This Article examines a fundamental tension in the effort to attack corruption and achieve "reform" in American politics. Many of the most significant prosecutions of allegedly corrupt state and local officials are brought by the federal government. At the same time, the Supreme Court, through its New Federalism jurisprudence, is carving out an enhanced vision of the states as semi-sovereign entities within the overall federal system. Clearly, one aspect of sovereignty is the ability not only to choose those officials who will govern, but to control their conduct while in office and discipline them when and how the relevant sovereign deems it appropriate. Yet the sovereign that is performing perhaps the most significant policing is not the one whose officials’ conduct is in question.

Section I of the Article examines the federal anti-corruption prosecutions that are most typical, focusing on their statutory basis. The Article contends that, contrary to the general view, the statutes upon which these prosecutions are based, are drafted with political corruption squarely covered by the operative language. The statutes as they read represent a conscious national decision to pursue corrupt governmental activity, rather than criminal laws that might reach illegal official behavior. Thus there is in place a statutory policy that advocates of the New Federalism might attack as they have done successfully in other contexts.

Section II of the Article examines briefly the major themes of the Court’s New Federalism case law, as well as academic commentary on these decisions. The analysis emphasizes the extent to which the cases, notably those in the Eleventh Amendment context, present the states as semi-sovereigns, almost mini-republics. The analysis examines the range of reactions from those who view the decisions as a counter-revolution to those who feel the court has made only a mid course correction which leaves intact the basic national role in areas such as civil rights and economic regulation.

Section III of the Article focuses on the inconsistency between the anti-corruption prosecutions and the tenets of the New Federalism. Particular emphasis is placed on the concept of accountability. Gregory v. Ashcroft, is an apt starting point for the proposition that states and localities retain substantial control over the actions of their officials. Later cases such as New York and Printz elevate state autonomy to a constitutional level focusing on the importance of accountability: citizens knowing whom to blame in the case of government actions with which they do not agree. I argue it is essentially the same notion of accountability that embraces the discipline of an official potentially guilty of wrongdoing.

Section IV begins the search for possible lines of authority that might support the active national role. This section of the Article analyzes at length the patronage cases, beginning with Elrod v. Burns that span the period from 1976 to 1996. I find in them more than just the First Amendment analysis principally relied on; these decisions are presented as endorsing national oversight of state political processes at the behest of private plaintiffs armed with a strong federal claim. The cases are analyzed as reaching beyond issues of the franchise—indeed, voting rights precedents play little or no role—
but extending to the ongoing neutrality and fairness of state and local government. The patronage cases provide some support for the federal role that the corruption prosecutions represent.

Section V of the Article seeks other possible bases of support for a protective role on the part of the national government. I take as my point of departure Professor John Hart Ely’s position “that it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open.” Numerous themes in the American legal tradition are relevant to the question of guarding the guardians. States may be unable to police certain problems adequately, especially if those involved are investigating themselves. The national government has always shown a special solicitude for matters such as the franchise, the functioning of the electoral process, and the protection of civil rights. I examine these and other themes, such as the development by the lower federal courts of the doctrine of the citizen’s intangible right to honest services, with a view to arriving at an accommodation between the apparent dictates of the new federalism and the well established role of the national government in prosecuting corruption.

Section VI of the Article examines possible scenarios in which the Court might cut back on anti-corruption prosecutions. One potentially vulnerable area is the wide use of statutes with an affecting commerce jurisdictional element, such as the Hobbs Act. I consider the possibility of a substantial curtailment of such uses, as well as that of a hard look at the jurisdictional reach of the mail fraud statute. It is also possible that the Court will reconsider substantive issues such as the scope of the honest services doctrine and the concept of extortion “under color of official right.”

A likely battleground is the Federal Program Bribery Act, 18 U.S.C. §666. Despite the Court’s recent Salinas decision, there is considerable ferment in the lower courts about the reach of a statute which appears to criminalize a range of behavior in any jurisdiction receiving a threshold level of federal funds, regardless of the existence of any connection between the conduct and the funds. Perhaps the most interesting debate centers on the extent to which §666 is a use of the Necessary and Proper clause to augment the Spending Power by ensuring that there is honesty throughout recipient jurisdictions. I view this as a dubious argument.

In sum, I see significant areas of vulnerability, as well as a thrust of the New Federalism that might lead to cutting back federal prosecutions of state and local officials. On the other hand, the national protective role has strong support, both direct and indirect. Eliminating it completely would seem the constitutional equivalent of drastic reductions in federal protection of civil rights and the franchise, and regulation of the national economy. None of these is likely to happen.