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Conditional Federal Spending and States' Rights

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ABSTRACT: With its 1995 decision in *United States v. Lopez*, the Rehnquist Court made clear that the commerce clause does not grant Congress a plenary police power. Prevailing spending clause doctrine, however, permits Congress to use conditional offers of federal funds in order to circumvent seemingly any restrictions the Constitution might be found to impose on its authority to regulate the states directly. This article first explores three normative arguments in favor of the Court's abandoning the existing test, set forth in *South Dakota v. Dole*, in favor of one that would better safeguard state autonomy while simultaneously preserving for Congress a power to spend that is greater than its power directly to regulate the states. It then proposes a new test under which the courts would presume invalid that subset of conditional offers of federal funds to the states that, if accepted, would regulate them in ways that Congress could not directly mandate. The presumption would be rebutted, and the offer of funds permitted, by a determination that the offer of funds constitutes "reimbursement" spending rather than "regulatory" spending.

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AMIDST all the attention afforded the Supreme Court's recent federalism decisions, one important fact has gone largely unnoticed: the greatest threat to state autonomy is, and has long been, Congress's spending power. No matter how narrowly the Court might read Congress's powers under the commerce clause and Section 5 of the Fourteenth Amendment, and no matter how absolute a prohibition the Court might impose on Congress's "commandeering" of state and local officials, the states will be at the mercy of Congress so long as Congress is free to make conditional offers of funds to the states that, if accepted, regulate the states in ways that Congress could not directly mandate.[1]

THE CASE LAW

On several occasions beginning in 1923, the Court has explicitly stated that a conditional offer of federal funds to the states is constitutionally unproblematic because it "imposes no obligation but simply extends an option which the State is free to accept or reject."[2] Because a state has "the 'simple expedient' of not yielding to what she urges is federal coercion,"[3] the Court has concluded that "the powers of the State are not invaded"[4] and there is no Tenth Amendment violation.

In its 1987 decision in *South Dakota v. Dole*, the Court made clear that conditional federal spending affords Congress a seemingly easy end run around any restrictions the Constitution might be held to impose on Congress's ability to regulate the states. The *Dole* Court reaffirmed both that "objectives not thought to be within Article I's 'enumerated legislative fields' . . . may nevertheless be attained through the use of the spending power and the conditional grant of federal funds"[5] and that the "Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions legitimately placed on federal grants."[6] The Court cautioned that "the spending power is of course not unlimited . . . but is instead subject to several general restrictions articulated in our cases."[7] Unfortunately, none of the stated restrictions was portrayed as having much bite.

The most promising constraints on conditional federal spending noted by the *Dole* Court were a "germaneness" requirement and a "coercion" threshold. With regard to "germaneness," the Court observed that "conditions on federal grants *might be* illegitimate if they are unrelated 'to the federal interest in particular national projects or programs,' " but added that this restriction was merely "suggested (without significant elaboration)" by prior cases.[8] With regard to "coercion," the Court opined 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.' "[9] The Court concluded that a threatened loss to states of 5 percent of their otherwise obtainable allotment of federal highway funds, for example, did not pass this critical point, but the Court did not suggest what percentage of these (or any other) funds might.[10]

For those who lament the fact that any constitutional limits on Congress's regulatory powers can apparently be circumvented through combined use of the taxing and spending powers, *Dole* leaves three important issues unresolved. First, although the *Dole* Court suggested that the spending clause did not authorize Congress either to coerce the states unduly[11] or to impose conditions "unrelated 'to the federal interest in particular national projects or programs,' "[12] it provided neither a workable definition of these critical "coercion" and "germaneness" standards nor any actual or hypothetical example of their violation.

Second, the *Dole* Court attempted no answer to the central normative question raised by its suggestion that there *are* limits on Congress's power to offer the states conditional funds: why should Congress *not* be able to attach any conditions it chooses to the federal funds it offers the states? As the Court itself has repeatedly observed, a state is always free to decline an offer of federal funds that it finds unattractive.[13] Why, then, is additional, judicial protection needed to ensure the states' autonomy? Third, to the extent that *Dole* would relegate control over conditional federal spending to the federal political process, one might question the ability of the states to protect themselves from Congress within that process.

TOWARD A NORMATIVE THEORY OF CONDITIONAL FEDERAL SPENDING

There are at least three good reasons for the Court to abandon the *Dole* test in favor of one that would better safeguard state autonomy by, for example, presuming invalid those offers of federal funds to the states that, if accepted, would regulate them in ways that Congress could not directly mandate. First, the federal government has a monopoly power over the various sources of state revenue, which renders any offer of federal funds to the states presumptively coercive. Second, many conditional offers of federal funds will actually pose a choice only to a small subset of states, and this minority cannot effectively protect themselves against the majority of states through the political process. Third, federal regulatory spending is especially likely to reduce aggregate social welfare by reducing the diversity among the states in the package of taxes and services, including state constitutional rights and other laws, that each offers to its residents and potential residents.

Sources of state revenue

A conditional offer of federal funds to the states implicitly divides them into two groups: (1) states that already comply, or without financial inducement would happily comply, with the funding condition(s) and for which the offer of federal money therefore poses no real choice; and (2) states that find the funding condition(s) unattractive and therefore face the choice of forgoing the federal funds in order to avoid complying with the condition(s) or submitting to undesirable federal regulation in order to receive the offered funds.

When the federal government makes a conditional offer of funds, states in the second group are severely constrained in their decision making by the lack of equivalent, alternative sources of revenue. There is no competitor to the federal government to which these states might turn for substitute financial assistance. And, although each state has the power to raise funds by taxing income, purchases, and property within its borders, this power, too, is subject to federal control, albeit indirectly. Since the adoption in 1913 of the Sixteenth Amendment, which granted Congress the power to tax income "from whatever source derived, [and] without apportionment among the several States," the states implicitly have been able to tax only the income and property remaining to their residents and property owners after the federal government has taken its yearly share.

This means, in addition, that when 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. Moreover, should a state decline proffered federal funds because it finds a condition intolerable, it receives no rebate of any tax dollars that its residents have paid into the federal fisc. In these cases, the state (through its residents) contributes a proportional share of federal revenue only to receive less than a proportional share of federal spending. Thus, when the federal government offers the states money, it can be understood simply as offering to return the states' money to them, often with unattractive conditions attached.

Protections of the political process

One might be less concerned about the level of judicial scrutiny accorded conditional offers of federal funds to the states if one were confident that the states could protect themselves through the political process. Professor Herbert Wechsler has observed in this context that the Senate, in which all states are equally represented, "cannot fail to function as the guardian of state interests as such" and that "federalist considerations . . . play an important part even in the selection of the President" (Wechsler 1954, 548, 557). He has therefore concluded that

> the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress. (559)

While the state-based apportionment of representation within the federal government may well ensure that "*state interests as such*" are protected against federal oppression, *federal* oppression is not the problem. The problem, rather, lies in the ability of *some states* to harness the federal lawmaking power to oppress *other states*. Not only can the state-based allocation of congressional representation not protect states against this use of the federal lawmaking power, it facilitates it.

Recall that a conditional offer of federal funds to the states implicitly divides them into two groups. One would therefore expect such conditional funding legislation to be enacted only if a (substantial) majority of states fell within the group of states that already willingly complied with, or favored, the stated condition, and the conditional offer of funds would therefore be no less attractive to them than a similar unconditional offer. Few congressional representatives, after all, should be eager to support legislation that gives the states money only if they comply with a condition that a majority of their own constituents would independently find unattractive.

Congressional representatives from the states that happily will or already do comply with a particular funding condition might prefer a conditional to an unconditional offer of funds for any of several reasons: (1) to "entice" outlier states into amending or adopting some provision(s) of state constitutional or statutory law whose adoption, at least after *New York*[14] and *Lopez*,[15] Congress could not directly mandate; (2) in the hope that some state(s) might decline the offer of federal funds, leaving more money in the federal fisc for other purposes that might (disproportionately) benefit their own state; or (3) in order to secure majority support for legislation that would be much less politically palatable without the attached conditions (for example, excluding abortions from coverage might facilitate passage of a bill offering states funds for providing certain medical services to their low-income residents).

In summary, the state-based apportionment of representation in Congress facilitates the ability of some states to harness the federal lawmaking power in order to burden other states to their own advantage. Whatever a particular legislator's motivation might be, supporting a conditional grant of federal funds to the states is likely to make her state (and therefore herself) better off, and should only rarely make it (and herself) worse off, if her state already voluntarily complies, or without federal financial inducement would happily comply, with the funding condition. For these states and their congressional representatives, a vote in favor of the conditional grant is nearly always a vote to impose a burden solely on other states. Whether a state that is not already in compliance chooses to decline the offer of federal funds or to acquiesce in the stated condition, those states already in compliance may well improve, and will only rarely worsen, their competitive position relative to that state.

Interstate competition and aggregate social welfare

In the usual course of affairs, each of the 50 states chooses the package of taxes and services, including state constitutional rights and other laws, that it will offer its residents and potential residents. In this way, the states compete both for individual and corporate residents and for their tax dollars (Tiebout 1956). As part of its unique package, a state might choose, for example, to permit same-sex civil unions.[16] In the absence of a federal government, a state that does not permit same-sex civil unions would have only two ways to compete with a state that does. The former state could continue to offer its current package of taxes and services, including a prohibition against same-sex civil unions, and seek to attract (and retain) those individuals and corporations who prefer this package. Alternately, the state could make some adjustment(s) to its package, which may include adopting a statutory or constitutional provision making same-sex civil unions available.

But if Congress is permitted to offer the states federal funds on the condition that the states prohibit same-sex civil unions, notwithstanding the fact that Congress likely could not directly mandate the states to do so,[17] a simple majority of states will be able to harness the federal lawmaking power to restrict the competition for residents and tax dollars that would otherwise exist among them. Thus, whenever a state might choose to permit same-sex civil unions, the majority of states, which prohibit such unions, would have a third, competition-impeding option: their congressional representatives could enact an appropriately conditioned offer of federal funds in order to divest the outlier state of any competitive gains from its action.

By supporting legislation that offers the states federal funds on the condition that they prohibit civil unions for same-sex couples, a coalition of the states opposed to intimate same-sex relationships can put any state that does not share that policy preference to an unattractive choice: either abandon the competitive advantage that its more inclusive availability of civil unions presumably afforded or forgo the offered federal funds and accept an obvious financial disadvantage relative to each state that accepts the federal money. In this way, conditional offers of federal funds necessarily make the states that without financial inducement would not willingly comply with the funding condition relatively worse off than they would have been in the absence of the offer, while making all other states, by implication, relatively better off.

Permitting Congress to offer the states funds conditional on the constitutional rights and other laws that they offer their residents and potential residents enables a simple majority of states to harness the federal lawmaking power to force some states to pay more than others (including themselves) for their preferred package of laws. This is especially problematic when the funding condition seeks to reduce—to the minimum mandated by the U.S. Constitution and federal statutes—the heightened statutory or constitutional protection that a small number of outlier states currently provide certain minorities. In these cases, one might expect the increased cost of the protection, measured in terms of forgone federal funds, to cause an outlier state readily to relinquish it. After all, the greatest and most direct benefits of such heightened protection will typically accrue to a relatively small and powerless segment of the state's voters, while the proffered federal funds may well be of direct benefit to a substantial majority.

To permit Congress to offer the states funds on the condition that they not make civil unions available to same-sex couples, notwithstanding the fact that Congress likely could not directly mandate the states to do so, is to authorize an end run around the federal amendment procedure. It is to provide a simple majority of Congress the option of denying states a power reserved to them under the Tenth Amendment—the power to choose what sorts of intimate relationships a state will recognize under state law—without the burden of securing a federal constitutional amendment to that effect. For outlier states, the disadvantage of this option is clear: they are likely to find it more difficult to garner the simple majority in either chamber necessary to block a congressional enactment than to assemble the coalition of 13 states necessary to block an amendment to the U.S. Constitution.

By providing a competition-impeding alternative to interstate competition, conditional offers of federal funds reduce the diversity among the states in the package of taxes and services, including state constitutional rights and other laws, that each offers. Thus some individuals and corporations may no longer find any state that provides a package (including the availability of same-sex civil unions) that suits their preferences, while other individuals and corporations may confront a surfeit of states offering a package (including a prohibition against same-sex civil unions) that they find attractive. The net result is likely to be a decrease in aggregate social welfare, since the loss in welfare to proponents of same-sex civil unions is unlikely under these circumstances to yield a comparable gain in welfare for those who oppose their availability.

Of course, increased diversity among the states is not always a good thing. Some states, for example, might have laws expressing a moral preference that a majority of Americans consider unacceptable and that a conditional offer of federal funds might persuade these states to repeal. In addition, some conditional offers of federal funds may increase aggregate welfare by impeding welfare-reducing interstate "races to the bottom" or by reducing the costs that disuniformities may impose on corporations and individuals seeking to act in more than one state. These observations, however, do not lead inexorably to the conclusion that Congress should be permitted to offer the states federal funds subject to any conditions that it chooses.

To begin, conditional offers of federal funds are not needed to rid states of their most pernicious laws:

our federal and state constitutions prohibit their enactment and enforcement. State laws that violate no federal constitutional provision but that nonetheless express a moral preference that some find reprehensible—for example, laws making the death penalty available for first-degree murder convictions, providing free abortions to indigent women, or providing legal recognition to same-sex marriages or domestic partnerships—denote areas of significant moral disagreement within our society. These are precisely the areas in which interstate diversity is most valuable and federal homogenization through conditional federal spending will therefore most greatly reduce aggregate social welfare.

Should 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. History offers many examples of our willingness and ability to amend the Constitution to reflect such shifts in our moral sensibilities.

In the end, it is important to keep in mind that permitting Congress to offer the states federal funds subject to any conditions that it chooses is likely often to yield reductions in aggregate social welfare. Thus any benefits that may result from always affording Congress this *additional* legislative means of preventing interstate races to the bottom, and of reducing the costs that disuniformities impose on multistate actors, must be weighed against those substantial costs.

A SUBSTITUTE FOR THE *DOLE* TEST

We have seen that there are good reasons for the Court to abandon the *Dole* test in favor of one that would better safeguard state autonomy while simultaneously preserving for Congress a power to spend that is greater than its power directly to regulate the states. The substitute I propose is for the courts to presume invalid those offers of federal funds to the states that, if accepted, would regulate the states in ways that Congress could not directly mandate. This presumption would be rebutted upon a determination that the offer of funds constitutes "reimbursement" spending rather than "regulatory" spending. "Reimbursement" spending legislation specifies the *purpose* for which the states are to spend the offered federal funds and simply reimburses the states, in whole or in part, for their expenditures for that purpose. Most "regulatory" spending legislation thus includes a simple spending component that, if enacted in isolation, would be unproblematic under the proposed test.

An earlier part of the present article, on a normative theory of conditional federal spending, discussed the rationale underlying the proposed test's presumption of invalidity for the subset of conditional offers of federal funds that, if accepted, would regulate the states in ways that Congress could not directly mandate. The present part, therefore, will focus on the distinction the proposed test would make between reimbursement and regulatory spending legislation. In order to understand this critical distinction, it may be useful to consider two hypothetical statutes (A and B) offering federal funds; each statute seeks to regulate those states that accept the conditional offer of funds in ways that Congress could not directly mandate.

(A) Any state receiving federal Death Penalty Funds ("Funds") must have the death penalty available for first-degree murder convictions; participating states shall receive Funds in the amount of their demonstrated costs of executing those sentenced to death for first-degree murder.

(B) Any state receiving federal Law Enforcement Funds ("Funds") must use the Funds to provide beat cops who will daily patrol the state's urban neighborhoods on foot, and must demonstrate its depth of commitment to the national fight against crime by having the death penalty available for first-degree murder convictions; participating states shall receive Funds in the amount of $1.00 per resident according to the most recent federal census.

Congress has no power under the Constitution to make the death penalty available for certain violations of *state* law or to mandate that the states themselves do so. Thus both Statute A and Statute B would regulate those states that accept the conditional offer of funds in ways that Congress could not directly mandate. Both statutes would therefore be presumed invalid under the proposed test. In each case, however, this presumption of invalidity can be rebutted, and the conditional offer of federal funds ultimately sustained, if the statute is determined to be reimbursement spending legislation.

Statute A, in fact, is an example of reimbursement spending legislation. It simply specifies the purpose for which the states are to spend the proffered federal funds (here, executing those sentenced to death for first-degree murder) and, critically, offers states an amount of money no greater than that necessary to reimburse them for their expenditures for the specified purpose. Statute B, in contrast, is regulatory spending legislation and has both reimbursement and regulatory spending components. The reimbursement spending component is the offer of Law Enforcement Funds, whose purpose and authorized use are limited to reimbursing the states for some portion of their (or their localities') cost of employing police to patrol the state's urban neighborhoods daily on foot. The regulatory spending component, which renders the entire statute impermissible under the proposed test, is the statute's *additional* requirement that states receiving these Law Enforcement Funds also have the death penalty available for first-degree murder convictions.

In seeking to distinguish between reimbursement spending and regulatory spending legislation, the proposed test, like the *Dole* test, imposes a type of "germaneness" requirement on conditional offers of federal funds to the states. In contrast to that in *Dole*, however, the germaneness inquiry under the proposed test has two separate parts, and a challenged condition will be found germane and subsequently sustained if it meets the requirements of either part.[18]

The germaneness requirement of the *Dole* test focuses solely on the relationship between the funding condition and "the federal interest in particular national projects or programs" and is met if the condition is not "unrelated" to some "federal interest."[19] As applied by the Court, this requirement entails only the weakest form of "rational basis" scrutiny of the relationship between the condition and the federal interest. Moreover, the Court's notion of a permissible "federal interest" is seemingly boundless, expressly including even those regulatory objectives that Congress cannot achieve directly.[20] Under the first part of the proposed test's germaneness inquiry, in contrast, the notion of a "federal interest" is strictly and unambiguously limited by Congress's Article I regulatory powers other than the spending power, and a funding condition will be found to be germane under this part whenever its regulatory effects are ones that Congress *could* otherwise achieve directly.

The second part of the germaneness inquiry under the proposed test is embodied in the distinction between reimbursement spending and regulatory spending, and it applies only to those conditional offers of federal funds that, if accepted, would regulate the states in ways that Congress could *not* directly mandate. It focuses on the relationship of the funding condition to both the purpose for which the funds are offered and the amount of money at issue. A condition will be found to be germane under this portion of the proposed test's inquiry only (1) if it specifies nothing more than how—that is, the purpose for which—the offered funds are to be spent, *and* (2) if the amount of money offered does not exceed the amount necessary to reimburse the state for its expenditures for the specified purpose. The germaneness requirement set out in *Dole*, in contrast, permits conditions that do much more than specify the purpose for which the states are to spend the offered funds, and it permits seemingly any amount of money to be made contingent on a state's compliance with a given condition.[21]

It is important to keep in mind that a germaneness inquiry is merely the means to some normative end. Let us now therefore examine the normative justification for the second part of the proposed test's germaneness inquiry, which centers on the distinction between reimbursement spending and regulatory spending legislation.

Consider Statutes A and B again. Both statutes provide states an incentive to make the death penalty available for first-degree murder convictions. From the perspective of a state that, prior to these federal enactments, preferred not to have the death penalty, however, Statute A is surely preferable. Under Statute A, the cost to a state of not complying with the condition attached to the offered funds is much lower than it is under Statute B. Although a noncomplying state forgoes federal reimbursement for the costs of executing individuals it convicts of first-degree murder and sentences to death, it incurs no such costs. Thus the major cost of Statute A to such a state is an opportunity cost: a portion of the federal fisc is being used to subsidize a project—executing individuals that *other states* have convicted of first-degree murder and sentenced to death—from which the state will not directly benefit (and by which it will in fact be burdened) instead of a project that the state would prefer. The cost of Statute B to a noncomplying state, in contrast, is (1) the opportunity cost represented by that portion of the federal fisc—including its own contributions—that is being used to provide a benefit solely to other states, *as well as* (2) forgone desired Law Enforcement Funds for which the state would have been eligible had it been willing to waive its Tenth Amendment right not to administer the death penalty.

It is important to recognize that a noncomplying state bears a similar opportunity cost under both statutes. Thus the significant difference, both descriptively and normatively, between Statutes A and B is the additional cost of forgone, desired Law Enforcement Funds that a noncomplying state bears only under Statute B. Regulatory spending legislation such as Statute B is normatively problematic precisely because the additional cost that it threatens to impose on noncomplying states makes this legislation especially likely to induce otherwise reluctant states to comply. After the enactment of Statute B, for example, it is quite possible that each of the 12 states in which the death penalty is not currently available[22] would choose to make it available for first-degree murder convictions rather than forgo the offered funds. This means that some individuals, who would prefer to live in a state in which the death penalty is not available and who, in any case, do not want their federal tax dollars used to subsidize the execution of individuals convicted in other states of first-degree murder, will no longer find any state that offers a package of taxes and services, including state constitutional rights and other laws, that they find attractive. Meanwhile, other individuals may now confront a surfeit of states offering a package of taxes and services—including the availability of the death penalty for first-degree murder convictions—that suits their preferences.

The net result is likely to be a decrease in overall social welfare, since the aggregate loss in welfare to death penalty opponents from the decrease from 12 to zero in the number of non-death penalty states seems likely to be greater than the aggregate gain in welfare to death penalty proponents from the increase from 38 to 50 in the number of death penalty states.

Of course, reimbursement spending legislation such as Statute A will also impose costs on noncomplying states. These opportunity costs, which all conditional offers of federal funds impose, may give states some (likely small) incentive to conform with the conditions imposed by reimbursement spending legislation. But regulatory spending enactments such as Statute B impose costs *in addition to* these opportunity costs and thus typically provide states a greater incentive to conform. This in turn means that regulatory spending legislation is more likely than reimbursement spending legislation to yield interstate homogeneity and a concomitant reduction in aggregate social welfare. In the end, then, the normative distinction to be made between reimbursement and regulatory spending is one of degree rather than of kind.

Thus the problem is to decide where on the continuum of incentives to conform that conditional offers of federal funds always provide the states, mere "encouragement" ends and "coercion" begins. In *Dole*, the Court simply stated that it would draw the line at the point where the "pressure" exerted by the financial inducement "turns into compulsion."[23] The Court did not acknowledge that since all conditional offers of federal funds to the states provide them some incentive to conform, any determination of the point at which "compulsion" begins is inevitably arbitrary or subjective. The *Dole* Court never defined "compulsion" or "pressure," never explained how one should or could consistently distinguish between the two, nor provided any example of an impermissibly "coercive" offer of federal funds to the states.

The "coercion" inquiry of the proposed test, in contrast, is embodied in its distinction between reimbursement and regulatory spending legislation. The proposed test would draw a line between conditional offers of federal funds that impose opportunity costs on noncomplying states (permissible reimbursement spending legislation) and offers that impose both opportunity costs *and additional costs* on noncomplying states (impermissible regulatory spending legislation).

In some instances, the line that the proposed test would draw between reimbursement and regulatory spending legislation may not comport with our intuitive or subjective notions of when coercion begins: the additional costs that render a statute impermissible regulatory spending legislation may sometimes seem insignificant in amount. Against this disadvantage, however, one must weigh the substantial advantages of having a line that is bright, straight, readily and consistently drawn, and normatively justifiable.

THE FUTURE OF *DOLE*

Is there any chance that the Court might reconsider *Dole*, whether or not it adopts my proposed standard of review? I am cautiously optimistic. Only three members of the *Dole* majority are still sitting—Chief Justice Rehnquist and Justices Stevens and Scalia—and the possibility of change is, therefore, real.[24] Moreover, there is evidence that several of the sitting justices are aware of the problem posed by *Dole*. Justice O'Connor dissented in *Dole*,[25] and Justice Kennedy has remarked publicly that conditional federal spending, rather than the Court's interpretation of the commerce clause, is the major states'-rights issue facing the country today.[26]

In addition, Justice Scalia observed in *Printz* that many federal statutes that "require the participation of state or local officials in implementing federal regulatory schemes" exist as "conditions upon the grant of federal funding [rather] than as mandates to the States."[27] He went on to observe that the *Printz* Court would "not address these or other currently operative enactments that [were] not before [it]," but he added suggestively that there "will be time enough to do so if and when their validity is challenged in a proper case."[28] Assuming Justice Thomas would vote to overturn *Dole*, Chief Justice Rehnquist remains the key to a "states'-rights" majority on this issue; ironically, he authored both the majority opinion in *Lopez* and the majority opinion in *Dole* that threatens to render *Lopez* and the rest of the Court's states'-rights revival moot.[29]

An even more intriguing possibility is suggested by Justice Breyer's 1999 dissent in *College Savings Bank*,[30] joined by Justices Stevens, Souter, and Ginsburg. Justice Breyer contended that certain conditional offers of federal funds to the states might be more "coercive" than a constructive or implied waiver of sovereign immunity attached to certain federally regulated conduct in which a state voluntarily elects to engage:

> Given the amount of money at stake [more than $20 billion in 1998], it may be harder, not easier, for a State to refuse highway funds than to refrain from entering the investment services business.... It is more compelling and oppressive for Congress to threaten to withhold from a State funds needed to educate its children than to threaten to subject it to suit when it competes directly with a private investment company.[31]

Writing for the majority in *College Savings Bank*, Justice Scalia agreed that the "intuitive difference" between a "denial of a gift" and a "sanction," which makes a congressional threat to impose the former seemingly less coercive than the latter, might indeed "disappear[] when the gift that is threatened to be withheld is substantial enough."[32] The majority reaffirmed *Dole*'s holding that some conditional offers of federal funds " 'might be so coercive as to pass the point at which "pressure turns into compulsion," ' " en route to its conclusion that "the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive [sovereign immunity] is the exclusion of the State from otherwise lawful activity."[33]

Because the Court in *College Savings Bank* held constructive waivers of sovereign immunity to be inherently coercive, and because both the majority and dissent agreed that certain conditional offers of federal funds to the states are *even more* coercive, all nine justices might now be more inclined not only to invalidate certain conditional offers of federal funds to the states but also to engage in meaningful judicial review of such offers.[34] If so, they may find the standard of judicial review proposed in this article to be a welcome alternative to *Dole*'s vague and historically toothless "coercion" standard.

Notes

1. For a comprehensive examination of this argument, from which this article is substantially derived, see Baker 1995.

2. *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923).

3. *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 143-44 (1947); *Mellon*, 262 U.S. at 482 ("If Congress enacted [the statute] with the ulterior purpose of tempting [the states] to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.").

4. *Mellon*, 262 U.S. at 480.

5. *Dole*, 483 U.S. 203, 207 (1987) (citing *United States v. Butler*, 297 U.S. 1, 65-66 (1936)).

6. *Dole*, 483 U.S. at 210.

7. Id. at 207.

8. Id. (emphasis added).

9. Id. at 211 (emphasis added) (citing *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

10. See id. Two years later, the Ninth Circuit upheld even those provisions of the Federal Highway Act that required 95 percent of federal highway funds to be withheld from states that did not post a 55-mile-per-hour maximum speed limit, and the Supreme Court denied certiorari. See *Nevada v. Skinner*, 884 F.2d 445, 454 (9th Cir. 1989), cert. denied, 493 U.S. 1070 (1990).

11. See *Dole*, 483 U.S. at 211.

12. Id. at 207 (citing *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

13. See, for example, *Dole*, 483 U.S. at 210; *Oklahoma*, 330 U.S. at 143-44; *Steward Machine*, 301 U.S. at 595; *Mellon*, 262 U.S. at 482.

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

15. *United States v. Lopez*, 514 U.S. 549 (1995); see also *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Morrison*, 120 S. Ct. 1740 (2000).

16. See Around the Nation 2000, which discusses the Vermont governor's signing of legislation "granting gay couples nearly all of the benefits of marriage" and "allow[ing] gay couples to form civil unions beginning July 1[, 2000]."

17. Both the majority and the dissent in *Lopez* specifically identified family law, albeit in dicta, as an area in which states "historically have been sovereign" and which would therefore likely be beyond the scope of Congress's regulatory power. *Lopez*, 514 U.S. at 564; id. at 624 (Breyer, J., dissenting).

18. It should also be noted that the germaneness inquiry under the *Dole* test is but one of four (albeit quite toothless) prongs that must be met if the legislation is to be sustained. The two-part germaneness inquiry under the proposed test, in contrast, is that test's only prong.

19. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

20. See *Dole*, 483 U.S. at 207 ("[O]bjectives not thought to be within Article I's 'enumerated legislative fields' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." (citation omitted)).

21. See *Dole*, 483 U.S. at 208-9.

22. See Claiborne and Duggan 2000, observing that death penalty laws are currently "on the books in 38 states."

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

24. Chief Justice Rehnquist and Justice Scalia were in the majority in both *Dole* and *Lopez*; Justice Stevens joined the majority in *Dole* but dissented in *Lopez*. Cf. *Dole*, 483 U.S. 203 (1987), with *Lopez*, 514 U.S. 549 (1995).

25. See 483 U.S. at 212.

26. Justice Kennedy made this comment to the author on 28 Sept. 1995 at a cocktail party in Tucson, AZ, hosted by the University of Arizona College of Law.

27. *Printz*, 521 U.S. at 917-18.

28. Id. at 918.

29. For one possible explanation for the apparent inconsistency in Chief Justice Rehnquist's concern for "states' rights," see Baker 1995, 1915 n. 13.

30. *College Savs. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 692 (1999).

31. Id. at 2236.

32. Id. at 2231.

33. Id.

34. My optimism on this score concerning the *College Savings Bank* dissenters is dampened somewhat by their observation that, notwithstanding the Court's decision, "perhaps Congress will be able to achieve the results it seeks (including decentralization) by embodying the necessary state 'waivers' [of sovereign immunity] in federal funding programs—in which case, the Court's [recent Eleventh

Amendment] decisions simply impose upon Congress the burden of rewriting legislation, for no apparent reason." Id. at 2240. One might have expected justices concerned about the coercive effects of conditional federal spending to indicate some reservations about whether such legislation involving waivers of sovereign immunity would or should be sustained.

References

Around the Nation. 2000. *Washington Post*, 27 Apr.

Baker, Lynn A. 1995. Conditional Federal Spending after *Lopez*. *Columbia Law Review* 95:1911-89.

Claiborne, William and Paul Duggan. 2000. Spotlight on Death Penalty; Illinois Ban Ignites a National Debate. *Washington Post*, 18 July.

Tiebout, Charles M. 1956. A Pure Theory of Local Expenditures. *Journal of Political Economy* 64:416-24.

Wechsler, Herbert. 1954. The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government. *Columbia Law Review* 54:543-60.