

THOMAS, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 03–44

BASIM OMAR SABRI, PETITIONER *v.*
UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[May 17, 2004]

JUSTICE THOMAS, concurring in the judgment.

Title 18 U. S. C. §666(a)(2) is a valid exercise of Congress’ power to regulate commerce, at least under this Court’s precedent. Cf. *Perez v. United States*, 402 U. S. 146, 154 (1971). I continue to doubt that we have correctly interpreted the Commerce Clause. See *United States v. Morrison*, 529 U. S. 598, 627 (2000) (THOMAS, J., concurring); *United States v. Lopez*, 514 U. S. 549, 584–585 (1995) (THOMAS, J., concurring). But until this Court reconsiders its precedents, and because neither party requests us to do so here, our prior case law controls the outcome of this case.

I write further because I find questionable the scope the Court gives to the Necessary and Proper Clause as applied to Congress’ authority to spend. In particular, the Court appears to hold that the Necessary and Proper Clause authorizes the exercise of any power that is no more than a “rational means” to effectuate one of Congress’ enumerated powers. *Ante*, at 4–5. This conclusion derives from the Court’s characterization of the seminal case *McCulloch v. Maryland*, 4 Wheat. 316 (1819), as having established a “means-ends rationality” test, *ante*, at 4, a characterization that I am not certain is correct.

In *McCulloch*, the Court faced the question whether the United States had the power to incorporate a national bank. The Court was forced to navigate between the one

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extreme of the “absolute necessity” construction advocated by the State of Maryland, 4 Wheat., at 387 (argument of counsel), which would “clog and embarrass” the execution of the enumerated powers “by withholding the most appropriate means” for its execution, *id.*, at 408, and the other extreme, an interpretation that would destroy the Framers’ purpose of establishing a National Government of limited and enumerated powers, see *id.*, at 423; cf. *Gibbons v. Ogden*, 9 Wheat. 1, 194–195 (1824). The Court, speaking through Chief Justice Marshall, carefully and effectively refuted Maryland’s proposed “absolute necessity” test. “It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution,” the Court stated; “[t]his could not be done 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.” *McCulloch*, 4 Wheat., at 415. The Court opined that it would render the Constitution “a splendid bauble” if “the right to legislate on that vast mass of incidental powers which must be involved in the constitution” were not within the power of Congress. *Id.*, at 421.

But the Court did not then conclude that the Necessary and Proper Clause gives unrestricted power to the Federal Government. See *ibid.* (“[T]he powers of the government are limited, and . . . its limits are not to be transcended”). Rather, it set forth the following test:

“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

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constitution, are constitutional.” *Ibid.*¹

“[A]ppropriate” and “plainly adapted” are hardly synonymous with “means-end rationality.” Indeed, “plain” means “evident to the mind or senses: OBVIOUS,” “CLEAR,” and “characterized by simplicity: not complicated.” Webster’s Ninth New Collegiate Dictionary 898 (1991); see also N. Webster, *American Dictionary of the English Language* (1828) (facsimile edition) (defining “plainly” as “[i]n a manner to be easily seen or comprehended,” and “[e]vidently; clearly; not obscurely”). A statute can have a “rational” connection to an enumerated power without being obviously or clearly tied to that enumerated power. To show that a statute is “plainly adapted” to a legitimate end, then, one must seemingly show more than that a particular statute is a “rational means,” *ante*, at 4–5, to safeguard that end; rather, it would seem necessary to show some obvious, simple, and direct relation between the statute and the enumerated power. Cf. 8 Writings of James Madison 448 (G. Hunt ed. 1908).

Under the *McCulloch* formulation, I have doubts that §666(a)(2) is a proper use of the Necessary and Proper Clause as applied to Congress’ power to spend. Section 666 states that, for any “organization, government, or agency [that] receives, in any one year period, benefits in excess of \$10,000 under a Federal program,” §666(b), any person who

¹We have recently used a very similar formulation in describing the appropriate test under the Necessary and Proper Clause. In *Jinks v. Richland County*, 538 U. S. 456 (2003), we upheld the constitutionality of 28 U. S. C. §1367(d) only after carefully concluding that the statute was both “conducive to” Congress’ “power to constitute Tribunals inferior to the supreme Court,” and also “plainly adapted” to that end. 538 U. S., at 462, 464 (internal quotation marks omitted).

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“corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of [such] organization or of [such] State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more,” §666(a)(2),

commits a federal crime. All that is necessary for §666(a)(2) to apply is that the organization, government, or agency in question receives more than \$10,000 in federal benefits of any kind, and that an agent of the entity is bribed regarding a substantial transaction of that entity. No connection whatsoever between the corrupt transaction and the federal benefits need be shown.

The Court does a not-wholly-unconvincing job of tying the broad scope of §666(a)(2) to a federal interest in federal funds and programs. See *ante*, at 5. But simply noting that “[m]oney is fungible,” *ibid.*, for instance, does not explain how there could be any federal interest in “prosecut[ing] a bribe paid to a city’s meat inspector in connection with a substantial transaction just because the city’s parks department had received a federal grant of \$10,000,” *United States v. Santopietro*, 166 F.3d 88, 93 (CA2 1999). It would be difficult to describe the chain of inferences and assumptions in which the Court would have to indulge to connect such a bribe to a federal interest in any federal funds or programs as being “plainly adapted” to their protection. And, this is just one example of many in which any federal interest in protecting federal funds is equally attenuated, and yet the bribe is covered by the expansive language of §666(a)(2). Overall, then, §666(a)(2) appears to be no more plainly adapted to protecting federal funds or federally funded programs than a hypothetical federal statute criminalizing fraud of any

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kind perpetrated on any individual who happens to receive federal welfare benefits.²

Because I would decide this case on the Court's Commerce Clause jurisprudence, I do not ultimately decide whether Congress' power to spend combined with the Necessary and Proper Clause could authorize the enactment of §666(a)(2). But regardless of the particular outcome of this case under the correct test, the Court's approach seems to greatly and improperly expand the reach of Congress' power under the Necessary and Proper Clause. Accordingly, I concur in the judgment.

²Criminalizing the theft (by fraud or otherwise) or embezzlement of federal funds themselves fits comfortably within Congress' powers. See *United States v. Hall*, 98 U. S. 343 (1879) (embezzlement of a soldier's federal pension).