

# Making a Federal Case Out of It: *Sabri v. United States* and the Constitution of Leviathan

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## I. Introduction

The popular expression “Don’t make a federal case out of it!”<sup>1</sup> only makes sense if federal involvement is something unusual or special that is reserved for matters of urgent national interest. It assumes that a “federal case” is, or at least ought to be, something relatively rare and noteworthy.

For the founding generation, federal involvement in people’s affairs, especially through the criminal law, was in fact a relatively rare and noteworthy event. In *The Federalist*, James Madison told the citizens of New York that the powers of the proposed new national government “will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce,” while the states would be primarily responsible for “all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”<sup>2</sup> The first congressional statute devoted to defining federal crimes, enacted in 1790, largely vindicated Madison’s prediction. It was limited to such matters as treason; murder,

\*Much of this article is based on a brief filed by the Cato Institute as an amicus curiae in *Sabri v. United States*. I am grateful to Roger Pilon and Bob Levy for giving me the opportunity to work on that brief and for their invaluable comments and guidance in its production.

<sup>1</sup>The expression evidently emerged in the middle of the twentieth century. See Eric Partridge, *A Dictionary of Catch Phrases* 52 (1977) (identifying 1950 as the expression’s date of origin) (cited in Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 *Ind. L.J.* 223, 285 (2003)).

<sup>2</sup>The *Federalist* No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961). Federal tax collectors, Madison further predicted, “will be principally on the seacoast, and not very numerous.” *Id.*

manslaughter, or larceny on federal territory; crimes on the high seas; counterfeiting; stealing or falsifying federal court records, bribery of federal judges, perjury, and interference with federal service of process; interference with foreign ambassadors; misprision of felony with respect to federal crimes; attempts to rescue accused traitors before trial; and (my personal favorite) attempting to rescue the dead body of an executed murderer that had been given over to medical professionals for dissection.<sup>3</sup> Federal criminal law remained confined to such topics until the Civil War, and it really did not begin to take anything resembling its present shape until the New Deal.<sup>4</sup> For much of the nation's history, making a federal case out of it was indeed an extraordinary event.

The Supreme Court's unanimous decision in *Sabri v. United States*,<sup>5</sup> issued on May 17, 2004, demonstrates that modern lexicographers may have to perform some major surgery on that old expression. Basim Sabri was federally indicted for attempting to bribe a state official in connection with the administration of a state program. The only federal involvement in the events giving rise to the indictment was that the entity for which the state official worked received some federal funds. The statute under which Sabri was indicted did not require the attempted bribe to *involve* those federal funds in any way, but required only that a portion of the state agency's multi-million dollar budget come from federal funds. The Supreme Court thought it obvious that this statute was constitutional. A federal case just ain't what it used to be.

The story of how attempted bribery of state officials, with no claim that the bribe concerned the use of federal money, has come to be regarded as uncontroversially within the constitutional scope of federal power highlights virtually all of the myriad ways in which the government envisioned by Madison has developed into precisely the Leviathan that Anti-federalist opponents of the Constitution

<sup>3</sup>Act of Apr. 30, 1790, ch. IX, 1 Stat. 112–19.

<sup>4</sup>For a concise history of the development of federal criminal law, see Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 *Hastings L.J.* 1135, 1137–41 (1995). For a longer version, see Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf"?*, 50 *Syracuse L. Rev.* 1317 (2000).

<sup>5</sup>124 S. Ct. 1941 (2004).

feared. The statute at issue in *Sabri* is a microcosm of almost everything that has gone wrong in constitutional law over the nation's history with respect to the scope of national powers. In order for the national government to claim jurisdiction over the kinds of offenses with which Sabri was charged, one must simultaneously misinterpret the scope and/or sources of the federal government's power to spend money, power to regulate interstate commerce, and power to implement its enumerated authority through the promulgation of criminal laws. As *Sabri* demonstrates, a long string of Congresses, presidents, and Supreme Courts have all been more than up to this considerable task.

Perhaps mercifully, however, the *Sabri* case did not cleanly present these fundamental issues for decision by the Court. The case arose in a procedural context that left many of those constitutional questions in the background. Furthermore, the constitutional claims made by the parties shifted several times during the course of Sabri's appeals, which makes it difficult to determine exactly what was at issue at each stage of the proceedings. Accordingly, Part II of this article describes at length the somewhat convoluted legal maneuverings that led up to the Supreme Court's *Sabri* decision and the procedural wrinkles that significantly skewed the presentation and decision of the case. Part III then looks beyond the technicalities to identify the faulty constitutional principles concerning national power that the Court in *Sabri* either adopted or simply took for granted. Some of those faulty principles are so deeply ingrained in modern jurisprudence that they were not challenged, or even identified, by the parties to the case. Part IV briefly reflects on *Sabri*'s long-term implications for limited government.

## **II. The *Sabri* Litigation**

Basim Omar Sabri is a Minnesota real estate developer.<sup>6</sup> In 2001, Sabri was planning some commercial development in the city of Minneapolis for which he sought city help in the form of regulatory and financial assistance.<sup>7</sup> During this time, Brian Herron was a member of the Minneapolis City Council and a member of the Board of Commissioners of the Minneapolis Community Development Agency

<sup>6</sup>*Id.* at 1944.

<sup>7</sup>*Id.*

(MCDA), a municipal agency that has authority to provide loans and grants to business development projects.<sup>8</sup> A federal criminal indictment charged Sabri with attempting to bribe Herron to help secure needed regulatory approvals, induce property owners to sell their land to Sabri through threats of eminent domain, and obtain financial assistance from the city of Minneapolis and the MCDA.<sup>9</sup>

If these claims are true,<sup>10</sup> one can understand why the city of Minneapolis and the state of Minnesota would be concerned. One would expect bribery and corruption charges to be brought by local or state prosecutors against both Sabri and Herron. It is less obvious why the federal government would get involved in this matter. Sabri, after all, was not accused of trying to bribe federal officials. The federal government had nothing to do with the land deals that he was trying to execute. There was no federal official who could help him, corruptly or otherwise.

The indictment identified the following basis for federal criminal jurisdiction: During 2001, the city of Minneapolis was expected to receive about \$28.8 million in federal aid, and the MCDA was expected to receive about \$23 million in federal aid.<sup>11</sup> There was no claim in the indictment that any of Sabri's activities involved any of these federal funds.<sup>12</sup> The claim was simply that Herron, the alleged target of Sabri's bribes, worked for local governmental entities that received some form of federal financial assistance in some of their operations.<sup>13</sup>

The statute under which Sabri was charged, section 666(a)(2) of Title 18 of the United States Code, does not require the federal government to claim anything more than it did. The statute, entitled "Theft or bribery concerning programs receiving Federal funds," provides that if a state governmental organization receives more

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> There has not yet been a trial, so the truth of the indictment's allegations has not been tested. That is because Sabri challenged the adequacy of the indictment, and courts must assume that the indictment's allegations are true for purposes of ruling on that challenge.

<sup>11</sup> 124 S. Ct. at 1944.

<sup>12</sup> *United States v. Sabri*, 326 F.3d 937, 938 (8th Cir. 2003) (reciting allegations of the indictment).

<sup>13</sup> *Id.*

than \$10,000 in federal benefits in a given year, then anyone who “corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of [such] an organization . . . or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more; shall be fined under this title, imprisoned not more than 10 years, or both.”<sup>14</sup> Put simply, the statute criminalizes attempted bribery of state or local officials provided that the state or local agency receives nontrivial federal benefits in connection with some facet of its operations. If, for example, Minneapolis received federal benefits solely for training police dogs, that would be enough to make it a federal crime for someone like Sabri to attempt to bribe a Minneapolis city official in connection with local land-use decisions.

*A. Litigation in the Lower Courts*

Sabri challenged the legal sufficiency of the indictment in the federal district court in Minnesota on two grounds. First, he claimed that section 666(a)(2) should be interpreted to require proof of some connection between the federal benefits received by the state entity and the conduct that is the subject of the indictment. That claim had been successful in some courts,<sup>15</sup> but was rejected by the district court because “[t]he text of § 666(a)(2) cannot support the existence of a ‘connection’ requirement as one of the elements of the offense . . . .”<sup>16</sup> The Eighth Circuit court of appeals affirmed on this point of statutory interpretation.<sup>17</sup> Sabri also argued that if the statute does not require any such connection between the offense and the federal

<sup>14</sup>18 U.S.C. § 666(a)(2) (2000). The requirement that the agency receive more than \$10,000 in federal benefits in a given year comes from section (b) of the statute. See *id.* § 666(b) (“The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.”). For comprehensive studies of the legal issues surrounding this statute, see George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 *Notre Dame L. Rev.* 247 (1998); Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 *Cornell L. Rev.* 1 (2003).

<sup>15</sup>See *United States v. Zwick*, 199 F.3d 672, 681–87 (3d Cir. 1999); *United States v. Santopietro*, 166 F.3d 88, 93 (2d Cir. 1999).

<sup>16</sup>*United States v. Sabri*, 183 F. Supp. 2d 1145, 1153 (D. Minn. 2002).

<sup>17</sup>See *United States v. Sabri*, 326 F.3d 937, 945 (8th Cir. 2003).

funds received by the agency, then the statute exceeds Congress's constitutional powers. On that point, the district court and the Eighth Circuit parted ways.

The district court held that section 666(a)(2) was not a valid exercise of Congress's power under the Constitution's Spending Clause, which courts, for nearly seventy years, have maintained authorizes the federal government to spend funds for virtually any purpose and to attach regulatory conditions on the receipt of those funds.<sup>18</sup> The court said that section 666(a)(2) could not be justified under the Spending Clause because it required no connection between funds disbursed to local government and the conduct that is subject to the statute.<sup>19</sup> Furthermore, said the court, section 666(a)(2) is not a valid condition placed on the recipient of federal funds because it regulated private third parties rather than the funding beneficiary.<sup>20</sup> The court did not discuss any other possible constitutional basis for the statute, nor is there any indication that the federal government offered any other possible basis for the statute in its argument.

On appeal to the Eighth Circuit, the government contested the district court's constitutional judgment *solely* on the ground that the Spending Clause, and its concomitant authority to attach conditions on the receipt of federal funds, justified the enactment of section 666(a)(2). The court of appeals unanimously agreed with Sabri and the district court that section 666(a)(2) could not be sustained as a condition on a spending statute because the so-called "conditions"—criminal liability for attempted bribery—were imposed on third parties such as Sabri rather than on the beneficiary of the spending statute.<sup>21</sup> Nonetheless, the Eighth Circuit held the statute constitutional on the basis of a theory that had not been advanced by the government.

Article I, section 8, clause 18 of the Constitution gives Congress authority "[t]o make . . . all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of

<sup>18</sup>If the reader is eagerly awaiting a citation to the Constitution's Spending Clause, on which the federal government relied in *Sabri*, a little patience will yield large rewards. See Part III-A *infra*.

<sup>19</sup>See 183 F. Supp. 2d at 1157–58.

<sup>20</sup>See *id.* at 1155–56.

<sup>21</sup>See 326 F.3d at 940–45; *id.* at 953 (Bye, J., dissenting).

the United States, or in any Department or Officer thereof.”<sup>22</sup> It is conventional today to call this provision the “Necessary and Proper Clause,” but the founding generation knew it as the “Sweeping Clause,”<sup>23</sup> and I will henceforth use the original label. The Eighth Circuit held that section 666(a)(2) was a valid exercise of power under the Sweeping Clause as a means for carrying into execution the Spending Clause.<sup>24</sup> That is, according to the Eighth Circuit, the Spending Clause authorized Congress to appropriate funds to benefit the city of Minneapolis and the MCDA, and the Sweeping Clause authorized the enactment of laws to protect the integrity of the funded programs. The court was untroubled by the fact that the federal government’s lawyers specifically disavowed any reliance on the Sweeping Clause as support for section 666(a)(2).<sup>25</sup> The court was also untroubled by the absence in section 666(a)(2) of any required connection between the prohibited conduct (attempted bribery) and the expenditure of federal funds. The Sweeping Clause gives Congress power to enact laws that are, *inter alia*, “necessary” for executing other federal powers. The Eighth Circuit concluded that a law could be “necessary” if the congressionally-chosen means were—and the court used this phrase three times—“rationally related”<sup>26</sup> to a legitimate legislative end. In constitutional parlance, a “rationally related” standard of inquiry is barely one step removed from no inquiry at all; it represents the highest, most extreme form of deference to legislative decisionmaking.<sup>27</sup> Under this deferential standard, it is readily permissible for Congress to police “the integrity of the entire organization that receives federal benefits”<sup>28</sup> in

<sup>22</sup>U.S. Const. art. I, § 8, cl. 18.

<sup>23</sup>See, e.g., The Federalist No. 33, *supra* note 2, at 203 (Alexander Hamilton) (discussing “the sweeping clause, as it has been affectedly called”).

<sup>24</sup>See 326 F.3d at 949–53.

<sup>25</sup>See *id.* at 957 (Bye, J., dissenting) (“the government disavowed reliance on the Necessary and Proper Clause when the question first arose at oral argument”).

<sup>26</sup>*Id.* at 949, 950, 951.

<sup>27</sup>See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 11–12 (1992) (discussing “rational basis” review under the Equal Protection Clause of the Fourteenth Amendment). See also *Garnett*, *supra* note 14, at 82 (“It is difficult to see how the extent of federal regulatory power authorized by this doubly deferential scrutiny [adopted by the Eighth Circuit in *Sabri*] is anything but ‘limitless.’”).

<sup>28</sup>326 F.3d at 951.

order to guard against the possible misuse of federal funds in some settings.

Judge Bye dissented on the ground that, once the Eighth Circuit majority had brought the Sweeping Clause into the case over the parties' objections, the majority had applied only part of the clause while ignoring some of its most important language. The Sweeping Clause requires congressional laws to be both "necessary" and "proper" for carrying into execution federal powers. Drawing on work by the present author,<sup>29</sup> Judge Bye concluded that even if section 666(a)(2) was "necessary" in order to protect federal funds despite the absence of any connection between the prohibited conduct and the use of federal money, it was not a "proper" means for doing so because it interjected federal power into matters of purely local concern.<sup>30</sup>

#### B. Sabri in the Supreme Court

The Supreme Court did *not* agree to hear this case in order to address constitutional questions. Rather, the Court granted certiorari in order to resolve the question of statutory interpretation on which the district court and the Eighth Circuit had agreed but which had divided other lower courts: whether section 666(a)(2) should be construed to require some connection between the charged conduct and the misuse of federal funds.<sup>31</sup> But although this statutory question was the only issue raised by Sabri's petition for a writ of certiorari,<sup>32</sup> the Supreme Court's opinion made only one backhanded reference to that issue.<sup>33</sup> The bulk of its brief opinion was instead devoted

<sup>29</sup>See *id.* at 954 (citing Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267 (1993)).

<sup>30</sup>See 326 F.3d at 954–56.

<sup>31</sup>See Sabri v. United States, 124 S. Ct. 1941, 1945 (2004).

<sup>32</sup>See Petition for a Writ of Certiorari, Sabri v. United States, 124 S. Ct. 1941 (2004) (No. 03-44), available at 2003 WL 22428473.

<sup>33</sup>See 124 S. Ct. at 1946 ("It is true, just as Sabri says, that not every bribe or kickback offered or paid to agents of governments covered by § 666(b) will be traceably skimmed from specific federal payments or show up in the guise of a *quid pro quo* for some dereliction in spending a federal grant."). Cf. Salinas v. United States, 522 U.S. 52, 56–57 (1997) ("The expansive, unqualified language of the statute does not support the interpretation that federal funds must be affected to violate § 666(a)(1)(B)."). The reference strongly suggests that the Court saw no requirement of a connection in section 666(a)(2) between the charged conduct and the misuse of federal money.

to two other issues. First, it approved the Eighth Circuit's view that section 666(a)(2) was constitutional as a "necessary" means for carrying into execution the federal spending power, essentially for the same reasons given by the Eighth Circuit. The Court did not mention Judge Bye's concern that section 666(a)(2) might not be "proper." Second, the Court focused heavily on a technical issue that sharply limits the decision's reach and that therefore must be addressed and understood. The issue is confusing even to legal scholars, so I plead for indulgence from non-lawyers.

1. *The "Facial" Challenge to Section 666(a)(2)*

Sabri challenged the sufficiency of his indictment before there was a trial. He claimed, in other words, that even if one accepts everything contained in the government's indictment as true, the indictment did not describe an offense within the constitutional power of Congress to proscribe. This is known in legal jargon as a "facial" challenge to a statute: a challenge that does not depend on the particular facts pertaining to the litigant. If there had been a full trial, with factual findings by the district court, and Sabri had then challenged the constitutionality of the statute on the basis of the record developed at trial, his claim would be called an "as-applied" challenge, meaning that the statute, even if constitutional in some contexts, could not properly be applied to him on the facts of his specific case.

Facial challenges pose special problems for litigants. As a matter of pure theory, a "facial" challenge must claim, in essence, that there is no conceivable set of facts to which the statute can constitutionally be applied.<sup>34</sup> After all, when a court says that a statute is unconstitutional, it does not erase the statute from the pages of the United

<sup>34</sup>Justice Scalia has made the theoretical case against facial challenges that do not meet this demanding standard at length in a dissenting opinion. See *Chicago v. Morales*, 527 U.S. 41, 74–83 (1999) (Scalia, J., dissenting). The Court has occasionally seemed to adopt this strict position against facial challenges, see *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid"), but the Court's general practice has been considerably, if inconsistently, more generous towards such challenges. For a detailed (and generally approving) discussion of the Court's wavering standards for judging and applying facial challenges, see Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 *Stan. L. Rev.* 235 (1994), and for a bold attempt to bring some conceptual order to a confused and confusing topic, see Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 *Harv. L. Rev.* 1321 (2000).

States Code. It simply says that the statute cannot be applied as law in the case before it, which leaves open the possibility that the statute *could* be applied as law in some other proceeding with different facts. Thus, if section 666(a)(2) constitutionally could be applied to Sabri, then it should be irrelevant whether the statute would be unconstitutional if applied to someone else; that abstract “unconstitutionality” in some different case would not make the statute disappear from the legal world or from Sabri’s case. On this procedural understanding, Sabri would have to prove that section 666(a)(2) could *never* be applied to *anyone* in any proceeding in order to challenge the statute before trial.

Sabri had no chance of succeeding if that was the standard for facial challenges to statutes. If Sabri had bribed a local official directly with respect to administration of a federal grant—for example, to steer a federal grant to Sabri<sup>35</sup>—it would be very hard to argue that federal regulation of such bribery was not “necessary and proper” for carrying into execution the federal grant program.<sup>36</sup> Surely the federal government can police the direct spending of its own money. The putative problem with section 666(a)(2) is that it *also* covers conduct that *does not* directly involve the use of federal funds. Thus, there are certainly some circumstances in which section 666(a)(2) could constitutionally be applied, and a pure facial challenge to the statute should therefore fail. That does not mean that Sabri could never challenge the constitutionality of the statute. But he would have to await the outcome of the trial and then, if convicted, would have to argue that no connection to federal funds had been proven and that the circumstances of his case therefore did not fall within the range of constitutionally permissible applications of the statute. His challenge to the indictment jumped the gun.

An alternative route for Sabri that would attempt to circumvent the theoretical problems with facial challenges to statutes would be to claim that the indictment itself had to allege facts directly connecting Sabri’s conduct to the administration of federal funds and that

<sup>35</sup>This is precisely what the government argued had happened. See Brief for the United States in Opposition at 10, *Sabri v. United States*, 124 S. Ct. 1941 (2004) (No. 03-44), available at 2003 WL 22428474.

<sup>36</sup>This assumes, of course, that the federal government has power to appropriate funds to local government agencies for economic development. Sabri never challenged this power. I will do so shortly. See Part III-A *infra*.

the statute itself must identify those connections to federal funds as an element of the offense. Under this approach, Sabri would not have to wait for trial to raise his constitutional claim, because even if one accepted all of the government's allegations in its indictment as true, no connection between Sabri's conduct and federal funds was alleged. This was essentially how the Supreme Court construed Sabri's argument.<sup>37</sup> But that claim was doomed. As the Court explained, the position that "proof of the congressional jurisdictional basis must be an element of the statute . . . is of course not generally true at all."<sup>38</sup> In other words, if the government is able to prove at trial the facts necessary to establish federal criminal jurisdiction, the absence of those facts from the statute or indictment is not fatal to its case.

Thus, if the Court strictly applied the theoretical rules for challenging criminal statutes before trial, there would be no occasion to consider any constitutional issues in Sabri's case. Sabri would lose even if section 666(a)(2) was, in some theoretical sense, unconstitutional. The Court, however, does not strictly apply those rules. In general, the Court allows facial challenges to statutes even when those statutes might have some constitutional applications if it is worried that potentially overbroad application of statutes might "chill" legitimate activity for fear of prosecution, if the statutes are ambiguous, or (and there is no better way to describe this) if the Court really, really wants to make a broad constitutional pronouncement about a "hot button" issue such as abortion. None of those concerns was strictly presented by section 666(a)(2). Section 666(a)(2) does not involve any "hot button" issues and is not ambiguous. Concerns about "overbreadth" are generally invoked with respect to statutes whose broad application might threaten freedom of expression, which again is not the case with section 666(a)(2).

## *2. The Court's Opinion*

So on what basis, and in what context, did the Court in *Sabri* consider the constitutionality of section 666(a)(2)?

The key paragraph in the opinion reads as follows:

<sup>37</sup>See 124 S. Ct. at 1945.

<sup>38</sup>*Id.* at 1948.

We can readily dispose of this position that, to qualify as a valid exercise of Article I power, the statute must require proof of connection with federal money as an element of the offense. We simply do not presume the unconstitutionality of federal criminal statutes lacking explicit provision of a jurisdictional hook, and there is no occasion even to consider the need for such a requirement where there is no reason to suspect that enforcement of a criminal statute would extend beyond a legitimate interest cognizable under Article I.<sup>39</sup>

In the context of that observation concerning the extent to which statutes (and indictments) must contain elements establishing federal jurisdiction over alleged crimes, the Court brusquely affirmed Congress's constitutional authority to enact section 666(a)(2). It said that Congress "has authority under the Spending Clause to appropriate federal monies to promote the general welfare, and it has corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft . . . ."<sup>40</sup> Section 666(a)(2), the Court maintained, "addresse[d] the problem at the sources of bribes, by rational means . . . ."<sup>41</sup> The Court acknowledged, as Sabri argued, that not every action covered by section 666(a)(2) "will be traceably skimmed from specific federal payments or show up in the guise of a *quid pro quo* for some dereliction in spending a federal grant . . . [.] [b]ut this possibility portends no enforcement beyond the scope of federal interest."<sup>42</sup> The Court reasoned that "[m]oney is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value. Liquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring in there. And officials are not any the less threatening to the objects behind federal spending just because they may accept general retainers."<sup>43</sup>

<sup>39</sup> *Id.* at 1945–46.

<sup>40</sup> *Id.* at 1946.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

The Court also briefly dismissed two other arguments made by Sabri. It maintained, as had the district court and the Eighth Circuit before it, that section 666(a)(2) did not impose impermissible conditions on recipients of federal funds because the statute imposes no conditions at all on such recipients; it directly regulates non-recipients such as Sabri.<sup>44</sup> The Court also rejected Sabri's suggestion that some recent decisions limiting the scope of Congress's power under the Commerce Clause were relevant to the constitutionality of section 666(a)(2).<sup>45</sup>

The majority added "an afterword on Sabri's technique for challenging his indictment by facial attack on the underlying statute"<sup>46</sup> that emphasized that facial challenges "are best when infrequent," "are especially to be discouraged," and are valid "in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence."<sup>47</sup>

Justice Kennedy and Justice Scalia joined most of the opinion but did not join the "afterword" discussing facial challenges. Their four-sentence concurrence said only that certain prior decisions involving the constitutional power of Congress under the Commerce Clause were unaffected by the decision in *Sabri*.<sup>48</sup>

Justice Thomas concurred in the judgment. He agreed with the majority that section 666(a)(2) was constitutional, but he did not agree that the Sweeping Clause was the appropriate source of constitutional authority. He thought that the majority's discussion of the Sweeping Clause, which assumed that the clause required only a

<sup>44</sup>*Id.* at 1947–48.

<sup>45</sup>See *id.* at 1947.

<sup>46</sup>*Id.* at 1948.

<sup>47</sup>*Id.*

<sup>48</sup>See *id.* at 1949 (Kennedy, J., concurring) ("The Court . . . does not specifically question the practice we have followed in cases such as *United States v. Lopez* [514 U.S. 549 (1995)] and *United States v. Morrison* [529 U.S. 598 (2000)]. In those instances the Court did resolve the basic question whether Congress, in enacting the statutes challenged there, had exceeded its legislative power under the Constitution."). It is hard to figure out the purpose of this concurrence. My best guess—and it is purely speculation—is that Justices Kennedy and Scalia were concerned that Justice Souter, the author of the majority opinion, was trying to plant some seeds to undermine the authority of the *Lopez* and *Morrison* decisions, of which Justice Souter has been a persistent and vocal critic.

“‘means-ends rationality’ test,”<sup>49</sup> misinterpreted the constitutional meaning of the word “necessary,” which he thought requires a plainer and more direct connection between means and ends than the majority suggested.<sup>50</sup> Instead, he would have upheld section 666(a)(2) as valid under the Court’s case law concerning the Commerce Clause.<sup>51</sup> He reiterated his long-standing doubts about whether the modern Court has correctly interpreted the Commerce Clause, but observed that no one in *Sabri* challenged those precedents.<sup>52</sup>

In the final analysis, Sabri brought his challenge too soon to raise cleanly the constitutional issues concerning section 666(a)(2). If he had been convicted after a trial, at which the government failed to prove any connection between his conduct and the administration of federal funds, his case would have squarely presented issues about the power of Congress to reach such conduct. As the case was presented, however, Sabri was a likely loser *even if section 666(a)(2) is in fact unconstitutional* over a range of cases, perhaps including his own.

### III. The Constitutional Principles at Stake in *Sabri v. United States*

One can understand why someone in Sabri’s position would be quick to challenge the constitutionality of section 666(a)(2). How could attempted bribery of local officials involving local land-use decisions possibly be the business of the federal government? One can perhaps imagine why the federal government would be concerned about allegations that federal grants were being misappropriated, but two of the three counts in the indictment against Sabri involved nothing more than the local regulatory approval and eminent domain processes. How does the receipt of federal money by the city of Minneapolis convert every transaction involving city employees into a potential federal crime?

<sup>49</sup>*Id.* (Thomas, J., concurring in the judgment).

<sup>50</sup>See *id.* at 1949–51.

<sup>51</sup>See U.S. Const. art. I, § 8, cl. 3 (granting Congress power “[t]o regulate Commerce . . . among the several States”).

<sup>52</sup>See 124 S. Ct. at 1949.

The grounds on which section 666(a)(2) was defended by the government and/or upheld by the courts have been shifting and varied, ranging from the spending power to the commerce power to the Sweeping Clause. In the end, none of these sources provides the categorical support for section 666(a)(2) sought by the government or suggested by the Court in *Sabri*. A study of the possible constitutional bases for section 666(a)(2) demonstrates how far from the original constitutional design our world has strayed.

*A. The Elusive Spending Power*

The constitutional problems with section 666(a)(2) actually run deeper than the parties to the case, or any of the judges involved, were able to acknowledge under the current state of the law. As Justice Thomas (and Judge Bye on the Eighth Circuit) recognized, it is far from obvious how it can be “necessary,” much less “proper,” for the federal government to criminalize attempted bribery of local officials that may have nothing to do with the administration of federal money. I will address those issues about the scope of Congress’s power under the Sweeping Clause in due course. But there is an even more basic problem with section 666(a)(2) that was never noted by any of the parties or judges. The Sweeping Clause is not a free-standing, self-contained grant of power. The Sweeping Clause only gives Congress power to pass necessary and proper laws “for carrying into Execution . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Every exercise of power under the Sweeping Clause must be tied to the exercise of some other enumerated federal power. If a law enacted pursuant to the Sweeping Clause is not enacted “for carrying into Execution” a granted federal power, it does not matter how “necessary and proper” the law may be. So exactly which federal power does section 666(a)(2) “carry[] into execution”?

The seemingly obvious answer is the federal spending power. The jurisdictional “hook” for section 666(a)(2) is the provision of federal financial benefits to local governments, such as federal funds provided to the city of Minneapolis or the MCDA for local economic development. When Congress spends money, can’t it be necessary and proper for Congress to try to ensure that the money is spent for the appropriated purposes and no others?

Of course Congress can police the uses of appropriated funds through the Sweeping Clause (though I will discuss later whether

it can do so through the specific mechanisms employed by section 666(a)(2)). The more basic question, however, is whether Congress has the constitutional power to make the *kinds* of appropriations that form the jurisdictional basis for section 666(a)(2). If Congress simply has no constitutional authority to hand over federal money to an entity such as the MCDA, then one never reaches the question of the extent to which Congress can police the uses of those funds once they reach their target. There would be no valid federal power for section 666(a)(2) to help carry into execution.

Sabri never raised this deeper issue about the federal spending power for an obvious reason: Modern law decrees constitutional challenges to these kinds of appropriations to be hopeless—possibly to the point of being sanctionably frivolous. But the truth is that section 666(a)(2) is a symptom of a very advanced constitutional disease. From the standpoint of the Constitution's true meaning, the most important issue concerning section 666(a)(2) is not that it reaches conduct that does not directly concern federal funds, but that it reaches conduct that does in fact directly concern federal funds that should never have been appropriated in the first place. It is like a statute that provides for congressional removal of the commissioners of a certain federal agency, where the agency's mission is to pre-screen all newspaper editorials to make sure that they conform to official governmental policy. One can surely raise a constitutional challenge to the procedure for removal of the commissioners,<sup>53</sup> but such a challenge somewhat misses the point. Accordingly, the first issue that ought to be raised by section 666(a)(2) is where, if anywhere, does Congress get the authority to hand over federal money to entities such as the city of Minneapolis or the MCDA?

The Court's opinion in *Sabri* blandly noted that "Congress has authority under the Spending Clause to appropriate federal monies to promote the general welfare, Art. I, § 8, cl. 1,"<sup>54</sup> which authority could then be effectuated through the Sweeping Clause. The constitutional provision identified by the Court as the "Spending Clause," which allegedly contains the authority to spend for the general

<sup>53</sup>See *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that Congress cannot reserve to itself statutory power to remove federal officers).

<sup>54</sup>*Sabri v. United States*, 124 S. Ct. 1941, 1946 (2004).

welfare that forms the predicate for section 666(a)(2), says that “[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”<sup>55</sup> For almost three-quarters of a century, modern law has acted as though this clause affirmatively authorizes Congress to spend money to promote the general welfare.<sup>56</sup> For almost three-quarters of a century, modern law has been egregiously wrong.

The only power granted to Congress by the first clause of Article I, section 8 is the power to lay and collect taxes, duties, impost, and excises (which I will henceforth collectively call “taxes,” although the various revenue measures were distinct entities to the founding generation).<sup>57</sup> Everything else in the clause—which is properly called the Taxing Clause rather than the Spending Clause—clarifies, qualifies, or limits the taxing power. The final portion of the clause makes clear that duties, impost, and excises must be uniform throughout the country; Congress cannot enact a duty that makes imports into New York less costly than imports into Boston.<sup>58</sup> The phrase “to pay the Debts and provide for the common Defence and general Welfare of the United States” identifies the *purposes* for which revenue measures may be laid and for which revenue may be collected but does not grant any power independent of the basic power to lay and collect taxes. People have from time to time tried to argue that this

<sup>55</sup>U.S. Const. art. I, § 8, cl. 1.

<sup>56</sup>See *United States v. Butler*, 297 U.S. 1, 64–66, 78 (1936); *Helvering v. Davis*, 301 U.S. 619, 640 (1937). For an entire symposium devoted to this so-called Spending Clause, which nowhere seriously questions whether Article I, section 8, clause 1 really is a spending clause, see *Spending Clause Symposium*, 4 *Chapman L. Rev.* 1-230 (2001).

<sup>57</sup>On the differences among taxes, duties, impost, and excises, see Joseph A. Story, *A Familiar Exposition of the Constitution of the United States* § 156 (1833).

<sup>58</sup>The word “taxes” was not included in this uniformity provision because the original Constitution elsewhere required (direct) taxes to be “apportioned among the several States which may be included within this Union, according to their respective Numbers.” U.S. Const. art. I, § 2, cl. 3. This apportionment provision was abrogated by the Sixteenth Amendment in 1916. See *id.* amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”).

clause grants Congress an independent legislative power to “provide for the . . . general Welfare of the United States,”<sup>59</sup> but such an argument makes no textual or structural sense. The grammar of the clause does not support such a reading, and a free-standing “general Welfare” power would transform Congress into a general legislature and thereby make hash out of the rest of Article I.<sup>60</sup> The “general Welfare” is a permissible object of the federal taxing power, but it is not an object of general federal legislative authority.

This identification in the Taxing Clause of the permissible purposes for federal taxation serves some important functions. First, as a purely rhetorical device, it seeks to assure a populace suspicious of federal taxes that such taxes will only be imposed for good cause. Second, and more important, the reference to the “general Welfare” as a permissible purpose for taxation makes clear that taxes may be levied for appropriate regulatory purposes and not simply to raise revenue. As Professor Jeffrey Renz has detailed, this was a matter of special concern to the founding generation, which saw tax policy as an important regulatory tool.<sup>61</sup> For example, the second statute enacted by the First Congress in 1789 imposed duties on imports and described those duties as “necessary for the support of government, for the discharge of the debts of the United States, and *the encouragement and protection of manufactures.*”<sup>62</sup> All three stated purposes for the duties are legitimized by the Taxing Clause; the third purpose would arguably not be permissible without the reference

<sup>59</sup>See, e.g., 12 Annals of Cong. 473 (1803) (statement of Rep. Rodney).

<sup>60</sup>For an exhaustive and detailed dissection of the untenable claim that Congress has an enumerated power to promote the general welfare, see Jeffrey T. Renz, *What Spending Clause? (Or the President’s Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. Marshall L. Rev. 81 (1999).

<sup>61</sup>See *id.* at 87.

<sup>62</sup>Act of July 4, 1789, ch. II, § 1, 1 Stat. 24 (emphasis added). For those who are curious: The very first statute enacted by the First Congress prescribed the form of the oath of office for government officials other than the president. Act of June 1, 1789, ch. I, 1 Stat. 23. The Constitution requires all federal and state governmental officials to be “bound by Oath or Affirmation, to support this Constitution,” U.S. Const. art. VI, cl. 3, but the president is the only official for whom the Constitution specifically prescribes the content of the oath. See *id.* art. II, § 1, cl. 7. Oaths, in those days, were serious business. For a modest attempt to revive their importance, see Gary Lawson, *Everything I Need to Know About Presidents I Learned from Dr. Seuss*, 24 Harv. J.L. & Pub. Pol’y 381 (2001).

in the Taxing Clause to the “general Welfare.” Thus, the Taxing Clause grants Congress the power to impose taxes for a broad range of purposes. But the only power granted by the clause is the power to tax.

When push comes to shove, very few people actually argue that the Taxing Clause directly grants to Congress the power to spend, for the general welfare or otherwise. That is not surprising, as neither the word “spend” nor any remote synonym appears anywhere in the clause. Instead, modern law has reasoned that a power to spend for the general welfare can be *inferred* from the Taxing Clause. As the Supreme Court argued in 1936 in *United States v. Butler*, which is the seminal modern case on the congressional spending power:

The Congress is expressly empowered to lay taxes to provide for the general welfare. Funds in the Treasury as a result of taxation may be expended only through appropriation. They can never accomplish the objects for which they were collected unless the power to appropriate is as broad as the power to tax. The necessary implication from the terms of the grant is that the public funds may be appropriated “to provide for the general welfare of the United States.” These words cannot be meaningless, else they would not have been used.<sup>63</sup>

There is a great deal wrong with this inference. First, it would be bizarre if the national government’s power to spend rested on nothing more than an inference from a taxing provision. One would expect something as basic as the power to appropriate funds to have a cleaner textual basis—which, as I will shortly demonstrate, is precisely the case. Second, there is no structural ground for expecting the federal government’s taxing and spending powers to come from the same source. “Indeed, one might well expect the contrary if one thinks that there are likely to be different internal limitations on taxing and spending authority; there is no reason, for instance, to suppose that the Constitution would impose a uniformity requirement on spending in the same manner that it imposes a uniformity requirement on taxation.”<sup>64</sup> Third, as scholars have pointed out for

<sup>63</sup>297 U.S. 1, 65 (1936).

<sup>64</sup>Gary Lawson & Guy Seidman, *The Constitution of Empire: Territorial Expansion and American Legal History* 26 (2004).

many years, the inference from taxing power to spending power overlooks the fact that taxes are not the federal government's only source of revenue. Money can also be raised by borrowing or by selling land or other property.<sup>65</sup> As David Engdahl has pointed out, "nothing in the Taxing Clause even implicitly contemplates spending such funds [from land sales],"<sup>66</sup> and "the spending allusion in the Taxing Clause does not even colorably reach borrowed sums."<sup>67</sup> Does that mean that borrowed funds or proceeds from land sales cannot be spent—or can only be spent for different purposes than funds raised through taxation? If the language in the Taxing Clause truly generates spending authority, these absurd conclusions are difficult to avoid.<sup>68</sup> Fourth, the language in the Taxing Clause concerning the "general Welfare" is hardly rendered surplusage if one declines to use it to generate spending authority. As has already been discussed, that language assures that the federal taxing power may be used for regulatory as well as revenue-raising purposes. The modern inference of a power to spend for the general welfare rests on nothing.

So where does Congress get the undoubted power to spend money? The obvious answer is: from the same place that it gets the undoubted power to create federal offices, enact criminal statutes, and regulate federal court procedures. The federal spending power comes from the Sweeping Clause. An appropriations act is constitutionally authorized whenever it is "necessary and proper for carrying into Execution" some other federal power.

Important consequences flow from grounding the federal spending power in the Sweeping Clause. Any law enacted pursuant to the Sweeping Clause must "carry[] into Execution" some power vested in an institution of the national government. Spending authority under the Sweeping Clause is therefore limited by the enumerations of substantive powers elsewhere in the Constitution. The

<sup>65</sup>See U.S. Const. art. I, § 8, cl. 2 (granting power "[t]o borrow Money on the credit of the United States"); *id.* art. IV, § 3, cl. 2 (granting power "to dispose of . . . the Territory or other Property belonging to the United States").

<sup>66</sup>David E. Engdahl, *The Spending Power*, 44 *Duke L.J.* 1, 49 (1994).

<sup>67</sup>David E. Engdahl, *The Basis of the Spending Power*, 18 *Seattle U. L. Rev.* 215, 222 (1995).

<sup>68</sup>See Charles Warren, *Congress As Santa Claus or National Donations and the General Welfare Clause of the Constitution* 28–29 (1932).

Sweeping Clause does not generate a free-standing spending power that extends to some conception of the “general Welfare of the United States.”<sup>69</sup>

In the context of *Sabri*, the question would be: What enumerated federal power is “carr[ie]d into Execution” by an appropriations act dispensing federal grant money to the city of Minneapolis or the MCDA? If the answer is (as it certainly appears to be) “none,” then there is nothing for section 666(a)(2) to do in *Sabri*’s case. Section 666(a)(2) can only “carry[] into Execution” the federal appropriation power if that appropriation power is itself properly exercised.

It is a telling indictment of our current constitutional situation that no lawyer in his or her right mind would challenge section 666(a)(2) on this basis. The result would be ridicule at best and legal sanctions at worst. The federal spending power has been running out of control, unconnected to its constitutional moorings, for many decades, and there is no sign that this will change in the foreseeable future.

#### *B. The Ubiquitous Commerce Power*

If challenged to produce an enumerated power that federal grants to cities and local development agencies could plausibly be said to “carry[] into Execution,” a modern lawyer would likely shoot back, without much hesitation, “the Commerce Clause.” That clause grants Congress power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>70</sup> Modern law, notwithstanding a few recent blips, generally treats the clause as a *carte blanche* for federal authority that is very hard to distinguish from a broad power to promote the “general Welfare of the United States.”<sup>71</sup> Indeed, Justice Thomas in *Sabri* thought

<sup>69</sup>David Engdahl has argued at some length that a free-standing spending power can be generated from the Property Clause, U.S. Const. art. IV, § 3, cl. 2, which gives Congress power to “dispose of . . . Property belonging to the United States.” See Engdahl, *supra* note 66. I have elsewhere outlined the structural case against this position. See Lawson & Seidman, *supra* note 64, at 27–30.

<sup>70</sup>U.S. Const. art. I, § 8, cl. 3.

<sup>71</sup>See, e.g., *Perez v. United States*, 402 U.S. 146 (1971) (Congress can regulate local loan sharking under the Commerce Clause); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (Congress can regulate racial discrimination in restaurants under the Commerce Clause). The few modern “blips” concern attempts by Congress to use the Commerce Clause to regulate matters of an obviously noneconomic nature, such as gun possession near a school, see *United States v. Lopez*, 514 U.S. 549 (1995), or violence against

that the Court's Commerce Clause decisions would *directly* sustain section 666(a)(2), without need for recourse to the Sweeping Clause.<sup>72</sup> If that is even close to being true, then economic development grants to local governments could easily be seen as "carrying into Execution" the commerce power, and section 666(a)(2) could easily be seen as "carrying into Execution" the ensuing federal grant authority.

A detailed treatment of the Commerce Clause is beyond my mission here. The clause has been more than ably analyzed by Randy Barnett, who has elegantly dissected the many modern misconceptions about the original meaning of the power to "regulate commerce . . . among the several States,"<sup>73</sup> including the prevalent misconception that the word "commerce" as it appears in the Constitution refers to all gainful human activity. But if one simply looks at the Constitution, without trying to accommodate modern doctrines or (mis)understandings, the idea that the Commerce Clause can ground a statute such as section 666(a)(2) becomes absurd. A bribe that occurs within the city of Minneapolis is hardly "commerce . . . among the several States," so the Commerce Clause cannot directly authorize section 666(a)(2) as it applies to persons such as Sabri. Nor is a federal grant to the city of Minneapolis a regulation of interstate commerce. Such grants may (or, more likely, may not) ultimately increase the amount of interstate commerce by encouraging economic development, but not everything that increases the amount of commerce is a regulation thereof. The power to *regulate* commerce is not the same as the power to *promote* commerce; the framing generation, after all, knew how to use the word "promote."<sup>74</sup> Nor is it a power to regulate everything that touches on anything that

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women, see *United States v. Morrison*, 529 U.S. 598 (2000). And even these modest constraints on national power generated hotly contested 5-4 decisions.

<sup>72</sup>*Sabri v. United States*, 124 S. Ct. 1941, 1949 (2004) (Thomas, J., concurring). Accord: Peter J. Henning, Federalism and the Federal Prosecution of State and Local Corruption, 92 Ky. L.J. 75, 123 (2003-04) ("Congress clearly could make bribery and embezzlement involving state and local officials a federal crime under the Commerce Clause . . . . Corruption is largely an economic offense . . . .").

<sup>73</sup>See Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001).

<sup>74</sup>See, e.g., U.S. Const. art. I, § 8, cl. 8 (giving Congress power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

is economic; commerce is a subset of economic activity rather than the entire universe. And if the federal government had no power to hand over money to the city of Minneapolis and the MCDA, it had no power to police Sabri's activities with respect to employees of those entities.

*C. The Not-Quite-So-Sweeping Sweeping Clause*

The federal government in *Sabri* initially defended section 666(a)(2) as a valid exercise of so-called conditional spending authority: Assuming (as modern law unquestionably does) that federal grants to local government agencies are permissible, Congress is permitted to attach conditions to those grants as long as those conditions are not unduly coercive.<sup>75</sup> All three of the courts that heard Sabri's case resoundingly—and correctly—rejected this argument on the simple ground that section 666(a)(2) is not a condition on spending. It does not direct recipients of federal benefits to take or refrain from any action. Instead, it regulates non-recipients of federal funds who deal with agents of recipient entities. No agreement, tacit or express, by entities that receive federal benefits can explain or justify the extension of federal criminal liability to non-recipients who merely transact with those entities.<sup>76</sup>

The Eighth Circuit upheld the constitutionality of section 666(a)(2) on the ground (which the government specifically disavowed) that the statute was a “necessary and proper” means for carrying into execution the federal spending power. The Supreme Court in *Sabri* affirmed the constitutionality of section 666(a)(2) on the same basis. For purposes of analyzing this claim, let us counterfactually assume that the federal government has the power (from whatever source) to make grants to agencies such as the city of Minneapolis and the MCDA. Is section 666(a)(2) “necessary and proper for carrying into Execution” that assumed power? This question really poses two separate questions: Is the statute “necessary” for that purpose and is it “proper” for that purpose? I will consider each question in turn.

<sup>75</sup>See *South Dakota v. Dole*, 483 U.S. 203 (1987).

<sup>76</sup>The rejection of this “conditional spending” rationale for section 666(a)(2) now seems fairly universal. See, e.g., Henning, *supra* note 72, at 116–17; Garnett, *supra* note 14, at 84.

### 1. *Necessary Connections*

The word “necessary” as it appears in the Sweeping Clause describes a required causal, or telic,<sup>77</sup> connection between legislative means and ends. If section 666(a)(2) prohibited bribery or attempted bribery of federal officials who administer grant programs, no one would doubt that the statute was well tailored for carrying into execution whatever constitutional power justified the grant program. The same would be true if the statute prohibited bribery or attempted bribery of state or local officials in direct connection with the administration of federal funds. The problem with section 666(a)(2) is that it reaches conduct that does not directly involve the administration of federal funds, such as an attempt to bribe a city official to obtain local regulatory clearances or the exercise of local eminent domain authority.

The only causal link between federal spending and the prohibited conduct in such a case is the “money is fungible” argument advanced by the Supreme Court in *Sabri*:

Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value. Liquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring in there. And officials are not any the less threatening to the objects behind federal spending just because they may accept general retainers.<sup>78</sup>

As causal connections go, this one is not completely laughable. Neither is it airtight. The question raised starkly by section 666(a)(2) is thus how tight the connection between ends (ensuring that federal funds are spent for their appropriated purposes) and means (penalizing attempted bribery of any employee of any entity that receives federal funds whether or not the bribe directly concerns federal funds) must be under the Constitution. How “necessary” does a law have to be in order to be “necessary and proper for carrying into Execution” federal powers?

The question, in its most general form, has a long and famous history. In *McCulloch v. Maryland*,<sup>79</sup> the state of Maryland argued

<sup>77</sup>See David E. Engdahl, *Constitutional Federalism in a Nutshell* 20 (2d ed. 1987).

<sup>78</sup>*Sabri v. United States*, 124 S. Ct. 1941, 1946 (2004).

<sup>79</sup>17 U.S. (4 Wheat.) 316 (1819).

that a law could only be “necessary” within the meaning of the Sweeping Clause if it was “indispensably requisite”<sup>80</sup> to the effectuation of some enumerated power. This was also the view of Thomas Jefferson, who understood the Sweeping Clause to authorize only the use of “means without which the grant of the power would be nugatory.”<sup>81</sup> This strict definition of the word “necessary” was echoed by other members of the founding generation,<sup>82</sup> and it conforms elegantly to the meanings reported in Samuel Johnson’s then-contemporary *Dictionary of the English Language*, which in both the 1755 and 1785 editions defined “necessary” as “1. Needful; indispensably requisite. 2. Not free; fatal; impelled by fate. 3. Conclusive; decisive by inevitable consequence.”<sup>83</sup> That linguistic understanding of “necessary” has continued into modern times; the 1933 edition of the *Oxford English Dictionary* defined the term as “Indispensable, requisite, essential, needful; that cannot be done without” and “closely related or connected; intimate.”<sup>84</sup>

Other founding-era figures took a very different approach. Alexander Hamilton’s position, for instance, was reflected in the preamble to the bill for the first Bank of the United States, which maintained that a law was “necessary” if it “might be conceived to be conducive” to achieving legislative ends,<sup>85</sup> which translates into so-called “rational basis” scrutiny under modern equal protection doctrine.<sup>86</sup>

James Madison took a third view. In his 1791 remarks in Congress opposing the first Bank of the United States, he cast doubt on the strict Jeffersonian understanding of “necessary” as the term appears in the Sweeping Clause:

<sup>80</sup> *Id.* at 367 (argument of Mr. Jones).

<sup>81</sup> Opinion on the Constitutionality of the Bill for Establishing a National Bank, in 19 *The Papers of Thomas Jefferson* 275, 278 (Julian P. Boyd ed., 1974).

<sup>82</sup> See Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 *U. Pa. J. Const. L.* 183, 188–96 (2003).

<sup>83</sup> These dictionaries were not numerically paginated.

<sup>84</sup> 7 *Oxford English Dictionary* 60–61 (1933).

<sup>85</sup> 1 *Annals of Cong.* 1948 (1791) (statement of James Madison quoting the preamble to the first Bank Bill).

<sup>86</sup> See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 11–12 (1992) (“the Equal Protection Clause is satisfied so long as . . . the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational”).

Those two words [“necessary” and “proper”] had been, by some, taken in a very limited sense, and were thought only to extend to the passing of such laws as were indispensably necessary to the very existence of the government. He was disposed to think that a more liberal construction should be put on them . . . for very few acts of the legislature could be proved essentially necessary to the absolute existence of government.<sup>87</sup>

At the same time, Madison warned against too generous a reading of the means-ends requirement for executory laws:

The essential characteristic of the government, as composed of limited and enumerated powers, would be destroyed; if instead of *direct and incidental* means, any means could be used, which in the language of the preamble to the bill, “might be conceived to be conducive to the successful conducting of the finances, or might be conceived to tend to give facility to the obtaining of loans.”<sup>88</sup>

Madison explained his intermediate position nearly three decades after the first debate on the bank bill. After *McCulloch* had been decided, Madison said in a letter to Spencer Roane that “[t]here is certainly a reasonable medium between expounding the Constitution with the strictness of a penal law, or other ordinary statute, and expounding it with a laxity which may vary its essential character. . . .”<sup>89</sup> That reasonable medium, in the context of the Necessary and Proper Clause, is to require of executory laws “a definite connection between means and ends,” in which the executory law and the executed power are linked “by some obvious and precise affinity.”<sup>90</sup>

<sup>87</sup> 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 417 (Jonathan Elliot ed., 1836).

<sup>88</sup> 1 Annals of Cong. 1947–48 (emphasis added).

<sup>89</sup> Letter of Sept. 2, 1819 to Spencer Roane, in 8 The Writings of James Madison 447, 451–52 (Gaillard Hunt ed., 1908).

<sup>90</sup> *Id.* at 448.

In *McCulloch*, the Court's opinion by Chief Justice Marshall famously rejected the strict Jeffersonian view of "necessary."<sup>91</sup> The Court relied on several considerations to reach this conclusion, but the most powerful argument was the intratextual comparison of the Sweeping Clause with the Imposts Clause of Article I, section 10. The Imposts Clause forbids a state from laying import or export duties without congressional consent "except what may be *absolutely necessary* for executing its inspection laws."<sup>92</sup> The Court reasoned, with considerable plausibility, that the pairing of "necessary" with the qualifier "absolutely" supports the view that the unqualified word "necessary" in the Sweeping Clause means something less restrictive than "those single means, without which the end would be entirely unattainable."<sup>93</sup>

It is less clear what standard for necessity the Court in *McCulloch* actually adopted. The Court in *McCulloch* considered whether Congress had power to incorporate a bank as a means "necessary and proper for carrying into Execution" various enumerated fiscal powers of the federal government. In upholding the constitutionality of the bank statute, Chief Justice Marshall articulated the now-standard formulation of the meaning of the Sweeping Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."<sup>94</sup> If one had to associate that formulation with Jefferson, Hamilton, or Madison, one would probably choose Madison. A requirement that a law be "appropriate" and "plainly adapted" to a permissible end and "consist with the

<sup>91</sup>I include the following lengthy discussion of *McCulloch* for historical context and for the issues and arguments that it highlights, not because I regard it, or any other Supreme Court pronouncement, as authoritative on the meaning of the Constitution. The Constitution means what it means, regardless of what Founders, judges, or scholars may say about it. For more on my decidedly idiosyncratic disregard for the authority of precedent, see Gary Lawson, *The Constitutional Case Against Precedent*, 17 Harv. J.L. & Pub. Pol'y 23 (1994). For more on my less-decidedly idiosyncratic approach to constitutional interpretation, which focuses on what a reasonable original observer would have concluded after considering all relevant evidence, see Lawson & Seidman, *supra* note 64, at 7–12.

<sup>92</sup>U.S. Const. art. I, § 10, cl. 2 (emphasis added).

<sup>93</sup>*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414 (2004).

<sup>94</sup>*Id.* at 421.

letter and spirit of the constitution” does not read like an endorsement of a Hamiltonian rational basis test. To the contrary, a law that is “plainly adapted” to an end is a law that has more than a remote, hypothetical relationship to the desired end. Otherwise, the adaptation would not be “plain[.]”

The Court’s application of its standard to the question before it in *McCulloch* also had a Madisonian ring:

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, *if required for its fiscal operations*. To use one, must be within the discretion of Congress, *if it be an appropriate mode of executing the powers of government*. That it is a convenient, a useful, *and essential* instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its *importance and necessity*; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, Congress, justifying the measure by its necessity, transcended, perhaps its powers to obtain the advantage of a bank; and our own legislation attests the *universal conviction of the utility* of this measure. The time has passed away, when it can be necessary to enter into any discussion in order to prove the *importance* of this instrument, as a means to effect the legitimate objects of the government.<sup>95</sup>

The emphasized language demonstrates that the Court perceived significantly more than a rational connection between the bank and governmental ends. One can fault the Court for taking judicial notice of contested facts about the importance of a national bank, but given the thirty-year history of the bank struggle up to that point, the Court’s shorthand reference to that history is understandable.

There is other language in *McCulloch*, however, that suggests a looser means-ends standard more in line with Hamilton. The Court declared at one point that “[t]o employ the means necessary to an

<sup>95</sup> *Id.* at 422–23 (emphasis added).

end, is generally understood as employing *any means calculated to produce the end*, and not as being confined to those single means, without which the end would be entirely unattainable.<sup>96</sup> Elsewhere, the Court stated that federal powers could not be beneficially executed “by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end.”<sup>97</sup> While the primary focus of these passages was to reject the strict view advanced by the state of Maryland, they do suggest a highly relaxed requirement for tailoring legislative means to ends.

The Eighth Circuit in *Sabri* took this loose Hamiltonian view that requires only a minimal connection between legislative means and ends. This reflected the clear modern consensus about the meaning of *McCulloch* among lower courts and commentators,<sup>98</sup> though Supreme Court decisions between *McCulloch* and *Sabri* were in fact a bit more equivocal than that consensus suggested.<sup>99</sup> The Supreme

<sup>96</sup>*Id.* at 413–14 (emphasis added).

<sup>97</sup>*Id.* at 415.

<sup>98</sup>See, e.g., *United States v. Edgar*, 304 F.3d 1320, 1325–26 (11th Cir. 2002); *United States v. Wang Kun Lue*, 134 F.3d 79, 84 (2d Cir. 1998); Laurence H. Tribe, *American Constitutional Law* § 5-3, at 805 (3d ed. 2000).

<sup>99</sup>Some modern decisions, for example, clearly endorsed a rational basis test, see, e.g., *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 276 (1981); *United States v. Darby*, 312 U.S. 100, 121 (1941), but those decisions were so closely tied to broad views of the commerce power that it is hard to know whether the Commerce Clause or the Sweeping Clause was doing most of the hard work in those cases. Decisions applying the enforcement provisions of the Civil War Amendments, which authorize Congress to enforce the substantive provisions of those amendments through “appropriate legislation,” U.S. Const. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2, sometimes articulated something that resembles a rational basis test while linking those enforcement provisions to the Sweeping Clause, see, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 650–51 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966), but it is doubtful whether “rational basis” accurately describes the connection between congressional means and ends required under current caselaw for enforcement of those amendments. See, e.g., *Boerne v. Flores*, 521 U.S. 507, 533–34 (1997). A recent application of the Sweeping Clause, which upheld a statute that tolls state statutes of limitations while claims over which federal courts have supplemental jurisdiction are pending in federal court, made no specific mention of the test for necessity but conducted a very careful analysis of the statute’s relation to Congress’s powers over the federal courts that is hard to square with a rational basis test. See *Jinks v. Richland County*, 583 U.S. 456 (2003).

The strongest pre-*Sabri* decision in favor of a rational basis test held, with respect to Congress’s power to regulate court procedures under the Sweeping Clause, that Congress may “regulate matters which, though falling within the uncertain area

Court in *Sabri* went out of its way to endorse the Eighth Circuit's position. The Court said that "[s]ection 666(a)(2) addressed the problem at the sources of bribes, *by rational means*, to safeguard the integrity of the state, local, and tribal recipients of federal dollars."<sup>100</sup> More tellingly, the only cases cited by the Court to describe the necessity requirement under the Sweeping Clause were the two cases that probably took the broadest views of necessity in the Court's history<sup>101</sup> and *McCulloch*, which the Court characterized as "establishing review for *means-ends rationality* under the Necessary and Proper Clause."<sup>102</sup> According to the Court in *Sabri*, the phrase "necessary" in the Sweeping Clause effectively means "believed by Congress to be helpful."

This position makes no constitutional sense. As a matter of text, structure, and history, the Madisonian position is the most plausible, though there is a nonfrivolous case for the strict Jeffersonian view. The one position for which there is no credible constitutional basis is the view that "necessary" means "believed by Congress to be helpful."

Textually, while the word "necessary" in the Sweeping Clause perhaps means something less than "indispensable," it surely means more than "rationally related." Each of the definitions of "necessary" found in Samuel Johnson's eighteenth-century dictionary reflects a far stricter understanding of the term than a mere rational relationship between means and ends. That may not be enough to establish

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between substance and procedure, are rationally capable of classification as either." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). The strongest decisions against such a standard rejected claims that Congress's power "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, cl. 14, allowed Congress to extend court martial jurisdiction to servicepeople who have left the service or to dependents of servicepeople who live on overseas military bases. See *Kinsella v. United States*, 361 U.S. 234, 247–48 (1960) (no court martial jurisdiction over civilian dependents for non-capital crimes); *Reid v. Covert*, 354 U.S. 1, 20–22 (1957) (plurality opinion) (no court martial jurisdiction over civilian dependents for capital crimes); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21–22 (1955) (no court martial jurisdiction over ex-servicepeople even for crimes committed while in the service). Under a rational basis standard, those congressional judgments respecting military security should have been easy winners.

<sup>100</sup> *Sabri v. United States*, 124 S. Ct. 1941, 1946 (2004) (emphasis added).

<sup>101</sup> See *id.* (citing *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 276 (1981), and *Hanna v. Plumer*, 380 U.S. 460, 472 (1965)).

<sup>102</sup> 124 S. Ct. at 1946 (emphasis added).

that Jefferson's interpretation of the Sweeping Clause was correct, but it is more than enough to show that Hamilton's "rationally related" interpretation was wrong.

In one of *McCulloch*'s most famous passages, Chief Justice Marshall questioned this textual argument by declaring of the word "necessary": "If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another."<sup>103</sup> Putting aside the seeming oddity of equating the word "essential" with the words "convenient" and "useful": Marshall did not identify any of the "approved authors" of whom he spoke, nor did he provide any examples of usages that conformed to his suggested loose meaning for "necessary." In fact, Marshall was simply echoing Alexander Hamilton's famous observation in his opinion to President Washington concerning the first Bank of the United States that "[i]t is a common mode of expression to say, that it is *necessary* for a government or a person to do this or that thing, when nothing more is intended or understood, than that the interests of the government or person require, or will be promoted by, the doing of this or that thing."<sup>104</sup> Hamilton provided no more support for his contention than did Marshall nearly three decades later.

While it would require a professional linguist, a professional historian, or both (and I am neither) to pronounce definitively upon Hamilton's and Marshall's position, a humble lawyer can make two pertinent observations. First, Samuel Johnson's dictionary provides no support whatsoever for the Hamilton/Marshall view of "necessary." If one is looking for reliable authorities concerning common founding-era usage of the word "necessary," Johnson the lexicographer would seem to have more than a modest advantage over a secretary of the treasury and a Supreme Court justice with notorious political interests in the outcome of the inquiry. Second, I have examined every usage of the word "necessary" contemporaneous with or prior to the decision in *McCulloch* that appears in the substantial database contained in the *American Freedom Library* CD-ROM

<sup>103</sup> 17 U.S. (4 Wheat) 316, 413 (1819).

<sup>104</sup> Opinion on the Constitutionality of an Act to Establish a Bank, in 8 The Papers of Alexander Hamilton 97, 102 (Harold C. Syrett & Jacob E. Cooke eds., 1965).

collection, and none of those usages even remotely approaches “convenient” or “useful.” If I may risk the conceit of self-quotation, the Hamilton/Marshall position on this point “appears to be blather.”<sup>105</sup>

Structurally, the case against the “rational basis” interpretation of the word “necessary” is strongly reinforced by two important intratextual comparisons within the Constitution. First, if one plugs the Hamiltonian understanding of “necessary” into the Imposts Clause, the result is gibberish: “No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be *absolutely* [rationally related to or believed by Congress to be helpful] to executing its inspection Laws.” The qualifier “absolutely” is nonsensical on such an interpretation. In order for the Imposts Clause to make sense, the word “necessary” must involve a direct and substantial connection between means and ends, with the word “absolutely” *amplifying* but not changing the basic character of that connection.

Second, the Constitution’s uses of the words “necessary” and “needful” are also instructive. Samuel Johnson’s founding-era dictionary cross-defined “necessary” and “needful” as synonyms: One of Johnson’s definitions of “necessary” was “needful,” and Johnson’s entire definition of “needful” was simply “necessary; indispensably requisite.” On two separate occasions—the Territories Clause and the District Clause, the latter of which immediately precedes the Sweeping Clause in Article I, section 8—the Constitution uses the term “needful” to define Congress’s powers.<sup>106</sup> Both usages of “needful” involve contexts—federal territory and federal enclaves—in which Congress acts with the powers of a general government. If there were ever going to be occasion for giving terms such as “needful” or “necessary” a relatively loose construction, it would occur when defining the legislative powers of a general government rather than when defining the legislative powers of a limited government. Again, this may not be enough to sustain the

<sup>105</sup>Gary Lawson, Discretion As Delegation: The “Proper” Understanding of the Nondelegation Doctrine, 73 Geo. Wash. L. Rev. (forthcoming 2005).

<sup>106</sup>See U.S. Const. art. I, § 8, cl. 17 (giving Congress power of exclusive legislation over all land acquired from States “for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings”); *id.* art. IV, § 3, cl. 2 (authorizing Congress to make “all needful Rules and Regulations respecting” federal territory or property).

view that “necessary” means “indispensable,” but it certainly defeats the claim that “necessary” means “rationally related.”

Historically, the Hamiltonian rational basis standard is inconsistent with the circumstances of the founding. During the ratification debates, the Sweeping Clause was a frequent target of attack as a threat to liberty. The Constitution’s advocates responded that the Sweeping Clause simply made explicit what would have been implicit in the absence of such a clause.<sup>107</sup> In a government of limited and enumerated powers, one could hardly imply a congressional power to pass all laws “rationally related” to the enumerated powers in the absence of the Sweeping Clause.

Madison’s standard, which requires a direct, obvious, and precise connection between legislative means and ends, best conforms to the Constitution’s text, structure, and history. Textually, Madison’s formulation conforms to the ordinary meaning (then and now) of the word “necessary,” which is not a term that one would likely use to describe remote and attenuated connections. Structurally, it makes sense of the Imposts Clause; under a Madisonian view of “necessary,” the phrase “absolutely necessary” in the Imposts Clause of Article I, section 10 means that without congressional consent, states can only tax imports or exports if their inspection laws would otherwise be unenforceable, which makes good structural sense. And historically, if there were no Sweeping Clause, one would likely infer something very much like Madison’s standard as an implication from the grant of enumerated powers. The best understanding of the word “necessary” as it appears in the Sweeping Clause is that congressional legislation under that clause must have a direct, obvious, and precise connection to appropriate legislative ends.

<sup>107</sup> See The Federalist No. 33, *supra* note 2, at 202 (Alexander Hamilton) (the Sweeping Clause is “only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government and vesting it with certain specified powers”); The Federalist No. 44, *supra* note 2, at 285 (James Madison) (“Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government, by unavoidable implication.”); see also 1 Annals of Cong. 1951 (Joseph Gales ed., 1791) (statement of James Madison) (“The explanations in the State Conventions all turned on the . . . principle that the terms necessary and proper gave no additional powers to those enumerated.”).

It is, of course, one thing to say that the Sweeping Clause requires a direct, obvious, and precise connection between legislative means and ends. It is another thing to explain how to apply that standard to specific circumstances. Just as one cannot specify in advance all of the means that Congress might try to employ to effectuate federal powers, one cannot specify in advance exactly which fits between means and ends will be unconstitutional. Madison, for instance, may well have been wrong about the application of his own standard to the Bank of the United States; the causal connection between the Bank and the federal borrowing power is hardly remote.

With respect to section 666(a)(2), however, the case against the statute is easy. The statute criminalizes bribery attempts in connection with any transaction involving \$5,000 or more as long as the bribe's intended target is "an agent of an organization or of a State, local or Indian tribal government, or any agency thereof" that receives at least \$10,000 in federal assistance within one year of the alleged crime. There is no requirement that the attempted bribe have anything to do with any particular federally funded program. The statute simply polices the honesty of everyone who deals with any recipient of the statutorily required amount of federal financial assistance. This falls far short of the constitutional requirements of the Sweeping Clause.

Congress could surely penalize misappropriation of federal funds by their recipients. Such a statute would plainly have a "definite connection" to and "obvious and precise affinity" with the underlying federal program. For similar reasons, Congress could also penalize the acceptance of bribes by recipients of federal funds when the bribes concern the operation of federally-funded programs. Indeed, Congress can possibly penalize such bribes even if they are not shown specifically to affect the disposition of federal funds.<sup>108</sup> In this circumstance, the connection between the penal statute and the execution of an underlying federal power is not as definite, obvious, and precise as in the case of the misappropriation of federal funds, but to require the narrowest possible tailoring of implementing statutes might move too far toward the view that "necessary" means

<sup>108</sup>See *Salinas v. United States*, 522 U.S. 52 (1997); cf. *Westfall v. United States*, 274 U.S. 256 (1927) (Congress may prohibit bank fraud perpetrated on state banks in the Federal Reserve System without showing that any of the Federal Reserve Banks suffered a specific loss).

“indispensable.” Congress can ensure the integrity of the programs that it funds through general laws, even if those laws sometimes sweep beyond their central concerns. It is more doubtful whether Congress could prohibit persons who do not themselves receive federal benefits from offering bribes to persons who do receive such benefits, even when the bribes concern the operation of a federally-funded program: It is unclear how a federal program is definitely or obviously affected simply because temptation is placed in the path of federal funding recipients, given that those recipients can always be punished if they yield to the temptation. But section 666(a)(2) goes far beyond any remotely plausible connection to the execution of federal powers.

Section 666(a)(2) does not require any showing that the alleged bribery have any connection to any federally funded program. All that must be shown is that the target of the bribe received federal assistance of some kind in the amount of \$10,000 and that the attempted bribe concerned a transaction involving at least \$5,000. This amounts to saying that Congress has an interest in ensuring that recipients of federal benefits not face undue temptation in areas of their lives other than the administration of federal benefits, for fear that they might yield in those other areas and subsequently yield with respect to federal funds as well. If that is “necessary . . . for carrying into Execution” federal powers, so would be a statute prohibiting, for example, solicitation of adultery in connection with recipients of federal funds. The same considerations defeat the Supreme Court’s argument that “money is fungible.” Federal funding may perhaps increase the possible scope for bribery by increasing the budgets of the funded agencies, but to call that a “definite,” “obvious” or “precise” connection between criminal liability and the federal funding power is to reduce those words to a rational basis test. Section 666(a)(2) does not represent a “definite,” “obvious,” and “precise” means for carrying federal powers into execution.

## *2. Proper Behavior*

I have spent a good portion of my professional life arguing that the words “necessary” and “proper” in the Sweeping Clause represent distinct constitutional requirements, so that even if a statute is “necessary . . . for carrying into Execution” federal powers, it is still beyond Congress’s powers under the Sweeping Clause if it is not

“proper” for that purpose. The argument for this proposition is set out at great length elsewhere,<sup>109</sup> and I cannot replicate that argument here. For those who are disinclined to read two long law review articles, and the commentary thereon, in order to discover for themselves whether my position on the meaning of the word “proper” is, as one set of critics has claimed, “idiosyncratic” and “dramatic”<sup>110</sup>: Although many people disagree with the content that I would attribute to the word “proper” in the Sweeping Clause, the basic view that the words “necessary” and “proper” in the Sweeping Clause have distinct meanings approaches conventional wisdom among informed commentators;<sup>111</sup> was the foundation for Judge Bye’s dissenting opinion in *Sabri* in the Eighth Circuit;<sup>112</sup> and has been specifically endorsed by the Supreme Court on at least three occasions in the past decade. In two cases, the Supreme Court has specifically held that congressional statutes were unconstitutional because they were not “proper” means for executing federal powers,<sup>113</sup> and in a third, the Court treated as too obvious for discussion that congressional statutes under the Sweeping Clause must be analyzed separately for necessity and propriety.<sup>114</sup> In my academic career, I have advanced plenty of positions that deserve to be called idiosyncratic, including more than a few in this article, but the view that the words “necessary” and “proper” in the Sweeping Clause serve distinct constitutional functions is not one of them.

The word “necessary” in the Sweeping Clause regulates the “fit” between means and ends that must be exhibited by executory legislation. The word “proper” serves a different function. A “proper”

<sup>109</sup>See Lawson, *supra* note 105; Lawson & Granger, *supra* note 29.

<sup>110</sup>Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1728 n.20 (2002).

<sup>111</sup>See, e.g., Randy E. Barnett, Constitutional Legitimacy, 103 Colum. L. Rev. 111, 145 (2003); Steven G. Calabresi & Saikrishna Prakash, The President’s Power to Execute the Laws, 104 Yale L.J. 541, 587 (1994); Stephen Gardbaum, Rethinking Constitutional Federalism, 74 Tex. L. Rev. 795, 814 (1996); Garnett, *supra* note 14, at 79; Michael Stokes Paulsen, Abrogating Stare Decisis By Statute: May Congress Remove the Precedential Effect of Roe and Casey?, 109 Yale L.J. 1535, 1568 (2000); Saikrishna Prakash, The Essential Meaning of Executive Power, 2003 U. Ill. L. Rev. 701, 737 (2003).

<sup>112</sup>See *United States v. Sabri*, 326 F.3d 937, 954–57 (8th Cir. 2003) (Bye, J., dissenting).

<sup>113</sup>See *Alden v. Maine*, 527 U.S. 706, 732–33 (1999); *Printz v. United States*, 521 U.S. 898, 923–24 (1997).

<sup>114</sup>See *Jinks v. Richland County*, 538 U.S. 456 (2003).

law, reflecting the principal meaning of the word “proper” identified by Samuel Johnson in 1785,<sup>115</sup> must respect the *peculiar and distinctive jurisdictional arrangements set forth in the Constitution*. More specifically:

[T]he authority conferred by executory laws must distinctively and peculiarly belong to the national government as a whole and to the particular institution whose powers are carried into execution. In view of the limited character of the national government under the Constitution, Congress’s choice of means to execute federal powers would be constrained in at least three ways: first, an executory law would have to conform to the “proper” allocation of authority within the federal government; second, such a law would have to be within the “proper” scope of the federal government’s limited jurisdiction with respect to the retained prerogatives of the states; and third, the law would have to be within the “proper” scope of the federal government’s limited jurisdiction with respect to the people’s retained rights.<sup>116</sup>

<sup>115</sup>See 2 Samuel Johnson, *Dictionary of the English Language* (1785) (“proper” means “1. Peculiar; not belonging to more; not common”).

<sup>116</sup>Lawson & Granger, *supra* note 29, at 297. This “jurisdictional” understanding of the word “proper” has a firm linguistic grounding in founding-era usages, both generally with respect to the allocation of governmental powers, see *id.* at 291–97, and specifically with respect to the Sweeping Clause, see *id.* at 298–308. Two intratextual comparisons indicate that such a usage was incorporated into the Constitution. First, the Recommendation Clause instructs the president to recommend to Congress such measures “as he shall judge *necessary and expedient*.” U.S. Const. art. II, § 3 (emphasis added). If the Constitution’s drafters wanted a term to accompany “necessary” that simply referred to a law’s suitability or aptness, they had a ready model at hand in the term “expedient.” Instead, they used the word “proper” as the companion term in the Sweeping Clause; the contrast between “necessary and proper” and “necessary and expedient” highlights the jurisdictional meaning of “proper.” Second, the Territories Clause of Article IV gives Congress power to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,” U.S. Const. art. IV, § 3, cl. 2, with no requirement that such laws be “proper.” Again, the contrast with the Sweeping Clause highlights the jurisdictional component of the latter. When Congress legislates for the territories, it has the powers of a general government; it is not limited by the scheme of enumerated powers. It makes perfect sense to place a jurisdictional restriction in the Sweeping Clause, which applies to Congress in its guise as a limited-government legislature, but not in the Territories Clause, which applies to Congress in its guise as a general-government legislature. Additional, generally unarticulated evidence of this understanding of the word “proper” can be found in events from the founding era. See Lawson & Granger, *supra* note 29, at 315–26. Finally, the jurisdictional understanding of the word “proper” harmonizes with the *principle of reasonableness* that grounded eighteenth-century views of delegated power. See Lawson, *supra* note 105.

The Eighth Circuit majority rejected Judge Bye's argument that section 666(a)(2) was not "proper" because it believed that a law can only fail to be "proper" under the Sweeping Clause when Congress directly regulates states in violation of constitutional principles of federalism.<sup>117</sup> Although the two recent Supreme Court cases that invalidated congressional statutes on the ground that they are not "proper" both involved direct regulation of states in their sovereign capacities, this hardly exhausts the circumstances under which executive laws can be improper.

If Congress sought to direct the outcome of a specific court case, such a statute would not be "proper for carrying into Execution" the federal judicial power.<sup>118</sup> If Congress sought to give itself power to remove executive officers by means other than impeachment, such a statute would not be "proper for carrying into Execution" any federal powers.<sup>119</sup> In 1790, before ratification of the Fourth Amendment, if Congress had sought to authorize the use of general warrants to enforce the tariff laws, such a statute would not have been "proper for carrying into Execution" the taxing power.<sup>120</sup> Laws can be improper under the Sweeping Clause without regulating or involving the states. A "proper" law must respect the Constitution's basic structure in all respects.

The Constitution's most basic structural feature is the principle of enumerated power. A statute enacted pursuant to the Sweeping Clause that threatens to unravel that principle is not "proper for carrying into Execution" federal powers. This point was acknowledged by (of all people) Alexander Hamilton, writing as Publius in *The Federalist*:

But it may be again asked, Who is to judge of the *necessity* and *propriety* of the laws to be passed for executing the powers of the Union? . . . The propriety of a law, in a constitutional light, must always be determined by the nature of the powers

<sup>117</sup>See *United States v. Sabri*, 326 F.3d 937, 949 n.6 (8th Cir. 2003).

<sup>118</sup>See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871).

<sup>119</sup>See *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

<sup>120</sup>See 1 *Annals of Cong.* 438 (1791) (statement of James Madison) (suggesting that in the absence of a bill of rights, Congress might misconstrue its powers under the Sweeping Clause and wrongly enact laws, such as laws providing for general warrants, "which laws in themselves are neither necessary nor proper").

upon which it is founded. Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the Federal legislature should attempt to vary the law of descent in any State, would it not be evident that, in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the State?<sup>121</sup>

One must accordingly ask whether section 666(a)(2) is consistent with the Constitution's overall distribution of governmental authority.

The Sweeping Clause is a vehicle for executing federal powers. It is not a vehicle for circumventing the Constitution's enumeration of Congress's legislative jurisdiction. The Sweeping Clause, of course, is part of that enumerated legislative jurisdiction, and there are accordingly many subjects that Congress can reach by virtue of that clause that otherwise would not be within its power. The power to create federal offices, the power to regulate court procedures, the power to condemn property, and the power to punish offenses other than counterfeiting, maritime offenses, or violations of the law of nations are all powers beyond those enumerated elsewhere in the Constitution that Congress possesses under the Sweeping Clause.

That does not mean, however, that the means constitutionally available to Congress are infinite, even limiting oneself only to those means that are "necessary" within the meaning of the Sweeping Clause. There is a difference between laws that execute or implement federal powers (by creating offices, condemning property for public purposes, specifying court procedures, etc.) and laws that regulate. Congress's regulatory authority is carefully defined by the enumerations of subjects over which Congress is competent. Those enumerations define what might be termed Congress's "subject matter jurisdiction," which can be effectuated by means of laws pursuant to the Sweeping Clause. But a law that is presented as a means for carrying into execution federal powers that in fact regulates an area beyond the specific enumerations of Congress's regulatory authority is not "proper." It is not a law that is distinctively and peculiarly within the jurisdiction of Congress.

<sup>121</sup> The Federalist No. 33, *supra* note 2, at 203–04 (Alexander Hamilton) (emphasis in original).

Section 666(a)(2) is such a law. Congress has authority to promulgate a general criminal code for the territories, the District of Columbia, and federal enclaves, but it has no such authority with respect to territory within the jurisdiction of the states. Rather, in that context, Congress only has authority to promulgate criminal laws that are “necessary and proper for carrying into Execution” enumerated federal powers. Even a criminal law that is “necessary” for that purpose—and section 666(a)(2) fails that test—is beyond Congress’s constitutional power if it disrupts a “proper” allocation of authority between state and federal authority. Section 666(a)(2) criminalizes the conduct of persons who simply come into contact with recipients of federal funds. That is precisely the kind of general legislative authority that Congress is denied by the enumerations of legislative competence in Article I, section 8. It is precisely the kind of authority that is not “proper” for Congress to exercise when executing federal powers.

The Supreme Court in *Sabri* did not discuss at all the question whether section 666(a)(2) was “proper” legislation under the Sweeping Clause. Perhaps this is because Sabri’s counsel did not highlight the argument. For whatever reason, the issue went unaddressed, even by Justice Thomas.

#### **IV. *Sabri*’s Implications For Limited Government**

It is doubtful whether the Supreme Court’s decision in *Sabri* will be long remembered. Because Sabri brought a facial challenge to the statute, virtually everything that the Court said about the Constitution is colored by the Court’s general distaste for such facial challenges, especially when obviously constitutional applications of the statute are readily at hand. The Court did make some very bad law when it affirmed that the governing test for necessity under the Sweeping Clause is a rational relationship test, but no one was startled by that conclusion, which simply confirmed long-held assumptions about the Court’s inclinations. The Court avoided altogether the crucial question whether section 666(a)(2) is “proper” under the Sweeping Clause. Perhaps if the government fails at Sabri’s trial to prove any connection between Sabri’s activities and the administration of federal funds, the case will reappear in a more appropriate procedural posture with full briefing of the question of section 666(a)(2)’s propriety.

Given the near-limitless scope granted by the Court to congressional spending power, the broad authority granted by the Court to Congress under the Commerce Clause, and the Court's apparent unwillingness to police the boundaries of necessity under the Sweeping Clause, advocates of limited government probably should not look forward to the next case involving section 666(a)(2).