Notes

THE VIRTUE OF VAGUENESS: A DEFENSE OF *SOUTH DAKOTA V. DOLE*

REEVE T. BULL

INTRODUCTION

With the death of Chief Justice William Rehnquist on September 3, 2005,[1] the inevitable scholarly speculation upon the primary legacy of the Rehnquist Court began in earnest. Undoubtedly, scholars will reflect upon the federalist resurgence that occurred during Rehnquist's term on the Court and particularly during his tenure as Chief Justice. Consternation over the decisions of the Court often reached a fever pitch following the issuance of important opinions bolstering states' rights.[2] A deeper examination of the Rehnquist Court, however, reveals a legacy that may be troubling to federalists. Though Rehnquist famously pared federal Commerce Clause authority in *United States v. Lopez*[3] and *United States v. Morrison*,[4] he left Congress with virtually unbounded authority under the Spending Clause in *South Dakota v. Dole*.[5] Hence, states' rights advocates are understandably concerned that *Dole* may provide Congress with an alternative route to achieve effectively unlimited regulatory power at the expense of the states. As a result, numerous federalist scholars

1. Charles Lane, *Chief Justice Dies at Age 80*, WASH. POST, Sept. 4, 2005, at A1.

2. *See* Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 643–44 (1996) (chronicling the exaggerated reaction of certain news reporters and scholars to the *Lopez* decision).

3. *See* 514 U.S. 549, 567–68 (1995) (declaring the Gun-Free School Zones Act unconstitutional as exceeding Congress's Commerce Clause authority).

4. *See* 529 U.S. 598, 627 (2000) (declaring the Violence Against Women Act unconstitutional as exceeding Congress's Commerce Clause authority).

5. *See* 483 U.S. 203, 212 (1987) (upholding Congress's conditioning receipt of 5 percent of federal highway funds upon states agreeing to raise the minimum drinking age to twenty-one).

and politicians have proposed multifarious limits upon Congress's spending power.

This Note examines the implications of the Court's *Dole* decision, focusing extensively on whether *Dole* gives Congress a "back door" to evade the principles of federalism championed by the Rehnquist Court in *Lopez* and *Morrison*. This Note ultimately concludes, however, that *Dole* is not such a "back door" and provides as much protection for states' rights as is necessary and desirable in an inherently nebulous area of constitutional jurisprudence. Part I discusses the importance of the spending power by chronicling the recent rise of federalist principles that resulted in a significant retrenchment in Congress's Commerce Clause power in *Lopez* and examining the historical evolution of extreme deference in reviewing national legislation passed under the Spending Clause. Subsequently, Part II examines the decision in *South Dakota v. Dole* in detail and concludes that its four explicitly articulated limitations on the spending power are largely rhetorical and place no limit on congressional authority that meaningfully preserves the rights of the states. Part III analyzes the prohibition against "coercion" of states noted only in passing in *Dole*[6] and concludes that it provides the most promising limitation of federal Spending Clause authority. Though perhaps unsatisfyingly vague, the prohibition against coercion serves as an adequate warning against attempts by Congress to wield unbounded authority under the Spending Clause. This warning proves to be superior to any proposed bright-line standard in that more definitive limits on Spending Clause power are likely to fail, given the inherent ambiguity of the Spending Clause itself. Finally, Part IV marshals empirical support for the contention that the absence of coercion requirement of *Dole* and earlier cases, coupled with the inherent protections of the political process, has effectively influenced Congress to exercise less than its maximal theoretical powers under the Spending Clause, and has provided a meaningful—if admittedly unclear—federalism-based limit upon Congress's spending power.

---

6. *See id.* at 211 (recognizing that coercive conditions may be unconstitutional but holding that conditioning 5 percent of highway funds upon raising the minimum drinking age does not rise to the level of coercion).

I. THE INCREASING RELEVANCE OF THE SPENDING CLAUSE

A. The Decline of the Commerce Clause

Historically, Congress passed the vast majority of its regulatory legislation under the Commerce Clause and relied only occasionally upon the Spending Clause as a source of constitutional authority.[7] For roughly sixty years, the Supreme Court gave virtually complete deference to Congress in its efforts to promulgate legislation under the Commerce Clause based upon purported "substantial economic effect[s] on interstate commerce."[8] In 1995, however, the Rehnquist Court's decision in *Lopez* repudiated this legacy by holding that Congress did not have the power under the Commerce Clause to enact the Gun-Free School Zones Act, an act criminalizing the possession of guns within school zones.[9] According to the *Lopez* majority, upholding the Act "would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[10] Scholars have debated the importance of *Lopez* and the likelihood that it might spark a resurgence of the federalist values of the pre-New Deal era, but few dispute that *Lopez* marked a radical departure from what was virtually judicial abdication in policing limits upon Commerce Clause power that characterized the era from 1937 to its issuance.[11]

Consequently, *Lopez* justifiably resulted in significant consternation amongst those who support a strong centralized government with the ability to regulate in areas in which the states are otherwise incapable of wielding or unwilling to exert sufficient

---

7. *See* Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1112–13 (1987) (explaining an apparent dearth of interest in the Spending Clause by the traditionally extensive authority available to Congress under the Commerce Clause).

8. Wickard v. Filburn, 317 U.S. 111, 125 (1942).

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

10. *Id.* at 567.

11. *Compare* Lynn A. Baker, *Conditional Federal Spending after* Lopez, 95 COLUM. L. REV. 1911, 1914 (1995) (contending that *Lopez* represents a declaration of the Court's intention to police against excessive expansion of federal power vis-à-vis the states), *with* Nagel, *supra* note 2, at 654 (suggesting that *Lopez* merely comprises the fulfillment of the Court's repeated assertions in prior Commerce Clause cases that federal power cannot be expanded excessively and some continued role for the states must exist).

control.[12] Further, their concerns were heightened given that most federal civil rights legislation is promulgated under the Commerce Clause[13] and that such laws may not prove sufficiently commerce related to pass a stringent application of the *Lopez* test.

In response to the apparent resurgence of federalist principles in the Burger and Rehnquist Courts,[14] advocates of a strong centralized government partly shifted their attention to the Spending Clause as an alternative means of constitutional authority to enact laws that might not meet the Commerce Clause standard under *Lopez*.[15] Literally days after the *Lopez* decision, President Bill Clinton advocated the passage of a law equivalent to the Gun-Free School Zones Act under the Spending Clause.[16] Indeed, now that the Court has at least partially narrowed the "front door" of Commerce Clause authority, scholars' and legislators' interest in the "back door" of Spending Clause authority has increased considerably.[17]

B. The Rise of the Spending Clause

Constitutional authority for Congress to appropriate and spend funds arises from two sources: the implied power to tax and spend based on a combination of the Necessary and Proper Clause[18] and

12. *See* Nagel, *supra* note 2, at 643 (chronicling the responses to *Lopez* in the popular press and noting the fear that *Lopez* constituted the initial step in repudiating much of the legislation of the Civil Rights and New Deal eras).

13. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (upholding applicability of the Civil Rights Act of 1964 to a restaurant that purchased significant quantities of food that had traveled in channels of interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261-62 (1964) (upholding applicability of the Civil Rights Act of 1964 to a motel that served numerous interstate travelers).

14. *See, e.g.*, New York v. United States, 505 U.S. 144, 175–76 (1992) (holding that Congress may not commandeer state governments in forcing them to enact regulations but rather must regulate directly or proffer states incentives for compliance under the Spending Clause); Nat'l League of Cities v. Usery, 426 U.S. 833, 851–52 (1976) (holding that Congress exceeded its Commerce Clause authority in applying the Fair Labor Standards Act to hiring practices of states qua states), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

15. *See* Baker, *supra* note 11, at 1913 (noting President Clinton's efforts to pass legislation similar to the Gun-Free School Zones Act under the Spending Clause).

16. *Id.*

17. *See* Rosenthal, *supra* note 7, at 1131 ("If the front door of the commerce power is open, it may not be worth worrying whether to keep the back door of the spending power tightly closed.").

18. U.S. CONST. art. I, § 8, cl. 18.

various constitutional grants of federal legislative power[19] and of the explicit allocation of the "power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."[20] Early in America's history, Alexander Hamilton and James Madison debated the significance of the latter source of power,[21] commonly known as the "Spending Clause." Whereas Madison contended that the clause merely reiterated the ability to appropriate and spend funds under the other affirmative constitutional grants of legislative power, Hamilton argued that the ability to provide for the "general welfare" included the ability to tax and spend for national purposes beyond the power implied by the Necessary and Proper Clause.[22] The Supreme Court eventually explicitly adopted the Hamiltonian position,[23] though the Court initially severely limited Congress's spending power in areas of authority reserved for the states through the Tenth Amendment.[24] Tenth Amendment jurisprudence atrophied with time,[25] however, and the Court ultimately acquiesced to the right of Congress to use the Spending Clause to encroach into areas traditionally within the ambit of state power.

In 1937, the Supreme Court retreated from the Tenth Amendment limitations on the Spending Clause and allowed Congress to regulate in areas traditionally handled by state governments, so long as Congress tied compliance with the

19. Rosenthal, *supra* note 7, at 1118. For instance, the ability to provide for national defense through raising an army and navy would necessarily involve the ability to tax and spend for the upkeep of such organizations. *Id.* at 1118–19.

20. U.S. CONST. art. I, § 8, cl. 1.

21. United States v. Butler, 297 U.S. 1, 65-66 (1936).

22. *Id.*

23. *Id.* at 66.

24. *Id.* at 68 ("It is an established principle [of the Tenth Amendment] that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted.").

25. Indeed, *Garcia* effectively rendered the Tenth Amendment a mere truism, a reassertion of the unexceptional fact that separate spheres for state and federal regulation must exist. *See* 469 U.S. 528, 560 (1985) (Powell, J., dissenting) ("[T]oday's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause."). In *New York v. United States*, 505 U.S. 144 (1992), the Court did not challenge such a contention, *id.* at 160, but rather noted that commandeering of state legislative machinery is beyond congressional power, *id.* at 176, whether foreclosed by the Tenth Amendment or simply disallowed under the Commerce Clause.

regulations to the receipt of federal funds.[26] Inasmuch as states could simply decline the receipt of federal funds, they possessed a legitimate choice of whether or not to adopt the regulations contemplated by the conditions placed on those funds, and therefore did not suffer any diminution of their authority.[27] The state could "adopt[] the 'simple expedient' of not yielding to what she urges is federal coercion" by rejecting the funds.[28] Of course, past penalties for noncompliance have been relatively minimal.[29] If Congress were to impose a more extensive penalty on a state for noncompliance, the state's ostensible "free choice" could devolve into a mere token gesture of acquiescing to federal coercion rather than facing unacceptable repercussions for defying Congress.[30]

II. TOWARD CONSTITUTIONAL LIMITATIONS UPON SPENDING CLAUSE AUTHORITY

Part I.B suggested the virtually unlimited extent of federal Spending Clause power prior to *South Dakota v. Dole*. *Dole*, unlike the aforementioned cases, explicitly attempts to define the precise dimensions of the power and the limits thereon.[31] Yet its relatively terse explanation of these limitations has spawned extensive speculation as to their extent, particularly in light of the recent contraction of Commerce Clause authority under *Lopez*.[32] It is unclear whether *Dole* offers meaningful affirmative limitations upon the scope of Spending Clause authority. Indeed, its four explicit limitations appear to be rhetorical flourishes and effectively give complete deference to Congress in placing conditions upon federal funds.

---

26. *See* Steward Mach. Co. v. Davis, 301 U.S. 548, 598 (1937) (upholding various provisions of the Social Security Act that created a strong incentive for states to establish their own unemployment compensation laws).

27. *Id.* at 596.

28. Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127, 143–44 (1947).

29. *See, e.g.*, *id.* at 133 (noting that if a member of the State Highway Commission of Oklahoma was not removed pursuant to the Hatch Act's limitations on state agents in political campaigns, the state of Oklahoma would lose the equivalent of two years of the state agent's salary).

30. For a more thorough examination of this possibility, *see infra* Part III.B.

31. *See generally* South Dakota v. Dole, 483 U.S. 203 (1987) (enumerating the various limits on the Spending Clause power).

32. *See* Baker, *supra* note 11, at 1929 (noting that, though *Dole* acknowledged that Spending Clause authority is subject to certain limits, none of the articulated limits is particularly effective in defining the extent of Spending Clause power).

A. Limiting the Spending Power under South Dakota v. Dole

In *Dole*, the Court considered the constitutionality of a federal statute that conditioned the receipt of 5 percent of federal highway funds upon the states' raising the minimum drinking age to twenty-one.[33] The statute thereby attempted to indirectly effect a nationwide change in the age at which citizens could legally imbibe alcohol, a type of regulation typically relegated to the "police powers" of the states. First, *Dole* cursorily noted that Congress may spend only for the general welfare.[34] It then largely eviscerated this potential limitation by asserting that "courts should defer substantially to the judgment of Congress" as to what constitutes the general welfare.[35] Second, *Dole* asserted that the conditions placed upon the receipt of federal funds must be communicated clearly and unambiguously to states such that they may form a fully informed, autonomous decision of whether or not to accept the funds and their associated conditions.[36] Third, *Dole* required a discernible relationship between the conditions placed on the funds and the legitimate federal aims sought to be achieved.[37] *Dole* failed, however, to specify how close the relationship between the ends and means must be, or the amount of over-inclusiveness and under-inclusiveness that the judiciary would tolerate.[38] Fourth, *Dole* cautioned that Congress could not indirectly violate separate constitutional limitations upon legislative authority by conditioning federal funds upon the states' superseding those limitations.[39] The fourth limitation, however, allows Congress to accomplish indirectly what it cannot accomplish directly because of *Lopez*. For instance, Congress could legitimately promulgate legislation lacking Commerce Clause support under the Spending Clause; Congress could not, however, violate an express limitation of the Constitution, such as by conditioning receipt of federal prison

33. 483 U.S. at 211.
34. *Id.* at 207.
35. *Id.*
36. *Id.*
37. *Id.* at 207–08.
38. *See id.* at 207 (failing to specify extent of acceptable over- and under-inclusiveness).
39. *Id.* at 208.

funds upon states' agreeing to inflict cruel and unusual punishment upon state prisoners.[40]

Finally, *Dole* noted in passing that conditions placed upon funds may become sufficiently coercive that otherwise permissible exertion of pressure may evolve into compulsion and render the attempted persuasion unconstitutional.[41] Interestingly, *Dole* did not explicitly enumerate the "coercion" limitation amongst the four aforementioned direct limitations upon spending power, yet the "coercion" limitation provides the most promising potential check upon Congress's ability to completely usurp traditional state authority.[42]

Justice O'Connor authored a powerful dissent in *Dole* discussing the third requirement of relatedness.[43] Her objections on the basis of relatedness, however, may more meaningfully be construed as objections to the coerciveness of the statute.[44]

B. The "General Welfare" Requirement

Dole implied without explicitly holding that the first requirement, or the "general welfare" requirement, is merely pro forma and does not constitute a judicially enforceable check upon Congress's regulatory power.[45] In any event, present case law suggests that the "general welfare" requirement at best constitutes little more than a rhetorical assertion that spending must promote the welfare of the nation as a whole.[46] Promotion of national ends does not imply, however, that Congress may never regulate in areas traditionally within the ambit of state authority.[47] Indeed, *Dole* explicitly permitted

---

40. *See id.* at 210–11 ("These cases establish that the 'independent constitutional bar' limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly.").

41. *Id.* at 211–12 (noting that the conditioning of 5 percent of federal highway funds upon elevating the minimum drinking age to twenty-one fails to rise to the level of compulsion).

42. *See infra* Part III.

43. *Id.* at 212 (O'Connor, J., dissenting).

44. For a more thorough discussion of this point, see *infra* Part III.D.

45. *See id.* at 207 n.2 ("The level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all.").

46. *See* United States v. Butler, 297 U.S. 1, 67 (1936) ("[T]he powers of taxation and appropriation extend only to matters of national, as distinguished from local, welfare.").

47. *See id.* at 68 (distinguishing the issue of whether "general welfare" encompasses regulation of agriculture, which the Court does not decide, and considering the issue of whether

conditioning funds upon regulation of the drinking age, a power traditionally left to the states. *Dole* did so in light of the fact that purely local actions, such as minors' drinking in South Dakota, may result in interstate effects, such as inebriated drivers on North Dakota roads.[48] Given the virtually limitless potential for "intrastate" activity to result in "interstate" effects, states' rights advocates are unlikely to derive much firepower with which to challenge Spending Clause legislation from this limitation.

C. The "Unambiguous Expression" Requirement

The second limitation upon Spending Clause authority, that Congress must unambiguously convey its intention to condition receipt of funds so that states may exercise a fully informed and autonomous choice in accepting or rejecting funding,[49] is, by nature, wholly rhetorical. The limitation merely requires that Congress clearly express its intentions. For instance, in *Pennhurst State School & Hospital v. Halderman*,[50] the Court struck down a "bill of rights" provision, partly enacted under the Spending Clause, because in passing it Congress failed to convey its intention to impose conditions on the receipt of federal funds.[51] Of course, the Court's reasoning partly rested upon the assumption that Congress would not impose the substantial costs of complying with the "bill of rights" provision without providing "substantial contribution[s] to defray costs."[52] Assuming that Congress were explicitly to condition receipt of funds upon compliance with the "bill of rights" provision, however, the state's remaining objections would relate to the "coerciveness" of the legislation rather than its ambiguity. Consequently, Congress may express even unconstitutional conditions unambiguously and satisfy the second *Dole* limitation.

---

regulation of agriculture violates the Tenth Amendment by intruding on traditional state authority).

48. *See Dole*, 483 U.S. at 209 (concluding that the conditioning of funds satisfied the relatedness requirement since drinking in one state can diminish overall highway safety in multiple states).

49. *Id.* at 207.

50. 451 U.S. 1 (1981).

51. *See id.* at 17 ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.").

52. *See id.* at 24 ("The fact that Congress granted to Pennsylvania only $1.6 million in 1976, a sum woefully inadequate to meet the enormous financial burden of providing 'appropriate' treatment in the 'least restrictive' setting, confirms that Congress must have had a limited purpose in enacting [the 'bill of rights' provision].").

D. The "Relatedness" Requirement

Of the four explicitly articulated Spending Clause limitations in *Dole*, the relatedness requirement carries the greatest potential to limit the inordinate expansion of congressional authority. On closer inspection, however, the provision proves merely to impose an additional rhetorical limitation upon Congress: It must name and allocate funds in such a manner that a challenging party cannot demonstrate that the conditions are unrelated to congressional goals. *Dole* further illustrated that the courts will likely render an exceedingly high degree of deference to Congress in its findings of relatedness.[53]

In her dissent, Justice O'Connor legitimately objected to the broadness of the majority's interpretation of the relatedness requirement, noting that such a test would permit Congress to regulate anything tangentially related to federal highways.[54] For instance, if Congress determined that the location of a state's capital unduly burdened interstate travel by elevating levels of traffic, it could arguably condition receipt of a percentage of federal highway funds upon relocation of the capital.[55]

However, Justice O'Connor appeared to have realized the difficulty of crafting an alternative relatedness requirement that would more meaningfully limit federal power. Her proposed limitation on the federal ability to condition funds more closely addressed the issue of coerciveness of federal conditions, as opposed to the relatedness of the conditions. Specifically, O'Connor proposed a distinction between conditions—which could legitimately be placed upon the manner in which a class of funds could be spent—and regulations—which went beyond the manner of permissible disposition of funds and impermissibly intruded into a state's sphere

---

53. *See Dole*, 483 U.S. at 208–09 (concluding that the drinking age condition explicitly serves one of the primary purposes of federal highway spending, the promotion of safety). Of course, the majority also asserted that the state of South Dakota did not object to the finding of relatedness between the condition and the federal aims, *id.* at 208, perhaps suggesting that the Court would more closely scrutinize the germaneness of the condition upon the existence of an appropriately pled objection. Nonetheless, the majority's express statement that "the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel," *id.*, suggests that it considered the qualifications for relatedness met.

54. *Id.* at 215 (O'Connor, J., dissenting).

55. *Id.*

of authority.[56] Congress could, however, facilely circumvent the test simply by reclassifying and renaming the funds it provides. For instance, Congress could easily accomplish its aims of regulating highway safety simply by dedicating a certain percentage of highway funds to prevention of alcohol consumption by minors. Such a system would preclude Congress from abusing its regulatory power by withholding from states a far greater percentage of highway funds than would be required to prevent alcohol abuse by minors, but would allow Congress to achieve any desired aim promoting the "general welfare" simply by appropriately naming the allocated funds.[57] Hence, though Justice O'Connor reasonably objected to the apparent lack of anything more than an attenuated relationship between federal highways and underage drinking, her proposed solution more adequately addressed the dilemma of coercive conditions and thereby implicitly recognized the exceeding difficulty of formulating any coherent limitation based upon relatedness of conditions and federal ends.[58]

---

56. Of course, Justice O'Connor's dissent is equally susceptible to the interpretation that "conditions" devolve into impermissible "regulations" when they are tenuously related to federal aims (rather than when they are overly coercive). However, O'Connor derives her test from the *Butler* decision, *id.* at 216, a case that explicitly distinguishes between unconstitutional regulations and mere conditions upon how money will be spent, United States v. Butler, 297 U.S. 1, 73 (1936). That case nowhere mentions any requirement of "relatedness." *But cf.* Baker, *supra* note 11, at 1961–62 (arguing that O'Connor imposed a "relatedness" requirement but failed to reconcile existing case law in neither proffering a definition for "condition" nor clarifying how withholding two years of pay, at issue in *Oklahoma*, constitutes a proper "condition" whereas withholding 5 percent of highway funds does not).

57. For instance, rather than simply allocating to states a bloc of funds designated as "highway funds," Congress could parse the funds into various portions reflecting the aims it sought to achieve, such as "highway safety funds," "highway maintenance funds," "highway traffic reduction funds," etc.

58. Indeed, O'Connor's "parade of horribles" concerning the ability of Congress to regulate the states in otherwise unacceptable ways, such as in conditioning federal highway funds upon relocation of the state capital, *Dole*, 483 U.S. at 215, would also seem to fail her articulated test if construed as an interdiction against coercion. For example, under O'Connor's test, a requirement of moving the state capital, an obviously coercive imposition upon state authority, would comprise an impermissible regulation rather than a condition insofar as the costs of relocating the capital far exceed any savings in reduced highway traffic. *See id.* at 216 ("[T]here is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced." (quoting United States v. Butler, 297 U.S. 1, 73 (1936))).

E. The Absence of "Unconstitutional Conditions" Requirement

Finally, the *Dole* majority imposed the rather unexceptional limitation that Congress cannot induce states to behave in a manner that violates the Constitution by conditioning receipt of federal funds upon such conduct.[59] Numerous scholars have addressed the fourth limitation as a promising check on the power of Congress to intrude upon traditional state authority. Such proposals, however, even if instituted, are unlikely to circumscribe Congress's potentially limitless authority under the Spending Clause. This Section addresses two prominent representative examples of such proposals to illustrate the difficulty of crafting any meaningful limit on federal Spending Clause power through the unconstitutional conditions requirement.

Professor Albert Rosenthal, as part of a broader examination of the so-called unconstitutional conditions doctrine, considers the applicability of the doctrine to the protection of states' rights. In a separate section of the article dealing with the protection of individual liberties, Rosenthal argues for a presumption that conditions upon federal spending may not be used to coerce conduct that violates one of the Constitution's various provisions protecting civil liberties.[60] He recognizes, however, that the Court has taken a significantly more protective approach when defending individual liberties against diminishment by coercive conditioning of federal funds than it has when defending state rights.[61]

In the field of protection of states' rights, Professor Rosenthal proposes that the assumption that states may adequately defend their interests through the political process is inapposite, given that any state may find it problematic to lobby both for receipt of federal funds and for removal of the conditions attached thereunto.[62] Yet, Rosenthal does not propose a presumption against indirect Spending Clause regulation when direct regulation is otherwise unachievable,

---

59. *Id.* at 208. Importantly, the fourth limitation does not prevent Congress from promulgating legislation under the Spending Clause otherwise lacking support under other affirmative grants of constitutional power but rather prohibits its conditioning funds upon the states' engaging in behavior otherwise barred by the Constitution, such as infliction of cruel and unusual punishment. *Id.* at 210–11.

60. Rosenthal, *supra* note 7, at 1152.

61. *See id.* at 1163 ("It is striking that in recent years the majority of the Court has almost never expressed in the civil liberties area what it has said with respect to interference with state autonomy: If you object to the condition, you have the simple alternative of not taking the money.").

62. *Id.* at 1141.

as he does in the individual liberty area. Rather, he simply concludes that more evidence on the ability of states to control conditioning of funds through their representation in the federal government would be useful to courts in deciding such cases.[63] Though Rosenthal provides powerful arguments for reexamining the degree of deference rendered to Congress in Spending Clause cases, he stops short of advocating a presumption against Spending Clause regulation that would otherwise fail under any other enumerated power of Congress. As such, Rosenthal appears implicitly to acknowledge that the principles of federalism vaguely implied by constitutional provisions such as the Tenth Amendment are not to be as vigilantly applied by the courts as provisions dealing with individual liberties. His implied acknowledgement rests on the recognition that Congress does not behave "unconstitutionally" and thereby violate the fourth *Dole* limitation every time it broadly applies constitutional grants of power and wields "police powers" of the type typically retained by states.

Professor William Van Alstyne offers a modified version of the unconstitutional conditions doctrine as a solution to usurpation of state authority, suggesting that state judiciaries should invalidate acceptance of federal funds when the regulations attached to the funds would violate provisions of *state* constitutions.[64] His proposed approach would potentially achieve the salubrious result of allowing states to provide more stringent constitutional protections for their citizens than they are otherwise minimally guaranteed under the U.S. Constitution.[65] For instance, the legislature of California, a state in which the high court has interpreted the state constitution to guarantee access to abortion services in public as well as private facilities, could not legitimately accept federal funds conditioned upon states' disallowing nontherapeutic abortions in public health facilities.[66]

Unfortunately, Professor Van Alstyne's brief article, though insightful, does not address the practicality of states' refusing funds

---

63. *Id.* at 1142.

64. *See* William Van Alstyne, *"Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law*, 16 HARV. J.L. & PUB. POL'Y 303, 316 (1993) (addressing the right of state courts to invalidate acceptance of funds through a hypothetical example of a state's compliance with regulations that violate an article of its constitution).

65. *See id.* at 320–21 (noting that Congress's tendency to "flatten . . . out" differences amongst states may lead to a net reduction in the protection of civil liberties nationwide).

66. *Id.* at 317–18.

with attached conditions that violate state constitutions.[67] Indeed, an exceedingly coercive attempt at Spending Clause regulation, such as conditioning all federal healthcare funds upon permitting public facilities to refuse to offer abortion services, could easily render it virtually impossible for a state to adhere to its desired level of protection of civil liberties. Under such circumstances, state voters would be likely to favor an amendment to the state constitution over losing the funding likely necessary to ensure survival of the state health care system, and the very conformity that Professor Van Alstyne fears would result.[68]

In short, the unconstitutional conditions doctrine seemingly protects only against the violation of explicitly enumerated constitutional rights, such as those dealing with civil liberties like the right of free speech or the right to be free of cruel and unusual punishment, and thereby offers little protection against the expansion of federal authority into areas traditionally controlled by the states.[69] Further, though state courts may legitimately require a state whose constitution precludes engaging in the behavior contemplated by a condition placed upon federal funds to refuse such funds,[70] Congress may still likely induce compliance, even if through amendment of the

67. *See* Baker, *supra* note 11, at 1959 (noting that Van Alstyne's focus on the acceptance of federal funds rather than the offering of federal funds leads him to overlook the serious dilemma that states that reject funds in such a manner suffer a competitive disadvantage vis-à-vis states that accept funds).

68. *Id.* at 1958–59.

69. *See* South Dakota v. Dole, 483 U.S. 203, 210 (1987) ("[T]he 'independent constitutional bar' limitation on the spending power is not . . . a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly."). The Tenth Amendment could theoretically provide an independent constitutional limitation on the ability of Congress to expand its powers into areas traditionally within the ambit of state authority via the Spending Clause. *See, e.g.*, Baker, *supra* note 11, at 1923–24 ("The Constitution's limitations, at least after *Lopez*, on Congress's ability directly to regulate the states can be understood as Tenth Amendment rights that the states have against the federal government."). However, modern case law has suggested that the Tenth Amendment merely comprises a truism and simply prevents expansion of grants of legislative power, such as the Commerce or Spending clauses, beyond the limitations inherent in the provisions themselves. *See, e.g.*, New York v. United States, 505 U.S. 144, 156–57 (1992) ("The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.").

70. Van Alstyne, *supra* note 64, at 316.

state constitution, through the imposition of highly coercive conditions upon the funds.[71]

III. *DOLE*'S ABSENCE OF "COERCION" REQUIREMENT AS AN ADEQUATE CHECK

This Part commences with an examination of the historical evolution of the coercion standard, which first received complete, if somewhat obscure, articulation in the *Dole* decision. Subsequently, this Part acknowledges scholarly dissatisfaction with *Dole*'s vague absence of coercion standard. As a result of this dissatisfaction, numerous scholars have called for more meaningful limits on the federal spending power and have advanced proposals that largely focus, explicitly or implicitly, upon strengthening the vague interdiction against coercive conditions outlined in *Dole*. This Part relies primarily upon the work of Professor Lynn Baker as representative of the call for a clearer definition of the ambit of Congress's spending power. Ultimately, this Part rejects Professor Baker's proposed solution and the concept of a bright-line limit upon spending power generally. It concludes that the vague absence of coercion requirement developed in Spending Clause case law culminating in *Dole* provides a check upon Spending Clause power sufficient to deter congressional abuse while maintaining Congress's ability to exercise effective control over the use of its funds as envisioned by the Hamiltonian standard adopted in *United States v. Butler*.[72]

A. Coercion Standard Precedent

Near the end of the *Dole* decision, almost as an afterthought, Chief Justice Rehnquist noted "that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[73] Though the *Dole* opinion did not precisely define when permissible persuasive conditions evolve into forbidden coercive ones, it summarily dismissed South Dakota's claim that the conditioning of 5 percent of

71. Baker, *supra* note 11, at 1958–59.

72. 297 U.S. 1 (1936).

73. *Dole*, 483 U.S. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

federal highway funds upon raising the minimum drinking age to twenty-one comprised coercion.[74]

In this respect, *Dole* reflected the longstanding historical understanding that, as long as the state possesses the ultimate authority to accept federal funds with their associated conditions or to reject both, Congress does not interfere with traditional state authority even if it achieves indirectly through conditioning of funds what it could not achieve directly through legislation. The state, much as a party to a contract, makes the ultimate decision.[75] *Massachusetts v. Mellon*[76] reflected such an understanding by noting rather unceremoniously in dicta that a requirement appended to federal funds would likely prove constitutional inasmuch as "the statute imposes no obligation but simply extends an option which the state is free to accept or reject."[77] Indeed, with the exception of *Butler*, which relied upon presently discredited tenets of the Tenth Amendment's serving as an independent bar to Congress's intrusion into areas of traditional state authority,[78] the Court has never held unconstitutional a statute regulating states via conditions attached to federal funds.[79]

Effectively, the corpus of modern Spending Clause legislation implies the concept that Congress's irrefutable possession of the broad ability to deny states of its largesse in distributing federal funds necessarily entails the lesser ability to distribute those funds subject to the states' adopting various conditions associated therewith. The rationale is similar to that articulated in *Harris v. McRae*,[80] which held that Congress's ability to refuse entirely to provide healthcare funds to indigent patients necessarily entails the ability to subsidize only certain procedures and explicitly to exclude even medically necessary

74. *Id.*

75. *See* Rosenthal, *supra* note 7, at 1141 (noting the traditionally high degree of deference accorded to Congress in conditioning federal funds but arguing that such deference is largely misplaced).

76. 262 U.S. 447 (1923). This decision derives from the pre-New Deal era, when the Court had an exceedingly narrow view of the Commerce Clause.

77. *Id.* at 480.

78. *See* United States v. Butler, 297 U.S. 1, 68 (1936) ("From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted.").

79. Rosenthal, *supra* note 7, at 1110.

80. 448 U.S. 297 (1980).

abortions from those subsidized procedures.[81] In short, the greater power to withhold funding implies the lesser power to grant it only upon satisfaction of certain conditions.

B. "Regulatory" and "Reimbursement" Spending Standard as Possible Limit on Spending Power

Recently, scholars have questioned the autonomy-based notions upon which the courts have seemingly relied in almost universally upholding the constitutionality of conditions attached to federal funds.[82] One such scholar, Professor Lynn Baker, articulately disputes the ability of states simply to decline federal funds when they find the attached conditions unpalatable. Specifically, she asserts that the federal government wields a monopoly power to tax the citizens of the various states to achieve its regulatory purposes.[83] Given the virtually limitless ability of the federal government to tax and spend for the "general welfare,"[84] it may unobjectionably tax state citizens to obtain sufficient funds to achieve its desired ends and then return those funds to the states subject to a bevy of conditions that achieve regulatory objectives otherwise beyond the constitutional ability of the federal government to achieve.[85] Of course, the states' concomitant ability to tax the citizens to achieve their desired regulatory objectives will thereby diminish, given that only a limited supply of tax dollars from which either government may draw exists.[86]

More importantly, politically powerful states may exploit such a situation to ensure that their favored programs become the

---

81. *See id.* at 316 ("[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.").

82. *See, e.g.*, Baker, *supra* note 11, at 1938 ("[The] monopoly power that the federal government directly and indirectly wields over the states' ability to raise revenue makes the states' financial relationship with the federal government more closely analogous to that of welfare recipients than to that of public employees."); Rosenthal, *supra* note 7, at 1135 ("[T]he dependence of the state or local government upon federal funds may have become so great as to destroy the possibility of an effective choice.").

83. *See* Baker, *supra* note 11, at 1937 ("[W]hen the federal government offers a state money subject to unattractive conditions, it is often offering funds that the state readily could have obtained without those conditions through direct taxation—if the federal government did not also have the power to tax income directly." (emphases omitted)).

84. *See supra* notes 45–48 and accompanying text.

85. *See* Baker, *supra* note 11, at 1937 ("[W]hen the federal government offers the states money, it can be understood as simply offering to return the states' money to them, often with unattractive conditions attached.").

86. *See id.*

nationwide standards, utilizing their control in Congress to condition receipt of federal funds upon other states' adhering to their desired regulations[87] and achieving the homogenization that scholars have feared.[88] For instance, if the forty-nine states that do not recognize marriages amongst same-sex couples were to determine to coerce Massachusetts into similarly abandoning such a commitment to equal civil rights,[89] they could presumably easily do so by conditioning the receipt of federal healthcare funds, the administration of which is at least marginally related to the existence or absence of unions amongst homosexual couples, upon outlawing same-sex marriage.

Ultimately, Professor Baker concludes that such homogenization will diminish the aggregate social welfare insofar as the existence of a variety of "packages" of various rights allows any given American citizen to locate in the state that most closely approximates his or her desired level of protection and that such diversity increases net social welfare.[90] To illustrate, were states that permit the death penalty for first-degree murder, which constitute a majority,[91] to condition receipt of federal criminal enforcement funds upon receiving states' allowing the imposition of the death penalty for first-degree murder, the net result would be negative. The net loss to death penalty opponents, who would no longer be able to locate in a state supporting their views, would exceed the net gain to death penalty advocates, who

87. *See id.* at 1940 ("The problem . . . lies in the ability of some states to harness the federal lawmaking power to oppress other states.").

88. *See* Van Alstyne, *supra* note 64, at 320–21 (noting that Congress's tendency to "flatten . . . out" differences amongst states may lead to a net reduction in the level of protection of civil liberties nationwide).

89. *See* Editorial, *Sound of Shifting Ground*, USA TODAY, Dec. 22, 2005, at 10A ("Massachusetts allows gay marriage. A handful of states accept or are considering allowing civil partnerships.").

90. Baker, *supra* note 11, at 1950–51.

91. Thirty-eight states possess a death penalty statute, and twelve do not; the death penalty statutes of New York and Kansas were declared unconstitutional in 2004. Death Penalty Information Center, Facts about the Death Penalty, http://www.deathpenaltyinfo.org/FactSheet.pdf (last visited Aug. 16, 2006). However, the U.S. Supreme Court recently found the challenged Kansas death penalty statute constitutional. Kansas v. Marsh, 126 S. Ct. 2516, 2529 (2006). In *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004), the New York Court of Appeals held the state's death penalty statute unconstitutional, *id.* at 361. The United States Supreme Court has not granted certiorari in the case, leaving thirty-seven states that permit capital punishment. *See infra* text accompanying note 92.

would not vastly benefit from the addition of thirteen states to the thirty-seven that already permit the death penalty.[92]

Professor Baker acknowledges the countervailing dilemmas of states' failing to adequately protect the rights of their citizens and the concomitant "races to the bottom" that may result when inadequate protection of citizens' rights results in a competitive advantage for a state.[93] She argues, however, that the minimum levels of civil rights guaranteed in the federal Constitution and the ability to amend the Constitution when such minimum levels of protection are no longer sufficient may guard against states' abuse of their autonomy.[94]

To thwart the ability of coalitions of states to homogenize state laws and constitutions by conditioning federal funding upon noncomplying states' adopting policies desired by the coalition, Professor Baker proposes a presumption against conditions placed upon federal funds that regulate states in a manner that Congress could not achieve under an alternative constitutional grant of legislative authority.[95] Congress may rebut the presumption by demonstrating that the spending at issue comprises "reimbursement" spending, which merely provides states with the capital necessary to finance projects, rather than "regulatory" spending, which provides financial incentives greater than those necessary to fund the proposed

92. *See* Baker, *supra* note 11, at 1951 ("The net result is likely to be a decrease in aggregate social welfare, since the loss in welfare to opponents of the death penalty is unlikely under these circumstances to yield a comparable gain in welfare for those who favor it.").

93. *See id.* at 1952–53 ("[C]onditional offers of federal funds are not needed to rid states of their most pernicious laws: our federal and state constitutions unambiguously prohibit their enactment and enforcement. . . . [Further,] [s]hould our society reach a substantial consensus that interstate diversity in some area is no longer acceptable, we can always amend the Constitution to prohibit the practice(s) agreed to be immoral."). The classic example is child labor: states without child labor laws may produce goods more cheaply than those who promulgate such statutes, given the relative inexpensiveness of such labor. Likely the most famous case addressing child labor, *Hammer v. Dagenhart*, 247 U.S. 251 (1918), noted that such disparities in levels of protection offered may result in "unfair competition" amongst the states but nonetheless invalidated national legislation aimed at preventing the shipment in interstate commerce of goods produced by child labor inasmuch as the legislation intruded upon traditional state police powers, *id.* at 273 ("There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition."). Undoubtedly, such regulation of inherently commercial activity would easily survive even the *Lopez* standard for Commerce Clause legislation today. *See* Nagel, *supra* note 2, at 648 (noting that inherently commercial activities with even weak ties to interstate commerce are easily subject to regulation under the *Lopez* standard).

94. *See* Baker, *supra* note 11, at 1952–53.

95. *Id.* at 1954.

projects.[96] For example, Congress may legitimately reimburse states for their expenses in prosecuting individuals who knowingly possess firearms within a school zone, providing an incentive for states to enact such legislation, but may not condition receipt of a larger amount of federal education funds than is required to prosecute such offenders.[97]

Professor Baker's article likely provides the most complete recognition of the dilemmas underlying federal spending legislation to date, yet her proposed bright-line solution of dividing federal spending into constitutional reimbursement and unconstitutional regulation potentially creates more problems than it solves. Under the proposed system, as Professor Baker recognizes, states may still strongly encourage if not coerce uniformity of state laws by reimbursing themselves for programs they have already instituted, and thereby deplete limited tax revenues available for other programs in states that do not possess the programs for which reimbursement occurs.[98] Of course, the proposed system nonetheless remains far less coercive than, for example, Congress's attempts to condition all federal funds of a certain type upon enactment of a desired statute or compliance with a desired regulation.

More importantly, Professor Baker's system would largely ravage the ability of Congress to achieve various salubrious policies previously accomplished through the conditioning of federal funds, by allowing states to dissect spending statutes and then insist that they receive full funding less any costs associated with administering the various conditions. For example, in *Fullilove v. Klutznick*,[99] the Supreme Court upheld the conditioning of federal public works funds upon the recipient state's administering a system of race-based affirmative action in obtaining contractors to complete the construction contemplated by the funds.[100] Under Baker's system,

---

96. *Id.*

97. *Id.* at 1964–65.

98. *See id.* at 1970 (noting the problem of depleted funds but recognizing that every allocation of federal tax dollars results in such opportunity costs, given that some states would always prefer that the money be spent differently).

99. 448 U.S. 448 (1980).

100. *Id.* at 478. This Note cites *Fullilove* merely to provide an example of a variety of condition placed upon federal funds that cannot be easily analyzed via a typical cost-benefit analysis. However, though *Fullilove* has never been explicitly overruled, its effectively upholding an affirmative action system based upon a quota is almost certainly invalid in light of the Court's more recent holding in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499

states could insist that Congress determine the actual cost of administering such a system, which may be nearly impossible to define,[101] and deduct that cost, if any, from the noncomplying states' share of such funds. In short, Baker simply assumes that the cost of conditions may be defined economically, an assumption that may prove spurious for conditions that create more abstract costs and benefits. Hence, Baker's proposal strictly limits Congress's ability to ensure that states expend federal funds in a manner that achieves the goals Congress sought to accomplish in providing the funds.

C. Abstractness as a Virtue: A Defense of the Dole Coercion Requirement

Professor Baker's bright-line solution potentially places excessive limits on the ability of Congress to ensure that its funds are expended in an acceptable manner, and perhaps erroneously assumes that the value of any condition may be assessed economically. Nonetheless, the limitations of Baker's proposed standard do not necessarily imply that another bright-line solution may not preserve ample regulatory authority for Congress while providing more meaningful guidance to lower courts than does the vague absence of coercion requirement articulated in *Dole*. For instance, the Court could simply set an explicit percentage of funds, greater than the 5 percent of highway funds at issue in *Dole*, beyond which congressional conditioning of funds would automatically be deemed "coercive." Though such explicit numerical standards are exceedingly rare,[102] such a cutoff

(1989) ("While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts . . . ."). Nevertheless, affirmative action programs remain constitutional in appropriate contexts. *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (upholding law school affirmative action program wherein race is considered as one factor amongst many).

101. Indeed, though administration of affirmative action programs undoubtedly creates costs for the states, many would suggest that the countervailing benefits produced, economically or otherwise, outweigh such costs, at least in the educational context. *See, e.g.*, *Grutter*, 539 U.S. at 328 ("Today, we hold that the [University of Michigan] Law School has a compelling interest in attaining a diverse student body."). In fairness, such benefits should be subtracted from the costs created by the administration of the system, yet the economic value of such benefits is virtually impossible to determine.

102. Though admittedly unusual, such a bright-line standard based upon an exact mathematical figure is not unprecedented in the case law. For instance, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the Supreme Court strongly suggested that an award of punitive damages that exceeded compensatory damages by a ratio of more than 10:1 would be declared unconstitutional as contrary to the Due Process Clause of the

would provide a clear directive to Congress of the extent of its Spending Clause power.

Perhaps more realistically, the Court could articulate a more informative definition of the term "coercion." Though she ultimately rejects a strengthened version of the coercion requirement as a legitimate check upon Spending Clause power,[103] Professor Baker recognizes the potential classification of "coercion" into four distinct varieties of descending compulsion: (a) "'no choice at all,'" (b) "'no practical choice,'" (c) "'no fair choice,'" and (d) "'no rational choice.'"[104] An actor possesses "no choice at all" when physically compelled to act, such as when someone forcibly commandeers another's arm to strike a third person.[105] The actor possesses "no practical choice" when compelled to act by extreme threat of force, such as when someone threatens to shoot another if he or she fails to engage in a certain action.[106] Somewhat differently, the actor possesses "no fair choice" when offered an irresistible benefit for acting, such as when an affluent party offers to feed the starving children of another party in exchange for sexual favors.[107] Finally, the actor possesses "no rational choice" when offered a benefit that a rational economic actor would accept, such as when an affluent party offers an impecunious party nonetheless living above subsistence level an exceedingly large sum of money for similar sexual favors.[108]

Though the first two alternatives likely have no analogy in the Spending Clause context, the Court could potentially sort Spending Clause conditions into those offering "no fair choice" and those merely offering "no rational choice," invalidating the former but permitting the latter. For instance, Chief Justice John Roberts recently characterized the position of law schools that oppose the Solomon Amendment's requirement of equal access for military

---

Fourteenth Amendment, *see id.* at 425 ("Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

103. *See* Lynn A. Baker & Mitchell N. Berman, *Getting off the* Dole*: Why the Court Should Abandon its Spending Doctrine, and how a Too-Clever Congress Could Provoke it to do so*, 78 IND. L.J. 459, 521 (2003) ("Toughening the coercion prong is, we think, unlikely.").

104. *Id.* at 520.

105. *Id.* at 518–19.

106. *Id.* (noting the similarity of this situation to the criminal law scenario of duress).

107. *Id.* at 519.

108. *See id.* at 520 ("[An actor] has 'no rational choice' [when] only one alternative is consistent with the minimum demands of instrumental rationality.").

recruiters to on-campus recruitment outlets despite the military's discrimination against homosexuals yet continue to accept federal funding for scholastic programs as disingenuous,[109] given that the law schools could simply reject the funds. Indeed, the absence of federal funds would likely not prove fatal to most law programs, given the presence of state and private support, though a school's loss of federal funding would certainly result in an overall decrease in quality of instruction and resultant comparative disadvantage vis-à-vis law schools that accept the same funds. In this light, most law schools effectively have "no rational choice" but to accept federal funding, given that a rational economic actor would sacrifice his or her moral convictions to receive substantial financial assistance. However, the same law schools likely possess a "fair choice," given their capability of declining the funds and suffering the adverse impact of the consequent depletion of available resources. Applying such a rule, the Solomon Amendment would prove to comprise an acceptable application of the federal spending power, though the condition may devolve into one offering "no fair choice" if, for example, law school instruction in a particular region or state deteriorated so significantly that the court system of the region or state could no longer function properly.

Unfortunately, such labels do not significantly facilitate the definition of the point at which acceptable persuasion devolves into impermissible compulsion, but rather recast the nomenclature. In short, simply defining acceptable conditions as offering "no rational choice" and unacceptable conditions as offering "no fair choice" provides no insight into the extent of coercion required for one to transition to the other. One could theoretically define conditions providing "no fair choice" as those that would require states to discontinue critical programs that cannot otherwise subsist absent federal funding if the states decline the funding. The state, however, constitutes an entity that can only act through its duly authorized agents, the elected representatives, and such representatives would face political fallout for declining federal funding necessary to perpetuate the critical state programs. The choice of any given representative between achieving a desired goal through refusal of

109. *See* Transcript of Oral Argument at 39, Rumsfeld v. Forum for Academic and Institutional Rights, 126 S. Ct. 1297 (No. 04-1152) (2006) ("What you're saying is, 'This is a message—[Laughter]—we believe in strongly, but we don't believe in it, to the tune of $100 million.'").

crucial federal funds and preserving reasonable prospects for reelection, therefore, appears far more analogous to a decision posing "no rational choice."

In short, any conceivable bright-line solution is likely to suffer the inadequacies inherent to bright-line rules, either arbitrarily categorizing cases on the basis of some proposed mathematic limit[110] or providing some vague verbal classification of cases that provides little more guidance than a broad term such as "coercion."

Nevertheless, the law often imposes bright-line standards, despite their inherent drawbacks, so as to achieve certainty and consistency in lower court decisions. For more fundamental reasons, however, any bright-line solution in the Spending Clause context will almost certainly fail. The Constitution theoretically cannot simultaneously demand the limitless congressional power under the Spending Clause, envisioned by Hamilton and accepted in *Butler*, and the constricted view of congressional power demanded by federalism, yet the present constitutional jurisprudence appears to demand precisely that. Indeed, Spending Clause authority must provide powers beyond those enumerated in other constitutional grants of power such as the Commerce Clause, lest the Madisonian approach be effectively instituted in contravention of *Butler*.[111] However, Supreme Court cases have repeatedly averred that Spending Clause authority is not unlimited.[112] As such, any attempt to set an affirmative, bright-line limit on Congress's spending power will be assailed as violating the Hamiltonian interpretation of the Spending Clause and *Butler*, yet the failure to impose any meaningful limit on the spending power will be assailed as a repudiation of the principles of federalism.

Interestingly, following the issuance of the *Lopez* decision, Professor Robert Nagle noted a similar contradiction in the

110. Examples would include both Baker's test, which limits the amount of funds conditioned to the sum necessary to reimburse states for certain programs, Baker, *supra* note 11, at 1916, and the proposed test of an exact numerical limit upon the percentage of funds Congress could condition.

111. *See* United States v. Butler, 297 U.S. 1, 66 (1936) ("[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.").

112. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 n.13 (1981) ("There are limits on the power of Congress to impose conditions on the States pursuant to its spending power." (citations omitted)).

Commerce Clause,[113] contending that the Court's declaring the Gun-Free School Zones Act unconstitutional merely constituted a step in the process of "successive validation," wherein courts favor one side of an inherently two-sided problem while asserting the importance of the competing viewpoint.[114] Hence, in *Lopez*, the Court finally fulfilled its repeated intimations in decisions upholding legislation passed under the Commerce Clause from 1937 to 1995 that that constitutional grant of legislative authority was subject to affirmative limits.[115] Similarly, almost all modern Spending Clause decisions illustrate a similar pattern of upholding the conditioning of federal funds at issue but reminding Congress, at least implicitly, that an excessively coercive conditioning of funds will not pass constitutional muster. Though modern case law lacks any instance of the Court's declaring a statute unconstitutional as exceeding Congress's regulatory power under the Spending Clause,[116] *Dole*'s clear if somewhat terse interdiction against overly coercive conditions places Congress on notice that the Court[117] will not tolerate naked attempts to coercively regulate states in a manner otherwise unachievable under other constitutional grants of legislative power.[118] This is not dissimilar to the Rehnquist Court's striking down two Commerce Clause statutes in *Lopez* and *Morrison* while leaving intact a massive body of statutory law enacted pursuant to the Commerce Clause, arguably simply providing a warning to Congress to behave with

113. *See* Nagel, *supra* note 2, at 649 ("[O]ur Constitution only authorizes certain enumerated powers for the national government, but also authorizes some enumerated powers that are broad enough to allow congressional control over any aspect of human affairs.").

114. *Id.* at 652.

115. *Id.*

116. *See* Rosenthal, *supra* note 7, at 1126–27 (noting that only *Butler*, the holding of which relies upon presently discredited notions of the Tenth Amendment, declared a statute unconstitutional as exceeding Spending Clause authority).

117. The Court presently includes three of the five Justices who joined the *Lopez* majority and two traditionally conservative Justices who may show similar deference to states' rights. Chief Justice William Rehnquist passed away on September 3, 2005, and was replaced in this position by conservative judge John Roberts when the Supreme Court began its annual term on October 3, 2005. Richard Willing, *Justice O'Connor Remains Seated in the Swing Seat*, USA TODAY, Oct. 28, 2005, at 4A. Justice Sandra Day O'Connor announced her retirement on July 1, 2005. *Id.* President George W. Bush nominated conservative judge Samuel Alito to replace Justice O'Connor on October 31, 2005, Editorial, *A New Nominee*, WASH. POST, Nov. 1, 2005, at A24, and the Senate confirmed Judge Alito's nomination on January 21, 2006, Maura Reynolds, *A Stark Division in Vote for Alito*, L.A. TIMES, Feb. 1, 2006, at A1.

118. *See* South Dakota v. Dole, 483 U.S. 203, 211 (1987) (cautioning that Congress may not constitutionally impose overly coercive conditions).

caution in intruding upon states' rights while providing no clear boundary that Congress may not cross.

Furthermore, the *Dole* standard implicitly recognized that states typically possess sufficient political capital to oppose imposition of conditions that they consider objectionable.[119] Professor Herbert Wechsler argued persuasively that, with respect to direct federal regulation, states exercise sufficient control through their influence upon the election of senators and members of congress and, less directly, the president, to effectively ensure that their interests are adequately defended at the national level.[120] In the field of indirect Spending Clause legislation, one could theoretically argue that states may not as effectively oppose indirect regulation through conditioning of federal funds as they may oppose direct regulation through the Commerce Clause.[121] Spending Clause decisions, however, have virtually unanimously asserted that Congress intrudes less thoroughly upon traditional domains of state power when regulating indirectly under the Spending Clause rather than directly under the Commerce Clause.[122] Indeed, Professor Rosenthal's contentions that states may find it difficult to oppose conditions while simultaneously supplicating for funding[123] largely reinforces the prevailing assumption that regulation through conditioning of funds diminishes state autonomy to a lesser extent than does direct

---

119. *See, e.g.*, *id.* at 210 ("The Court [in *Oklahoma*] found no violation of the State's sovereignty because the State could, and did, adopt 'the "simple expedient" of not yielding to what she urges is federal coercion.'" (quoting Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127, 143–44 (1947))).

120. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954) ("Far from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse, necessitating the widest support before intrusive measures of importance can receive significant consideration, reacting readily to opposition grounded in resistance within the states."). Notably, the Supreme Court cited Wechsler's article approvingly in the *Garcia* decision. *See* 469 U.S. 528, 550–51, 551 n.11 (1985) ("[T]he composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government." (citing Wechsler, *supra*)).

121. *See* Rosenthal, *supra* note 7, at 1141 ("Whether or not there is enough political influence at the state and local government level to prevent the more intrusive direct threats to the autonomy of those governments, the same process may not work effectively to forestall similar interference through coercive conditions.").

122. *See id.* ("[T]he actions of the courts and the comments of some scholars have consistently assumed that where direct regulation is valid, the constitutionality of similar interference with the states through conditional funding will be upheld *a fortiori*.").

123. *Id.*

regulation, given that state legislators would almost certainly oppose conditions attached to a spending statute were the marginal cost of accepting the funds to exceed the marginal cost of rejecting them. In short, Wechsler's insightful and widely accepted[124] conclusions seem to apply at least as presciently to Spending Clause regulation as to other forms of regulation, suggesting that courts should not be overly eager to draw specific lines for when persuasion devolves into coercion insofar as the states already possess considerable political capital to oppose such coercion.

IV. EVIDENCE OF THE ADEQUACY OF EXISTING FEDERALIST CHECKS

If the above arguments concerning the definite existence of inexact limits upon Congress's ability to coerce state compliance with desired regulations prove correct, then Spending Clause statutes should reflect Congress's implicit recognition that it must refrain from plying excessive coercion against states, lest the Court honor its promises made explicit in *Dole* and implied in earlier cases that it shall invalidate truly coercive legislation.

Although Congress could theoretically condition the receipt of every dollar of federal funding within a specific category upon states' compliance with every single condition concerning funds in that category, a review of litigated cases suggests that it almost never does so, reinforcing the contentions above.[125] Instead, Congress typically (1) conditions only a percentage of major types of federal funding upon states' compliance with desired regulations, (2) withholds a set sum of funding upon each instance of state noncompliance, or (3) defines funding types exceedingly narrowly and conditions receipt of that limited variety of funds upon compliance with regulations.

Dole comprises the primary example of conditioning a percentage of a major category of funds upon states' compliance with a desired regulation, and the percentage of funds it withheld is not unreasonable in light of state highway expenditures.[126]

---

124. *See supra* note 120 and accompanying text.

125. *See supra* Part III.C.

126. *Dole* involved withholding of 5 percent of federal highway funds. South Dakota v. Dole, 483 U.S. 203, 211 (1987). In 2000, states spent 6.3 percent of their highway funds, including federal and state sources, on "Highway Law Enforcement & Safety." U.S. Department of Transportation, Highway Funding and Expenditures, http://www.fhwa.dot.gov/ohim/onh00/onh2p10.htm (last visited Aug. 30, 2006). Obviously, far less than the entire 6.3

Oklahoma v. U.S. Civil Service Commission[127] comprises an example of withholding a set amount of funds upon each instance of state noncompliance. The state of Oklahoma suffered the loss of an amount equal to two years of salary of an official who impermissibly participated in political activities,[128] a relatively minimal sum and an amount reasonably designed to incentivize compliance with the conditions placed upon the funds but not to penalize the state to an extent unjustified by the gravity of the transgressions of the officer at issue. *Steward Machine Co. v. Davis*,[129] though difficult to classify under the aforementioned framework, largely involved a similar system of persuading state compliance. In the system involved in the case, an employer contributing to a state unemployment compensation fund could vastly reduce his or her contributions to the analogous federal fund, providing an incentive for states to create unemployment compensation systems complying with various federal standards to capture such payments by employers.[130]

Mellon involved the complete withholding of a very narrow category of federal funds, those designated for mitigating infant and maternal mortality during childbirth, upon the states' failure to comply with various provisions attached to the funds.[131] Similarly, *Fullilove* required states to institute a system of race-based affirmative action in order to receive federal funds for certain construction projects.[132] In short, though the entire category of federal funds is withheld, the funds within the category are often relatively minimal and the condition at issue is absolutely *sine qua non* to ensure that the federal government achieves its objectives in distributing that limited category of funds.

---

percent is dedicated to eradicating drunken driving by minors, but the figure suggests that roughly 5 percent of federal funds are spent on "highway safety" and that *Dole*'s permitting withholding of that amount, though in excess of what would be appropriate "reimbursement spending," was not irrational.

127. 330 U.S. 127 (1947).

128. *Id.* at 133.

129. 301 U.S. 548 (1937).

130. *Id.* at 574 ("If the taxpayer has made contributions to an unemployment fund under a state law, he may credit such contributions against the federal tax, provided . . . that the state law shall have been certified to the Secretary of the Treasury by the Social Security Board as satisfying certain minimum criteria.").

131. 262 U.S. 447, 479 (1923).

132. 448 U.S. 448, 474 (1980) ("The program conditions receipt of public works grants upon agreement by the state or local governmental grantee that at least 10% of the federal funds will be devoted to contracts with minority businesses . . . .").

Further, when dealing with such narrow categories of funding, the Court is hesitant to enforce implied requirements of more extensive regulation than that necessary to achieve the limited aims contemplated by the narrow category of funds. For instance, in *Pennhurst*, the Court displayed an extreme hesitance to interpret a "bill of rights" for developmentally disabled persons, which would result in extensive compliance costs for the states, as mandatory inasmuch as Congress had only provided extremely limited funding to the states under a fairly narrow program for assisting persons with developmental disabilities.[133]

Of course, not all statutes drawing upon the federal Spending Clause power easily fall into the aforementioned framework. For instance, the Religious Land Use and Institutionalized Persons Act,[134] a statute that specifically raises the prospect of Congress's circumventing limits upon its power through the use of the Spending Clause,[135] simply requires all states who receive federal prison funds to comply with the terms of the Act.[136] However, the concomitant

133. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24 (1981) ("The fact that Congress granted to Pennsylvania only $1.6 million in 1976, a sum woefully inadequate to meet the enormous financial burden of providing 'appropriate' treatment in the 'least restrictive' setting, confirms that Congress must have had a limited purpose in enacting [the 'bill of rights' provision]."). The holding of *Pennhurst* depends largely on the rationale of *Harris v. McRae*, 448 U.S. 297 (1980), wherein the Court was exceedingly hesitant to interpret a statute to require states to fund medically necessary abortions when the state and federal government had shared the costs of funding such in the past, though the Court did note that Congress could perhaps impose such a requirement were it expressed clearly, *see id.* at 309 ("Since the Congress that enacted Title XIX did not intend a participating State to assume a unilateral funding obligation for any health service in an approved Medicaid plan, it follows that Title XIX does not require a participating State to include in its plan any services for which a subsequent Congress has withheld federal funding.").

134. 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).

135. In 1990, the Supreme Court held that laws of general applicability that only incidentally burden the free exercise of religion do not require analysis under strict scrutiny. Cutter v. Wilkinson, 544 U.S. 709, 715 (2005). Congress responded in 1993, effectively reinstituting strict scrutiny through the Religious Freedom Restoration Act. *Id.* The Court declared the Religious Freedom Restoration Act unconstitutional in 1997, asserting that the Act superseded Congress's remedial powers under the Fourteenth Amendment. *Id.* The Religious Land Use and Institutionalized Persons Act comprises the most recent utterance in the dialogue between the Court and Congress and applies strict scrutiny in a more limited set of circumstances, employing the Commerce Clause and Spending Clause rather than the Fourteenth Amendment as constitutional support. *Id.* at 2118–19. In *Cutter*, the Court affirmed the constitutionality of the Religious Land Use and Institutionalized Persons Act under the Establishment Clause, *id.* at 2123, declining to consider whether the Act exceeded Congress's Commerce or Spending Clause powers because such issues were not considered by the Court of Appeals, *id.* at 2120 n.7.

136. *See* 42 U.S.C. §§ 2000cc, 2000cc-1 (2000) (requiring all governments that receive federal financial assistance or that impose burdens affecting interstate commerce to refrain from

presence of Commerce Clause justification for the statute suggests that Congress could potentially regulate the states directly without engaging in conditioning of funds. Consequently, the statute provides little guidance as to whether Congress could legitimately condition the receipt of all federal prison funds upon state compliance with the Act. Indeed, so long as Congress retains relatively broad authority under the Commerce Clause[137] and inasmuch as Congress may validly regulate states by conditioning any sum of funds so long as it could regulate the states directly under the Commerce Clause,[138] one cannot confidently assess whether such statutes that impose what would otherwise appear to be a coercive conditioning of an excessive amount of federal funds would survive if solely relying upon Spending Clause justification.

The review of relevant Spending Clause statutes, however, suggests that Congress often either declines to exercise its potential power to condition every dollar of major categories of funding upon state compliance with desired conditions, or invokes a separate potential constitutional power, such as the Commerce Clause, to independently justify the legislation. Whether such forbearance arises from fear of provoking the Court into invalidating an overly coercive statute or from the success of state representatives in adequately defending the interests of their respective states in the national lawmaking forum, Congress seldom withholds such massive amounts of funds that autonomous state acceptance becomes a chimera. Rather, Congress typically closely tailors the penalty for noncompliance to provide a strong incentive for compliance but preserve meaningful choice.

---

imposing any substantial burden upon the free exercise of religion of institutionalized persons or from imposing such a burden through land use regulations unless in furtherance of a compelling governmental interest).

137. A very recent reassertion of the broad authority of Congress to regulate any activity that may rationally be described as having effects on interstate commerce occurred in *Gonzales v. Raich*, 545 U.S. 1 (2005), wherein the Court upheld the ability of the federal government to regulate the growing of medical marijuana for personal use under the Commerce Clause insofar as production of such a fungible commodity altered supply and demand in the illegal interstate channels in which it typically traded, *id.* at 2206–07.

138. *See* Fullilove v. Klutznick, 448 U.S. 448, 475 (1980) ("The reach of the Spending Power, within its sphere, is at least as broad as the regulatory powers of Congress. If, pursuant to its regulatory powers, Congress could have achieved the objectives of the [program at issue], then it may do so under the Spending Power.").

CONCLUSION

When considering the present contour of Spending Clause jurisprudence, the classic adage "if it ain't broke, don't fix it" seems to offer the wisest path to follow. The Spending Clause has the potential to allow Congress to completely supplant state governments in the exercise of their core police powers, but the principles of federalism dictate that the courts preserve some limits. The limits articulated in *Dole* are admittedly vague and provide little clarity to lower courts in considering the constitutionality of conditions attached to federal funds. *Dole's* four enumerated limits upon Spending Clause authority appear to consist more of rhetoric than substance. The Court only noted the fifth limitation on coercion in passing, and never fully articulated its precise dimensions. The Court's attempts to define "coercive" and "non-coercive" in the Spending Clause context prove as arbitrary and unsatisfying as attempts to define "commercial" and "non-commercial" in the Commerce Clause context. Yet, despite its flaws, *Dole* may provide as much clarity as is possible in an area in which precise lines are difficult if not impossible to draw. The sheer prospect that the Court might break the cycle of successive validation and strike down a statute as exceeding the spending power induces congressional caution in the area. The mere shadow of potential judicial invalidation of a Spending Clause statute provides an amorphous but real check on Congress's power beyond that inherent in the political process. This suggests that Chief Justice Rehnquist's opinion in *Dole*, far from being inconsistent with federalist principles, actually advanced them. Indeed, Rehnquist's opinion in *Dole* established a framework for Spending Clause legislation similar to that adopted for Commerce Clause legislation, one subject to vague limits that nonetheless place Congress on notice of the Court's willingness to preserve a continued role for state governments.