he castigated the majority in the two cases for the analytical confusion discussed above;[452] in particular, their apparent blurring of the *Elrod* and *Pickering* analyses.[453] He read *Umbehr* as adopting the latter, more deferential approach[454] and reminded his colleagues that the *Rutan* dissenters would have applied it there.[455] Conceivably, the patronage-based action at issue in that case might have stood if

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444. *Id.* at 714–15. The Court went on to state:

> We hold that the protections of *Elrod* and *Branti* extend to an instance like the one before us, where government retaliates against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance.

Id.

445. *See id.* at 721 (citing Illinois law on bribery).

446. *See id.* at 718 (citing *Elrod* and Justice Stevens's concurring opinion in *Rutan*).

447. *Id.* at 724.

448. *Id.* at 726.

449. Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 686 (1996) (Scalia & Thomas, JJ., dissenting). The joint dissent is printed after *Umbehr*, but applies to both decisions.

450. *Id.* at 688–90 (Scalia & Thomas, JJ., dissenting).

451. *Id.* at 687 (Scalia & Thomas, JJ., dissenting).

452. *See id.* at 702 (Scalia & Thomas, JJ., dissenting) (contrasting use of strict scrutiny in *Rutan* with balancing test in *Pickering*).

453. *See id.* at 705–06 (Scalia & Thomas, JJ., dissenting) (criticizing inconsistent treatment by majority).

454. *See id.* at 702–03 (Scalia & Thomas, JJ., dissenting) (applauding Court's use of fact-sensitive deferential weighing approach).

455. *Id.* at 702 (Scalia & Thomas, JJ., dissenting).

it did not have to face a "strict scrutiny standard."[456] At least *Umbehr* drew the line.

"What the Court sets down in *Umbehr*, however, it rips up in *O'Hare*."[457] Justice Scalia noted the replacement of balancing with "the rigid rule of *Elrod* and *Branti*."[458] This gave him the opportunity to focus not only on the different treatment of speech and political affiliation but also on the problem of how to tell the difference in the first place. The *O'Hare* plaintiff certainly presented his case as involving speech.[459] Justice Scalia hypothesized the many cases in which courts could not discern which right is involved, accused the Court of suggesting it might balance in *Elrod* cases, and generally dismissed both contractor decisions as "traged[ies] of inconsistency."[460]

One can hardly fault the dissenters for poking fun at an opinion whose first paragraph states that it is governed by one standard,[461] remands for determination of which of two different standards applies,[462] and suggests in the body that the two standards are, in fact, the same.[463] Perhaps, however, this is the important point to take away from the two decisions: The different "tests" are not that different and would lead to the same result in all patronage-based treatment of employees.[464] Each has its roots in the First Amendment, each draws heavily on unconstitutional condition precedents such as *Perry v. Sindermann*,[465] and each involves balancing. Regardless of how one constructs the balancing, it is highly doubtful that the various majorities that have condemned patronage would allow it to prevail over any dismissal based on exercise of First Amendment rights.

Perhaps the real significance of Justice Scalia's dissent is neither its methodological critique nor its reiterated support of patronage. Rather, it is his

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456. *See id.* at 702–03 (Scalia & Thomas, JJ., dissenting) (rejecting strict scrutiny standard and advocating a more flexible approach).

457. *Id.* at 703 (Scalia & Thomas, JJ., dissenting).

458. *Id.* at 704 (Scalia & Thomas, JJ., dissenting).

459. *See* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 715–16 (1996) (alleging in the complaint that "the removal was in retaliation for Scratzianna's stance in the campaign").

460. Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 706 (1996) (Scalia & Thomas, JJ., dissenting).

461. *See O'Hare*, 518 U.S. at 714–15 (asserting case is governed by *Elrod* and *Branti*).

462. *Id.* at 726.

463. *Id.* at 719. Justice Kennedy stated that the Court would apply *Pickering* balancing in cases in which affiliation is joined with speech. *Id.* He also stated that affiliation cases call for a reasonableness analysis. *Id.*

464. The Court's remand suggests that independent contractors might lose, however, depending on the test applied.

465. Perry v. Sindermann, 408 U.S. 593 (1972).

rejection of an aspirational view of American government that sees politics as playing a rightful role only at election time and only as long as the field is level and incumbents do not benefit from unfair advantages.[466] In this view, politics then disappear in favor of a government that treats citizens neutrally, or at least does not differentiate on the basis of their political stance.[467] Seen this way, patronage-based personnel decisions are doubly wrong. They can alter the political playing field by giving incumbents advantages that lead to entrenchment and they represent nonneutral awards of the benefit of government employment. For Justice Scalia, on the other hand, politics is something of a no-holds-barred contest, and the governmental process of bargains and pressures is a continuation that reflects electoral results.[468] "[I]t is utterly impossible to erect, and enforce through litigation, a system in which *no* citizen is intentionally disadvantaged by the government because of his political beliefs."[469] The *O'Hare* majority paid lip service to the fate of constituencies that must take their chance "in the larger political process,"[470] but that assessment is far from agreement with Justice Scalia's view that "[f]avoritism . . . happens all the time in American political life, and no one has ever thought that it violated—of all things—the First Amendment."[471] As the patronage cases show, the Court has struggled for consistency when presented with contrasting views of the political-governmental process. Viewing these cases as part of this broader debate opens the door to analyzing them as more than First Amendment disputes. It also suggests that an anticorruption perspective might bolster the decisions, thereby making up for some serious weaknesses in the analyses.

6. The Patronage Cases and the First Amendment: A Further Look at the Problems

From *Elrod* to *O'Hare*, the Court's patronage opinions rely solely on the First Amendment. No other substantive constitutional provision plays a role in the analysis. Yet, prior to *Elrod*, critics of patronage did not tend to see it as a First Amendment problem. Justice Scalia may have exaggerated slightly when he said that "[n]o court [had] ever held, and indeed no one ever thought,

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466. Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting).

467. The majority opinions in the patronage cases reflect this aspirational view. *Infra* section V.B.7.

468. *See, e.g., Umbehr*, 518 U.S. at 710 (Scalia, J., dissenting) (describing political process of rewarding supporters).

469. *Id.* at 695 (Scalia, J., dissenting).

470. *Id.* (Scalia, J., dissenting) (quoting O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 720 (1996)).

471. *Id.* at 711 (Scalia, J., dissenting).

prior to our decisions in *Elrod* and *Branti*, that patronage contracting could violate *the First Amendment*."[472] However, he is not far from the mark. The most widespread criticisms of patronage had been that it led to inefficient government and was tied to corruption in general.[473] From a legal perspective, the most obvious basis for an attack was the *Baker v. Carr*[474] line of cases that opened up the franchise. Indeed, these cases appear to have been the principal foundation for the *Shakman* litigation aimed at patronage in Cook County and Chicago.[475] Although equal protection analysis would certainly have bolstered the result, none of the Supreme Court patronage cases cites *Baker* and its progeny or *Shakman*.[476]

Perhaps another sign of weakness with the cases is the ongoing division and uncertainly within the Court. In *Elrod* there was no majority.[477] Justice Stewart, whose concurring opinion provided the necessary votes for a majority in *Elrod*, dissented in *Branti* when the Court changed the standard for determining when patronage dismissals of public employees are valid.[478] Moreover, every one of the decisions has provoked a strong dissent, first by Justice Powell,[479] then by Justice Scalia.[480] The methodological problems that the latter has decried, while perhaps not as fatal as he insists, do suggest that the Court thinks something is wrong with the governmental actions before it, but cannot make up its mind on how to analyze them.

Evidence from the lower courts suggests that Justice Scalia was right in warning of considerable uncertainty in applying the Court's guidance. The Court presented *Branti* as a narrowing of permissible patronage-based action,

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472. *Id.* at 689–90.

473. *See, e.g.*, C. Richard Johnson, *Successful Reform Litigation: The* Shakman *Patronage Case*, 64 CHI.-KENT L. REV. 479, 482 (1988) (criticizing system that benefitted parties over the public); Segal, *supra* note 298, at 508 (noting civil service reformers' blaming patronage "for rampant government waste and inefficiency"). Professor Segal discusses contemporary problems of "oppressive" patronage in the context of decentralized schools in New York. *Id.* at 524–26.

474. Baker v. Carr, 369 U.S. 186 (1962).

475. *See* Johnson, *supra* note 473, at 483–84 (citing *Baker* and equal protection). However, First Amendment claims were present in the case. *See id.* at 484 (noting violations of political speech).

476. The *Shakman* litigation was commenced in 1969 and led to a consent decree in 1972.

477. Justice Brennan's plurality opinion was joined by two Justices. Elrod v. Burns, 427 U.S. 347, 349 (1976) (plurality opinion). Two other Justices concurred. *Id.* at 374 (Stewart, J., concurring).

478. Branti v. Finkel, 445 U.S. 507, 520 (1980) (Stewart, J., dissenting).

479. *E.g.*, *Elrod*, 427 U.S. at 376 (Powell, J., dissenting).

480. *E.g.*, Rutan v. Republican Party of Ill., 497 U.S. 62, 92 (1980) (Scalia, J., dissenting).

but some lower courts have been inclined to read the exception broadly.[481] One commentator found "a cacophonous mix of lower court voices on the issue of patronage"[482] and stated that the situation "cries out for resolution by the Supreme Court."[483] What is involved is more than the inevitable confusion that ensues when the Court introduces a new doctrine. The problem is weakness in the grounding of that doctrine solely in the First Amendment.

Certain fundamental aspects of the First Amendment analysis do not seem quite right. In *Elrod*, Justice Brennan relegated to a conclusory footnote any waiver argument that might be raised against the discharged employees.[484] The issue deserves more consideration, as Justice Powell's two invocations of it suggest.[485] The plaintiffs in *Elrod* and *Branti* appear to have gotten their jobs through patronage.[486] Thus, the Court let those who were beneficiaries of the system turn into attackers. A strong sense of equity adheres in the notion that "beneficiaries of a patronage system may not be heard to challenge it when it comes their turn to be replaced."[487] Justice Brennan seemed to think these plaintiffs were fighting an unconstitutional condition the government had thrust upon them.[488] More likely, they wanted the condition because it gave them a preference they would otherwise not have had. To say that these plaintiffs cannot sue is not to validate patronage as Justice Brennan suggests.[489] A current employee who had not received his or her job because of partisan affiliation could still challenge a patronage dismissal. Thus, Brennan's contention confuses standing with the merits.

He also brushes aside any contention that patronage practices balance out in the long run.[490] True, what the Court considers a violation occurs after a

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481. *See* Martin, *supra* note 310, at 28 (describing confusion over *Branti* application).

482. Berry, *supra* note 309, at 668.

483. *Id.* at 682.

484. *See* Elrod v. Burns, 427 U.S. 347, 359 n.13 (1976) (plurality opinion) ("The difficulty with [the waiver argument] is that it completely swallows the rule. Since the qualification may not be constitutionally imposed absent an appropriate justification, to accept the waiver argument is to say that the government may do what it may not do.").

485. *See id.* at 380–81 (Powell, J., dissenting) (stressing that employees had gotten their jobs through patronage, had knowledge about political loyalty expected in the system, and reaped benefits from such a system); *see also* Branti v. Finkel, 445 U.S. 507, 526 n.6 (1980) (Powell, J., dissenting) (repeating the position he took in *Elrod*).

486. *Branti*, 445 U.S. at 526 n.6 (1980) (Powell, J., dissenting); *Elrod*, 427 U.S. at 380–81 (Powell, J., dissenting).

487. *Elrod*, 427 U.S. at 380 (Powell, J., dissenting).

488. *See id.* at 360–61 (citing the unconstitutional condition precedents for the following proposition: "The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly.").

489. *See id.* at 360 n.13 (stating that the waiver argument "completely swallows the rule").

490. *See id.* at 360 (arguing that "regardless of how evenhandedly these restraints may

given election. But the next election can redress the balance, at least in a two-party context.[491] Over time, advantages and disadvantages may cancel each other out. This is a far cry from the type of hypothetical edict on which Justice Brennan placed heavy reliance: an imposed orthodoxy that bars individuals of certain races or beliefs from public office.[492] The losing Republicans in *Elrod* may be shut out, or they may fight like tigers to unseat the (temporarily?) victorious Democrats. Perhaps this calls for the fact-specific analysis a trial court could make in a particular case.[493] That is different from an appellate court's generalized conclusion that "patronage is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government."[494] As Justice Scalia said, the Court in the patronage cases "left the realm of law and entered the domain of political science."[495] Indeed, much of the debate among the Justices has focused on how to interpret political science materials.[496] A famous law review article written in 1991 concluded that Justice Scalia's predictions about the cases' impact on political parties were wrong,[497] but he has continued to attack them.[498]

7. *The Patronage Cases as an Anticorruption Statement: A Supplemental Explanation*

The Powell and Scalia dissents, and other criticisms suggested here, are strong arguments that the cases are close ones. However, it does not follow that the results, at least all of them,[499] are wrong as a matter of federal constitu-

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operate in the long run, after political office has changed hands several times, protected interests are still infringed and thus the violation remains").

491. In a one-party context, the advantages of entrenchment might negate any balancing out. However, Justice Brennan stated that the rule of *Elrod* applies categorically. *Id.*

492. *See id.* at 357–59 (stressing that the use of race, religion, or belief to disqualify persons from public employment is impermissible).

493. *Cf.* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 719 (1996) (explaining that certain instances involving party affiliation and the exercise of free speech may call for a case-by-case adjudication).

494. Elrod v. Burns, 427 U.S. 347, 369–70 (1976) (plurality opinion).

495. Rutan v. Republican Party of Ill., 497 U.S. 62, 113 (1980) (Scalia, J., dissenting).

496. *E.g., id.* at 88 n.4. Citing numerous political science and law review articles, Justice Stevens stated: "I note only that many commentators agree more with Justice Scalia's admissions of the systemic costs of patronage practices . . . than with his belief that patronage is necessary to political stability and integration of powerless groups."

497. Cynthia Grant Bowman, *"We Don't Want Anybody Anybody Sent": The Death of Patronage Hiring in Chicago*, 86 NW. U. L. REV. 57, 95 (1991).

498. *E.g.*, Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 686 (1996) (Scalia, J., dissenting).

499. Perhaps the strongest case is *Rutan*, in which the governor appeared to have effec-

tional law. My main point is that the cases do not fit comfortably within First Amendment analysis. Something more is at issue. What that might be is obscured by the Court's focus on the rights of the plaintiffs—an Article III necessity under a strict reading of the adjudicatory role of the federal courts. This focus may cause insufficient attention to the broader effects of the defendant's conduct beyond those rights. Clearly, the Court saw the various defendants' actions as examples of corruption and it was at least as anxious to condemn that corruption as it was to grant redress to the plaintiffs. An aspirational, anticorruption reading of the patronage cases not only helps understand (and perhaps strengthen) the results, but it also explains why the Court reached out for First Amendment analysis to achieve those results. The First Amendment served as the most readily available building block on which to base this broader vision.

From the outset, the antipatronage Justices have gone to some length to link patronage with corruption. In *Elrod* itself, Justice Brennan cited "strong" nineteenth century "discontent with the corruption and inefficiency of the patronage system"[500] and even mentioned that patronage "played a significant role in the Nazi rise to power."[501] In *Rutan*, Justice Stevens, concurring, cited "the financial corruption, such as salary kickbacks and partisan political activity on government-paid time, [and] the reduced efficiency of government."[502] Majority Justices have noted the possible presence of bribery,[503] possible "abuses of power in the name of patronage"[504] and, of course, one can find a reference to the disregard of the "public interest."[505]

The concept of abuse of power represents a general critique. On a more specific level, one can trace four major themes linking patronage to what might be seen as a form of corruption. The most frequent theme is the detrimental effect of patronage on the electoral process. Given the cases' First Amendment framework, this is usually stated as a constraint on the freedom of individual voters.[506] However, another dimension to the problem exists: the danger that

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tively abolished the civil service system to the point that a very wide range of personnel actions depended on political affiliation. *Rutan*, 497 U.S. at 65–66.

500. Elrod v. Burns, 427 U.S. 347, 354 (1976) (plurality opinion).

501. *Id.* at 353.

502. Rutan v. Republican Party of Ill., 497 U.S. 62, 88 n.4 (1980) (Stevens, J., concurring).

503. *E.g.*, O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 721 (1996); *Umbehr*, 518 U.S. at 682.

504. Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 682 (1996).

505. *See Rutan*, 497 U.S. at 88 (Stevens, J., concurring) (contending that Justice Scalia's "defense of patronage obfuscates the critical distinction between partisan interest and the public interest").

506. *See id.* at 82 n.3 (Stevens, J., concurring) (stating that the interest in protecting parties from "unrestrained factionalism . . . has not disturbed our protection of the rights of individual

patronage destroys any possibility of a level playing field. "Patronage . . . tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant."[507] There are direct echoes here of *Buckley v. Valeo*'s upholding of limits on "large individual financial contributions."[508] Admittedly, the analogy is not perfect. *Buckley* was concerned with possible *quid pro quos* from outside forces.[509] Here, the suspect force is not outside—parties are part of the system and are expected to try to win. Moreover, the patronage cases may come closer to accepting an equalization rationale than *Buckley* and its progeny.[510] Still, the broader value of "confidence in the system of representative government,"[511] found in both *Buckley* and the patronage cases,[512] is threatened if the electorate views the process as rigged in advance.[513] It is in this sense, I believe, that Justice Brennan in *Elrod* discussed *Buckley* in his reference to "the evil of influence" and "the grave evil of improper influence in the political process."[514]

The dissenters would dismiss this line of argument as naïve[515] and point to the long tradition of bare-knuckles politics in America. People and parties with advantages will use them.[516] At this point, a second major theme of the corruption analogy comes into play: "entrenchment." The cases are replete with discussions of this evil.[517] Entrenchment can, of course, simply be

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voters").

507. Elrod v. Burns, 427 U.S. 347, 356 (1976) (plurality opinion).

508. Buckley v. Valeo, 424 U.S. 1, 27 (1976).

509. *Id.* at 26–27.

510. *See, e.g., id.* at 48–49 (rejecting equalization rationale as "wholly foreign to the First Amendment").

511. *Id.* at 27 (citing U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973)).

512. *Id.*; *see* Rutan v. Republican Party of Ill., 497 U.S. 62, 84 (1980) (Stevens, J., concurring) (noting the value of politically neutral public service).

513. *See Rutan*, 497 U.S. at 88 n.4 (Stevens, J., concurring) (describing "hopelessness" of challenging a political machine).

514. Elrod v. Burns, 427 U.S. 347, 379 n.25 (1976) (plurality opinion).

515. Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 696 (1996) (Scalia, J., dissenting) (expressing concern that the Court would "end up holding the First Amendment requires the city of Chicago to have as few potholes in Republican wards (if any) as in Democratic ones"). In his *Rutan* dissent, Justice Scalia accused the majority of "a naive vision of politics." *Rutan*, 497 U.S. at 103 (Scalia, J., dissenting).

516. *See Umbehr*, 518 U.S. at 710–11 (Scalia, J., dissenting) (noting that favoritism is common and often nothing that "one would get excited about").

517. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 70 (1980) (quoting *Elrod* for the same proposition); *Elrod*, 427 U.S. at 369 ("Patronage can result in the entrenchment of one or a few parties to the exclusion of others.").

another way of referring to an unfair playing field in which one party uses its captive troops to constantly outflank the others.[518] Citizens have the right to vote, but they cannot use it to effect change, a defect in the democratic system analogous to malapportionment. This is primarily the way the Court uses the term. However, entrenchment also serves to keep the emoluments of office flowing to the incumbents. Profiting from office for personal gain is certainly a major form of corruption.[519] The Court's references to bribes and kickbacks[520] can be seen as adding this dimension to its condemnation of patronage.

A third theme of the antipatronage critique that links it to corruption is the danger it poses to neutral operation of government.[521] The goal of equal access to government services is an important theme of conflict-of-interest analysis.[522] Harking back to *Ex Parte Curtis*,[523] the cornerstone of Supreme Court anticorruption jurisprudence, the Court has proclaimed the "impartial execution of the laws" as the "great end" of democratic government.[524] The landmark decisions upholding the constitutionality of the Hatch Act's restrictions on political activity by federal workers relied heavily on the dangers of partisan administration.[525] In the patronage context, the corruption lies in the fact that every citizen has an equal vote, but that equality does not extend to the administration of programs adopted by elected representatives.[526] If only a favored few get benefits intended for all, the system is not working democratically. Again, the dissenters would level accusations of naivete.[527] Some

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518. *See Rutan*, 497 U.S. at 88 n.4 (Stevens, J., concurring) (describing how public employees can be used as campaign workers).

519. Segal, *supra* note 298, at 534. In describing patronage as a possible form of bribery, Professor Segal states that "it involves an abuse of public office by officials for private gain." *Id.*

520. *E.g.*, O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 721 (1996).

521. *See, e.g., Rutan*, 497 U.S. at 84 (Stevens, J., concurring) (emphasizing the "desirability of political neutrality in the public service and the avoidance of the use of the power and prestige of government to favor one party or the other").

522. Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57, 79 (1992) (stating that "[t]he equal access principle seeks to keep government in the public interest rather than permitting it to be captured by private, monied interests").

523. *Ex Parte* Curtis, 106 U.S. 371 (1882).

524. U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973).

525. *See id.* at 555–66 (noting danger of allowing federal employees to become part of campaign structure).

526. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 84 (1980) (Stevens, J., concurring) (noting government's interest in "not compromising the availability of public service").

527. *See id.* at 103 (Scalia, J., dissenting) (stating that the Court's categorical rejection of

favoritism is inevitable, as Justice Kennedy admitted.[528] However, there are limits. The fact that basic governmental services cannot be differentially provided on the basis of race is well-established.[529] Large deviations on other grounds may not rise to the constitutional level, but they too erode confidence in the fairness of the system.

The overarching importance of preserving this confidence is a bedrock principle of anticorruption law and suggests a fourth theme: the pervasive effects of patronage call into question the legitimacy of government. Justice O'Connor questioned the legitimacy of patronage contracting.[530] Justice Stevens described the sense of hopelessness felt by opponents of the machine.[531] Perhaps his ultimate criticism of patronage is that "its paternalistic impact is actually at war with the deeper traditions of democracy."[532] A vigorous democracy is built on citizen participation. Distrust can lead to abandonment. In sum, the systemic evils of patronage touch many facets of the democratic system and threaten to destroy it. For the antipatronage Justices, viewing the practice as part of a broader corruption enhanced their desire to outlaw it.

8. When Good Government and the First Amendment Clash: The Campaign Finance Reform Conundrum

The patronage cases do not represent the only area in which the Court has intimated a vision of good government. The issue is sharply posed in the series of challenges to campaign finance reform legislation beginning with *Buckley*. Here, the political branches have sought to advance the cause of good government through regulating the campaign process. In these cases, the First Amendment functions essentially as a shield, wielded by those who assert their individual rights against these reform efforts. The Court has been somewhat receptive to their claims, leaving some doubt as to how far a vision

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patronage "reflects a naive vision of politics").

528. *See* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 720–21 (1996) (noting that the plaintiff "was not part of a constituency that must take its chance of being favored or ignored in the larger political process—for example, by residing or doing business in a region the government rewards or spurns in the construction of public works").

529. *See* Hawkins v. Town of Shaw, 437 F.2d 1286, 1292 (5th Cir. 1971) (determining that municipal services cannot be distributed unequally according to race), *rev'd in part*, 461 F.2d 1171 (5th Cir. 1972) (per curiam).

530. *See* Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 681 (1996) ("[W]e do not believe that tradition legitimizes patronage contracting.").

531. *See Rutan*, 497 U.S. at 88 n.4 (Stevens, J., concurring) (describing sense of hopelessness felt by political machine's opponents).

532. *Id.* at 91–92.

of electoral reform (an example of good government) can withstand a First Amendment challenge when the reform involves limiting the role of money in political campaigns.

The principal battleground has been how to define corruption. The Court is in general agreement that preventing *quid pro quo* corruption, or its appearance, can be a strong enough governmental interest to justify restrictions on what *Buckley* identified as First Amendment rights of association and speech in the campaign context. Corruption may well extend beyond bribery "to the broader threat from politicians too compliant with the wishes of large contributors," although some division on this point exists.[533] The extent to which equalization of electoral opportunity might justify curbs on the use of differing resources remains a particularly controversial issue.[534] The cases do not always point in the same direction. *Buckley* rejected an equalization rationale,[535] but *Austin v. Michigan State Chamber of Commerce*[536] points toward viewing unequal influence as close to corruption.[537] Notions of a level playing field seem implicit in limiting the influence of large contributors. How much of a step would it be from this view of corruption to an explicit recognition of equalization as a legitimate state interest? Professor Richard Briffault views the Court as engaged in a "nuanced revision of the meaning of 'corruption.'"[538]

The campaign finance cases are relevant to the inquiry here in at least three ways. The first is that the Court has articulated a vision of corruption that permits government action to overcome it in the face of constitutional challenge. Eliminating corruption is thus reinforced as a valid governmental interest. The cases focus primarily on the electoral process, as opposed to government operations in general, but many of the themes are the same as in the patronage cases. In particular, if large donors did receive preferential treatment, one would normally see it at some point during the operation of government.[539] Thus, the search for fairness in elections carries over to fair-

533. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000) (reading *Buckley* as recognizing such a threat); *id.* at 423–25 (Thomas, J., dissenting) (criticizing majority opinion for extending concept of corruption).

534. *See* Richard M. Briffault, Nixon v. Shrink Missouri Government PAC: *The Beginning of the End of the* Buckley *Era?*, 85 MINN. L. REV. 1729, 1741–45 (2001) (examining equalization with respect to monetary sources).

535. Buckley v. Valeo, 424 U.S. 1, 55–57 (1976).

536. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990).

537. *See* Briffault, *supra* note 534, at 1742 (noting that the Court "has repeatedly blurred the corruption/inequality distinction, treating inequality as a form of corruption").

538. *Id.* at 1757.

539. *See* Buckley v. Valeo, 424 U.S. 1, 25 (1976) (referring to corruption concerns as

ness in the ensuing government. A second similarity, already noted, is the repeated emphasis on citizen confidence in government as an important factor that buttresses reform efforts, even when they pose First Amendment problems.[540] Perhaps most importantly, those who challenge the campaign finance reform laws are pre-enforcement defendants whose legal position is somewhat analogous to the defendants in the corruption prosecutions.[541] While the campaign defendants are challenging actions of their own government, as opposed to those of another level, that does not detract from the similarity. What is key is that they assert a constitutional right in order to oppose, sometimes successfully, a governmental attempt to attack corruption. These defendants are asserting individual rights derived from the Constitution. The corruption defendants, if they invoke federalism, are at least asserting a constitutional value, perhaps a right on the state's part that could, under the new federalism, be viewed as equivalent to an individual's right.

Thus, the campaign finance reform cases may cut both ways in terms of the general problem this Article raises. On the one hand, they reinforce the notion of combating corruption as an important government activity. Thus, we can find an area of jurisprudence outside of the patronage cases in which a vision of good government is adumbrated. Even though, it may reflect a more narrow vision of corruption, focusing primarily on *quid pro quo* from outside sources.[542] On the other hand, the campaign finance reform cases show that the Constitution places limits on the activity of fighting corruption regardless of how it is defined. Whether these limits extend beyond the First Amendment rights involved in those cases to the state sovereignty values enshrined in the new federalism is for now an open question.

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reflecting concern over "the real or imagined coercive influence of large financial contributions on candidates' positions and on their *actions if elected to office*") (emphasis added).

540. *See, e.g., id.* at 27 (noting that averting the appearance of corruption is critical).

541. Any ultimate prosecution under the criminal provisions of these laws would probably not be for the corruption itself, but for acts that could lead to it.

542. The Court's decision in *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), defines corruption as follows:

> Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusion of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*; dollars for political favors.

Id. at 497. *But see* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000) (noting that the Court has "recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors").

A particularly helpful discussion of the problem of defining corruption is found in Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 798, 805 (1985).

9. *The Patronage Plaintiffs as Private United States Attorneys Combating Corruption*

As for the patronage cases, they do not address the federal role in combating state and local corruption. On the surface, the cases represent typical constitutional litigation. The plaintiff asserts a federal constitutional right, the Court agrees, and orders appropriate relief. However, they can be seen as more—as an endorsement by implication of a broad federal role. As an initial matter, one can view some of the plaintiffs as private attorneys general (or, better yet, United States Attorneys) who have brought a broad-scale problem—not only their individual claims—before the Court. In *Rutan*, for example, the Court should be viewed as having struck down the Governor's entire "political patronage system."[543] In *Elrod*, the Court not only struck down the patronage dismissals at issue, but also upheld the granting of broad preliminary injunctive relief.[544] Beyond the results in any particular case, the Court repeatedly made clear its disapproval of other practices and its view of patronage as a form of corruption that threatens the legitimacy of the democratic process itself.

The clearest indication of the Court's endorsement of a broad federal role in the area is that federalism-based objections were made forcefully in the patronage cases from the outset. Chief Justice Burger's dissent in *Elrod* relied heavily on federalism concerns in stating the issue as "whether the choice of [the patronage system's] use in the very government of each state was not, in the words of the Tenth Amendment, reserved to the States . . . or to the people."[545] For him, the answer was clear.[546] He even cited *National League of Cities v. Usery*[547] in decrying "constant inroads on the power of the States to manage their own affairs."[548] Federalism surfaced again in Justice Powell's dissent in *Branti*.[549] He warned that the decision might well "impair the right

543. Rutan v. Republican Party of Ill., 497 U.S. 62, 66 (1980).

544. *See* Elrod v. Burns, 427 U.S. 347, 373–74 (1976) (plurality opinion) (finding the practice of patronage dismissals unconstitutional and upholding the grant of injunctive relief, as First Amendment interests were threatened at time relief was sought and plaintiff's demonstrated a probability of success on the merits).

545. *Id.* at 376 (Burger, C.J., dissenting).

546. *See id.* (Burger, C.J., dissenting) (citing Congress's choice, not open to judicial scrutiny, to allow the executive branch to have a small number of political appointments, and stating that the state legislature's choice should be given equal deference).

547. Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

548. *Elrod*, 427 U.S. at 375–76 (Burger, C.J., dissenting).

549. *See* Branti v. Finkel, 445 U.S. 507, 521 (1980) (Powell, J., dissenting) (describing his concern with the imposition of a "constitutionalized civil service standard that will affect the employment practices of federal, state, and local governments").

of local voters to structure their government."[550] In *Rutan*, the majority rejected the concern expressed by the court below about opening state employment decisions to "excessive interference by the Federal Judiciary."[551]

The theme of states' ability to structure their internal operations is a recurring one in federalism debates. Chief Justice Burger's invocation of *National League of Cities* is particularly significant given its role as a major source of the precepts of today's federalism cases.[552] Obviously, federal attacks on patronage run counter to these views. Thus, one can see the patronage cases and their broader implications as an opposing theme to strong precepts of federalism, one that favors a national role. Moreover, the cases do not stand alone. Other, similar themes in the legal and constitutional tradition point in the same direction.

VI. The National Government's Protective Role Within the New Federalism

A. The Patronage Cases and the Prosecutions: Common Values

Despite what one might think from reading the editorial page of the *New York Times*,[553] the Supreme Court is not single-minded in its attempt to strengthen federalism at the expense of all other constitutional values. Profes-

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550. *Id.* at 532.

551. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 76–77 n.8 (1980) ("Our decision does not impose the Federal Judiciary's supervision on any state government activity that is otherwise immune. The federal courts have long been available for protesting unlawful state employment decisions.").

552. *Supra* notes 82–90 and accompanying text.

553. *See, e.g., A Misguided Expansion of States' Rights*, N.Y. TIMES, Jan. 12, 2000, at A22 (stating that the Supreme Court's decision that Congress had no authority to require states to observe federal law barring age discrimination was a result of its efforts to diminish Congress's power under the Fourteenth Amendment's Equal Protection Clause); *Supreme Mischief*, N.Y. TIMES, June 24, 1999, at A6 (finding recent decisions of the Supreme Court "disturbing," in that the Court "significantly strengthened the powers of the states in the Federal System while weakening those of the Federal Government"); *The High Court Loses Restraint*, N.Y. TIMES, Apr. 29, 1995, at 22 (arguing that the Supreme Court's decision in *Lopez* undermined the traditional deference that the Court had given Congress with respect to the Commerce Clause). Professor Massey offers the following observation:

> A reader only of the *Times* would think that the Rehnquist Court's federalism lacks any connection to constitutional history or doctrine, is devoid of reason, and is prompted only by partisan politics. As should be evident, I think this is a risible caricature. There may well be grounds for disagreement with the Court (and I shall register my disagreement later on) but the *Times*'s basis of disagreement is too shallow to merit further mention.

Massey, *supra* note 146, at 436 n.25

sor Farber sees the Court as currently focused on three goals: upholding the states as republics, maintaining the established balance of federal and state power, and defending constitutional rights from either level of government.[554] If one accepts an analysis along these lines, the natural assumption is that the Court will need to juggle conflicting normative commitments to state sovereignty, federal supremacy, and individual rights. Given the fact of strong pulls in different directions, the result is likely to be closer to a maintenance of the status quo than to a constitutional counter-revolution.[555] However, federalism issues are more hotly debated than in the past and federalism as a constitutional value occupies a higher status than it once did. As a result, some cases do come out differently.

As for the corruption prosecutions of state and local officials, they are an example of what might be called the protective role of the national government in terms of both the functioning of the federal system and the protection of individual rights. The key question then becomes the extent to which a national protective role can coexist with the centrifugal force of the new federalism. After all, one possible interpretation of the logic of the new federalism is that the states can protect their citizens and police themselves. This Article treats the patronage cases at length because they reach results and further values that are consistent with those of the prosecutions and the vision of a national protective role. Both sets of cases advance common nationalist values, many of which have deep roots in the American constitutional and legal traditions. This Part reviews those values briefly and considers how their interaction with the new federalism might play out.

B. Confidence, the Franchise, and the Goal of Neutral Government

The question of citizen confidence in government at all levels is a recurring theme in Supreme Court jurisprudence. The cornerstone case, *United States v. Mississippi Valley Generating Co.*,[556] represented a broad reading of a conflict-of-interest statute in a case which Chief Justice Warren stated "has a far-reaching significance in the area of public employment and involves fundamental questions relating to the standards of conduct which should govern those who represent the Government in its business dealings."[557] The

554. Farber, *supra* note 133, at 1134.

555. *See id.* at 1139 ("[T]he New Federalist Justices as a group seem to conceive of themselves as defending the status quo, preserving only the limits on that 'vast' federal power that have been respected through most of the post-New Deal era, and protecting those limits against the recent threat of an omnipotent nationalism.").

556. United States v. Miss. Valley Generating Co., 364 U.S. 520 (1961).

557. *Id.* at 523.

Court stressed the prophylactic nature of the conflict-of-interest statute, stating that it

> embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government . . . . It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation.[558]

The broad thrust of the opinion is captured in Chief Justice Warren's statement that

> the statute is directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.[559]

This emphasis on confidence recurs throughout the Court's opinions on campaign finance. As the Court recently stated in *Nixon v. Shrink Missouri Government PAC*:[560] "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."[561] Corrupt government at one level may erode public confidence in the system as a whole. This argument would justify prosecution of corruption at all levels.

Federal intervention in the processes of state and local government is not an isolated phenomenon. Perhaps the classic example is the availability of the federal courts to vindicate denials of the right to vote.[562] *Baker v. Carr*[563] was a fundamental step beyond denials into the thicket of reapportionment and vote dilution—a core political question of state and local governance.[564] Corruption

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558. *Id.* at 549–50.

559. *Id.* at 562.

560. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

561. *Id.* at 390.

562. *See* Reynolds v. Sims, 377 U.S. 533, 554 (1964) ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear."); *id.* at 555 (citing examples of federal judicial intervention); *id.* ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

563. Baker v. Carr, 369 U.S. 186 (1962).

564. *See id.* at 237 (finding that an equal protection challenge to Tennessee's statute regarding appointment of seats to the general assembly is a justiciable cause of action).

cases may also be tied directly to efforts to distort the fairness of a particular vote. A classic example is federal prosecution of a state or local official for extortion of campaign contributions, which give him or her an unfair advantage in the electoral process.[565] The repeated reference in the patronage cases to the problem of "entrenchment"[566] shows a close relationship to the overall concern with exercise of an unobstructed franchise.

Somewhat more controversial is the question of how far beyond the vote itself the federal role to protect the right to cast that vote extends. As Professor Karlan has stated, "[t]he right to vote embodies a nested constellation of concepts [including] . . . the ability to have one's policy preferences enacted into law within the process of representative decision-making."[567] This raises the question of how far one can extrapolate this principle from the actual vote to the manner in which the government implements policy. At the least, serious corruption within government after the election could be viewed as a classic attempt by one interest group to utilize superior resources to thwart the goals of democracy. A basic definition of corruption is the undermining of majority preferences through improper influence of "wealth and market forces."[568] The notion of thwarting the outcome suggests that some people—the winners—ought to be treated better than others. Either way, there are winners and losers.

At the same time, there exists in our constitutional tradition a frequently articulated notion of a right to be treated equally by public entities. The Equal Protection Clause embodies this ideal. A good example of its operation in practice is the series of cases associated with *Hawkins v. Town of Shaw*[569] that prohibit race-based denials of equal treatment in the provision of municipal services.[570] The broader thrust of the clause extends beyond its historical context to a general notion of equality before the laws. Concurring in the rehearing of *Hawkins*, Judge Wisdom viewed the decision as recognizing "the

565. *See* Segal, *supra* note 298, at 533–45 (discussing the role of extortion and bribery statutes in the campaign context).

566. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 369 (1976) ("Patronage can result in the entrenchment of one or a few parties to the exclusion of others.").

567. Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court, in* THE VOTE: BUSH, GORE, AND THE SUPREME COURT 77, 79 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

568. *See* SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 2 (1978) (discussing possible ways in which wealth and market forces affect political and legislative decisions).

569. Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *rev'd in part*, 461 F.2d 1171 (5th Cir. 1972).

570. *Id.* at 1288.

right of every citizen regardless of race to equal municipal services."[571] The same aspirations are captured in 42 U.S.C. § 1981, originally enacted in 1870, stating that "all persons" shall enjoy "the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws . . . as is enjoyed by white citizens."[572] Again, if one abstracts the racial context from these cases, the same aspiration toward equal administration is present. This Article has noted the importance of the Hatch Act cases[573] and their foundation in the landmark 1882 decision in *Ex parte Curtis*,[574] which declared equal treatment before the laws as a fundamental value of a democratic society.[575] There is, of course, a tension between the notion that the winners in a democratic election ought to be better off in some respects and the aspirational goal of equal administration. It surfaces sharply in the patronage cases. However, in the context of corruption prosecutions, both values may point in the same direction. The payment of bribes, extortion by officeholders, and other abuses by those in office skew the provision of services, thus violating one or even both of these precepts.

C. Towards a Right to Good Government

When it acts to preserve citizen confidence in institutions of government, the national government can, of course, be seen as protecting itself. A loss of confidence in one level of the democratic system could have repercussions for all levels.[576] Might it also be seen as acting to protect an individual right of state citizens to good government, instead of simply protecting itself? This view would put the national government in the more typical posture of protecting individual federal rights.

The right to vote is a good example. As discussed,[577] the question arises if one can extrapolate from this right, beyond such concepts as neutral administration, a basic right to good government. Professor Karlan offers an interest-

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571. *Hawkins*, 461 F.2d at 1175 (Wisdom, J., concurring).

572. 42 U.S.C. § 1981 (2000).

573. *See, e.g.*, U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973) ("A major thesis of the Hatch Act is that to serve this great end of government . . . it is essential that federal employees . . . not undertake to play substantial roles in partisan political campaigns . . . . Forbidding activities like these will reduce the hazards to fair and effective government.").

574. *Ex parte* Curtis, 106 U.S. 371 (1882).

575. *Id.* at 373.

576. *See* Kurland, *supra* note 34, at 376–77 (stating that "[t]he faith that the citizenry places in all levels of government is the foundation of the republic," and explaining that the government's interest in preventing erosion of this foundation should secure federal protection of it at all levels of government).

577. *Supra* notes 562–67 and accompanying text.

ing interpretation of *Bush v. Gore*[578] and the reapportionment cases dealing with racial gerrymandering.[579] She calls the right found in these cases "structural" equal protection.[580] As Professor Karlan states:

> In this newest model of equal protection, the Court deploys the Equal Protection Clause not to protect the rights of an individual or a discreet group of individuals, particularly a group unable to protect itself through operation of the normal political processes, but rather to regulate the institutional arrangements within which politics is conducted.[581]

Even if the cases she cites could be read to establish such a federal role, it is not clear the Equal Protection Clause could be extended to a broader individual entitlement to good government protected by the federal government standing ready to prosecute those who violate it. As the echoes of Professor John Hart Ely suggest, a classic derivative of the right to vote is an umpiring role for the judiciary.[582] Ely states, for example, that the focus should not be on "whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted."[583] He considers it an appropriate function of the Court to keep the "machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open."[584] Even so, this classic view of the national government's protective role, not just that of the judicial branch, may go beyond electoral participation, but it stops short of a general federal supervisory jurisdiction over the quality of government and public servants. There is an important conceptual step from fair and open government to corruption-free government.

However, other important strands in the legal tradition point in this direction. One, discussed earlier in this Article, is the lower federal courts' persistent development of the doctrine that citizens have an intangible right to honest public service.[585] A key question is whether the right belongs to individuals or is essentially of a shared, general nature. Thus, while this right might not be enforceable in a private civil suit, in part because of standing problems,

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578. Bush v. Gore, 531 U.S. 98 (2000).

579. *See generally* Karlan, *supra* note 567.

580. *Id.* at 78.

581. *Id.*

582. *See* ELY, *supra* note 8, at 76 (evaluating the meaning of footnote four in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938)).

583. *Id.* at 77.

584. *Id.* at 76.

585. *Supra* text accompanying notes 26–31.

the national government's continued protection of it through the criminal law is substantial evidence of the right's existence.[586] The right may not be of constitutional status. However, the federal courts can be viewed as developing, in the criminal context, a federal common law of good government.[587] The honest services doctrine has deep roots in the common law—in part, it is an application of concepts of fiduciary duty to public servants.[588] These common-law roots perhaps reinforce the notion of the doctrine as an individual right as well as a matter of "federal public policy."[589] Moreover, it is important to emphasize that when the Supreme Court brought this development to a halt in *McNally*, Congress stepped in almost immediately, and both ratified and endorsed the judicial creation of such a right.[590] The overturning of *McNally* is an example of a second strand: repeated congressional action to deal with corruption. While the traditional view is that the statutes under which the federal government prosecutes state and local corruption are not aimed at this phenomenon, a strong textual argument can be made that the statutes do confirm a national policy against corrupt government.[591] The defendants in these cases are not simply criminals who happen to be public officials. This is one more piece of evidence for the existence of some form of a right to corruption-free government that the prosecutions vindicate.

D. Preventing Corruption as Protecting Civil Rights

The classic example of the national government's protective role is in the area of civil rights. Professor Ely paraphrases the third paragraph of the

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586. A private civil suit to enforce the intangible right to honest services would appear to present a generalized grievance and thus encounter the sort of standing obstacle which the Supreme Court has emphasized since the 1970s. *See, e.g.*, Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 220–28 (1974) (finding that standing cannot be predicated on an abstract injury that all members of the public share, and holding that petitioners had no standing as taxpayers because they failed to satisfy the "nexus" test). Standing aside, Civil RICO, 18 U.S.C. § 1964(c) (2000), provides a possible enforcement vehicle. *See* H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 232–33 (1989) (consumer class action suit based on bribes to state agency and brought under civil RICO).

587. I put to one side issues of the validity of a federal common law of crimes. The honest services doctrine can always fit under the category of statutory construction. This is particularly true since the enactment of 18 U.S.C. § 1346 (2000). As for federal common law, it is far from clear that the duties of public officials fall within any of the recognized "enclaves." *See* FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (5th ed. 2003) (discussing enclave theory of federal common law).

588. *See* United States v. Margiotta, 688 F.2d 108, 123–26 (2d Cir. 1982) (discussing the fiduciary duties of public officials).

589. *Id.* at 124.

590. *Supra* notes 37–41 and accompanying text.

591. *See supra* notes 32–59 and accompanying text (discussing this issue at length).

famous *United States v. Carolene Products* footnote,[592] stating that it suggests "that the Court should also concern itself with what majorities do to minorities," particularly mentioning laws directed at "religious, national, and racial minorities and those infected by prejudice against them."[593] This has also been a major role for Congress, both as envisaged in Section 5 of the Fourteenth Amendment and as practiced in the extensive panoply of civil rights legislation. Civil rights also represent an area in which critics of the new federalism have been particularly concerned that it would lead constitutional law in a different direction. Nonetheless, observers such as Professor Farber insist that the new federalism does not mean a retreat from the national protection of civil rights.[594]

Assuming this to be the case, one can view corrupt government at the state and local level as a form of injury to minority groups. A good example is that of corrupt police departments. Apart from possible prejudice, they are likely to do a less effective job in protecting the residents of minority neighborhoods from street crimes, thus diminishing the protection of their basic rights to life, liberty, and property.[595] Let us assume as a general proposition that corrupt government will be less efficient overall and more responsive to those who can place extra resources in the hands of officials. Under these assumptions, minority citizens are likely to be the ones who suffer. The ultimate step in developing this logic would be a broad interpretation of the criminal civil rights jurisdiction of the national government. The possibility of such a development has been discussed,[596] and the Supreme Court's broad decision in *United States v. Lanier*[597] definitely increases the possibility of what Profes-

592. United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938).

593. *Id.*

594. *See* Farber, *supra* note 133, at 1140 ("Even a casual newspaper reader knows that the Court has taken action against the states in fields ranging from Free Speech to land use regulation to political redistricting and affirmative action. The Court's interest in states' rights ends at the point where its commitment to individual rights begins.").

595. *See* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 288 (1997) ("[T]he principal problem facing African-Americans in the context of criminal justice today is not over-enforcement but *under*-enforcement of the law." (quoting Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARVARD L. REV. 1255, 1259 (1994))). Stacy and Dayton go further in making the civil rights connection: "The national government's accepted role in promoting racial equality obviously can justify a national response to racially motivated crimes. Perhaps less obviously, it also furnishes significant support for supplemental national efforts to combat the violent street crime that disproportionately afflicts African-American communities." *Id.*

596. George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-*Lopez *Analysis*, 82 CORNELL L. REV. 225, 235–38 (1997) (discussing civil rights statutes as a means of combating political corruption).

597. United States v. Lanier, 520 U.S. 259 (1997).

sors Abrams and Beale foresaw as an increasing use of the civil rights statutes against "official corruption."[598] They certainly may be called into play when police departments act in an abusive manner that is aimed at minority groups, although how much further the jurisdiction would extend is unclear. A limiting factor is that the statute in *Lanier* recognizes harm to "a person" asserting federal rights.[599] This raises again the question of whether the right to good government can be viewed as belonging to an individual or is of a more shared, general nature.

In a sense, many of these arguments—the franchise, neutral administration, good government, and civil rights—are so closely associated that they can be seen as merging. A good example is the Supreme Court's decision in *Katzenbach v. Morgan*.[600] In that decision, the majority justified its broad interpretation of Section 5 of the Fourteenth Amendment as not only enhancing the voting opportunities of Puerto Rican citizens of New York, but "as a measure to secure for [them] non-discriminatory treatment by government both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing, and law enforcement."[601] *Katzenbach* represents the protective role at both the judicial and legislative levels. However, the decision has been qualified by new federalism decisions on the Fourteenth Amendment such as *City of Boerne v. Flores*.[602] Thus, the tension between traditional protective views and the jurisprudence of the new federalism is evident. Nonetheless, the notion of the national government stepping in to protect those not receiving adequate protection at the lower levels is a long-standing and enduring theme of constitutional and legislative decisions. Let us consider two justifications for this intervention in the corruption context, one widely accepted and one generally rejected.

E. The Issue of State Inability to Act as a Justification for a National Protective Role

A recurring theme in American constitutional discourse is whether state inability to deal with a particular problem justifies federal intervention. This inability is also relevant to the issue of federal power to deal with it. Article I, Section 10 of the United States Constitution declares certain subjects

598. ABRAMS & BEALE, *supra* note 25, at 529.

599. 18 U.S.C. § 242 (2000).

600. Katzenbach v. Morgan, 384 U.S. 641 (1966).

601. *Id.* at 652.

602. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (concluding that the Religious Freedom Restoration Act of 1993 exceeded congressional authority under Section 5 of the Fourteenth Amendment and that the Act contradicted vital principles that maintain the balance between state and federal powers and that respect the separation of powers).

off limits to the states, in part out of concern that state activity in, for example, war-related matters, would produce piecemeal acts that could frustrate the goals of the country as a whole.[603] Most of what Section 10 forbids to the states is granted to the national government.[604] In a similar vein, the post-Civil War Amendments lay the foundation for a national role in protecting persons of color that some states could not, or would not, protect.[605]

The issue of state ability to act in particular areas played an important role in twentieth century debates over the reach of the commerce and spending powers.[606] A frequent argument was that the states' competitive position *vis-à-vis* each other created a serious collective action problem. One state might hesitate to regulate a subject, or might regulate it leniently, out of fear that less regulation, or no regulation, by a competitor would prove attractive to the regulated entity. In theory, this could lead to actions, such as business relocations, detrimental to the first state. This view is reflected in the so-called "race to the bottom" thesis.[607]

In debates over federal criminal law, the states' capacity to deal with a problem does not stem from competition among states to attract criminal activities. Nonetheless, it occupies a central role regarding questions of the need for federal action.[608] Professor Rory K. Little's concept of "demonstrated state failure" presents a particularly helpful contribution to this

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603. U.S. CONST. art. I, § 10.

604. For example, powers relating to war and foreign affairs are specifically granted to the national government. Also, some of the matters forbidden to the states in Section 10 are permitted with the consent of Congress.

605. *See* U.S. CONST. amend. XIII (outlawing slavery); U.S. CONST. amend. XIV §§ 1, 5 (securing due process and equal protection of the laws for all persons born or naturalized in the United States and giving Congress the authority to enforce such provisions); U.S. CONST. amend. XV (securing voting rights for citizens of all races and giving Congress the power to enforce this provision).

606. *See, e.g.*, Steward Machine Co. v. Davis, 301 U.S. 548, 588 (1937) (stating that, with respect to the development of unemployment insurance schemes, "many [states] held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors").

607. *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 219–20 (4th ed. 2001) (discussing the "race to the bottom" thesis in the context of states deciding whether or not to adopt some kind of unemployment system).

608. *See generally* ABRAMS & BEALE, *supra* note 25, at 64–71 (outlining "the great debate" over the desirability of a broad federal criminal law). Several participants in the debate cite the need for federal involvement in an area in which "[t]he national government has a distinct advantage as compared to state criminal justice systems in detecting, prosecuting, or punishing a particular behavior." *Id.* at 67 (quoting Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 23 (1996)).

subject.[609] He begins with a "rebuttable presumption against federalization."[610] He then posits a "principle [which] would endorse the federalization of criminal conduct only when there is a demonstrated failure of state and local authorities to deal with the targeted conduct."[611] Whether stated as a matter of power or policy,[612] the concept of state incapacity has become widely accepted as a starting point for analysis.[613] Trying to identify actions a state might not take has led to the formulation of subject lists for federal criminal action at varying levels of generality. Frequent examples include "complex financial investigations,"[614] "activity calling for complicated surveillance capability,"[615] resources such as the witness protection program and preventive detention,[616] a need for "federal resources,"[617] and inadequacy of state criminal jurisdiction.[618]

Political corruption represents one area that is common to many lists.[619] Many agree that "in instances of state and local governmental corruption . . . the criminal conduct at issue may place it beyond the effective reach (or interest) of state authorities."[620] One can view the patronage cases as variants

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609. Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1077–1081 (1995) (outlining principle of demonstrated state failure); *see also* Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1142–43 (1997) (discussing state failure model). In a differnet context one might view the reapportionment cases as an example of federal intervention when the relevant state organs are unable to act.

610. Little, *supra* note 609, at 1071.

611. *Id.* at 1078.

612. Professor Kurland states that "an unfortunate, and perhaps unnecessary, dichotomy has developed between perceived federal interests and the federal authority for official corruption prosecutions of state and local officials." Kurland, *supra* note 34, at 376.

613. *See, e.g.*, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW, CRIMINAL JUSTICE SECTION, AM. BAR ASS'N 48 (1998) [hereinafter ABA REPORT] (discussing potential benefits of federalization of criminal law).

614. *Id.*

615. *Id.*

616. *See* ABRAMS & BEALE, *supra* note 25, at 67 (citing Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 81–82 (1995)).

617. *Id.* at 68.

618. *Id.* at 67.

619. *See* ABA REPORT, *supra* note 613, at 48 (discussing appropriate state areas for federal criminalization). One might argue that corruption is similar to competition because businesses will welcome the opportunity to purchase favorable treatment. However, many businesses may prefer to operate in a "clean" environment.

620. Little, *supra* note 609, at 1079 (footnote omitted). Professor Little adds an important qualification: "However, a demonstrated state failure should be required even in this context; local prosecutors have not always been ineffective in addressing local government corruption,

on the state default principle. To the extent that patronage has led to entrenchment and an uneven political process, state and local governments cannot provide the necessary corrective.[621] Just as with the forms of corruption referred to in the criminal law debate, these cases necessitate federal intervention, in this instance, through somewhat forced constitutional analysis. The fact that the current Court, by a substantial majority, has reaffirmed and extended the earlier patronage cases indicates that it sees a state default problem in this area.

The Supreme Court has also accepted state inadequacy as a justification for broad federal criminal statutes and as a rebuttal to federalism-based arguments against these statutes. This analysis did not occur in a corruption case, but the two statutes involved appear frequently in that context. *Perrin v. United States*[622] involved the definition of bribery under the Travel Act.[623] The defendant invoked federalism in arguing for a narrow definition.[624] The Court's terse response identified "a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement."[625] The Court elaborated on the theme of state default in *United States v. Turkette*,[626] its first treatment of RICO.[627] The defendant argued for an interpretation of the statute's concept of "enterprise"[628] that would limit it to "legitimate enterprises."[629] The Court again faced the contention that a broad construction of a federal statute would upset the federal-state law enforcement balance, and again the Court saw this as one of the goals of

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and federal prosecution of local corruption for publicity purposes alone, without inquiry into state failure, would not meet the federalization principle proposed here." *Id.* at 1079 n.242. I am indebted to Professor Marci Hamilton for the alternative view that local prosecutors might welcome federal intervention because it takes a difficult problem off their hands.

621. *See, e.g.*, Rutan v. Republican Party of Ill., 497 U.S. 62, 88–89 & n.4 (1980) (Stevens, J., concurring) (stating that "[t]he 'massive Democratic patronage employment system' maintained a 'noncompetitive political system' in Cook County in the 1960s" (quoting Johnson, *supra* note 473, at 481)); Elrod v. Burns, 427 U.S. 347, 369 (1976) (stating that "patronage dismissals clearly . . . retard [the political] process. Patronage can result in the entrenchment of one or a few parties to the exclusion of others.").

622. Perrin v. United States, 444 U.S. 37 (1979).

623. 18 U.S.C. § 1952 (2000).

624. *Perrin*, 444 U.S. at 49–50.

625. *Id.* at 50.

626. United States v. Turkette, 452 U.S. 576 (1981).

627. 18 U.S.C. § 1961 (2000).

628. *Id.* § 1961(4).

629. *Turkette*, 452 U.S. at 579–80.

RICO: "The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions."[630]

The concept of demonstrated state failure looks like a well-accepted justification for a national protective role in various contexts. Still, its consistency with the new federalism as currently articulated should not be taken for granted. As Professor Beale has noted, the existence of state "failure" is not always clear.[631] State inaction on a given matter may reflect a deliberate policy. Failure is in the eye of the beholder. There are two, more fundamental reasons for hesitation. The new federalism's vision of states as sovereigns presents the first problem. Sovereigns, like people, will make mistakes. They may fail to act, act when they should not, or adopt policies that some will view as "bad." The citizens of Providence, for example, might accept Mayor Cianci's conduct and place greater emphasis on his efforts to redevelop the city. The states would hardly enjoy true sovereignty if they possessed it only when the national government agreed with their policies. If taken as a general principle of the allocation of constitutional authority, the state default rationale presents a second problem—it would equal a step toward a form of variable national power to deal with any domestic problem that reaches sufficiently serious proportions.[632] Even if not an actual source of national authority, the state default rationale would play a role in construing the federal government's use of its powers much like the approach rejected by the federalist Justices in *Lopez* and *Morrison*. It could constitute a form of logic without a stopping point, which would inhibit, if not prevent, the delineation "between what is truly national and what is truly local."[633]

F. The Guarantee Clause: The Road Not Taken

Clearly, corruption prosecutions raise difficult federalism issues. If the Constitution directly addressed the national government's power to supervise the operations of state and local governments, these issues would go away. In an important article, Professor Adam Kurland argued that the Guarantee Clause does just that.[634] Its text—"the United States shall guarantee to every

630. *Id.* at 586.

631. *See* Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1297–98 (1995) (discussing role of federal government in criminal law).

632. Brown, *supra* note 596, at 241.

633. United States v. Lopez, 514 U.S. 549, 567–68 (1995).

634. *See* Kurland, *supra* note 34, at 490 (stating that "Congress should directly address the federal government's true constitutional role in the prosecution of state and local officials and unambiguously base those prosecutions on the constitutional foundation where they be-

State in this Union a Republican form of Government"[635]—provides support. Like the Fourteenth Amendment, the Guarantee Clause represents a specific provision of the Constitution that addresses the federal-state balance, pushing it in a nationalist direction. Under this approach, Congress could, for example, pass a general anticorruption statute applicable to states and localities.[636]

However, the clause has not developed in this direction. As an initial matter, one can read the text just as easily to cover only extreme situations, such as installation of a monarchy, in which a state's governmental structure or form has undergone fundamental change. For present purposes, more significance may attach to the current Court's apparent view that the clause preserves state independence.[637] In *New York v. United States*,[638] Justice O'Connor, in dictum, suggested that the Guarantee Clause did not cast doubt on portions of the statute the Court had previously upheld because, under the relevant provisions, "[t]he states thereby retain the ability to set their legislative agendas; state government officials remain accountable to the local electorate."[639] She expressed concern over the possibility of "altering the form or the method of functioning of New York's government,"[640] but the risk came from the federal government, and the protection would come from the Court. More recently, in *Printz v. United States*,[641] Justice Scalia listed the Guarantee Clause among provisions that reflect the Constitution's commitment to state sovereignty.[642] Moreover, the Court's federalistic reading of the clause has academic support.[643] In sum, it is not available as a *deus ex machina*.

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long—the Guarantee Clause").

635. U.S. CONST. art. IV, § 4.

636. *See generally* Kurland, *supra* note 34, at 415–70. It should be noted, however, that Section 5 of the Fourteenth Amendment provides specifically for federal enforcement. There is no analogous language in the Guarantee Clause. For a generally favorable analysis of the Kurland thesis, see John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 456–59 (1998).

637. These cases do not address the issue of congressional power. The modern political question cases discuss the clause frequently. They do so in the context of attempted private litigation under it. In this context, they have rendered the clause a "dead letter." STONE ET. AL., *supra* note 607, at 128.

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

639. *Id.* at 185.

640. *Id.* at 186.

641. Printz v. United States, 521 U.S. 898 (1997).

642. *Id.* at 919.

643. Professor Deborah Jones Merritt has compiled the most notable body of work, including *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988), which the Court cited in *New York*, 505 U.S. at 157, 185.

VII. A Tentative Reconciliation and Some Possible Scenarios

A. A Tentative Reconciliation

The Guarantee Clause represents a nationalistic route not taken, but the protective role of the federal government nonetheless has strong roots in the legal system. The corruption prosecutions fit squarely within that tradition, just as the new federalism represents, in part, a reaction against it. This Article has analyzed the patronage cases at length because they offer strong support for the protective role in general and, by inference, for the prosecutions. The fact that these cases began at the same time as *National League of Cities* and that the Court then reaffirmed and extended them one year after *Lopez* suggests the possibility of a coexistence with the new federalism. However, the Court's commitment to the new federalism will most likely cause it to take a second look at the prosecutions, whatever it may have said in other contexts. The prosecutions represent a problem it has thus far skimmed over, but they go to the heart of the relationship between the national government and the states. The defendants are not simply criminals who happen to be public officials. Their "crimes" embody instances of bad government made criminal by federal legislation. The Court cannot ignore its words regarding state sovereignty, accountability, autonomy, and related concepts. If one really believes all this, federal intrusions that amount to state-level ABSCAMS go far beyond anything the patronage cases might seem to support. Yet, the federal role in prosecuting state and local corruption has achieved a status somewhat analogous to the federal role in regulating the national economy, albeit more recent. Just as a rollback of the New Deal seems far-fetched, so does a broad-based ouster of the federal prosecutor from the local scene and wholesale declarations of the invalidity of the relevant federal statutes. Some continuation of the status quo, presents the sort of resolution to be anticipated in a situation of strong, conflicting currents within the legal system. Nonetheless, a significant tilt may develop in the direction of the states and localities. That tilt will come, if it does, primarily through statutory construction, with constitutional undertones, leaving basic constitutional questions unresolved, while suggesting that Congress still has the last word.

B. Possible Scenarios

1. Federal Criminal Law in General: Tightening Jurisdictional Elements

The general debate over federal criminal law could significantly affect the questions about the criminal statutes used in the corruption prosecutions

discussed here. This debate, ongoing and intense since the substantial growth of that law in the post-war period,[644] has recently taken on potential constitutional dimensions.[645] The interpretation of jurisdictional elements presents one area in which a more stringent approach could affect corruption prosecutions.[646] A jurisdictional element statute carves out of a larger class of activities, for example, all loansharking, a smaller class with a direct tie to a source of federal power, for example, loansharking using the facilities of interstate commerce. As Justice Breyer has noted, the availability of the jurisdictional element technique lets Congress choose between dealing with a matter "instance by instance" or "problem by problem."[647] The focus on cases with a direct tie between the defendant's conduct and federal power may also reflect congressional doubt as to its constitutional authority to deal with the problem more broadly. In both *Lopez* and *Morrison*, the Court seemed to express a receptive attitude toward statutes that contain jurisdictional elements.[648] However, the Court has not adopted a per se rule regarding these types of statutes. Whether a court's approach to jurisdictional elements is broad or narrow can make a substantial difference in deciding whether the requirements of a particular statute have been met.

2. *Mail (and Wire) Fraud: Revisiting* Schmuck

The mail fraud statute presents a good example of the problem.[649] It authorizes prosecution of any person who, as part of various schemes, "for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service."[650] The courts have developed the construction that the mailing need only be "incident to an essential part of the scheme."[651] Several earlier cases, although inconsistent, suggested that the mailing had to have a fairly close relation to the underlying

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644. *See, e.g.*, ABRAMS & BEALE, *supra* note 25, at 64–72 (discussing "the federal role in enforcement against crime").

645. *See generally* George D. Brown, *Constitutionalizing the Federal Criminal Law Debate:* Morrison, Jones, *and the ABA*, 2001 U. ILL. L. REV. 983.

646. *See id.* at 1013–1023 (discussing debate over jurisdictional elements).

647. United States v. Lopez, 514 U.S. 549, 630–31 (1995) (Breyer, J., dissenting).

648. *See id.* at 561 (noting absence of jurisdictional element).

649. 18 U.S.C. §1341 (2000).

650. *Id.*

651. Schmuck v. United States, 489 U.S. 705, 711 (1989); Pereira v. United States, 347 U.S. 1, 8 (1954).

scheme.[652] However, in *Schmuck v. United States*,[653] the Court took an extremely liberal approach.[654] The defendant sold used cars to retail dealers, after rolling back their odometers.[655] The dealers needed to submit a title application form to the State Department of Transportation in order to sell the cars to the ultimate purchaser.[656] The Court upheld the finding of jurisdiction on the ground that "[t]he mailing of the title-registration forms was an essential step in the successful passage of title to the retail purchasers."[657] Four Justices joined in Justice Scalia's dissenting opinion.[658] He relied primarily on the earlier cases that cast doubt on the presence of jurisdiction, contending that "it is mail fraud, not mail and fraud, that incurs liability."[659] Although he does not elaborate on the argument, a federalism note also occurs in Justice Scalia's dissent: "The law does not establish a general federal remedy against fraudulent conduct, with use of the mails as the jurisdictional hook, but reaches only those limited instances in which the use of the mails is *a part of the execution of the fraud*, leaving all other cases to be dealt with by appropriate state law."[660]

The broad construction criticized by Justice Scalia can, of course, play a large role in the availability of the mail and wire fraud statutes for corruption prosecutions. In *United States v. Woodward*,[661] the defendant challenged federal jurisdiction in an honest services prosecution under the wire fraud statute.[662] A Massachusetts lobbyist wined and dined a Boston-based state legislator in Florida, thus presenting a possible honest services violation.[663] The U.S. Court of Appeals for the First Circuit accepted the prosecution's argument that the legislator knew the necessity of some form of interstate communication for the lobbyist to make the reservations in Florida.[664]

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652. *See, e.g.*, United States v. Maze, 414 U.S. 395, 399 (1974) (addressing question of whether "these mailings were sufficiently closely related to respondent's scheme to bring his conduct within the statute").

653. *Schmuck*, 489 U.S. at 705.

654. *Id.* at 707

655. *Id.*

656. *Id.*

657. *Id.* at 714.

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

659. *Id.* at 723 (Scalia, J., dissenting).

660. *See id.* at 722–23 (Scalia, J., dissenting) (citing Kann v. United States, 323 U.S. 88, 95 (1944)).

661. United States v. Woodward, 149 F.3d 46 (1st Cir. 1998).

662. *Id.* at 51.

663. *Id.* at 51–54.

664. *See id.* at 63–65 (examining the sufficiency of evidence of intent in mail and wire

For purposes of this Article, let us consider the scenario of a significantly more narrow approach to jurisdictional elements than those accepted in *Schmuck* and *Woodward*. The result would lead to a substantial decrease in prosecutions under the relevant statutes, including those covering corruption. Given the importance of the mail and wire fraud statutes in this area, this narrow approach would represent a significant development and a reduction in federal authority. The jurisdictional attack is not the only serious possibility. Until now, the honest services doctrine has withstood vagueness challenges, but the issue has resurfaced.[665]

3. *Tightening Jurisdictional Elements and the Special Problem of the Hobbs Act*

A more narrow approach to jurisdictional elements generally is a distinct possibility. Most federal statutes with jurisdictional elements are based on the commerce power. In the corruption area, the principal examples are the Hobbs Act,[666] the Travel Act,[667] and RICO.[668] In its recent decision in *Jones v. United States*,[669] a unanimous Court reversed a conviction under an arson statute that reads in part:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be [punished] ....[670]

Jones applied a narrow construction to the statute's application to the arson of a residence. It is not the last word on construing jurisdictional elements, however, because the statute uses the word "used."[671] The Court suggested that a different interpretation would have resulted if Congress utilized only the broader term "affecting commerce."[672] Nonetheless, *Jones* is a step towards a narrow approach. From a doctrinal point of view, the opinion is particularly important because of its invocation of *Lopez* as the source of constitutional

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fraud conviction).

665. *See* United States v. Handakas, 286 F.3d 92, 96 (2d Cir. 2002) (reversing conviction for "honest services" violation because of vagueness).

666. 18 U.S.C. § 1951 (2000).

667. *Id.* § 1952.

668. *Id.* § 1961.

669. Jones v. United States, 529 U.S. 848 (2000).

670. 18 U.S.C. § 844 (i) (2000); *Jones*, 529 U.S. at 850.

671. 18 U.S.C. § 844(i) (2000).

672. *See Jones*, 529 U.S. at 853–57 (distinguishing between activities "on commerce" and those activities substantially "affecting commerce").

concerns about a broader construction.[673] I have discussed above the potential impact of a narrowing of jurisdictional element constructions on prosecutions under the mail and wire fraud statutes. There, at least, the problem is relatively straightforward: How close must the relation be between the defendants' conduct and use of the mails or wire communication? Prosecutions under the Hobbs Act may pose far more difficult problems.

The Hobbs Act plays such an important role in corruption prosecutions that Professors Abrams and Beale were prompted to state that it "now appears to be the statute of choice in prosecutions for bribery involving state and local officials."[674] Its jurisdictional element applies to "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce."[675] Let us assume initially that the trial court looks only at the particular act or acts that are the basis of the prosecution. Would a local building inspector's extortion of a payment in return for a building permit have an effect on interstate commerce? Would the effect have to be substantial, or would de minimis suffice?[676] Would the court look only at the payment, or would it factor in the effect of the building? Note that most of the problems arise under the "affects" language, as opposed to the "obstructs" or "delays" language.[677] The possibility exists for a narrowing of the jurisdiction of the Hobbs Act, with serious implications for corruption prosecutions.

One way the prosecution could evade the question of the effect of a single payment would be to consider how all similar payments taken in the aggregate affect interstate commerce. The possibility of aggregation under the Hobbs Act is a hotly debated topic.[678] A prior question is whether aggregation is even permitted under jurisdictional element statutes. The analysis here proceeds on the assumption that it is, although that is by no means clear.[679] After all, the whole point of a jurisdictional element is that Congress is *not* regulating a class of activities. One question is whether the defendants' activity must be viewed as economic before one adds it to similar activities. *Lopez* and *Morrison*

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673. *Id.* at 858; *see* Brown, *supra* note 645, at 1010–11 (stating that "one must note the presence and effect of key *Lopez* themes in *Jones*").

674. ABRAMS & BEALE, *supra* note 25, at 195.

675. 18 U.S.C. § 1951(a) (2000).

676. *E.g.*, United States v. Pascucci, 943 F.2d 1032, 1035 (9th Cir. 1991).

677. *See* Brown, *supra* note 645, at 1017–18 (discussing application of obstruct or delay component of statute as application of "protective principle" advocated by Professors Nelson and Pushaw).

678. *See, e.g.*, ABRAMS & BEALE, *supra* note 25, at 229–232 (discussing cases considering proper breadth of Hobbs Act).

679. *See* Brown, *supra* note 645, at 1020 (noting the appeal of aggregation but explaining its problems).

suggest a requirement of economic activity when aggregation is in question.[680] In the corruption context, an extorted payment might be viewed as an exchange for governmental services. Political extortion ("under color of official right")[681] is different from robbery; it is closer to the "extortionate credit transaction" in *Perez v. United States*.[682] Recently, a group of judges on the U.S. Court of Appeals for the Fifth Circuit have engaged in a sophisticated analysis of jurisdiction over robbery under the Hobbs Act.[683] They contend that aggregation requires a form of interconnected activity, usually economic,[684] and that robbery is not economic and, thus, cannot be aggregated.[685] The issue remains sharply debated in the Fifth Circuit.[686] Although extortion defendants have raised similar arguments, the same court has dealt with them in relatively summary fashion.[687] There are conceptually interesting issues that seem to remain unaddressed: Is there a national market in illegal government services, whose regulation is at issue? Does one look beyond the particular illegal service and aggregate it?[688] These questions do not seem to play a restraining role in Hobbs Act extortion cases. If the scenario plays out along these lines, the new federalism would not affect corruption prosecutions under the Act unless the Court were to develop a special set of rules to limit jurisdiction in such cases. This is possible, but the Court would have to be mindful of the importance of jurisdictional element analysis in all applications of the statute.

4. The Substance of the Hobbs Act and Mail Fraud Violations in the Corruption Context

An alternative way to give teeth to the new federalism in the context of corruption is to focus on those portions of two key statutes that are interpreted to criminalize it. For the Hobbs Act, the key concept is extortion "under color

680. United States v. Morrison, 529 U.S. 598, 610–12 (2000); United States v. Lopez, 514 U.S. 549, 559–60 (1995).

681. 18 U.S.C. § 1951(b)(2) (2000).

682. Perez v. United States, 402 U.S. 146 (1971).

683. United States v. McFarland, 311 F.3d 376, 377 (5th Cir. 2002) (Garwood, J., dissenting); *id.* at 410 (Higginbotham, J., dissenting); United States v. Hickman, 179 F.3d 230, 231–43 (5th Cir. 1999) (Higginbotham, J., dissenting).

684. *Hickman*, 179 F.3d at 233–36 (Higginbotham, J., dissenting).

685. *Id.* at 237 (Higginbotham, J., dissenting).

686. *See McFarland*, 311 F.3d at 416 (Jones, J., dissenting) (criticizing colleagues who did not explain their views).

687. *See, e.g.*, United States v. Villafranca, 260 F.3d 374, 377–78 (5th Cir. 2001) (rejecting Commerce Clause attack on jurisdiction in Hobbs Act extortion case).

688. *See id.* (relying on interstate market in drugs in extortion prosecution for fixing drug cases).

of official right."[689] Here, a possible scenario is limiting the language to the conduct described by Justice Thomas in his dissent in *Evans v. United States*.[690] He argued that the Court had taken the language much too far by only requiring "that a public official has obtained a payment to which he was not entitled, *knowing that the payment was made in return for official acts*."[691] Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, argued that the statute utilized the well-established common-law requirement "that the money or property be obtained under color of office, *that is, under the pretense that the officer was entitled thereto by virtue of his office*."[692] This construction would, as a matter of substantive coverage, severely reduce the availability of the Hobbs Act for most of the corruption cases in which prosecutors now use it. The federal prosecutors' problem would be that it is currently their principal vehicle for combating bribery given the somewhat restrictive requirements of the Travel Act. The federal program bribery statute is an alternative, but is the subject of some uncertainty.[693] However, *Evans* itself stands as a serious obstacle to any such limitation. Even though Justice O'Connor did not reach the question in her concurrence,[694] five Justices rejected Justice Thomas's narrow construction. He made the federalist arguments, but they did not prevail. Indeed, the majority ignored them.[695] The result in *Evans*, plus the force of stare decisis, makes this substantive reduction in the scope of the Hobbs Act unlikely.

The status of the honest services doctrine in mail and wire fraud prosecutions is somewhat more uncertain. The Supreme Court has never addressed its content. Courts of appeals constantly grapple with such questions as the relationship between the federal honest services doctrine and state law,[696] the

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689. 18 U.S.C. § 1951 (b)(2) (2000).

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

691. *Id.* at 285–86.

692. *Id.* at 279 (quoting 3 RONALD A. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 1393 (1957)).

693. *See infra* section VII.B.5 (discussing federal program bribery statute).

694. Justice O'Connor contended that the proper interpretation of "under color of official right" was not before the Court and had not been briefed or argued by either party. Therefore she expressed no view as to the correct position. *Evans*, 504 U.S. at 272 (O'Connor, J., concurring).

695. In ignoring the arguments, the majority acted consistently with other corruption cases in the Supreme Court in which federalism objections have not been deemed worthy of rebuttal. However, the *Evans* plurality did discuss and rebut Justice Thomas's statutory construction argument. The issue may not be dead. *See* Scheidler v. National Org. of Women, Inc., 123 S.Ct. 1057, 1064 (2003) ("At common law, extortion was a property offense committed by a public official who took 'any money or thing of value' that was not due to him on the pretense that he was entitled to such property by virtue of his office.").

696. United States v. Brumley, 116 F.3d 728, 731–34 (5th Cir. 1997) (requiring state law

extent to which a violation of that doctrine must resemble bribery as opposed to more general ethical violations,[697] and whether a scheme to defraud the public of an official's honest services can extend to efforts by that official to secure votes of colleagues.[698] In this general context, the Court might possibly take an honest services case and render a distinctly narrow construction of the doctrine. The new federalism certainly points in this direction, but the last time the Court attempted to rein in the law by abolishing the doctrine, Congress restored it almost immediately. Thus far, the scenarios developed in this section point towards the status quo, with perhaps the strongest possibility for a federalistic tilt in the area of jurisdictional elements, particularly those for mail and wire fraud. The next section examines a relatively new area on which the Court has spoken, but perhaps not so definitively as to rule out a new federalism decision that sharply curtails corruption prosecutions of state and local officials.

5. *The Federal Program Bribery Provision: Has the Court Foreclosed a Limitation of Its Use?*

A statute which has caused considerable differences of opinion within the lower courts[699]—many of them based on new federalism considerations—and which is likely to be before the Supreme Court once again is the federal program bribery statute.[700] This surprisingly little-known statute is on the way to becoming a favorite tool of federal prosecutors dealing with state and local corruption. It applies to governmental and other entities that receive

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regulation). Professor Coffee has criticized *Brumley*: "The acceptance of *Brumley* by other circuits would significantly cut back the ability of the federal government to reach state and local corruption." Coffee, *supra* note 636, at 453–54. *But see* United States v. Murphy, 323 F. 3d 102, 116 (3d Cir. 2003) (endorsing "the decisions of other Courts of Appeals that have interpreted § 1346 more stringently and required a state law limiting principle for honest services fraud"). *See generally* Brown, *supra* note 596 (discussing issue of federal enforcement in general and advocating use of state law standards in mail fraud honest services cases). It should be noted that Professor Coffee advocates a broad construction of the statute in cases involving public fiduciaries. *Coffee, supra* note 636, at 459–63.

697. United States v. Sawyer, 239 F.3d 31, 36–42 (1st Cir. 2001).

698. United States v. Lopez-Lukis, 102 F.3d 1164, 1168–70 (11th Cir. 1997).

699. *Compare* United States v. Suarez, 263 F.3d 468, 484–85 (6th Cir. 2001) (requiring no nexus between receipt of federal funds and bribe) *with* United States v. Zwick, 199 F.3d 672, 687 (3d Cir. 1999) (requiring nexus). *See generally* United States v. Sabri, 183 F. Supp. 2d 1145, 1149–54 (D. Minn. 2002) (discussing disagreements over construction of the statute within the lower federal courts).

700. 18 U.S.C. § 666 (2000). The statute first came before the Supreme Court in *Salinas v. United States*, 522 U.S. 52 (1997). *See infra* notes 714–18 and accompanying text (discussing *Salinas*); *see also* United States v. Fischer, 529 U.S. 667, 669 (2000) (applying § 666 to payments to Medicare providers).

"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."[701] Once an entity is covered, the statute delineates two separate types of crimes for which "agents" of the entity can be prosecuted. The first encompasses embezzlement, theft, obtaining by fraud, conversion, or intentional misapplication, property of the covered entity worth more than $5,000.[702] The second type of crime is a form of bribery. It is defined as corruptly soliciting, accepting, offering, or giving "anything of value [from or] to any person . . . in connection with any business, transaction, or series of transactions of [the covered entity] involving anything of value of $5,000 or more."[703] None of the specified crimes contain any reference to federal funds or programs.

The serious federalism problem that § 666 poses is the possibility of prosecutions under it that seem totally unrelated to receipt of federal funds. I will use the following hypothetical to illustrate the problem:[704] A large county receives a federal coastal planning grant for its seacoast region. In the interior section of the county, an agricultural inspector receives a bribe concerning a transaction worth $5,000. There is no connection between the coastal funding and the inspector's job or the matter in question. Could the federal government prosecute the inspector and the giver of the bribe under § 666?

Under the broad language of the statute, the answer is yes, assuming the coastal grant is for more than $10,000. The entity is covered, and the crime is covered. There are certainly arguments as to why such a prosecution is constitutional. One might begin by noting that Congress intentionally used broad language in order to deal with an area in which it possesses special expertise: the disbursement and protection of funds expended from the national treasury.[705] Congress specifically chose language of this breadth because it was convinced that some cases were falling through the cracks of the earlier statutory scheme.[706] On a more general level, since the 1930s the Court has shown great deference to Congress's exercises of the spending power.[707] Section 666 would seem to be clearly based on this power. In

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701. 18 U.S.C. § 666(b) (2000).

702. *Id.* § 666(c)(1)(A).

703. *Id.* § 666(a)(1)(B); *Id.* § 666(a)(2).

704. *See* Brown, *supra* note 45, at 289–90 (setting out similar hypothetical and referring to the hypothetical as presenting "the § 666 constitutional problem").

705. *See id.* at 277 (discussing concern of Congress to ensure protection of federal funds because of possible gaps in existing statutory coverage).

706. *Id.*

707. *See* South Dakota v. Dole, 483 U.S. 203, 206–08 (1987) (noting breadth of Con-

reviewing prosecutions under the statute, courts have accepted the argument that Congress's interest goes far beyond the particular funds to concern with the fiscal integrity of the recipient.[708] The statute thus can be seen as reflecting a policy of deterring fiscal-related crimes in recipient entities. In this respect, it is like a "cross-cutting" condition in a standard grant program. Typical examples are those requiring that recipients of federal funds refrain from specified civil rights violations.[709]

Nonetheless, there are serious constitutional questions about the broad reading, especially given the new federalism's emphasis on the somewhat autonomous status of states. Section 666 is not a grant statute. Thus, it may present sui generis problems rather than benefitting from the lenient approach that the Court has shown in analyzing grant conditions. If the bribery provision is analogized to a grant condition, however, one might apply the four-part test articulated in *South Dakota v. Dole*.[710] There certainly would be a relatedness problem, triggering the third *Dole* element.[711] The crime with no conceivable effects on federal funds does not appear to have any conceivable relation to their receipt. In the county hypothetical, would the United States have any basis for terminating the coastal grant because of the agricultural bribe? As for the cross-cutting conditions, such as civil rights provisions, they deal with areas in which the federal government has a long-standing concern, often with constitutional bases.[712] That, of course, is the whole issue under consideration in evaluating a broad use of § 666. Is there any parallel national interest in good government or entities that happen to receive federal funds for some of their operations? One might view this particular draftsmanship as another example of a jurisdictional element. However, it differs from the classic jurisdictional element which links the defendant's conduct directly to the subject over which Congress has power.[713] Indeed, the question is whether § 666 contains any such link.

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gress's power and citing cases).

708. *See* United States v. Westmoreland, 841 F.2d 572, 578 (5th Cir. 1988) (stating that Congress sought "to preserve the integrity of federal funds by assuring the integrity of the organizations or agencies that receive them").

709. *E.g.*, Title VI of the Civil Rights Act of 1964 (codified at 42 U.S.C. § 2000d (2000)).

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

711. *See id.* at 207–08 (listing four restrictions on spending power).

712. The Court in *Dole* suggested that Congress can use grant conditions "to further broad policy objectives." *Id.* at 206 (quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980)). *See generally* Brown, *supra* note 45, at 297 (discussing relationship between cross-cutting conditions and the presence of a separate federal regulatory power).

713. *See* United States v. Sabri, 182 F. Supp. 2d 1145, 1155 (D. Minn. 2002) (rejecting government's argument that "666(b) is an 'express jurisdictional element' that limits the statute's reach and constitutes a proper conferral of federal jurisdiction").

The Supreme Court may have resolved all of these issues in *Salinas v. United States*.[714] *Salinas* dealt with a prosecution of a county deputy sheriff under § 666.[715] The county had received federal funds to assist in modernizing its jail and also housed federal prisoners for which it was paid on a regular basis.[716] One prisoner gave bribes to key personnel in order to enjoy "contact visits" with his wife or girlfriend.[717] The federal interest in the integrity of its funding is clear—the national government would, presumably, not want prisoners for whose housing it paid to enjoy such visits. Moreover, the conduct fits easily within the broad statutory language. A unanimous Court, in an opinion by Justice Kennedy, emphasized that language in affirming the conviction. Justice Kennedy stressed the use of the word "any" as undercutting attempts to impose a "narrowing construction" and precluding a view of the statute as ambiguous.[718] Professor Coffee reads the case for all it is worth. In the course of contending that the current Court has been reluctant to apply a new federalist critique to the corruption prosecutions under discussion here, he states that

> [p]erhaps the clearest indication of this judicial hesitation at fully adopting the dual sovereignties position is exhibited in the Court's recent decision in *Salinas v. United States*, in which the Court held that a prosecution of a state official for bribery under [§ 666] does not require the prosecution to prove any effect upon federal funds, even though the statute's reach was dependent upon the state agency's receipt of a requisite level of federal funds.[719]

Professor Coffee also notes that "the case declined to construe narrowly a federal statute that seemed on its face intended only to protect the use of federal funds" and that a unanimous Court "expressly disdained the opportunity to apply either *Gregory v. Ashcroft*'s clear statement requirement or the principles of *McNally* to this context."[720] Some federal courts have agreed with this interpretation of *Salinas*: it validates a broad reading of the statute, and establishes that it is constitutional.[721]

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

715. *Id.* at 54.

716. *Id.*

717. *Id.* at 55.

718. *Id.* at 57.

719. Coffee, *supra* note 636, at 459 (citation omitted).

720. *Id.*

721. *See* United States v. Suarez, 263 F.3d 468, 484 (6th Cir. 2001) (noting Court's broad view of statute); Unites States v. Grossi, 143 F.3d 348, 350 (7th Cir. 1998) (declaring that court will not "trim § 666 by giving its text a crabbed reading" and citing *Salinas*).

However, the Kennedy opinion contains ambiguities which suggest that the constitutional problems posed by § 666 have not been laid to rest. Some courts have read the statute to require a connection between the crime and the federal funds,[722] some have found the statute unconstitutional,[723] and an excellent commentary, while advocating a broad reading, admits that the *Salinas* opinion "specifically left open" the issue of coverage.[724] On the surface, Justice Kennedy did encourage the broadest possible reading. One has to look a bit to discover the possible limitations. The first is that the defendants were arguing that the prosecution had to "prove the bribe in some way affected federal funds, for instance by diverting or misappropriating them."[725] This is an apparent reference to a reading that would limit the statute to actual effects on the funds, such as a bribe to put the giver in the position to participate in a federal grant. It may well be with reference to this narrow sense of affecting the actual monies, the receipt of which triggers the statute in the first place, that the opinion states that the broad language "does not support the interpretation that federal funds must be affected to violate section 666(a)(1)(B)."[726] Justice Kennedy emphasized the fact that the statutory language reaches the case before the Court—one in which the federal interest in the use of the funds was obvious—and rejected the specific contention made by the defendants.[727] Their conduct may not have affected the funds, but it certainly affected the program. The following quote from the opinion is representative: "[T]he text [of § 666] is unambiguous on the point under consideration here, and it does not require the Government to prove federal funds were involved in the bribery transaction."[728] What about less direct relationships, or none at all, in cases in which defendants do not argue for a specific effect, but rather that the statute requires some form of connection between their conduct and the funds? Justice Kennedy apparently left open the question whether the statute requires some form of "connection."[729] His statement of the holding is that it "does not require the Government to prove the bribe in question had any particular

722. *E.g.*, United States v. Zwick, 199 F.3d 672, 687 (3d Cir. 1999); United States v. Santopietro, 166 F.3d 88, 93 (2d Cir. 1999).

723. *See* United States v. Sabri, 183 F. Supp. 2d 1145, 1158 (D. Minn. 2002) (finding that § 666 "does not contain a proper conferral of federal jurisdiction"); United States v. McCormack, 31 F. Supp. 2d 176, 189 (D. Mass. 1998) (holding statute unconstitutional as applied to the case at bar).

724. Salvatoriello, *supra* note 32, at 2395.

725. Salinas v. United States, 522 U.S. 52, 55 (1997).

726. *Id.* at 56–57.

727. *Id.* at 65–66.

728. *Id.* at 60.

729. *See id.* at 59 ("We need not consider whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds . . . .").

influence on federal funds and that under this construction the statute is constitutional as applied in this case."[730] As one commentator notes, the opinion manages to imply a literal reading of unambiguous language while leaving open the possibility of qualifying it.[731] In other words, while stating that the statute is both unambiguous and constitutional, Justice Kennedy succeeded in authoring an opinion that is a masterpiece in creating doubt on both points.

If the matter does come before the Supreme Court again, as seems likely, the Court will have to face the important question of how to integrate its approach to the spending power with the new federalism.[732] (All analysts agree that § 666 represents an exercise of the spending power. At the beginning the funds are the property of the United States, and might be protected on this ground, but at some point, they cease to be federal property. Still the government's spending power justifies a continued interest in them.) In an influential article, Professor Baker argued that the Court should apply *Lopez*-like restraints to exercises of the spending power to ensure consistency in attaining its goals.[733] Professor Massey has suggested that the Court's doctrines are simply inconsistent; it is possible that they will remain so. Others suggest, or at least hope, that the Court will continue to give a broad reading to the spending power in order to preserve a strong national role in areas that restrictive new federalism decisions threaten.[734] Why the Court would leave Congress with this particular trump card if it is serious about rethinking federal-state relations across the board is unclear. The spending power permits the federal government, in effect, to regulate in areas in which it otherwise would be unable to do so. Moreover, issues of accountability and autonomy are substantially complicated by use of the grant device. Funds come from the federal government, sometimes matched, often with detailed guidelines concerning their use. Administrative responsibilities are shared between the two levels. Ironically, Justice O'Connor's opinion in *New York* takes a receptive approach to use of the spending power when grants create the very accountability problems that the opinion otherwise decries.[735]

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730. *Id.* at 61.

731. Salvatoriello, *supra* note 32, at 2404.

732. *See* Lynn Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1916 (1995) (proposing that the Court presume invalid "offers of federal funds to the states which, if accepted, would regulate the states in ways that Congress could not directly mandate under its other Article I powers"); Massey, *supra* note 146, at 436 (labeling as "curious" the lack of doctrinal innovations regarding the spending power during the development of the new federalism).

733. Baker, *supra* note 732, at 1962–63.

734. *E.g.*, Zietlow, *supra* note 151, at 192–93.

735. *See* New York v. United States, 505 U.S. 144, 166–69 (1992) (noting Congress's power to influence states' actions and discussing resultant accountability concerns).

The issue will not go away. Attention may be shifting to the Necessary and Proper Clause as justification for a broad reading.[736] Taken to its limits, the combination of the spending power with the Necessary and Proper Clause could exceed the scope of the Guarantee Clause discussed earlier. Congress could be viewed as having an interest in *all* facets of recipient governments in order to ensure that federal funds are being spent in accord with a wide range of perceived values, not limited to integrity. Several scenarios might play out if a case like the county hypothetical—criminal conduct in a recipient jurisdiction that is totally unrelated to federal funds—reaches the Court. One result could be that the statute is constitutional in all applications. A second possibility is that it is unconstitutional as applied, given the absence of any "connection." A third possibility is that the Court would change direction completely and hold that the large number of unconstitutional applications render the statute invalid as a general matter. A fourth possibility is a limiting construction that would prevent application to the hypothetical as an example of the sorts of cases Justice Kennedy seemed to have in mind. The first scenario seems too much at variance with basic principles of the new federalism. The second—unconstitutional as applied—might seem to introduce the unwieldy concept of "as applied" into an area where it would produce undesirable complexity. The scenario of outright unconstitutionality seems impossible after the unanimous decision in *Salinas*. *Salinas* also stands in the way of the limiting construction approach, but one can focus on language in the opinion suggesting that the statute was unambiguous on the facts presented while seeming to leave open different results in different cases. If the Court went down this route, it might develop some form of nexus test such as requiring the prosecution in a § 666 case to show that the defendant's conduct affected federal funds directly, indirectly, or potentially.[737] This approach would save the statute, respect the new federalism, and seems consistent with an overall status quo approach.

6. Executive Action

Up to this point, this Article has focused on the interaction between Congress and the Supreme Court, assuming that the Executive Branch will continue to bring prosecutions as it consistently has. However, the possibility always exists that the Executive Branch might change its mind, perhaps

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736. *See* United States v. Lipscomb, 299 F.3d 303, 323–37 (5th Cir. 2002) (discussing Necessary and Proper Clause analysis). In a forthcoming article, Professor Richard Garnett surveys the caselaw, and relevant arguments, including the Necessary and Proper Clause, and concludes that § 666 is unconstitutional. Richard W. Garnett, *Unfinished Business, Conditional Spending, Criminal Law, and the New Federalism*, CORNELL L. REV. (forthcoming).

737. *See* Brown, *supra* note 45, at 304–05 (advocating a form of the nexus test).

through Department of Justice action[738] or through a generalized Executive Order on federalism.[739] The executive action approach is frequently recommended and may exist to some extent already. Nonetheless, I do not propose to explore it here. Administrations come and go, as do changes in policy. There is also the possibility that whatever Washington says, individual United States Attorneys will find a way around it. Thus, the ultimate decision on where to go with the corruption prosecutions remains with the Court. I think this is where it ought to be, as long as we operate under the assumption that the new federalism is broad in scope and rests on serious constitutional underpinnings.

VIII. Conclusion

Mayor Cianci was convicted, but the issues raised by his prosecution remain. A serious tension exists between the Supreme Court's desire to elevate state and local governments to sovereign status and the federal government's continued practice of prosecuting their officials for corruption. So far the Court has not addressed, much less resolved, this tension. When it does, my expectation is that the prosecutions will not be eliminated, but they will be reduced, perhaps substantially. In particular, a serious re-examination of the jurisdictional dimensions of the Hobbs Act, mail fraud, and § 666 could produce a sea change in the allocation of prosecutorial responsibilities. Statutes that currently play a major role may be considerably narrowed, leading to far fewer federal prosecutions. The result will not only be a federal system in which decisionmaking and policy formulation at the local level have real meaning and visibility for citizens of states and localities; they will also control the selection and conduct of their officials through the franchise and whatever local means are available for disciplining corrupt conduct. The national protective role will not be completely eliminated, however. Perhaps we will see a modern variant of Madison's vision as set forth in *The Federalist No. 51*: "A double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."[740] The national government will still be able to step in, but on a considerably more limited basis, to restore the democratic functioning of institutions that have temporarily lost this capability. This result is not a clean victory for either side. Rather, it is a typically American compromise—an effort to achieve the best of both worlds. In a sense, it mirrors the federal system itself.

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738. *See* ABRAMS & BEALE, *supra* note 25, at 103–23 (discussing prosecutorial discretion).

739. *See Bush Administration Delaying Issuance of Controversial Federalism Executive Order*, 70 U.S.L.W. 2267, 2267 (Nov. 6, 2001) (noting possibility of such an order to ensure federal agencies do not preempt state laws).

740. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed. 1961).